Power and Liberty: Constitutionalism in the American Revolution
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We Americans are apt to think of the federal Constitution of 1787 as the model of constitutional thinking. It looms so large in our lives that we can scarcely pay any attention to our state constitutions. But the Revolutionary state constitutions created in 1776 were far more important in shaping America's understanding of constitutionalism than was the federal Constitution framed a decade later. Our single executives, our bicameral legislatures, our independent judiciaries, our idea of separation of powers, our bills of rights, and our unique use of constitutional conventions were all born in the state constitution-making period between 1775 and the early 1780s, well before the framing of the federal Constitution of 1787. In fact, the new federal government of 1787—its structure and form—was derived from what had taken place in the making of the state governments in the previous decade. In the first crucial years of independence, the states—not the federal government—were the focus of interest for most Americans.

Despite all the nationalizing and centralizing sentiments stirred up by the controversy with Great Britain in the 1760s and early 1770s, by the time of Independence a man's "country" was still his colony or state. Being a member of the British Empire had meant being an inhabitant of a particular colony with a history generally dating back a century or more. From these colonies the new states in 1776 inherited not only their geographical boundaries but also the affections and loyalties of their people.

The Declaration of Independence, though drawn up by the Continental Congress, was actually a declaration by "thirteen united States of America," proclaiming that as "Free and Independent States they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which independent States may of right do."[1]

In 1776 it was the states that were to be the arena for testing all that Americans had learned about politics both from their colonial experience and from the debate with Great Britain in the 1760s and 1770s. In fact, said Thomas Jefferson in the spring of 1776, making the new state constitutions was "the whole object of the present controversy."[2] The aim of the Revolution had become not merely independence from British tyranny, but nothing less than the eradication of the future possibility of tyranny.

Such a breathtaking goal explains the Revolutionaries' exhilaration in 1776 over the prospect of forming their new state governments. Because American leaders, as men of the Enlightenment, assumed that culture and institutions were man-made, framing their own governments became the ideal Enlightenment project. Americans believed, as John Jay of New York said, that they were "the first people whom heaven has favoured with an opportunity of deliberating upon, and choosing the forms of government under which they should live."[3]

Nothing in the years surrounding the Declaration of Independence—not the creation of the Articles of Confederation, not the making of the French alliance, and for some not even the military operations of the war—engaged the interests of the Americans more than the formation of their separate state governments. State constitution-making, said Jefferson, was "a work of the most interesting nature and such as every individual would wish to have his voice in."[4] Indeed, that seemed to be the case. Once independence was declared in July 1776, the business of the Continental Congress became stymied because so many delegates, including Jefferson, left Philadelphia for home to take part in the principal activity of erecting new state governments. Members of Congress, complained Francis Lightfoot Lee of Virginia, "go off & leave us too thin." For "alass [sic], Constitutions employ every pen."[5]

Some of the colonies, which were virtually independent by 1774, had already begun changing their governments. In the summer of 1775 Massachusetts had resumed its charter of 1691, which had been abrogated by the Coercive Acts. Since the royal governor was gone, the Council acted as the executive, but everyone knew that this situation was temporary. In the winter of 1775–76 New Hampshire and South Carolina also drew up temporary governments. But after the Declaration of Independence, constitution-making become more permanent.

These constitutions were written documents. Like Magna Carta, they could be picked up and read, quoted and analyzed. During the imperial debate the word constitution had been bandied about, used and abused in so many different ways, that Americans in 1776 realized that their constitutions had to be written down. The English constitution that the colonists had tried to appeal to was so vague, so intangible, that they knew that they had to have constitutions that were solid and secure.

By December 1776 eight of the revolutionary states had created new constitutions. Two states—Rhode Island and Connecticut, which as corporate colonies had elected their governors and were in fact already republics—revised their existing colonial charters by simply eliminating all references to the Crown. Delayed by wartime exigencies, two more states—Georgia and New York—wrote constitutions in 1777. In 1778 South Carolina drew up a more permanent constitution that did away with the governor's veto power and brought it more in line with the other revolutionary state constitutions. Massachusetts was not able to complete an acceptable constitution until 1780, and New Hampshire followed in 1784.

