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The Rule of Law (Part 1)

[Mark Alexander](http://patriotpost.us/alexander/bio.asp) (<http://patriotpost.us/alexander/bio.asp>)

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Publisher's Note: This essay is the first of a two-part seminal treatise on Constitutional Rule of Law in advance of Constitution Day, 17 September, the 222nd anniversary of our national Constitution. (Read part two, [Our Sacred Honor](http://64.203.107.114/alexander/edition.asp?id=660) (<http://64.203.107.114/alexander/edition.asp?id=660>)). The combined essay is published as the forward to our new [Constitution booklets](http://patriotshop.us/product_info.php?cPath=52&products_id=124) (http://patriotshop.us/product_info.php?cPath=52&products_id=124). On Constitution Day, *The Patriot* will announce a major education initiative promoting the Right construction of our Constitution and Rule of Law.

Fellow Patriots,

On December 16th, 1773, "radicals" from Marlborough, Massachusetts, threw 342 chests of tea from three British East India Company ships into Boston Harbor in protest of oppressive taxation and tyrannical rule. They wrote of their actions, "A free-born people are not required by the religion of Christ to submit to tyranny, but may make use of such power as God has given them to recover and support their ... liberties." That event, of course, was the Boston Tea Party.

On April 19th, 1775, Paul Revere departed Charlestown (near Boston), for Lexington and Concord, in order to warn John Hancock, Samuel Adams and other Sons of Liberty that British regulars were coming to arrest them and seize their weapons caches. Revere was captured after reaching Lexington, but his friend Samuel Prescott took word to the militiamen in Concord.

In the early dawn of that first Patriots Day, Captain John Parker, commander of the militiamen at Lexington, ordered, "Don't fire unless fired upon, but if they want a war let it begin here." And it did -- American Minutemen fired the "shot heard round the world," as immortalized by Ralph Waldo Emerson, confronting the British on Lexington Green and at Concord's Old North Bridge.

On July 6th, 1775, Thomas Jefferson and John Dickinson issued their Declaration of the Cause and Necessity of Taking up Arms: "With hearts fortified with these animating reflections, we most solemnly, before God and the world, declare, that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live as slaves."

Samuel Adams proclaimed, "[T]he people alone have an incontestable, unalienable, and indefeasible right to institute government and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it."

A year later in Philadelphia, on July 4th, 1776, Jefferson and 55 merchants, farmers, doctors, lawyers and other representatives of the original 13 colonies of the United States of America, in the General Congress, Assembled, pledged "our lives, our fortunes and our sacred honor" to the cause of liberty, declaring, "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

Our Founders further avowed, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to

institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

Our Declaration of Independence was derived from common law, "the Laws of Nature and Nature's God," all men being "endowed by their Creator with certain unalienable Rights." It calls on "the Supreme Judge of the world for the rectitude of our intentions" and "the protection of Divine Providence."

The Declaration's common law inspiration for the Rights of Man has its origin in governing documents dating back to the Magna Carta (1215), and was heavily influenced by the writings Charles Montesquieu, William Blackstone and John Locke.

However, its most immediate common law inspiration was Blackstone's 1765 "Commentaries on the Laws of England," perhaps the most scholarly historic and analytic treatise on Natural Law.

Blackstone wrote, "As man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will. This will of his Maker is called the law of nature. ... This law of nature, being coeval [coexistent] with mankind and dictated by God Himself is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity if contrary to this. ... Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered [permitted] to contradict these."

In 1776, the Second Continental Congress appointed a committee representing the 13 states to draft a formal document of incorporation, and approved the Articles of Confederation and Perpetual Union for ratification by the states on November 15, 1777. The Articles of Confederation were ratified on March 1, 1781, and the "the United States in Congress assembled" became the Congress of the Confederation.

"We the People..."

At the conclusion of the Revolutionary War, it was evident that the Articles of Confederation between the states was not sufficient to ensure the interests and security of the Confederation. In September of 1786, at the urging of James Madison, 12 delegates from the five states met in Annapolis, Maryland to consider amendments to the Articles.

Those delegates called for representatives from all the states to convene at the Pennsylvania State House in Philadelphia for full consideration of the revisions needed, and 12 states (Rhode Island declining) sent 55 delegates, a third of whom were signers of the Declaration.

The most noted delegates were George Washington, Roger Sherman, Alexander Hamilton, Benjamin Franklin, James Madison and George Mason.

Noticeably absent from the proceedings were Thomas Jefferson, Patrick Henry, Samuel Adams and Thomas Paine, who believed the Articles did not need modification. Summing up their sentiments, Henry wrote that he "smelt a rat in Philadelphia, tending toward the monarchy."

