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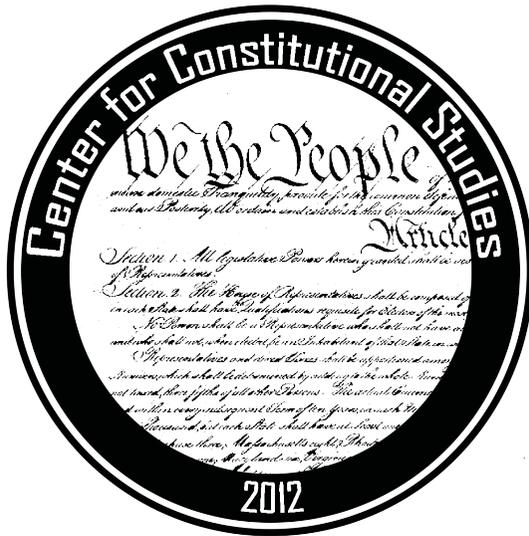
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# FOUNDATIONS

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# Fostering Facades: International Human Rights Norms and Sham Constitutions

Paige Robison

In an address to the annual meeting of the American Society of International Law, Justice of the Australia High Court Michael Kirby declared that “in a time of cyberspace, genomics, satellites, jumbo jets, and global perils such as AIDS and SARS” it is necessary “to acknowledge the role that international law plays, and will increasingly play, in the constitutional jurisprudence of nation-states.”<sup>1</sup> Scholars have tended to agree with Justice Kirby’s assessment that constitutional implementation is “one of the most powerful” means for the enforcement of international treaty norms at local levels.<sup>2</sup>

Even so, a nation’s implementation of international treaty rights into a constitution does not automatically ensure that the rights will be fulfilled or ensured for the citizenry of that nation. Indeed, “constitutions often fall short of their promises.”<sup>3</sup> This paper is driven by the question of why constitutions grant rights that a nation may not have the ability to, or the intention of, ever upholding. I examine the motivations behind making such empty promises,

particularly regarding human rights, and how doing so might influence a citizenry's perception of rights. I briefly examine the origins of international human rights norms, discuss possible reasons for implementation of those rights into constitutions of the world, and raise the issue of a disconnection between the adoption of international human rights norms into national constitutions and the realization of those rights by citizens.

The founding documents for nations have become increasingly liberal regarding human rights since World War II. Prior to 1945, only five nations (Mexico, Germany, Finland, Ireland, and Cuba) used the terms *human rights* or *human dignity* in their constitutions.<sup>4</sup> The turning point came on April 25, 1945, when forty-six nations gathered in San Francisco to discuss the formation of the United Nations (UN). Recognizing the atrocities committed during the war, the international community felt it appropriate to respond with a written declaration of the universal natural rights of humankind. Thus, the Universal Declaration of Human Rights (UDHR) was commissioned, and, on December 10, 1948, it was finally adopted by the United Nations General Assembly.<sup>5</sup> Eleanor Roosevelt, who had chaired the drafting committee from 1946 to 1948, spoke before her fellow delegates regarding the declaration:

In giving our approval to the Declaration today it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a Declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.<sup>6</sup>

The former First Lady's words make clear that the UDHR was not originally intended to be a legally binding document, but

rather a set of fundamental values, shared by all members of the international community. That voluntary spirit of human respect laid out by Roosevelt and her colleagues, and approved by forty-eight members of the UN General Assembly, did eventually prompt the creation of a legally binding agreement. In 1966, the United Nations General Assembly combined the UDHR with the International Covenant on Civil and Political Rights and the International Covenant on Economics, Social, and Cultural Rights to create the International Bill of Human Rights.<sup>7</sup> Every signatory nation was at that point obligated by international law to uphold every person's personal, political, economic, cultural, educational, religious, and labor rights. The adoption of the bill by a sufficient number of nations in 1976 revealed a notable shift in perception about the granting of rights—from a narrow focus on citizen's rights emanating voluntarily from a sovereign nation to globally universal rights granted to every person by nature and enforced by international law.<sup>8</sup>

Since the implementation of the International Bill of Human Rights, the number of core international human rights treaties in existence has increased to nine, and they now include provisions for protecting women from discrimination and declarations on the rights of children and the disabled.<sup>9</sup> Found within each of these treaties are no small number of obligations that ratifying countries are required by international law to uphold. However, the gravity of the rights requirements placed on signatories has not impeded the global push for human rights nor prevented their influence on the constitutions of the world. This is evidenced by the fact that, at the end of 2012, 84 percent of nations used the terms *human rights* and *human dignity* in their constitutions. Out of a sample of 363 constitutions written since 1945, 80 made explicit reference to an international human rights treaty, while 28 were purported to actually incorporate treaty directives into constitutional text.<sup>10</sup> The constitution of South Africa, for example, has been described as “a product of other nations' constitutions . . . and contemporary rights

conventions,” and, reportedly, the founding document of Canada was influenced by the European Convention on Human Rights.<sup>11</sup>

Regardless of whether a particular nation’s constitution mentions international human rights, the number of rights listed in constitutions has increased dramatically since the proliferation of the UDHR and has continued to increase in response to the creation of additional international human rights treaties.<sup>12</sup> For example, prior to the ratification of the International Torture Convention of 1984, only 34 percent of constitutions banned torture. After the Convention, however, 83 percent of the world’s constitutions explicitly banned torture.<sup>13</sup> In fact, any right that appears on an international human rights treaty has as much as a 50 percent increased probability of appearing in a sovereign nation’s constitution, while the exclusion of a right from international declarations can cause that right to decrease in popularity within national constitutions.<sup>14</sup>

The influence of human rights on constitutions across the globe could be heralded as one of the great successes of international human rights declarations and treaties, but it does raise an interesting question: Why would a nation choose to incorporate human rights norms into their constitutions rather than taking the much-easier and less-binding route of simply passing laws to uphold these same rights? There are several possible answers to this question.

A nation may have an ideological goal to improve human rights conditions. Constitutions demonstrate a greater commitment to true effectuation of change because constitutions are more credible and less flexible than legislative alternatives.<sup>15</sup> “Constitutions might incorporate treaty rights because the latter offer an authoritative statement of the most legitimate norms of the international community.”<sup>16</sup> Founding documents that incorporate treaty rights can serve as indications of the goodwill of politicians and governments to the international community, as well as to their own citizens.<sup>17</sup>

A nation might adopt the language of international treaty rights into its constitution to send a signal. As nations compete with their neighbors for private capital and human investment, investors are attracted by rule of law and tend to invest in countries where human rights are present.<sup>18</sup> Governments seeking investors might see the written protection of human rights as important in fostering a positive perception of their country. Governments hoping to protect their reputations in the international community might see non-commitment to the adoption of treaty rights into a constitution as sending a strong negative signal.<sup>19</sup>

This second possible motive for adopting international human rights treaty language into a constitution—sending a signal rather than truly fulfilling ideological goals—is quite compelling, possibly indicating why half of the world’s governments could still be classified as repressive.<sup>20</sup> Indeed, governments focused primarily on a reputation tend to fail to protect human rights because, with their attention elsewhere, they either misunderstand that human rights are essential or they lack the capacity to implement policies of protection.<sup>21</sup>

Such an ulterior motive for the adoption of international treaty language causes a disconnection between procedural implementation of human rights—that is, working them into a founding document—and their substantive implementation—that is, actually guaranteeing those rights for citizens. In essence, when countries incorporate international human rights norms for the sake of global acceptance or investment prospects, without either the intention or the ability to guarantee them, their constitutions become “sham constitutions,” which do not keep their explicitly stated promises and are therefore deceiving.<sup>22</sup> In these circumstances, constitutions can be seen as facades, bolstering a nation’s international reputation but providing no true indication of the internal domestic human rights conditions.<sup>23</sup>

Little research has been done into how well countries uphold constitutional guarantees, but the research on sham constitutions conducted by David S. Law and Mila Versteeg reveals some important findings on the topic.<sup>24</sup> Law and Versteeg sought to empirically document the prevalence of constitutional noncompliance over the past 30 years and to identify and study the worst practitioners of sham constitutionalism across the world.

The study found that of the 164 constitutions in existence in 2010, 39 (or 23.4 percent) could be classified as sham constitutions, based on the number of rights listed as opposed to the number of rights actually respected.<sup>25</sup> It is concerning that, despite the global push for human rights adoption and recognition, nearly one-quarter of constitutions currently in place around the world bear no resemblance to the true conditions within their respective national communities. Although human rights are more universally acknowledged in constitutions around the world, it is interesting to note that countries such as Afghanistan and Myanmar have either plateaued or even decreased in their abilities to uphold the rights promised in their constitutions.<sup>26</sup>

Law and Versteeg also point out that nations with constitutions explicitly stating many rights not only struggle to uphold those rights, but often perform worse in addressing human rights as a whole than countries that promise fewer rights. Countries with constitutions promising rights covering gender equality, fair trials, and the right to education experience a negative correlation, meaning those rights are less likely to be enforced when explicitly stated than in countries where these rights are not specified.<sup>27</sup>

How might these sham constitutions affect citizens' perception of human rights? There has been little research conducted that can answer this question directly. However, it might be assumed that the disconnection between procedural and substantive implementation of international rights treaties into constitutions would lessen the value of a nation's founding

document in the eyes of its citizens, assuming the public is actually aware of the rights their constitutions ostensibly guarantee. Indeed, if most countries that grant the right to free and public education cannot even begin to deliver on that promise, what are the chances that a majority among those nations' populations are even aware of what is promised to them in their constitutions? What value do constitutional rights possess if no one knows about them? Nevertheless, it is widely believed that education allows individuals, even those living under oppressive regimes, to recognize human rights violations.<sup>28</sup>

Furthermore, even if a majority of a nation's citizenry is informed about the content of their constitutions, who is to say that they understand what those granted rights entail? A 2005 study of people's perceptions of their governments' human rights practices in 17 post-communist countries came to the following conclusion about the influence of culture on the perception of human rights:

On its face, the lack of a strong effect of levels of respect for human rights on evaluations of human rights conditions among the sample as a whole appears to favor the cultural view of human rights, which suggests that the concept of human rights as operationalized by Western researchers may not have uniform leverage in societies with histories of repressive governments or may have meaning only for particular segments of a population.<sup>29</sup>

This idea that human rights can be seen differently through various cultural lenses suggests that even if citizens are familiar with the wording in their constitutions, they might not understand the extent of the freedoms those rights are meant to entail. If someone has never experienced international human rights norms such as freedom of speech, by what standard can they determine if and when that right is being violated?

International human rights law has profoundly influenced the constitutions of the world. Human rights are more universally acknowledged by national governments than ever before. But there is a dark side to the incorporation of language of international human rights treaties, especially when done shallowly, to maintain a nation's international reputation or to encourage outside investment. Rights ultimately mean nothing when they are written into a constitution but not enforced in the everyday lives of citizens, particularly if that lack of enforcement creates a citizenry ignorant of rights or unable to understand their significance.

NOTES

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- 12 Ginsburg, Tom, Zachary Elkins, and Beth Simmons. "Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice," *Harvard Journal of International Law* 61, no. 54 (2013): 71

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14 *Ibid.*, 81

15 Ginsburg, Chernykh, and Elkins. "Commitment and Diffusion," 201.

16 Simmons, Beth A. *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press), 2009.

17 *Ibid.*, 210

18 Farber, Daniel A. "Rights as Signals." *Journal of Legal Studies*, Jan. 1, 2002, pp. 84–85, accessed June 11, 2016.

19 *Ibid.*, 88

20 Hafner-Burton, E. M., and K. Tsutsui, "Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most," *Journal of Peace Research*, 44, no. 4 (2007): 407-25, doi: 10.1177/0022343307078942.

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22 Greenberg, Douglas. *Constitutionalism and Democracy: Transitions in the Contemporary World* (New York: Oxford University Press, 1993), 8–9.

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24 Law and Versteeg, "Sham Constitutions."

25 *Ibid.*, 885.

26 *Ibid.*, 899.

27 *Ibid.*, 913.

28 Carlson, M., and O. Listhaug. "Citizens' Perceptions of Human Rights Practices: An Analysis of 55 Countries." *Journal of Peace Research*, 44, no. 4 (2007): 480, doi: 1177/0022343307078939.

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# *Obergefell v. Hodges*: The Dangers of Judicial Overreach

J. Edward Cummings

The case of *Obergefell v. Hodges*, which actually draws on several Supreme Court cases, is a particularly informative example of egregious judicial overreach. The American judiciary has a mandate to uphold and, when necessary, interpret laws. In no case are the courts mandated to create laws, nor are they given the prerogative to do so. In *Obergefell*, however, it quickly becomes apparent that the Supreme Court is doing just that—creating law where none had existed before or otherwise effecting change based on personal opinions and beliefs, a practice referred to as judicial activism. By removing the same-sex marriage debate from its proper place—the legislatures of the various states and the people—the Supreme Court is substituting its collective opinion for the lawmaking process, violating the fundamental separation of powers, threatening the American nation of laws with the prospect of becoming a nation of personalities. Central to this threat, the Supreme Court appears to have fashioned itself the new American sovereign. If we allow this condition to persist, or allow any other body or person such unchecked power, our society may well be doomed to the fate of Rome.

The Constitution of the United States of America was written by a group of men who understood clearly that power is a corrupting force. They had fought a war against a king vested with immense power whom they considered corrupt, and they had already tried and failed to create a system in which the freedom of the individual could be protected (the first American government after independence was really a pseudo-government under the Articles of Confederation, which was too weak to provide the protections it was intended to provide). The founders understood well that government on the one hand and the citizenry on the other would both be formidable opponents to freedom—not necessarily out of malice but simply because of the unintended consequences of well-meaning statutes and policies.

As a result, one of the key provisions in the Constitution of the United States of America is the separation of power into three distinct branches of the federal government. The branches were designed to keep each other in check, preventing any one branch from obtaining overriding power over the others. Further, the Constitution limited the power of the federal government to a narrow range of situations in which only a federal government would be able to act appropriately. The rest of the power was left to the individual states or to the people. Specifically, Article I of the Constitution states clearly that all constitutionally granted legislative powers are exclusively given to the Congress. Article III of the Constitution lays out, somewhat vaguely, what the responsibilities of the Supreme Court shall be. Additionally, Amendment X of the Constitution declares, “Powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>1</sup>

This gives us a clear indication of where the framers of the Constitution thought that the bulk of the power should lie. The powers granted to the national government were narrow in scope, leaving the states with the power to create policy to

insure the safety, health, and morals of the community (these policy-making prerogatives are generally known as police powers). Among these policy-making powers reserved to the individual states—simply by virtue of not being specifically placed within federal jurisdiction by the Constitution—is the authority to define and regulate marriage. Ironically, in the majority opinion of *Obergefell v. Hodges*, Justice Kennedy acknowledges that the power to regulate and define marriage has always been the prerogative of the states.

Though the Constitution is quite vague about what the mandate of the courts would be, a pattern was established early in the history of our government to give the future Supreme Court some insight and instruction to what their role would look like. Before examining the case at issue—*Obergefell v. Hodges*—it will be helpful to briefly review the historical underpinnings of the Supreme Court and the role it plays in the American nation.