All in all, it was an extraordinary achievement. Never in history had there been such a remarkable burst of constitution-making. It captured the attention of intellectuals everywhere in the world. The state constitutions were soon translated into several European languages and published and republished and endlessly debated by European intellectuals. It was to refute French criticism of the state constitutions for being too much like the English constitution that John Adams wrote his three-volume master work, Defence of the Constitutions of Government of the United States of America (1787–88).

Adams had a vested interest in the state constitutions, for no one had been more important than he in influencing the structure and form of the new republics. Although Americans knew

that their new governments would be republics, which presumably meant that they would contain no hereditary elements, they were not sure what precise form they would take. “Of Republics,” said Adams in his significant pamphlet Thoughts on Government, published in April 1776, “there is an inexhaustible variety, because the possible combinations of the powers of society, are capable of innumerable variation.” By powers of society, Adams meant what Europeans called estates—in his case, monarchy, aristocracy, and democracy, or the one, the few, and the many.[6]

Paine in his pamphlet had suggested that America's new republican governments should contain only single houses of representatives. In other words, they would be democracies, according to the political science of the day. This suggestion infuriated John Adams. He told Paine that his plan of government was “so democratical, without any restraint or even an Attempt at any Equilibrium or Counterpoise, that it must produce confusion and every Evil Work.”[7] Although Paine's suggestion influenced the unicameral legislature of the Pennsylvania constitution of 1776, which came as close to a representative democracy as was possible for a large state in the eighteenth century, most of Adams's fellow Americans followed Adams's advice and created mixed constitutions with houses of representatives, upper houses or senates, and single executives. Having governors, upper houses, and houses of representatives was much more in line with the governments they were used to.

In these new republican constitutions, the Revolutionaries' central aim was to prevent power, which they identified with the governors, from encroaching on liberty, which was the possession of the people or their representatives in the lower houses of the legislatures. Most sought to create some sort of mixture or balance between power and liberty, rulers and ruled—the kind of balance that typified the ideal English constitution.

In all the constitutions, the power of the much-feared governors or chief magistrates was severely diluted, while the power of the popular assemblies or houses of representatives was significantly increased, as was their membership. The colonial assemblies had been small: New York's house of representatives had twenty-eight members; New Jersey's, twenty; Maryland's, sixty; and New Hampshire's, thirty-five. The new state constitutions greatly enlarged the houses of representatives, doubling and sometimes quadrupling them in size, and made all of them annually elected, which was an innovation outside of New England.

The constitution-makers emphasized the actual representation and the explicitness of consent that had been so much a part of the imperial debate. In addition to requiring annual elections, they created more equal electoral districts, enlarged the suffrage, imposed residential requirements for both electors and the elected, and granted constituents the right to instruct their representatives. Five states stated that population ought to be the basis of representation, and wrote into their constitutions specific plans for periodic adjustments of their representation, so that, as the New York constitution of 1777 declared, the representation “shall for ever remain proportionate and adequate.”[8] In the English-speaking world this was an extraordinary innovation, something the British did not achieve until several decades into the next century.

As a balancing force between these governors and the popular assemblies, upper houses or senates (the term taken from Roman antiquity) were created in all the states except Pennsylvania, Georgia, and Vermont. These senates were designed to embody the aristocracy set between the monarchical and democratic elements of these republicanized mixed constitutions. The senates were composed not of a legally defined nobility, but, it was hoped, of the wisest and best members of the society who would revise and correct the well-intentioned but often careless measures of the people, exclusively represented in the states' houses of representatives. These senates, although elected by the people in several states, had no constituents and were not at this point considered to be in any way representative of the people.

Of course, it was not long before some Americans began to question the aristocratic character of these senates. When reformers in the late 1770s suggested adding an upper house to Pennsylvania's unicameral legislature, they were accused of trying to foist a House of Lords on the state. The reformers defensively replied that that was not at all their intention. All they wanted was “a double representation of the people.”[9]

This reply had momentous implications. If the people could be represented twice, why not three, four, or more times? By 1780 the convention creating the Massachusetts constitution of 1780 drew out these implications: it concluded that “the Governor is emphatically the Representative of the whole People, being chosen not by one Town or County, but by the People at large.”[10]

By assuming that the electoral process was the criterion of representation, Americans prepared the way for an extraordinary expansion of the idea of representation. If governors elected by the people were thereby representatives of the people, then all elected officials could be viewed as representatives of the people. Once Americans began thinking like this, then it would not be long before some of them began describing their republics as actually democracies—since all parts of the mixed government, and not just the houses of representatives (the democratic part of a mixed government), were presumably representative of the people.

