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WE THE PEOPLE*

*Warren E. Burger***

*The preservation of the sacred fire of liberty, and the destiny of the republican model of government, are justly considered as deeply, perhaps as finally staked, on the experiment entrusted to the hands of the American people.****

EIGHT YEARS AGO, on the personal invitation of President Brezhnev, I spent two weeks visiting in the Soviet Union. I was invited to lecture before the Institute of United States and Canadian Studies, which is headed by Professor Arbatov, of whom we have been hearing a great deal lately. I put to them the question of the relationship between our Constitution and our development in less than 200 years. How did it happen that fifty-five men, following our revolution, were able to create a constitutional system, which has lasted longer than any system in all history? This is the story I wish to tell.

Many of the people in the thirteen states had left countries of Western Europe to come to America for freedom of religion, for freedom and liberty in the broadest sense, and the opportunities they hoped would be open to them, even though they had no way of anticipating the development of our system. Very few of these people who came to America in that period left anything behind them except memories, and many of those were bad memories. I put this question to Professor Arbatov, and I put it to you here: how did it happen that this small band of immigrants with shallow roots on this continent, developed in 200 years—indeed far less than 200

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** Chairman of the Commission on the Bicentennial of the United States Constitution; Chief Justice of the United States (1969-86).

*** George Washington, *quoted in* THE POCKET BOOK OF AMERICA 272 (P. Stern ed. 1942).

years—into a great world power, catching up to other great world powers having a long head start over the United States?

In the short space of time in terms of history—a bare 125 years from 1787 to World War I—our people developed institutions, industries, universal and advanced education, science and technology, medicine, and the arts in a way that was at least equal to most of the other countries in the world. And by World War II it was clear that we had surpassed a good many others. How did this happen? My thesis is that the Declaration of Independence first, and then its articulation and implementation in the Constitution and the Bill of Rights, operated to release—to unleash—the talents, the energies, the abilities of a whole people in a way that had never before occurred in human history. Not all of these people used the opportunities opened by this unique freedom, but a great many did so. People who would have made little or no progress in their native countries, and who would have remained at low economic and educational levels, were able, because of the opportunities and freedom allowed here, to perform what historians have agreed was one of the miracles of history.

I have always found it somewhat difficult, and I suspect others may share that difficulty, to understand really how very separate and very independent were each of the thirteen sovereign states that made up the government under the Articles of Confederation preceding the Union. We know that the people of Massachusetts Bay, for example, regarded themselves as quite different from the people of other colonies—Virginians, Marylanders or New Yorkers—even though they spoke the same language and shared many of the same traditions.

This ambiguity of allegiances is graphically illustrated in a significant episode that occurred three-quarters of a century after the drafting of the Constitution. This event occurred in another critical period of our history.

In 1861, after the fall of Fort Sumter, when war seemed imminent, President Lincoln consulted the Chief of Staff of the Army, General Winfield Scott, seeking his advice as to the officer who should become Commander in Chief of the United States Armies in the event of war. General Scott immediately recommended Robert E. Lee to command all of the union armies. When this proposal was made to Lee, he was a colonel in the United States Army.

Lee loved the Union; he was distressed at the idea of any dissolution of the Union, and he hated slavery. Yet he was so much a product of the age of his father, General “Lighthorse” Harry Lee,

who had served under Washington, that he rejected Lincoln's offer. It was clear at that time that Virginia would probably secede from the Union, and Lee could not fight against his native state. He immediately resigned from the Army and abandoned his beautiful home overlooking the Potomac and the City of Washington. He was fully aware that as a result of his actions, all of his property would be confiscated by the government in the event of war. Lee then went to Richmond, 120 miles south, to offer his services for the defense of Virginia—not for the support of secession, not for the defense of slavery, not for the dissolution of the Union, but simply for the defense of his native State of Virginia.