The Judiciary Act of 1789 granted the Supreme Court the authority to mandate compliance with policies originating from the executive branch. This came into question when President John Adams, as he was about to leave office, appointed a number of people to government positions but was unable to deliver all the commissions for the appointments before his term expired. When Thomas Jefferson took office, he refused to seat his predecessor's last minute appointees. One of these, William Marbury, sued the new Secretary of State, James Madison, and asked the Supreme Court to order Madison to grant his commission as a Justice of the Peace. The resulting case of *Marbury v. Madison* was heard in 1803.

Perceiving that they were in a precarious position, Chief Justice Marshall and his colleagues eventually settled on a solution that both strengthened and further defined the role of the American judiciary. For the nascent government, the dilemma was threatened a potentially devastating blow: If the court issued a writ of mandamus—which would have had the effect of ordering the

current administration to immediately deliver Marbury's commission—it would be ignored, causing the Supreme Court to appear weak. Failing to do so, however, would make the court look as though it feared the political power of the executive branch. The solution was to declare that the portion of the Judiciary Act of 1789 that granted the Supreme Court the ability to issue such writs violated the Constitution's Article III by giving the judiciary authority over the executive. It was in this case that the idea of judicial review—the court's power to rule on whether or not a law violates the Constitution—was born. At the same time, the court's role was more clearly defined—the court was not to take on anything which exceeded the powers granted to it by the Constitution.

Having established a little historical background, my intention is to go through the majority opinion in *Obergefell* point by point and reveal just how much the Supreme Court relied on their own personal opinions for their decision and how little basis there is for that decision in law—a prime example of judicial activism. The majority opinion in *Obergefell* opens with what Justice Kennedy calls “the history of the subject now before the Court.”<sup>2</sup> He goes on to recount the central role that marriage has played in the lives of humans throughout history, while at the same time acknowledging that marriage has always been an institution of relationships between people of opposite sexes. He notes, “The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.”<sup>3</sup>

After this glowing review of human matrimony throughout the ages, the opinion relates three poignant stories of the plaintiffs in this case. The stories are touching and evocative. They would, in fact, be well-suited to a debate on whether or not to legalize same-sex marriage. However, in a court trusted with the interpretation of existing law, these stories serve only to add emotional obfuscation to the legal question at hand. Transitioning from his story-telling, Justice Kennedy connects the fundamental nature

of marriage with the emotional issues of the plaintiffs. He says: “The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses’ memory, joined by its bond.”<sup>4</sup> This is where we begin to see the flaw in the Court’s reasoning. In legal terms, homosexuals have never been prevented from participating marriage as it is traditionally defined—that is to say, no law has ever prevented a gay man from marrying a woman or a lesbian from marrying a man. In fact, there are few real restrictions on marriage in our society. The real question in this case is simple: what does marriage mean? The plaintiffs in this case wish to use the term *marriage* to describe the relationship that they aspire to, or more accurately, to apply the age-old term to the relationship that they already have. The respondents in this case wish to maintain the traditional and historical definition of marriage. The real question at the center of this case—what constitutes marriage—is unfortunately not addressed by the Justices in the majority opinion.

As it unfolds, the majority opinion provides a brief history of the changes to marriage over the course of human existence. Justice Kennedy notes that marriage evolved from an arrangement made by parents for political, social, or economic reasons to the romantic notion of love that we now embrace, at least in western society. He acknowledges the abandonment of coverture, or the recognition of a married couple as a single legal entity with the man at its head, as women progressed toward a more equal legal footing. Kennedy explains that these changes, among others, were not insignificant, stating: “These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential.”<sup>5</sup> By enumerating these changes and pointing out that these changes were substantial, the Supreme Court maneuvered itself into a position from which they may say that the extension

of the definition of marriage to same-sex couples is the next step in a series of changes, which have been largely viewed as positive. They fail, however, to acknowledge the fact that marriage has always been considered to be a relationship between partners of the opposite sex despite whatever other changes occurred.

The Court goes on to give its opinion concerning how changes have come about throughout the history of our society:

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.<sup>6</sup>

It is here that the Supreme Court most apparently assigns itself the role of defining those “new dimensions of freedom.” In cases where social change brings about changes to the law properly—*Obergefell* does not fall into this category—there is a process that must occur. First, an issue is brought to the public’s attention; this may be through demonstrations or just through gradual changes in attitudes or something similar. This is usually followed by some kind of public debate. Finally, if anything is ever final, there are changes made to the law to reflect the people’s attitudes toward the subject. While this is not always the case—there have been other courts rightly accused of overstepped their bounds—it is the generally accepted form of defining new freedoms. In this instance, the Supreme Court is setting the stage for making changes by imposing their personal views on the people. The Justices attempt to justify this approach by citing *Lawrence v. Texas*.

Interestingly, *Lawrence v. Texas* was another controversial case in which Justice Kennedy wrote the majority opinion. This case was specifically concerned with a Texas law that criminalized homosexual sodomy. The opinion affirms that states cannot make laws restricting homosexual acts because the state has no legitimate

interest in involving itself with the private matters of citizens. It is important to note that this case deals with subject matter that is fundamentally different than that of *Obergefell*. In *Lawrence*, there is a specific law that criminalizes a behavior, and there are defendants who have run afoul of said law and, as a result, have been convicted and punitively sentenced. In this case, the Texas law restricted the freedom of a citizen and deserved judicial review.

The dissenting Justices in *Lawrence* would disagree with me, though on a legal point more than a material one. One of the controversies at issue in this case is really the same controversy that exists in the *Obergefell* case; that is, does the Supreme Court have the authority to override state laws in matters that the Constitution clearly leaves to the state? In his dissenting opinion, Justice Clarence Thomas declared:

I join JUSTICE SCALIA's dissenting opinion. I write separately to note that the law before the Court today "is . . . uncommonly silly." *Griswold v. Connecticut*, 381 U. S. 479, 527 (1965) (Stewart, J., dissenting). If I were a member of the Texas Legislature, I would vote to repeal it. Punishing someone for expressing his sexual preference through non-commercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources. Notwithstanding this, I recognize that as a member of this Court I am not empowered to help petitioners and others similarly situated. My duty, rather, is to "decide cases 'agreeably to the Constitution and laws of the United States.'" *Id.*, at 530. And, just like Justice Stewart, I "can find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy," *ibid.*, or as the Court terms it today, the "liberty of the person both in its spatial and more transcendent dimensions," *ante*, at 1.<sup>7</sup>

Because *Lawrence* is a case wherein the Supreme Court overturned a state law in order to protect the rights of individuals who faced

legal sanctions under that law, it does not support the *Obergefell* decision, in which no plaintiff had broken a law and faced no punitive legal action as a result. In other words, the difference arises from the fact that, in *Obergefell*, the plaintiffs are arguing for official recognition of their right to define marriage as something that it has never been; any harm asserted by the plaintiffs is not the result of government action but is rather the result of government inaction—i.e. not changing existing law to suit the plaintiffs' needs—which places *Obergefell* firmly on different legal ground than *Lawrence*. Clearly, *Lawrence* does not support the decision in *Obergefell*, despite having been construed to do just that.

Additionally, the Supreme Court's majority opinion in *Obergefell* is clearly the mixing legal precedent with emotional pleadings and assertions, expecting the emotional arguments to prevail simply because the legal arguments have managed to hold up. The court presents the following: "Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other."<sup>8</sup> While this is a wonderful bit of prose, it really has no basis in law. It is simply a further dilution of legal precedent with the opinions of the Justices. The Supreme Court follows this line of reasoning further by saying that even if *Lawrence* removed the legal barrier to same-sex intimacy, the social stigma remains. This is problematic because the Justices are not empowered to direct social attitudes. Social attitudes invariably shape laws, but it is not within the purview of the court to determine what that effect will be. We have a form of government in which the people are empowered to determine what effects social attitudes will have on the laws of our society and the extent of those effects.

The majority opinion posits the idea that marriage is the basis of the family and is especially important because it provides a stable relationship in which children may be raised. This idea has

been borne out over the centuries and is so commonly accepted as to require no discussion. This concept is often essential to the justification used by states to set regulations on marriage. The court carefully cites cases to support this idea and then states: “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples.”<sup>9</sup> And further:

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples. See *Windsor*, *supra*, at \_\_\_ (slip op., at 23).<sup>10</sup>

Here we see once again an emotionally charged argument stated as a justification for the Supreme Court to take action. Justice Kennedy offers another emotional argument:

Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.<sup>11</sup>

While these points certainly have merit and would have a place in a democratic debate on the subject of same-sex marriage, they are just so much fluff in legal terms. Aspiring to the transcendent

purposes of marriage and seeking fulfillment in its highest meaning may well be a worthy goal. On the other hand, what exactly does that mean? In terms of a legal argument, it is not substantive.

In a detour from its emotionally charged arguments, the majority opinion does attempt to answer the respondents' claim that the courts have not framed the question correctly. For the respondents, the various Courts of Appeal have looked at these cases as instances in which a fundamental right has been violated; the respondents, however, claim that allowing same-sex couples to marry requires the creation of a new right. In doing so, the respondents point to the case of *Washington v. Glucksberg*, which held that an assisted suicide statute in Washington state was unconstitutional.<sup>12</sup> In this case, the Supreme Court pointed to the historically criminal nature of suicide or assisting someone in committing suicide, but conceded that the decision regarding the "asserted right" to end one's own life was properly left to the people and their legislatures. As it explains itself to the accusations of the respondents in *Obergefell*, the Supreme Court appears to abandon the precedent of *Glucksberg* by essentially saying, Well, this is different: "Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."<sup>13</sup> Note how the Supreme Court talks about the "asserted right" in the *Glucksberg* case while saying that the approach is inconsistent with how the court looks at "fundamental rights." The court used a clumsy bit of verbal *legerdemain* to create the "fundamental right" of same-sex marriage out of whole cloth. Contrary to what the court asserts, the right to marry a person of the same sex does not preexist *Obergefell*—it is, in fact, new only as of *Obergefell*—and therefore the precedent in *Glucksberg* is perfectly applicable.

As it proceeds, the Supreme Court continues to glean from the precedents set by the cases mentioned previously—*Lawrence* and

*Glucksberg*—and others to suggest that rulings on marriage have often relied on the equal protection clause as well as the due process clause, covering a range of issues, including marriage, contraception, and women’s equality. In each case cited, the issue at hand is an established right. The court concludes:

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.<sup>14</sup>

While the court’s somewhat tortuous path through related, though misapplied, legal precedent certainly leads to the conclusion that marriage is a fundamental right, to draw the conclusion that therefore marriage must be extended to same-sex couples is hardly supported by the cases cited.

Regardless, having established that same-sex marriage is a fundamental right, however dubiously, the Supreme Court goes on to enumerate the reasons that the decision cannot wait to be legislated. After conceding that the appellate court had made a cogent argument for the continued debate on the subject, the Supreme Court dismisses it out of hand. They opine that there has already been much debate on the issue and point to a large body of information before the court in the form of judicial opinions, studies, and many *amici curie* from a variety of sources. These they claim give the court an “enhanced understanding”<sup>15</sup> of the issue, and therefore they have sufficient information to address the issue as a matter of constitutional law.

Disturbingly, the court now apparently decides how much democratic debate is sufficient. This appears particularly egregious when it is recalled that the majority of the states decided the issue in direct opposition to the court’s opinion. It would seem that the court considers itself to be better informed and more capable of making good decisions than the people of the United States. The

court's true role—to determine whether or not the issue at hand is in violation of the constitution and not to decide the wisdom or fairness of any issue—seems to have been forgotten or ignored.

On the other side, the dissenting justices were adamant in their opposition to the *Obergefell* ruling—so much so that, even though Chief Justice Roberts wrote the dissenting opinion, Justice Scalia and Justice Thomas both felt the need to write separate dissents in support of Chief Justice Robert's opinion. Chief Justice Roberts begins with a straightforward assessment of the situation:

This Court is not a legislature. Whether same-sex marriage is a good idea should be of no concern to us. Under the Constitution, judges have power to say what the law is, not what it should be. The people who ratified the Constitution authorized courts to exercise “neither force nor will but merely judgment.” The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered).<sup>16</sup>

Here, Chief Justice Roberts precisely identifies the fatal problem at the heart of the majority opinion of the court. He rightly indicates that the decision of the court is really nothing other than the five justices force-feeding their opinion to the country.

Throughout his dissent, Chief Justice Roberts repeatedly points out that the decision of the majority is a judgement that, instead of interpreting the existing law in accordance with the court's constitutional mandate, actually creates new policy. He pointedly remarks:

The majority's understanding of due process lays out a tantalizing vision of the future for Members of this Court: If an unvarying social institution enduring over all of recorded history cannot inhibit judicial policymaking, what can? But this approach is dangerous for the rule of law. The purpose of insisting that implied fundamental rights have roots in the history and tradition of our people is to ensure that when

unelected judges strike down democratically enacted laws, they do so based on something more than their own beliefs. The Court today not only overlooks our country's entire history and tradition but actively repudiates it, preferring to live only in the heady days of the here and now.<sup>17</sup>

It is a particular sentence embedded in this paragraph that is most ominous: "This approach is dangerous to the rule of law." Societies exist because the citizens thereof give up certain natural rights for the security of an organized society. If we lose the rule of law—creating a political situation wherein some are not constrained by law—our freedoms are essentially doomed, even potentially to be taken by a despot claiming to offer protection in return.

Justice Scalia begins his separate dissent by agreeing wholeheartedly with Chief Justice Roberts. He addresses a different but similarly dire threat introduced by the premise of the court's decision—the threat to democracy itself:

It is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.<sup>18</sup>

Justice Scalia points out, quite correctly, that this decision by a majority of nine unelected people effectively amends the Constitution. He also makes note of the fact that such decisions are always accompanied by heaping praise on liberty, while at the same time taking the most fundamental liberty of our society away from we the people—the liberty of self-governance.

His dissent contains an excellent case against such decisions. He points out that the people who ratified the Constitution and the Fourteenth Amendment knew that they did not have all of the answers, suggesting that this explains why there was a provision made for the amending of the Constitution itself. But that

provision, like all other lawmaking that would be necessary to our society, was left with the people and not with the nine unelected Justices of the Supreme Court. That was not accidental. Justice Scalia also describes how the debate and democratic process surrounding the question of same-sex marriage was the perfect example of what our society does when faced with new questions—until being halted and ignominiously slain by *Obergefell*. Uninterrupted, such questions are debated and then voted on. Those who lose may be disappointed, but they have at least had their say in the process. Further, they still have endless future opportunities to again try to convince their neighbors of the rightness of whatever cause was previously lost.

Justice Scalia also speaks of the fact that our republic is made up of persons of various backgrounds, ethnicities, religions, and ideas. He reminds us that the court reflects no such diversity, and warns that such a lack of diversity is irrelevant only if the Justices commit to using sound legal reasoning in their judgments. On the other hand, in a decision such as this—where he believes that the majority have decided the case based on their own preferences—that lack of diversity is devastatingly injurious. He believes that nine successful, ivy-league-educated lawyers who are mostly from New York do not accurately reflect a cross-section of the people.

Justice Scalia is not kind to his colleagues in his assessment of what he believes their decision represents. He opens the second section of his dissent with the following: “What astounds is the hubris reflected in today’s judicial Putsch,”<sup>19</sup> pointing out that the decision of the court basically says that the current majority was able to find in the Fourteenth Amendment a right that had escaped the notice of the finest legal minds of the past 135 years. He also talks of the poetic language that is used to phrase the opinion, calling it extravagant, and asserting that it has no place in a majority opinion of the Supreme Court.