Because the constitution-makers in 1776, like good Whigs, identified tyranny with magisterial authority, they were determined to fundamentally transform the role of the governors in the new constitutions. This was one of the most momentous and radical steps Americans of 1776 intended to take. The American constitution-makers, unlike the English in 1215 and 1689, were not content merely to erect higher barriers against encroaching power or to formulate new and more explicit charters of the people's liberties. In their ambitious desire to root out tyranny once and for all, they went way beyond anything the English had attempted with Magna Carta in 1215 or the Bill of Rights in 1689. They aimed to make the gubernatorial magistrate a new kind of creature, a very pale reflection indeed of its regal ancestor. They wanted to eliminate the magistracy's chief responsibility for ruling the society—a remarkable and abrupt departure from the English constitutional tradition. However much the English had tried periodically to circumscribe the Crown's power, they had not usually denied (except for the brief Interregnum of the seventeenth century) the Crown's principal responsibility for governing the realm.

Indeed, it is the monarch and her ministers who formally and constitutionally still govern England.

Americans in 1776 wanted a very different kind of chief magistrate. Most agreed with William Hooper of North Carolina that "for the sake of Execution we must have a Magistrate," but it must be a magistrate "solely executive," a governor, as Thomas Jefferson's 1776 draft for the Virginia constitution stated, without a voice in legislation, without any control over the meeting of the assembly, without the authority to declare war and make peace, raise armies, coin money, erect courts, lay embargoes, or pardon crimes; in sum, they wanted a ruler, as John Adams proposed, "stripped of most of those badges of domination, called prerogatives"—prerogatives being those often vague and discretionary powers that royal authority had possessed in order to carry out its responsibility for governing the society.[11] As the Revolutionary war years would quickly show, such an enfeebled governor could no longer be an independent magistrate with an inherent right to rule but could only be, as Jefferson correctly called him, an "Administrator."[12]

The Pennsylvania constitution, the most radical of all the new state constitutions, eliminated even the office of governor. Instead, it granted executive authority to a twelve-man executive council directly elected by the people. Other states, while clinging to the idea of a single executive magistrate, in effect destroyed the substance of an independent ruler. The framers surrounded all the governors with controlling councils elected by the legislatures. And they provided for the annual election of nearly all the governors, generally by the legislatures, limited the times they could be re-elected, and subjected them to impeachment.[13] So feared was magisterial power that the Georgia constitution required the annually elected governor to swear an oath that he would step down "peaceably and quietly" when his term had expired.[14] Perhaps this was not an unfounded fear, as demonstrated in our own time by numerous so-called "republican" rulers throughout the world refusing to surrender their offices even when defeated in an election.

The powers and prerogatives taken from the governors were given to the legislatures, marking a revolutionary shift in the traditional responsibility of government. Throughout English history, government had been identified exclusively with the Crown or the executive; Parliament's responsibility had generally been confined to voting taxes, protecting the people's liberties, and passing corrective and exceptional legislation. However, the new American state legislatures, in particular the lower houses of representatives, were no longer to be merely adjuncts of or checks on magisterial power; they were to assume familiar magisterial prerogatives, including the making of foreign alliances and the granting of pardons, responsibilities that seem inherently executive.

The transfer of nearly all political authority to the people's representatives in the lower houses of the legislatures led some Americans, like Richard Henry Lee of Virginia, to note that their new governments were "very much of a democratic kind," although "a Governor and a second branch of legislation are admitted."[15] In 1776 many still thought of democracy as a technical

term of political science referring to rule by the people exclusively in the lower houses of representatives.

Since English kings and royal governors had maintained their power by abusing the filling of offices in order to “influence” or “corrupt” the Parliament and the colonial legislatures, the constitution-makers were especially frightened of the magisterial power of appointment. This power, they thought, was the main source of modern tyranny and the way in which George III had corrupted Parliament to bend it to his will. Hence, in the new constitutions they wrested the power of appointment from the traditional hands of the chief magistrate and gave it to the legislatures. No longer would the governors have the power to influence legislators and judges by appointing them to offices in the executive.