The Philadelphia Convention (Constitutional Convention) opened its proceedings on May 25 of 1787, and soon decided against amending the existing Articles in favor of drafting a new Constitution. The next three months were devoted to deliberations on various proposals with the objective of drafting a document, which would secure the rights and principles enumerated in the Declaration and Articles of Confederation, preserving essential liberty.

In late July, after much debate, a Committee of Detail was appointed to draft a document to include all the compromise agreements, but based primarily on James Madison's Virginia Plan, establishing a republican form of government subject to strict Rule of Law, reflecting the consent of the people and severely limiting the power of the central government.

A month later, the Committee of Style and Arrangement, which included Gouverneur Morris, Alexander Hamilton, William Samuel Johnson, Rufus King, and James Madison, produced the final Constitution, and it was submitted for delegate signatures on September 17, 1787.

George Washington and the delegates to the Convention wrote, "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Of the new Constitution, Benjamin Franklin said, "I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. ... Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best."

Of the 55 delegates, 39 signed the new Constitution and the remaining delegates declined, most out of concern that the power apportioned to the new plan was a threat to the sovereignty of the several states, and thus, to individual liberty.

The ratification debates among the states were vigorous.

James Madison, John Jay and Alexander Hamilton authored The Federalist Papers advocating ratification of the new Constitution.

Patrick Henry's Anti-Federalists, who opposed the plan under consideration because it allocated too much power to the central government. Henry, Samuel Adams, George Mason, Robert Yates, Thomas Paine, Samuel Bryan and Richard Henry Lee were among those who spoke against ratification, and some authored The Anti-Federalist Papers.

The new Constitution stipulated that once nine of the thirteen original States ratified it through state conventions, a date would be established for its implementation. This condition was controversial, as the document in question had no standing authority to make such stipulation. However once the ninth state, New Hampshire, reported its convention's approval on June 21, 1788, the Continental Congress set the date for enactment of the Constitution for March 4, 1789.

With Rhode Island's ratification on May 29th of 1790, all thirteen states had endorsed the Constitution.

Though critical of many of its provisions, in reflection Thomas Jefferson wrote of the Convention and its product, "The example of changing a constitution by assembling the wise men of the state, instead of assembling armies, will be worth as much to the world as the former examples we had give them. The constitution, too, which was the result of our deliberation, is unquestionably the wisest ever yet presented to men."

"To secure these rights..."

The Bill of Rights: "In order to prevent misconstruction or abuse of [the Constitution's] powers..."

Endeavoring to define further our Constitution's limits on government interference with the innate Rights of the People, James Madison, its primary architect, introduced to the First Congress in 1789, a Bill of Rights -- the first 10 Amendments to our Constitution, which was then ratified on the 15th of December 1791.

The Bill of Rights was inspired by three remarkable documents: Two Treatises of Government, authored by John Locke in 1689 regarding protection of "property" (in the Latin context, proprius, or one's own "life, liberty and estate"); the Virginia Declaration of Rights, authored by George Mason in 1776 as part of that state's constitution; and, of course, our Declaration of Independence, authored by Thomas Jefferson.

There was great debate about the need to enumerate these rights, as such a listing might be taken to suggest that they were amendable rather than unalienable; granted by the state rather than "Endowed by our Creator."

As Hamilton argued in Federalist No. 84, "Bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. ... For why declare that things shall not be done which there is no power to do?"

On the other hand, George Mason was among 16 of the 55 Constitutional Convention delegates who refused to sign it because the document did not adequately address limitations on what the central government had "no power to do." Indeed, he worked with Patrick Henry and Samuel Adams against its ratification for that reason.

As a result of Mason's insistence, 10 additional limitations were placed upon the federal government by the first session of Congress, for the reasons outlined by the Preamble to the Bill of Rights: "The Conventions of a number of the States having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution..."

Read in context, the Bill of Rights is both an affirmation of innate individual rights (as noted by Thomas Jefferson: "The God who gave us life gave us liberty at the same time."), and a clear delineation of constraints upon the central government.

Rule of Law

"But where says some is the King of America? I'll tell you Friend, he reigns above, and doth not make havoc of mankind... Let it be brought forth placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know ... that in America THE LAW IS KING." --Thomas Paine

For its first 150 years (with a few exceptions), our Constitution stood as our Founders and "the people" intended -- as is -- in accordance with its original intent. In other words, it was interpreted exegetically rather than eisegetically -- textually as constructed, rather than as a so-called "living" document, altered to express the biases of later generations of politicians and jurists.