In his dissent, Justice Thomas takes a somewhat different tack. His first concern is that the court's decision misapplies the idea of liberty. He says: "The Court's decision today is at odds not only with the Constitution, but with the principles upon which our Nation was built. Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits."<sup>20</sup> He also points out that the framers of the American constitution derived their definition of liberty from sources such as Magna Carta (which defined liberty as freedom of movement) and the writings of John Locke (who held that liberty existed as "Natural Law" and that people consented to give up a portion of their liberty as the price of living in a secure society). From these basic principles Justice Thomas asserts that liberty, for the purposes of the Constitution, has always meant a freedom from government interference. In the case of the petitioners in *Obergefell*, however, the liberty required of the court is a substantive liberty—they claim the right to receive recognition and benefits from the government. Pointing out that the case was decided on a suspicious application of the principle of due process, Justice Thomas suggests that, in effect, the court has destroyed the political due process that had already taken place in more than thirty states, thus denying due process to a large portion of the population. This is the most salient danger that Justice Thomas perceives emerging from this decision.

There are two items in particular that speak to the extraconstitutional nature of the decision in *Obergefell*. The first is the juxtaposition of the opinions of the Supreme Court in relation to the cases of *United States v. Windsor* and *Obergefell v. Hodges*. The second is the case of *Citizens for Equal Protection v. Bruning*, which was argued before the Eighth Circuit Court of Appeals. This case is interesting primarily because it takes the opposite position of the Supreme Court in *Obergefell*.

During the latter half of the twentieth century, attitudes among society at large became more liberal toward homosexual lifestyles, with the question of extending marriage to same-sex couples therefore becoming more commonly discussed. These attitudes and discussions culminated with *United States v. Windsor*. Several states had begun deliberating whether or not there was a legitimate reason to take action to alter the definition of marriage to make it more inclusive. In light of these developments, the United States Congress passed the Defense of Marriage Act in 1996. Through the Defense of Marriage Act, the federal government took the unprecedented step of defining marriage—in this case, as a contract between a man and a woman. It also allowed states to refuse to recognize same-sex marriages performed in other states where such contracts could be legally made. This law stood unchallenged until the case of *United States v. Windsor* in 2013. In this case, it was held that parts of the Defense of Marriage Act were unconstitutional because they intruded upon the prerogative of the states to regulate marriage.

Because *Windsor* was decided just two years before *Obergefell*, it was decided by the same Supreme Court—that is, the same nine Justices decided both cases. Interestingly, though, in the first case (*Windsor*), the court held that the federal law was unconstitutional because it usurped the states' authority to regulate marriage; in the second (*Obergefell*), the same court decided that the Court has full authority to intervene in the same dispute and take the same power from the states that was restored to the states in the first case. The resulting dissonance is head-spinning and has all the trappings of hypocrisy.

*Citizens for Equal Protection v. Bruning* was a case that was brought by three groups against the state of Nebraska after a referendum amended the State Constitution by defining marriage as being between one man and one woman. The amendment was codified as Article I, §29 of the Nebraska Constitution. The petitioners asked the District Court to find that §29 was unconstitutional

on the grounds that it violated the Equal Protection clause and that it amounted to a bill of attainder that deprived gays and lesbians of their constitutional rights. The District Court ruled for the petitioners, and Nebraska promptly appealed. During the appeal, the Eighth Circuit Court chose to focus on the Equal Protection argument, deferring to the District Court decision for all other arguments. This focus on the Equal Protection clause affords an invaluable act of judicial restraint and humility. Offering legal precedents, the Eighth Circuit Court determined that the proper way to view the question was by rational-basis review, stating:

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification.” *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Thus, the classification created by § 29 and other laws defining marriage as the union between one man and one woman is afforded a “strong presumption of validity.” *Heller v. Doe*, 509 U.S. 312, 319 (1993). The Equal Protection Clause “is not a license for courts to judge the wisdom, fairness, or logic of [the voters’] choices.” *Beach Communications*, 508 U.S. at 313.<sup>21</sup>

The Eighth Circuit Court eventually concluded that there was a rational basis for the law, namely that the state has an interest in regulating marriage. Further, the court found that the American federal government has long recognized that the institution of marriage is within the purview of the states. The quote from *Beach Communications* is most informative for the purposes of this paper. The Eighth Circuit Court did their job correctly: relying on legal precedent and the Constitutional mandate for the courts, they decided that the voters of Nebraska were free to choose their own laws and that the dissatisfaction of the minority was not to

be remedied by overriding those voters to create a new and previously non-existent right.

In the case of *Obergefell v. Hodges*, we find the problem of blatant judicial overreach clearly at work. A slim majority in the Supreme Court, in a 5-4 decision, essentially legislated a new right into existence. The cases cited to justify their decisions have, as we have seen, come up short, only feebly supporting the conclusions drawn. In fact, it seems that they have built a narrative, using these cases, that relies far more on creative wording than on legal precedent. They have substituted their own personal opinions for sound legal judgement.

Judicial activism is wrong, regardless of who is doing it or what their particular pet cause is. The Constitution of the United States of America was written in such a way that it could be altered over time by the changes that its authors knew must come. It was also written in a way that made altering it difficult, as an additional measure of protection against the whims of whoever happens to be in power. When the Supreme Court chooses to take a particular issue out of the realm of public debate and ensconce it as law, the system of government that has kept us a free people for more than two centuries is threatened.

The division of powers in America is deliberate, and we as a people must do all we can to keep those powers separated and in check. We cannot allow one branch of government to seize power for itself, nor can we allow the government to seize the power that rightfully belongs to the people.

NOTES

1 U.S. Const. amend. X

2 *Obergefell v. Hodges*, 576 U.S. (2015)

3 Ibid.

4 Ibid.

5 Ibid.

6 Ibid.

7 *Lawrence v. Texas*, 539 U.S at 605 (2003)

8 *Obergefell v. Hodges*, 576 U.S. (2015)

9 Ibid.

10 Ibid.

11 Ibid.

12 *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997)

13 *Obergefell v. Hodges*, 576 U.S. (2015)

14 Ibid.

15 Ibid.

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 *Citizens for Equal Protection, Inc. v. Bruning*, 290 F. Supp. 2d 1004 (8<sup>th</sup> Cir. 2003)



# The Haudenosaunee Constitution and Its Influence on the United States Constitution

Thomas Hone

Centuries before the Constitutional Convention of 1787, a group of tribes banded together and brought forth the first constitution on the American continent. This fact creates a necessary and productive tension with the myth that the idea of constitutionalism and the idea of a representative government first came into existence with the creation of the United States' Constitution. These tribes came together and not only forged the true first American constitution, but also created a powerful nation known as the Haudenosaunee nation, known to Europeans as the Iroquois. The Haudenosaunee played an integral role in the shaping of the Americas. The establishment of this constitution would both open colonists' eyes to the need for a constitution and serve as a model for the United States' constitution. This examination of the Haudenosaunee constitution will illustrate the impetus or the "why" underlying its creation and the principles the constitution enshrines, and the resulting influence it held over the creation of the United States Constitution.

Regarding the creation of the Haudenosaunee constitution, there are two important points of view that could be examined: 1) the traditional historical point of view and 2) the point of view as embodied in the oral tradition of the Haudenosaunee. While each perspective has its merits, for the purpose of this paper, more emphasis is placed on the oral tradition. It may be argued that the historical/anthropological perspective would be more accurate; however, the weakness of this view is the emphasis on *how* the Haudenosaunee constitution came about instead of the *why* came about. Understanding both this “why” and the influence of the Haudenosaunee constitution is critical to establishing the connection between this ancient arrangement and the Constitution of 1787, as well as helping to demonstrate how this constitution influenced and shaped the founding document of the United States.

To facilitate a deeper understanding of the historical context of the “why,” I will relate the story as it is preserved in the oral tradition. This tradition holds that the Seneca, Onondaga, Oneida, Cayuga and the Mohawk people had forgotten the ways as taught to them by their creator. As a result, each tribe sought ways to expand their own influence and power at the expense of other tribes in the area. This expansion was accomplished through conflict, theft, cannibalism, and other forms of violence. Constant conflict hindered the growth of all of the tribes in the area and left them vulnerable to external threats. According to the tradition, this state of affairs endured until a man by the name of Deganwida (the Great Peacemaker) was born. Deganwida was a member of the Huron people in the early part of the twelfth century or mid-fifteenth century (depending on which historical record is referenced) in what is now Eastern Canada. Early in life, he demonstrated the disposition of a spiritual leader; due to speech impediments, however, he was never taken seriously by his people. Regardless, Deganwida was a witness to the constant state of conflict and violence that plagued not only his people, but the neighboring tribes as well. In the stories, this weighed heavily

on his mind, and, as he reached the age of adulthood, he began to wonder if there was another way.

According to tradition, Deganwida received a vision. He saw a large white pine tree in which all of humanity lived peacefully together, protected in the shade of the tree's branches. In addition, he saw powerful roots of the tree spreading out in all directions while a great eagle stood guard at the top of the tree. Deganwida interpreted this vision as follows: if all (the tribes of the area) could come together and live peacefully, they would not only be protected from danger, but they would also grow and flourish across the whole of the land.<sup>1</sup> Determined to accomplish this, Deganwida developed a new system that would allow for all people to confront the issues facing them together, solving problems in the interest of the whole. Instead of each group focusing only on their own wellbeing, they would make decisions that would benefit all, thus allowing all people to grow and flourish. Deganwida envisioned a leadership in which all people of the area would be fairly represented.

Despite being met with skepticism from his people, Deganwida's determination to realize his vision did not waiver. According to tradition, he was convinced that the only way his people and others would be able to prosper was if all were willing to work together and allow themselves to be led by a council. To accomplish this, Deganwida knew that he would need to gain support of the other tribes in the area. Seeking support, he left his home and traveled south, speaking to any and all who would listen. Eventually, tradition holds that he was able to convince others of his vision, among whom were Jigonhsasee and Hiawatha, two of the most prominent leaders in the area. Convincing Hiawatha was particularly relevant because, as a well-spoken and charismatic individual, Hiawatha was more successful than Deganwida at relaying the vision and the plan. Together, they were able to convince the five tribes to come together at Onnodaga Lake, where the tribes gathered and planted a Tree of Peace. This established

what would be known as the Kayanerenh-kowa (the great peace). This momentous occasion constituted the first widespread acknowledgement of a need to work together. The next step was considerably more difficult and complex: the creation and formation of an actual government. This government would have to appease all participating tribes, some with differing needs and views, and establish a reliable forum for discussion to take place.<sup>2, 3</sup>

While the accuracy of this story is subject to debate, it is known is that a peace between the Seneca, Onondaga, Oneida, and the Mohawk people was established and that a government consequently emerged. This government—established by the efforts of Deganwida, Jigonhsasee, and Hiawtha—bound all the participating tribes to each other and to their creator. This arrangement was documented as a constitution, first portrayed through the use of wampum and then later as a written document. Central to this constitution was the establishment of a common history of all the tribes, accomplished through the adoption of a common creation story. This tale of creation served to illustrate that they were all one people, declaring to the people that no one tribe was greater than any other. A common creation story condemns acts of theft or violence among the people, indicating that, as descendants of the same creator, they were kin. After establishing this kinship, the constitution turned to forming a functional government. For the main proponents of this plan—Deganwida, Jigonhsasee, and Hiawtha—it was crucial that no one individual would be able to assert control over all, that all would be treated equally, and that the core principles of their creator—peace, equity, and the power of good minds—would be preserved and adhered to. In order to realize these principles, the planners recognized the emerging need for a form of written constitution. This constitution would establish the rules and regulations needed to achieve the goals envisioned by Deganwida and the others.

The Haudenosaunee constitution contains 117 articles and can be divided into five sections. As noted, this constitution was not

initially recorded in a written language, but portrayed through wampum.<sup>4</sup> As English was introduced to the Haudenosaunee, their constitution was translated to and recorded in that language. The first section contains the history of the people and binds them together under one creator and includes the tale of how and why the constitution was created. The second, third, and fourth sections of the document contain directives that regulate the type of government to be formed, procedures of the government, how leaders were to be chosen, and how decisions were to be made. In these three sections, the ideas of representation and equality are expounded upon. The government, as Deganwida envisioned it, would insure that all felt included in governmental processes and that all would be seen and treated as equals. Each clan<sup>5</sup> selected a chief to represent them to the main government. This was to ensure all clans of all tribes would be a part of the decision-making process. In addition, while the selected chiefs were male, they were chosen by the matriarchs of each clan. This was to ensure that all, men and women, would be seen as equals and play equally important roles in the process of representation. This was also intended to instill in the minds of the chiefs that they were servants of the people.<sup>6</sup>

In addition, the Haudenosaunee sought to protect the rights they derived from their creator. They understood that, despite being one people, there were still differences among them that would need accommodation. Clans/Tribes each worshipped the Creator in their own way. As such, they included provisions within their constitution to protect the rights of worship: “The rites and festivals of each nation shall remain undisturbed and shall continue as before because they were given by the people of old times as useful and necessary for the good of man.”<sup>7</sup> This article established a notion of freedom of religion throughout the Haudenosaunee nation and allowed all to worship as they would. Other rights, such as property and speech, were also written into the constitution as protected. These and other procedures in the

constitution would lead to the creation of the most powerful nation on the continent in its time—indeed, a nation that would stand until the defeat of the British in the war of 1812.

A few hundred years after the establishment of the Haudenosaunee constitution, the generation of a government based on the idea that government exists by and for the people would play itself out again on the North American continent as men such as Madison, Franklin, and Hamilton were trying to decide how to organize a government for the newly independent American states. After securing their victory in the revolutionary war, the colonies attempted a government based on the idea of individual rights and freedoms. Fear of an overpowering central government led to the establishment of the Articles of Confederation, a quasi-government doomed to fail, wherein the individual states held the most power and could cripple the central government on a whim. The comparison of the Articles of Confederation and the five tribes prior to the Haudenosaunee constitution is an apt one, as well as that between the events leading to the creation of a constitution in both cases. While the states understood the benefit of working as one, there was not an entity with enough power to cause them to do so. In these circumstances, each state was left to itself to decide how to interact with other states or even foreign powers. This—directly and indirectly—caused a multitude of issues, including border conflicts between states and run-ins with foreign powers. One such issue that highlighted some of these problems has come to be known as Shay's Rebellion.

Shay's Rebellion consisted of a series of uprisings over the collection of taxes to pay wartime debts and outstanding debts owed to foreign investors. Most states were left with debt in the aftermath of the Revolutionary War, and it was left to each state to come up with the money to pay off their respective debts. For their share, Massachusetts instituted a series of taxes in order to

raise the funds necessary to pay off its debt, which were met with resistance. Initially, this resistance was merely a refusal to pay, but as Massachusetts began to use more forceful means to collect, the resistance also became less peaceable. As tensions grew, an open rebellion—led by Daniel Shay—erupted. Shay’s men quickly won a number of victories, primarily because Massachusetts was unable to secure help from the Continental Congress. It was not until Massachusetts itself was able to raise the funds and forces that the rebellion was put down.<sup>8</sup>

This rebellion, and the difficulty in suppressing it, highlighted the issues with a government lacking a strong central government. With each state acting primarily on its own accord and to its own ends, the nation as a whole was left vulnerable to attacks from within and from without. Shay’s Rebellion highlighted the need for the states to be able to come together in defense of what they had just won—or risking losing it all again. As a result, it was determined that a stronger central government was needed, which would bind the colonies together and establish rules and guidelines that would be followed to ensure unity and prosperity. Men like James Madison, George Washington, Alexander Hamilton, and many others pursued the creation of a government based Judeo-Christian values and democratic principles. To this end, the Constitutional Convention was held in 1787. By 1790, the resulting document was ratified by the states, and this process endowed the U.S. Constitution with the force of law.