Four of the state constitutions justified this radical barring of dual officeholding by the principle of separation of powers, a doctrine made famous by Charles-Louis de Secondat, Baron de Montesquieu, in the middle of the eighteenth century. This separation of the executive, legislative, and judicial powers had a much more limited meaning in 1776 than it would later acquire in American constitutionalism. The constitution-makers invoked Montesquieu's doctrine not to limit the legislatures but rather to isolate the legislatures and the judiciaries from the kind of executive manipulation or “corruption” of the members of Parliament that characterized the English constitution. Thus, the revolutionary state constitutions, unlike the English constitution, categorically barred all executive and judicial officeholders from simultaneously sitting in the legislatures.

In their efforts to prevent the popular representatives and the senators from becoming the tools of an insidious gubernatorial power, an effort echoed in Article I, Section 6, of the federal Constitution, the state constitution-makers prohibited the development of parliamentary cabinet government in America, presumably forever. In America no one can be both a member of the legislature and a member of the executive at the same time.

As the British stumbled into their system of ministerial responsibility and modern cabinet government in the late eighteenth and early nineteenth centuries, America's constitutional development moved in an entirely different direction. Whereas the British require their ministers to be members of Parliament—indeed, it is the key to their system—we demand that the executive's cabinet officials be absolutely banned from sitting in the legislatures. That is what Americans in 1776 meant by separation of powers.

This was one of the two important ways in which the American and English constitutional systems came to differ during the American Revolution. The other was over the meaning of a constitution.

The American Revolutionaries virtually established the modern idea of a written constitution. Of course, there had been written constitutions before in Western history, but the Americans did something new and different. They made written constitutions a practical and everyday part of governmental life. They showed the world how written constitutions could be made truly

fundamental and distinguishable from ordinary legislation and how such constitutions could be interpreted on a regular basis and altered when necessary. Further, they offered the world concrete and usable governmental institutions for carrying out these constitutional tasks.

Before the era of the American Revolution a constitution was rarely ever distinguished from the government and its operations. In traditional English thinking a constitution referred not only to fundamental rights but also to the way the government was put together or constituted. “By constitution,” wrote Lord Bolingbroke in 1733, “we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.”[16]

The English constitution, in other words, included fundamental principles and rights together with the existing arrangement of governmental laws, customs, and institutions. While it contained some written documents, it was not, as Supreme Court Justice William Paterson pointed out in 1795, “reduced to written certainty and precision'' and embodied in a single document. “In England,' said Paterson, “there is no written constitution, no fundamental law, nothing visible, nothing real, nothing certain.” The English constitution lay “entirely at the mercy of the parliament.” But in America, declared Paterson, “the case is widely different. Every State in the Union has its constitution reduced to written exactitude and precision.”[17]

By the end of the Revolutionary era Americans had come to view a constitution as no part of the government at all. It was a written document distinct from and superior to all the operations of government. It was, as Thomas Paine said in 1791, “a thing antecedent to a government, and a government is only the creature of a constitution.” And, said Paine, it was “not a thing in name only; but in fact.” For Americans a constitution was like a bible, possessed by every family and every member of government. “It is the body of elements,” said Paine, “to which you can refer, and quote article by article; and which contains ... everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound.”[18]

A constitution thus could never be an act of a legislature or of a government; it had to be the act of the people themselves, declared James Wilson in 1790, one of the principal framers of the federal Constitution of 1787. “In their hands it is as clay in the hands of a potter: they have the right to mould, to preserve, to improve, to refine, and to finish it as they please.” If the English thought this new idea of a constitution resembled, as the English writer Arthur Young caustically suggested in 1792, “a pudding made by a recipe,” the Americans were convinced that the English had no constitution at all.[19]

It was a momentous transformation of meaning in a short period of time. Like the other changes Americans made in their political culture during the revolutionary era, their new understanding of constitutionalism emerged initially out of their controversy with Great Britain.

Like all Englishmen, the eighteenth-century colonists had usually thought of power as adhering in the Crown and its prerogatives—that power always posing a potential threat to the people's liberties. Time and again they had been forced to defend their liberties against the intrusions of royal authority, usually expressed by the agents of the Crown, their royal governors. They relied for the defense of their liberties on their colonial assemblies and invoked their rights as Englishmen and what they called their ancient charters as barriers against crown power.

