

## Limitation of Governmental Power and of Majority Rule

The most accurate and helpful way to characterize our political system is to call it a constitutional democracy. The term implies a system in which the government is regulated by laws that control and limit the exercise of political power. In a constitutional democracy people participate in government on a limited basis. A distinction should be made between an unlimited democratic government and a constitutional democracy. In the former, the people govern through the operation of a principle such as majority rule without legal restraint; in the latter, majority rule is curtailed and checked through various legal devices. A constitutional system is one in which the formal authority of government is restrained. The checks upon government in a constitutional society customarily include a division or fragmentation of authority that prevents government from controlling all sectors of human life.

Hamilton noted in *Federalist I*, "It seems to have been reserved to the people of this country, to decide by their conduct and example, the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force." The framers of our Constitution attempted to structure the government in such a way that it would meet the needs and aspirations of the people and at the same time check the arbitrary exercise of political power. The doctrine of the separation of powers was designed to prevent any one group from gaining control of the national governmental apparatus. The selections reprinted here from *The Federalist*, which was written between October 1787 and August 1788, outline the theory and mechanism of the separation of powers.

### The Federalist Papers : No. 47

#### The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts

From the New York Packet. Friday, February 1, 1788.

MADISON

To the People of the State of New York:

HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts. One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts. No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded.

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied. In order to form correct ideas on this important subject, it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind. Let us endeavor, in the first place, to ascertain his meaning on this point. The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal bard as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged, so this great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the

form of elementary truths, the several characteristic principles of that particular system. That we may be sure, then, not to mistake his meaning in this case, let us recur to the source from which the maxim was drawn.

On the slightest view of the British Constitution, we must perceive that the legislative, executive, and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which, when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two Houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department forms also a great constitutional council to the executive chief, as, on another hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges, again, are so far connected with the legislative department as often to attend and participate in its deliberations, though not admitted to a legislative vote. From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority.

This, however, is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department. The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner. " Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR. " Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other AS THE NATURE OF A FREE GOVERNMENT WILL ADMIT; OR AS IS CONSISTENT WITH THAT CHAIN OF CONNECTION THAT BINDS THE WHOLE FABRIC OF THE CONSTITUTION IN ONE INDISSOLUBLE BOND OF UNITY AND AMITY. " Her constitution accordingly mixes these departments in several respects. The Senate, which is a branch of the legislative department, is also a judicial tribunal for the trial of impeachments. The President, who is the head of the executive department, is the presiding member also of the Senate; and, besides an equal vote in all cases, has a casting vote in case of a tie. The executive head is himself eventually elective every year by the legislative department, and his council is every year chosen by and from the members of the same department. Several of the officers of state are also appointed by the legislature. And the members of the judiciary department are appointed by the executive department. The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that 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. " This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated

by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches. Lastly, a number of the officers of government are annually appointed by the legislative department.

As the appointment to offices, particularly executive offices, is in its nature an executive function, the compilers of the Constitution have, in this last point at least, violated the rule established by themselves. I pass over the constitutions of Rhode Island and Connecticut, because they were formed prior to the Revolution, and even before the principle under examination had become an object of political attention. The constitution of New York contains no declaration on this subject; but appears very clearly to have been framed with an eye to the danger of improperly blending the different departments. It gives, nevertheless, to the executive magistrate, a partial control over the legislative department; and, what is more, gives a like control to the judiciary department; and even blends the executive and judiciary departments in the exercise of this control. In its council of appointment members of the legislative are associated with the executive authority, in the appointment of officers, both executive and judiciary. And its court for the trial of impeachments and correction of errors is to consist of one branch of the legislature and the principal members of the judiciary department.