This episode has always helped me understand the enormous difficulties of leading the Americans of the thirteen original states to think in terms of creating a federal union with a central government under a written constitution, binding them all together as a single, sovereign nation. In the eighteenth century and well into the nineteenth, men tended to be Virginians or New Yorkers first, and Americans second.

During the Revolution, when troops reporting from New Jersey to Washington's army were put to swearing allegiance to the United States, the New Jersey troops refused, proclaiming, "New Jersey is our Country." These simple soldiers were saying what Robert E. Lee still felt eighty odd years later. When the Articles of Confederation were drafted in 1777, they were cast in the language of a multilateral treaty and formally enunciated what the New Jersey troops had expressed. We can see how jealous the thirteen states were about their own sovereignty. The Articles recite: "Each state retains its sovereignty, freedom and independence."¹ And article 3 of that document provided: "The said states hereby severally enter into a firm league of friendship with each other."² Just think of it: a firm league of friendship to carry on a war against the greatest military power in the world of that day! But this is how the people of each of the states tended to regard and address each other. Between 1776 and 1787, the Continental Congress had no power to levy taxes or raise armies; it permitted each state to set up tariff barriers against the other states in order to preserve the state market.

In 1787, the term "constitution" was not commonly used. It is understandable that some people, having only recently shaken off

1. ARTICLES OF CONFEDERATION art. 2, *reprinted in* M. JENSEN, *THE ARTICLES OF CONFEDERATION* 263 (1970).

2. ARTICLES OF CONFEDERATION art. 3, *reprinted in id.*

the yoke of a distant and powerful government, were apprehensive about central power and central government. Early in 1787, the Continental Congress met in New York to consider the convening of what we now know as the Constitutional Convention, but when the Continental Congress acted, the resolution was carefully circumscribed. The delegates were instructed explicitly that they were to meet in Philadelphia "for the sole and express purpose of revising the Articles of Confederation."³

There were a great many people, far more than we realize in this day, who wanted no part of a strong central government under a written constitution. This resolution gave no hint of what the delegates would ultimately do. This separateness that I spoke of earlier was illustrated in the reactions of Patrick Henry, that great patriot of Virginia, when he was designated as a delegate to Philadelphia. He refused to go because, he said, he "smelt a Rat."⁴ The "Rat" he smelled, or thought he smelled, was the idea of creating a strong central government under a written constitution that would replace the loose arrangement under the Articles of Confederation. And when the delegates completed their work in Philadelphia, and reported the proposed Constitution back to the Continental Congress, there were some who were so opposed to it that they wanted to censure the delegates for drafting something they had not been sent to draft.

In 1776, other countries had great natural resources, with rich farm lands, forests, minerals and navigable streams. England, Spain, and France had rich colonies, and Russia had vast natural resources and industrious people just as intelligent, just as talented, just as accomplished as those early pioneers in our country. I reminded Professor Arbatov's Institute that Russia had centuries of culture, history and tradition when we were still colonies of England. But something very important happened in 1776—something unique. That event had an important and permanent impact, not just on the United States, but on the history of the world and the history of freedom. It was not just the revolution, but what we did with that revolution. The Constitution is what we did with that revolution.

Now let me discuss how we managed to secure that Constitution. There were over seventy people designated by the various

3. Res. of Congress, Feb. 21, 1787, *reprinted in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 641-42 (M. Farrand ed. 1937).

4. *Quoted in* M. FARRAND, THE FRAMING OF THE CONSTITUTION 15 (1913).

states to go to Philadelphia, but only fifty-five of them ever showed up. The political climate at the time and the obstacles are illustrated in several events that I will describe.