In the seventeenth century many of the colonies had been established by crown charters, corporate or propriety grants made by the king to groups like the Massachusetts Puritans or to individuals like William Penn and Lord Baltimore to found colonies in the New World. In subsequent years these written charters gradually lost their original purpose in the eyes of the colonists and took on a new importance, both as prescriptions for government and as devices guaranteeing the rights of the people against their royal governors. In fact, the whole of the colonial past was littered with such charters and other written documents of various sorts to which the colonial assemblies had repeatedly appealed in their squabbles with royal power.

In appealing to written documents as confirmations of their liberties, the colonists acted no differently from other Englishmen. From almost the beginning of their history, Englishmen had continually invoked written documents and charters in defense of their rights against the Crown's power. ''Anxious to preserve and transmit" their liberties "unimpaired to posterity," the English people, observed one colonist in 1775, had repeatedly "caused them to be reduced to writing, and in the most solemn manner to be recognized, ratified and confirmed, 'first by King John [with Magna Carta], then by his son Henry IIId ... and again by Edward the 1st, to Hen. 4th ... [and] 'afterwards by a multitude of corroborating acts, reckoned in all, by Lord Cook, to be thirty-two, from Edw. 1st to Hen. 4th and since, in a great variety of instances, by the bills of rights and acts of settlement: All of these documents, from Magna Carta to the Bill of Rights of 1689 and the Act of Settlement of 1701, were merely written evidence of those "fixed principles of reason" from which Bolingbroke had said the English constitution was derived.[20]

Although eighteenth-century Englishmen talked about the fixed principles and the fundamental law of the constitution, most agreed that Parliament, as the representative of the nobles and people and as the sovereign lawmaking body of the nation, had to be the supreme guarantor and interpreter of these fixed principles of fundamental law. In other words, the English constitution did not limit Parliament in any way. In fact, Parliament was a creator of the constitution and the defender of the people's liberties against the Crown's encroachments; it alone protected and confirmed the people's rights. The Petition of Right, the act of Habeas Corpus, and the Bill of Rights of 1689 were all acts of Parliament, mere statutes not different in form from other laws passed by Parliament.

For Englishmen therefore, as the great eighteenth-century jurist William Blackstone pointed out, there could be no distinction between the "constitution or frame or government" and "the system of laws." All were of a piece: every act of Parliament was part of the English constitution and all law, customary and statute, was thus constitutional. "Therefore;" concluded British theorist William Paley, "the terms constitutional and unconstitutional, mean *legal* and *illegal*."[21]

Nothing could be more strikingly different from what Americans came to believe. As early as 1773 John Adams realized that “many people had different ideas from the words legally and constitutionally.” The king and Parliament, he said, could do many things that were considered legal but were in fact unconstitutional. The problem was how to distinguish one from the other. The American constitutional tradition diverged at the Revolution from the British constitutional tradition on just this point: on its capacity to distinguish between what was “legal” and what was “constitutional.”[22]

The imperial debate had prepared Americans to think about political power differently from their cousins in Great Britain. During that debate in the 1760s and early '70s, the colonists came to realize that although acts of Parliament, like the Stamp Act of 1765, might be legal-that is, in accord with the acceptable way of making law—such acts could not thereby be automatically considered constitutional—that is, in accord with the basic rights and principles of justice that made the English constitution the palladium of liberty that it was. It was true that the English Bill of Rights of 1689 and the Act of Settlement in 1701 were only statutes of Parliament, but surely, the colonists insisted in astonishment, they were of “a nature more sacred than those which established a turnpike road.” Consequently, the colonists began talking about some English statutes being “unconstitutional,” a seemingly new and mystical word in British culture.[23]

Under this pressure of events the Americans gradually came to believe that the fundamental principles of the English constitution had to be lifted out of the lawmaking and other processes and institutions of government and set above them. “In all free States, the Constitution is fixed,” declared the Massachusetts Circular Letter of 1768 (written by Samuel Adams), “and as the supreme Legislature derives its Powers and Authority from the Constitution, it cannot overleap the Bounds of it without destroying its own foundation.”[24] Most eighteenth-century Englishmen would have found such a statement not just confusing but virtually incomprehensible.