The government envisioned by the Convention of 1787 was based on the idea that a just government is only possible where governmental power is kept out of the hands of a single individual and that all should have a say in the direction of the nation. The framers of the U.S. Constitution accomplished this by dividing governmental power into three separate branches of government: the legislative, the executive, and the judiciary (for the purposes of this essay, we need only discuss the first two). The legislative,

supposed to be the most influential, is further divided into the House of Representatives and the Senate, to ensure a more robust sense of representation. The House of Representatives was to be chosen by the people, while the Senate was to be chosen by the state governments to ensure that the states maintained a part of their autonomy<sup>9</sup>. The executive is better known as the President, who is chosen by a group of electors to ensure no one individual would be able to swindle the people and take control. In addition to the creation of the branches, the powers of government were divided and restricted: powers of trade, the ability to declare war, and the creation of new laws were granted to Congress; the power to communicate with foreign nations and the ability to conduct war were granted to the executive; and all other powers, such as police powers, welfare, and so on, were to be retained by the states governments. These measures were adopted to ensure that the people of the United States would be a free people and that those in official positions understood their roles as servants of the people.

The parallels of the Haudenosaunee constitution and the events leading up to it, and the founding of the United States are clear. The circumstances in both situations led a few visionaries to see the need for a central government that would limit conflict, allow prosperity, and ensure unity that would protect all from outside forces. Both Deganawida and the framers saw a need for a central government that would be able to bind together the people it governed. For both the Haudenosaunee and the colonists, the lack of a central government allowed destructive self-interest to reign over the affairs of whole civilizations. In both situations, the peoples' self-interest led to conflict and a lack of prosperity. It was not until the organization of a central governmental system that internal conflicts ceased, the influence of outside powers lessened, and the full potential of each people, both the Haudenosaunee and the nascent American nation, was realized.

Because both Deganwida and the framers had experienced the pitfalls of a too-powerful governmental figure, they each recognized and feared the distinct possibility that centralized government could vest too much power in a single individual. The framers had lived under a king and witnessed firsthand the resultant dangers; Deganwida had seen how one man's greed could lead entire tribes to conflict. Their respective governments had often sought the expansion of power to the detriment of the people. In response, both Deganwida and the Founders had enshrined the concept of representation as a central tenet in the governments they formed, clearly indicating that they believed the power of government springs from the people. The integration of this belief was the ultimate check on government power: if the people do not believe the government adequately represents their wants and needs, the people retain the power to remove or change the government.

The parallels between these disparate circumstances is more than mere coincidence, indicating that the Haudenosaunee constitution had a direct and substantial influence on the U.S. Constitution. It is known that the framers sought direction from and were influenced by the writings of Locke, Hobbes, Montesquieu, and other European scholars; however, the influence of the Haudenosaunee on the framers has never been fully acknowledged. While many scholars discount the influence the Haudenosaunee, the parallels described in this essay exist and are substantive enough that they must be taken into consideration.

In addition to these similarities, further evidence can be found by examining the writings and words of the framers. In his correspondence to James Parker, Benjamin Franklin states:

It would be a very strange Thing, if six Nations of ignorant Savages should be capable of forming a Scheme for such an Union, and be able to execute it in such a Manner, as that it has subsisted Ages, and appears indissoluble; and yet that

a like Union should be impracticable for ten or a Dozen English Colonies, to whom it is more necessary, and must be more advantageous; and who cannot be supposed to want an equal understanding of their interests.<sup>10</sup>

In the remainder of his letter to Parker, Franklin suggests the wisdom of following the pattern established by the Haudenosaunee, indicating that it would not only work for the colonies, but also benefit them. Later in his life, Franklin shared this belief with others, including other framers. It can thus be surmised that the framers, who were central to the establishment of the United States, were aware of how the Haudenosaunee constitution functioned and understood, to some extent, the benefits it provided for the people and the Haudenosaunee nation as a whole.

The Haudenosaunee were a powerful nation. By the time Europeans began settling in the Americas, they had long been established as one of the most influential groups of people on the continent. Their success drew the eyes of many observers, including the founders of the United States as we know it. The framers brought the writings of Locke and others, but the model of the Haudenosaunee provided evidence that their experiment could succeed. Conversely, the Haudenosaunee played the parts of both theorists and framers, creating a representative system of government—which enshrined many of the rights and privileges contemporary Americans still hold dear—without the help of Locke, Hobbes, Hume, or Montesquieu. In the study of the founding of the United States, Americans are justified in revering the framers for the work they did; in the spirit of giving credit where credit is due, however, the Haudenosaunee nation also deserves a place of reverence, as the people who, in the fifteenth century, independently put into practice essential ideas of liberty and democracy that Europeans could only write about until 1787.

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# No Refuge Without the First Amendment

Samuel Hill

This essay seeks to demonstrate the imminent need for the United States to abandon politically correct policies at the intersection of two divergent issues: 1) constitutional protections of religious freedom, and 2) asylum and refugee policies. Failure to take appropriate action in this area will open us to attack from enemies who would destroy us, fundamentally transform our way of life into something only our enemies want, and possibly threaten the very heart of western liberalism. By incautiously embracing aliens whose worldview is antithetical to the First Amendment—in the name of the First Amendment, ironically—we risk losing the rights, freedoms, and protections that define us as a nation.

This essay will begin by highlighting the Syrian Civil War and the ways in which it has moved from regional to global threat. An examination of the response from western nations, the United States in particular, will assist in understanding the dangers presented to religious freedom by governmental policy. This will be

followed by an exposition of the history and intent underlying the Constitution, the protections afforded by the First Amendment, and the proper understanding of the prohibition against religious tests in American government. To demonstrate the risks associated with current interpretations and uses, we will then engage in a discussion of recent policy statements and the dangers they invite. As justification for a proposed shift to a more discriminatory asylum policy, we will then examine the history and implications of the Alien and Sedition Acts of 1798, and the points of parity between the threat they sought to alleviate and more recent threats to the United States.

### **Where the Crisis Begins**

Beginning in late January 2011, a series of protests against the Assad regime in Syria started what would eventually develop into the Syrian Civil War.<sup>1</sup> This conflict developed as one of the largest human rights disasters in recent years, with hundreds of thousands fleeing the conflict that has since spread into other national territories. The world realized how bad things had become when pictures of 3-year-old Aylan Kurdi's body, washed up on a Turkish shore, went viral on news sites around the world.<sup>2</sup> Calls for relief and refugee status surged, as tens of thousands of people fled to Europe to escape the chaos and death in the Middle East.

The U.S. government became involved with the crisis as well, processing requests at ever-increasing numbers since the beginning of the conflict. In fact, since the start of hostilities in 2011, the number of approved asylum requests awaiting processing increased nine-fold, from just over 9000 to more than 80,000 in March of 2015.<sup>3</sup> These numbers only represent the American situation – the confirmed refugee load in Europe since the start of the conflict surpasses three million, and some estimate total emigration at over 9,000,000 in 2016 alone.<sup>4</sup>

Many view this charitable outpouring as the active embodiment

of western liberal views on international and humanitarian relations. While this may be the case in theory, the implications and results fall far short of the lofty ideal upon implementation. A closer look at events surrounding the refugees shows just how great a distance there is between ideal and practice. Videos emerged of large numbers of young male refugees on train platforms and in refugee camps rejecting and even destroying aid offered by their host nations even as hungry women and children seek and accept the help.<sup>5</sup> This rejection accompanied demands in other places for rather luxurious accommodations, demands out of character for refugees fleeing terror and death at the hands of their fellow citizens. This led to fears that some among the refugees might actually be agents-provocateur for another entity emerging from the chaos: The Islamic State.

It is essential at this point to distinguish between two groups of people, about whom some confusion exists in public and policy discussions. The first group represents the vast majority of Muslims worldwide, who are more or less devout in their faith, respectable citizens of the nations they call home, and tolerant of their neighbors' differing faiths and cultures. The other group is made up of the individuals and groups about whom this paper warns—those who ally themselves with terrorist organizations that explicitly proclaim their Islamic character. These include ISIS/ISIL, Al Qaeda, Boko Haram, and the Taliban, among others. These groups are motivated by and/or take justification from the Islamic holy texts and teachings, and their interpretations lead them to commit acts of terror around the world, particularly against the West—not that the West is the target of the majority of attacks, but rather that attacks against western liberal targets somehow seem to matter more to the radicals than attacks against their neighbors. Recent studies indicate that this latter group represents a very small percentage of Muslims worldwide, hovering at around 5% on average. Furthermore, the majority of their non-radicalized brethren abhor these radical organizations, with

favorability in Muslim majority nations rarely exceeding 15%.<sup>6</sup>

In fact, ISIS has developed such a bad reputation among everyday Muslims of Middle Eastern descent, that it has acquired a pejorative nickname from the non-radicalized:

[*Daesh* is] a loose acronym for ‘Islamic State of Iraq and the Levant’ (al-**D**awla al-Islamiya al-Iraq al-**S**ham). The name is commonly used by enemies of ISIS, and it also has many negative undertones, as *Daesh* sounds similar to the Arabic words *Daes* (‘one who crushes something underfoot’) and *Dahes* (‘one who sows discord’).<sup>7</sup>

Given the relatively small proportion of radicalized Muslims, why is America so concerned with them? Even though they represent a very small percent of the global Muslim population, proportions can be deceiving. The aforementioned estimate of 5% puts the combination of active and/or supportive individuals just north of 80 million. This puts the global population of radical Islamists at roughly the same as the population of Germany.<sup>8</sup> Additional fears emerge because these radicals do not have a national flag that allows them to be easily identified, and their leaders have encouraged and incited war against the nations of the liberal West by any means necessary for years.

This is where the problems with taking in large numbers of asylum seekers in the name of religious freedom start to become evident. Out of the many thousands of migrants that have arrived in the European Union and the United States, a notable few have shown themselves to be exactly what we fear—agents in hiding. The list of recent terrorist and organized criminal activities by Middle Eastern refugees is startling. In Austria, a 17-year-old youth raped a 70-year-old woman and has been sentenced to jail but will not be deported because he was a minor at the time of the crime, and the duration of the sentence does not meet the standard of deportation in Austrian law.<sup>9</sup> In Cologne, Germany, disputes continue between officials and citizens over the nationality and provenance

of those responsible for the more than 500 attacks on women on New Year's Eve.<sup>10</sup> Sweden has registered over 5000 migrant-related criminal acts since October 2015, including the stabbing death of 22-year-old aid worker Alexandra Mezher in a children's holding facility.<sup>11</sup> More relevant to U.S. concern, Canada recently considered a fast-track for Syrian student refugees just as the effectiveness of the U.S. vetting process came into question when it was discovered that the San Bernardino shooter was revealed to have passed the U.S. anti-terrorism screening.<sup>12</sup> The asylum process normally takes 18-24 months for the very reasons we are here to discuss.

Not surprisingly, there are many in the United States who criticize the intent to take in more refugees from the Middle East at this time, as when Senator Lindsey Graham warned "there is a 9/11 coming, and it is coming from Syria".<sup>13</sup> As well, more than half of American governors have declared their intent to reject more refugees.<sup>14</sup> In response, those in favor of streamlining the asylum process have scolded their opposition, claiming that "there is no religious test" for asylum and that to seek to implement one is un-Christian.<sup>15</sup> There are two problems with this assertion. The first: there *is* a religious test in applying for asylum—of sorts. At the top of their asylum information page, the USCIS explicitly lists religion as a justification for granting asylum.<sup>16</sup> The second problem comes from the Constitution itself and the language included therein on the topic of religious tests. Article 6, section 3, states that "no religious Test shall ever be required as a *qualification to any Office or public Trust* under the United States" (emphasis added).<sup>17</sup> This is the sole reference to religious tests in the entire U.S. Constitution. Those in favor of easing the asylum and immigration standers seek to conflate the religious test prohibition with the protections guaranteed to citizens by the First Amendment, but the two are fundamentally different in their aims.

## Original Intent

These are essential steps in understanding the objections to the policy presented here. The Constitution is the fundamental blueprint for our political society, and deviations from its plan should be approached with caution. Dr. Rick Griffin is fond of saying in his classes: “The Constitution is not a suicide pact,” and we are not bound to follow every casuistic interpretation of the document *ad absurdum*, especially if that end is inimical to its purposes.<sup>18</sup> In order to accept the proposition that a policy will be harmful to the ends of the Constitution, we must first understand those ends. Fortunately for us, there is no shortage of authoritative information that defines this purpose in simple terms.

In paving the way for the eventual passage of the Constitution, the Declaration of Independence asserted that “Governments are instituted among Men” for the express purpose of securing “unalienable Rights,” among which are the explicitly listed “Life, Liberty and the Pursuit of Happiness”.<sup>19</sup> Further, it indicates the right of all people everywhere to design their government “as to them shall seem most likely to affect their *Safety and Happiness*” (emphasis added).<sup>20</sup> The Preamble to the Constitution is also quite clear as to the purpose of the document:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>21</sup>

Lastly, we can with confidence take the words of President George Washington, the man who was “First in war, first in peace, and first in the hearts of his countrymen.”<sup>22</sup> In a letter dated January 9, 1790, to Catherine Macaulay Graham, Washington asserts, “the establishment of our new Government seemed to be the last great experiment for promoting human happiness by reasonable compact in civil Society.” Given the extensive deliberations

and compromises made by the delegates who drafted both the Declaration and the Constitution and the unimpeachable character of President Washington, we can safely say that the end to which the great American experiment is aimed is the promulgation of human happiness within the scope of its power.

How, then, do the protections of the First Amendment and the prohibition against religious tests fit into this happiness-promoting structure, and what do they have to do with petitions for asylum? The answer for this goes back even further, into the British-American colonial era, and the religious wars in Europe during the last 500 years. Europe was in a state of near constant warfare for centuries over the issue of religion. England, although isolated from the continent, was a microcosm of this strife, with kings and prelates claiming allegiance to both the Catholic and Protestant faiths. Moreover, while Henry VIII Tudor is famous for precipitating a sharp break with the church in Rome, he can claim to neither have started the conflicts in England nor have resolved any problems present at the time of his divorce from Catharine of Aragon.<sup>23</sup>

Indeed, one of the prime motivations for the English Civil War was the abuse directed against those not of the king's religion. Only a year after the execution of Charles I, the Commonwealth army invaded Scotland to root out "the Antichristian tyranny that was exercised by the late King and his prelates, over the consciences, bodies, and estates of the true spiritual Church of Jesus Christ" and to free those who had been "imprisoned, banished, and otherwise grievously molested at the pleasure of those that then ruled."<sup>24</sup>

It was this persecution prompted the earliest immigrants to depart for the New World. Ironically, while they sought relief from persecution, they promptly established governments wherein they became the persecutors. With a few notable exceptions, such as Roger Williams' Providence, and William Penn's Pennsylvania,

every colony—at some point in its history—adopted laws requiring office holders, landholders, and those desiring franchise to declare some oath of allegiance to the predominant Christian faith of the area. Jews, Muslims, atheists, and even the “wrong sort” of Christians were all subject to arrest, imprisonment, excessive taxation, and disenfranchisement for the sake of their belief.<sup>25</sup>

At the time of the Constitutional Convention, virtually every one of the Founders had recognized to some extent the harmful effects of having state-sponsored religion. By the 1870s, it was commonly accepted that when state and religion are combined, men “will be apt to quarrel about religion, and, in the end, have a bad government and bad religion, if they do not destroy both.”<sup>26</sup> The prohibition against a religious test in Article VI has nothing whatsoever to do with asylum.