But incrementally, constitutional Rule of Law in the United States has been diluted by unlawful actions of those in the executive, legislative and judicial branches -- most notably, the latter -- at great hazard to the future of liberty.

As Thomas Jefferson warned repeatedly, the greatest threat to the Rule of Law and constitutional limitations on the central government was an unbridled judiciary: "The original error [was in] establishing a judiciary independent of the nation, and which, from the citadel of the law, can turn its guns on those they were meant to defend, and control and fashion their proceedings to its own will. ... The opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislature and Executive also in their spheres, would make the Judiciary a despotic branch."

Jefferson understood that should our Constitution ever become a straw man for a politicized judiciary to interpret as it pleased, Rule of Law would gradually yield to rule of men -- the terminus of the latter being tyranny.

Regarding the process of amendment prescribed by our Constitution in Article V (popular ratification rather than judicial diktat), Samuel Adams wrote, "[T]he people alone have an incontestable, unalienable, and indefeasible right to institute government and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it. And the federal Constitution -- according to the mode prescribed therein -- has already undergone such amendments in several parts of it as from experience has been judged necessary."

Jefferson concurred: "The will of the majority [is] the natural law of every society [and] is the only sure guardian of the rights of man. Perhaps even this may sometimes err. But its errors are honest, solitary and short-lived."

Alexander Hamilton noted, "[T]he present Constitution is the standard to which we are to cling. Under its banners, bona fide must we combat our political foes -- rejecting all changes but through the channel itself provides for amendments."

On the subject of constitutional interpretation, Jefferson wrote: "The Constitution on which our Union rests, shall be administered ... according to the safe and honest meaning contemplated by the plain understanding of the people of the United States at the time of its adoption -- a meaning to be found in the explanations of those who advocated it.... On every question of construction carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates and instead of trying what meaning may be squeezed out of the text or invented against it, conform to the probable one in which it was passed. ... Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

James Madison agreed: "I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that is not the guide in expounding it, there may be no security for a consistent and stable, more than for a faithful exercise of its powers."

Justice James Wilson, a signer of the Declaration of Independence and one of the six original Supreme Court justices appointed by George Washington, wrote, "The first and governing maxim in the interpretation of a statute is to discover the meaning of those who made it."

The Federalist Papers, as the definitive explication of our Constitution's original intent, clearly define constitutional interpretation. In Federalist No. 78 Alexander Hamilton writes, "[The Judicial Branch] may truly be said to have neither FORCE nor WILL, but merely judgment ... liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."

In Federalist No. 81, Hamilton declares, "[T]here is not a syllable in the [Constitution] which directly empowers the national courts to construe the laws according to the spirit of the Constitution. ... [T]he Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution." And yet this non-existent "spirit" is the essence of the so-called "living constitution," which liberal jurists now amend by judicial diktat rather than its prescribed method in Article V.

The "Living Constitution"?

The first instance of extra-constitutional interpretation by the federal judiciary was the 1803 case of *Marbury v. Madison*, in which the Supreme Court, under Chief Justice John Marshall, denied the plaintiff's claim because it relied on the Judiciary Act of 1789, which the court ruled unconstitutional.

Marbury set a very dangerous precedent, which would, a century later, be used to greatly expand the limited judicial powers outlined in Article III of our Constitution.

Prior to Franklin D. Roosevelt's "New Deal" mischief, however, the courts were still largely populated with originalists, those who properly rendered legal interpretation based on the Constitution's "original intent." But Roosevelt grossly exceeded the constitutional limits of his office and that of the legislature in his ill-advised efforts to end the Great Depression (the latter falling victim to World War II -- not FDR's social and economic engineering).

FDR even attempted to increase the number of justices on the Supreme Court in 1937 so those appointees would give him a majority, which would do his political bidding. He failed, but during his unprecedented first three terms, he appointed eight justices to the High Court, who radically accommodated their "interpretation" of the Constitution to comport with Roosevelt's expansion of central government authority and power.

It is no coincidence that the term "living constitution" was coined in the same year, as the title of a book on that subject.

In the decades that followed, the notion of a "living constitution," one subject to contemporaneous interpretation informed by political agendas, took hold in federal courts. With increasing frequency, "judicial activists," jurists who "legislate from the bench" by issuing rulings at the behest of like-minded special-interest constituencies, were nominated and confirmed to the Supreme Court.

This degradation of the Rule of Law was codified by the Warren Court in *Trop v. Dulles* (1958). In that ruling, the High Court noted that the Constitution should comport with "evolving standards ... that mark the progress of a maturing society." In other words, it had now become a fully pliable document, "a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please," as Thomas Jefferson had warned. Indeed, the Court had become "a despotic branch."