The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary department are appointed by the legislative department and removable by one branch of it, on the impeachment of the other. According to the constitution of Pennsylvania, the president, who is the head of the executive department, is annually elected by a vote in which the legislative department predominates. In conjunction with an executive council, he appoints the members of the judiciary department, and forms a court of impeachment for trial of all officers, judiciary as well as executive. The judges of the Supreme Court and justices of the peace seem also to be removable by the legislature; and the executive power of pardoning in certain cases, to be referred to the same department. The members of the executive council are made EX-OFFICIO justices of peace throughout the State. In Delaware, the chief executive magistrate is annually elected by the legislative department. The speakers of the two legislative branches are vice-presidents in the executive department. The executive chief, with six others, appointed, three by each of the legislative branches constitutes the Supreme Court of Appeals; he is joined with the legislative department in the appointment of the other judges. Throughout the States, it appears that the members of the legislature may at the same time be justices of the peace; in this State, the members of one branch of it are EX-OFFICIO justices of the peace; as are also the members of the executive council. The principal officers of the executive department are appointed by the legislature; and one branch of the latter forms a court of impeachments. All officers may be removed on address of the legislature.

Maryland has adopted the maxim in the most unqualified terms; declaring that the legislative, executive, and judicial powers of government ought to be forever separate and distinct from each other. Her constitution, notwithstanding, makes the executive magistrate appointable by the legislative department; and the members of the judiciary by the executive department. The language of Virginia is still more pointed on this subject. Her constitution declares, "that the legislative, executive, and judiciary departments shall be separate and distinct; so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of county courts shall be eligible to either House of Assembly." Yet we find not only this express exception, with respect to the members of the inferior courts, but that the chief magistrate, with his executive council, are appointable by the legislature; that two members of the latter are triennially displaced at the pleasure of the legislature; and that all the principal offices, both executive and judiciary, are filled by the same department. The executive prerogative of pardon, also, is in one case vested in the legislative department.

The constitution of North Carolina, which declares "that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other," refers, at the same time, to the legislative department, the appointment not only of the executive chief, but all the principal officers within both that and the judiciary department. In South Carolina, the constitution makes the executive magistracy eligible by the legislative department. It gives to the latter, also, the appointment of the members of the judiciary department, including even justices of the peace and sheriffs; and the appointment of officers in the executive department, down to captains in the army and navy of the State. In the constitution of Georgia, where it is declared "that the legislative, executive, and

judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other," we find that the executive department is to be filled by appointments of the legislature; and the executive prerogative of pardon to be finally exercised by the same authority. Even justices of the peace are to be appointed by the legislature. In citing these cases, in which the legislative, executive, and judiciary departments have not been kept totally separate and distinct, I wish not to be regarded as an advocate for the particular organizations of the several State governments. I am fully aware that among the many excellent principles which they exemplify, they carry strong marks of the haste, and still stronger of the inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation, of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper. What I have wished to evince is, that the charge brought against the proposed Constitution, of violating the sacred maxim of free government, is warranted neither by the real meaning annexed to that maxim by its author, nor by the sense in which it has hitherto been understood in America. This interesting subject will be resumed in the ensuing paper.

PUBLIUS.

## **The Federalist Papers : No. 48**

### **These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other**

**From the New York Packet. Friday, February 1, 1788.**

**MADISON**

To the People of the State of New York:

IT WAS shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained. It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

What this security ought to be, is the great problem to be solved. Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited; both in the extent and the duration of its power; and where the legislative power is

exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions. The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere.

On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former. I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might find a witness in every citizen who has shared in, or been attentive to, the course of public administrations. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise, and at the same time equally satisfactory, evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution, that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting "Notes on the State of Virginia," p. 195. "All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government. It will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us, that they are chosen by ourselves. An ELECTIVE DESPOTISM was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. BUT NO BARRIER WAS PROVIDED BETWEEN THESE SEVERAL POWERS. The judiciary and the executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches. They have accordingly, IN MANY instances, DECIDED RIGHTS which should have been left to JUDICIARY CONTROVERSY, and THE DIRECTION OF THE EXECUTIVE, DURING THE WHOLE TIME OF THEIR SESSION, IS BECOMING HABITUAL AND FAMILIAR.

