Thomas Jefferson and the United States Constitution: A Comparative Study of Jefferson as Maturing Political Thinker to Jefferson the Political Operative

Thomas A. Parker

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THOMAS JEFFERSON AND THE UNITED STATES CONSTITUTION:
A COMPARATIVE STUDY OF JEFFERSON AS MATURING
POLITICAL THINKER TO JEFFERSON THE
POLITICAL OPERATIVE

by

Thomas A. Parker

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Thomas A. Parker
The purpose of this thesis is to use historical, qualitative, and comparative methods of research in studying the life of Thomas Jefferson, his views on governance, and his impact on the highest law of our land, the United States Constitution. Thomas Jefferson's constitutional thoughts and theories evolved first as a maturing political thinker and later as a political operative on the state, national and international stage. His beliefs were shaped by many factors including Jefferson's own principles and character, his scholarship via learned men and life experiences, American and overseas events in and out of his control, titles and offices he occupied, and peers with differing viewpoints.

It is my hope that the reader will both be exposed to the plethora of ideas and thoughts Jefferson had throughout his life concerning constitutional matters and will conclude that his promotion for these ideas would become part of our American foundation and heritage. These include Jefferson's advocacy that the United States should become a strong nation through the principles of republicanism; a commitment to liberty, citizen's rights and political equality; the strength of written constitutions, scrupulously adhered to; and popular participation and vigilance over government to contain arbitrary power.
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CHAPTER I

INTRODUCTION

The Declaration of Independence announced to the world the birth of the United States as a nation. It also provided in its eloquent second paragraph a national credo. But it did not create the constitutionalism that later became for many people almost an ideology in itself and that is at the very heart of the American system of government. Ideas about how government was to be structured and how it would operate had to be worked out in the years that followed separation from Great Britain in 1776. Thomas Jefferson recognized this period as a rare opportunity actually to implement his beliefs. "It is a work of the most interesting nature and such as every individual would wish to have his voice in," he observed in a letter to Thomas Nelson dated May 16, 1776. (Peterson 1986, 119) It was an awesome challenge, for the problem of how America was to be governed was at the very essence of the American Revolution. As Jefferson put it,

It is the whole object of the present controversy; for should a bad government be instituted for us in the future it had as well to have accepted at first the bad one offered to us from beyond the water without the risk and expense to contest. (Peterson 1986, 119)

These words, penned shortly before the issuance of the Declaration of Independence, clearly indicate that Jefferson understood the
importance of the task. But he probably did not fully realize that in one form or another the problem of how Americans should govern themselves would preoccupy him for the rest of his life. The challenge was enormous in its dimensions. It involved dealing with such fundamental matters as the meaning of republicanism, the institutional structure of the state and national governments, the proper distribution of power in a federal system, and the protection of individual rights and liberties from the abuse of authority. This challenge was to involve various frustrations, defeats, mistakes and missed opportunities for Jefferson. Often he did not fully think through the implications of some of his ideas, and more than a few times he changed his mind. In the end, however, many of his ideas proved to be of enduring importance, and as much as any member of the revolutionary generation, he shaped the constitutional values under which we live today.

What shall be attempted in this thesis is to compare Jefferson as a maturing political thinker and theorist to Jefferson the political operative as he takes his place on the state and national political stage. Jefferson's constitutional theory did not develop suddenly or in isolation from historic events; rather it evolved gradually, shaped by the circumstances of his time. We will first examine Jefferson as a young scholar and observe how ideas, books, and teachers shaped his character and influenced his thoughts on government, political philosophy, republicanism, and rule by a colonial power. As Jefferson transcends from young scholar to politician,
author, and representative, Jefferson begins to expound and apply his thoughts and ideas not only on the Virginia political stage as representative and governor but in the Continental Congress. Among his many important accomplishments, it is at this stage that he pens the immortal words of the Declaration of Independence.

After the Revolution, the new United States and Jefferson search for ways for our country to become a united states and for the form of government which will best unite the nation. It is at this point in his life that Jefferson reaches the national stage. Jefferson becomes a commentator on the struggles to create a United States Constitution. Next Jefferson serves in the new offices of Secretary of State, Vice President, and President. As precedents are set and ideas are shared, these offices evolve and so do Jefferson's political and constitutional thoughts and actions.

Throughout his life, Jefferson was a central figure in virtually every significant constitutional issue of his age. Although he was not present at the Constitutional Convention, Jefferson nevertheless properly may be regarded as one of its founders because of the central role he played in the key issues that surfaced during the first four decades of government under the Constitution- issues many of which persist to this day. Among them was Jefferson's espousal of a federal Bill of Rights. His voice, particularly advocating the First Amendment, was instrumental in getting this early addition to the Constitution. His concern about the president's perpetual
eligibility for reelection was reflected in the two-term limitation followed in practice for nearly 150 years and finally made mandatory by the Twenty-Second Amendment. His espousal of a strict interpretation of the powers granted to Congress under the Constitution, and the corresponding powers retained by the states, has been influential among advocates of state's rights both before and after the Civil War. Events such as the Louisiana Purchase, the incorporation of a national bank, and the Virginia and Kentucky Resolutions played an early role in constitutional interpretation. His ideas about the rights of each generation to free itself from the limitations imposed by preceding generations, continues to pose challenging questions about the continued vitality of the Constitution itself and the need for constitutional change.

In sum, this thesis allows the reader to gain a better understanding of Thomas Jefferson the person, his philosophy of constitutional and republican government which ordinarily remained consistent throughout his career but at times evolved by circumstances, and his thoughts and actions which helped to make the United States a strong nation. One example which succinctly states his views on government can perhaps be expressed when Jefferson once wrote his good friend General LaFayette in 1816 asserting,

To establish republican government, it is necessary to effect a constitution in which the will of the nation shall have an organized control over the actions of its government, and its citizens a regular protection against its oppressions. (Ford 1892, 7:18)
Unlike his father, Peter Jefferson, who was a self-taught man, Thomas Jefferson received a formal education. From the age of nine until fourteen, the same year as his father's death, young Thomas attended the Revered William Douglas's Latin School, where he learned the rudiments of Latin, Greek, as well as some French. It's been said that Peter's dying instruction was that his son should continue his classical education. Thomas did this at the school of the Reverend James Maury, whom the younger Jefferson later described as a "correct classical scholar." (Mayer 1994, 3) After two years of study with Maury, Jefferson was able to read ancient authors in the original Greek and Latin. At Maury's school Jefferson also became familiar with some English literature, history, geography, and mathematics. (Mayer 1994, 3-4)

In the spring of 1760 Jefferson went to Williamsburg, where he studied for two years at the College of William and Mary and then began preparation for the practice of law. The void in Jefferson's life that had been created when his father had died was filled during his Williamsburg years by two mature counselors who, it is no exaggeration to say, "fixed the destinies" of his life, William Small and George Wythe. (Mayer 1994, 4)
Dr. William Small, from Scotland, was professor of natural philosophy and moral philosophy at the college; as Jefferson described him in his autobiography, he was "a man profound in most of the useful branches of science." (Mayer 1994, 4) Jefferson studied physics, mathematics, natural history, logic, ethics, rhetoric and belle lettres. Dr. Small exposed young Jefferson to the scientific rationalism of the Enlightenment. (Mayer 1994, 4) "From his conversation," Jefferson noted, "I got my first views of the expansion of science, and of the system of things in which we are placed." (Ford 1892, 1:4)

It was under the tutelage of George Wythe that Jefferson began the study of law. Like Small, Wythe was a true man of the Enlightenment. One of the more distinguished members of the bar of the General Court, Wythe was a self-educated native Virginian with a keen legal mind and a passion for classical studies. One English traveler, who met Wythe a few years before Jefferson began studying with him, described Wythe as a man who had a perfect knowledge of Greek and of ancient philosophy and such a character "as would have dignified a Roman Senator, even in the most virtuous times of the republic." (Mayer 1994, 4) As Jefferson completed his years of study and prepared to enter upon "the business of life," Wythe remained Jefferson's "Faithful and beloved mentor" as well as his "most affectionate friend." (Mayer 1994, 4-5)

Influenced by Wythe's guidance who believed that law was not to be studied in an intellectual vacuum but rather must be read in conjunction
with the other branches of science, and especially history, which Wythe considered “as necessary as law to form an accomplished lawyer”, Jefferson purchased other books interspersed with his purchase of lawbooks in 1764 and 1765. (Mayer 1994, 5) Among them were Milton’s *Works*, Hume’s six-volume *History of England*, Robertson’s *History of Scotland*, Stith’s *History of Virginia*, Sterne’s *Sermons*, Bacon’s *Philosophy* and *The Thoughts of Cicero*. Jefferson also kept three commonplace books, writing down noteworthy passages and comments from his readings. Various entries in his legal commonplace book indicate sources for Jefferson’s hostility to feudalism, the law of entail and primogeniture, as well as for the Whig version of English history to which Jefferson wholeheartedly subscribed. (Mayer 1994, 5)

Whig philosophy had a major impact on young Jefferson’s thoughts of English politics, history, the colonies’ relationship to England, and English law. Whig ideas also became a core, central belief to Jefferson which was to carry over into his many theories of forming state and federal government and his design and practices of constitutionalism. Basic to the Whig philosophy was a profound distrust of concentrated political power and with it, an especially intense devotion to the ideal of limited government.

Six books that Jefferson read as a young man and recommended to others were laced with Whig philosophy and were vital in shaping his view on English law, the constitution on the eve of the Revolution, and
Jefferson's beliefs throughout his life. Jefferson read the multivolume *History of England* written by Paul de Rapin, sieur de Thoyras, and recommended it as the "most faithful" general history of England. He read both Sir John Dalrymple's *History of Feudal Property in Great Britain* and the anonymous *Historical Essay on the English Constitution*, which has been attributed to Obadiah Hulme, and abstracted them in his legal commonplace book. (Mayer 1994, 12-13). The first law text Jefferson read was Sir Edward Coke's *Commentary upon Littleton*. After reading Coke and the others Jefferson undoubtedly concluded that the English constitution— the "law of the land"— was rooted in time immemorial and limited the power of all officers of government, including the monarch. (Mayer 1994, 10)

The Whig historians had an idealized model of government, which they believed was introduced in northern Europe by the barbarian tribes that settled there, and saw in that model the original constitution. According to Whig historians, "whilst all the rest of Europe groaned under the galling yoke of tyranny and oppression," (St. Amand 1767, ii-iv) the tribes of Germany preserved their native political liberty in a model of government "as far superior to the Greek and Roman commonwealths, as these surpassed the governments of the Medes and Persians." (Hulme, 1771, 3) Citing Tacitus's *Germania*, the Whig historians described as a key element of this "Gothick model of government" the general assemblies, where all important matters were decided and where outstanding men
were chosen as leaders to determine the affairs of lesser consequence. (Mayer 1994, 13)

As the German tribes increased in number, they conquered neighboring territories for the settling of their people, some of whom, "distinguished by the name of Saxons," settled in England "about the year four hundred and fifty." (Hulme 1771, 3) After destroying the native Britons or driving them westward to Wales, the Saxons distributed the lands among the various tribes, who had settled as "little republics," paralleling the political organization that had prevailed in their native lands. The land conquered by the Saxons "was vested in the collective body of the people, and not in any one person." (St. Amand 1767,viii) This fact was significant, for it demonstrated to the Whig historians that feudalism, as understood in the ninth and tenth centuries, was "unknown to our Saxon ancestors before the Norman invasion." (Dalrymple 1759, 7) Not only were the Saxon feudal tenures rather undeveloped, but also a great deal of the land continued to be allodial, free from the tenurial rights of a feudal overlord. (Mayer 1994, 13)

With so many lands held allodially in Saxon England, "it was necessary to subject in a political capacity those who were not subjected in a feudal." (Dalrymple 1759, 11) Within each Saxon kingdom the allodial lands were divided into counties or shires, which were in turn divided into wapentakes, or hundreds, and these were subdivided into boroughs and rural tythings. Each of these little republics was self-governing, and within
each all those to whom lands were apportioned had a say in the government. Over times, as the population grew and the seven Saxon kingdoms merged into one, the people’s “native rights of being governed by laws made by themselves” came to be exercised indirectly through their representatives. (Amand 1767, lix) Those representatives were the presiding judges or magistrates, who were elected annually within each borough or tything. These wites, or wise men, as they were called, along with the king’s thanes and the bishops and abbots as representatives of the clergy, comprised the witenagemot, or Saxon parliament. (Mayer 1994, 13-14)

This parliament was literally an assembly of “wise men,” an assembly of “all the presiding judges of the nation, earls, bishops, and wites, or the annual magistrates of the tything or boroughs, who represented all the proprietors of land in their respective tythings.” (Rapin 1757, 2:32-33) A key characteristic of the Whig historians’ “Gothick model of government,” then, was the fact that each piece of land was represented, directly or indirectly, in the assembly. (Mayer 1994, 14) Just as the lands conquered by the Saxons were taken by the whole collective body and distributed to all who had a right to share in the conquest, so too was the making of laws entrusted to the whole nation, as represented in the assembly. (Mayer 1994, 14)

The Saxons “had only one mode of government,” whether for a town, a wapentake, a shire, or a kingdom, government by representatives elected
annually by each inhabitant of the respective district. (Hulme 1771, 27-30)

Today this can best be described as a separation of powers model. Each
level of government had its equivalent of a court of council to make laws, a
court of law to enforce laws, and a chief magistrate to administer the laws.
The chief magistrate’s power was circumscribed by the laws, and this
limitation applied equally as well to kings, the chief magistrates of the
nation, the only difference being the duration and the compass of
authority: the magistrate’s was annual and confined to the walls of the
town, while the king’s was for life and extended over the whole kingdom.
Thus, the English constitution in its original form- was “an intimate union
between the prince and the people,” (Rapin 1757, 1:xiii) connected by the
witenagemot, the assembly of wise men “who represented the whole
nation.” (Mayer 1994, 14)

The Whig historians argued that the conquest of England by
William, duke of Normandy, “contaminated the purity of the English
constitution” by mixing the old Saxon laws, “founded on the principles of
liberty” with the new establishment of the Normans, founded on “the
principles of slavery.” (Hulme 1771, 8, 38) Although the English
constitution continued to be fundamentally a union between the crown and
the people, connected by a parliament nominally representative of the
whole nation, the character of that union was greatly altered in two
respects under the weight of the Norman yoke. First, the imposition of
Norman feudalism so changed the composition of Parliament that it no
longer served as an adequate check upon the power of the king. Thus, although the executive authority in theory continued to be confined to a certain sphere of action prescribed by the law, it in fact was quite arbitrary. Second, the dilution of the elective power of the people made Parliament less and less representative of the will of the nation. In time, the Whig historians declared, it came to reflect the will of the sovereign and of certain factions that had come to power. (Mayer 1994, 14-15)

When William the Conqueror came to power he redistributed the lands of his former Saxon opponents among his own confederates. A Norman chief, or baron, was placed over most tythings, alongside the existing Saxon earls, to undermine their power. The estates of the Norman chiefs were called baronies, and the barons recognized no superior but the king. Although “every spot of land” was still represented by Parliament, the government fell into the hands of a “new order of men, with new authority derived from the king.” (Rapin 1757, 2: 33-34) William also created many more seats in Parliament, and by doing so, amassed a great deal of power; he “put his finger upon the great artery of the constitution, and stopped the circulation of all power arising from the Saxon principles of government.” (Hulme 1771, 47-48)

As Jefferson wrote to Edmund Pendleton in 1776, he was interested in the Saxons not only because they were “our ancestors” but also because their system of government was “the wisest and most perfect ever yet devised by the wit of man.” (Boyd 1950, 1:492) Like other Whigs he
admired Tacitus as “the first writer in the world without exception” because his works, including a description of the Saxons in Germania were a “compound of history and morality of which we have no other example.”

(Boyd 1950, 1:492)

As young Jefferson read these Whig principles through authors like Tacitus, de Rapin, and Dalrymple, they helped shape his early political thinking before 1776. Jefferson consistently referred to the ancient Whig principles including the ideals of limited government, a distrust of concentrated political power, self-government in small republics, separation of powers, frequent elections of representatives, and laws made in the assembly by wise men representing all the people- as the wellspring for the values underlying the movement for American independence.

According to Joseph Ellis in American Sphinx: The Character of Thomas Jefferson, the appeal of the Whig histories also derived from something more than just their philosophy, morality, or logic. They were influential precisely because they told a story that fitted perfectly with the way Jefferson’s mind worked. Their romantic endorsement of a pristine ancient Saxon past, a long-lost time and place where men had lived together in perfect harmony without coercive laws or predatory rules, gave narrative shape to his fondest imaginings and to utopian expectations with deep roots in his personality. The Whig histories did not create his romantic expectations. They put into words the visionary prospects that
Jefferson already carried around in his mind and heart as a young scholar. (Ellis 1996, 37)

During the initial months in Philadelphia Jefferson was less concerned with plumbing the depths of his Whig principles than with sharing their practical implications with his fellow delegates. For Jefferson, this new concept or term was called “expatriation.” The core idea was that America was the refuge for the original Saxon values. Throughout the fall and winter of 1775 Jefferson did extensive research in Richard Hakluyt’s Voyages with the aim of documenting the claim that the earliest migrants from England to America came over at their own expense unassisted by the wealth or the strength of Great Britain and, most significantly, regarded their migration as a clean break with the mother country. If true, this was revisionist history with the most revolutionary consequences, for it suggested that independence from England was not some future prospect that he and his fellow delegates in the Continental Congress were seriously contemplating; it was an event that had already happened in the misty past. The theory of expatriation was utterly groundless as history. However, Jefferson clung to the theory with nearly obsessive tenacity throughout his life, though even he admitted that, “I had never been able to get any one to agree with me but Mr. Wythe.” (Ellis 1996, 37-38)

Jefferson’s strange attachment then, to the myth of the Saxon past was an early ideological manifestation of a characteristically Jeffersonian
cast of mind. It represented his discovery of an idyllic time and place that accorded with his powerful sense of the way things were meant to be. And any compromise of that seductive vision was a betrayal of one's personal principles. Back there in the faraway world of pre-Norman England, prior to the feudal corruptions, men and women had found it possible to combine individual independence and social harmony, personal freedom and the rule of law, the need to work and the urge to play. Throughout his life Jefferson was haunted by the prospects of such a paradise and eager to find it in bucolic pastoral scenes, distant Indian tribes, well-ordered gardens, local communities (he later called them ward-republics) or new and therefore uncorrupted generations. At the private level the young Jefferson who was taking his seat in the Continental Congress had already begun to build his personal version of utopia at Monticello. At the public level he was preparing to release his formidable energies against a British government that, as he and other like-minded Whigs saw it, was threatening to disrupt and destroy the basic Whig principles of governing on the patch of potential perfection that was forming on the western edge of the British Empire. (Ellis 1996, 41)
CHAPTER III

A SUMMARY VIEW AND DECLARING INDEPENDENCE

Jefferson was not alone in his reading of English Whig writers on history and government and the classical authors to whom they frequently alluded. Colonial Americans were thoroughly familiar with the chronicles of the collapse of the Roman republic and the rise of the empire by Plutarch, Cicero and Tacitus; the writings of Coke and other seventeenth-century common lawyers; the works of Locke, Sidney, Trenchard and Gordon and other Real Whigs of the late seventeenth and early eighteenth centuries; and the writings of their contemporaries, Burgh and other British Radicals of the 1760s and 1770s. (Mayer 1994, 26)

Devouring Whig opposition thought, Americans held a "comprehensive theory of politics"- a "pattern of ideas and attitudes"- that they shared with their ideological brethren across the water. (Mayer 1994, 26) Like the Real Whigs of the mother country, American Whigs dissented from the general complacency of eighteenth-century politics and, insisting instead that government was inherently threatening of liberty and self-government, called for vigilance against the abuse of governmental power. Associated with this inherent suspicion of government was another concept, also derived from Whig thought: the veneration of the English constitution as the great protector of the subjects' liberties. It is in the
joining of these two concepts in American thought- in the interpretation that Americans gave to the new regulations imposed by the British government on the colonies after 1763- that the roots of the colonies' rebellion may be found. The Americans saw nothing less than a conspiracy which threatened the destruction of the English constitution and the rights and privileges embedded in it. (Mayer 1994, 26)

What was true of colonial Americans generally was also true of Virginians. Charles Sydnor has noted the remarkable extent to which Virginian lawyers were familiar with English constitutional history, observing that some of the great names- and one might add, the great deities in the Real Whig pantheon- were “perhaps better known in American than in England in the 1770s.” (Sydnor 1965, 17-18) The Virginia gentry venerated their traditions of representative government and consent. The “most valuable Part of our Birthright as Englishmen,” Richard Bland asserted, was the “vital Principle in the Constitution” that “all men” were “only subject to Laws made with their own Consent.” (Mayer 1994, 27) The House of Burgesses as the agency through which the governed gave their consent to laws, was the natural guardian of their rights Virginians believed. Indeed, Virginia's heritage of self-government ran deep: representative government had already existed in the Old Dominion for well over a hundred years when Jefferson was born. No doubt Jefferson held the values that Virginians generally shared, and
these values helped shape his reactions to the crisis with Britain as it emerged in the 1760s and 1770s. (Mayer 1994, 26-27)