Since then, judicial despots have not only undermined the plain language of our Constitution, but also grossly devitalized the Bill of Rights.

For example, the First Amendment reads plainly: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Once again, in plain language, "Congress shall make no law..."

Judicial activists have for decades "interpreted" this amendment to suit their political agendas, placing severe constraints upon the free exercise of religion, invoking the obscure and grotesquely misrepresented "Wall of Separation" to expel religious practice from any and all public forums.

As noted by the late Chief Justice of the Supreme Court William Rehnquist, "The wall of separation between church and state is a metaphor based upon bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned. ... The greatest injury of the 'wall' notion is its mischievous diversion of judges from the actual intention of the drafters of the Bill of Rights."

Meanwhile, judicial despots and legislators are endeavoring to abridge the freedom of speech and the press, while asserting that virtually all other mediums of expression constitute "free speech."

As another example, the Second Amendment reads plainly: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." And yet certain executive, legislative and judicial principals are unceasing in their efforts to enfeeble this essential right.

In the 1788 Massachusetts Convention debates to ratify the U.S. Constitution, Founder Samuel Adams stated: "The Constitution shall never be construed ... to prevent the people of the United States who are peaceable citizens from keeping their own arms."

That same year, James Madison wrote in Federalist No. 46, "The ultimate authority ... resides in the people alone. ... The advantage of being armed, which the Americans possess over the people of almost every other nation ... forms a barrier against the enterprises of ambition."

Madison's appointee, Justice Joseph Story, in his Commentaries on the Constitution (1833), has correctly observed of the Second Amendment: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."

Similarly, Founder Noah Webster wrote, "Tyranny is the exercise of some power over a man, which is not warranted by law, or necessary for the public safety. A people can never be deprived of their liberties, while they retain in their own hands, a power sufficient to any other power in the state."

Equally offensive to our Constitution is the manner in which the 10th Amendment's assurance of states' rights has been eroded by judicial interpretation.

The 10th Amendment reads plainly: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In Federalist No. 45, Madison outlines the clear limits on central government power established in the Constitution: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."

But as early as 1794, Madison had begun to rail against the government's unconstitutional urge to redistribute the wealth of its citizens: "I cannot undertake to lay my finger on that article of the Constitution which granted a right to Congress of expending, on objects of benevolence, the money of their constituents. ... If Congress can do whatever in their discretion can be done by money, and will promote the General Welfare, the Government is no longer a limited one, possessing enumerated powers, but an indefinite one, subject to particular exceptions."

Jefferson wrote: "[G]iving [congress] a distinct and independent power to do any act they please which may be good for the Union, would render all the preceding and subsequent enumerations of power completely useless. It would reduce the whole [Constitution] to a single phrase, that of instituting a Congress with power to do whatever would be for the good of the United States; and as they sole judges of the good or evil, it would be also a power to do whatever evil they please. Certainly no such universal power was meant to be given them. [The Constitution] was intended to lace them up straightly within the enumerated powers and those without which, as means, these powers could not be carried into effect." Today, more than two-thirds of the federal budget is spent on "objects of benevolence," for which there is no constitutional authority. Put another way, much of your income is being confiscated and redistributed unconstitutionally.

Perhaps with an eye toward such a future, George Washington advised, "The basis of our political systems is the right of the people to make and to alter their Constitutions of Government. But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People is sacredly obligatory upon all."

But by the 1980s, adulteration of our Constitution had become so commonplace that liberal Supreme Court Justice Thurgood Marshall was lecturing on "The Constitution: A Living Document," in defense of interpretation on based on contemporaneous moral, political, and cultural circumstances.




More recently, Justice Antonin Scalia said of the "living constitution": "[There's] the argument of flexibility and it goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that; the Constitution is not a living organism; it is a legal document. It says something and doesn't say other things."

Justice Clarence Thomas follows, "[T]here are really only two ways to interpret the Constitution -- try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no basis in the Constitution. ... To be sure, even the most conscientious effort to adhere to the original intent of the

framers of our Constitution is flawed, as all methodologies and human institutions are; but at least originalism has the advantage of being legitimate and, I might add, impartial."

On the political consequences of a "living constitution," Justice Scalia concludes plainly, "If you think aficionados of a living Constitution want to bring you flexibility, think again. ... As long as judges tinker with the Constitution to 'do what the people want,' instead of what the document actually commands, politicians who pick and confirm new federal judges will naturally want only those who agree with them politically."

[Part 2 of this treatise will be published next week.]

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