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In the first book of *De Re Publica,* Cicero pleads for the participation of able men in public affairs. "It is not enough," he says, "to possess virtue, as if it were an art of some sort, unless you make use of it . . . . and its noblest use is the government of the State, and the realization in fact, not in words, of those very things that the philosophers, in their corners, are continually dinning our ears . . . . those who rule . . . . by wise counsel and authority are to be deemed far superior, even in wisdom, to those who take no part at all in the business of government . . . . For, in truth, our country has not given us birth and education without expecting to receive some sustenance, as it were, from us in return . . . . there is really no other occupation in which human virtue approaches more closely the august function of the gods than that of founding new States or preserving those already in existence."

These words in praise of patriotism and love of country could not have been known to the Founding Fathers, for the manuscript of *De Re Publica* was not "discovered" until the year 1820. But they seem to me to describe perfectly the motives and the attitudes of the men who created our government. In no other moment of American history was so high a proportion of the best minds of the country dedicated to the public service as in the decade of the 1780's. Can you name offhand any great Americans of that time who were not public men?

I have in effect suggested one reason why the work of the Constitutional Convention of 1787 was so fruitful of good things. The convention was composed of the outstanding Americans of the period. But the greatness of the Founding Fathers cannot alone explain why they succeeded in forming a new government. On this point Cicero again has something to say. At the beginning of the second book of *De Re Publica,* he writes:

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> Cato used to say that our [the Roman] constitution was superior to those of other States on account of the fact that almost every one of these other commonwealths had been established by one man, the author of their laws and institutions; . . . On the other hand our own commonwealth was based upon the genius, not of one man, but of many; it was founded, not in one generation, but in a long period of several centuries and many ages of men. For, said he, there never has lived a man possessed of so great genius that nothing could escape him, nor could the combined powers of all the men living at one time possibly make all necessary provisions for the future without the aid of actual experience and the test of time.

If we are to understand how the constitution was made, and the ideas that went into its making, we must, you now see, take the historical approach. We must attend to the development of public law and political philosophy in the English communities on both sides of the Atlantic ocean during the seventeenth and eighteenth centuries. Indeed, we may desire to extend our view still further backwards. For the men who assembled at Philadelphia in 1787 brought with them not only the knowldge they had acquired in the practice of law and politics but also their heritage of a thousand years of British history.

Each of these men was simultaneously a radical and a conservative. The nationalists or Federalists are commonly considered the more conservative members of the Philadelphia convention. That is because they are judged on the basis of their later careers and because the words radical and conservative are defined in different and often in contradictory ways. From certain points of view the nationalists were the most radical members of the Convention. Of course, all of the makers of the constitution had repudiated the authority of the Crown in parliament and had renounced the imperial connection with Great Britain. But the Federalists, the "conservative revolutionaries," were twice radicals. They also dared to establish "republican federalism," and thereby they broke with the past in a manner as sharp as the secession from the British Empire.[1] Not only were the Federalists of 1787-1788 the "real radicals of their day," but it was they, the supposed conservatives, "who created a national

[1] Morris, "The Confederation Period and the American Historian," 13 Wm. & Mary Q. 156 (1956).

framework which could accommodate the later rise of democracy."[2]

The makers of the constitution, while playing the role of radicals, nevertheless demonstrated their devotion to certain principles of conservatism. True, their actions seem to suggest the kind of unbounded confidence attributed by Edmund Burke to the "politicians of metaphysics" in France. These "speculatists" said Burke, thought they could form a constitution without drawing upon the "general bank and capital" of the ages. The Founding Fathers, on the contrary, with all of their boldness and self-confidence, still valued the accumulated wisdom of their forefathers. The Americans had severed the constitutional ties that had bound them to England, and they introduced a novel form of government, but they did not disdain history. In the sense that they thought and worked within the framework of the colonial and the English political tradition, the fathers of the constitution were properly conservatives. But more like Cicero than Burke, they thought it possible for superior individuals consciously and systematically to weave the stuff of history into a fabric of government.