Jefferson's first acquaintance with the developing crisis with Britain was as an observer- while a law student in Williamsburg in 1764, he listened at the Capitol to Patrick Henry's oration against the Stamp Act- but he soon became an active player in Virginia's protests against the actions of the British government as a member of the House of Burgesses. He disagreed with the imposition of the Townshend Acts and led in a day of fasting and prayer in Virginia to protest the closing of the port of Boston after the Boston Tea Party. Jefferson also attended a meeting of the Committees of Correspondence that ordered letters sent to similar committees in the other colonies calling for a general congress of all colonies. (Mayer 1994, 27) As Dumas Malone has noted, Jefferson thus "helped translate the local grievance of Boston into a common cause, and unquestionably he himself was among the first to be electrified." (Malone 1948, 1:172-173)

The freeholders of Albemarle County, meeting in Charlottesville toward the end of July, 1774, reelected Jefferson and John Walker as their delegates to the general congress and adopted resolutions that Jefferson had drawn up. These declared in unmistakable terms the rights of Americans to be governed by laws to which they had given consent in their own colonial legislatures, insisting that "no other legislature whatever may rightfully exercise authority over them." (Boyd 1950, 1:117-118) The
resolutions further declared that “these their natural and legal rights” frequently had been “invaded” by Parliament, most recently by the closing of the port of Boston. “All such assumptions of unlawful power” were “dangerous to the rights of the British empire in general,” the resolutions concluded, noting Virginia’s readiness to join the “common cause” of Americans on behalf of “their constitutional rights.” (Boyd 1950, 1:117-118)

Jefferson elaborated these ideas, expecting to present them to the Virginia delegation of the Continental Congress meeting in Williamsburg but was stricken ill and did not attend. (Mayer 1994, 28) Instead friends arranged for the publication of his draft by a press in Williamsburg. From there printers and newspaper editors picked up the pamphlet under the title of A Summary View of the Rights of British America. The audience at whom Jefferson had actually aimed his words, the Virginia legislators, chose not to follow them, preferring to recommend that its delegates adopt a more moderate posture toward Great Britain. What Jefferson had recommended, and what became the basis of his political reputation outside Virginia, was decidedly more radical. Indeed, if the arguments of Summary View were to be believed, they put him in the vanguard of the revolutionary movement in America. It was this carefully reasoned document that established Jefferson as a chief writer of eloquence and insight in the thirteen colonies. Jefferson at the age of thirty-two in the summer of 1774 had written a major literary contribution to the patriot cause. (Ellis 1996, 34)
In the broadest terms *A Summary View* forcefully argues on constitutional and legal grounds that the association between the Colonies and the Crown was purely voluntary and thus Parliament had no inherent authority over the American communities. Three features of *A Summary View* are Jefferson's use of Whig history in context of colonists' rights, liberty and the rights of man, and King George III's role. At first glance *A Summary View* reads like a Whig history. Indeed as Trevor Colbourn has observed, the document was "the first graphic illustration of the political use Jefferson made of his careful reading of the past, and specifically his English forefathers." Jefferson, "behaving more like an archeologist than a revolutionary," placed American rights in a historical context which far antedated the seventeenth-century settlements in America. (Colbourn 1958, 66) In the midst of his litany against monarchial abuses of power, Jefferson inserts a long paragraph in which he traces the origin of abuses back to the Norman Conquest. The source of the colonial problem with British authority did not date from the Stamp Act crisis of 1765; the problem really began in 1066, when the Normans defeated the Saxons at the Battle of Hastings. This was the origin of what Jefferson called "the fictitious principle that all lands belong to the king." (Ellis 1996, 36) What the reader sees in *A Summary View* is that Jefferson's early exposure to Whig philosophy has a profound influence on his thoughts and writings.

Three other views that Jefferson expresses in *A Summary View* include; first his theory of expatriation- that as expatriated men,
Americans were not simply transplanted subjects of the British king, but a separate, sovereign people. Second, Jefferson states the traditional Whig demands for a restoration of liberties derived from the English constitution. Third, Jefferson refers in the document repeatedly to natural rights. The rights that Jefferson claimed on the colonists' behalf were not only rights derived from the English constitution but "those rights which God and the laws have given equally and independently to all, a right, which nature has given to all men, a free people claiming their rights as derived from the laws of nature, and not as the gift of their chief magistrate." Jefferson thus states in A Summary View, like he will do later in the Declaration of Independence, that the case for American independence is based not only on the rights of Englishmen but also on natural rights and the rights of man. (Mayer 1994, 37)

Just where Jefferson received his information about natural rights is unknown. He did not copy much from the writings of John Locke in his commonplace book as a student of Wythe. As early as 1770 however Jefferson said publicly that under the law of nature all men are born free. Like so many of his enlightened contemporaries, Jefferson also believed that men had originally been in a state of nature; that they had been free to order their own actions and to dispose of their own persons and property as they saw fit; that government was instituted among them in the first place by their consent. At this early stage in his political career he employed the term "right" primarily in a moral sense. He was confident
that force could not give it and that natural rights could not be derived
from a king. He found the source of natural rights in the universal law of
nature; “The God who gave us life gave us liberty at the same time.”
(Malone 1948, 1:176) Nothing less could have been expected of God, for
liberty was right, just as force was wrong.

*A Summary View* was indeed a bold statement. Although too
extreme for 1774, it would not long be so regarded. Jefferson’s ideas of
Whig history and philosophy, which made an early impression on him as
an argument for the rights of British Americans would be largely ignored
by most of the colonial leaders. The ideas of liberty, nature, and natural
rights were not yet interwoven into the minds of colonists at this time.
Another feature of *A Summary View* received little attention at the time
but, like the idea of natural rights, was destined to loom large in the
debates within the Continental Congress over the ensuing months. This
was Jefferson’s treatment of King George III and the author’s attitude
toward the British monarchy. The dominant public reaction to *Summary
View* focused on its repudiation of parliamentary authority, because that
was the pressing constitutional issue then being faced throughout the
various colonial legislatures. What went largely unnoticed was that
Jefferson had already moved forward to the next target, the monarchy,
which was in fact the only remaining obstacle to the assertion of American
independence. To put it somewhat differently, the lengthy indictments
against the king that take up two-thirds of the Declaration of
Independence were already present in embryo in *A Summary View*. (Ellis 1996, 35)

Jefferson's posture toward the monarch throughout *A Summary View* is declaratory rather than plaintive, and the tone toward George III ranges between the disrespectful and accusatory. The document reflects the Whig approach to history; that the crown continues to deprive the people of their liberties, the rights of all men, and American colonists' constitutional rights as transplanted Englishmen. (Mayer 1994, 37) Jefferson writes in *A Summary View* that the king is not some specially endowed ruler but merely “the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government erected for their use, and consequently subject to their superintendence.” (Ellis 1996, 35) Rather than blame the entire mismanagement of imperial policy toward America on Parliament or “the evil ministers to the king,” still the accepted approach within even the radical camp, Jefferson made the king complicitous in the crimes against the colonial rights. He accused George III of negligence; permitting colonial assemblies to be dissolved; refusing to hear appeals from aggrieved petitioners; delaying the passage of land reforms. But he also charged the king with outright acts of illegality on his own; sending troops into colonial cities to put down lawful demonstrations; prohibiting the natural migration of colonial settlers beyond the Appalachian Mountains. He even introduced the charge that provoked such spirited debate when included in
his original draft of the Declaration of Independence- namely, that George III had perpetuated the existence of chattel slavery by repeatedly blocking colonial efforts to end the African slave trade. In effect, with the advantage of hindsight, it is possible to see *A Summary View* as a preliminary draft of the bill of indictment against George III contained in the Declaration of Independence, written two full years before the more famous document and before Jefferson had even taken his seat in the Continental Congress. (Ellis 1996, 35-36)

The timing of the pamphlet was also perfect. Several other colonial dissenters- John Adams in Massachusetts and James Wilson in Pennsylvania- were simultaneously reaching the same conclusion about Parliament’s and the King’s lack of authority in the colonies. It was the logical implication of the entire colonial protest movement that had begun in 1765. Jefferson however, staked out the constitutional ground just as it was becoming the only tenable position for the opponents of British imperial policy to stand on. And Jefferson did it in a pamphlet that combined the concision and matter-of-factness of a legal brief with the epigrammatic force of a political sermon. (Ellis 1996, 35)

By 1776 after the Battles at Lexington, Concord, and Bunker Hill were fought and the writings of Thomas Paine were widely read by the colonists, Jefferson was far more successful in speaking for “all Americans Whigs” in stating in the Declaration of Independence the “harmonizing sentiments;” explaining the actions of July 2, 1776, the day Congress voted
to approve the resolution for independence. (Mayer 1994, 39) Part of his success in making the Declaration an expression of the American mind must be attributed not to Jefferson but to Congress, for its deletion of certain passages of Jefferson's draft—particularly three long passages that stated his unique views detailing "the circumstances of our emigration and settlement here," denouncing the British people as "unfeeling brethren," and condemning George III for having "waged cruel war against human nature itself" by permitting slavery to exist in the colonies. (Mayer 1994, 40) Instead, after Congress made its revisions, Jefferson's draft of the Declaration brilliantly downplayed those issues that had divided the Patriots and stated the case for American independence in terms on which they could all agree— and thus expressed, in a quite literal sense, the "harmonizing sentiments" of the American Whigs of the day. (Mayer 1994, 41)

Analytically, Jefferson's Declaration began where his Summary View ends: the case for the redress of American grievances having failed, it was time to put forth the case for American independence. Yet, as Thomas Grey has noted, the case for independence "could not be made in legal terms" but rather had to be based upon extralegal considerations of utility and political philosophy. (Grey 1978, 890) The theory is familiar: all men created "equal and independent" with respect to their natural rights, institute governments to secure those rights; the "just powers" of government deriving from "the consent of the governed," it is the right of
the people "to alter or to abolish" government whenever it has become "destructive of these ends" and when "a long train of abuses and usurpations" makes it clear that there is no other way for the people to restore their liberties. (Mayer 1994, 41) The ideas expressed were, as Jefferson said in his 1825 letter to Henry Lee, the "harmonizing sentiments" of the day. The language used was strikingly similar to that used not only by Enlightenment authors like Locke and Sidney, both of whose works Jefferson specifically mentioned as the "elementary books of public right" on which the authority of the Declaration rested, but also by other Whig writers on government. (Mayer 1994, 41)

As John Phillip Reid wrote in *The Irrelevance of the Declaration*, many of the counts against George III in the Declaration state constitutional grievances "previously litigated and established as offenses in British constitutional law" in such milestones of Whig constitutionalism as the Petition of Right of 1628 and the Bill of Rights of 1689. (Reid 1981, 84-87) These include standing armies, quartering troops, taxing without the consent of elected representatives, and the use of martial law against civilians. Moreover, the general charge by Jefferson of making war on the king's own people was "one of the most serious constitutional grievances that could be made in English constitutional law." (Reid 1981, 84-87) Americans rights under the English constitution were relevant, but so too were their basic, natural rights as men. Jefferson states that George III violated not only his original compact but also the Lockean social compact
by making his government of the colonies destructive of the ends for which it was established. And, in declaring themselves independent, the Americans were exercising not merely their right to rebel, under Whig constitutional theory, but also their right to institute new government, under Whig political theory that based all government on the consent of the governed. (Mayer 1994, 44)

The Whig concept that government was based on the consent of the governed or popular sovereignty was a matter Jefferson took seriously, for it was at the heart of the American Revolution: the foundation of the American republic lay in the principle enunciated in the Declaration of Independence, that governments derive their just powers from “the consent of the governed.” James Burgh wrote, “All lawful authority, legislative and executive originates from the people.” (Burgh 1774, 1:3-4) Algernon Sidney stated ninety years earlier in his book *Discourses Concerning Government*,

Power in the people is like light in the sun, native, original, inherent, and unlimited by anything human. In governors, it may be compared to the reflected light of the moon; for it is only borrowed, delegated, and limited by the intention of the people, whose it is and to whom governors are to consider themselves responsible, while the people are answerable only to God... And happy is that people, who having originally so principled their constitution, and they themselves can without violence to it, lay hold of its power, wield it as they please, and turn it, when necessary, against those to whom it was entrusted, and who have exerted it to the prejudice of its original proprietors. (Sidney 1698, 117, 134)

The same year that Jefferson wrote the Declaration, the Massachusetts General Court announced that the sovereign power “resides
always in the body of the People” and that it “never was, or can be
delegated, to one Man or a few.” (Mayer 1994, 46) Gordon Wood has aptly
described this as the “disembodiment of government” because it separated
sovereignty, the locus of ultimate political power in the society, from
government. The legislature represented the people for certain purposes
only, and not to all intents and purposes whatever. Its powers were limited
to those that the people, who always remained sovereign, had conferred;
and the written constitution served as a documentation of this ad hoc
conferral of powers from people to government. This notion of popular
sovereignty and the view of government that it entailed was indeed the
crucial issue of the Revolution. (Mayer 1994, 46-47)
CHAPTER IV

THE VIRGINIA CONSTITUTION

Just prior to writing the Declaration of Independence in late May and early June of 1776 Jefferson was focused on events back in Virginia. He devoted the bulk of his energies to producing three different drafts of a new constitution for his home state. Through these drafts we see, for the first time, Jefferson's constitutional philosophy on paper. The Continental Congress had called on the states to adopt new governments "under the authority of the people." (Peterson 1986, 120) Eager to participate in this important work, Jefferson requested permission to leave the Continental Congress and return to Virginia to help draft a state constitution. But the convention that governed Virginia at that time denied his request. Clearly disappointed, but undaunted, Jefferson prepared his own version of a constitution and a preamble which included a list of grievances against the king. Only the latter was adopted by the convention. The Virginia delegates adopted George Mason's basic plan of government and his Declaration of Rights. (Peterson 1986, 120)

Jefferson was very unhappy with the constitution adopted by Virginia in 1776. Thoroughly revolutionized by the preindependence debate with Great Britain, he believed the new state government should represent a more thorough break with the past. In particular, he advocated
a more direct assault on the “artificial aristocracy,” as he called it, that still ruled the Old Dominion. He believed it should be replaced by a natural aristocracy based on merit, virtue, and an informed electorate. He wanted to overturn the existing system of land tenure, primogeniture, and entail which had its origins in feudal practice. (Peterson 1986, 120)

In his constitution, Jefferson emphasized the integration of Whig principles including the separation of powers, an independent judiciary and a bicameral legislature, with a weak executive (called the Administrator in order to signify his lack of governing power). Jefferson agreed with the decision at the Virginia Constitutional Convention to reduce sharply the power of the executive branch. His opposition to placing too much power in the hands of a single person flowed naturally from the bitter debates of the 1760s and early 1770s, when royal governors were the leading spokesmen and chief enforcers of imperial policies. But Jefferson sharply disapproved of the manner in which the now all-powerful state legislature was elected. He desired to see property qualifications for officeholding eliminated and suffrage broadened. (Peterson 1986, 120)

Jefferson’s draft would have extended the suffrage to freeholders possessing only a quarter of an acre in town or twenty-five acres in the country and to all residents who had paid taxes to the government for two years or more. This suffrage provision, coupled with a provision granting fifty acres of land to every man of full age who did not already have that many, would have resulted in near-universal adult white male suffrage.
Representation in the lower house would have been based on the distribution of voters (thus, practically, on population). (Mayer 1994, 56) This principle along with suffrage as J.R. Pole has observed, indicate that "the author of the affirmation that governments derive their just powers 'from the consent of the governed' had done some purposeful thinking about the meaning of consent" by penetrating to the principle of equal representation of individuals. (Pole 1971, 288-289)

Jefferson also desired that representation in the lower house be based on population rather than the existing system of two delegates per county (regardless of population), which was created deliberately to give a decisive advantage to the more numerous and smaller slaveholding counties in the eastern part of the state at the expense of the larger and more populous nonslaving counties of the west. (Peterson 1986, 120)

Although Jefferson wanted to see the Virginia Constitution more firmly grounded in the consent of the governed, he was not as extreme as some proponents of democratic reform in 1776. The radical democrats who had gained control of the government-making machinery to the north in Pennsylvania in 1776 had completely eliminated the executive branch and provided for a unicameral legislature and an elective judiciary. Jefferson was not prepared to go this far. In addition to favoring a relatively weak executive to administer the laws passed by the legislature, he also strongly believed in a bicameral legislature but had reservations about putting the government completely and directly under the control of the people. He
believed the framers of the Virginia Constitution had committed a mistake by making both houses of the state legislature directly responsible to the electorate. Jefferson believed that the lower house should be elected by the people and that in turn the lower house should select the upper house from among its most respected members. His Senate would have been aristocratic by virtue of its wisdom, not its wealth. He justified this arrangement on these grounds, in a letter to Edmund Pendleton of August 26, 1776 first by stating that he sought to have the “wisest men” chosen and did not think “integrity the characteristic of wealth.” (Peterson 1986, 120) In his opinion on the people directly electing Senators however he added,

I have ever observed that a choice by the people themselves is not generally distinguished for its wisdom. This first secretion from them is usually crude and heterogeneous. But give to those so chosen by the people a second choice themselves, and they generally will choose [sic] wise men. (Peterson 1986, 120-121)

After originally providing for life appointment of senators, he finally decided on election of the senators by what he called the House of Representatives for staggered terms of nine years, with one-third removed every three years and incapable of reelection. (Mayer 1994, 57)

Like most Americans of his time, Jefferson had not worked out in 1776 the difficult problem of what role the judiciary should play in a republican form of government. In fact, it is doubtful that he ever fully came to terms with this problem, although he was to encounter it in various ways throughout his long public career. He did not advocate an
elective judiciary, but he did indicate in the letter to Pendleton that a judge should “be a mere machine” in enforcing the will of democratically elected legislatures and that “a judge’s power to interpret the meaning of laws should be sharply limited.” (Peterson 1986, 121)

Anyone on the lookout for more avowedly progressive features in Jefferson’s thinking could have found them. Jefferson stated that “no person hereafter coming into this country” would be held in slavery “under any pretext whatever.” (Mayer 1994, 57) He proposed a state-supported system of public education to facilitate the upward mobility of the brightest white students, regardless of their class backgrounds.

Jefferson’s progressive draft also included a section on “Rights Private and Public” which not only was a bill of rights but also embodied a number of far-reaching reforms. Full and free liberty of religious opinion would be guaranteed and the Anglican church disestablished; freedom of the press, except for private libel actions, would be absolute. The significance of these reforms became evident when a federal bill of rights came under consideration. Two more reforms proposed in Jefferson’s draft constitution of 1776, anticipated provisions similar to those that later either would be included in some other state constitutions or would be proposed for the federal Bill of Rights. These were the provisions requiring that juries try all factual questions, “whether Chancery, Common, Ecclesiastical, or Marine law,” and guaranteeing a freeman’s right to use
arms while forbidding standing armies. The Virginia Constitution of 1776 neither embodied nor envisioned such reforms. (Mayer 1994, 57-58)

Jefferson urged that the new constitution be ratified by a special convention called exclusively for that purpose rather than by the sitting legislature, a democratic idea that John Adams had also proposed as a way of implementing the principle of popular sovereignty. Moreover, it contained no article for future amendment or revision. Jefferson's draft, in contrast, contained an unprecedented clause that these fundamental laws and provisions of government could be altered by the vote of the people of two-thirds of the counties, all voting on the same day. Thus, despite his apparent difficulty in transcending the British theory of balanced government, Jefferson nevertheless was far ahead of his countrymen in anticipating a constitutionalism based fully upon popular sovereignty. The form of popular ratification that Jefferson proposed had no parallel in any of the first state constitutions; indeed, it anticipated by some four years the system of popular ratification first utilized to approve the Massachusetts Constitution of 1780. All in all, Jefferson's prescription for the new Virginia republic were an impressive blend of traditional forms and selective, progressive reforms. (Mayer 1994, 58-59)

In his 1824 letter to the English radical Whig John Cartwright, Jefferson noted that despite the "more favorable ground" on which the Revolution commenced, he and his fellow American Whigs "did not avail themselves of all the advantages of our position. Inexperienced in the
exercise of self-government and unschooled in its principles and forms, when forced to assume it, we were novices in its science.” (Mayer 1994, 58)

Thus the early state constitutions established “some, although not all its important principles”: among them that,

all power is inherent in the people; that they may exercise it by themselves, in all cases to which they think themselves competent,... or they may act by representatives, freely and equally chosen; that it is their right and duty to be at all times armed; that they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of the press. (Mayer 1994, 58-59)

Jefferson left the Continental Congress in September, 1776 and won a seat in the newly created Virginia legislature, where he directed his energies to bringing about through ordinary legislation many of the reforms he advocated. He played a central role in revising many of the state’s laws in order to create what he termed a “government truly republican”. This included the elimination of primogeniture and entail. More significantly, he initiated the political campaign that culminated in the Virginia Statute for Religious Freedom, finally enacted in 1786 after Jefferson had left for France. This law provided not only for the complete separation of church and state but also for complete religious freedom. Its underlying premise is that there should be no connection between the civil rights of the people and the manner in which they worship God. It was an extremely important piece of legislation, for it has served as the dominant model for church-state relations on both the local and federal levels of
government in the United States. Jefferson considered to be one of his
greatest contributions to mankind. (Peterson 1986, 121)