Likewise, the language of the First Amendment on religion is quite concise and has a specific meaning: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” is the entirety of the language.<sup>27</sup> This language is a response to the centuries of abuse in England and the colonies by kings seeking to empower themselves by endorsing one religion or persecuting others. In short, the constitutional language of religious protection is not relevant to immigration policy, and should not be used as justification for any policy moving forward.

A student of judicial decision-making will find problems in my conclusions here in light of many twentieth-century decisions that articulate a very different interpretation of religion in the Constitution—*Engel v. Vitale*, *Cantwell v. CT*, *Boerne v. Flores*, and *Lee v. Weisman*, among others. While this paper does not challenge the potential legitimacy of that understanding in the modern era, that legitimacy does not change the original intent. The historical referent of original intent, regardless of our ideology, serves as a proverbial lighthouse by which we may orient

our heading, regardless of the direction. Freedom of conscience applies to everyone, and, taken broadly, we see the fulfillment of the Founders' hopes concerning religion in public life today. America remains a majority Protestant Christian nation, yes, but millions of Jews, Catholics, Muslims, and atheists happily call it home. Even the surge of lawsuits and decisions forcing religious business owners to accommodate those with conflicting beliefs illustrates the essential nature of American religious policy, which is to permit the greatest happiness to the largest number of peaceable citizens.<sup>28</sup>

## Games

It is unfortunate indeed that the public and political debate now uses one of the highest aspirations of American political thought to pursue a course of action so hazardous to the long-term viability of our way of life. President Obama's remarks that America does not "have a religious test for our compassion" are, simply stated, intellectual dishonesty of the highest order.<sup>29</sup> Indeed, the intense concern over increased immigration of Syrian Muslims stems not from their faith as Muslims, but from their Syrian nationality. The war in Syria has opened the door for ISIS to expand so rapidly that it has beggared the wildest predictions of analysts and experts on the politics of the region. In fact, the Islamic State now lays claim to thousands of square miles of territory in multiple adjoining states, and its stated intention is to continue to wage war in any way available until it establishes "a global caliphate."<sup>30</sup>

Despite the seeming efforts to sidestep or ignore the problem in the United States, Islamist motivated attacks are occurring here. The Orlando and San Bernardino shootings are the most visible cases from the last twelve months, but there are many others we can cite: the arrest of Samy Mohamed Hamzeh for his plot to kill everyone at a Milwaukee masonic temple;<sup>31</sup> the attack on a Mohamed-themed art contest in Texas that left the two attackers

dead;<sup>32</sup> the detaining of a Middle Eastern woman conducting surveillance on Mexican border crossings;<sup>33</sup> and the attack on a military recruiting center in Tennessee that left five dead.<sup>34</sup>

Our Constitution and Bill of Rights do promise freedom of practice and freedom from persecution for those who live peaceably within our borders and our laws. In light of the multitude of threats, both real and potential, that ISIS and the wider Syrian conflict present, however, asserting that the religious clauses contained in America's founding documents dictate a blindly open border and careless immigration policy is irrational.

Another point at issue here is the extent of the threat we face here in the United States from what many perceive to be little more than cave-dwelling terrorists who have somehow occupied a bit of land. This point of view ignores the realities of international politics and influence in the modern age. In an era when private and corporate entities have taken up activities that defined state power for millennia and done them better, the lack of official status as a state has little real meaning. Even the great American war machine, which until recently could only be matched in terms of historical parity, has resorted to the extensive use of private military contractors.<sup>35</sup> If ISIS can occupy land and enforce its will, it already has more power than many weaker nations. There is much to recommend a shift toward a Post-Nation-State mindset as we deal with these new outlier groups whose power far outstrips their official legitimacy.

Much has been made of the efforts of these non-state actors in the realms of peacemaking, social engineering, and infrastructure development and much ought to be made. Unfortunately, the power to promote peace and improve lives on a mass scale is not the only development. The other development that we must face is the dissemination of the power to make war to non-state actors. The rapid expansion of ISIS territory and power throws the nation-state paradigm into disarray.

This all may seem like a long way to go for such a simple answer. This is intentional to prove an important point: the interpretation and application of American constitutional religious protections is not a sound-byte issue, especially as it relates to those who would use our principles against us. That a group is able to comprehend the utility of wrapping itself in a useful part of the Constitution to achieve its ends does not justify short-circuiting our rightfully discriminatory wisdom on the issue. This is even more applicable when we are dealing with people who, it may be reasonably argued, believe themselves to be at war with us. The attacks across Europe on New Year's Eve 2015 carry an interesting subtext when interpreted through the lens of Professor Saud Saleh's comments regarding rape and war. She articulates what seems to be an idea unique in the modern era to Islamic extremists: that in times of war, non-Muslim women become the property of their Islamic captors, to be freely bought, sold, and raped.<sup>36</sup> Taken alone this statement is damning, but if we look at it alongside the widespread sexual assault of women across Europe since the migrant crisis began, it justifies a worrisome interpretation of what the more radicalized individuals think they are doing in the West.

## **Aliens**

What do we do in the United States when faced with a body of foreigners whose ideals, behaviors, customs, or politics clash harmfully with ours? Simply put, we exclude them. If an applicant has been convicted of major crimes, has participated in the persecution that other asylum-seekers are fleeing, or has connections to states or organizations with whom the U.S. is at war, that individual can be denied asylum according to current U.S. policy<sup>37</sup> One well-documented example is the case of the French-American "Quasi War" and the Alien and Sedition Acts.

## **French Revolution and U.S. diplomacy**

From 1793 to 1794, the fruits of the French Revolution ripened into what is known today as the Reign of Terror. While that revolution began with enlightened hopes for a more republican national direction, the radical policies adopted by the Committee of Public Safety governments led to a bloody and horrifying harvest.<sup>38</sup> Tens of thousands died, both under the guillotine in Paris and elsewhere. The western world watched anxiously as one of the oldest royal powers descended into what seemed an interminable spiral of death and misery. Many feared that such revolt and unrest would spread to their own lands, inspired by the French émigrés fleeing the worst of the bloodshed. Even America, although not among the royal powers of the earth, had its own apprehensions. Barely having settled its feet in Federal Republicanism, one of its surest allies had descended into chaos, and the French leaders and diplomats were dissatisfied with the reaction of the American Congress to their plight.<sup>39</sup>

## **The Alien and Sedition Acts**

The result of the mistreatment of American diplomats by the French diplomatic corps was an undeclared “Quasi-War.” In the aftermath of this conflict, Federalist politicians began to harbor concerns that French agents would be active in the United States, attempting to incite the people toward French radical republicanism.<sup>40</sup> In response to this perceived threat, and cognizant of the political capital they might gain by defaming the less hawkish Democratic Republicans, the Federalist-dominated Congress passed the Alien and Sedition Acts in 1798. These Acts have been almost universally panned as Federalist political chicanery. Indeed, their application gives strong support to this interpretation. Political enemies were by far the most common targets of the Sedition Act, and the portions relating to aliens as enemies or problems were almost totally unenforced and unused.

The abuse of these laws by the Federalist Congress deserves every word of reproach ever uttered. To view the acts solely through the lens of their misuse, however, is shortsighted. Indeed, it was largely the abuse of “An Act for the Punishment of Certain Crimes against the United States” (the Sedition Act) that raised the ire of the Democratic Republicans and the nation. The act was never used against foreign individuals or enemy combatants, but was directed against political enemies—at times to dreadful results.<sup>41</sup>

There were three other acts passed in 1798 which are included in the Alien and Sedition group: “An Act Concerning Aliens,” “An Act Respecting Alien Enemies,” and “An Act to Establish an Uniform Rule of Naturalization.” These may be criticized to some degree, it is true, but none was so grossly misapplied as the Sedition Act. One could rationalize that because the U.S. had entered a state of undeclared war, the President could be granted peacetime use of powers normally used in wartime, and the naturalization process became much longer and more difficult.

Overall, however, they were good law. In many ways, the two acts respecting alien residence during times of war and peace reflect current law. They respected existing treaties, even with hostile nations. They uphold the rights of property for those deported or detained, with no regard to citizenship or the time that passes. While most of these were explicitly repealed or allowed to expire, “An Act Respecting Alien Enemies” remained in effect until the Wilson administration re-codified it and included it in the body of U.S. war statutes.<sup>42</sup>

The problem with a universal hatred for the Alien and Sedition Acts is that it ignores the viability of the legislation, especially in the face of well-founded fears of infiltration and subversion. Competition with the Democratic-Republicans aside, not even the Federalists wanted to import the seeds of French Republicanism if it meant an American version of the French Revolution. The ideals of French radical republicanism and the terrible events they

inspired were undesirable on their own merits, but also represented a distinct break from the Federal Republicanism for which many of the members of Congress had fought and sacrificed.

What does any of this have to do with religious freedom in America today? The United States and the western world face a threat from an ideology that would change us to comply with its own standards once again. Today's threat comes not from an atheistic political ideology of extreme democracy, but from a theocratic ideology of absolute domination.

## **Ties**

The points of comparison between the two problems are many: All nations, not just those sharing borders with the Middle East, worry at the possibility of unintentionally importing unrest while attempting to help the truly downtrodden of the Syrian Civil War. There are documented cases of ISIS agents covertly entering enemy nations to promote their ideas or sow unrest and weaken them, as detailed above. Islamist-inspired revolutions and coups have overthrown long-established and legitimate powers, leaving chaos and blood in their wake. Given the very real possibility of bringing a snake to our breast by exercising too much compassion and too little caution, many Americans are justly concerned and confuse by the current application of religious freedom in American asylum policies.

The relaxed state of U.S. immigration is even more perplexing because the ISIS threat is imminent in a way that far outstrips the risks faced by our nation in 1798. The relatively open border we share with Canada and the miles of uncontrolled land at the Mexican border are all potential routes of entry for a group that has already demonstrated both its willingness and its ability to cause extraordinary amounts of death and destruction. They are more than willing to adopt the mien of poor refugees and game our system to accomplish it.

## Conclusion

What are we to do? While there have been some extreme calls for a return to a policy of isolationism, most respected voices recognize the implausibility of such a course. I assert that the United States needs to return to a more originalist understanding of religious freedom if we are to accomplish the twin ends of protecting human happiness and maintaining our own societal integrity.

In our pluralistic world, we draw closer to realizing the ideal described by Thomas Jefferson in his letter to the Danbury Baptist Association, where a man's religion "lies solely between [him] and his God."<sup>43</sup> This progress is a good thing. We must recognize, however, that some influences in our world are regressive, and would "degrade and ultimately destroy" the very rights that have inspired the world to follow the Liberal West into freedom.<sup>44</sup>

In closing, the Constitution does not require us to apply the tenets contained therein to the point of absurdity. To suggest otherwise is akin to one stricken with cancer deciding to take all of their chemotherapy at once in a bid to recover faster. The principle of chemotherapy works, but only in measured doses as intended. When applied *ad absurdum*, the treatment kills rather than heals. If America is to remain a shining beacon for those seeking the freedoms they lack in their home countries, then our policies must favor those who recognize that they are "the foundation of our way of life; our civilization—a civilization that learned, slowly, painfully, not to burn heretics, but to honor them."<sup>45</sup> A return to the originalist interpretation will protect legitimate asylum seekers and enable them to escape the persecution and tyranny of their homes. It will protect the United States from the threats posed by those who would use our good will and systems of government against us.

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# The Roman Constitution

Joshua Eaton

The Roman civilization lasted from 509 BC to 1453 AD, an astonishing 1,962 years. This incredible feat was the result of the Romans' ability—both as a republic and an empire—to spread their rule and maintain their power was rooted in their lack of a written constitution. This is not to say that the Romans did not have a constitution; it was merely not a document that provides firm boundaries within which the government could function and outside of which the government could not. The Roman government was not strictly accountable to any written form and was therefore remarkably elastic. The characteristic elasticity of the unwritten Roman constitution allowed the Roman government to adapt quickly to overcome new and unanticipated threats.

There exist numerous examples of how the Roman government fundamentally changed in order to adapt to new situations. These examples include the First and Second Triumvirate, the rise of Gaius Octavius (Augustus) and his empire, and then the split of the Roman Empire with Diocletian. Each of these instances

represent times that the Roman government effected internal changes to handle situations such as civil war or to accommodate an ever-expanding empire.

The First Triumvirate, which lasted from 58 BC to 49 BC, consisted of three powerful men: Julius Caesar, Marcus Licinius Crassus, and Gnaeus Pompeius Magnus. These men were the chief players in their three respective factions. Crassus belonged to the Republicans, Pompeius to the Optimates, and Caesar to the Populares. The Senate granted power to the First Triumvirate to forestall a military revolt. After the death of Crassus, the alliance between Caesar and Pompeius began to deteriorate. This falling out between two of the most powerful Romans led to another civil war (49 BC to 45 BC) between the Optimates and the Populares. In the year 45 BC, Caesar defeated the forces of Pompeius and became the dictator of Rome.

His reign did not last. Caesar was assassinated in 44 BC by the self-proclaimed liberators Marcus Junius Brutus and Gaius Cassius Longinus, along with a few other Senators. The assassination was motivated by a desire to prevent Caesar from destroying the Roman Republic by establishing himself as a lifelong dictator. The political motivations behind Caesar's assassination ultimately failed, as Rome again plunged into a civil war resulting in the rise to power of Gaius Octavius, known in history as Augustus. The rise of Octavius was made possible by the Optimates Senator Marcus Tullius Cicero. A deep hostility had developed between Cicero and fellow Senator Marcus Antonius. When Octavius, as the adopted son of Caesar, was named Caesar's heir, Cicero perceived and quickly grasped the opportunity to defeat his rival.

At Cicero's request, the Senate conferred the powers of a Commander to Octavius, as well as giving him a seat in the Senate. These actions unprecedented—traditionally, Octavius was neither old enough nor experienced enough for these positions. The flexibility of the unwritten Roman Constitution allowed the Senate

to do this as it was found necessary. Cicero was empowered to justify these actions to the Senate because, unlike the American Constitution—which provides specific provisions for political leaders, such as boundaries on eligibility for the executive in the form of age limits and citizenship—the Roman constitution, based as it was on a client-patron relationship, could not prevent such action by the Senate.

The client-patron relationship, which was prolific in Rome, enabled many of the members of the Roman Senate to obtain their positions. The system functions when a client provides services for the patron, such as military service or providing votes for the patron. In return, patrons granted rank and status to those clients for services rendered. The ruling elite kept their power by giving rank and position to their clients, who remained loyal to their patrons. This cultural phenomenon was at the root of Cicero's campaign to empower Octavius, thereby making Octavius a client of Cicero. Employing his considerable shrewdness, Cicero intended to use Caesar's heir to destroy Marcus Antonius.