I have been saying that we cannot find the ideas that made the constitution merely by studying the records of the Philadelphia convention. After examining them very carefully, we would still have to search elsewhere to understand why fifty-five men (or thirty-nine if we include only those who signed the completed document) could reach agreement so quickly upon so great a matter, and not only reach agreement but produce what Gladstone called "the most wonderful work ever struck off at a given time by the brain and purpose of man." Surely they were able men, experienced in public affairs on the state and national levels. They were also well-educated men—bookish, many of them. Twenty-five of them had attended college and thirty-four had studied law, some in England. Twenty-one had fought in the Revolution. As to their experience in public affairs—forty-six had sat in colonial or state legislatures, seven had been state governors, thirty-nine had been delegates to the earlier Congresses, eight had helped to form state constitutions, and the same

[2] Morris, *supra* note 1; Kenyon, "Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," 12 Wm. & Mary Q. 43 (1955).

number had signed the Declaration of Independence (but only eight out of fifty-five, indicating that the Fathers of the Constitution had not in all cases been Fathers of the Revolution). Their public careers were not to end when they had signed the Constitution only four months after coming to Philadelphia. Fourteen of the members of the Convention were to sit in the House of Representatives, and nineteen in the Senate which they created. And two would become presidents of the United States —George Washington, who presided over the Convention and James Madison, the architect of the constitution.

When I call these men experienced and learned, I suggest only one line of my historical inquiry. If it was because of their intimacy with the problems of government and their knowledge of history and law that these men succeeded so well in their task of framing a new government, we then must ask what was the nature of their experience and what were the ideas they had assimilated during their studies?

There was first of all the experience which produced the uneasiness, the fear, and the discontent that resulted in the calling of the Constitutional Convention. On November 5, 1786, Washington said, "We are fast verging to anarchy and confusion."[3] In calling the Constitutional Convention, Congress charged it with the duty of rendering "the federal constitution adequate to the exigencies of Government & the preservation of the Union." The preamble of the Constitution also describes the needs of the times when it says that the Constitution was ordained and established "in order to form a more perfect Union," that is to say, more perfect than the union provided by the Articles of Confederation in 1781. On the eve of the Convention, Madison wrote a paper entitled "Vices of the Political System of the United States."[4] He was dissatisfied with the government established by the Articles. The federal authority, said Madison, was inadequate; the Articles constitued "nothing more than a treaty of amity, of commerce and of alliance, between independent and sovereign states . . . ." Experience showed the states derelict in fulfilling their obligations, and there was no practicable way to coerce them into "obedience . . . to the acts of the federal government."

[3] Morris, *supra* note 1, at 140.
[4] 2 Writings of James Madison 361-69 (Hunt ed. 1901).

There was a "want of concert in matters where common interest requires it," and the want of concert could only be supplied by strengthening the authority of the federal government.

But if the Articles of Confederation were defective, we can readily appreciate the reason. They were written by men who had declared their independence rather than submit to taxation and commercial regulations imposed by the imperial parliament of Great Britain. Consequently, when they undertook to create a general government to replace that which they had repudiated, they were not likely to endow their new government, even if it were their own, with powers which were obnoxious and, they thought, destructive of their liberties. But this distrust had produced several years of frustration under a government "inadequate to the exigencies of union." Though certain historians now look more charitably upon the Articles of Confederation, and question whether the period was quite so "critical" as formerly men believed it was, I have not been persuaded by these efforts to revise the history of the 1780's. I still consider the period of the Articles of Confederation as a "critical period" of American history.

Another recent effort at historical revision has pleased me more, perhaps because I have always been a Federalist at heart. (It was rather lonely, I might add, to be a Hamiltonian among my contemporaries in graduate school back in the 1930's; we are still a minority in the history profession—I mean, the professed Hamiltonians). You may be familiar with the thesis set forth by Charles Beard some forty-five years ago in his *Economic Interpretation of the Constitution of the United States.* Employing the biographical methodology, Beard studied the movement for revision of the Articles, the Convention, and the ratification of the Constitution in the light of the economic interests of the leading participants. He concluded that the creation of the new federal system was a triumph for personalty interests and a reaction against the ideals of liberty for which the Revolution had been fought. Beard's thesis, somewhat distorted and carried to extremes by later historians, became the gospel of the 1930's, and appears in textbooks on American history. Recently, Beard's methods and his conclusions have been subjected to searching scrutiny, notably by Robert E. Brown and Forrest MacDonald.