He failed, however, to implement the other aspects of his reform
program. A humanitarian attempt to make the state's criminal code less
bloody was rejected. (Peterson 1986, 121) This bill was influenced by
Jefferson's reading of Cesare Beccaria and other Enlightenment writers-
particularly the vast array of crimes that were punishable by death- and
urged more humane and rational punishments, proportionate to the
particular crime. Convinced that Virginia criminal law was "too
sanguinary," Jefferson proposed that capital punishment be abolished,
except for treason and murder, and that other felonies be punished either
by hard labor on roads, canals, and other public works or by lex talionis-
"an eye for an eye". (Mayer 1994, 68) His Bill for the More General
Diffusion of Knowledge, premised on the belief that a truly republican
government required a public system of education, also met defeat. A timid
attempt by Jefferson to examine the relationship between slavery and
republicanism came under sharp criticism, and he quickly retreated from
it. He also could not get the legislature to broaden suffrage or adopt a more
equitable system of representation. Virginia's failure to embrace the
principles and opportunities of the American Revolution, as Jefferson saw
them, distressed him for the rest of his life. (Peterson 1986, 121)

Jefferson became governor of Virginia in 1779. This was not a very
happy experience. The war had been going badly for several years, and in
1781 the British invaded Virginia. Economic turmoil, the lack of adequate military supplies, and widespread desertion among the militia made effective resistance very difficult. The situation required strong, even arbitrary, leadership on the part of the executive, but Jefferson, as a true product of the Revolution, was not, at this point in his life, capable of providing it. He worked conscientiously but ineffectively within the framework of the weak governors' office created by the Virginia Constitution. His opposition in the Virginia House of Delegates ordered an inquiry into his conduct of the war, and although he was eventually cleared, it was a humiliating experience. A significant result of what happened was that Jefferson began to rethink the issue of executive power. (Peterson 1986, 121)

Jefferson withdrew from public life for the next two years. During this self-imposed retirement, he wrote his only book, *Notes on the State of Virginia*, in response to a series of twenty-three questions about Virginia and the New World posed by Francois, Marquis de Barbe-Marbois, the secretary of the French legation in Philadelphia. Among his writings, Jefferson's understanding of the various ways in which the 1776 Virginia Constitution was "imperfect" is revealed in his *Notes*. Query XIII, regarding the Virginia Constitution, and query XIV, concerning the laws of Virginia, are particularly interesting to read about Jefferson's thoughts on government. Jefferson now seemed to endorse the more traditional Whig view that the lower house of the legislature should represent the people,
and the upper house, "the property of the state." Why he backed off from his earlier assertion that the upper house should consist of the wisest men in the state is unclear. He may have been impressed by the provision for an arrangement such as he now favored in the Massachusetts Constitution of 1780, which had been written by his good friend John Adams. At any rate, his strong belief in bicameralism further distinguished Jefferson from the more extreme proponents of constitutional democracy who had begun to emerge after 1776. (Peterson 1986, 121-122)

Along the same lines, in his Notes, Jefferson was critical of the concept of legislative supremacy. He already was at odds with Patrick Henry, who opposed many of his reform measures and controlled the Virginia legislature, and his own experience as governor had clearly indicated what could happen if the legislature fell under the control of the wrong kind of leadership. He now realized that legislative supremacy was not an adequate check on arbitrary government for "173 despots would surely be as oppressive as one." (Peterson 1986, 122) The remedy, he now believed, was to build up the powers of the executive and judicial parts of the government as a way of checking the power of the legislature. "An elective despotism," he wrote in Query VIII, "was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided," among the different branches. (Peterson 1986, 122)
Perhaps most important in his *Notes*, Jefferson elaborated on one of his major concerns about the Virginia Constitution of 1776 that he had only hinted at earlier. It concerned the type of body which would create a new constitution. The idea behind a written constitution was to create a government of limited powers, one controlled by fundamental law. How was such a constitution to be created? Jefferson criticized the Virginia Constitution on the grounds that it had been written and adopted by an ordinary legislative body whose membership had been elected for a variety of reasons to carry on the ordinary business of the state. Like a growing number of Americans, Jefferson argued that for a constitution to be truly the fundamental law of the state and secure from legislative interference, it would have to be created by a special convention for the specific and sole purpose of writing a constitution, which was then to be submitted to the people for ratification. Only when formed in this manner could a constitution be called the highest or fundamental law of the state. (Peterson 1986, 122)

In the *Notes* and elsewhere, Jefferson elaborated on the convention selection process and made clear his understanding on what a constitution is:

that it is a fundamental law which defines and limits the powers of the ordinary legislature and which cannot be altered or affected by ordinary legislation. Hence, a true constitution must be established by the people themselves, acting through special agents appointed for that particular purpose, in a constitutional convention or the equivalent. (Mayer 1994, 59)
Jefferson repeatedly urged the Virginia legislature to call such a
convention, but to no avail. Throughout his life, Jefferson viewed the
Virginia Constitution of 1776 with contempt. (Peterson 1986, 122)

Printed as an appendix to the Notes on the State of Virginia was
another proposed constitution, drafted by Jefferson in 1783, which he
offered as a new frame of government without the defects of the 1776
constitution. The 1783 draft constitution also reflected Jefferson's
experience with the actual operation of Virginia government, for three
years as a legislator and two years as governor. As in his 1776 draft
constitution, Jefferson provided for liberal suffrage and equitable
representation, proportionate to the number of electors in each district. He
retained the district system for the election of senators, but they were to be
elected not by the House of Delegates but by the electorate operating
through senatorial electors. Elections were to be held every three years
instead of annually, and the senatorial term lengthened to six years, with
half the Senate subject to change at each general election. (Mayer 1994,
63-64)

The provisions concerning the office of the governor especially
reflected Jefferson's own frustrating experience as governor of Virginia
during the critical years of the Revolutionary War. Although still chosen by
joint ballot of both houses of the General Assembly, the governor in
Jefferson's 1783 draft constitution was made more independent of that
body by being given a single five-year term. He was invested with "the
Executive powers," which were broadly defined as "those legislative powers...necessary to carry into execution the laws" and not by nature legislative or judicial, with some limitations. (Mayer 1994, 64) A Council of State was retained, but its function was reduced to virtually the status of an advisory board, and the governor was given ultimate command of "the whole military of the state, whether regular or militia." (Mayer 1994, 64) The governor, in short, was a vastly more effective executive officer than Jefferson, acting under the inherent constraints imposed by the 1776 constitution, had been. (Mayer 1994, 64)

In sum, Jefferson's efforts to reform law and government in the 1770s and 1780s were shaped by his evolving understanding of republicanism, the offices he held, and the events he witnessed. Viewing the Revolution as an unprecedented opportunity to establish the foundations for a government "truly republican," Jefferson saw the first priority to be the framing of new plans for government, based firmly on the consent of the people, within each of the states. In his own state, or "country" as he usually referred to Virginia, he found the constitution that had been framed in 1776 to be deficient in several respects. First and foremost, it failed as a constitution- as fundamental law that would bind, and therefore limit, legislative power- because it had not been adopted by a special convention. Second, the constitution imperfectly implemented the very principle that it declared to be its chief device for controlling power, the doctrine of the separation of powers. Too much power was concentrated
in the legislature— a state of things which Jefferson fully realized after his unhappy experience as governor— and the legislature itself was imperfectly constituted, chiefly in its unequal representation of the people, a third basic defect. Jefferson sought to correct these defects, and to that end he himself drafted constitutions that he proposed to offer as alternatives. (Mayer 1994, 83-84)

Republicanism, however, meant more than simply abolishing monarchy and framing a constitution which would effectively check the abuse of power through the institutions that it established. Basic to Jefferson's Whig thought was his fear of political power, his conviction that—as he would later express it— "the natural progress of things is for liberty to yield and government to gain ground." (Mayer 1994, 84) A written constitution was an important safeguard, one that Whigs on the other side of the Atlantic lacked, but it alone was insufficient, he believed. The American Revolution "commenced on more favorable ground" because it permitted not only the establishment but also the continuing functioning of a government truly based on popular sovereignty; a government accountable to the people in its day-to-day operations and a people watchful of the government and jealous of their rights. (Mayer 1994, 84)

Jefferson reentered the Continental Congress in the fall of 1783. He did make one major contribution in the year that he served in the Continental Congress. Jefferson chaired the committee that drafted the Ordinance of 1784, which created a national domain out of the area west of
the Appalachian Mountains and established a system for surveying and selling the land that favored actual settlers over speculators. Jefferson prevailed upon Congress to adopt this bold nation-building measure without any constitutional power or authority. The ordinance, along with another adopted in 1785, provided a plan for territorial governments that stressed self-government for the settler. According to the provisions of the ordinances, when Congress opened part of the national domain for sale, the settlers within it were to form a temporary government and adopt the constitution and laws of any state in the Union they chose. When the population of a new area reached 20,000, a convention would be called and a formal constitution adopted. At this point the developing territory could also send a nonvoting delegate to Congress. As soon as the population of the new territory equaled that of the free inhabitants of the smallest of the original thirteen states, the new area could enter the Union as a state and equal partner. To do this, the new state would only have to consent to remain part of the United States, be subject to the laws of the central government, contribute its share to the payment of the national debt, maintain a republican form of government, and exclude slavery after 1800. Although various aspects of this plan were altered in 1787 and afterward, its basic spirit and emphasis on the need to create new, free, and equal self-governing states has determined the development not only of the Old Northwest but of all additional territories in American history. Jefferson placed a great of emphasis on the importance of western development. He
wanted to see America become a continuously expanding "empire for liberty." His stress on self-government and equal partnership stood in marked contrast to the European system of empire and imperialism. 

(Peterson 1986, 122-123)
Jefferson's congressional career ended in May, 1784 when he was appointed minister plenipotentiary to join Benjamin Franklin and John Adams in Paris, on the commission to negotiate treaties of amity and commerce with European states. As a former member of Congress and now foreign diplomat, Jefferson was keenly aware that the current form of government, The Articles of Confederation, needed amending to strengthen national powers. This development had a nationalizing effect upon Jefferson. Increasingly he had to deal with problems facing the United States as opposed to those of Virginia. During his time in Congress and as a foreign diplomat, Jefferson saw three principal features that were lacking under the Articles; the requisite degree of unity needed for conducting foreign affairs and regulating interstate and foreign commerce, a mode of coercing states that failed to observe their obligations, and the separation of powers. (Mayer 1994, 91) As Jefferson put it, “My idea is that we should be made one nation in every case concerning foreign affairs, and separate ones in whatever domestic.” (Boyd 1950, 12:34)

The most serious defect, in Jefferson's opinion, was that relating to commerce. The Articles of Confederation failed to grant Congress the power to regulate the commerce of the several states. Having no original
and inherent power over commerce, Congress could exercise such power only indirectly, by virtue of the ninth article, which authorized it to enter into treaties of commerce with foreign nations. As an American minister his solution was “to take the commerce of the states out of the hands of the states, and to place it under the superintendence of Congress, so far as the imperfect provisions of our constitution will admit,” until such time as “the states shall by new compact make them more perfect.” (Mayer 1994, 92) Jefferson became more aware during this time as events and evidence mounted of the value of a strong central government that had the ability and the energy to require individual states to honor America’s treaty obligations, to protect the country’s vulnerable southern and northern borders and secure the allegiance of the area west of the Allegheny Mountains, to garner respect of foreign countries, and to secure favorable treaties of navigation and commerce. (Peterson 1986, 123)

Further reasons for the necessity of a strong central government via foreign affairs included a hope by Jefferson that through open markets and international cooperation, freer trade could develop. If America had national coordination of trade, the U.S. could act as one nation and so acting not only expand trade abroad but strengthen the bonds of union at home. Indeed, Jefferson asserted that the latter was his primary object. His hopes were quickly disappointed, however. The European courts, with two or three exceptions, rebuffed the American overtures for freer trade; and as the various state legislatures undertook to regulate foreign trade,
Jefferson's political objective was undermined. Jefferson had also seen the infant American republic jeered, kicked, and scoffed at from London to Algiers, all respect for its government annihilated from the universal opinion of its feebleness and incompetence. He had been frustrated in commercial diplomacy even at Versailles; and he and Adams had gone begging to Dutch bankers to keep the confederation afloat. A stronger government, more national in character, with higher tone and energy was therefore necessary to raise the country's reputation in Europe. (Levy 1986, 1015) From a historical perspective, his lifelong recognition that American foreign policy was the one area requiring a strong federal government congealed at this time.

With the regard to the supposed lack of coercive power against delinquent states- in enforcing, for example, contributions of money- Jefferson took the position that it was not necessary that the Articles give Congress that power expressly; Congress could exercise the enforcement power by the law of nature. This was so because the Confederation was a compact among the several states; and as in any other contract,

the right of compulsion naturally results to the party injured by the breach. Thus, when any one state in the American Union refuses obedience to the Confederation by which they have bound themselves, the rest- acting through Congress- have a natural right to compel them to obedience. (Boyd 1950, 5:4)

Finally, with regard to the lack of separation of powers, he argued that in order “to enable the Federal head to exercise the powers given it, to best advantage,” it should be organized as the state governments were,
more or less, “into Legislative, Executive and Judiciary” departments, each exercising the appropriate powers. (Mayer 1994, 93) The legislative and judiciary were “already separated”; the executive, he argued “should also be.” The want of such a separation had “done more harm than all the [other] federal defects put together.” (Mayer 1994, 93) Part of the problem was that Congress was in perpetual session, with a leader who was given little power. This became a source of its debility to make decisions and govern. To remedy the problem of no executive, Jefferson proposed a “Committee of the states” to function as an executive committee, but in late 1786 he expressed doubt whether Congress could ever have “self-denial enough” to go through with this distribution of executive powers to a separate body. (Mayer 1994, 93-94) The plan promptly collapsed under trial. Congress seemed as incapable of exercising the power it already had as it was of obtaining new powers from the state. By advocating for new and additional congressional powers including regulating foreign commerce, raising revenue, and a reorganization of government Jefferson showed that he was no “strict constructionist” where the Articles were concerned. (Levy 1986, 1015)

Despite his explicit recognition of one critical “flaw” and at least two other more easily remediable “defects” in the Articles, Jefferson regarded the Confederation as “a wonderfully perfect instrument.” As he observed in the summer of 1787 that “with all the imperfections of our present government, it is without comparison the best existing or that ever
Jefferson was largely out of touch with the sense of urgency felt by many of his countrymen to reform or replace the Articles of Confederation. For Jefferson, France proved to be the ideal perch from which to observe two of the most significant political events in Western history of the 1780s in what he and others would later call "the age of experiments in governments." (Ellis 1996, 116) From afar it afforded Jefferson a conveniently detached perspective on the debate surrounding the creation of and ratification of the new Constitution of the United States, a debate in which the combination of his distance and the quality of his chief source-James Madison- allowed him to accommodate himself to political ideas that violated his deepest ideological instincts. From close up it provided him with the unique opportunity to witness the coming of the French Revolution and, in the crucible of conversations with several of its staunchest supporters and ultimate victims, to work out the full implications of his truly radical vision of politics. As both a bird's-eye observer of American developments and a ringside witness of French convulsions, in short, he fashioned what were to become endurably Jeffersonian convictions about mankind's tenuous relationship with government. (Ellis 1996, 116)
Jefferson's ongoing correspondence with James Madison and James Monroe had kept him abreast of the growing dissatisfaction with the inherent weakness of the Articles through the federal Congress in Philadelphia. "The politics of Europe render it indispensably necessary that with respect to every thing external we be one nation only, firmly held together," he informed Madison, adding, "Interior government is what each state should keep to himself." (Ellis 1996, 116) As previously mentioned he wanted it known back home in Virginia and in Philadelphia that he favored reform of the Articles of Confederation to enlarge federal jurisdiction over foreign trade and foreign policy but preferred leaving control over all domestic concerns, including taxation, to the particular states. "To make us one nation as to foreign concerns, and keep us distinct in Domestic ones," he wrote Madison, "gives the outline of the proper division of powers between the general and particular governments." (Ellis 1996, 116)

Jefferson nevertheless held a favorable attitude towards the Constitutional Convention which was about to unfold in Philadelphia. He was sincere in expressing his high opinion of the statesmen who met when he referred to the convention as "really an assembly of demigods." While
the convention was sitting, he wrote to George Washington, its presiding officer, and urged that the great objects should be

   to make our states one as to all foreign concerns, preserve them several as to all merely domestic, to give to the federal head some peaceable mode of enforcing their just authority, [and] to organize that head into Legislative, Executive, and Judiciary Departments. (Mayer 1994, 94)

These recommendations were in full accord with the defects Jefferson had perceived in the Confederation and the reforms necessary to correct them that he had written to Madison earlier. He had no idea, however, of the extent to which the convention would go in reforming the national government. Months would pass before Jefferson learned of the outcome because the members, including Madison and Monroe, were sworn to secrecy. (Mayer 1994, 94)

   By 1786 Madison was already contemplating much more drastic changes in the structure of the federal government. Jefferson had inadvertently contributed to such thoughts and perhaps subverted his own ideas on the Constitution by sending over two trunks of books, including the collected works of David Hume, which Madison then proceeded to study in preparation for the Constitutional Convention. The historian Douglass Adair has called Madison’s intensive reading of Hume perhaps the most productive and consequential act of scholarship in American history. (Ellis 1996, 116-117)

   Meanwhile Jefferson was receiving reports from other quarters about an insurrection in western Massachusetts led by a veteran of the
American Revolution named Daniel Shays to protest new taxes imposed by Boston. In the grand scheme of things Shay's Rebellion was a tempest in a teapot, but prominent figures throughout the country interpreted it as a harbinger of incipient anarchy and a clarion call for a more vigorous and fully empowered federal government: "In short, my Dr. Sir," John Jay wrote from Philadelphia, "we are in a very unpleasant Situation. Changes are Necessary, but what they Ought to be, what they will be, and how and when to be produced, are arduous questions." (Ellis 1996, 117) From London, Abigail Adams summoned up the scene of a looming apocalypse. "Ignorant, without conscience or principles," she informed Jefferson, "have led a deluded multitude to follow their standard, under pretence of grievances which have no existence but in their own imaginations." (Ellis 1996, 117)

In retrospect it is clear that both the Shaysites' fear of tyranny and the corresponding fear of observers like Jay and Adams, that America was on the verge of social disintegration were mutually reinforcing overreactions of near-paranoid proportions. Jefferson's response to the entire display was especially revealing both for its clear-sighted and even serene endorsement of popular resistance to government in almost any form and for its eventually famous phrasing: "I hope they pardoned them [i.e. the Shaysites]," he told Abigail. "The spirit of resistance to government is so valuable on certain occasions, that I wish it to be always kept alive...I
like a little rebellion now and then. It is like a storm in the atmosphere.”
(Ellis 1996, 118)

He had first proposed a similar formulation of the problem two months earlier in a letter to Ezra Stiles, the president of Yale. “If the happiness of the mass of the people can be secured at the expense of a little tempest now and then,” he had written Stiles, “or even of a little blood, it will be a precious purchase.” A month later he had written Madison in language almost identical to his message to Abigail. (Ellis 1996, 118)

His boldest formulation came a few months later, in November, 1787, when he told William Stephen Smith that Shay's Rebellion was actually a symptom of America's political health, “What signify a few lives lost in a century or two?” he observed. “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure.” (Ellis 1996, 118) Moreover, those alleged statesmen who wished to use Shay's Rebellion as an occasion to justify more coercive political institutions, he warned “are setting up a kite to keep the hen yard in order.” (Ellis 1996, 118) Jefferson saw it as a sign of strength, rather than weakness, the occurrence of just one rebellion during eleven years of government under the Confederation. These were extremely radical statements, which taken literally- or, for that matter, at all seriously-placed Jefferson far to the left of any responsible political leader of the revolutionary generation. For his remarks suggested that his deepest
allegiances were not to the preservation of political stability but to its
direct opposite. (Ellis 1996, 118)

Perhaps it was in part that Jefferson was so far away from the
American shores and political scene that he made the previous radical and
anarchistic statements. However, there is reason to believe that Jefferson
meant what he said, indeed that his entire way of thinking about
government was different from that of any other prominent American
leader of the time. In January, 1787, while Madison was studying the
classic texts of Hume and Montesquieu in preparation for the
Constitutional Convention later that spring, Jefferson wrote him to share
his own thoughts on the appropriate political models for American society.
While Madison was grappling with questions about political architecture—
how to configure federal and state power; how to design institutions so as
to balance interest groups without replicating the gridlock of the current
government under the Articles of Confederation—Jefferson was thinking
much more grandly, about the very ground on which any and all political
structures must be constructed. While Madison was struggling with the
arrangements of authority in three branches of the government, Jefferson
was identifying three kinds of society in which human beings might
arrange themselves. (Ellis 1996, 119)

Jefferson identified these three societies by writing there was
European society, with governments that ruled by force, usually
monarchical in form, what Jefferson described as “a government of wolves
over sheep.” (Ellis 1996, 119) Then there was American and, to a slightly lesser extent, English society, with governments responsive to the populace as a whole, where “the mass of mankind enjoys a precious degree of liberty and happiness.” (Ellis 1996, 119) Finally there was Indian society, which managed itself without any formal government at all by remaining small and assuring the internalization of common values among all members. If forced to choose, Jefferson preferred the Indian solution, while admitting that it was “inconsistent with any degree of population.” (Ellis 1996, 119) He reiterated the point in a letter to Edward Carrington, a conservative Virginia planter and politician. “I am convinced,” he explained, “that those societies (as the Indians) which live without government enjoy in their gen’l mass an infinitely greater degree of happiness than those who lived under European governments.” (Ellis 1996, 119)