After Octavius came to power, however, he quickly started to use his power for his own political gain, eventually becoming a member of the Second Triumvirate (the other two members were Marcus Antonius and Marcus Aemilius Lepidus), which wielded power from 44 BC to 31 BC. These three men united and used their powerful position to eliminate their political enemies and then to contend with the liberators (the same group of men who had colluded to assassinate Julius Caesar). As evidenced here, the Roman government, unhampered by its elastic constitution, could fundamentally shift as its leaders perceived new threats, particularly during times of civil war. This characteristic of the Roman system of government becomes even more apparent during the reign of Gaius Octavius, who would become Caesar Augustus.

After the defeat of Marcus Antonius and Cleopatra at the Battle of Actium in 31 BC, Octavius gained new political powers.

Initially, his title was the Dux (meaning essentially duke). Soon after, he rose to become the Princeps (Principate 27 BC to 284 AD), a position that gave him the political power of Proconsular Imperium (power over the army) and Tribunicia Potestas (power over society). This made Octavius the most powerful Roman Magistrate of the late Republic era. These powers were granted by the Senate, and, through the exercise thereof, Octavius became the first Emperor of Rome. Although he did not openly or formally declare himself emperor, he cleverly manipulated the circumstances to eventually gain this title by showing *pietas* (respect for authority or reverence for tradition); in other words, he was able to make these fundamental changes while appearing to uphold the traditions of the Roman Republic. In this way, though the Senate remained during the years of the Roman Empire, power ultimately resided with the emperor as despotism cast its long shadow over Rome.

Centuries later, the remarkable actions of Diocletian demonstrate—in a manner unfathomable to those accustomed to government under a written constitution—the almost unbelievable fluidity of the political composition of the Roman Empire. Diocletian was faced with an expanding empire, which had numerous enemies on two distant fronts. In an effort to resolve the administrative and logistical difficulties inherent in the rule of such a vast realm, Diocletian split the empire into two parts: the Eastern Empire and the Western Empire—a division that would last from 285 AD to 324 AD. Under the new method of governance, the empire became known as the Dominate. The division of the empire empowered the realm to effectively combat both the Bagaudae (Barbarians) in the West and the Persians in East. To accommodate the division of the empire, Diocletian quartered the title of Emperor: there would be two main emperors (of the east and west respectively) called Augusti and two inferior emperors called Caesars. After Diocletian's actions, the leadership of the Roman Empire looked essentially like this:

## Dominate

### Eastern Empire

Augusti: Diocletian

Caesar: Galerius

### Western Empire

Augusti: Maximin “Herculius”

Caesar: Constantius

This administrative division of the empire, though fundamentally changing its organizational identity, played a crucial role in the survival of the Roman Empire. Power and command was further distributed among the commanders of the 27 *Limitanei* legions (soldiers on the frontier districts), as well as the fact that each of the Rulers (the two Augusti and the two Caesars) commanded his own legions. This dissemination of power allowed leaders to individually assess and combat the most pressing threats within their individual spheres of influence, rather than one emperor attempting to command two different armies on two different fronts.

After Diocletian stepped down as Augusti of the Eastern Empire, the Caesar of that empire rose to Augusti; this was neither shocking nor unexpected. In fact, the Caesar of each empire expected to become Augusti when the current Augusti died or stepped down. This passage of power lies in stark contrast to the Augustian model. As Augustus determined the heir to his throne, he considered his sons, including his adopted son Tiberius, as well as some of his allies—Postumus Agrippa for example. Though power ultimately passed to Tiberius when Augustus died, the Augustian model made it theoretically possible for any one of several different candidates to gain the throne, rather than the stable and predictable rise in rank from Caesar to Augusti. These contrasting models both functioned within the same governmental framework, a testament of the adaptability of the Roman system of government.

Later, when Constantine rose to power, he eliminated the power of the Augusti and Caesars and regained complete control over the empire in 324 AD. He restored a single Princeps, recalling the Augustian model. Constantine's rule marked another significant change in the make-up of the Roman political system—reverting from two emperors (Augusti) and two inferior emperors (Caesars) back into a single emperor under the power of a Princeps or Principate.

While Rome was originally founded as a Republic, the lack of a written constitution afforded the nation the fluidity to reshape and mold itself as new threats arose, whether internal conflicts—such as civil wars surrounding the formation of the First and Second Triumvirates—or the presence of powerful enemies prowling the borders—such as the Persians and the Barbarians. Although difficult to imagine and perhaps even more difficult to accept, the unwritten Roman constitution remained central to the Roman civilization as it equivocated between a republic and a despotic regime, ultimately providing the power Rome needed to survive for nearly two millennia.





# The Economic Genius of Alexander Hamilton

Paul T. Chavez

When the American Colonies of Great Britain first declared their independence, they still inflexibly identified as individual colonies or independent nation-states. Each of the colonies relied mostly on its own independent legislative assembly to get things done. In the nation's infancy, these independent states came together under a document that did not do much more than provide for defense against enemy invasion and allow for declarations of war—the Articles of Confederation. In the aftermath of the American Revolution, this attempt at a constitutional document did just what the title implied: bringing a group of still sovereign states together, while maintaining the mass of power within the individual state governments and making cooperation with the continental government more or less voluntary.

What this original American governing document conspicuously lacked was a centralized government and an effective mechanism for progress on a larger scale—elements which many (including a highly influential group known as

Federalists) deemed integral to the survival of this newly-formed independent America. During the latter part of 1787, when the US was still operating under the Articles of Confederation, Alexander Hamilton, one of the most well-known Federalists, declared in Federalist 15 that

The United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either... The consequence of this is, that though... [those laws are] constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.<sup>1</sup>

The Federalists understood that the government had to be centralized in order to more effectively tax the people, bring these new states together as a united body, and truly preserve that which had been so vigorously fought for in the American Revolution: the ideas and principles of independence, freedom, equality, due process of law, taxation with representation, and true political sovereignty.

Alexander Hamilton did much to ensure the preservation of this new country—in many ways because of his fondness of the British form of government that had just been tossed aside as a result of the Revolution. He also helped to preserve the infant nation by seeing and acting upon opportunities to apply British concepts and ideologies to the American form of government. Conspicuous among a myriad of factors, Hamilton's leadership and vision enabled the United States of America to endure and perpetuated the ideas of justice, freedom, direct taxation, and free market economics.

It is impossible to truly understand Hamilton and his *modus operandi* without first understanding his background and upbringing. Hamilton grew up in the West Indies in somewhat destitute conditions due to a variety of reasons, including the absence—aside from an occasional correspondence—of his father, James Hamilton, from 1766 onward. The untimely death of his mother

when he was about thirteen only made the young man more resilient in the face of severe difficulty.<sup>2</sup> Though his youth was fraught with trauma, struggles, and heartbreak, one of his many biographers, Ron Chernow, says, “He embodied an enduring archetype: the obscure immigrant who comes to America, re-creates himself, and succeeds despite a lack of proper birth and breeding.”<sup>3</sup>

The young Hamilton was fortunate to encounter perceptive and wealthy benefactors who, observing his natural gifts, provided means for him to begin pursuing a formal education at King’s College, which would eventually become Columbia University. While still young, Hamilton demonstrated earnestness and tenacity as he studied military strategy, artillery tactics, and law. Where he perceived a void or gap in his intellect or abilities, he took action to fill it.

In a display of such action, Hamilton quickly became invaluable as a young soldier and officer. Hamilton joined the war effort at the age of 21, less than a year into the Revolutionary War, commissioning as a captain and commanding the Provincial Company of Artillery for the Continental Army. While serving in this capacity, he distinguished himself as a military leader in many key battles, including the surprise attack of the city of Trenton, held at the time by British and Hessian forces. Though Hamilton had been struggling through a severe sickness that had left him bed-ridden, he mustered the strength to make “an eight-mile march through a thickening snowfall, [where he] and his troops, equipped with two cannon, glimpsed the metal helmets and glinting bayonets of a Hessian detachment.”<sup>4</sup> Boldly and deftly ambushing the enemy, Hamilton’s efforts prevented enemy soldiers from advancing on American forces. As a result of his distinguished service, along with the praise he received from General Henry Knox, Hamilton was appointed as an aide to General George Washington in the winter of 1777.

As a member of General Washington's staff, Hamilton quickly rose through the ranks of political society by associating with important people—from generals to political figures, and on down through the general ranks of the Continental Army. Washington found use of Hamilton's natural writing ability, tasking him with writing letters, keeping records, and taking notes from various discussions. For five years, he served with Washington as his military aide, during which time he had the honor and privilege of leading a charge towards Yorktown, where British General Charles Cornwallis was under siege from American and French forces. During the night of the 14<sup>th</sup> of October, "Hamilton and his men...rose from their trenches and raced with fixed bayonets toward redoubt ten, sprinting across a quarter mile of landscape pocked and rutted from exploding shells."<sup>5</sup> The British redoubt soon fell, with Hamilton and his troops experiencing only minimal casualties. Just a few days later, General Cornwallis and his men surrendered, which ultimately led to the end of the War for American Independence.

After the conclusion of Hamilton's service as an aide de camp to Washington came to a close, he continued his studies, which ultimately focused on law. After completing his self-guided education, he apprenticed for a local law firm and was eventually admitted to the New York bar. He began his practice of law by defending individuals who had remained loyal to the Crown during the war, but who had chosen to stay in America. Many of these loyalists had obtained property in New York that had been abandoned by American rebels when the city was captured by the British. In all, Hamilton defended over 45 loyalists who were sued as trespassers on American property during the war. In 1784, Hamilton participated in *Rutgers v. Waddington*, a groundbreaking court case that involved these alleged trespassing loyalists. This case was instrumental in the development of judicial review in the American political process.<sup>6</sup> In the same year, he also assisted in founding the Bank of New York—an experience Hamilton surely drew upon

in his later banking ventures. A few years later, in 1787, Hamilton was elected to serve in the Continental Congress as a representative for the state of New York. He was an avid proponent of a strong centralized government and played an important role in convincing the Continental Congress of the pressing need for a constitution that would give the federal government more power and greater authority over the states.<sup>7</sup>

It can be argued that, among the many signers of the Constitution of the United States of America, no one was more intent on having a strong and powerful federal government than Alexander Hamilton. Said he in March of 1788: “Energy in the executive is a leading character in the definition of good government.”<sup>8</sup> Hamilton spent countless hours writing the essays that would become the bulk of the Federalist Papers, with the intent of convincing the states—specifically the citizens and delegates of New York—of the need for the ratification of the newly drafted United States Constitution. All in all, Hamilton wrote or heavily contributed to 52 of the 85 Federalist Papers.<sup>9</sup> Hamilton was one of the most influential and controversial of the founders of these newly formed United States of America.

Only two years after the Constitutional Convention—and after the ratification of the resultant document—Hamilton was appointed to serve as the country’s first Secretary of the Treasury by newly-elected President George Washington, a post Hamilton filled effectively from 1789 to 1795. There were many reasons why Washington chose Hamilton to fulfill this crucial role, including the loyalty that he had seen from Hamilton during his years of service as Washington’s aide-de-camp. Perhaps more importantly, Washington recognized Hamilton’s keen mind and his unmatched fiscal ability, as “no one in the army, and few outside it, rivaled Hamilton when it came to understanding economic issues.”<sup>10</sup> Hamilton understood the need for creating a Bank of the United States, which would give America the ability to produce

and then distribute bank notes in place of actual gold and silver. Using bank notes, according to Hamilton, would allow America to leverage her assets and “would augment ‘the active or productive capital of [the] country.’”<sup>11</sup>

Some of the issues addressed by Hamilton and the newly formed Executive Branch of the United States included establishing “tariffs and other taxes for federal [income],”<sup>12</sup> seeking means to pay off wartime debts incurred by the Continental Congress during the American Revolution, establishing policies regarding the wartime debts of the new states that had been inherited by the federal government, forming a new centralized national bank, and creating a currency that could be used on a national scale that would be “based upon newly minted coins.”<sup>13</sup> Hamilton could not have done many of these things under the Articles of Confederation, which had dubiously governed this newly independent federation of states for nearly eight years. Before 1789, the federal government had no power to directly tax the people, and it therefore relied wholly on the states to tax the people and then remit some of the revenue to it—a process that took an excessively long time and that nearly always led to less than desirable results. With the ratification of the new Constitution by the last of the needed states on June 21, 1788, and the initial adoption of that Constitution on March 4, 1789, the federal government could directly tax the people and carry out the many other policies that Hamilton eventually proposed.<sup>14</sup>

Up until this point, the United States had been trudging through shaky economic times. The nation had essentially defaulted on all non-interest-bearing debt<sup>15</sup> between the years of 1780 to 1790, according to economic historian, Farley Grubb.<sup>16</sup> Under the Articles of Confederation, the government’s lack of central authority and direct control had precluded the infant nation’s ability to pay back its creditors or pursue any kind of effective economic solvency. Similarly, the Continental Congress had

issued paper money during the American Revolution that it was unable to honor once America had gained its independence—as a result, the new nation defaulted on all specie relating to the Continental dollar (which was considered a non-interest-bearing debt) by 1790. In these uncertain conditions, the implementation of the policies derived from the economic prowess of Alexander Hamilton and the adoption of the Constitution were crucial to America’s eventual success as a united and stable nation.

As part of the adoption of the Constitution, the United States would only be able to issue credit notes that were considered interest-bearing, and these notes were backed by land assets, which would “help explain how the federal government could garner an excellent credit rating by the early 1790s despite its prior history of default and its massive debt position.”<sup>17</sup> This impressive turnaround, of course, did not just magically happen. Achieving this excellent credit rating was made possible in large part due to the economic policies promoted by Hamilton, set forth within the parameters of the new Constitution. Hamilton had proposed a “low price for directly swapping government land for government liabilities” of \$0.30 an acre, which was accepted by Congress.<sup>18</sup> Grubb asserts that Hamilton did this specifically to discourage people—specifically federal and state governments—from swapping their land for debt. In 1792, the federal government transferred an area of 202,187 acres, known as the Eerie Triangle, to Pennsylvania for “an average of \$0.75 an acre,”<sup>19</sup> thus boosting the estimated price per acre of all federal lands and bolstering the nation’s solvency and their creditors faith that the fledgling US economy would increase and become strong and steady.<sup>20</sup>

Hamilton vigorously pursued the creation of a national bank, easily one of the biggest and boldest of his various propositions made to the newly formed American Congress. Hamilton understood that a national bank could make the United States more fiscally capable: transfers from one part of the country to

the other could be made more easily, tax revenue could be more readily deposited into this new central bank, money could be lent to the government or to its officials for government business, and the economy of the United States could be strengthened without relying wholly on the export of goods. A national bank would also “cement the relationship between the fledgling government and the leading men of business.”<sup>21</sup> These affairs that transpired in the financial world early on in America’s history were crucial to ensuring the success and longevity of the infant nation; luckily, President Washington had wisely chosen one of the best and brightest for the job of watching over these matters of great import.<sup>22</sup>

Hamilton relied on what he referred to as the implied powers doctrine of the Constitution to facilitate the creation of the national bank that was to be chartered by Congress. The act of chartering a bank was unprecedented and therefore controversial, which led to a great deal of debate on the floor of Congress. Leading the faction against the bill, James Madison and Thomas Jefferson argued that such a bank was unconstitutional.<sup>23</sup> They pointed out that the delegates to the Constitutional Convention had voted on whether to make the allowance for chartering a national bank a part of the enumerated powers of Congress, and the clause had been defeated by an 8 to 3 vote. The clause in question, however, was nowhere to be found in the official notes of the Constitutional Convention. These notes in the possession of President Washington at the time that the vote on whether or not to allow Congress to charter a national bank was taking place; it is clear that Washington supported Hamilton in this venture.

