AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 3: The Founding Era – Federalism/Constitutional Amendment and Ratification

*Thomas Jefferson*, **Notes on the State of Virginia** (1784)[[1]](#footnote-1)

*The* Notes on the State of Virginia *was originally drafted to the French ambassador to the United States as an explanation of the post-Revolutionary situation in Virginia and was subsequently published as a book. In the* Notes*, Jefferson was critical of the state constitution as insufficiently democratic and called for its revision. The first Virginia constitution was drafted by the state legislature and entrenched many of the political interests represented in that legislature. The idea of having a special constitutional convention that was separate from the legislative assembly meet to draft constitutions did not emerge immediately, and it was only after criticism mounted that legislatures gave up their constitution-writing power. What might be the point of calling a separate popularly elected assembly to draft the constitution in a republic, where the government itself was a popularly elected assembly?* *Despite criticism of the constitution, it was not replaced until 1830. Although apportionment and suffrage were liberalized during that constitutional convention, delegates from the eastern part of the state, including such luminaries as James Madison, James Monroe, and John Marshall, resisted calls from the mountain regions to take Jefferson’s advice and let political power follow population.*

*The idea that constitutions should undergo a separate ratification process was not immediately attached to the idea of a written constitution either. The requirement that constitutions be submitted for public approval after being drafted before they could take legal effect was the result of political pressure brought to bear on political elites and eastern settlements which controlled the state legislatures and constitutional conventions in the early republic that produced the first constitutions. Massachusetts town meetings were the first to demand popular ratification of a state constitution, and the towns defeated the first constitution sent to them for their approval. The Massachusetts Constitution of 1780 was the first constitution to be popularly ratified. Popular ratification emerged as a check on constitution drafters. Popularly elected assemblies such as the British Parliament had arisen as checks on unelected kings.*

*The process for creating constitutions was brand new during the Founding Era. Many of the basic features of the process that are familiar today were the result of trial-and-error and political negotiation in the states during the first years after the Revolution. Was it enough for a popularly elected legislature to draft a constitution? How should that legislature be constituted? Was it necessary for a constitution to be ratified by some separate body after it was drafted? Was it necessary that a constitution be drafted by some separate body than the legislature? Thomas Jefferson was among those who argued that constitutions should be drafted by special convention and popularly ratified in order to better reflect the will of the people. Popular pressure in many states gradually forced incumbent politicians to accept that approach to creating constitutions, but some argued that such efforts were unnecessary and counterproductive. Why exactly was a popularly elected convention better or more authoritative than a popularly elected legislature? Was popular ratification of a complicated and often carefully negotiated document like a constitution really useful? What if no constitution could win popular ratification? Is Jefferson’s highly democratic approach to constitutionalism the best way?*

*What might be the point of calling a separate popularly elected assembly to draft the constitution in a republic, where the government itself was a popularly elected assembly? Is ratification the only method for checking drafting assemblies? Would it be more effective to adjust how drafting assemblies are constituted? Is it democratically required that constitutions be popularly ratified?*

The [state] constitution was formed when we were new and unexperienced, in the science of government. It was the first too which was formed in the whole United States. No wonder then that time and trial have discovered very capital defects in it.

1. The majority of the men in the state, who pay and fight for its support, are unrepresented in the legislature, the roll of freeholders entitled to vote, not including generally the half of those the roll of the militia, or of the tax-gatherers.

2. Among those who share the representation, the shares are very unequal. Thus, the county of Warwick, with only 100 fighting men, has an equal representation with the county of Loudon, which has 1746. So that every man in Warwick has as much influence in the government as 17 men in Loudon. . . . The[] 19,000 [fighting men] . . . living in one part of the country [near the sea coast] give law to upwards of 30,000 living in another [the rest of the state], and appoint all their chief officers executive and judiciary. From the difference of their situation and circumstances, their interest will often be different.

3. The senate is, by its constitution, too homogeneous with the house of delegates. Being chosen by the same electors, at the same time, and out of the same subjects, the choice falls of course on men of the same description. The purpose of establishing different houses of legislation is to introduce the influence of different interests or different principles. . . .

4. All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one: 173 despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for; but one which should be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. . . . Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered. . . .

5. That the ordinary legislature may alter the constitution itself. On the discontinuance of assemblies, it became necessary to substitute in their place some other body, competent to the ordinary business of government, and to the calling forth the powers of the state for the maintenance of our opposition to Great-Britain. . . . So far as a temporary organization of government was necessary to render our opposition energetic, so far their organization was valid. But they received in their creation no powers but what were given to every legislature before and since. They could not therefore pass an act transcendent to the powers of other legislatures. If the present assembly pass an act, and declare it shall be irrevocable by subsequent assemblies, the declaration is merely void, and the act repealable, as other acts are. . . . Lord Coke says . . . “though diverse parliaments have attempted to restrain subsequent parliaments, yet could they never effect it; for the latter parliament hath ever power, to abrogate, suspend, qualify, explain, or make void the former in the whole or in any part thereof, notwithstanding any words of restraint, prohibition, or penalty, in the former.” . . . The other states in the union have been of the opinion, that to render a form of government unalterable by ordinary acts of assembly, the people must delegate persons with special powers. They have accordingly chosen special conventions to form and fix their governments. . . .

1. Excerpt taken from Thomas Jefferson, *Notes on the State of Virginia*, 3d ed. (Newark: Pennington & Gould, 1801), 171–183. [↑](#footnote-ref-1)