The Jeffersonian ideal, in short, was not a specific version of balanced republican government. It was a world in which individual citizens had internalized their social responsibilities so thoroughly that the political architecture Madison was designing was superfluous. Though prepared to acknowledge the need to make necessary compromises with his ideal for practical reason- the size of the American population and the vastness of its territory obviously demanded some delegation of authority beyond the sovereign self- he did so grudgingly. And the elaborate reasoning about constitutional structure that so captivated political thinkers like Madison and the other delegates at the Convention never
animated the best energies of his mind, which drew its inspiration from a utopian vision of the liberated individual resisting all external coercion and regarding all forms of explicit government power as a necessary evil. (Ellis 1996, 118-119)

All this helps explain his initially hostile reaction to the news leaking out of Philadelphia about the shape of the new American Constitution in the summer of 1787. Madison had tried to prepare him for what was coming, suggesting that America needed an energetic federal government “with a negative in all cases whatsoever over the local legislatures.” (Ellis 1996, 119) But Jefferson resisted the suggestion and questioned the decision to make wholesale changes in the current, albeit inadequate, national government: “The negative proposal...on all acts of the several [i.e. state] legislatures is now for the first time suggested to my mind,” he told Madison. “Prima facie I do not like it. It fails in an essential character [by proposing] to mend a small hole by covering the whole garment.” (Boyd 1950, 11:219-220) He expressed the same apprehension to Adams, claiming that “the good of the new constitution might have been couched in three or four articles to be added to the good, old and venerable fabrick, which should have been preserved even as a religious relique.” (Ellis 1996, 120) Edward Carrington also tried to prepare him for a fundamentally new kind of federal government, not just a minor revision of the Articles of Confederation. “The Ideas here suggested,” Carrington wrote in June, 1787, “are far removed from those which prevailed when
you were amongst us, and as they have arisen with the most able, from an actual view of events, it is probable you may not be prepared to expect them." (Ellis 1996, 121) Jefferson's location in Paris rather than Philadelphia proved a major advantage, by providing time to adjust to political ideas that ran counter to his own and that he would in all likelihood have opposed if present. (Ellis 1996, 121)

Jefferson did conceal his worries about what was brewing in Philadelphia from all his European correspondents, preferring to play his customary role as America's champion. "Our Federal convention is likely to sit till October," he wrote a French friend,

and we may be assured their propositions will be wise, as a more able assembly never sat in America. Happy for us, that when we find our constitution defective and unsufficient to secure the happiness of our people, we can assemble with all the coolness of philosophers and set it to rights, while every other nation on earth must have recourse of arms...(Boyd 1950, 12:113)

Meanwhile Madison apologized for his inability to provide a detailed account of the ongoing deliberations. "I am still under the mortification of being restrained from disclosing any part of their proceedings," he wrote in July. "As soon as I am at liberty I will endeavor to make amends for my silence and ... give you pretty full gratification. I have taken lengthy notes of every thing that has yet passed..." (Boyd 1950, 11:600)

Madison was as good as his word. His letter of October 24, 1787, provided Jefferson with a lengthy report on the wide-ranging deliberations at the Constitutional Convention and a truly remarkable appraisal of the
constitutional issues at stake. He described how the delegates had tried “to draw a line of demarkation which would give to the General Government every power requisite for general purposes, and leave to the States every power which might be most beneficially administered to them.” (Ellis 1996, 121) This formulation blurred the relative powers of federal versus state authority, but in terms that clearly extended federal jurisdiction over domestic policy in ways that Jefferson staunchly opposed. Madison then went on to analyze the intricate and purposefully ambiguous and the different versions of representation. “Those who contend for a Simple Democracy, or a pure republic, actuated by a sense of the majority, and operating within narrow limits,” he observed, “assume or suppose a case which is altogether fictitious.” (Ellis 1996, 121) What Madison was terming “fictitious” was in fact the essence of Jefferson’s thinking about government. Jefferson acknowledged as much in his response to Madison. “I own I am not a friend to a very energetic government,” he confessed. “It is always oppressive... After all, it is my principle that the will of the Majority should always prevail.” (Ellis 1996, 122) Madison did not write back to explain that, at least as he saw it, the Constitution had been designed to subvert mere majority rule on the assumption that the chief threat to individual liberty in America was likely to come from that direction. Jefferson would have found such an argument unintelligible, since he found it impossible to regard popular majorities as dangerous or to think about the powers of government in positive ways. Madison’s entire
emphasis on social balance was at odds with Jefferson’s commitment to personal liberation. (Ellis 1996, 122)

Jefferson’s initial reaction when an actual copy of the Constitution came to him in France was one of surprise and uncertainty. In November, 1787 he wrote to John Adams, “How do you like our new constitution? I confess there are things in it which stagger all my dispositions to subscribe to what such an assembly has proposed.” (Mayer 1994, 95) He particularly objected to the office of president, which he characterized as “a bad edition of a Polish King” because the incumbent could be elected “from 4 years to 4 years, for life,” making the office “worthy of intrigue, of bribery, of force, and even of foreign interference.” (Mayer 1994, 95) He also feared that once in office such a president, “possessing the military force of the Union, without the aid of check of a council,” would not be “easily dethroned.” (Mayer 1994, 95) Jefferson however wrote to George Washington to assure the man who was virtually certain to be elected the first president that his worries were about the future, after Washington had left the office. They were also intensified by his European experience.

I was much an enemy to monarchy before I came to Europe, he apprised Washington, and was ten thousand times more so now since I have seen what they [i.e. kings] are... I can further say with safety there is not a crowned head in Europe whose talents or merits would entitle him to be elected a vestryman by the people of any parish in America. (Ellis 1996, 123)

Jefferson made other comments about the Constitution over the next several months. He wrote to Edward Rutledge his fear that the convention
had “run from one extreme to the another.” “Our government wanting bracing,” he observed, while warning that “we must take care... not to brace too high.” (Mayer 1994, 95) He wrote to John Adam’s son-in-law William Stephens Smith, “There are very good articles in it: and very bad. I do not know which predominate.” (Mayer 1994, 95) The clearest characterization of his stance was made in a letter to Edward Carrington in December, 1787: “As to the new Constitution I find myself nearly a Neutral. There is a great mass of good in it, in a very desirable form: but there is also to me a bitter pill, or two.” (Mayer 1994, 95)

Perhaps the most thorough exposition of Jefferson’s views on the new Constitution is found in a letter to James Madison dated December 20, 1787. Jefferson first stated what he liked about the document:

I like much the general idea of framing a government which should go on of itself peaceable, without needing continual recurrence of the state legislatures. I like the organization of the government into Legislative, Judiciary and Executive. I like the power given the Legislature to levy taxes; and for that reason solely approve of the greater house being chosen by the people directly. For tho’ I think it a house chosen by them will be very illy qualified to legislate for the Union, for foreign nations &c. yet this evil does not weigh against the good of preserving inviolate the fundamental principle that the people are not to be taxed by representatives chosen immediately by themselves. I am captivated by the compromise of the opposite claims of the great and little states, of the latter to latter to equal, and the former to proportional influence. I am much pleased too with the substitution of the method of voting by persons, instead of that voting by states: and I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power. (Mayer 1994, 96)
In this letter to Madison, Jefferson thus expressed a basic satisfaction with the strengthened national government established by the Constitution, the separation of powers, the bicameral organization of the Congress, and— at least with respect to the president’s veto power—the system of checks and balances. These elements comported with his own general idea of what a good constitution should provide (as evidenced by his 1783 draft constitution for Virginia) as well as his understanding of what was needed to remedy the defects in the Articles of Confederation. (Mayer 1994, 96)

Jefferson then specified what he did not like about the Constitution. There were two chief defects that Jefferson noted. The first was the absence of a bill of rights, something which “the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inference.” (Mayer 1994, 96) The second was the absence of rotation in office, particularly in the case of the president. As in his letter to Adams from November, he predicted to Madison that the president, if perpetually eligible for reelection, would be “an officer for life,” and again stated that “the European nations therefore would attempt to influence elections in America.” (Mayer 1994, 96) He acknowledged to Madison that he was at a loss as to how to correct these two defects, whether to hope for amendment or to consider another convention, and he expressed his willingness to acquiesce in whatever public opinion demanded by stating,
After all, it is my principle that the will of the Majority should always prevail. If they approved the proposed Convention in all its parts, I shall concur in it cheerfully, in hopes that they will amend it whenever they shall find it works wrong. (Mayer 1994, 97)

In other correspondence at this time, Jefferson identified the same two basic defects in the proposed constitution. After further reflection, by early February, 1788 he decided not to press the objection to the perpetual reeligibility of the president, perceiving no objections in America. He was still astonished by the omission of a bill of rights, however; he despaired to find “such a change wrought in the opinions of our countrymen since I left them” that they would “be contented to live under a system which leaves to their governors the power of taking from them” fundamental rights. “This is a degeneracy in the principles of liberty to which I had given four centuries instead of four years.” (Ellis 1996, 123) Determined to press this point, he hoped that nine states would ratify the Constitution so that it would go into force, but that four states would reject it until a bill of rights was added. He advised William Stephens Smith,

Were I in America, I would advocate it warmly till nine should have adopted and then as warmly take the other side to convince the remaining four that they ought not to come to it till the declaration of rights is annexed to it. Such a course of action would be the happiest turn the thing could take, since it would at once secure all the good of the new Constitution and yet procure so respectable an opposition as would induce the accepting states to offer a bill of rights. (Ellis 1996, 123)

By the summer of 1788 he backed away from that position, endorsing ratification but only on the condition that a bill of rights be added once the
new government was in place. When Edward Carrington sent him a copy of the recently published *Federalist Papers*, Jefferson sent his compliments to Madison, one of the main contributors, praising the work as "the best commentary on the principles of government which was ever written" and conceding that "it has rectified me in several points. It is a good canvas, on which some strokes only want retouching." (Ellis 1996, 123-124)

In 1789, after the struggle over ratification had crystallized into a political party struggle, Jefferson was asked by Francis Hopkinson if he was a staunch Federalist. Jefferson replied, "I am not a Federalist," in protest, emphasizing his desire never to submit "the whole system of my opinions to the creed of any party of men"; but he added, "I am much further from [the party] of the Antifederalists," explaining that he "approved, from the first moment, of the great mass of what is in the new constitution" despite some points of disapprobation. He concluded,

I am neither federalist nor antifederalist;... I am of neither party, nor a trimmer between parties. Such an addiction to parties is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all. (Ellis 1996, 124)

In a very real sense, this statement, albeit unintentionally, captured the essence of Jefferson's ultimate position on the Constitution and indeed on all specific constitutional schemes. He found them excessively technical configurations of political power that did not speak directly to his own political creed, which transcended categories like "Federalist" and "Antifederalist" by inhabiting a more rarefied region where political
parties, constitutional distinctions, and even forms of government themselves were rendered irrelevant. His lifelong attitude toward the constitutional settlements of 1787-88 remained ambiguous and problematic. The trouble with most Europeans, he wrote to Francis Hopkinson, was that they had been bred to prefer “a government which can be felt; a government of energy. God send that our country may never have a government, which it can feel.” (Ellis 1996, 124) Madison and most Federalists believed that the new American Constitution was admirable for precisely the energetic qualities Jefferson denounced. As for Jefferson, his mind and heart longed for a world where government itself had disappeared. Given the terms of the constitutional debate that raged in America in the 1780s, the one issue that best embodied Jefferson's political convictions was the insistence on a bill of rights that transcended all the Madisonian complexities. That was pretty much what Jefferson chose to emphasize. (Ellis 1996, 124-125)

While Jefferson was in France he wrote a letter on September 6, 1789 that was to be one of the most famous letters in his vast correspondence to Madison. While witnessing the French Revolution from Paris he wrote, “The course of reflection in which we are immersed here on the elementary principles of society has presented the question to my mind.” (Ellis 1996, 131) The question itself was not entirely new. It was “Whether one generation of men has a right to bind another,” which Jefferson claimed had an implication that had not been sufficiently
appreciated in either Europe or America. (Ellis 1996, 131) His answer to the question had the kind of unequivocal ring that he normally reserved for documents like the Declaration of Independence. “I set out on this ground,” he announced, “which I suppose to be self-evident, that the earth belongs in usufruct to the living.” (Ellis 1996, 131) Exactly what Jefferson meant by this proposition has been the subject of endless debate among historians for some time. In the letter itself Jefferson seemed to be advocating some version of generational sovereignty. “We seem not to perceive,” as he put it to Madison, “that, by the law of nature, one generation is to another as one independent nation is to another.” (Ellis 1996, 131) He produced elaborate calculations based on Buffon’s demographic tables to show that, on average, a generation lasted about nineteen years. It therefore followed from the principle—“the earth belongs always to the living generation”—that all personal and national debts, all laws, even all constitutions, should expire after that time. (Ellis 1996, 131)

Madison, always the gentle critic of Jeffersonian ideas, complimented Jefferson on his “interesting reflections,” then proceeded to demolish the idea of generational sovereignty, which was not really an idea at all, he suggested, but rather a dangerous fantasy. In the course of presenting his argument, Jefferson had asked Madison to imagine, “a whole generation of men to be born on the same day, to attain mature age on the same day, and to die on the same day.” (Ellis 1996, 131) Here, Madison observed not so diplomatically, was the chief clue that Jefferson
was engaged in magic more than political philosophy. For there is not, and never can be, a generation in Jefferson's pure sense of the term. Generational cohorts simply do not come into the world as discrete unites. There is instead a seamless web of arrivals and departures, along with an analogous web of obligatory connections between past and present generations. These connections are not only avoidable but absolutely essential for the continuation of civilized society. To Madison it struck him as an utterly irresponsible and positively dangerous example of speculation. It could undo all of the painstaking work he and his Federalists had done the past two years in promoting the stability and long-term legality that the new Constitution was designed to assure. The notion that all laws, contractual obligations and hard-won constitutional precedents would lapse every nineteen or twenty years was a recipe for anarchy. (Ellis 1996, 131-132)

As usual, Jefferson listened to Madison's advice. He never put forward his generational argument as a serious legislative proposal, and he refrained from ever mentioning the matter to Madison again. But whatever practical problems the idea posed, whatever its inadequacies, as a realistic rationale for legal reform, he clung to it tenaciously, introducing it in conversations and letters for the rest of his life. If, as Madison had suggested, the core of the idea was incompatible with the way the world actually worked, it was compatible with the way Jefferson's mind worked. Indeed, there is no single statement in the vast literature by and about
Jefferson that provides as clear and deep a look into his thinking about the way the world ought to work. The notion that “the earth belongs to the living” is in fact a many-faceted product of his political imagination that brings together in one place his essential obsessions and core convictions. (Ellis 1996, 132-133)

The idea does come up in Jefferson’s correspondence between January and July, 1789 with LaFayette. The major topic was the drafting of the Declaration of Rights. This prompted both men to think about what LaFayette called the “right of succeeding generations.” At one level the phrase was designed to assure subsequent constitutional reform, in the form of either amendments or conventions pioneered by the new American states. At a deeper level the thinking was poised at the current French political crisis that had been prompted by fiscal problems that now required the present generation to assume the accumulated debts of its predecessors. Inherent in the French political situation was a heightened sensitivity toward the burdens of the past imposed by the present, especially in the form of debt and also in the form of legacies like aristocratic privileges. Jefferson and LaFayette seemed to be moving toward a built-in constitutional mechanism that would relieve future generations from the same burden. (Ellis 1996, 133-134)
CHAPTER VII

JEFFERSON'S REPUBLICANISM

Thomas Jefferson's theory on the American system of government and the Constitution is very complex at best. Some of his ideas on government were radical, for example, his views promoting popular resistance against government tyranny and his generational sovereignty argument. His ideas were not stagnant. Always at the center of his philosophy however, were his beliefs in expanding republican liberty and containing arbitrary power. Jefferson, like many of his contemporaries, was committed to the ideas of republicanism. The years between 1776 and 1783 were crucial to Jefferson's thoughts on republicanism, for it was then that he fashioned his basic understanding of what American republicanism should be. During these years he was deeply involved in the affairs in the new American nation. He attended Congress, crafted the Declaration of Independence, and became governor of Virginia. Jefferson's republicanism was shaped profoundly by the particular circumstances and revolutionary experiences of his native state, Virginia. It was his intimate knowledge of Virginia and its people that gave his revolutionary concept of republicanism vividness and distinctive meaning. (Peterson 1986, 61)

We have seen Jefferson's understanding and commitment to republicanism through his thoughts, words, and actions on a more local
scale- Virginia. The following is a summary of what has been written thus far about Jefferson's alignment with the republican philosophy throughout his career. Jefferson believed that abolishing the English monarchy from the shores of America as well as striking the idea of a monarchy being reestablished here was important because it cleared the way for the more positive task of building a republican political order. These ideas also trace its origin back to the Whig ideology that Jefferson learned as a young man. Jefferson believed that it was essential to limit and contain governmental power. He was not an advocate for or seeking to promote an energetic government. Jefferson and others felt that governmental power posed a continuous threat to human liberty. Liberty signified power's absence.

Jefferson grounded his republicanism in the doctrine of a fundamental law, a written constitution existing prior to government and defining what government should be. In his later years Jefferson wrote in 1816 to LaFayette a statement which expressed this belief saying, "To establish republican government, it is necessary to effect a constitution in which the will of the nation shall have an organized control over the actions of its government, and its citizens a regular protection against its oppressions." (Ford 1892, 7:18)

His concern to limit and define government also explains his emphasis on dividing government into distinct branches; executive, legislative and judicial capable of standing watch over one another. Jefferson sought a pattern close to that of his Whig colleagues and the
ancient Saxon government whereby a chief magistrate (executive) would administer the laws but have few powers and be limited to the number of terms in office, the court of council (legislative) which made laws in an assembly and represented all of the people, and a court of law (judicial) which enforced laws. Jefferson did not express what role the judiciary should play but did hint that a judge should be a "mere machine" in enforcing the will of the democratically elected legislatures and that a judge's power to interpret the meaning of laws should be sharply limited. Jefferson himself advocated a strict constitutionalist stance though we have seen this bend on occasion.

Popular sovereignty was important in any form of government that Jefferson wished to see. To him government had no existence apart from the people but derived its consent and authority directly from them. Government should also be held accountable to the people in its day-to-day operations. Jefferson disagreed with the origins of the Virginia Constitution in 1776 because government officials, not delegates elected by the people for the express purpose of writing a constitution, wrote it. Frequent elections and term limits were part of any republican government. So too was accountability. Freedom of speech, the press, and other rights demanded by Jefferson advocating a Bill of Rights kept a free flow of information about government officials and their behavior. Constraining thought and expression violated human nature.
Jefferson embraced the doctrine of political equality more fully than many of his revolutionary peers particularly the elite. His ideas for the legislative body included that the lower house should represent the people and have proportional representation, while the upper house should be composed of virtuous and wise men being appointed- and not based on aristocrats or elites. Both houses should also have term limits. We see republicanism and political equality expand with Jefferson’s Ordinance of 1784 which provided for new territories entering the Union and becoming equal with the original thirteen states. Other ideas for political equality included near universal adult male suffrage, the abolition of primogeniture and entail, an adherence to majority rule, and a bill designed to implement public education which would provide all young men with basic literacy and progressively filter out a leadership elite.

The brand of government he wished for America, republicanism, was thought unattainable on a national scale. It was a central tenet of revolutionary belief that republics were viable only in small, contiguous areas where society was relatively homogeneous and government could be kept manageable. The reasons for this were simple. Only powerful governments, it was believed, could effectively administer large areas, and power was regarded as the bane of republics. The economic and social differences characteristic of large countries were understood to generate “factions,” organized private interests that sought their own advantage at the expense of the public good. Faction was the cancer of republicanism, for
it eroded people’s sense of public duty— their willingness to forego private interest, if need be, for the public good— and generated civic strife. “Public virtue” was the term for this self-sacrificing stance. In republics, where kings and aristocracies, armies and established churches—the traditional agencies of social control—were missing, such conflict easily spiraled out of control into civil war. Republican theory, then, required that no area larger than an individual state could be encompassed by a republican system.

As we have read, not only did we grow into a nation via the American Revolution, the Articles of Confederation and the Constitution but Jefferson also grew to become a national figure. In the near future he would serve as a foreign diplomat, a cabinet member, a vice president and a two-term president. This new, national context of his public life forced Jefferson to reconsider virtually every important principle of his republican belief—his attitudes toward central government, political equality, and problems posed for republicanism by economic and social development. We see, for example, that by 1784 Jefferson was advocating a policy, “One nation in every case concerning foreign affairs, separate ones in whatever domestic.” (Boyd 1950, 12:34)

Compared to Virginia, the national republic was geographically vast and politically complex. Jefferson had to deal with many of his peers who shared the belief that if republicanism was to be brought on a national scale, this “experiment with liberty” would be risky. A question facing Jefferson and advocates of republicanism was, how could a nation as large
as America support and sustain a republican form of government?