In his turn, Hamilton argued that the implied powers of the Constitution, as set forth in Section 8 of Article 1 of the Constitution, gave Congress the necessary constitutional authority to charter a national bank. The Constitution states that Congress has the lawful ability “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and

all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>24</sup> In the end, Congress sided with Hamilton, and Washington did not veto the bill—to the chagrin of Madison and Jefferson.<sup>25</sup> So a new central bank, the First Bank of the United States, was chartered in 1791 and would stand for 20 years.<sup>26</sup>

Though Hamilton was a gifted politician, a skillful lawyer, and a brilliant fiscal and military strategist, he was no saint. Speaking of Hamilton, Abigail Adams warned her husband John, saying, “[The phrase,] beware that spare Cassius, has always occurred to me when I have seen that cock sparrow... Oh, I have read his heart in his wicked eyes. The very devil is in them. They are lasciviousness itself.”<sup>27</sup> This was a response to Adams’ declaration of his intention to keep Hamilton out of public affairs during Adams’ service as the second American President.<sup>28</sup> Hamilton had retired from politics publicly by the time Adams was elected, but he privately moved to undercut Adams at every chance, encouraging war with France at a time when American vessels were being seized on the high seas by French frigates. President Adams knew that America was not ready for another major war so soon after the Revolution, and he wisely preferred peace to an unnecessary conflict with a powerful adversary. At the same time, however, he made efforts to stabilize and build up the federal navy—which grew to nearly 50 war vessels at the pinnacle of his administration—seeking to check the powers of France by using a strategic method of defense as the best offense. President Adams’ approach included sending a three-man diplomatic delegation to France; it was ultimately enough to avoid war, effectively thwarting Hamilton’s efforts. Peace with France was formally achieved when the Senate approved the Convention of Mortefontaine in February of 1801.<sup>29</sup>

Hamilton did nothing but berate, second-guess, and attack Adams throughout his entire term as President of the United

States. Hamilton maintained contact with certain members of Adams' staff who had served with Hamilton during Washington's tenure as President—specifically Timothy Pickering, Oliver Wolcott, and James McHenry—and it was via these relationships that Hamilton was able to exercise more than his due influence.<sup>30</sup> Thus he sought to achieve his own ambitious designs of military glory and a robust centralization of power in America. Hamilton even went so far as to compose an exhaustive pamphlet on October 24, 1800, entitled, *Letter from Alexander Hamilton Concerning the Public Conduct and Character of John Adams, Esq. President of the United States*.<sup>31</sup> The pamphlet criticized and harangued President Adams in an effort to prevent his bid for a second term in office—an effort that proved successful.<sup>32</sup>

Hamilton continued his unbecoming habit of excessively criticizing and berating public figures, including Aaron Burr—causing a tension that had fatal consequences. Hamilton had publicly commented that Burr was “the most unfit and dangerous man in the community.”<sup>33</sup> This insult, which accompanied abuse from other political figures at the time, left Burr incensed. When Hamilton refused to offer Burr a reasonable explanation for his libelous comments, an enraged Burr challenged Hamilton to a duel. On July 12, 1804, Hamilton took Burr's bullet in the abdomen and died the next day—according to some scholars, Hamilton had intentionally missed his opponent.<sup>34</sup>

While at the center of many beneficial policies aimed at advancing the cause of freedom and prosperity in America, Hamilton also set a dangerous precedent for American political actors to steer out of line at times. He was a genius, an economic tycoon of sorts, but also too often an unbridled miscreant with his pen—a tendency that led to his unfortunate demise. The man is still one to be admired for his many successes and his economic and military feats; unfortunately, he is also to be pitied for a foolish tendency towards belittling and undercutting political figures, which

was often imitated in the political landscape of early America. He is and will be remembered as: the founder of the first Bank of the United States under the new Constitution; a man of intellect and tenacity who composed the unmatched and highly effective Federalist Papers; the face of the ten-dollar bill; and the man who poked a bull one too many times and eventually brought about his own untimely end.

The United States Constitution, in large part due to the genius and determination of Alexander Hamilton, preserved the fledgling nation and allowed for a strong and vibrant future—economically, diplomatically, and politically. The people of the nation were united under one central government, and that government played, and yet plays, a substantial role in how currency is created, how trade is managed, and how debt is handled. Hamilton's love for his country and what he considered his life's work is apparent in his writing that: "There is something noble and magnificent in the perspective of a great Federal Republic...prosperous at home, respectable abroad."<sup>35</sup> Indeed, Hamilton lived and died by his words, which were many.<sup>36</sup> This prophetic prose has surely become evident as the generations of many good Americans have come and gone, and as the United States of America has long maintained its place in the world: "prosperous at home, respectable abroad."

NOTES

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## *The Economic Genius of Alexander Hamilton*

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# A More Perfect Union—Again: The Case for Restoration Instead of Revolution

Matthew Nolte

On Monday, September 17, 1787, a group of delegates from 12 of the original 13 United States of America, then bound together in “a firm league of friendship”<sup>1</sup> under the Articles of Confederation, were in the final meeting of what came to be known as the Constitutional Convention. The Convention’s members were commissioned by the Confederation Congress—the same congress that had adopted the Articles establishing the “Confederation and Perpetual Union”<sup>2</sup> of the United States of America just nine years earlier—to meet together and report on their findings of “such alterations and amendments of the... Articles of Confederation as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union.”<sup>3</sup> Though these members went beyond the scope of their original mandate, the result was a governmental structure they believed would best answer the charge they were given by Congress: “to render [the government] adequate to the preservation and support of the Union.” The original purpose of the Articles of Confederation—to

provide for perpetual union—was better achieved through the convention’s proposal of a new government structure designed “to form a more perfect union.”<sup>4</sup> The desire in both cases was the same: to establish a limited government equipped with the powers and the limitations necessary to allow for individual sovereignty. The means were also the same in each instance. The Framers of both documents knew that such individual sovereignty could only be achieved through perpetual union and, later, a more perfect union.

As we enjoy the benefits available to us through this union, which was established (and then reestablished) over two centuries ago, we also encounter threats to the wellbeing of this political structure today. Though the situation we experience today may seem unprecedented, the way to continually maintain our freedoms as citizens of the United States will, if we are honestly seeking, invariably lead us to same means that brought about the establishment of our freedoms and structure in the first place—namely, through maintenance of limitations on government power, participation in government functions, and union.

Within the first nine years of the new American Confederation, it became distinctly evident to many American citizens that their government structure under the Articles of Confederation contained flaws which were “fatal to the object of the Union.”<sup>5</sup> James Madison offered his well-read perspective on 12 such fatal attributes after he completed an extensive study of political and sociological history. In a document titled “Vices of the Political System of the United States,”<sup>6</sup> he outlined his findings and offered the following criticisms:

- [1] Failure of the States to comply with the Constitutional requisitions...
- [2] Encroachments by the States on the federal authority...
- [3] Violations of the law of nations and of treaties...
- [4] Trespasses of the states on the rights of each other...
- [5] Want of concern in matters where common interest requires it...
- [6]

Want of guaranty to the States of their Constitutions & laws against internal violence...[7] Want of sanction to the laws, and of coercion in the Government of the Confederacy... [8] Want of ratification by the people of the articles of Confederation...[9] Multiplicity of laws in the several States...[10] Mutability of the laws of the states...[11] Injustice of the laws of the states [and (12)] Impotence of the laws of the states.<sup>7</sup>

To justify his compilation of the vices of the Confederation, James Madison offered numerous historically documented examples of the corruption he outlined above, including: Georgia's wars and independent treaties with the Native American nations; violations by the states of treaties with Holland and other nations; the restrictions by certain states of trading goods and services with other states at reasonable rates; lack of cooperation in mutually beneficial projects between states, such as roadway and canal construction and use of waterways and lands between the states; issues of slavery and threats of sedition to the entire Confederation by certain state militias; lack of supremacy in the national government and a lack of power to enforce general laws and regulations; threat of the overall contract between the states becoming void due to corruption among the parts of the whole, and the ultimately non-binding nature of the Confederation; mutability of the federal laws by the states due to the lack of federal enforcement power and the weak nature of the confederation; abuse of legal authority by individuals in the several states, whose excessive laws caused a lack of legal legitimacy and rarely perceived abuse within the over-complicated structures of the states; instability in, and mutability of, certain laws before they could be implemented or enforced within and among the states; and overall impotence of the word of law among and within all the states and their citizens within the confederation.

James Madison's list of 12 vices accurately portrayed many of the crippled aspects of the Confederation government. A review

of the history between the time of the American Revolution and the drafting of the Constitution reinforces the validity and urgent relevance of Madison's concerns. The referenced examples are only a small illustration of the corruption Madison and others had witnessed and perceived. It was, therefore, apparent to many in the new nation that the Articles of Confederation were quite flawed—perhaps, as Madison would say, to a fatal degree.

Heroes from the recent war with Great Britain and other social and political leaders such as Henry Knox, Alexander Hamilton, John Jay, and George Washington each felt, to varying degrees, that the Articles of Confederation needed at least to be revised and at most to be replaced. For his part, John Jay (who would later become the first Chief Justice of the Supreme Court) expressed his understanding of the delicate situation of the young confederation in a letter to George Washington, written in the Spring of 1786, just one year before the Constitutional Convention convened. He wrote:

An opinion begins to prevail that a general convention for revising the articles of Confederation would be expedient. Whether the People are yet ripe for such a Measure, or whether the System proposed to be attained by it, is only to be expected from Calamity & Commotion, is difficult to ascertain. I think we are in a delicate Situation, and a Variety of Considerations and Circumstances give me uneasiness.<sup>8</sup>

John Jay's fearful expression of the "delicate situation" he witnessed was brought about by many of the same events outlined in James Madison's "Vices of the Political System of the United States," and may have only been compounded by the subsequent events, particularly what came to be known as Shay's Rebellion. This uprising was brought about by farmers throughout the nation, many of whom had been denied payment for their services in the Revolutionary War. They had sacrificed and suffered through the conflicts of the last decade only to be left destitute,

plagued with financial hardships. To make matters worse, the floundering credit of the United States made it necessary for the states to collect taxes from these individuals without regard for the relief and well-being of those who could not make the payments. Before long, unofficially organized militias began to threaten what remained of the fragile order of several of the states.

Amid the burgeoning conflict of the rebellion, another letter came to George Washington from Henry Knox, who, in addition to being Washington's trusted friend and advisor, had been a general under his command during the Revolutionary War. In his letter, Knox summarized how the states and localities not only subverted the purpose of the Confederation Government, but also subverted their own purposes by their various mistakes in governing themselves. He explained:

Our political machine constituted of thirteen independent sovereignties have been constantly operating against each other, and against the federal head, ever since the peace— The powers of Congress are utterly inadequate to preserve the balance between the respective States, and oblige them to do those things which are essential to their own welfare, and for the general good. The human mind in the local legislatures seems to be exerted, to prevent the federal constitution from having any beneficial effects. The machine works inversely to the public good in all its parts. Not only is State, against State, and all against the federal head, but the States within themselves possess the name only without having the essential concomitant of government, the power of preserving the peace; the protection of the liberty and property of the citizens.<sup>9</sup>

Knox's explanation that "The machine works inversely to the public good of all its parts" summarizes the understanding of many in the young nation of the various failures that occurred under the Articles of Confederation. In the spring of 1787, only

a few months after Washington received Knox's letter, Shay's Rebellion came to a dramatic and bloody end at the hands of the Massachusetts state militia.

The first government established in the United States, the Articles of Confederation, was intended to provide for "a firm league of friendship"<sup>10</sup> and ensure that "the blessings of liberty"<sup>11</sup> be available "to all whom these presents [should] come."<sup>12</sup> It is therefore lamentable that the reception and implementation of this first government of the optimistic young republic turned out far removed from the ideal the Framers of the Articles had envisioned. The union was in peril and its political system was in desperate need of revision. Thus, for the sake of "Perpetual Union between the states,"<sup>13</sup> the time had come for something new. To their credit, those who selected the members of the Constitutional Convention—the mostly impotent Confederation Congress and the frequently fractious state legislatures—picked men worthy of the task presented to them.

The Framers of the U.S. Constitution were a renowned, well-educated group with extensive political experience. They were some of the best and brightest individuals living in the young confederation at the time. They were thus a suitable group to create and report on "such alterations and amendments of the said Articles of Confederation as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union."<sup>14</sup>

A National Archives exhibit titled "America's Founding Fathers: Delegates to the Constitutional Convention" provides a brief summary of the qualifications of these delegates:

The 55 delegates who attended the Constitutional Convention were a distinguished body of men who represented a cross section of 18th-century American leadership. Almost all of them were well-educated men of means who were dominant in their communities and states, and many

were also prominent in national affairs. Virtually every one had taken part in the Revolution; at least 29 had served in the Continental forces, most of them in positions of command.<sup>15</sup>

The summary continues: “The group, as a whole, had extensive political experience. At the time of the convention, four-fifths, or 41 individuals, were or had been members of the Continental Congress...Practically all of the 55 delegates had experience in colonial and state government.”<sup>16</sup> This brief overview of the combined experience and qualifications of the delegates speaks for itself in demonstrating how suited these men were to the task they had received from the Confederation Congress.

In general, each of Convention’s delegates was prepared with a wealth of extensive life-long experiences to address the challenge they confronted; however, it is an almost incontestable fact that the most prepared member of the Convention was the so-called Father of the Constitution, James Madison. In order to gain a simple understanding the amount of historical, social, and political research Mr. Madison was fond of conducting throughout his life, one can view an extensive reading list of texts compiled by The Montpelier Foundation.<sup>17</sup> Regarding his exceptional personal library, the Foundation related the following:

James Madison’s personal library grew to over 4,000 volumes by the time of his death. His collection, voluminous by period standards, necessitated several storage spaces throughout Montpelier. Mary E. E. Cutts described Madison’s Old Library as filled with “plain cases, not only round the room, but in the middle with just sufficient room to pass between, these cases were filled with books, pamphlets, paper, all every thing [sic] of interest to our country before and since the Revolution.” Much of Madison’s preparation for the 1787 Constitutional Convention required exhaustive reading and research, and he spent the months prior in deep study, pulling ideas from authors and philosophers represented in his growing library.<sup>18</sup>

As mentioned in the above summary, James Madison thoroughly prepared himself for the Constitutional Convention through months of careful research and planning. His studies and preparations took him through thousands of years of history and political science, whereby he compiled his “Notes on Ancient and Modern Confederacies”<sup>19</sup>—an extensive list of notes, written in both English and Latin, on government functions, limitations, and procedures on a number of levels in nine different confederacies throughout history. These studies, among many others, paid off, and “Blending ‘together the profound politician, with the Scholar,’ [James Madison] took the lead on nearly every great question at the convention and consistently came forward as ‘the best informed Man of any point in debate.’”<sup>20</sup>

It should be, therefore, unsurprising that a remarkably high proportion of the originally proposed resolutions of James Madison’s Virginia Plan were incorporated, in one form or another, into the Convention’s final rendition of the Constitution. It certainly seems inconsistent with the nature of the men at the Convention—as they were described by Benjamin Franklin to have possessed “all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views”<sup>21</sup>—to defer their influence on the nature of the new government they were creating and concede to many of the original objects of Madison’s plan. However unlikely these concessions may seem, the convention’s delegates compromised on a range of issues—from the simple to the significant—on some of which they could not have been more zealously divided. One of the few explanations offered for the reasoning behind such exceptional compromises is the general understanding among the delegates of their imperative to stay united—an admirable trait we might all do well to emulate.