"The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the constitution, was "to inquire whether the constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution. " In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings, with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the constitution had been flagrantly violated by the legislature in a variety of important instances. A great number of laws had been passed, violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of legislature. The constitutional trial by jury had been violated, and powers assumed which had not been delegated by the constitution. Executive powers had been usurped. The salaries of the judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department frequently drawn within legislative

cognizance and determination. Those who wish to see the several particulars falling under each of these heads, may consult the journals of the council, which are in print. Some of them, it will be found, may be imputable to peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the constitution. There are three observations, however, which ought to be made on this head: FIRST, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; SECONDLY, in most of the other instances, they conformed either to the declared or the known sentiments of the legislative department; THIRDLY, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is, that a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

PUBLIUS.

## **The Federalist Papers : No. 51**

### **The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments From the New York Packet. Friday, February 8, 1788.**

**HAMILTON OR MADISON**

To the People of the State of New York:

TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent

of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State. But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified.

An absolute negative on the legislature appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department? If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view. First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.

There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.

In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will

depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States oppressive combinations of a majority will be facilitated: the best security, under the republican forms, for the rights of every class of citizens, will be diminished: and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.

It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practical sphere, the more dully capable it will be of self-government. And happily for the REPUBLICAN CAUSE, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the FEDERAL PRINCIPLE.

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## Interpreting the Constitution

The preceding selections have offered contrasting views on the framing, nature, and purpose of the Constitution. As background, John Locke's political philosophy expressed in his *Second Treatise, Of Civil Government* (1690) supported the political beliefs of many eighteenth-century Americans in government as a social contract between rulers and ruled to protect the natural rights of citizens to life, liberty, and, very importantly, property.

To John Roche the Constitution was a practical political document reflecting compromises among state delegations with contrasting political and economic interests among and advocates of strong national power and proponents of states' rights. Charles Beard saw the Constitution as a reflection of the interests of property owners and creditors who feared that the rule of the debtor majority would inflate currency, cancel debts, and deprive creditors of their rightful property. James Madison's selections from *The Federalist* suggest a mistrust of government, a wary view of both political leaders and the people, and an emphasis upon the need for governmental checks and balances to prevent the arbitrary exercise of political power. Madison also distrusted what he termed "faction," by which he meant political parties or special-interest groups, which he considered intrinsically to be opposed to the national interest (see *Federalist* 10, Chapter 9).

The separation of powers among the executive, legislative, and judicial branches is an outstanding characteristic of our constitutional system. A uniquely American separation of powers incorporated an *independent* executive, pitting the president against Congress and requiring their cooperation to make the government work. The separation of powers was a constitutional filter through which political demands had to flow before they could be translated into public policies.

James Madison clearly saw the separation-of-powers system, incorporating checks and balances among the branches of government, as a process that would help to prevent arbitrary and excessive governmental actions. The three branches of the government, but particularly the president and Congress, would have independent political bases, motivations, and powers that would both enable and encourage them to compete with each other.

While Madison saw the separation of powers as an important limit upon arbitrary government, Alexander Hamilton represented a different point of view. He viewed the independent presidency, a central component of the separation of powers, as an office that could make the national government energetic and effective. "Energy in the executive is the definition of good government," wrote Hamilton in *Federalist* 70, and the constitutional separation of powers would provide that energy rather than simply making the president of a co-equal branch subject to congressional whims or Supreme Court constraints.

History has, at different times, borne out the views of both Madison and Hamilton regarding the effect of the separation of powers. During times of relative political tranquility the president and Congress have often been stalemated in a deadlock of democracy. But Hamilton's imperial presidency has taken charge in times of crisis, such as during the Civil War, Franklin D. Roosevelt's New Deal in the 1930s, and the Second World War in the 1940s.