Jefferson remained the optimist however. In a 1797 letter to James Sullivan expressed hope for an America with a republican form of government when he wrote,

The great body of our native citizens are unquestionably of the republican sentiment...Our countrymen left to the operation of their own unbiased good sense, I have no doubt we shall see...our citizens moving in phalanx in the paths of regular liberty, order, and a sacrosanct adherence to the Constitution. (Lipscomb 1903, 9:378)
CHAPTER VIII

SECRETARY OF STATE AND VICE PRESIDENT

Before Thomas Jefferson returned from Paris to the United States, the French Revolution occurred. At first Jefferson was wary that the Revolution might go too far and bring about a conservative reaction. But as it grew more radical, particularly with the adoption of the Declaration of the Rights of Man and Citizen, he was tremendously excited by the possibility of a major European country following the American example of overthrowing a monarchical government. Among other things, the actions of the French reinvigorated his faith in the yet only partially fulfilled republican promise of the American Revolution. In this he differed with the growing political conservatism of many of the leading supporters of the adoption of the United State Constitution, who had become increasingly skeptical about the democratic implications of the principles of 1776. (Peterson 1986, 123-124)

Upon his arrival in the United States, President George Washington and James Madison urged Jefferson to accept the position of secretary of state under the new government. From the beginning Jefferson found himself opposed to the policies of Alexander Hamilton, who had been appointed secretary of the treasury. The split began on foreign policy issues, but it quickly went beyond these and soon involved basic
ideological and constitutional considerations. Hamilton favored closer ties with England and the centralization and vigorous enforcement of the federal government's power. Jefferson, on the other hand, wanted America to maintain close ties to France, whose aid after 1776 had been crucial in securing independence and whose own revolution he viewed as "the first chapter in the history of European liberty." (Peterson 1986, 124) Also, like many Americans, he feared the concentration of power in the hands of the national government, especially on domestic matters. The American Revolution, after all, was fought to deny the authority of a central government- the only one that the Americans had ever known, Great Britain. It was natural therefore to associate the idea of a central government with England's arbitrary actions during the 1760s and 1770s. Further buttressing and giving direction to this experience was the ideology of the Revolution, which stressed the tensions between liberty and power. Hamilton, Jefferson believed, did not understand these precepts; in fact, given Hamilton's preoccupation with the accumulation and use of power, he showed outright hostility to them and was fully capable of betraying the principles of the Revolution. (Peterson 1986, 124)

Although Jefferson reluctantly went along with the funding of the national debt and the assumption of the state debts, he opposed Hamilton's proposal to establish a national bank. After Hamilton, as secretary of the treasury, submitted his proposal for a national bank to Congress in December, 1790, Jefferson privately began to express his concerns about
Hamilton's policies. In Congress Madison openly led the opposition to the bank bill but failed to block the measure, which passed both houses in February, 1791, and was sent to the president. Before deciding whether to sign the bill, Washington sought opinions on its constitutionality, first from Attorney General Randolph and then from both Jefferson and Hamilton. These confidential memoranda prepared for the president's use were not made public. Nonetheless, they were immensely important papers and in time became known. Their importance lies less in the evidence of the emerging split between the two cabinet members than in the constitutional interpretations they both advanced. The reasoning of each officer would have far-reaching influence in American history. Jefferson's continued arguments for strict construction laid the foundation for the states' rights interpretation of the Constitution, while Hamilton's opinions served as the model that Chief Justice John Marshall would later follow in giving judicial sanction to the doctrine of implied powers. (Cunningham 1987, 164-165)

Jefferson's concise brief arguing that the bill to charter a national bank was unconstitutional rested on the dictum of the still-unratified Tenth Amendment that "the powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively, or to the people." (Cunningham 1987, 165) Jefferson considered this provision to be the foundation of the Constitution. He insisted that "to take a single step beyond the boundaries thus specially
drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.” (Cunningham 1987, 165) The incorporation of a bank had not been delegated to the United States by the Constitution. He first examined the specifically enumerated powers of Congress, particularly the powers to tax, to borrow money, and to regulate commerce, and concluded that the chartering of a bank was not included among any of the enumerations. He then considered the general phrase of the Constitution that identified the purpose of the taxing power as “to pay the Debts and provide for the common Defence and general Welfare of the United States.” (Cunningham 1987, 165) Congress, he said, was to levy taxes only for these purposes, not for any purpose they pleased. “In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose.” (Cunningham 1987, 165) To interpret this provision in any other way would reduce the Constitution to “a single phrase, that of instituting a Congress with power to do whatever would be for the good of the U.S. and as they would be the sole judges of good or evil, it would be also a power to do whatever evil they pleased.” (Cunningham 1987, 165)

Jefferson next turned to the constitutional provision giving Congress the authority to make all laws necessary and proper for carrying into execution its enumerated powers. He insisted that this key clause be read strictly. A bank was not necessary for Congress to carry into execution any of its enumerated powers and therefore was not authorized
by the Constitution. It mattered not how useful or convenient a bank might be in collecting taxes or borrowing money; Congress was restricted to only that which was necessary. Jefferson argued that the word ‘necessary’ meant that the means to carry out delegated powers must be indispensable and not merely convenient. Jefferson stated, “Otherwise there was nothing which ingenuity may not torture into a convenience, in some way or other, to some one of so long a list of enumerated powers.” Congress, he concluded, was limited to “those means without which the grant of the power would be nugatory.” (Cunningham 1987, 165)

In offering his opinion to the president, Jefferson also gave his interpretation of the president’s veto power. He maintained that the presidential veto power was “the shield provided by the constitution to protect, among other things, the rights of the states.” (Mayer 1994, 197) Jefferson advised Washington that “unless the President’s mind on a view of every thing which is urged for and against this bill, is tolerably clear that it is unauthorized by the constitution,” he should give the benefit of doubt to Congress and sign the bill. (Mayer 1994, 197) Jefferson added, probably more to reinforce his negative assessment of the bill than as a mere aside, that “it is chiefly for cases where they [Congress] are clearly misled by error, ambition, or interest, that the constitution has placed a check in the negative of the President.” (Mayer 1994, 197) The national bank was another example of the strict construction of the Constitution and supremacy of the legislative branch that Jefferson advocated. As
president, Jefferson would follow the rule he advocated to the first president in regard to the use of the veto power, and in eight years he would never employ the executive veto. (Cunningham 1987, 166)

In sum, Jefferson's opinion on the constitutionality of the bank bill presented a theory of interpretation of the Constitution which assumed that the legislative powers of the United States, vested in Congress under Article I, were strictly limited to those powers enumerated in section 8 of that article. He interpreted "necessary and proper" fairly strictly, although the opinion on the bank bill suggests that he realized the line between those means that were absolutely necessary and those that constituted mere conveniences was not a clear one and that, in most questions, the power proposed would likely fall somewhere between these two poles. Jefferson's definition of 'necessary means' - "those means without which the grant of the power would be nugatory" - clearly, however, put the burden on the proponents of a new federal measure. Where the measure proposed clearly interfered with state law, as Jefferson argued was the case with the bank bill, "nothing but a necessity invincible by any other means" could justify it. (Mayer 1994, 197)

As Dumas Malone has observed, the theory of constitutional interpretation revealed in Jefferson's opinion on the bank bill must be understood within the context of his general attitude toward public law. "To him laws in general, and constitutions in particular, were shields against tyranny; and he coupled a positive faith in human beings with a
predominantly negative attitude toward political agencies and institutions." (Malone 1948, 2:342) Jefferson certainly was no foe to change; after all, he was the man who believed that each generation has the right to govern itself and who accordingly favored the revision of constitutions every twenty years. He nevertheless feared new interpretations of existing law- by any public functionary, legislative, executive, or judicial- as the instrument of change. Whig principles of government had taught him that it was the inevitable tendency of those in power, however well intentioned, to seek to expand their powers at the expense of individual liberties. For this reason he tended to be a literalist, even with respect to statute law, but particularly with respect to fundamental law as embodied in constitutions. (Mayer 1994, 194)

Although Jefferson's argument on the bank bill was to resonate throughout American history, it failed to convince President Washington, who gave his approval to the bank. Unhappy with the pro-English and what he viewed as excessively nationalistic policies of the administration under Hamilton's leadership, Jefferson found himself increasingly sympathetic to the growing opposition in Congress. This placed him in a difficult position, for not only was he opposed to the policies of the administration in which he held a prominent office but, as he had stated earlier in his career along with virtually everyone else in his generation, Jefferson did not like the idea of factions or political parties. Factions or parties had not been anticipated by the framers of the Constitution, and no
provision had been made for them. In fact, in the late eighteenth century the idea of a loyal opposition had not developed in America, and most people viewed an organized political opposition as dangerous and subversive. However, two political parties were being formed—the Federalists led by Hamilton and the Republicans with Jefferson and James Madison as influential spokesmen. Jefferson tried to mitigate this breach of ideology somewhat by stressing his loyalty to President Washington even though he opposed Hamilton’s policies. But it was not a satisfactory solution, and when his influence in the administration continued to wane sharply, he resigned his post as secretary of state, withdrew from politics, and retired to his beloved Monticello to put his private affairs in order. (Peterson 1986, 124-125)

President Washington’s decision not to seek a third term in 1796 opened the way for the first contested election for the presidency under the United States Constitution. Reluctantly, and with some trepidation, Jefferson agreed to be the Republican standard-bearer against John Adams, who ran as a Federalist. This did not signify an acceptance on his part of the idea that political parties were a positive good. Rather, Jefferson justified his involvement with an organized opposition on the grounds that the Federalists had subverted the Constitution and strayed from the true principles of the Revolution. Adams was victorious, but Jefferson captured the vice-presidency. This result of the election of 1796 was a clear indication of how unprepared the framers of the Constitution
were for the development of political parties. Under the original terms of
the Constitution, they anticipated that the ablest man running would
become president and that the second ablest man would become vice
president and heir apparent; they never expected that the two might
represent antagonistic points of view. (Peterson 1986, 125)

Jefferson liked and respected John Adams a great deal. He had
worked well with him in the Continental Congress in the mid-1770s and in
the diplomatic corps in the late 1780s, and he hoped they could cooperate
now, in the best interests of both the country and the Constitution. But
Adams’ hostility to France quickly drove a wedge between the two men,
and when, following the XYZ affair, Adams put the country on a war
footing by building up the army and the navy, and moved through the
Alien and Sedition Acts to suppress public criticism of his policies,
Jefferson became alarmed. He feared, in particular, that the
administration intended to use the military to crush its domestic
opposition, and he believed the Alien and Sedition Acts were a violation of
the First Amendment. (Peterson 1986, 125) Jefferson felt that these
Federalist enactments had two chief purposes- to undermine the support
the Jeffersonian opposition was receiving from French refugees, recent
immigrants, and resident aliens -the Alien Act and to stifle the
these laws as “an experiment on the American mind, to see how far it will
bear an avowed violation of the constitution.” (Mayer 1994, 201) Although
never tested definitively in the Supreme Court, the Sedition Act was recognized and implemented by the lower federal courts. (Levy 1992, 275)

The question for Jefferson and the Republicans was how to oppose these measures effectively. It made no sense to go into the courts, since they were completely under Federalist control. Although throughout the country various Republicans denounced these measures in speeches, pamphlets, and newspapers, this kind of opposition was both ineffective and unofficial. Seeking to express their disapproval through a legally constituted forum, Jefferson and James Madison secretly prepared two separate sets of resolutions to be submitted to, respectively, the Kentucky and Virginia legislatures, both of which were under Republican control. (Peterson 1986, 125)

The Virginia and Kentucky Resolutions expressed many things. They denounced the Alien and Sedition Acts as unconstitutional, stating that they nullified the First Amendment guarantees of speech and the press. Their documents called upon all states to declare the Alien and Sedition Acts null and void and urged Congress to repeal them on the grounds that the federal government had been created by a “compact” among the sovereign states in 1787-88 and therefore possessed only those powers specifically delegated to it by the states. The Kentucky and Virginia Resolutions also took issue with the Federalist claim that the United States Supreme Court was the exclusive and final arbiter of constitutional questions. As Jefferson argued in the Kentucky Resolutions,
the Court was a creature of the Constitution and to give it the power of judicial review would be to make "its discretion, and not the Constitution, the measure of its powers." (Peterson 1986, 125) According to the Kentucky and Virginia Resolutions, should the federal government assume a power not granted to it, each state, as a party to the compact, had the right to declare the law unconstitutional; and since Congress exceeded its constitutional powers when it adopted the Alien and Sedition Acts, the state of Kentucky declared these to be "not law" and "altogether void and of no force." (Peterson 1986, 125-126)

Of the two sets of resolutions, Jefferson's for Kentucky was the more extreme. He used the word 'nullification' in his draft, although the Kentucky legislature omitted it when it formally passed the resolutions. The discovery of this in the 1820s allowed John C. Calhoun to link the states'-rights doctrine as promulgated in the Kentucky and Virginia Resolutions to slavery, succession, and nullification when he began to espouse it the late 1820s and early 1830s. In the end, the question of whether a state or the United States was the final arbiter on constitutional questions would be settled by the Civil War. (Peterson 1986, 126)

Upon hearing of the Virginia and Kentucky Resolutions, the states north of Virginia repudiated the notion of nullification as well as the compact theory and called upon the federal judiciary rather than the states to decide upon matters of constitutionality. As the Rhode Island legislature would put it, Article III of the Constitution "vests in the Federal Courts,
exclusively, and in the Supreme Court, ultimately, the authority of
deciding on the constitutionality of any act or law of the Congress of the
United States.” (Levy 1992, 276) In an indirect way, the Virginia and
Kentucky Resolutions helped to pave the way for *Marbury v. Madison*
(1803) which was the Supreme Court’s first clear assertion of its power of
judicial review. (Levy 1992, 276)

In appraising the Virginia and Kentucky Resolutions we can see
that they were replete with his principles of constitutionalism and
republicanism. These include Jefferson’s ideas of popular sovereignty via
defending civil liberties, support for the integrity of the states, limited
government, due process of law, faithfulness to the language of the written
constitutional text and a strict constructionist adherence, fear of federal
“consolidation,” an abhorrence for judicial supremacy, and the importance
of having an authority located somewhere- in this case, the states- with
jurisdiction to declare federal laws unconstitutional.

The rhetoric of the Kentucky and Virginia Resolutions was a good
deal more extreme than their reality, however. They were never meant to
be a prescription for action. Even though both states declared the Alien
and Sedition Acts to be unconstitutional, no official attempt was made to
prevent the enforcement of the laws by federal officials within the
boundaries of Kentucky and Virginia. The resolutions were issued for
political effect: to rally the Republican opposition, to reaffirm the
revolutionary tradition wherein the defense of personal and civil liberty
was joined to state's rights, and to offer a theory of the origins of the national government that undercut the constitutional basis for the Federalist programs of centralization. In this sense the resolutions were an enormous success, as they played an important role in helping Jefferson obtain the presidency in 1800. (Peterson 1986, 126) The longer picture for the nation however was that in appealing to states' rights and state resistance- interposition or nullification or succession- Jefferson struck a course potentially as dangerous to the Constitution and the Union as the resolutions were in bracing civil and political liberty.
CHAPTER IX

THE REVOLUTION OF 1800

In 1800 John Adams and Thomas Jefferson faced each other again in the race for the presidency. The election of 1800 placed a severe strain on both the United States Constitution and the Union it created. The campaign was a bitter one, and while John Adams failed in his bid for reelection, he was only defeated by eight electoral votes. Moreover, the well-organized Republican electors each cast a vote for both Jefferson and Aaron Burr, the Republican vice-presidential candidate. This resulted in a tie, and it meant the election would have to be decided by the lame-duck Federalist-dominated House of Representatives, with each state delegation casting one vote. A deadlock ensued when a number of Federalists conspired to make Burr president. Outraged, some of Jefferson’s supporters began to talk of resorting to military force to ensure that the will of the people by carried out. Ironically it was Jefferson’s old foe, Hamilton, who now came to his aid. Hamilton, more fearful of Burr than of Jefferson, used his influence with Federalists to secure Jefferson’s election. Finally, on February 17, 1801, after thirty-six separate ballots, Jefferson became the third president of the United States. (Peterson 1986, 126)

Jefferson’s elevation to the presidency a short time later raised several significant constitutional and ideological problems. It was the first
time that an opposition party had come to power under the United States Constitution. Did it mean simply a change in the policies and personnel of the new government, or did it mean a change in the government itself? To what extent was the Republican victory—which involved not only the presidency but both houses of Congress as well—a mandate to the new administration to do whatever it wanted? Was it obliged, after an especially bitter election contest, to take into consideration the feelings and interests of the defeated minority and to try to heal the wounds of the country? Further, how was Jefferson to reconcile his position as representative of all the people with the fact that he also now was a party leader? In the first decade of the nineteenth century, not all Republicans agreed to how to answer these questions. Many of Jefferson's followers wanted to see fundamental alterations made in the Constitution. Others, led by James Madison, who more than anyone else had helped create the Constitution, feared and opposed such changes. (Peterson 1986, 126)

The Federalists too were concerned about Jefferson's political agenda as president. No one knows for sure exactly what the president-elect meant by his theory of "pure republicanism." "Mr. Jefferson is well calculated to pull down any political edifice," wrote Charles Lee, a Virginia Federalist, "and those will not be disappointed who have feared he would employ himself...in taking to pieces the national building..."; he warned that "even the foundation will be razed in less than four years." (Ellis 1996, 211) The reference to "the foundation" hinted at the chief Federalist fear,
which was that Jefferson intended to disavow the constitutional settlement of 1787-88. Considering Jefferson' deep-seated aversion to political coercion of any sort and his long-standing commitment to a dissenting tradition that regarded all government power as inherently arbitrary and corruptive in character, it was difficult for Federalists to know where he drew the line that separated the legitimate exercise of political authority from the oppressive and abusive infringement of personal freedom. The Federalists were asking, how could Jefferson take an oath to preserve, protect, and defend the Constitution of the United States if his primary goal as president was to dismantle the federal institutions created by that very document? (Ellis 1996, 212)

Although Jefferson understood the fears of his Federalist opponents and sympathized with the concerns of the more radical wing of his own Republican party, he nonetheless opted for a policy of moderation and reconciliation. This was evidenced in his inaugural address on March 4, 1801 when he asserted, “But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all republicans: we are all federalists.” (Ellis 1996, 216) For all Americans it signaled that the bitter party battles of the 1790s could not continue in the Jefferson presidency, that the incoming Republicans would not seek revenge for past Federalist ‘atrocities’ like the Alien and Sedition Act. Most significantly, it foretold that Jefferson’s understanding of “pure republicanism” did not mean a radical break with
Federalist policies or a dramatic repudiation of the governmental framework established in the Constitution. Note however that the words "republicans" and "federalists" are not capitalized. Many in the crowd thought that the new president was speaking to the common ground shared by the two parties. However Jefferson was referring to the common belief, shared by all American citizens, that a republican form of government and a federal bond among the states was most preferable. (Ellis 1996, 215-216)

With respect to the Constitution, Jefferson wanted to return government to what he saw as the Constitution’s original principles and revolutionary foundation. These principles were not different from the ones he had advocated previously; limited government, popular sovereignty, an adherence to a written constitution, political equality, etc. Several years after his retirement as president, he referred to his election as “the revolution of 1800,” then went on to explain that his elevation as president was “as real a revolution in the principles of our government as that of 1776 was in its form.” (Mayer 1994, 119)

Jefferson cited three basic principles as the incoming president during his “revolution of 1800” with which he pledged to return the government to the original ideals of the Constitution. First he believed in the protection of state governments in all their rights as the primary jurisdiction of domestic affairs, second he favored a frugal and simple administration of the federal government, and third Jefferson desired a
sharp reversal of executive power and influence which had threatened to “monarchize” the Constitution. (Levy 1986, 1017)

One principle that Jefferson strongly advocated was his belief that state governments were the primary vehicles for our domestic affairs and that their sovereignty should be protected. We have seen a consistent pattern of this belief throughout Jefferson’s career. In his first inaugural address Jefferson stated his, “support of the state governments in all their rights, as the most competent administrations for our domestic concerns and the surest bulwarks against anti-republican tendencies.” (Mayer 1994, 185) This bolstered the claim of republican theory that the smaller the area, the better chance a republic had of thriving. Shortly before being elected president, Jefferson said, “The true theory of our Constitution...surely the wisest and best, that the States are independent as to everything within themselves, and united as to everything respecting foreign nations.” (Ellis 1996, 212) Jefferson had said virtually the same thing ten years earlier as Minister to France. During this period his efforts were to enhance federal powers for the purpose of regulating foreign commerce and securing treaties. Jefferson further observed beginning with his service in the cabinet that there was an inherent danger in enhancing federal power particularly when the federal government encroached on the states. The events of the decade of the 1790s, including the national bank and the Virginia and Kentucky Resolutions, surely convinced him that the
greatest need was to keep and check the powers of the federal government, and thus to resist the designs of the Hamiltonians. (Mayer 1994, 187)

Jefferson therefore came to regard the states, as he put it many years later, as “the true barriers of our liberty in this country” and “the wisest conservative power ever contrived by man.” (Mayer 1994, 187) From the context of this statement, it is clear that what he sought to conserve was individual liberty, through the states against what he elsewhere described as “the natural progress of things,” for liberty to yield and government to gain ground. (Mayer 1994, 188) Jefferson was constantly on guard against the danger of tyranny, and he found in the federal system an effective device against this danger:

Seventeen distinct States, amalgamated into one as to their foreign concerns, but single and independent as to their internal administration, regularly organized with legislature and governor resting on the choice of the people, and enlightened by a free press, can never be so fascinated by the arts of one man, as to submit voluntarily to his usurpation. Nor can they be constrained to be by any force he can possess. While that may paralyze the single State in which it happens to be encamped, sixteen others, spread over a country of two thousand miles diameter, rise up on every side, ready organized for deliberation by a constitutional legislature, and for action by their governor, constitutionally the commander of the militia of the State. (Mayer 1994, 188)

A second principle was a frugal and simple administration of the federal government. This principle harbored a central tenet of his republican belief- limited government. Shortly before being elected Jefferson told Gideon Granger, “let our general government be reduced to a very simple organization and a very unexpensive one- a few plain duties
Jefferson also declared during his inaugural address,

> a wise and frugal government, which shall restrain men from injuring one another, which shall leave them free to regulate their pursuits of industry and improvements, and shall not take from their mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities. (Ellis 1996, 217)

This would be Jefferson's clearest statement of limited or minimalist government. He felt that the very notion of government itself was the core problem. His term would not be one of energetic government like his good friend Madison would want. In this sense he desired to remain true to his Whig tradition, which stigmatized all forms of political power as inherently corrupt, as well as to his own ideal of personal autonomy, which regarded any explicit exercise of authority that was not consensual or voluntary as inherently invasive. Jefferson therefore was declaring from his first day as president that his primary responsibility was to render ineffectual and invisible the very government he was elected to lead. Likewise Jefferson, in contrast to others who believed that without a strong central government there could be no coherent American nation felt that as the power of government decreased the release of national energy increased. (Ellis 1996, 216)

One example of Jefferson's minimalist government concerned his retirement of the national debt. In 1801 the national debt stood at $112 million, most of which had accrued as a result of Hamilton's programs to
assume the state debts. Jefferson had always regarded this decision as a political version of America's original sin, for which he was forever doing penance because of his own complicity. As Jefferson later explained to his Secretary of the Treasury, "I consider the fortunes of our republic as depending, in an eminent degree, on the extinguishment of the public debt...", adding that failure to discharge the debt would send Americans careening down "the English career of debt, corruption and rottenness, closing with revolution." (Ellis 1996, 230) Redeeming the national debt, for Jefferson was truly a matter of national redemption, a matter "vital to the destinies of our government..." (Ellis 1996, 230) He informed Gallatin that it was the highest priority of his presidency and that it was unlikely that America would "ever see another President and Secretary of the Treasury making all other objects subordinate to this." (Ellis 1996, 230)

Following Jefferson's instructions, Gallatin came up with a plan to retire the debt within sixteen years at the rate of $7 million a year. Since the annual income of the federal government, mostly from custom duties and the sale of public lands, was about $9 million, this left only slightly more than $2 million to fund the annual expenses of the entire government. But that was precisely what Jefferson proposed to do. In an ironic sense, both Jefferson and Hamilton regarded the national debt as the cornerstone of national policy. For Hamilton it was a national blessing because it created the need for taxes, banks, and federal fiscal policies that amplified the powers of the national government. For Jefferson it was a
The national debt was also, however a blessing in disguise, because it defined and disciplined the core mission of his administration. The central impulse of Whig ideology was oppositional; it required a clear and present danger to focus its energies. The debt gave Jefferson his essential enemy. Gallatin's program to retire the debt required reductions in the size of the number of federal employees, shrinking the army and significant cuts in the navy. The debt, in this sense, was a godsend because it became the budgetary tool for enforcing austerity and reducing the size of the government. It defined, in an eminently practical way, how a president used executive power to limit governmental power. (Ellis 1996, 231)

A third principle was a sharp reversal of executive power and influence which had threatened to “monarchize” the Constitution. Jefferson, from his first writings in A Summary View and the Declaration of Independence, had always been suspicious of power in the hands of one or a few and his views on this subject remained consistent. Because Jefferson was perhaps known to be the person who wrote and spoke his displeasure on this subject, he knew that many would be watching to see if his presidency promoted or limited the power he now held. In addition many wondered if he would also advance the notions of political equality,
popular sovereignty, and the separation of powers in order to facilitate limiting his executive power.

Jefferson had written his friend Maria Cosway a few weeks before his inauguration and stated, "I feel a sincere wish, indeed, to see our Government brought back to its republican principles, to see that kind of government firmly fixed to which my whole life has been devoted." (Ellis 1996, 202) Jefferson saw himself as the instrument for a recovery of pure republicanism, by which he meant the political principles forged in the crucible of the American Revolution, principles that had then been corrupted by the Federalists i.e., "Anglomen," and "monarchists" since 1776. (Ellis 1996, 202)

Jefferson however, as a president seeking to reverse executive power and influence, did not engage in sweeping removal of Federalist officeholders, attempt to repeal Hamilton's system for the funding of the national and state debts, or try to dismantle the Bank of the United States. When extremists within the Republican Party complained he did not go far enough, Jefferson disagreed. He stated his beliefs to all parties in his inaugural address:

I know, indeed, that some honest men fear that a republican government cannot be strong; that this government is not strong enough. But would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm, on the theoretic and visionary fear that this government, the world's best hope, may possibly want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest government on earth. I believe it is the only one where every man, at the call of the laws, would fly to the
standard of the law, and would meet invasions of the public order as his own personal concern. (Ellis 1996, 218)

This passage acknowledged, at least implicitly, that his election had prompted widespread apprehension about the dismemberment of the federal government and the resulting dissolution of the national union. But then Jefferson inverted the argument, claiming that his critics had been seized by a "theoretic and visionary fear." His skeptics were the ones to lacked his republican faith. (Ellis 1996, 278) Jefferson's decisions not to engage in root-and-branch reform when he assumed the presidency contributed much valued constitutional stability that has been a characteristic of American politics since 1789. (Peterson 1986, 127)

To fit his republican model of a minimalist presidency, Jefferson exercised his office as unobtrusively as he could. The office of the president would need to neither feel nor look like power at all. For example, Jefferson rarely made a public appearance. This constituted a break with precedent, since both Washington and Adams had delivered periodic public addresses before crowds and had appeared before Congress at least once a year to deliver their annual messages. Jefferson discontinued the practice of presenting his Annual Message as a speech, claiming that a written version was more efficient. It also eliminated the spectacle of the presidential entourage parading up Capitol Hill in conspicuous imitation of European royalty, then placing the members of Congress in the position of subjects passively listening to his proclamation. Jefferson believed that a republican president should be inconspicuous. He wanted to
institutionalize a self-consciously nonimperial presidency. As far as we
know, the only two public speeches he delivered throughout his eight years
in office were his two inaugural addresses. (Ellis 1996, 227-228)

In his relations with Congress he sought to keep his constitutional
distance from that branch insisting that they, and not the president, had
the power to make the laws. In all his formal dealings with Congress-
particularly his annual messages and confidential messages dealing with
foreign affairs- Jefferson took an extremely deferential tone trying not to
wield executive power over their role as law maker. He customarily spoke
only in generalities, both in describing problems that ought to command
the attention of the "Supreme Council of the nation" as he called Congress,
and in suggesting the solutions that it should adopt. For example, in his
1804 annual message Jefferson observed to Congress,

> Whether the great interests of agriculture,
manufacturing, commerce, or navigation, can, within the
pale of your constitutional powers, be aided in any of their
relations; whether the laws are provided in all cases
where they are wanting...in fine, whether anything can
be done to advance the general good, are questions within
the limits of your functions which will necessarily occupy
your attentions. (Mayer 1994, 236)

Even when his administration had specific programs in mind, the tone of
his messages suggested otherwise. One of the best examples was
Jefferson's confidential message to Congress in December, 1805 concerning
the negotiations with Spain for purchase of Florida, where the formal
message only hinted vaguely at the administration's request for a $2
million appropriation. The so-called Two Million Act eventually was
approved by Congress but at the cost of alienating John Randolph of Roanoke, the volatile Republican leader in the House, who opposed the merits of the policy and was offended because the president had not stated in his message precisely how much he wanted and what he wanted for it. (Mayer 1994, 236)

Despite the emphasis that Jefferson placed on the separation of powers between the executive and legislative branches, Jefferson did utilize some of the informal tools in dealing with Congress. These included his own sizable personal skills of persuasion, willingness and ability to use legislative lieutenants on the floor of Congress, and his role as leader of the Republican party, coupled with his popular support. (Mayer 1994, 236-237)

Jefferson also contributed to a reversal of executive power by changing the conception of the presidency which had been held by the framers and by Jefferson's Federalist predecessors. For the Federalists, this conception was drawn from the English model of balanced government held that the executive was charged with checking the more popular branches. Jefferson's conception, by contrast, emphasized the popular base of the president's authority, its direct relationship to the consent of the governed. It was a conception of executive power that, if not drawn directly from, was probably at least shaped by Jefferson's reading of those Whig historians and writers on government who viewed the Anglo-Saxon ideal of kingship as that of the link between the people and the government. The presidency, Jefferson once wrote, should "lead things into the channel of
harmony between governors and governed." (Mayer 1994, 239) He later stated,

In a government like ours, it is the duty of the Chief Magistrate, in order to enable himself to do all the good which his station requires, to endeavor, by all honorable means, to unite in himself the confidence of the whole people. This alone, in any case where the energy of the nation is required, can produce a union of the powers of the whole, and point them in a single direction, as if all constituted but one body and one mind. (Mayer 1994, 239-240)

This understanding was basic to Jefferson's exercise of presidential powers.

For Jefferson himself, his principles of shrinking executive power, making the federal government more simple and frugal, and allowing state governments to lead in our country's domestic affairs would, at times, prove embarrassing to Jefferson's leadership. The story of his administration became the story of how Jefferson escaped, evaded, or overcame the restraints of his own principles in order to provide the strong leadership the country required. (Levy 1986, 1017)
Jefferson's first test to his administration and its principles concerned the judiciary. Beyond the personal hatred and the understandable bitterness at being saddled with the Adams appointments lay Jefferson's more tortured sense of hostility toward the entire federal judicial system per se. Part of the problem with recovering his mentality in this area is that it does not fit neatly into the logical and legal categories that constitutional scholars, who have done the best work on the general subject, have tended to bring with them. Questions about federal versus state jurisdiction, for example, or the highly constitutional question about judicial review did not engage his full attention except as specific episodes in a larger political drama about the true meaning of the American Revolution. And the simple truth was that the original American revolutionaries had not envisioned a national judiciary at all. At times Jefferson seemed to believe that to be true to the original "spirit of '76" all federal courts should be abolished completely and the judicial decisions left to the states. But such thoughts did not emerge out of specific legal arguments so much as a grander sense of "sweeping away" the institutional residue that had built up since the Revolution. (Ellis 1996, 264)
Similarly, Jefferson did not have a consistent or cogently constructed position on the ultimate questions of constitutional sovereignty. In his more radical moments he seemed to believe that all fundamental constitutional questions should be settled by a popular referendum, since the doctrine of popular sovereignty empowered only the people at large to render such judgments. This was obviously impractical, but it drew inspiration from the same visionary impulse that welcomed a “sweeping away” of all laws every generation. In his first Annual Message to Congress he proposed a more moderate idea that each branch of the federal government was sovereign and therefore empowered to interpret the Constitution for itself. (Ellis 1996, 264-265)

In the 1770s he did not advocate an elective judiciary; his draft constitution for Virginia provided that judges would be appointed and hold their offices during good behavior. He did argue, however, that a judge should be “a mere machine,” dispensing “equally and impartially” the law formulated by the elected representatives of the people. Jefferson’s writings of the 1780s suggest that he switched opinions and “reposed great confidence” in the judiciary as a protector of rights and that he believed in judicial review- or something very much like judicial review- as an effective “legal obstacle,” or “legal check,” against legislative tyranny. (Mayer 1994, 257) At about the same time he became president, however, Jefferson apparently switched positions again; he criticized the federal judiciary as a “stronghold” of the Federalist party and proposed a theory of concurrent
review emphasizing the independent roles of the president and Congress as interpreters of the Constitution. (Mayer 1994, 257)

Dumas Malone, noting Jefferson's changes about the judiciary, stated that Jefferson was at first more hospitable toward judicial review and may be explained that, "he generally opposed such tyrannies as seemed most menacing at a particular time" and that in the late 1780s, when he seemed to favor vigorous judicial review, Jefferson was not so concerned about the danger of judicial tyranny as he was later, when John Marshall headed the federal judiciary. (Mayer 1994, 258)

To be fair, Jefferson was hardly alone in grappling with the proper role of the federal judiciary, especially the Supreme Court. The judicial institutions were still congealing as integral parts of the national government. Nor had there been any clear consensus at the Constitutional Convention about the role of the Supreme Court as the ultimate arbiter of the Constitution's meaning. This was part of the genius of the constitutional settlement of 1787 to leave such controversial questions blurry and unresolved. In that sense Jefferson's confusion accurately mirrored the crisscrossing currents of constitutional opinion prevalent at the time. (Ellis 1996, 265)

For Jefferson he preferred that his mind operate at a higher altitude, where the details and technicalities disappeared from sight and the larger moral patterns assumed a clear shape. From that perspective, he saw the federal judiciary and its capstone in the Supreme Court as a
source of unmitigated danger. If Jefferson saw the emergence of the West as a dynamic engine of expansion and national liberation that continually vitalized the American republic with its energy, the federal judiciary was the engine of centralization and consolidation that sucked the energies of the new nation into a stifling sinkhole. The fact that the “the revolution of 1800” began without a single Republican member on the judiciary was obviously bad enough, but the federal judiciary itself embodied counterrevolutionary tendencies fundamentally at odds with the deepest impulses of “pure republicanism” as Jefferson understood it. Jefferson’s views were distinctive and radical on this score. Both Adams and Madison recognized the need for a judicial counterpoise to majority rule. The fact that federal judges served for life and were least accountable to popular opinion was, as they saw it, an important asset, for such requirements helped balance the democratic excesses of the more directly elected branches of government. Jefferson, however, saw no need for such balancing mechanisms. For him, the American Revolution was about release, not restraint. In addition to being a “Federalist Gibraltar” occupied by his most devoted enemies then, the national judiciary was a permanent brake placed on the wheels of the ongoing American Revolution. (Ellis 1996, 265-266)

The first battle over the judiciary began shortly after the election results which elected Jefferson in 1800 were made public. The Federalist-controlled lame-duck Congress passed the Judiciary Act of 1801. It was
offensive to Republicans for several reasons: It was a partisan measure designed to shore up Federalist control over the court system before Jefferson took office. The act did so by establishing a separate circuit court with sixteen new judges, essentially creating a new layer of federal jurisdiction between the Supreme Court and the district courts. (Ellis 1996, 266) Moreover, before he relinquished his office to Jefferson, John Adams made sure that all the new judges under the new law went to Federalists, who were now tenured for life. These judges were labeled the “midnight appointments.” As Jefferson saw it, “By a fraudulent use of the Constitution, which has made judges irremovable, they have multiplied useless judges merely to strengthen their phalanx.” (Mayer 1994, 266) At the same time, Adams nominated John Marshall as chief justice of the United States Supreme Court. Even though Marshall and Jefferson were alike in blood as distant cousins, they differed widely in policy and politics and detested each other. (Peterson 1986, 127)

Jefferson and his followers were enraged by the Judiciary Act and the “midnight appointments.” They were convinced that the Federalists planned to use their control over the national judiciary to undermine Republican policies and to reduce further the rights of the states. The more extreme “Old Republican” members of the party proposed amending the Constitution to reduce the powers of the national judiciary. They also suggested impeaching a number of the more partisan Federalist judges. (Peterson 1986, 127) Although Jefferson was active in mobilizing the
Republican forces behind the scenes, he made a point of maintaining a
distance from the congressional debates, which were heated, and
attempted to present his opposition to the circuit courts in the most
innocuous terms, claiming that there were simply not enough cases to
justify the new layer of federal judges. Rather than raise the controversial
constitutional or ideological issues about the entire judicial system, he
preferred to cast the issues in terms of republican austerity. Treasury
Secretary Gallatin had already prepared the budget estimates for 1802 on
the presumption that the circuit court judges would be eliminated. Given
the Republican dominance in Congress, victory was a foregone conclusion.
The national court system, with minor modifications, returned to the way
it had existed throughout the 1790s under the Judiciary Act of 1789. (Ellis
1996, 266-267)

As Jefferson saw it the repeal of the Judiciary Act was to, "restore
our judiciary to what it was while justice and not federalism was its
object." (Mayer 1994, 268) Political considerations no doubt entered into
his reluctance to take the offensive, as they clearly did with respect to his
decision not to press for constitutional amendments and to delete from his
annual message an explicit repudiation of judicial review. More
fundamentally than the political or austerity approaches, this cautious
approach reflected his constitutional principles. His quarrel was not with
judicial independence from the other branches of government but rather
with judicial independence of the will of the nation. As Jefferson later put
it, "A judiciary independent of a king or executive alone, is a good thing; but independence of the will of the nation is a solecism, at least in a republican government." (Mayer 1994, 268) Jefferson's constitutional theory, in fact relied upon the independence of the judiciary as the guardian of individual rights against executive and legislative tyranny; his quarrel with the judiciary was that it was under the control of the Federalists. It failed to fulfill this vital function and had become the destroyer rather than the protector of the Constitution and citizens' liberties. (Mayer 1994, 268)

The Federalists denounced the repeal of the Judiciary Act of 1801 and argued that it was unconstitutional because federal judges could only be removed from office when found guilty of high crimes and misdemeanors. What the Republicans had done, they believed, was to dismiss the circuit-court judges without a trial. This set up a second skirmish between Jefferson, his Republicans, and the Federalists. The Federalists took the matter to the United States Supreme Court, but that Federalist-dominated body, fearful of further provoking the Republicans, refused to declare the repeal of the Judiciary Act of 1801 unconstitutional. At the same time, another, and as it was to turn out, more significant case had come before the Supreme Court. William Marbury and a number of other "midnight appointees" had gone to the Supreme Court complaining that the Jefferson administration had failed to deliver the signed and sealed commissions for their positions as justices of the peace for the
District of Columbia, thus preventing them from assuming their offices. As a remedy they requested the Court to issue a writ of mandamus ordering Secretary of State Madison to deliver the necessary papers. (Peterson 1986, 127-128)

Chief Justice Marshall and the other members of the Supreme Court approached *Marbury v. Madison* very cautiously. Although they sympathized with Marbury and the other complainants and believed they had a right to their commissions, they realized that if they ordered the commissions delivered and the administration refused to comply with the decision, it would only embarrass the Court. Marshall therefore decided to dismiss Marbury’s suit on the grounds that the Supreme Court lacked jurisdiction. The case was significant, however, because it was the first time the Court held a portion of a law of Congress unconstitutional: it declared Section 13 of the Judiciary Act of 1789, which empowered the Court with original jurisdiction in issuing a writ of mandamus, to be contrary to the Constitution and therefore void. (Peterson 1986, 128) What the case did for Marshall was to provide an occasion to lecture Jefferson through this opinion for failing to uphold the law by refusing to appoint Marbury. The message was clear to all the interested parties of the day: The Republican assault on the federal judiciary may have been successful at eliminating the circuit courts, but the Supreme Court was off-limits, The Federalist fortress on Gibraltar could fire back. (Ellis 1996, 267)
Jefferson's feelings about the decision were undoubtedly mixed. It contained a long lecture to the administration on why the commissions should have been delivered. Jefferson felt this portion of the decision was unnecessary, and it annoyed him a great deal. The decision also implicitly supported, although it did not explicitly take a stand on, the Federalists claim that the Supreme Court should be the final arbiter on constitutional issues. Jefferson did not agree with this theory. During the Kentucky Resolutions he had indicated that on federal-state questions, such decisions were better left in the hands of the states. As to the questions that arose over relations between the different branches of the federal government—legislative, executive, and judicial, Jefferson addressed this problem with a theory of his own in the original draft of his first annual message to Congress. In it he observed that the three branches of the federal government were equal and independent, he called it the theory of "tripartite balance," and that in areas under their respective jurisdictions, Congress, the president, and the Supreme Court each "acts as a last resort and without appeal, to decide on the validity of an act according to its own judgement, and uncontrolled by the opinions of any other department." (Peterson 1986, 128) This equality of decisional power, under which each of the coordinate branches of government had the equal right to decide questions of constitutionality for itself, was as necessary to maintaining the constitutional separation of powers, in Jefferson's view, as the doctrine of states' rights was to preserving the division of authority in the federal
system. Under the theory he considered the Sedition Act, which had expired, unconstitutional from the beginning and pardoned those still suffering its penalties by discontinuing any prosecutions. The idea of governmental adaptation and change through construction of the Constitution was repugnant to Jefferson. Even more repugnant was the idea of vesting the ultimate authority of interpretation in a court whose members had no accountability to the people. This went against his most basic instincts of republicanism. (Levy 1986, 1017)

Jefferson did not seem at all troubled by the fear of conflicts arising from three distinct and perhaps divergent interpretations of the Constitution. In part, this may have been due to the fact that in his day, for all practical purposes, the legislature and the executive continued to determine for themselves, whether or not they were acting within the bounds of the Constitution. If a truly difficult conflict arose between two or more branches, it could be resolved by the only ultimate arbiter of constitutional questions, the people, acting in their elective capacity. Through their periodic choosing of officers for two of the three departments of national government, the people have an opportunity to reintegrate the Constitution by demonstrating their approval or disapproval of those branches' interpretation of it. What did trouble him was that judges, who were not in check by elective means, were the ultimate arbiters of all constitutional questions. (Mayer 1994, 271) That notion, which he
emphasized repeatedly, was a "very dangerous one" which would "place us under the despotism of an oligarchy." (Lipscomb 1903, 15:277-278)

Jefferson's tripartite balance was an explicit denial of the Federalist concept of judicial supremacy. Upon the advice of his advisors Jefferson dropped this passage concerning the tripartite balance from the final draft of his message sent to Congress in December, 1801. He did so, however, because he was determined to avoid any kind of controversy over the Constitution, not because he abandoned the idea of three separate and equal departments, whose differences over how to interpret the Constitution, if fundamental enough to impair the functioning of the government, would have to be resolved by amendment. (Peterson 1986, 128)

Jefferson chose in 1803 not to make an issue over the Supreme Court's decision in Marbury v. Madison, because he wanted to pursue his policy of moderation and conciliation. He could adopt this course because in at least one important way the decision was a victory for him: it rejected Marbury's request for a writ of mandamus and did not order the administration to deliver the commissions. The decision was palatable to the new president also in that it did not try to take away any powers being used by the president or Congress but did reject an attempt by Congress to increase the powers of the Supreme Court by giving it original jurisdiction in cases involving writs of mandamus. Finally, while the Supreme Court claimed for itself the right to oversee the Constitution, it did not explicitly
declare that its power to do so was either exclusive or final. *Marbury v. Madison* was later, long after Jefferson had died, to take on enormous significance as the first example of the Supreme Court's declaring a congressional act unconstitutional, but at the time it was handed down it was considered by many as a defeat for the more belligerent members of the Federalist party and as a conciliatory gesture on the part of the Supreme Court towards Jefferson's administration. (Peterson 1986, 128-129)

The third skirmish came at the end of Jefferson's second term, when the Republicans in Congress, at the president's instigation, un unsuccessfully attempted to impeach Supreme Court Justice Samuel Chase. Next to Marshall, Chase was the most formidable Federalist presence on the Court, a white-maned giant who preferred to play the role of Jehovah with all Jeffersonians who had the misfortune to land in his courtroom. He had attracted sharp criticism for his strenuous support of the Sedition Act. In May, 1803, after reading about Chase's inflammatory charge to a Baltimore jury, Jefferson wrote to a Republican leader in the House, "Might this seditious and official attack on the principles of our Constitution...go unpunished? And to whom so pointedly as yourself will the public look for the necessary measures. I ask these questions for your consideration. For myself, it is better than I should not interfere." (Ellis 1996, 268) This was the equivalent of a command to his Republican
lieutenants in Congress to launch impeachment proceedings against Chase.