These scholars, among others, are forcing us to revise older notions about the nature of American society in the Revolutionary period and to reconsider the political thought of the era. They have shown that the struggle over the Constitution was not a conflict between personalty and realty; that society in the 1780's was much more democratic, measured by the ability of people to qualify for the franchise, than we used to believe when we judged only from the letter of the statutes; that the movement for a stronger central government was not a conservative conspiracy against the principles of the Declaration of Independence; that the Antifederalists were not invariably championing democracy when they opposed the constitution; and finally, that the real issue between the Antifederalists and Federalists was not democracy at all but the nature of the central government. The Federalists believed that a strong national government could be republican in form and compatible with liberty.[5]

The problem of the 1780's, which was the problem of reconciling local and central relationships, was simply the old controversy between the colonies and mother country cast in different form. It was now exclusively intra-American, but it was still the problem of federalism which had appeared at the end of the French and Indian War when the necessity for imperial reorganization became apparent. The British government endeavored to strengthen imperial defense, to provide for better administration of the Ohio Valley, and to improve the enforcement of the protective commercial system of the Empire. To these ends, parliament sought revenues in the colonies and provoked a bitter controversy about the nature of the imperial constitution. Americans objected to parliamentary taxation, not only because they disliked paying taxes, but because parliament, they said, did not have the constitutional authority to tax them directly. This argument convinced very few Englishmen. Members of the imperial parliament almost unanimously scoffed at it and asserted, rightly, that the imperial parliament could legislate for

[5] Brown, Charles Beard and The Constitution (1956); MacDonald, We the People: The Economic Origins of the Constitution (1958); Morris, *supra* note 1; Kenyon, *supra* note 2. Professor Jackson Turner Main's study of the Anti-Federalist ideas as they emerged during the years 1781-1787 will soon be published. According to "A Newsletter from the Institute of Early American History and Culture," May 22, 1959, Professor Main shows that "while democrats at this time accepted the doctrine of weak government, the adherents of weak government did not always believe in democracy."

the colonies "in all cases whatsoever." That phrase meant legislation not only for the purpose of regulating commerce but also for raising revenue by direct taxation. When this controversy about parliament's authority began, Americans did not generally deny the power to regulate commerce, but eventual denial was implicit in their arguments, and by a few persons, openly admitted.[6] As early as 1768 Franklin was unable to find any middle ground between the proposition that parliament could make *"all laws"* for the colonies or none at all. In 1773 Governor Thomas Hutchinson told the Massachusetts Assembly there was no line between "the supreme authority of Parliament and the total independence of the Colonies." John Adams agreed with Hutchinson's statement but was not shocked by its implications. These became obvious when in 1776 the Americans declared their independence.

Thus ended for all practical purposes the attempt within the framework of the old imperial structure to establish some system whereby central authority would be sufficiently strong to perform services of a general nature while essential local rights would remain inviolate. Federalism as a system of imperial government was not yet clearly understood on either side of the Atlantic. It would require another decade, filled with war and fear, before Americans, by empirical rather than speculative processes, discerned the true principles by which the corpus of governmental authority could be divided between the general and the local governments.

But the decade between the Declaration of Independence and the calling of the Philadelphia Convention was nevertheless a fruitful one. In the first place the Americans won their independence, and in the second place, in the midst of war and internal political divisions, they addressed themselves with remarkable results to the problems of political reconstruction. In some ways, this second achievement is even more impressive than military victory. As John Adams said, "I always expected that we should have more difficulty and dangers, in our attempts to govern ourselves, . . . than from all the fleets and armies of Great Britain."[7] The wonder is, not that the Articles

[6] Gipson, The Coming of the Revolution 212-13 & n. 66 (1954).
[7] 3 Works of John Adams 13 (Adams ed. 1851).

of Confederation were replaced by the Constitution of 1787, but that the first experiment in organizing an American imperial government worked as well as it did, and that a second opportunity presented itself. Partly this was because the work of political reconstruction on the state level had been so wonderfully successful.

As early as May, 1775, the provincial congress of Massachusetts (a revolutionary body) raised the question of organizing civil gorvernments to replace the dissolving colonial governments. A year later the Continental Congress recommended constituent action by the states. Judging by the procedures followed in some of the states, it would appear that the distinction between a constitutional convention an a legislature (a distinction which seems so obvious to us today) was imperfectly understood.[8] In New Jersey, Virginia, and South Carolina the revolutionary provincial legislatures drafted the constitutions; in seven other states, new revolutionary assemblies were elected, and not only drafted constitutions but enacted statutes. If these procedures seem irregular, we must admit the pressure of events. We must also recognize that while the idea of written constitutions was an old one, not even the political philosophers had produced a universally accepted manual of procedure which set forth in detail how a people went about the business of creating a constitution or organizing a body politic.

