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Introduction

“LIKE A GARMENT TO THE BODIE”: ON CONSTITUTIONAL RELATIONSHIPS

Remember my Countrymen, the present aera—perhaps the present struggle will fix the constitution of America forever.—think of your ancestors, and of your posterity.

—BENJAMIN RUSH ON THE TEA ACT CRISIS,
PENNSYLVANIA JOURNAL, OCTOBER 20, 1773

CONSTITUTIONS CARRY great emotional weight. Words like faith and love are not too strong to describe the feelings they inspire. Constitutions connect traditional objects of devotion—a beloved community and its history and customs—with cherished principles. The rights and liberties constitutions protect allow people to imagine and live better lives. Constitutions are living traditions, linking the present to the past and offering a vision of a society’s future.

Over two centuries, through sectional crisis and civil war, depression, world wars, and cold war, Americans of all stripes have voiced their pride in their constitution, often hailed as the world’s oldest written constitution still in effect. A national Constitution Day (September 17) is observed every year in its honor. It even has its own museum in Philadelphia. The version of the text inscribed on parchment in 1787 is a prime relic of the nation’s civic religion.¹ When the Library of Congress

transferred the document to a specially built exhibition hall at the National Archives in 1952, it was delivered in an armored personnel carrier, escorted in a procession of tanks, and placed in a fifty-ton, custom-built safe, from which it could be lowered nightly into a bomb-proof vault and raised again each day into a display case filled with argon gas.² Much of this veneration stems from the fact that Americans have looked to their constitution's provisions, especially those spelled out in the Bill of Rights, as tools to defend and expand the scope of freedom and to empower a wide range of people within the republic.

America's tradition of constitutional veneration has deep roots in the nation's colonial past. Like modern Americans, eighteenth-century Britons—in the home country and in the colonies—took enormous pride in the British constitution. With Britain's perfectly balanced sovereign triad of king, Lords, and Commons keeping tyranny, oligarchy, and anarchy in check, with traditions such as the common law preserving English rights, and with historic victories for liberty enshrined in documents from Magna Carta (1215) to the Bill of Rights (1689), Britons boasted of greater freedom than any other nation: "The constitution of our English government (the best in the world) is no arbitrary tyranny like the Turkish Grand Seignior's, or the French King's."³ In the words of the future King George III, "The pride, the glory of Britain, and the direct end of its constitution, is political liberty."⁴ The king's subjects in the colonies were quick to agree. In 1759, *The New American Magazine* declared Britain's constitution to be "the best model of Government that can be framed by Mortals."⁵ For John Adams writing in 1766, "Here lies the difference between the British constitution, and other forms of government, viz. that Liberty is its end, its use, its designation, drift, and scope, as much as grinding corn is the use of a mill, the transportation of burdens the end of a ship, the mensuration of time the scope of a watch, or life and health the designation of the human body."⁶

During the "Glorious Revolution" of 1688–89, after a century of violent conflict, the monarchy's status was redefined by Parliament and the relationship between the Church of England and dissenting religions was settled in a major revision to the British constitution. Over the subsequent eight decades, Britain's empire grew ever larger, richer, and

more powerful. Britannia ruled the waves, rose “more majestic” from each “foreign stroke,” and refused all attempts of “haughty tyrants” to “bend thee down.” “Britons never will be slaves”; this, in the words of the poet James Thomson, was “the charter of land.” “Rule, Britannia,” Thomson’s 1740 anthem, presaged the empire’s tremendous victories in the Seven Years’ War (1756–63), when British arms drove the Gallic foe from North America and opened vast reaches of territory to further expansion. In the immediate wake of these victories, colonists reveled in the empire’s glories and sang the virtues of their unparalleled constitution. In 1764, while writing an impassioned defense of the rights of the British colonies, Bostonian James Otis took care to observe that “the finest writers of the most polite nations on the continent of *Europe*, are enraptured with the beauties of the civil constitution of *Great Britain*.” Otis concurred: “The *British* constitution in theory and in the present administration of it, in general comes nearest the idea of perfection, of any that has been reduced to practice.”⁷

Yet within little more than a decade, Britain’s authority over thirteen of its colonies and a huge swath of American territory would collapse. The breakdown occurred not because colonists rejected the British constitution but because they claimed to defend it against an imperial government that had failed to uphold its principles. The American Revolution was a constitutional crisis within the first British Empire, an imperial civil war in which the combatants came to blows over differing interpretations of a constitution both sides cherished.