The Constitution is a frugal, bare-bones document that has, almost miraculously and with very few amendments, remained in place for over 200 years. It was not, however, a perfect governmental plan, for the nation had to fight a bloody Civil War to establish the principle of *e pluribus unum* once and for all.

While reverence for the Constitution is an important strand in our political history, it has not prevented sharp political controversy over how the Constitution should be interpreted. The framers themselves did not see eye to eye on many constitutional provisions, interpreting them in different ways. To buttress their positions political opponents have often cited the Constitution, claiming that it supports their side. For example, during George Washington's presidency Thomas Jefferson argued that the Constitution should be strictly interpreted to limit Congress to its explicit Article I powers, which did not allow establishment of a national bank. Secretary of the Treasury Alexander Hamilton took the "loose" constructionist approach in support of the bank. Hamilton argued that while Article I of the Constitution did not explicitly give Congress the authority to create a national bank, Congress could imply such authority under its enumerated power to regulate commerce among the states. Both men were using the same Constitution to support their contrasting political positions.

The historic debate over whether or not the Constitution should be read "strictly" or "loosely" has metamorphosed into another and related debate over the importance of "original intent" in constitutional interpretation. Strict constructionists argue in selection 64 that the Supreme Court has often erred in not following the original intent of the framers. The authors of the following selection however claim that the framers of the Constitution knew they had forged a flexible -document that future generations would be able to adapt to their values and needs.

### How Not To Read the Constitution *Laurence H. Tribe and Michael C. Dorf*

From its very creation, the Constitution was perceived as a document that sought to strike a delicate balance between, on the one hand, governmental power to accomplish the great ends of civil society and, on the other, individual liberty. As James Madison

put it in *The Federalist Papers*, "[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." Although Madison initially opposed the inclusion of a Bill of Rights in the Constitution, as his correspondence with Thomas Jefferson shows, he became convinced that judicially enforceable rights are among the necessary "auxiliary precautions" against tyranny.

In the Constitution of the United States, men like Madison bequeathed to subsequent generations a framework for balancing liberty against power. However, it is only a framework; it is not a blueprint. Its Eighth Amendment prohibits the infliction of "cruel and unusual punishment," but gives no examples of permissible or impermissible punishments. Article IV requires that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," but attempts no definition of republican government. The Fourteenth Amendment proscribes state abridgments of the "privileges or immunities of citizens of the United States," but contains no catalogue of privileges or immunities.

How then ought we to go about the task of finding concrete commandments in the Constitution's majestically vague admonitions? If there is genuine controversy over how the Constitution should be read, certainly it cannot be because the disputants have access to different bodies of information. After all, they all have exactly the same text in front of them, and that text has exactly one history, however complex, however multifaceted. But of course different people believe different things about how that history bears on the enterprise of constitutional interpretation. . . .

Perhaps the disputants agree on what *counts* as "the Constitution," but simply approach the same body of textual and historical materials with different visions, different premises, and different convictions. But *that* assumption raises an obvious question: How are those visions, premises, and convictions relevant to how this brief text ought to be read? Is reading the text just a pretext for expressing the reader's vision in the august, almost holy terms of constitutional law? Is the Constitution simply a mirror in which one sees what one wants to see? . . .

### Reading the Constitution or Writing One?

The belief that we must look beyond the specific views of the Framers to apply the Constitution to contemporary problems is not necessarily a "liberal" position. Indeed, not even the most "conservative" justices today believe in a jurisprudence of original intent that looks only to the Framers' unenacted views about particular institutions or practices. Consider the following statement made by a Supreme Court justice in 1976:

The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly changing environment in which they would live. . . . Where the framers . . . used general language, they [gave] latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.

The author was not Justice William Brennan or Justice Thurgood Marshall, but then-Justice William Rehnquist. Or consider the statement by Justice White, joined by Justice Rehnquist in a 1986 opinion for the Court: "As [our] prior cases clearly show, . . . this Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the 'plain meaning' of the Constitution's text or to the subjective intention of the Framers. The Constitution," wrote Justice White, "is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it."