But impeachment, as Jefferson readily acknowledged, was a clumsy instrument, requiring as it did evidence of “treason, bribery, or high crimes and misdemeanors.” (Ellis 1996, 268) Though Republicans attempted to wrap themselves in the trappings of legality, the trial in the Senate had a distinctly partisan flavor that struck several observers as a Republican version of the Sedition Act. Jefferson followed the proceedings closely; he kept a running tabulation of the votes on each count for conviction but maintained official silence. Chase was eventually acquitted on all the charges. His Federalist defenders enjoyed the advantage of the narrow requirements imposed by the Constitution for removing judges; they could plausibly describe Chase as a political target and victim; and they particularly relished the opportunity to remind Jefferson that the principle of an independent judiciary had been a rallying cry in 1776 as well as one of the sacred truths that Jefferson had once accused George III of violating. (Ellis 1996, 268-269)

For Jefferson he believed that the federal judiciary had no prominent place in his vision of the “pure republicanism” of the American Revolution. Jefferson’s campaign against the judiciary predated today’s public enshrinement of the Supreme Court. What appears as almost sacrilegious to us was then still in the process of carving out its place in American political theory. The judicial branch was nearly an afterthought
compared to the other two branches. Jefferson went to his grave believing that Marshall and his colleagues on the Supreme Court were an evil conclave, a gang of "sappers and miners" sabotaging the republican experiment from within. But if his ideological convictions were clear and unwavering, his reluctance to declare unlimited war on the federal judiciary stands out as the defining feature of the conflict. Perhaps at some level Jefferson recognized that a national government required some kind of national system of laws, that those moderate Republicans who regarded the Constitution and the constitutional settlement of 1787-88 as the sacred corollary to the revolutionary magic of 1776 had at least half a point. If so, he never acknowledged this concession publicly or privately. It might have been one of those silent occasions when Madison's invisible influence proved decisive. Or perhaps Hamilton was right after all: that Jefferson's aversion to conflict dictated a policy of caution for purely personal reasons, in spite of his moral certainty that the federal judiciary was a blot on the face of "pure republicanism." Or perhaps his own belief in the inherent limitations that republicanism imposed on the executive branch— the unimperial presidency— made more decisive action more impossible for him. (Ellis 1996, 269-270)

In reviewing the theory of republicanism he advocated and principles he sought to follow as president we have observed that Jefferson's opinion of the judiciary changed through time. Among the many things we've mentioned, Jefferson promoted and recognized that they too
were a branch of the federal government and were charged with enforcing the laws under the separation of powers scheme. Jefferson adhered to his principle of limiting executive management by carefully avoiding the use of his office or title in restructuring the judicial branch. We do see, however, that he used his political connections in Congress and elsewhere in an attempt to shape the judiciary. His principle of less government was advanced by restricting the addition of another layer to the judicial branch, the circuit court. He still was not convinced that the Supreme Court should be the final arbiter on all constitutional issues and at times his policy of strict construction conflicted with their decisions. Jefferson would have preferred that the opinions via popular sovereignty had more weight in judicial matters over what he saw as an oligarchy deciding constitutional issues. One can get a sense of Jefferson's opinions on the judiciary but one cannot be exactly sure of Jefferson's true theory on the judicial branch for, like the judicial branch itself, they were both congealing over time.
CHAPTER XI

THE LOUISIANA PURCHASE

In 1802 news reached Washington, D.C. that Spain had ceded its rights in North America, including the all-important control over the Mississippi River, to Napoleon and France. Jefferson had long understood that possession of the city of New Orleans at the mouth of the Mississippi was key to controlling navigation, and that free navigation of the Mississippi was in turn vital to the commercial life of the developing west. Jefferson recognized that the French presence was a fundamental shift in this strategic location; it both threatened American security and blocked westward American expansion. In his diplomatic efforts Jefferson sought to acquire only New Orleans; but in the spring of 1803 Talleyrand, the French foreign minister, offered Robert Livingston and James Monroe, who were the American representatives, all of Louisiana- a vast territory whose addition would more than double the size of the United States. It was an unexpected bonus, and at the price agreed upon- $15 million- could be considered a bargain; but the immediate importance of the treaty to Jefferson, when he first received news of its signing in Paris, was that it secured New Orleans and thereby the control of the Mississippi. That this was absolutely vital to the interests of the United States was the premise
upon which Jefferson and his administration based all of its thinking.
(Mayer 1994, 245)

The purchase did not come without constitutional issues that troubled Jefferson and other Americans. For Jefferson the Louisiana Purchase violated his presidential style and his most cherished political principles several times over in order to guarantee the most expansive version of what was called the "noble bargain." Jefferson temporarily made himself into just the kind of monarchical chief magistrate that he had warned against. "It is incumbent on those who accept great changes," he explained afterward, "to risk themselves on great occasions," adding that "to lose our country by a scrupulous adherence to written laws, would be to lose the law itself." (Ford 1892, 10:146)

The Louisiana Treaty actually raised two basic questions of constitutionality: the power to acquire new territory by treaty and the power to incorporate into the Union new states formed from territory acquired since ratification of the Constitution. In an opinion received by Jefferson on January 13, 1803, Secretary Gallatin offered some "hasty and incomplete" constitutional arguments: first, "that the United States as a nation have an inherent right to acquire territory"; second, "that whenever the acquisition is by treaty, the same constituted authorities in whom the treaty-making power is vested have a constitutional right to sanction the acquisition"; and third, "that whenever the territory has been acquired, Congress have the power either of admitting into the Union as a new state,
or of annexing to a State with the consent of the State, or of making regulations for the government of such territory.” (Mayer 1994, 245) He further pointed out that if it were not the case that the power of acquiring territory by treaty was delegated to the United States, under the Tenth Amendment such power would be reserved to the people along, since the Constitution expressively prohibited the states from making treaties. Such a construction of the Constitution would preclude the United States from ever enlarging its territory. Would it not be “a more natural construction to say that the power of acquiring territory is delegated to the United States by the several provisions which authorize the several branches of government to make war, to make treaties, and to govern the territory of the Union,” he asked. (Mayer 1994, 246)

Gallatin’s arguments somewhat satisfied Jefferson, who replied that he saw “no constitutional difficulty as to the acquisition of territory” and viewed as “a question of expediency” whether territory, having been acquired, “may be taken into the Union by the Constitution as it now stands.” He cautioned however, that he thought “it will be safer not to permit the enlargement of the Union but by amendment of the Constitution.” (Ford 1892, 8:241)

The constitutional question was necessarily held in abeyance while the administration awaited word from its negotiators in Paris. As Dumas Malone has noted, for Jefferson to have suggested difficulties and voiced scruples to Congress at this stage “would have been to borrow trouble.”
When news of the cession reached him in July, however, he faced an agonizing dilemma. “Recognizing as he did the supreme importance of the undisputed control of the inland waterways, he had no hesitancy in accepting the whole of Louisiana, but the sheer size of the cession inevitably magnified and accentuated the constitutional question.” (Malone 1948, 4:313)

Gallatin's argument did not overcome Jefferson's constitutional scruples as to the incorporation of new states formed from territory acquired since the ratification of the Constitution. In his communications with others, he maintained that an amendment to the Constitution was necessary. He wrote to one of the men of 1776, John Dickinson, in early August:

Our confederation is certainly confined to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this. In the meantime, we must ratify and pay our money, as we have treated, for a thing beyond the constitution, and rely on the nation to sanction an act done for its great good, without its previous authority. (Ford 1892, 8:262-263)

In another letter on the amendment process, Jefferson explained to Senator John Breckinridge of Kentucky, he had been placed in the awkward position of a guardian who, presented with an unprecedented investment opportunity, had decided to act without obtaining the consent of his clients, saying in effect, “I thought it my duty to risk myself for you.”
Jefferson now felt he was under a moral obligation to request a constitutional amendment from the Congress at the same time he forwarded the treaty for ratification. (Ellis 1996, 249)

In the summer of 1803 Jefferson made at least two known attempts to draft an amendment, the first preceding and the second following receipt of the treaty. His latter draft, which was sent to Attorney General Lincoln at the end of August, provided:

Louisiana, as ceded by France to the U.S. is made a part of the U.S. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing with other citizens of the U.S. in analogous situations. Save only that as to the portion thereof lying North of and East and West line drawn through the mouth of the Arkansas river, no new State shall be established, nor any grants of land made, other than to Indians in exchange for equivalent portions of land occupied by them, until authorized by further subsequent amendment to the Constitution shall be made for these purposes. (Mayer 1994, 247)

An additional paragraph stipulated that Florida, "whenever it may be rightfully obtained," should also become part of the United States and its white inhabitants, citizens. (Malone 1948, 4:314-315)

Two points are worth noting about Jefferson's draft amendment. First, by failing to mention a grant of authority to acquire new territory by treaty, Jefferson in effect conceded that the general government possessed that power under the Constitution. Apparently he continued to be convinced, as he had observed to Gallatin earlier in the year, that there was no constitutional difficulty as to the acquisition of territory. Second, the draft underscores what Jefferson's correspondence over the summer of
1803 indicated: that his chief concern was the lack of constitutional authority for holding newly acquired territory and incorporating it into the Union. His draft amendment made Louisiana part of the United States but it was narrowly drawn, denying Congress the authority to grant lands in the unsettled northern section of the newly acquired province until given such authority by another amendment. Thus the power that would be granted by his own proposed amendment would be sharply limited, confined to correction of the constitutional difficulty. (Mayer 1994, 248-249)

Dumas Malone has observed that no important adviser or supporter of Jefferson apparently urged either the necessity or the practicality of such a constitutional procedure, however. Indeed, Jefferson's close friend Senator Cary Nicholas argued strongly against it, saying that a declaration from Jefferson that the treaty exceeded constitutional authority would lead to its rejection by the Senate or at least to the charge of his willful breach of the Constitution. (Malone 1948, 4:318)

Jefferson's reply to Nicholas's letter in September, 1803, stating in particularly striking terms his lingering constitutional scruples, has been one of the most often quoted of Jefferson's writings on constitutional matters. He first addressed Nicholas' argument that Article IV, section 3, providing for the admission of new states into the Union, with some exceptions, ought to be interpreted broadly:

When I consider that the limits of the U.S. are precisely fixed by the treaty of 1783, that the Constitution
expressively declares itself to be made for the U.S., I cannot help believing that the intention was not to permit Congress to admit into the Union new States, which should be formed out of the territory for which, and under whose authority alone, they were then acting. I do not believe it was meant that they might receive England, Ireland, Holland, &c. into it, which would be the case on our construction. (Mayer 1994, 249)

He then stated his basic theory of constitutional interpretation, the theory that underlay all his concerns:

When an instrument admits two constructions, the one safe, the other indefinite, I prefer that which is safe & precise. I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction. I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is, then we have no constitution. If it has bounds, they can be no others than the definitions of the powers which that instrument gives. It specifies and delineates the operations permitted to the federal government, and gives all the powers necessary to carry these into execution. (Mayer 1994, 249-250)

Conceding the likelihood that the framer's enumeration of powers was "defective" for "this is the ordinary case of all human works" he urged, "Let us go on then perfecting it, by adding by way of amendment to the constitution, those powers which time & trial show are still wanting." (Mayer 1994, 250) In the present case, he concluded, it was "important...to set an example against broad construction by appealing for new power to the people." (Mayer 1994, 250) With particular reference to this letter, Richard Ellis observed that "probably no other president in American history has expressed greater doubt about the constitutionality
of his own actions. His caution testifies to the seriousness with which Jefferson treated constitutional issues." (Mayer 1994, 250)

By the time the special session of Congress convened in October, 1803, however, Jefferson changed his mind about the constitutional amendment. Reports from Paris indicated that the ever-impulsive Napoleon was having second thoughts; at the same time the Spanish were threatening to challenge the entire treaty on the ground that no one really knew the proper boundaries of Louisiana. Fearing that any delay might put the purchase at risk, Jefferson concluded that, "the less that is said about my constitutional difficulty, the better; and that it will be desirable for Congress to do what is necessary in silence." (Ellis 1996, 249) If the choice was between sustaining his strict interpretation of executive authority or losing half a continent, he chose the more pragmatic course, all the while expressing the hope that "the good sense of our country will correct the evil of [broad] construction when it shall produce ill effects." (Ellis 1996, 249)

Jefferson thus dropped the matter, not because he had given up strict construction but because he was following his Nicholas's advice not to press the constitutional problem, realizing that it could jeopardize a treaty so vital to the nation's security. "What is practicable must often control what is pure theory; and the habits of the governed determine in a great degree what is practicable." (Mayer 1994, 250-251) Jefferson took solace in what he regarded as the "good sense" of the people, not to permit
this one precedent to destroy the whole edifice of enumerated powers upon which constitutional limitations on the federal government rested. (Mayer 1994, 251)

The constitutional predicament became worse over the succeeding months. The huge Republican majority in Congress ratified the Louisiana Purchase, as one senator put it, “in less time than required for the most trivial Indian contract,” then passed enabling legislation that delegated to the president nearly autocratic power over decisions about a provisional government in the Louisiana Territory. (Ellis 1996, 249) John Quincy Adams, one of the few senators to oppose the legislation, observed that Jefferson would possess “an assumption of implied power greater...than all the assumptions of implied powers in the years of the Washington and Adams administration put together.” (Ellis 1996, 250) The old enemy of George III now wielded more arbitrary power over the residents of Louisiana than any British king had wielded over the American colonists. (Ellis 1996, 250)

Moreover, Jefferson chose to use that executive power to propose a blatantly nonrepublican territorial government. His outline for a proposed constitution was accompanied by a cover letter to Senator Breckinridge, swearing him to secrecy. “You must never let any person know that I have put pen to paper,” he warned, “and should destroy the original” immediately after making a copy. “I am this particular,” Jefferson explained, “because you know with what bloody teeth and fangs the
federalists will attack any sentiment or principle known to come from me, and what blackguardisms and personalities they make it the occasion of vomiting forth.” (Ellis 1996, 250)

The chief reason for Jefferson’s apprehension was that the provisional government of the territory he proposed consisted of a governor appointed by the president called the “assembly of Notables.” This was precisely the kind of constitutional arrangement one might have expected from John Adams, who was more comfortable with aristocratic entrustments of authority, preferred ornate titles, and might have argued that the predominantly French residents of Louisiana would appreciate a familiar political framework reminiscent of the ancien regime. But this was also precisely the kind of government Jefferson had condemned the Federalists for preferring, since it deprived the residents of any elective rights and, as Madison privately admitted, “will leave the people of that District for a while without the organization of power dictated by the Republican theory.” (Ellis 1996, 250) In his private correspondence, Jefferson explained his position on the territorial government by writing, “our new fellow citizens [in Louisiana] are as yet incapable of self-government as children, yet some cannot bring themselves to suspend [republican] principles for a single moment.” (Ellis 1996, 251) The suspension of U.S. citizenry rights was only temporary, he promised, until he could be assured that the political temperature had sufficiently lowered to avoid the risk of insurrection. (Ellis 1996, 251)
As time passed, the administration more and more came to recognize and respect the wishes, rights, and traditions of the non-American population and in 1808 accepted the *Digest of the Civil Laws Now in Force in the Territory of Orleans*, which incorporated the traditions of French and Spanish civil law into Louisiana law. This compromise brought the acceptance by the settled population of lower Louisiana of permanent American rule and elevated the level of American tolerance of foreign peoples within its borders. (Cunningham 1987, 268)

For Jefferson the events of the Louisiana Purchase left him with many shattered republican principles which he had tried to uphold during the entire affair. His constitutional beliefs on acquiring territory, incubating and implementing political equality and popular sovereignty through a republican system of government, and the use of executive power led Jefferson to quandaries over constitutional interpretation, energetic government, and a feeling of monarchical decision making.