How could this happen? How could Britain’s venerable constitution—the best model of government, perfectly designed to promote liberty—suffer such a grave crisis? In the generations after 1688, the British Empire had changed in dramatic ways, but its framework of government had failed to adapt. The colonists of British North America, roughly 200,000 people at the time of the Glorious Revolution, ballooned to 2.5 million by the American Revolution, growing from statistical insignificance to a quarter of the population of the British realm in less than a century. With a booming economy, the colonies became both vital producers of goods for the British homeland and major consumers of British manufactures. Growing at a ferocious pace, the American territory Britain

claimed to govern more than doubled in area with the conquest of New France. Yet the place of the colonies within British governance had not been adjusted. England and Scotland had been formally united under a single parliament in 1707; England and the colonies had not, though the colonies were now larger in population and size than Scotland and growing much faster. King and Parliament together transformed taxation and state finance on the home island, empowering Britain's imperial rise. The colonies had never been formally included in this taxation system. Each individual colony spawned legislatures that mimicked (imperfectly) Britain's Houses of Lords and Commons. The status of these legislatures in relation to king and Parliament remained undefined. When, in the wake of the Seven Years' War, George III and his parliamentary ministries attempted to reform the empire, each of these constitutional gaps, each yawning chasm between old institutions and practices and new realities, provoked conflict.

The flash points, the infamous events that triggered a revolution, will be familiar to many, if not most, readers: The Royal Proclamation of 1763 that foreclosed colonists' access to newly conquered territories. The Stamp Act (1765) and Townshend Duties (1767) that asserted Parliament's right to tax the colonists over the objections of colonial legislatures. The formation of new colonies without representative assemblies in Quebec and Florida. Royal interference in colonial courts. The use of royal troops to enforce Parliament's laws, resulting in the Boston Massacre of 1770. With respect to all these controversial measures, the colonists' opposition was rooted in their claims to possess the "rights of Englishmen" guaranteed by the ancient customs and written documents of the British constitution. But the sovereign right of king and Parliament to impose these measures had been resolved in the Glorious Revolution of 1688 and the subsequent century's development of settled practices of government. Neither side was wrong under the British constitution, but neither could their conflicting positions be reconciled. The British Empire had expanded beyond its constitution's capacity to encompass it and, as a result, tore itself apart from within.

The emergence of an independent American nation may seem inevitable today, 250 years after the event. But we should not underestimate just how wrenching, in emotional terms, the break from Britain and its vaunted constitution was to Americans, even among those determined to achieve independence. Love for Britain was strong. The principles of the British constitution were of necessity intertwined in the popular imagination with the institutions and persons who represented and defended them, including the royal dynasty. Across the developing landscape of America, colonists had strewn the names of members of the House of Hanover across their new settlements and rising cities, from Hanover, New Hampshire, to Hanover Street in Boston to Hanover Square in New York. Lunenburg, Massachusetts, and New Brunswick, New Jersey; Frederick, Maryland, and Fredericksburg, Virginia; Charlotte, North Carolina, and Charlottesville, Virginia, all derive their names from the royal family.⁸ The Hanoverian dynasty had defended Britain against invasions by the Catholic Stuart pretenders and fought wars against France and Spain that expanded and enriched the colonies.