In 1776, the continent of North America was largely a wilderness, rich in natural resources. The thirteen states had fewer than four million people, most of whom had come from Western Europe. They were scattered along the Atlantic seaboard from Canada to what is now Florida. To the west of that thin strip on the Atlantic seaboard, including what is now the state of Ohio, was a rugged, unexplored wilderness, with Indians resisting the occupation and development of the land. Most of the settlers were farmers, fishermen, carpenters, stone-masons: ordinary people. They were the yeomen Jefferson often spoke of. There were a few well-educated people, some native and some who had immigrated to America, but only a handful. Historians agree that this was a unique combination of men—Washington, Madison, Hamilton, Adams, Dickinson, Wilson and the two Morrisises. While this was a very thin layer of educated, intellectual people, they had read the history and philosophy of Greece, Rome and England—and the Scottish Enlightenment. A good number of them were lawyers trained in the British Inns of Court. Four of the lawyers were Benchers of Middle Temple, where they had been trained as barristers. Yet another had been trained at Inner Temple.

Of course, we know that for many years before the meeting in Philadelphia, the leaders within each of the states had experimented in local and state government, even though they were limited by their colonial status. We are familiar with the series of great colonial documents that sought to ensure greater protection of individual rights and liberties. Many of these leaders had been reading and studying and thinking about government for a long time; furthermore, they had been practicing some of their beliefs. In 1787, they had just come through a revolution, and that experience exposed some of the weaknesses of the Articles of Confederation.

If George III had not been required to think about what Spain and France might do, and if he had focused all of Britain's great power on our Revolution, we might not have won that war. From these experiences, the men who conducted the revolution, from the high command down to the soldiers in the ranks, learned something about the practical side of constitutional jurisprudence. Many of the soldiers furnished their own clothing and rifles, and even their own gunpowder at times. The winter at Valley Forge—and other winters—taught them a great deal. Only a few miles from where

the Constitution was written, Washington's troops had suffered from a harsh winter with many deaths from starvation and freezing. That alone showed the inherent weaknesses of the Articles of Confederation, for there was no true sovereign authority to require the states to furnish the means to carry on the war. The financial genius of the Confederation was described in the war period as the "Receiver of Continental Taxes"—not the "collector," but the "receiver." He had power to receive and disburse, but no power to enforce collection.

The lessons learned at Valley Forge had an important impact on the Constitution itself. Before the Constitution took effect, each of the states was free to put tariffs on goods shipped from other states; each state could issue its own currency. The merchants and the businessmen wanted a system that would open the channels of trade and commerce, which would in turn lead to the development of manufacturing industries. To accomplish these objectives, it was necessary to create a system that would have a common currency, a central revenue system, a central banking system, a central authority to negotiate with other nations, and of course, the power to raise and support armies.

George Washington, James Madison, Alexander Hamilton, John Dickinson, James Wilson, William Morris and others were firmly committed to the idea that we needed a strong central government to unite the thirteen states in a way that they were not bound under the Confederation during the war against England.

It was clear from the beginning of the Philadelphia convention that to create the kind of system that would survive and grow would require a government with authority to deal with the common problems. To accomplish this, the delegates had to overcome the deep hostility toward a central power, and the debate was prolonged and heated. At one point, John Dickinson of Delaware said: "If the General Government should be left dependent on the State Legislatures, it would be happy for us if we had never met in this Room."⁵ Another delegate wrote home at the end of the Convention saying: "It was done by bargain and compromise, yet notwithstanding its imperfections, on the adoption of it depends . . . whether or not we shall become a respectable nation, or a people torn to pieces by intestine commotions."⁶

The approach of those who were hostile toward a strong central

5. Quoted in C. BOWEN, *MIRACLE AT PHILADELPHIA* 185 (1966).

6. Nicholas Gillman (New Hampshire), quoted in *id.* at 254.

government would have meant a nation balkanized and beset by internal competition and quarreling that would have made it relatively easy for the great world powers to pick off our states one by one, and destroy the Union. James Wilson, who was to become the first Justice of the Supreme Court of the United States from the State of Pennsylvania, said in the course of the debates, “[i]f no state will part with any of its sovereignty, it is in vain to talk of a national government . . . I do not see the danger of the states being devoured by the national government. On the contrary, I wish to keep [the states] from devouring the national government.”⁷ At the close of the convention, Madison wrote that people everywhere must “perceive in [the Constitution] a finger of that Almighty hand, which has been so frequently . . . extended to our relief in the critical stages of the revolution.”⁸ Benjamin Franklin, in his final speech, said:

Mr. President, 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. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.”⁹

After the close of the convention when Franklin was asked what had been created, his answer was: “A republic, if you can keep it.”¹⁰

Washington, Hamilton, and others, who had undergone the terrible ordeal of trying to run a revolution with sporadic and uncertain support from the thirteen states, were convinced that there must be a strong central government. Young John Marshall was a lieutenant, a captain-lieutenant, and later deputy judge advocate under Washington. He spent that terrible winter at Valley Forge and saw his comrades starve and die for want of a central authority. We can see a constant theme throughout the great building block cases written by John Marshall—*Marbury v. Madison*, *McCulloch v. Maryland*, and *Gibbons v. Ogden*. There was disagreement in those early years about the need for a central banking system, and debates

7. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 3, at 153.

8. THE FEDERALIST No. 37 (J. Madison).

9. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 3, at 641-42.

10. Recorded by James McHenry in his diary and published in 11 AM. HISTORICAL REV. 618 (1906), *reprinted in* J. BARTLETT, FAMILIAR QUOTATIONS 348 (5th ed. 1980).

about whether the federal government had the power to create such an instrument. But when the State of Maryland undertook to tax the federal instrumentality, Marshall's opinion in *McCulloch v. Maryland* settled that issue for all time. In some respects, *Gibbons v. Ogden* can be seen as even more important. The lessons Marshall learned at Valley Forge found their way into his reading of the Commerce Clause. Marshall's opinion in that case gave our country a "common market" a century and a quarter before that term came into our vocabulary, and before the States of Europe had such a market. As a result, our adjustment from the colonial period to the common market of *Gibbons v. Ogden* was far simpler than the European experience.

Even before the convention, Hamilton and Madison had developed convictions about the form of government necessary to sustain the fledging Nation. Hamilton wrote that what was needed was not a kind of structure that appealed "to the narrow colonial sphere in which we have become accustomed to move, [but rather t]o that enlarged kind suited to the government of an independent nation."¹¹ Madison anticipated the momentous holding of the Supreme Court in *Marbury v. Madison* when he wrote: "Let the national government be armed with a positive and complete authority in all cases where uniform measures are necessary . . . Let this national supremacy be extended also to the judiciary department."¹²

This last line and a half is, of course, the essence of *Marbury v. Madison*, and affords a basis for those who say that the concept of judicial review of legislation derives from the Constitution, even if only by implication. Madison's foresight as the principal draftsman of the Constitution becomes apparent in his rejection of Jefferson's concept of a rural America—a nation of farmers, artisans, and strong "yeomen," as Jefferson called them. With that kind of a rural society, the United States could probably not have developed manufacturing, commerce and trade, as it did, and become a great world power in less than 150 years after its founding.

There were a number of differences in our story and the story of other revolutions in world history. Our leaders knew not only how to plot and how to fight, but also how to govern. One may pause only for a moment and think of the revolutions over the past ten or twenty years to find that it is one thing to plot and execute a revolu-

11. Quoted in C. BOWEN, *supra* note 5, at 8.

12. Quoted in *id.* at 14.

tion, and quite another to govern. Iran, since the fall of the Shah, is but one example. The delegation to Philadelphia included farmers and merchants and other plain men who understood that the value of a horse depended on keeping it in harness. And these men were not without guides in their task. They knew of the First Charter and Ordinances of Virginia, and charters of the other states that had developed from 1606 to 1776. It is very important to remember that the rights created by Magna Carta at Runnymede in June of 1215 were a grant from the Monarch, the government, to the people—not all of the people, but only to some—the elite. That was, indeed, a breakthrough, but the Constitution of the United States did not come from the government; it was a grant from the people and the states to the government it created.