According to Joseph Ellis, and I would have to concur, from a long-term historical perspective, and with all the advantages of hindsight, Jefferson’s controversial decisions about the Louisiana Territory were, for the most part, wise decisions. The decision to bypass the constitutional issue was unquestionably correct, for the practical reason that the debate over a constitutional amendment would have raised a constellation of nettlesome questions - about slavery and the slave trade, Indian lands, Spanish land claims and a host of jurisdictional issues - that might have
put the entire purchase at risk. The decision to install an essentially arbitrary and nonrepublican provisional government over the Territory to carry it through the early years of assimilation cannot be condemned outright, since both the sheer size of the region and the ethnic diversity of the Creole population posed governance problems that justified a firmer hand at the start. Louisiana as a state was admitted into the Union in 1812. (Ellis 1996, 251)

The issue then, is not whether Jefferson’s policies toward Louisiana were right or wrong but rather how his philosophy changed and evolved over the course of the acquisition of Louisiana. We view Jefferson implementing decisions that defied in so many ways his long-standing commitment to his consistent principles on the limitations of executive power and the near-sacred character of republican principles. Two of the more conventional answers to this question do not ring true: First, Jefferson was not simply seized by power-hungry impulses once he assumed the presidency, since in a broad range of other policy areas he exhibited considerable discipline over the executive branch and habitual deference to the Congress; second, he did not discover a pragmatic streak in his political philosophy, since on issues like the debt and, as we will discuss in the next chapter, the embargo, he clung tenaciously to Jeffersonian principles despite massive evidence that they were at odds with reality. The pragmatic interpretation fails to explain why he was
capable of putting his beliefs in "pure republicanism" aside in this instance and not in others. (Ellis 1996, 251-252)

The answer would seem to be the special, indeed almost mystical place the West had in his thinking. When history presented him with an unexpected and unprecedented opportunity to eliminate forever the presence on America's western border of any major European power, it triggered his most visionary energies, which then overrode his traditional republican injunctions. For Jefferson, more than any other major figure in the revolutionary generation, the West was America's future. Securing a huge swath of it for posterity meant prolonging for several generations the systemic release of national energy that accompanied the explosive movement of settlements across the unsettled spaces and drove the American republic forward. The West was also the place where Jefferson's farmer, the backbone and sinew of our nation, could continue his quest thereby postponing into the indefinite future the crowded conditions and political congestions of European society. Jefferson liked to think of the West in much the same way that some modern optimists think of technology, as almost endlessly renewable and boundlessly prolific. It was the secret weapon that made the American experiment in republicanism-immune to the national aging process, at least for the remainder of the century. It was America's fountain of youth. (Ellis 1996, 252)
CHAPTER XII

BOTH FOREIGN AND DOMESTIC

Having had success in his first term in defending the Constitution against any major altercation, Jefferson in general followed a strict constructionist and states'-rights policy on domestic matters throughout his first administration. Jefferson's principle of a frugal, simple administration remained intact by eliminating taxes, retiring the national debt, and rejecting another layer of judicial bureaucracy in the circuit court. In his second administration he began to talk about a nationally financed system of internal improvements that would include the building of roads, canals, and various educational, scientific, and literary institutions. By these operations, he asserted in his Sixth Annual Message, "new channels of communication will be opened between the States; the lines of separation will disappear, their interests will be identified, and their union cemented by new and indissoluble ties." (Peterson 1986, 129-130) Such a program, clearly, had strong nationalist implications. Some precedents existed. The Ohio Enabling Act of 1802, under which that state entered the Union in 1803, provided that five percent of the proceeds from the sale of its public lands be used to build roads to connect it with the East. A national road also was started, stretching from Maryland into Pennsylvania and through western
Virginia into the Old Northwest. But neither was on such a scale or as systematic as what was now proposed, and although Jefferson strongly favored a federal system of internal improvements on policy grounds, he recognized that it raised constitutional problems. How were the various sites and routes to be chosen? Who would control or maintain them—the states or the federal government? Should the states have a veto power over the decisions of the federal government that affected their lands and citizens? (Peterson 1986, 130)

Jefferson denied that the “general welfare” clause of the Constitution, as some argued, gave the federal government the authority to act without consulting the states in these matters. He therefore requested an amendment to the Constitution to clarify the issues involved. As it turned out, the difficulties in foreign affairs and the economic hard times that dominated the end of Jefferson’s second administration forced the matter to be postponed. It was not taken up again until after the War of 1812, by which time he had retired from politics. One of his last acts as president was to stifle a bill for internal improvements on the grounds that it granted the federal government unconstitutional powers. Jefferson’s successors James Madison and James Monroe both followed Jefferson’s admonition and insisted upon a constitutional amendment. When Congress refused to go along with this and tried to establish a federally controlled system of internal improvements they both vetoed the measure. As a consequence, the
building of schools and universities, libraries, and scientific centers, and roads and canals had to be undertaken by the state governments and private enterprise. Jefferson's principle of the protection of the state government as the primary jurisdiction of domestic affairs continued as a precedent for future administrations and generations. (Peterson 1986, 130)

The last year of Jefferson's second administration was dominated by the problem of maintaining American neutrality in the face of the revived war between Great Britain and France. Both countries interfered with American commerce. In addition England had impressed numerous seamen who were United States citizens and in June, 1807 assaulted the American naval frigate Chesapeake off the coast of Norfolk, Virginia. In response, Jefferson adopted a policy of "peaceable coercion" by which he hoped to rely upon economic pressure to bring the belligerent countries to terms. He recommended, and Congress speedily adopted, an embargo. It prohibited United States ships from sailing for foreign ports and required vessels engaged in the coastal trade to post substantial bonds to guarantee that they would go to American ports. Opposition to the measure was widespread in New England and in many parts of the Middle Atlantic states. The constitutionality of the measure was attacked, but it was upheld by a Massachusetts district court, from which no appeal was ever taken to the Supreme Court. (Peterson 1986, 131)
Americans found ways to evade the embargo. Merchants engaged in widespread smuggling, and a substantial clandestine trade developed along the border with Canada. At first Jefferson did not fully comprehend either the unpopularity of the measure or the economic distress it was causing. Preoccupied with America's foreign-policy problems, he called for even harsher measures to ensure the vigorous enforcement of his embargo policy. The discretionary power of customs officials to engage in search and seizure increased as numerous ships and warehouses were inspected without benefit of search warrants, and the military was increasingly used to enforce the laws. Despite these measures the suppression of the various kinds of illegal activity that had developed proved to be an impossible task in a country the size of the United States. At no point was Jefferson able to rally public opinion effectively to his side. As time went on, the federal courts handed down a number of decisions unfavorable to the government's enforcement procedures. (Peterson 1986, 131-132)

Increasingly, the opposition accused Jefferson of being an arbitrary tyrant. This was a particularly painful charge for someone who, as a member of America's revolutionary generation, had stressed throughout his life the importance of individual liberty and governmental restraint. When Jefferson finally fully comprehended the disastrous internal consequences of his embargo policy for America, he abandoned it and actually signed the law for its repeal during his last days in office. Although the enforcement of the embargo does not reflect favorably on
Jefferson, it is worth noting that in the end, however reluctantly, he acceded to the will of the people. (Peterson 1986, 132)

The will of the people, popular sovereignty, freedom of expression, and protecting state government were very important principles throughout both of Jefferson's administrations. Jefferson recognized that internal improvements were important as a way for the United States to become more united. However, he chose that the amendment process should determine whether or not the people willed that these internal improvements be carried out. Jefferson himself never saw this question answered on his presidential watch. This domestic issue became a state issue which, for Jefferson, was where he was philosophically aligned. The embargo, with its many foreign elements, became a federal issue and a federal problem. Again this was parallel to Jefferson's concept of power. Jefferson did not recognize though, until the end, that the people had the right to express their opinions on foreign issues. For him, the will of the people, the voice he had followed many times in his career, and a concept he held dear was stronger, and more correct than his misguided policies. It was a poor ending to Jefferson's presidency and a bitter pill to swallow.
Jefferson left the presidency a very unhappy man, yet by no means a broken one. Although he never again held elective office or strayed very far from Monticello, he was very active in his retirement. In addition to pursuing his interests in botany, agricultural reform, architecture, music, and education, he kept abreast of current affairs and maintained a special interest in constitutional issues, of constitutional preservation and change. (Peterson 1986, 132) He knew there could be no preservation without change, no constructive change without preservation. He knew, as he wrote again in championing reform of the Virginia constitution, “that laws and institutions must go hand in hand with the progress of the human mind.” (Levy 1986, 1018) He again advocated that each generation, representing a new constituent majority, should make its own constitution. Not long before his death, he “despaired of ever seeing another amendment to the Constitution,” and observed, “Another general convention can alone relieve us.” (Levy 1986, 1018) His amendments advocated a two-term limitation of the president and the direct election of the president. He expressed concern about the many nationalist tendencies that emerged after the end of the War of 1812. (Levy 1986, 1018)
Jefferson was especially critical of the activities of John Marshall and the Supreme Court. Jefferson wrote in 1821 to Madison,

That body, like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is engulphing [sic] insidiously the special governments into the jaws of that which feeds them. The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric, they are construing our constitution from a co-ordination of a general and special government to a general and supreme one. This will lay all things at their feet. (Levy 1986, 1018)

Jefferson also denied the power of the Supreme Court to decide on questions of constitutionality. “The ultimate arbiter,” he insisted, “is the people of the Union, assembled by their deputies in convention, at the call of Congress, or of two thirds of the States.” (Ellis 1996, 331) In other words, Jefferson was again denying the principle of judicial review and argued that the provisions made for amending the Constitution were the only proper procedures for deciding all questions of constitutionality. (Ellis 1996, 331)

Jefferson continued to write to Madison and renewed his friendship with John Adams in 1816. They engaged in an extensive correspondence that examined, among other things, the origin and meaning of the American Revolution, the principles of 1776, and explored many of the key assumptions behind the American tradition of constitutionalism and republicanism. Adams may have prompted an analysis of the latter since he remarked that the term “republicanism” was one of those “weasel
words that different people understood to mean different things." (Ellis 1996, 311) Jefferson's most familiar formulation tended to follow a binary system of political thought, juxtaposing “republican” and “monarchy,” but then leaving the matter at that, not specifying what “republican” meant beyond the elimination of royal prerogatives and divine right presumptions of power. Indeed one of the most alluring features of Jefferson's formulation was his eloquent silence throughout his lifetime on the whole question of what a republican government actually entailed. Adams had written four fat volumes on this very subject, and Madison had given the matter equivalent analytical attention in *The Federalist Papers*. Perhaps the most beguiling facet of Jefferson's habit of mind was its implicit assumption that one need not worry or even talk about such complex questions, that the destruction of monarchy and feudal trappings led naturally to a new political order. The best name for that new order had always been “republican.” (Ellis 1996, 311)

In 1816 he began to find this language inadequate. “In truth, the abuses of monarchy had so filled all the space of political contemplation,” he remarked, “that we imagined everything republican which was not monarchy.” (Ellis 1996, 311) But subsequent events demonstrated that “we had not yet penetrated to the mother principle, that governments are republican only in proportion as they embody the will of the people, and execute it.” (Ellis 1996, 311) He made the same point in a slightly different way to John Taylor, his fellow Virginian and even more fervent
agrarian enthusiast: "The further the departure from direct and constant control by the citizens, the less has the government the ingredient of republicanism." (Ellis 1996, 311) In answer to the Adams claim that "republicanism may mean anything or everything", Jefferson apprised Taylor that the true doctrine was that "governments are more or less republican as they have more or less of the element of popular election and control in their composition." (Ellis 1996, 311) Whatever evils might flow from what he called "the duperies of the people" were infinitely less threatening or injurious "than those form the egoism of their agents." (Ellis 1996, 312)

Without fully realizing it at the time, he and his fellow revolutionaries in 1776 had launched a political movement whose full implications were only now seeping into conscious articulation. Here, for the first time, Jefferson embraced the idea that would eventually and then everlastingly be associated with his name. What he had always called "pure republicanism" was really "democracy." The voluntary consent of the individual citizen, was the elemental principle and political power source. Jefferson's level of mistrust toward the different branches of the federal government had followed naturally from this principle: The federal courts were the furthest removed from popular consent, and he hated them the most; the Senate came next, followed closely by the president, then the House of Representatives; the state legislatures were then closer to the popular will; county representatives were closer still, and town or
what he called ward officials stood face-to-face with the elemental source itself, the semisacred "will of the people." (Ellis 1996, 312)

Almost every other political thinker in America, especially Adams and Madison, had begun with the presumption that the intimacy of local politics could not be replicated at the national level, which required different and more complex political principles and institutional mechanisms to work effectively, indeed to work at all. Jefferson did not think about politics in this conventional fashion. Democracy could never be completely perfect, but the more of it, the better. (Ellis 1996, 312-313) His discovery of the wards as the primal democratic unit or the "pure and elementary republics" led him to what we might call a theory of democratic contagion: Combine the wards and they will congeal to form a democratic state; then, as the states interact to form a nation, they "will make of the whole a true democracy." (Ford 1892, 10:45-46) Even to the end Jefferson believed that any nation, big or small, could prosper if the leaders followed the will of the people.

Fortunately Jefferson at the end of his life was pressed on and came to terms with ideas such as "republicanism." However, efforts to clarify the somewhat misty and mystical notion of "the people" or "the will of the people" never made much headway with him. Perhaps he understood that if democracy were to become a political religion, he needed to preserve a sense of mystery at the core. (Ellis 1996, 314)
CHAPTER XIV

CONCLUSION

The primary purposes of this thesis were to define the constitutional philosophy of Thomas Jefferson as a maturing political thinker and theorist as well as Jefferson the political operative as he took his place on the state and national political stage and compare and contrast these two periods of Jefferson's life. In Chapter VII, Jefferson's Republicanism, we summarized his political philosophy through the conclusion of the Constitutional Convention in 1787. We noted the many facets to his theory of republicanism which he advocated as a maturing political thinker. His republican ideas included a belief in the expansion of liberty and the containment of arbitrary power; the concept of limited government; an abolition of the monarchy on American shores; the advocacy of a separation of powers; a desire to strengthen political equality and popular sovereignty; a creation of written constitutions prior to the start of government composed by the people, and followed by an adherence to strict construction of that constitution; a resistance to factions and energetic government; a support of state's rights; and proposals including generational sovereignty and even popular resistance against governmental tyranny. Additionally in Chapter IX, the Revolution of 1800, we listed three principles that Jefferson pledged to use in guiding
the government back to the original ideals of the Constitution and a republican state. These principles included; a sharp reversal of executive power and influence, a frugal and simple administration of the federal government, and a protection of state government in all their rights as the primary jurisdiction of public affairs. Let us expand on the concepts, ideas, principles, and beliefs summarized above and attempt to conclude whether or not Jefferson as president, guided the nation back to his ideals of the Constitution and republicanism which he held as a maturing political thinker.

I think that one of the strongest principles which merged both his early philosophy and his presidency were the actions he took to limit the power of the executive. Jefferson, the author of the Declaration of Independence, admonished the executive actions of the English king. His words and actions throughout his career advocated the liberation of any trace of monarchial power. Jefferson's early upbringing on Whig philosophy, which viewed the executive as a chief magistrate- a link between the people and government- functioning as an administrator with limited powers is evident throughout his presidency. Jefferson limited his powers as president by recognizing another important Whig doctrine, the significance of the separation of powers. Jefferson relied on the legislative branch, not the executive, to make the laws. This is not to say that Jefferson did not influence congressional legislation by means of personal persuasion, his role as leader of the Republican Party, or the use of
legislative lieutenants on the floor of the Congress. Jefferson, however, limited his power as executive by never once using his veto power to stop a bill passed by the legislative branch which was well within his constitutional prerogative. As Jefferson stated to President Washington during the struggle over the national bank, he maintained that the presidential veto power was "the shield provided by the constitution" to protect, among other things, the rights of the states. Jefferson further advised Washington that, "unless the President's mind on a view of everything which is urged for and against a bill is tolerably clear that it is unauthorized by the constitution" he should give the benefit of doubt to Congress and sign the bill. (Mayer 1994, 197) It was therefore up to Congress to make laws, not the president.

Jefferson also relied on the people and the states, not the power of the executive, to change the Constitution by amendment. The only explicit change which he endorsed publicly during his presidency was the Twelfth Amendment, which corrected the irregularities that occurred in the elections of 1796 and 1800 by providing that separate electoral ballots be cast for president and vice president. Jefferson advocated this change because he personally witnessed the problems the current statute caused. On other occasions Jefferson felt that if a correction was to be made in the Constitution, it was up to the people and the states, not the president or Congress, who should have the authority to amend the Constitution. The strongest evidence was Jefferson's struggle over the issue of the Louisiana
Purchase and his desire for the people, not he or his ministers, to decide the acquisition of this new territory. Only when the purchase was in jeopardy did he acquiesce to his strict constructionist view. We observed this rationale of the amendment process again in letting the people, not the federal government, decide on the issue of internal improvements.

Other evidence which shows that Jefferson desired to limit the power of the executive branch includes his attitude towards public appearances and speeches. He found that the annual address to Congress too reminiscent of the king's opening speech of Parliament and discontinued it after his first two. In sending a written message rather than delivering it, he broke with George Washington's precedent and started a tradition which lasted more than a century, until Woodrow Wilson's presidency.

We have, however, observed a couple of instances when Jefferson did increase his executive power. Once was after the acquisition of Louisiana. The territorial government which Jefferson put into place lacked the republican ideals which other American citizens possessed. This political framework was temporary and Jefferson actually allowed the incorporation of French and Spanish civil law into Louisiana law. Another increase of executive power was during the embargo crisis in Jefferson's final year as president. Among the policies Jefferson employed in enforcing his embargo with England and France was suspending civil rights, expanding search and seizure power, increasing the use of the
military, and demanding that merchants suspend foreign trade with all nations. It was only after the federal courts handed down a number of decisions unfavorable to his government's enforcement procedures and, especially, the people openly rebelling against Jefferson's decisions that he acquiesced and cancelled his policy.

Contrary to James Madison's belief, Jefferson did not advocate an energetic government. He stated just after the Constitutional Convention, "God send that our country may never have a government which it can feel." (Ellis 1996, 124) The policies we mentioned above concerning limiting the power of the executive are ones which reflected his non-energetic presidential desire. Many Federalists feared that when Jefferson was elected president he would become energetic by not following precedents set by the previous two administrations and make many changes. Jefferson, however, did not engage in root and branch reform by removing officeholders, change fundamental beliefs, do away with the national bank, etc. This lack of energy led to constitutional stability.

Jefferson's desire for a non-energetic government corresponded with his principles of limited government and a desire for a frugal, simple administration of the federal government. His policy of retiring the national debt became a budgetary tool for enforcing austerity and reducing the size of government. It became a practical way with how a president could use executive power in a way which would limit the power
of the government. Likewise Jefferson discouraged the adoption of the circuit courts into the government. This policy prevented the addition of another layer of the judicial branch. All of these actions showed that throughout his career Jefferson was not interested in expanding the power of the government and that his desire was not to be an energetic leader.

In terms of policies which espoused popular sovereignty and political equality principles, we mentioned that Jefferson felt that the people should be involved in the decision making process on the Louisiana Purchase and that he eventually reversed many of his actions after the people rebelled in the embargo crisis. Early in his first term as president he let it be known that he supported a proposal being circulated in Virginia by John Taylor and Edmund Pendleton that called for a one-term presidency with reduced executive powers, shorter terms for senators, and federal judges removable by a vote of Congress. These were never carried out and, for Jefferson, he would have preferred that citizens use the amendment process if they chose to make wholesale changes in the Constitution. By stating his preferences, however, Jefferson was still espousing many of his early held beliefs favoring greater political equality and popular sovereignty in government. After his presidency in 1824, two years before his death, Jefferson came closer to his earlier held belief in near universal adult male suffrage when he came out in favor of the
elimination of the property requirement for voters in Virginia, saying it disenfranchised men who otherwise were expected to serve in the militia.

Jefferson advocated for both Virginia and the United States that a written constitution should exist prior to government and define what powers that government had. Furthermore Jefferson's espoused a strict constructionist view towards any constitution that was created. As Dumas Malone stated, "To Jefferson laws in general, and constitutions in particular, were shields against tyranny; and he coupled a positive faith in human beings with a predominantly negative attitude toward political agencies and institutions." (Malone 1948, 2:342) Moreover the Whig principles he learned as a young man taught him that it was the inevitable tendency of those in power, however well intentioned, to seek to expand their powers at the expense of individual liberties. For this reason he tended to be a literalist. We saw this most evident in his written opinion he gave to George Washington concerning the bank bill. Jefferson argued that the bill to charter a national bank was unconstitutional by using the Tenth Amendment, by denying that the incorporation of a bank could be a delegated power, or through the power of Congress to tax, or by using the "necessary and proper" clause. Jefferson also chose to apply his strict constructionist attitude in advancing the separation of powers doctrine by letting Congress make laws and the judicial branch interpret laws. In addition, we see Jefferson continue this strict construction interpretation during the Louisiana Purchase, the Virginia and Kentucky
Resolutions, and over the question of financing internal improvements. We've mentioned that Jefferson, at the time of the Louisiana Purchase desired to have American citizens decide its purchase. Jefferson felt that the purchase by any other means would be an example of broad construction.

Both the Virginia and Kentucky Resolutions and the internal improvement questions dealt with not only strict construction beliefs but ones in which, according to Jefferson's theory, were constitutional matters left to the states. After his return to the United States in 1790 until the end of his life, Jefferson's emphasis was almost always on the danger of encroachments by the federal government on the states. He felt that domestic concerns and federal-state questions were generally a matter for the states. Jefferson hesitated to establish internal improvements (roads, canals, schools, universities, libraries, scientific centers, etc.) because he felt it interfered with states rights control. Jefferson desired to clarify this question by a constitutional amendment and whether the "general welfare" clause gave the federal government the power to establish internal improvements. Unfortunately the embargo crisis impeded this enquiry from being answered. Jefferson also used his strict constructionist and states rights viewpoints when writing his Kentucky Resolution calling for the states to declare the Alien and Sedition Acts null and void and urging Congress to repeal them, on the grounds that the federal government had been created by a "compact" among the sovereign states
and therefore possessed only those power specifically delegated to it by the states.

To say that Jefferson was a literalist or a strict constructionist, however, is insufficient to describe his theory of interpretation. It was more the context of a particular constitutional provision within the overall purpose of the federal Constitution alone, that mattered to Jefferson. We see that he was a strict constructionist with regard to the powers granted Congress in Article I, Section 8, especially where the federal powers could preempt state law. Nevertheless, he could interpret federal powers under the Constitution quite liberally in matters involving foreign affairs, as he did during the embargo crisis. In general terms though Jefferson preferred broader moral categories that hovered over the more conventional constitutional distinctions. Any opportunity which could expand liberty and contain arbitrary power were part of his lifelong quest.

Much of Jefferson's theory concerning principles on republicanism and constitutionalism remained consistent and were carried forward from his formative years as a political thinker to his practice as a political operative. He was fundamentally committed to the idea of a limited government through a written constitution; he rarely strayed from his mission of expanding liberty; he desired that the ideas of popular sovereignty, political equality, and consent of the governed be carried forward; he believed that the federal government's main sphere of activity should be in foreign affairs and that domestic matters, unless specifically
provided for in the Constitution, should be left to the states; and he was critical of all forms of judicial activism. At times however we see Jefferson straying from his consistent principles of republicanism and constitutionalism. These instances have occurred particularly in the sphere of foreign affairs most notably during the embargo crisis and the Louisiana Purchase.

One can certainly follow a paper trail regarding Jefferson's opinion on any subject of government. This is due to the fact that Jefferson was a prolific writer and his recordings on paper exist to this day. Jefferson was also a complex individual. Henry Adams perhaps said it best about Jefferson's elusive character,

Almost every other American statesman might be described in a parenthesis. A few broad strokes of the brush would paint the portraits of all the early Presidents with this one exception..., but Jefferson could be painted only touch by touch, with a fine pencil, and the perfection of the likeness depended upon the shifting and uncertain flicker of its semi-transcendent shadows. (Ellis 1996, 270)

Thomas Jefferson was by no means a perfect man, but he was definitely a great one and a figure of monumental importance in the development of the American constitutional tradition.
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