The depth of this affection for Britain, its constitution, and its history made the experience of separation excruciating. The colonists struggled to disentangle the virtues, ideals, and principles of the British constitutional tradition from what they saw as its corruption by the recent practices of the king's ministers. Even after the outbreak of war at Lexington and Concord on April 19, 1775, the Continental Congress sent the "Olive Branch Petition" to King George III on July 8, pouring out its continuing affection in the hope of reconciliation:

Attached to your Majesty's person, family, and Government, with all devotion that principle and affection can inspire; connected with *Great Britain* by the strongest ties that can unite societies, and deploring every event that tends in any degree to weaken them, we solemnly assure your Majesty, that we not only most ardently desire the former harmony between her and these Colonies may be restored, but that a concord may be established between them upon so firm a basis as to perpetuate its blessings, uninterrupted by any future dissensions, to succeeding generations in both countries.⁹

George III responded by declaring the colonists to be rebels and traitors and promised “to bring to condign Punishment the Authors, Perpetrators, and Abettors of such traitorous Designs.”¹⁰

Only then, when cast out of the constitution’s protection and threatened with gruesome forms of execution, did the delegates to the Continental Congress move slowly toward a Declaration of Independence which at last named the king as a tyrant. Even then, in the very act of separation, the colonists’ wounded feelings seep through their list of grievances, the “long train of abuses” identified in the Declaration. Its concluding paragraphs remind “our British brethren” of how the colonies “have appealed to their native justice and magnanimity, and conjured them by the ties of our common kindred”—all in vain. Now the rebels must “mutually pledge to each other our Lives, our Fortunes, and our Sacred honor” to carry out the task of throwing off a government that had descended into despotism, and “provide new Guards for their future security.”

The constitution of the United States is in a precarious condition today, for reasons much like those that threatened the British constitution 250 years ago. Americans’ long-standing reverence for the U.S. Constitution as a bulwark against tyranny is not misplaced. In countless ways, domestic tranquility, the common defence, general welfare, and the blessings of liberty have been the better for it. And yet, like the British constitutional order in the late eighteenth century, the American constitutional order teeters on the verge of collapse. With hindsight, we can readily diagnose the constitutional flaws and identify the political crises that undermined Britain’s constitutional order in America. In our present predicament, clarity of this sort is beyond our reach. Nevertheless, over the first quarter of the twenty-first century, Americans’ faith in their government has plummeted amid escalating conflicts over fundamental constitutional issues. In recent years, attacks on the constitution’s foundational structures by sitting governments have commenced as well, exceeding even some of the abuses that George III was accused

of in the Declaration. Many Americans feel the same anguish and fear experienced by our forebears in the 1770s, worrying that the constitution can no longer protect them and that our ancient and venerable constitutional tradition, for all its virtues, may not be capable of containing the forces that threaten to pull it apart.

The purpose of this book is not to diagnose the political crisis of the moment or catalogue the present symptoms of an ailing constitution. Rather, the book before you is a historical investigation of how the constitutional order of the United States came together and changed over time, ultimately to reach its twenty-first century crossroads. It follows the story of the American constitution from its origins to the present. But it differs from many constitutional histories in steering away from court cases, Supreme Court decisions, and interpretations made by legislators, lawyers, and judges. They are not the sole proprietors of constitutional history. This book is grounded in the premise that our present crisis, like Britain's in the 1770s, emerged from long years of dynamic and comprehensive change, change located as much in expanding and mobile populations, shifting economies, and new environmental conditions as in the internal workings of legislatures and courts. It takes a long view, exploring social and political traditions that originated in Britain and evolved over many centuries. Rather than beginning in 1787, as if somehow Americans were inspired at that moment to create the world anew, we can better understand the origins of the United States Constitution—and even the question of what, exactly, constitutions are—by situating ourselves in the world from which an independent American nation emerged.