Never a diffident person, John Adams undertook to instruct his congressional colleagues.[9] He had "looked into the ancient and modern confederacies for example," yet he had not been completely satisfied. The American people possessed "more intelligence, curiosity, and enterprise" than others, and would not be satisfied with decisions made "by a few chiefs" who had "huddled up in a hurry." In America the people would have to be "consulted" and invited "to erect the whole building with their own hands, upon the broadest foundation." This "could be done only by conventions of representatives chosen by the people in the several colonies." When asked whether the people of a state would accept a constitution drawn up in such a manner, Adams thought they would if the document were submitted to them for ratifica-

[8] Kelly & Harbison, The American Constitution, Its Origin and Development 95 (1948).

[9] 3 Adams, *op. cit. supra* note 7, at 16, 20.

tion, and thus "the people may make the acceptance of it their own act."

The people of Massachusetts followed Adams' recommendation to the letter. They rejected the constitution of 1717 in part because it was a legislative act performed by the provincial congress; the constitution of 1780 was drawn up by a specially elected constitutional convention and was ratified by the people.

The procedure recommended by Adams and followed by Massachusetts was exemplary practice of the revolutionary philosophy. The Declaration of Independence, you will recall, speaks of the unalienable Rights of Man. In order "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, [and] whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." The Massachusetts Bill of Rights of 1780, written by Adams, was even more explicit:

> The body-politic is formed by a voluntary association of individuals; it is a social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good.

The constitutional convention as we know it is the institutional expression of these ideas. Though not always properly, it was employed by the states after 1776; it was resorted to in 1787 for the purpose of organizing a new general government, and it has functioned many times since then, here in Kentucky as in other states. Yet it was not invented by John Adams in 1776. Both in colonial and English history one finds precedents for the constitutional convention and the written constitution which is inevitably associated with it.

The idea of a written constitution appears at first glance to be alien to the British tradition. The Americans knew that the British constitution was not set forth in a single document but was an accumulation of statutes and customs—the law and custom of the constitution—in short, a product of a thousand years of history. They also recognized the power of the Crown in

Parliament to alter the constitution by statutory process. Yet Americans believed in the doctrine of fundamental law; during the pre-revolutionary controversy with Britain, they, and James Otis in particular, had denied to Parliament the competence to legislate contrary to fundamental law. They referred to the great Justice Coke who, in 1610, had proclaimed in *Bonham's Case* that "the common law will control Acts of Parliament." This doctrine was not universally accepted in England in Coke's day, and later English constitutional development repudiated it in favor of parliamentary sovereignty, as Blackstone, somewhat begrudgingly, had to concede.

It was in America that the idea of a higher law which went beyond the common law became absorbed into the main stream of constitutional development. The idea of a higher law can be traced back to ancient times. By medieval thinkers the natural law as a higher law embodying the immutable principles of justice was conceived of as part of the Divine Order, and derived its authority, therefore, from religious sanction. During the seventeenth and eighteenth centuries, certain political philosophers like Hobbes and Locke, and the religious radicals of the English Civil Wars, transformed the doctrine of the natural law. I think we may say that they secularized it, and gave to it an egalitarian character alien to the ancient tradition. And unlike Plato and Aristotle, they dignified the social compact—what John Adams called "an original, explicit, and solemn compact"—and made it pivotal to their political thought. During the Puritan Revolution in England in the 1640's, it was held by the radicals, the Levellers, that the people had resumed their fundamental authority, for the "original of all just power is the people." In the "Agreement of the People," a paper constitution drawn up by left-wingers in 1647, and in "The Instrument of Government" of 1653, the first written national constitution that we know of, expression was given to the ideas of the sovereignty of the people and of a basic constitutional law, the result of a social contract that creates institutions of government and limits their powers. The government created by the "Instrument" did not endure, but the idea underlying it survived in America among the descendants of the English Puritans. In 1688 the English experienced another Revolution, the Glorious Revolution associated with the

name and the philosophy of Locke. Here was an event which seemed to vindicate the contract theory of government—the sovereign people ridding themselves of a bad king, replacing him with a ruler of their choice, and then, through their representatives in Parliament, enacting certain basic statutes that gave permanence and clear definition to the accomplishments of the Revolution. The most famous of these enactments was the Bill of Rights which, in the tradition of Magna Carta and the Petition of Right of 1628, and in anticipation of the American Bill of Rights aimed at securing the rights of the individual. To the American revolutionaries these documents seemed to be of the nature of fundamental laws, as Magna Carta had been to seventeenth century Englishmen, though, in fact, they were but statutes.