The Constitution, as we know, was unique in its division of three separate, coequal, coordinate branches of government. That was a deliberate mechanism to provide checks and balances; this had never been tried before. We know from long experience now that our kind of government does not always produce the most efficient government, but that it protects freedoms. Efficiency in the private sector, and the conduct of business and industry, of course, are critical. But freedom and protection of individual rights, not efficiency per se, was the primary target of the draftsmen of the Constitution. We remember Churchill's statement that "Democracy is the worst form of government, except all the other forms that have been tried from time to time."¹³

The freedom that was created by this Constitution released and unleashed the latent energies, abilities, and talents of every individual to develop as that individual's ambitions and industry might permit.

In my native State of Minnesota, which had only a few hundred thousand people a century ago, there are examples of what this kind of freedom produced. A simple immigrant from Ireland came to Minnesota after stopping briefly in Canada. After working for a coal yard, he started his own, and then expanded and began to build spur tracks from the main lines of the railroad to his yards. He became so interested in laying railroad tracks that he went on to build one of the world's greatest transportation systems first known as the Great Northern Railroad, and today the Burlington-Northern Railroad.

13. Speech by Winston S. Churchill to the House of Commons (Nov. 1947), *reprinted in* INTERNATIONAL THESAURUS OF QUOTATIONS § 231.7, at 146.

Another immigrant, this one from Germany, came to Minnesota to work in lumberyards, then acquired his own lumberyards, followed by timberlands. His unleashed energies and talents enabled him to build what is, even today, the world's largest private lumber-producing company, the Weyerhaeuser Company.

An immigrant from Birmingham, England settled in Southern Minnesota, and became a doctor by way of the medical apprentice system of that day. By the time his two sons were teenagers, they regularly accompanied him in a horse and buggy to farms and outlying homes, performing surgical operations on the kitchen table. In turn, those two young sons went to medical school and opened up a medical practice in a Southern Minnesota town whose name is, today, synonymous with great medicine: Rochester, Minnesota. These two young doctors formed the first large group practice of medicine in America. They went on to create what is today one of the largest and greatest of all the institutions dealing with medical education, medical research, and the care of patients—the Mayo Clinic. When these two doctors retired about sixty years ago, they gave the entire institution to the public and it will be operated forever as a public trust.

In our own time, following World War I, a young man in St. Paul, Minnesota, along with his wife conceived the idea of a magazine that would condense the best works that were being published. That conception became the *Reader's Digest*, which today has a circulation over twenty million, and its editions are published in more than a dozen languages. This was the team of DeWitt and Lila Wallace, whose total lifetime public benefactions approach one billion dollars.

There are similar examples in every state in the country. That is what I mean when I refer to the system of government that unleashed the energies and talents of every person within its reach. How many other systems do that?

The delegates left Philadelphia exhausted after their sessions throughout the hot, humid, Philadelphia summer. They had a right to be elated. The result was something that philosophers had dreamed of, but it had never been tried. Their elation was temperate, however, for the document had yet to be approved by nine of the states before it could go into effect, and that was not easy.

Virginia was then the largest, most populous, and probably most politically powerful state with leaders like Washington, Madison, Jefferson, and a host of others. The Virginia Ratification Convention in Richmond extended over three weeks with that great patriot,

Patrick Henry, strongly opposed to the Constitution. His oratory was met by analytical arguments from Madison and the rising young lawyer, John Marshall. When the vote was called on the final day, it was eighty-nine to ratify and seventy-nine opposed. Just think of it—a margin of ten when George Washington, James Madison, James Monroe, and Edmund Randolph were all for it! The Constitution went on to New York and was ratified by three votes. Earlier in the same year of 1788, Rhode Island had rejected it by popular vote, and New Hampshire's legislature had approved it by only a ten-vote margin.

The vision of our Founding Fathers was ultimately realized, and every American today reaps the benefits of the Constitution. This is the story that every lawyer and every law student must carry to the American people—and to all people who seek freedom—over the next several years as we celebrate the bicentennial of that great document.