So the "conservatives" on the Court, no less than the "liberals," talk as though *reading* the Constitution requires much more than passively discovering a fixed meaning planted there generations ago. Those who wrote the document, and those who voted to ratify it, were undoubtedly projecting their wishes into an indefinite future. If writing is *wish-projection*, is reading merely an exercise in *wish-fulfillment-not* fulfillment of the wishes of the *authors*, who couldn't have begun to foresee the way things would unfold, but fulfillment of the wishes of *readers*, who perhaps use the language of the Constitution simply as a mirror to dress up their own political or moral preferences in the hallowed language of our most fundamental document? Justice Joseph Story feared that that might happen when he wrote in 1845: "How easily men satisfy themselves that the Constitution is exactly what they wish it to be."

To the extent that this is so, it is indefensible. The authority of the Constitution, its claim to obedience and the force that we permit it to exercise in our law and over our lives, would lose all legitimacy if it really were only a mirror for the readers' ideals

and ideas. Just as the original intent of the Framers—even if it could be captured in the laboratory, bottled, and carefully inspected under a microscope—will not yield a satisfactory determinate interpretation of the Constitution, so too at the other end of the spectrum we must also reject as completely unsatisfactory the idea of an empty, or an infinitely malleable, Constitution. We must find principles of interpretation that can anchor the Constitution in some more secure, determinate, and external reality. But that is no small task.

One basic problem is that the text itself leaves so much room for the imagination. Simply consider the preamble, which speaks of furthering such concepts as "Justice" and the "Blessings of Liberty." It is not hard, in terms of concepts that fluid and that plastic, to make a linguistically plausible argument in support of more than a few surely incorrect conclusions. Perhaps a rule could be imposed that it is improper to refer to the preamble in constitutional argument on the theory that it is only an introduction, a preface, and not part of the Constitution as *enacted*. But even if one were to invent such a rule, which has no apparent grounding in the Constitution itself, it is hardly news that the remainder of the document is filled with lively language about "liberty," "due process of law," "unreasonable searches and seizures," and so forth—words that, although not *infinitely* malleable, are capable of supporting meanings at opposite ends of virtually any legal, political, or ideological spectrum.

It is therefore not surprising that readers on both the right and left of the American political center have invoked the Constitution as authority for strikingly divergent conclusions about the legitimacy of existing institutions and practices, and that neither wing has found it difficult to cite chapter and verse in support of its "reading" of our fundamental law. As is true of other areas of law, the materials of constitutional law require construction, leave room for argument over meaning, and tempt the reader to import his or her vision of the just society into the meaning of the materials being considered. . . .

When all of the Constitution's supposed unities are exposed to scrutiny, criticisms of its inconsistency with various readers' sweeping visions of what it ought to be become considerably less impressive. Not all need be reducible to a single theme. Inconsistency—even inconsistency with democracy—is hardly earth-shattering. Listen to Walt Whitman: "Do I contradict myself? Very well then, I contradict myself." "I am large, I contain multitudes," the Constitution replies.

Woll, Peter, ed. *American Government Readings and Cases*. New York: Pearson Longman, 2004. 47-49.

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## How to Read the Constitution

*The following is an excerpt from Supreme Court Justice Clarence Thomas's Wriston Lecture to the Manhattan Institute last Thursday:*

When John F. Kennedy said in his inaugural address, "Ask not what your country can do for you -- ask what you can do for your country," we heard his words with ears that had been conditioned to receive this message and hearts that did not resist it. We heard it surrounded by fellow citizens who had known lives of sacrifice and hardships from war, the Great Depression and segregation. All around us seemed to ingest and echo his sentiment and his words. Our country and our principles were more important than our individual wants, and by discharging our responsibilities as citizens, neighbors, and students we would make our country better. It all made sense.