Besides English history, Americans found precedents and guidance in their own colonial background.[10] The Mayflower Compact of 1620, strictly speaking not a constitution, was signed by men who "solemnly and mutually in the presence of God and one another, covenant and combine ourselves together into a civil Body Politick." The Fundamental Orders of Connecticut of 1639 is a better example of a constitution. The people of the Connecticut Valley agreed to "enter into Combination and Confederation together" for the purpose of securing both their religious and their civil welfare, and to that end, created institutions of government. The crown charters provided another basis for colonial governments. Originally granted to commercial companies, the charters were easily transformed into civil constitutions, and some of them endured beyond the Revolutionary period. Connecticut and Rhode Island, instead of writing new constitutions, chose to retain their colonial charters—Connecticut said that hers was "a free and excellent constitution." The state constitutions of the 1770's were based on precedents of commercial charters, the covenants of church groups, and the fundamental acts of bodies politic.

The Fundamental Orders of Connecticut was a constitution and not a legislative act. This point needs emphasis when considering the problem of constitution making. Government was

[10] The process of "covenanting" in American history is described in many books, and conveniently in Kelly & Harbison, *op. cit supra* note 8, and in McLaughlin, The Foundation of American Constitutionalism (1932).

derivative, described by the constitution and limited by it. The fundamental act was the creative constitution-making act of the entire body politic in convention assembled (that is, the people represented by deputies chosen specifically for the purpose of making a constitution, and for that purpose only). A constitutional convention was not a legislative body, the constitution was not the result of a legislative act but itself created the legislature. It followed then that legislative arcts are inferior to the supreme law, the constitution itself.

The American states of the revolutionary period, as I have said, did not always adhere as scrupulously as did Massachusetts to this formula. But the idea of the fundamental nature of a constitution remained and it grew stronger and became a fixture of the American political tradition. For, as John Dickinson said in his *Letters From a Farmer in Pennsylvania* (1768), if political freedom is to exist, the powers of government must be "constitutionally checked and controlled." Americans of that period believed that the best way to accomplish this was by defining and limiting the powers of government in a written constitution framed by the sovereign people.

The higher law of our constitutional history, therefore, is a kind of hybrid. On one side it descends from the natural law of Cicero and the schoolmen, though somewhat adulterated by the seventeenth and eighteenth century philosophers. On the other side, our fundamental law is derived from the newer concepts of sovereignty residing in the people. While, like Jefferson, Americans refer to God as the source of justice and rights, in practice they also hold that the majority will creates law and grants rights. The fundamental law, then, is both the law of nature and the law of the constitution itself. Insofar as they held that the constitution is supreme because it emanates from the will of the sovereign people, the eighteenth century revolutionaries anticipated the later positivist view of the nature of law. We call this a democratic concept—that the constitution derives from the people and the government described by it is therefore a limited government. But it has a totalitarian potentiality, as John C. Calhoun well knew, because for practical purposes the sovereign will in a democratic regime is the will

of the majority.[11] But then, all government is a situation of power, and power is both potentially good and potentially dangerous. The constitution makers knew this, and were willing to take the chance, but they also believed that sovereign power was not absolute. Certain influences have modified the application of popular sovereignty in America. We have entrusted to the courts the power of judicial review—a power that was specifically declared in 1803, but which was implicit in the ideas I am discussing, and had been exercised by state courts prior to Marshall's epochal decision (Do you remember how in the 1930's some people said the power was usurped by the courts, and now the same people are grateful for its exercise?). In this manner the powers government have been restricted within the limits prescribed by the constitution. Then, the amending process is awkward, making it difficult for the sovereign people to express their will by changing the constitution. They could, of course, revise the amending process, but the American people, and the people of the respective states, somewhat inconsistently, tend to regard as sacred the constitution, which in the first place they created. And perhaps most important of all, the sovereign American people do not really believe that their sovereign power is unlimited. We still have a kind of instinctive allegiance to the older ideas of absolute right and immutable justice which Aristotle said "everyone to some extent divines" and Coke thought were "written with the finger of God in the heart of man." We still believe that certain actions are *mala in se*—wrong in themselves—and ought not to be performed, even in the name of the sovereign people. As the history of American jurisprudence reveals, the new idea of sovereignty has not completely triumphed over the ancient natural law concepts.[12] For jurisprudence, based on legal positivism, is derived from common sense.

If, however, the revolutionary generation conceived of a higher law embodied in a written constitution emanating from

[11] For the higher law background, see Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev. 149-85, 365-409 (1928-29). This applies even more obviously to democratic countries that do not have written constitutions—England, for example. See, "The Decline of Parliament," Time & Tide, May 30, 1959, p. 611. Parliament "is in a fair way to become more tyrannical than any sovereign in history," for it represents the will of the majority of the sovereign people.