A year later, in 1769, the Rev. John Joachim Zubly of Georgia clarified the Americans' point more fully. Britain had a Parliament which admittedly was the supreme legislature over the whole British Empire, but, said, Zubly, Britain also had a constitution. The Parliament “derives its authority and power from the constitution, and not the constitution from the Parliament.” Surely the English nation, for example, would never consider a parliamentary law as constitutional that made the king's power absolute. Zubly concluded, therefore, “that the power of Parliament, and of every branch of it, has its bounds assigned by the constitution.”[25]

Thus in 1776, when Americans came to frame their own constitutions for their newly independent states, they knew they had to be different from ordinary laws. They were determined to write them out explicitly in documents and somehow or other make them fundamental.

It was one thing, however, to define the constitution as fundamental law, different from ordinary legislation and circumscribing the institutions of government; it was quite another to make such a distinction effective. The distinction between fundamental and ordinary law was

there for all to see, but everywhere there was confusion over how the fundamental law was to be produced and maintained. What institution or authority could create it? Could it still be fundamental if the legislatures created and altered it?

Consequently, many of the states in 1776 stumbled and fumbled in their efforts to make their constitutions fundamental.[26] Virginia simply declared that its constitution was fundamental. Delaware stated that its constitution was law and that some parts of that law were unalterable by the legislature. New Jersey allowed the legislature to change its constitution except for certain articles—those having to do with the right to trial by jury and the rules governing the legislature's composition, term of office, and powers.

Five of the states in 1776—Virginia, Pennsylvania, Maryland, Delaware, and North Carolina—prefaced their constitutions with bills of rights, combining in a jarring but exciting manner ringing declarations of universal principles with motley collections of common law procedures. Yet it was not always clear whether these bills of rights were fences just against the chief magistracy or against all the institutions of government, including the representatives of the people. Many in 1776 still thought that the legislatures representing the people ought to be capable, like Parliament, of altering the constitutions. In other words, they hadn't yet come fully to terms with the idea of a constitution as fixed and superior to ordinary legislation.

In 1776 most of the revolutionary state constitutions were written by provincial congresses or conventions acting in place of the legislatures, which the royal governors had dismissed or refused to convene. Thus, many constitution-makers initially assumed that because of the absence of the governors, their revolutionary conventions were legally deficient bodies, necessary expedients perhaps but not constitutionally equal to the formal legislatures in which the governors were present.

In 1688 the English, in the absence of James II who had fled to France, had relied on such a convention of the Lords and Commons to set forth a declaration of rights and to invite William and Mary to assume the vacant English Crown. But once the monarch was present, the convention immediately became a legitimate Parliament and the declaration of rights was reenacted as the Bill of Rights of 1689. In 1776 some of the American constitution-makers likewise felt uneasy about the fact that their constitutions had been created by mere conventions whose legality was suspect. The new state of Vermont felt so uneasy over the origins of its 1777 constitution by a mere convention that its legislature reenacted it in 1779 and again in 1782 “in order to prevent disputes respecting [its] legal force.”[27]

At the same time, Americans struggled with ways of changing or amending their fundamental laws. All sensed to one degree or another that their constitutions were a special kind of law, but how to change it? Could a simple act of the legislature change the constitution? Delaware provided that five-sevenths of the assembly and seven members of the upper house could change those parts of the constitution that were alterable. Maryland said that its constitution could be changed only by a two-thirds vote of two successive separately elected assemblies. Pennsylvania pulled a monster out of Roman history, a council of censors, as a separately

elected body to look into the constitution every seven years and if changes were needed, to call a special convention to revise it. So it went in state after state, as American groped their way toward the modern idea of a constitution as a fixed fundamental law superior to ordinary legislation.

Although Americans were convinced that constitutions were decidedly different from legislation, the distinction was not easy to maintain. They hadn't yet imagined what a constitution meant. They were conscious that their constitutions were written documents, but they weren't yet ready to define these constitutions simply by their fixed textuality. In other words, they still retained something of the older notion of a constitution as a dynamic combination of powers and principles. In the years following the Declaration of Independence many Americans paid lip service to the fundamental character of their state constitutions, but, like eighteenth-century Britons, they continued to believe that their legislatures were the best instruments for interpreting and changing these constitutions. After all, statutes of Parliament changed the common law and were integral parts of the English constitution. So the American state legislatures, which represented the people more equally than the House of Commons represented the British people, should be able to amend and change their state constitutions.