Today, we live in a far different environment. My generation, the self-indulgent "me" generation, has had a profound effect on much around us. Rarely do we hear a message of sacrifice -- unless it is a justification for more taxation and transfers of wealth to others. Nor do we hear from leaders or politicians the message that there is something larger and more important than the government providing for all of our needs and wants -- large and small. The message today seems more like: Ask not what you can do for yourselves or your country, but what your country must do for you.

This brings to mind the question that seems more explicit in informed discussions about political theory and implicit in shallow political speeches. What is the role of government? Or more to the point, what is the role of our government? Interestingly, this is the question that our framers answered more than 200 years ago when they declared our independence and adopted our written Constitution. They established the form of government that they trusted would be best to preserve liberty and allow a free people to prosper. And that it has done for over two centuries. Of course, there were major flaws such as the issue of slavery, which would eventually lead to a civil war and casualties of fellow citizens that dwarf those of any of the wars that our country has since been involved in.

Though we have amended the Constitution, we have not changed its structure or the core of the document itself. So what has changed? That is the question that I have asked myself and my law clerks countless times during my 17 years on the court.

As I have traveled across the country, I have been astounded just how many of our fellow citizens feel strongly about their constitutional rights but have no idea what they are, or for that matter, what the Constitution says. I am not suggesting that they become Constitutional scholars -- whatever that means. I am suggesting, however, that if one feels strongly about his or her rights, it does make sense to know generally what the Constitution says about them. It is at least as easy to understand as a cell phone contract -- and vastly more important.

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

The framers structured the Constitution to assure that our national government be by the consent of the people. To do this, they limited its powers. The national government was to be strong enough to protect us from each other and from foreign enemies, but not so strong as to tyrannize us. So, the framers structured the Constitution to limit the powers of the national government. Its powers were specifically enumerated; it was divided into three co-equal branches; and the powers not given to the national government remained with the states and the people. The relationship between the two political branches (the executive and the legislative) was to be somewhat contentious providing checks and balances, while frequent elections would assure some measure of accountability. And, the often divergent interests of the states and the national government provided further protection of liberty behind the shield of federalism. The third branch, and least dangerous branch, was not similarly constrained or hobbled.

Since *Marbury v. Madison* the federal judiciary has assumed the role of the interpreter and, now, final arbiter of our Constitution. But, what rules must judges follow in doing so? What informs, guides and limits our interpretation of the admittedly broad provisions of the Constitution? And, more directly, what restrains us from imposing our personal views and policy preferences on our fellow citizens under the guise of Constitutional interpretation?

To assure the independence of federal judges, the framers provided us with life tenure and an irreducible salary -- though inflation has found a way around the latter. This independence, in turn, was to assure our neutrality and impartiality, which are at the very core of judging -- and being a judge. Yet, this independence can also insulate a judge from accountability for venturing beyond the proper role of a judge. But, what exactly is the proper role of a judge? We must understand that before we can praise or criticize a judge. In every endeavor from economics to games there is some way to measure performance.

As important as our Constitution is, there is no one accepted way of interpreting it. Indeed, for some commentators, it seems that if they like or prefer a particular policy or conduct, then it must be constitutional; while the policies that they do not prefer or like are unconstitutional. Obviously, this approach cannot be right. But, it certainly is at the center of the process of selecting judges. It goes something like this. If a judge does not think that abortion is best as a matter of policy or personal opinion, then the thought is that he or she will find it unconstitutional; while the judge who thinks it is good policy will find it constitutional. Those who think this way often seem to believe that since this is the way they themselves think, everyone must be doing the same thing. In this sense, legal realism morphs into legal cynicism. Certainly this is no way to run a railroad, not to mention interpret the Constitution. . . .

Let me put it this way; there are really only two ways to interpret the Constitution -- try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores. To be sure, even the most conscientious effort to adhere to the original intent of the framers of our Constitution is flawed, as all methodologies and human institutions are; but at least originalism has the advantage of being legitimate and, I might add, impartial.

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