[12] McKinnon, 1 Proceedings, Notre Dame Natural Law Institute, 85-103 (1949).

the will of the sovereign people and limiting the powers of government, at first glance the state constitutions they wrote seemed to violate this precept.[13] With few exceptions, notably in the constitutions of New York, New Hampshire, and Massachusetts, "the legislatures were absolutely unrestrained in legislation."[14] This was mainly because in that era men feared strong executives more than they feared strong legislatures. In Europe, Enlightened Despots ruled, and in England, George III, whom the Declaration of Independence pointed to as the author of recent abuses against the colonies, was in fact a powerful political leader. Thomas Jefferson wrote, "Before the Revolution we were all good English Whigs, cordial in their free principles, and in their jealousies of their executive Magistrates. These jealousies are very apparent in all our state constitutions." During their careers as colonists, Americans distrusted their royal governors as representatives of a distant authority, whereas, according to James Wilson, the Assemblies "were chosen by ourselves." Very naturally, this confidence in popular assemblies was strengthened by secession from the Empire, and the new state legislatures were "profusely" given "every good and precious gift."[15] The first few years of statehood taught Americans the dangers of weak executives and over-bearing legislatures which encroached even upon the domains of the courts. In consequence, as we shall see, the office of president, created by the Philadelphia Convention, was quite a different office from that of the state executives. But in any case this practical legislative sovereignty, while seemingly inconsistent with, did not vitiate the theory of popular sovereignty. Most state constitutions had bills of rights that placed certain matters beyond the reach of the legislatures, and the electoral process was an inevitable, if not always an immediate restraint.

I have already suggested another reason for dwelling upon the making of the state constitutions. Some of their provisions anticipate the federal constitution of 1787. The men who met in Philadelphia received some of their ideas about government

[13] Webster, "A Comparative Study of the State Constitutions of the American Revolution," 9 Annals 380-420 (1897); Thach, "The Creation of the Presidency 1715-1789," John Hopkins University Studies in Historical and Political Science, Series XL, No. 4 (1922); Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," 30 Amer. Hist. Rev. 511-36 (1925).

[14] Webster, *supra* note 13, at 383.

[15] Thach, *supra* note 13, at 26, 27.

from the examples set by the states. All but two of the states provided for bicameral legislatures. By implication or expressly they paid homage to the principle of separation of powers, however imperfectly they understood it.[16] Montesquieu was only one of several recent philosophers who had written about separation of powers, and his influence upon American thought has been considerably exaggerated. American statesmen saw, or believed that they saw the principle in operation in England. Since the Act of Settlement of 1701 there had been an independent judiciary in England (Coke's goal had at last been attained), and as for separation of executive and legislature, the cabinet system, which merges them, did not then exist. English ministers of state in the 1770's still considered themselves constitutionally responsible to the king even though for practical reasons a cabinet needed the support of Parliament. And never before 1782 did a ministry which enjoyed the king's confidence fail to possess the support of Parliament. But the main source of the doctrine of separation of powers was American colonial experience. The history of the relations between colonial assemblies and royal governors seemed to advise the principles of separation, as well as the principle of checks and balances. Even before they could have read Montesquieu, the Massachusetts Assembly refused to grant a permanent salary to the royal governor because "it would greatly tend to lessen the just weight of the other two branches of the government, which ought ever to be maintained and preserved; especially since the governor has so great authority and check upon them."[17] One other feature of the state constitutions should be noticed. Seven of them contained bills of rights. These are important for obvious reasons. You will recall that when the constitution of 1787 was presented to the states for ratification, so much objection was made to the absence of a bill of rights that men favorable to the constitution agreed one should be added. This was done in 1791.

The establishment of state governments was only one of the problems facing the revolutionary Americans. They had renounced the authority of the imperial government, and with a war on their hands, there was an obvious and urgent need for some gen-

[16] Corwin, *supra* note 13, at 515-16. Also Wright, "The Origins of the Separation of Powers in America," 13 Economica 169-85 (1933).

[17] McLaughlin, A Constitutional History of the United States, 116-17 & n. 26 (1935).

eral government. There was no disagreement about the need; the question was rather on what terms to establish union. The states were sovereign. The general government would be created by them and endowed with such powers as they saw fit to grant to it. When finally adopted by Congress in 1777 and ratified by enough states to go into effect in 1781 (when the war was nearly over) the Articles of Confederation did not empower the federal government to tax or to regulate commerce, for reasons that I have already discussed. The Articles were consistent even if in the end they operated awkwardly. When we criticize the British government for refusing until too late to concede the principle of federalism to the Americans, we should remember that our own first attempt to construct a federal system was not "adequate to the exigencies of Government" and was abandoned in favor of a system that returned to certain features of the old imperial system. Under the Constitution of 1787, Congress, as under the old imperial constitution Parliament, could levy taxes and regulate commerce. And this necessary enlargement of the authority of the central government was not achieved without a significant political struggle in the years 1787-1788.