Two centuries before the American Revolution, indeed prior to the beginnings of English colonization in America, the scholar and diplomat Sir Thomas Smith unwittingly anticipated the eventual breakdown of the British constitution in a treatise on the Commonwealth of England, *De Republica Anglorum* (1583). Smith outlined the various forms of government that were combined and balanced within the English

system—monarchy, oligarchy, democracy—and explained that changes to the form of government within a society are normal occurrences, not necessarily signs of foul play: “The mutations and changes of fashions of government in common wealthes be natural, and do not always come of ambition or malice.” Because societies differ, “according to the nature of the people, so the commonwealth is to it fit and proper.”¹¹ In early modern Europe, for instance, cities often had distinctive forms of government, spelled out in corporate charters or maintained by autonomous city-states. Urban life was different from rural life; merchants and artisans needed different rules and practices to govern their complex commercial society than peasants growing crops in the service of an aristocratic lord. A government suitable for a trading republic like Venice or Genoa would never do for the kingdom of France.

Smith offered a vivid analogy to convey this idea. A frame of government should suit the society to which it is applied “like a garment to the bodie or shoe to the foote, then the bodie politique is in quiet, and findeth ease, pleasure, and profit. But if a contrary forme be given to a contrary maner of people, as when the shoe is too litle or too great for the foote, it doth hurt and encomber the convenient use thereof.” In Smith’s view, the proper fit between a form of government and the nature of a society was critical. If a “free people” were “tyrannized or ruled by one against their willes, were he never so good,” then they might “never rest untill they either destroie their king and them that would subdue them, or be destroyed themselves.”¹² It’s difficult to imagine a more succinct characterization of the constitutional crisis that would emerge within King George III’s realm in the decade after 1763. Issue after issue tested the strength and flexibility of a constitution stretched to fit the distended body of the empire, until at last the fabric was torn asunder.

Amid one of these conflicts, the crisis over Parliament’s Tea Act in 1773, Benjamin Rush of Philadelphia rallied his supporters, saying, “Remember my Countrymen, the present aera—perhaps the present struggle *will fix the constitution of America forever*.—think of your ancestors, and of your posterity.”¹³ Rush was a prominent physician, reformer, and civic leader but he was no soothsayer; we should not imagine that he could foresee how American colonists would successfully rebel and

“fix the constitution of America” via drafting conventions, written documents, and popular ratification. Rather, Benjamin Rush, like all Britons, understood the British constitution to be fixed by virtue of the settled relationship among its several elements: first, the *body of society*—the land and people to be governed, their social conditions, how they earned their livings and organized their world (this was what Sir Thomas Smith meant by the “bodie” in his analogy); second, the *frame of government*—the institutions, practices, traditions, and customs that structured Britons’ civic lives, including the king, the lords temporal and spiritual, the House of Commons, the common law, and all the customary rights and liberties that Englishmen loved to claim; and third, *written instruments* across the ages—from royal charters such as Magna Carta and the charters of cities, universities, and colonies to acts of Parliament such as the Act of Union with Scotland, the Bill of Rights, and the Act of Toleration of 1689 that declared and defended particular powers, rights, and liberties. These last two elements together—the frame of government and the written instruments that supported it—were the garment in Smith’s analogy.¹⁴

When Benjamin Rush warned his fellow colonists that the struggle over the Tea Act would fix America’s constitution forever, he meant that a fundamental constitutional issue was at stake—whether Parliament or the colonial assemblies had the ultimate power to levy taxes on the king’s subjects in the colonies. What would fix America’s part in the British constitution would not be a Supreme Court making a judicial decision on the constitutionality of Parliament’s acts—no such body, no such concept, existed in the British constitution. Nor would it be a new written instrument rearranging the structure of the British government. This was theoretically possible, as when the parliaments of England and Scotland each voted in 1707 to pass Acts of Union, uniting to form a single Parliament for Great Britain, but unlikely in this situation. No, in this case, what Rush meant was that the outcome of the political standoff, either colonial acquiescence to the Tea Act or colonial resistance that forced Parliament to back down and repeal the law, would settle the question of Parliament’s right to tax the colonies. The result would be an adjustment made to the British constitution through

the establishment of a new precedent with lasting consequences. If the colonies acquiesced, they would see the diminishing power of their colonial assemblies and the growing authority of parliamentary legislation. Perhaps the colonial assemblies would wither away, and the older colonies would come to resemble the new ones in Quebec and East and West Florida, where royal governors ruled without assemblies.