After only a few days of the Convention had passed, the Framers were already deeply engaged in a debate regarding how widely they could interpret the scope of their mandate. Just one

day after the Virginia Plan was brazenly presented, one of the delegates to the Convention threatened to secede. The threat arose when Madison and others were seeking the approval of the delegates for a national government to replace the confederation. According to Madison's notes, George Reed, a delegate from Delaware, indicated that "the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention."<sup>e22</sup> This statement was met with general frustration—Gouverneur Morris, a delegate from Virginia, observing "that the valuable assistance of those members could not be lost without real concern, and that so early a proof of discord in the convention as a secession of a State, would add much to the regret."<sup>e23</sup> After a bit of deliberation, the motion regarding representation was postponed for the sake of preserving the unity of the members before the convention adjourned for the day.

This early event in the Convention was later shown to be a mild beginning to the intense divisions that would separate and test the united resolve of Framers until the final day of the Convention. The members were intensely divided on many subjects, including slavery, federalism, and sovereignty; perhaps the most divisive topic of the whole convention was the question regarding how the states and people would be represented in the new federal legislature. In fact, this very issue of representation, which had caused so much strife on May 30, was not decided until "The Great Compromise" was finally reached nearly seven weeks later, on July 16, 1787. The delegates were so utterly divided on this point that, on June 30, 1787, the representatives from the larger states threatened to dissolve the confederation in order to form their own union. Gunning Bedford, a delegate from Delaware, responded, "The Large States dare not dissolve the Confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand

and do them justice.” This division of the delegates on representation in the national legislature was no small point of debate nor was it simply a moment of stubborn frustration by the Framers. Indeed, the final decision in this case would indirectly define the whole meaning of the future government. Would the government continue to be a league of equally represented states, a condition that some members of the Convention credited with the political and economic calamities they currently faced, or would it be a national government, the seemingly unlimited power of which many of the members of the convention had grown to fear during the Revolution? Such moments as these were an ominous foreshadowing of the potential division and ruin of the nation that had so optimistically united itself just nine years earlier.

Shortly after the previously mentioned threats of secession were hurled by representatives from both sides of the debate on representation, the Great Compromise, also known as the Connecticut Compromise, was proposed and adopted. The proposal, submitted by Roger Sherman, was possibly the only idea that could have saved the Constitutional Convention—and therefore the Constitution itself—from ruin. It suggested mixed representation in the legislature through proportional representation based on population in the House of Representatives and equal representation of states in the Senate. A brief explanation recorded in the online history of the U.S. Senate explains that “the convention adopted the Great Compromise by a heart-stopping margin of one vote. As the 1987 celebrants duly noted, without that vote, there would likely have been no Constitution.”<sup>24</sup> Through this and other compromises on hotly debated topics, the Convention’s members ultimately came together and set aside their differences, thus producing a document worthy of replacing the Articles of Confederation of Perpetual Union, and “establish[ing] a more perfect union.”<sup>25</sup>

On September 17, 1787, during the final official meeting of the Constitutional Convention, Benjamin Franklin is recorded by Madison to have said:

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise.<sup>26</sup>

This sentiment, I believe, summarizes well the thoughts and feelings of the members of the Convention, who had begun their deliberations with deep-rooted disagreements and intense differences in opinion but then generally concluded that the document they produced together was remarkable. Franklin continued:

I doubt too whether any other Convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies, who are waiting with confidence to hear that our councils are confounded like those of the Builders of Babel; and that our States are on the point of separation, only to meet hereafter for the purpose of cutting one another's throats. Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best.<sup>27</sup>

Franklin explained that, despite the concentration of shortcomings among the Convention's members, in their joint wisdom and through their many compromises, they did succeed in compiling

a masterful document. The above excerpts from Franklin’s speech are a sobering reminder of the delicate situation in which the Framers found themselves both before and after they created our constitutional structure. We would do well to understand the delicate situation we find ourselves in today as the current custodians of that carefully balanced structure. We would equally profit from maintaining an understanding of the mutual benefit we enjoy from our universal rights and remembering that the preservation of our rights, our peace, and our unity is worth more than gaining traction—in small or large amounts—in our political pursuits.

Though many procedures, checks, and separations of power have been implemented to prevent corruption in the American governmental system, a number of recent surveys conducted by the Pew Research Center reveal alarming findings about the current public perception of such corruption. Regarding these surveys, a Pew Research article reads:

Currently, just 19% say they can trust the government always or most of the time, among the lowest levels in the past half-century. Only 20% would describe government programs as being well-run. And elected officials are held in such low regard that 55% of the public says ‘ordinary Americans’ would do a better job of solving national problems.<sup>28</sup>

Beyond this unprecedentedly low level of trust toward the federal government felt by most Americans, the Pew Research Article continues: “Nearly two-thirds of Americans (64%) say that on the issues that matter to them, their side loses more often than it wins.”<sup>29</sup> Based on these perceptions, it would seem that there is a legitimate lack of representation and individual sovereignty within the U.S. political system in its current state. Make no mistake, however, that these problems do not begin with flaws in our government structure. Rather, they begin with the generally accepted misperceptions of defined “sides” in political conflicts and the necessity of sacrificing the other side’s freedoms

or ideals—or even our very Constitutional safeguards—for the sake of political gains.

Admittedly, it is human nature that compels us to unite with likeminded individuals and fiercely battle for our ideologies—a conflict that too often rages along party lines. President Washington believed this compulsion is “inseparable from our nature, having its root in the strongest passions of the human mind.”<sup>30</sup> However, President Washington also understood that whatever our desired ends in seeking the use and power of government, they should never justify the means of relying on interest groups and party politics to do so.

After his two terms in office, President Washington delivered his famous Farewell Address, in which he offered words of encouragement and counsel to prepare his countrymen against political issues that began in his time and continue to challenge our freedoms to this day. The greatest threats to the current U.S. political system—the divisive nature of party politics and the abuse of constitutionally mandated constraints—are mentioned in lengthy detail by President Washington in his address, though he began by identifying unity as a universal salve:

The unity of government which constitutes you one people is . . . now dear to you. It is justly so, for it is a main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety; of your prosperity; of that very liberty which you so highly prize. But as it is easy to foresee that, from different causes and from different quarters, much pains will be taken, many artifices employed to weaken in your minds the conviction of this truth.<sup>31</sup>

Unity, President Washington explained, “is a main pillar in the edifice of [our] real independence,” as well as our peace, safety, and prosperity.<sup>32</sup> Given the fear of overreaching government power and influence—glaringly apparent in his time as well as ours—Washington’s use of the word *real* in this phrase was both

intentional and critical. Real independence in this instance not only implies freedom from a foreign nation or nations, but also freedom from any abuse of the sovereignty and liberty of the individual from any source. President Washington believed that this real independence only continues so long as the public stays united in their determination to uphold it. He further warned that many pains and artifices would be employed to weaken our minds to the conviction of the truth that unity is the load-bearing pillar in the edifice of our real independence, central to all our freedoms.

The remaining majority of President Washington's speech addressed the divisive and destructive nature of party spirit. "In popular government," he said, "this spirit is seen in its greatest rankness, and is truly [our] worst enemy."<sup>33</sup> Of these parties, he warned, "You cannot shield yourselves too much against the jealousies and heartburnings which spring from these misrepresentations."<sup>34</sup> Just over a half a century after this speech, the divisive platforms of the north and south led to the American Civil War. Not only do parties lead to divisions among free people, they also have the potential to lead to the division of freedom itself from the people. This process of turning freedom over to despotism through party dissension has occurred in many countries throughout the world, including Russia, late eighteenth-century France, Egypt, and Turkey most recently. It was not unfounded paranoia, but an understanding of human nature and politics, that inspired President Washington to warn:

If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.<sup>35</sup>

Usurpation of properly defined constitutional authority is ultimately a usurpation of our own authority as citizen-sovereigns of this Republic. These usurpations can occur in various ways—some of which are obvious violations of constitutional safeguards, such as The Sedition Act of 1798. This act is one of the first major examples of an abridgment of constitutionally defined rights, as it suspended nearly all First Amendment freedoms, such as freedom of the press, freedom of speech, and freedom of assembly—all in the name of national security. Other dark times in U.S. history will remind us of equally apparent violations of rights and usurpation of Constitutional authority: the internment of Japanese Americans during World War II and the establishment of the House Un-American Activities Committee during the Cold War. If we are honest with ourselves, we can also admit that, though the desired effects of Lincoln’s suspension of habeas corpus, Roosevelt’s New Deal, and even the PATRIOT Act were meritorious, each act was a blatant violation of Constitutional mandates of separation of powers, limits on authority, and restrictions on abridgment of individual rights.

Unfortunately, each of these glaring examples of usurpation and abuse would not have been possible without the support—tacit or otherwise—of the political parties that established each of the responsible regimes, as well as a vast number of citizens and political leaders who supported or at least accepted the unconstitutional efforts simply because they believed that their elected official or party was doing the right thing—that they were justified in these violations due to the necessity of the outcome. Despite the achievement of anticipated outcomes, the skirting of constitutional safeguards rendered each affected safeguard weaker than it was before it was ignored or trampled.

In today’s Republic, the usurpation of our rights regularly occurs in subtler ways. In the name of political gains, elected officials and party leadership—selected by extra-governmental

processes—frequently ignore their constituency at times to collude together; regularly promote divisive ideals; and shamelessly entrench themselves in ideological pursuits instead of seeking to understand or compromise on commonly debated political issues. Indeed, it seems that the continued membership of the current two-party system thrives on disagreement, division, misinformation, and fear of the other “side” and the “spirit of revenge.”<sup>36</sup> Another section of President Washington’s Farewell Address explains:

The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of public liberty.<sup>37</sup>

Whether we are motivated to unite in parties by our strongest desires or by our deepest-held disagreements with each other, it is imperative for each citizen to remember that some ends do not justify certain means—especially because some means only lead to certain ends.

Though the liberties retained in the U.S. political structure have not yet been overthrown, President Washington’s speech is well worth remembering and studying, as is a warning given by Benjamin Franklin in the previously quoted speech on the last day of the Constitutional Convention:

There is no form of Government but what may be a blessing to the people if well administered, and [I] believe farther that this is likely to be well administered for a course of years, and

can only end in Despotism, as other forms have done before it, when the people shall become so corrupted as to need despotic Government, being incapable of any other.<sup>38</sup>

In the end, our Constitution is just a piece of paper. Its validity as something more—the bulwark of our sovereignty as well as our liberties and freedom from despotism—is entirely dependent upon our united respect for the rule of law defined in the document, and our devotion to the “main pillar in the edifice of [our] real independence,”<sup>39</sup> our union. Though my hope is that the American political system has not yet reached Franklin’s point of no return where the only way forward is despotism, I fear that this condition is looming. I further believe, however, that the crisis can be averted. It must be averted.

To do this, we must override the destructive influence of party politics and unite together insofar as it is our individual duty to defend each other individual’s human rights. There is a significant difference between uniting *against* Republicans or Democrats or any other party on one hand, and uniting *for* universal freedoms and principles upon which we can all agree on the other. In order to achieve union, one of the best things we can collectively and individually do is seek understanding and common ground in all of our political interactions. We may lose a bit of our own footing as we do this, but so did the founders when they compromised—many times—on the very definition of our freedoms and political structure. Being united does not mean that we must always agree, nor does it mean that we capitulate our hopes and plans on every point. It does, however, mean that we will no longer seek to bypass our established system through corruption, lobbying, and paying our dues to and supporting incorrect decisions made by the mafia-style party system that has become entrenched in American politics. In short, I suggest that we demand the truth together, root out corruption together, live in freedom together, and then continue in our significant disagreements with each

other together—thereby avoiding the possibility of undermining the mutual enjoyment of our rights and liberties.

The current state of corruption and division in American politics reveals an alarming level of distrust toward the U.S. political structure among the majority of American citizens and clearly suggests that our political system is in desperate need of change. Though the difficulties we face today may seem unprecedented, a glimpse into the American Founding Era reveals the existence of more perilous circumstances then, as well as a timeless solution to the issues that arise within our current sociopolitical system.

The American experiment, though not without its flaws, has proven that fundamental human rights may continually be preserved and strengthened when a nation embraces the following: 1) the establishment and maintenance of limitations and balance within government institutions; 2) participation in and awareness of government functions; and, perhaps most importantly, 3) a united focus in promoting these efforts. People of all lifestyles and circumstances can agree that our system needs change, and our united effort in restoring this Republic to its founding principles—specifically the three referenced above—will allow us to achieve much of what we individually want, though we can and will continue to disagree with each other on many levels. In order to maintain this freedom to disagree, along with all other freedoms currently enjoyed, it is critical that we devote ourselves to a collective union—a union that will subordinate the influence of parties, interest groups, and other forms of corruption to the life and liberties of each individual.

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## CONTRIBUTORS

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**J. Edward Cummings** is a truly nontraditional student. He has worked in a number of different positions, both blue and white collar. As he approached middle age, he found himself with a great job in an occupation that had largely been replaced by the internet. With that inevitability looming, John decided it was time to move in a different direction. He moved to Eastern Europe and taught English in his wife's hometown for a few years. Upon returning to the United States, he found that his technical training and experience were not really a marketable skill package. John decided it was time to finish his degree, eventually enrolling at UVU. He is currently in his senior year, studying political science with an emphasis on world politics.

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**Samuel Hill** is a student of political science at Utah Valley University, with an emphasis on American political philosophy and constitutionalism. He was selected as one of the first Eric Zachary Wood Assistants at the Center for Constitutional Studies (CCS) at UVU. He coordinated and supported numerous CCS events, such as the Constitution Week Symposium on Freedom of Speech, the Constitutional Symposiums on Religious Freedom in 2014 and 2015, and the 2015 International Symposium on Magna Carta. His areas of research include immigration and immigration law, classical western philosophy, the Bill of Rights, especially the 1st Amendment protections for religion and speech, and the history of Europe, England, and the United States.

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**Matthew Nolte** is a senior at UVU, majoring in Political Science with a minor in Constitutional Studies. He enjoys studying history, political science, law, languages, and constitutionalism. Matt works at the Center for Constitutional Studies at UVU, where he has served in various volunteer, student, and staff positions since the fall of 2013. He recently published an essay regarding freedom of conscience and the First Amendment, which was awarded the first place prize in a student essay contest. Currently, Matt is involved with two other Wood Assistants in a remote internship with Oxford, compiling a database of events and documents related to the U.S. Constitutional Convention. In 2011, Matt returned from a two-year service mission to the state of São Paulo, Brazil, where he had the privilege of learning Portuguese and acquired an interest in studying cultures and languages. He is now studying French and German, and has studied Spanish and Latin. His other interests include music, movies, creative writing, longboarding, and spending time with his wife, Elise, and their one-year-old son, Jonathan.