We have now come full circle and have returned to our starting point, the Philadelphia Convention. Once the decision had been made to reconsider the problem of the general government, the ideas I have been talking about became decisive. Whatever the nature and extent of the changes desired, they were to be determined in a constitutional convention whose actions were to be considered organically fundamental, and not of the nature of mere legislative acts. Whether the Articles were to be amended or a new constitution to be drafted, these fundamental acts would represent the will of the sovereign people; the government would be the creature of the people organized through their deputies in a convention and would possess only derivative powers to be defined in the constitution itself. The Virginia plan, which became the basis of subsequent deliberations of the Convention, clearly assumed that the Convention's work would "stand on the will of the people and not on the authority of the state governments."[18]

This decision expressed the fundamental principle of Ameri-

[18] *Id.* at 156.

can constitutional government. By giving to the national government what Gouverneur Morris called "a compleat and compulsive operation" in its sphere of authority, the Convention solved the problem of federalism that had been in the forefront of American thinking since 1754 when Franklin had proposed a form of union to the Albany Congress. When the Americans were subjects of the British crown, and again when they were citizens of sovereign states, they had known the inconvenience of an uncertain division of authority between the local and the general governments. That was because they had been unable to accept the solid foundation for the central government which in 1787 they erected. Though the states now existed and could not be abolished, neither could they be permitted to hold the general government in bondage. This was what the Federalists understood, and it was they rather than the Antifederalists who made the bold, creative, and enduring decision which was America's great contribution to the art of government.

The preamble of the constitution records this decision—"We, the people of the United States . . . do ordain and establish this Constitution . . . " The decision was amplified by Article I, Section 8 which spells out Congress' powers, and it has been kept abreast of changing conditions by the amending process and by judicial interpretation. For almost two centuries the constitution has been adequate to the exigencies of government and the preservation of the Union. At the same time, the restrictions placed upon Congress by Article I, Section 9 and by the Bill of Rights, and especially by the principle of reserved powers clarified by the tenth amendment, made the constitution acceptable to the people in the beginning and have ensured the identities of the states. The members of the Convention, in choosing the plan of federation embodied in the Constitution, applied the lessons they had learned from recent history, and to Madison's satisfaction, demonstrated that they understood "the true difference between a *League* or *treaty*, and a Constitution." The one, he said, was "founded on the Legislatures [of the States] only, and [the other was] founded on the people."

The Convention's decisions concerning the form of the government and the relationships among its several branches were made within this framework. Of the three branches of the government,

the executive was to the greatest extent a work of invention because precedent and history furnished less guidance. That was why the establishment of the presidential office was the most perplexing problem the Convention faced. Eighteenth century revolutionaries feared strong executive authority; most of the European governments of that age were strong monarchies; the greatest dangers to individual liberties, as Americans remembered from their study of English history, had come from the pretensions of the crown, while the victory of Parliament over the king in 1688 had seemed to assure the liberties of the nation. The executive authority in America, therefore, must not be monarchy under another name. And yet, honoring the principle of separation of powers and remembering the defects of the recent state constitutions, the Convention could not permit the executive to be a mere creature of the legislature.[19] It was James Wilson who saw the problem most clearly. The presidency must rest upon its own foundations; its powers must be stated in the constitution and not left for the legislature to define. Wilson found arguments to support this contention in the provisions of the New York constitution. Finally, the phrase for which Gouverneur Morris was mainly responsible, that the "executive Power be vested in a President of the United States of America," was of real significance. It permitted wider latitude than did a mere enumeration of powers, and left room for experience, events, and personalities to devise the "conventions" that have shaped the presidency we know today. While allowing opportunity for the authority of the president to grow, the Convention did not desire to make it possible for him to slough off personal and official responsibility in the way that the King in England escaped responsibility for the acts of his ministers who were members of his council. That is the reason why the Constitution does not specifically provide for an advisory council to assist the president. These considerations magnified the importance of the method of choosing the president. The Convention reversed itself at least nine times before it settled the matter; this was "in truth the most difficult of all on which we have had to decide," said James Wilson. But in the end, the provision for an electoral college did not prevent the develop-

[19] Thach, *supra* note 13.

ment of the clear idea that the president is responsible to the people.