Thus, in the late 1770s and the early 1780s several state legislatures, acting on behalf of the people, set aside parts of their constitutions by statute and interpreted and altered them, as one American observed, “upon any Occasion to serve a purpose.”[28] Time and again the legislatures interfered with the governors' legitimate powers, rejected judicial decisions, disregarded individual liberties and property rights, and in general, as one victim complained, violated “those fundamental principles which first induced men to come into civil compact.”[29]

No one wrestled more persistently with the problem of distinguishing between statutory and fundamental law than Thomas Jefferson. Although he was anxious in 1776 to ensure the fundamental character of the new Virginia constitution, all he could suggest in his first draft of a constitution that the constitution be unrepealable except “by the unanimous consent of both legislative houses.” By his second and third drafts, however, he had refined his thinking and proposed that the constitution be referred “to the people to be assembled in their respective counties and that the suffrages of two-thirds of the counties shall be requisite to establish if' This would make the constitution unalterable “but by the personal consent of the people on summons to meet in their respective counties.”[30]

Jefferson soon recognized that his suggestions for making the constitution fundamental were too complicated. By 1779 he had also come to appreciate from experience that a constitution or any act that should be fundamental enacted by a legislature could never be immune to subsequent legislative meddling and altering. Assemblies, he said, “elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding Assemblies.” Thus he realized that to declare his great act for Establishing Religious Freedom in Virginia to be “irrevocable would be of no effect in law; yet we are free,” he wrote into the bill in frustration, “to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its

operation, such act will be an infringement of natural right." In other words, all he could do in 1779 to make his act of religious freedom fundamental was to put a curse on subsequent lawmakers who might violate or tamper with it.[31]

Such a paper curse was obviously not enough, and Jefferson soon realized that something more was needed to protect basic rights and fundamental constitutions from legislative tampering. By the mid-1780s both he and James Madison were eager "to form a real constitution" for Virginia; the existing one enacted in 1776, they thought, was merely an "ordinance" with no higher authority than the other ordinances of the same session. They wanted a constitution that would be "perpetual" and "unalterable by other legislatures." But how? If the constitution were to be truly fundamental and immune from legislative tampering, somehow or other it would have to be created, as Jefferson put it, "by a power superior to that of the legislature."[32]

By the time Jefferson came to write his Notes on the State of Virginia in the early 1780s, the answer had become clear. "To render a form of government unalterable by ordinary acts of assembly," said Jefferson, "the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments."[33]

In 1775–77, Americans had regarded their conventions or congresses as legally deficient bodies made necessary by the refusal of the royal governors to call together the regular and legal representatives of the people. By the 1780s, however, Jefferson and others described these once legally defective conventions as special alternative representations of the people temporarily given the exclusive authority to frame or amend constitutions.

Massachusetts in framing its constitution of 1780 had shown the way, followed by New Hampshire in 1784. As Boston warned its representatives in the legislature in 1778, they and their fellow legislators could not create a constitution, for they may "form the Government with peculiar Reference to themselves." Only a special constitution-making convention called "for this, and this alone, whose Existence is known No Longer than the Constitution is forming" could legitimately create a constitution.[34] Thus the General Court in 1779 authorized the election of a special convention with the sole duty of drafting a constitution, which then was to be sent to the towns for ratification by two-thirds of the state's free adult population. This Massachusetts experience set the proper pattern of constitution-making and constitution-altering: constitutions were created or changed by specially elected conventions and then placed before the people for ratification.

Therefore, in 1787 those who wished to change the federal government knew precisely what to do: they called a convention in Philadelphia and sent the resultant document to the states for approval by specially elected ratifying conventions. Even the French in their own revolution several years later followed the American pattern. Conventions and the process of ratification made the people the actual constituent power.

These were extraordinary contributions that Americans of the Revolutionary era made to the world—the practice of separation of powers, the modern idea of a constitution as a written

document, the device of specially elected conventions for creating and amending constitutions, and the process of popular ratification.

It may be that the sources of these constitutional achievements lay deep in Western history. For centuries people had talked about fundamental law and placing limits on the operations of government. But not until the American Revolution had anyone ever developed such practical, everyday institutions not only for controlling government and protecting the rights of individuals but also for changing the very framework by which government operated. And all these remarkable achievements were realized prior to the formation of the federal Constitution-in the ten short years or so following the Declaration of Independence. Indeed, the creation of the federal Constitution in 1787 would not have been possible without the previous experience with state constitution-making. For many Americans in the decades following the Declaration of Independence, the states remained the places where their thinking about constitutions was most fully developed.