We know the outcome. Colonists did “think of their ancestors, and of their posterity.” Inspired by their own history of opposition to royal tyrants, Bostonians violently resisted the Tea Act to preserve for their posterity the rights their ancestors had won: the right to consent, through their own representatives, to any request for taxation. They destroyed the East India Company’s tea rather than let it be unloaded, sold, and taxed. Parliament responded not with compromise but with punitive legislation, changing the constitutional relationship by attacking the rights granted to Massachusetts in its 1691 charter. One act cut off the lifeblood of Boston’s economy by closing the port to all trade. Another struck down the institutions and practices of self-government in Massachusetts, from the town meeting to the elected council. A third revoked the power of Massachusetts courts to try the king’s officers for crimes (up to and including murder) against colonists. In response, the people of Massachusetts rose in rebellion and convinced twelve other colonies to join them. In the ensuing war, the united colonies “never rested until they destroyed their king and them that would subdue them.”

Amid this violent rupture, the former colonists began the process of “fixing” their American constitution in ways that Benjamin Rush could not have envisioned just a few years earlier. They created their own charters of government first as independent states and then as a confederated nation. During this process, each new state paid conscious, even obsessive, attention to the relationship of the elements that made up their constitutions. The thirteen states varied enormously in size: Pennsylvania’s land area was thirty times the size of Rhode Island’s. They varied greatly in population: Virginia had twelve times as many people as Delaware. Some states were exclusively agricultural, others were more urban and heavily commercial. In some states enslaved people were the majority of the population, their forced labor the heart of the economy. In others slavery barely existed. Some states had a strong established

church, while others had none and fostered a chaotic array of competing religions. Some had long-cherished egalitarian self-government and widespread popular representation; others had more oligarchic traditions with elite gentry dominating small legislatures. Even amid the chaos of war, when the states set about framing new constitutions for themselves, each one strove to align the institutions of government they were creating and the written instruments that described them with the traditions, customs, and practices their framers deemed suitable to the conditions of their own state—not to some abstract ideal. As a result, the written instruments that declared rights and framed governments—the state constitutions—varied widely one from another.

When the states attempted to join together in a formal union, first with the Articles of Confederation and later with the Philadelphia Constitution, the wide differences among them made it difficult to agree on the principles, institutions, and powers suitable for a federal or “general” government. At the Philadelphia Convention in the summer of 1787, these differences generated fierce arguments. Regardless of the intensity of these disputes, there were two things that every delegate at Philadelphia, even those who refused to sign the final draft, agreed on. First, that a constitution should, indeed must, align the character of the land and people it governs with an appropriate frame of government; the garment should fit the body. It had been a grievous mistake for Britain’s Parliament to attempt to rule directly a sprawling array of distant colonies whose conditions and interests were unknown to Parliament’s members. The former colonies deserved governments suited to their own needs, not England’s. Second, that it lay within the power of a people to alter a broken constitutional relationship, even in radical ways. It was in fact their duty to do so now that the people in America were independent and sovereign; they would tailor the constitutional garment in which they would clothe themselves.