This discussion of the background for the decisions that established the office of president suggests the manner in which virtually every clause of the constitution could be analyzed. Tradition and precedents lay behind all of the decisions made by the Convention. But to historical examples the Fathers of the Convention applied wisdom and creative genius. This statement is perfectly illustrated by the story of the Bill of Rights—the last topic I am going to consider.

The reason why we have a Bill of Rights is simple enough. Many persons in the various state ratifying conventions were afraid of the new government which had been created. Whether this fear was genuine or pretended, it was expressed often by men who said that the national government might use its great powers to encroach upon the fundamental rights of life, liberty and property. James Wilson in the Pennsylvania ratifying convention, and Hamilton in No. 84 of the Federalist papers, argued in vain against the necessity of placing further restrictions upon the national government. It possessed only the powers that had been granted to it. The people, said Hamilton, retain "every thing" not granted. Indeed, to attempt further to specify the limitations upon the government would encourage the belief that everything not prohibited belonged to the government. The arguments impressed Canadians eighty years later—there is no bill of rights in the British North American Act of 1867—but failed to persuade Hamilton's contemporaries. As Madison said, and John Marshall too, the Bill of Rights, and particularly the tenth amendment, was intended to quiet the jealousies of federal power that had been expressed in the ratifying conventions.

But besides their fears, the advocates of the bill of rights based their case upon numerous precedents. Seven of the constitutions of the thirteen original states included bills of rights, and just as these were designed to protect individual rights from the powers of the states, so was the federal bill of rights intended to guard against the unwarranted exercise of power by the national government. Another precedent for a bill of rights was found in English history; the very phrase Bill of Rights was first used in this in-

clusive sense to describe the statute of 1689 which William and Mary accepted after the Glorious Revolution.

The Bill of Rights of the Federal Constitution does not bear merely an accidental resemblance of the state bills of rights and to the British statute of that title. The similarities among these documents indicate that Americans of the 1780's agreed essentially with their forebears as to the nature of the rights most essential to the enjoyment of life, liberty and property. It may be worth remembering that the Bill of Rights, notably the fourth, fifth, sixth, seventh, and eighth articles, reveal as lively a concern with preserving traditional common law procedures as with the basis rights of the first amendment about which we hear so much today.

The really new feature of the Bill of Rights, new because the federal system was new, is found in the tenth amendment. Intended to distinguish between the powers of the states and of the national government by reserving to the States or to the people the powers not delegated to the United States, it gave assurance of the derivative character and the limited powers of the federal government. This special distinction between federal and state powers, of course, only labored the obvious. Madison said that it added nothing and changed nothing. That the federal government possessed only delegated powers should have been clear from the constitution itself; the tenth amendment only made assurance doubly sure. The principle of reserved powers that it enshrines was an old one. It was, as we have seen, the very essence of contemporary political thought, and was completely consistent with the procedure of constitution making that the Americans had followed. They believed in the principle that power is originally in the sovereign people. Richard Henry Lee wrote in 1787 of his displeasure over the absence of a bill of rights. Such a bill was necessary to safeguard what Lee and Blackstone called "that residuum of human rights" which people withhold from government. Blackstone in turn referred to the English Bill of Rights, the Petition of Right, and of course to Magna Carta as declarations of "our rights and liberties"—"that residuum of natural liberty which is not required by the laws of society to be sacrificed to public convenience."[20] If the tenth amendment quieted fears temporarily, the time would come when men would

[20] Hutchinson, The Foundation of the Constitution 320 (1928).

disagree violently about its implications for the nature of the federal union. Jefferson Davis, for example, argued that the amendment "deliberately" made provision for the secession of the Confederate states.

That question is settled, but the Bill of Rights is still a subject of controversy. I suspect we shall hear more about it before this seminar ends. I shall only add that Hamilton to the contrary, the Bill of Rights has served us well in protecting individual liberties from encroachment by government. It has done this in the obvious way under the practice of judicial review. But it has also protected human liberties in a less obvious way. In this age of legal postivism and historical relativism, the very existence of the Bill of Rights impresses our minds with an enduring truth—that sovereign power, whether located in a potentate or in the people, is not unlimited. For politics and law do not exist apart from the moral universe; the principles of natural justice do not change; as Horace said, "You may drive out nature with a pitchfork, yet it will always return."[21]

[21] Quoted in Rommen, The Natural Law 257, n. 2 (1955).