This book offers a history of the United States Constitution that, in formal terms, was set in motion by the convention in Philadelphia in the summer of 1787.¹⁵ But it does not define “constitution” simply or solely

as the written document drafted by the convention, ratified the following year, and formally amended on rare occasions over the subsequent two dozen decades. Rather, it insists that in the Anglo-American tradition in which the United States emerged, a constitution is a *relationship* among the fundamental elements of a governing compact: the *body of society*, the nature and condition of the land and people; the *frame of government* as defined by its institutions, principles, practices, and customs; and the *written instruments* employed to define, describe, and delimit the government's powers.¹⁶

This view draws on the oldest English definitions of the word constitution, which refer to “the physical nature or character of the body.”¹⁷ Over time, the word came to describe bodies politic, “the mode in which a state is constituted or organized; especially as to the location of the sovereign power, as a *monarchical, oligarchical, or democratic constitution*”—these were the terms in which Thomas Smith described England's commonwealth in the 1560s.¹⁸ It also encompasses the term's evolution across the long eighteenth century, when constitution increasingly came to refer to “the system or body of fundamental principles according to which a nation, state, or body politic is constituted and governed.” After the American and French Revolutions, both of which generated written instruments delineating fundamental principles of governance, the word constitution came to be associated with these instruments: “In the case of a *written Constitution*, the name is sometimes applied to the document embodying it.”¹⁹ In other words, constitution has historically been taken to mean both the “body” and the “garment,” further supporting the relational aspect of the concept.

The evolution of the word constitution might be taken to imply a historical narrative in which the term, in premodern times, meant the general composition of a state or society and its form of government, but in modern times came to mean a written document, a deliberately designed rulebook for government. This would be a mistake for two reasons. First, the older tradition lived on into modernity; Britain continued on its path to becoming the world's largest and most powerful empire in the nineteenth century without attempting to frame its system of government under a single written instrument. But second and

more importantly, no written document can ever completely define, let alone create, a governmental system and the fundamental principles that shape its nature, functions, and limits. The structure of a society and the way it is governed always exceed the bounds of any written document, in the same way that maps are always inadequate to the terrain they depict.²⁰ Constitutions are more than just written instruments; they take the form of relationships between the body of a society, its frame of government, and its written instruments, the last of which always and necessarily fail to encompass the whole.

In exploring the evolution of American constitutional history, this book pays special attention to the significance of *land* to the body of society—the first element in the tripartite relationship—that is, those characteristics and qualities of a particular nation which a frame of government should be made to fit. The heightened significance of land is deeply rooted in English history and in the long process whereby constitutional practices that developed in England were transplanted to North America.

Governments marshal the resources of societies in order to govern them. At the most fundamental level, these resources consist of the land and the people—the natural endowments of a particular place and the productive labor of its population in generating wealth and power. Arrangements can vary widely; in countries where land is plentiful and human population slight, governments often focus on the control of people, the scarcer resource in the equation. Medieval England faced the opposite condition: an island kingdom with limited arable land, its population already exceeded two million at the time of its conquest by the Normans nearly a millennium ago. Power was determined by who possessed and controlled that limited and valuable land. As a result, England's constitutional evolution in the centuries before American colonization was shaped profoundly by struggles among the possessors of the land—the monarchs, the great aristocrats, and the church—as well as by the efforts of commoners to win or retain “liberties” against the overweening power of the landholders.

English efforts to colonize North America began five hundred years after the Norman Conquest of 1066. The colonists, guided by charters granted by the crown, attempted to recreate systems of government drawn from their English experience but ill suited to conditions in the colonies. Unlike England, the territory of North America was immense, essentially limitless as far as the first colonists could judge. Compared to England's, North America's Indigenous population was sparse—perhaps no larger than that of insular England at the time colonization began—but spread across a vast continent. Indigenous societies were not organized around the permanent and continuous occupation of fixed tracts of cultivated land. But such was the system, the constitutional order, that English colonists sought to impose on the land of North America. For the subsequent two centuries, this system, rooted in medieval doctrines of land and governance that were replicated in the colonial charters, evolved under the new conditions of life in America—conditions that were extraordinarily different from those in Britain.

The most significant difference for understanding the distinctive qualities of American constitutionalism lay in the astonishing dynamism of the American colonial population and its insatiable hunger for land. The explosive growth of settler society across the eighteenth century, doubling every twenty-five years, and its ceaseless quest for new and better land put tremendous pressure on the Indigenous peoples of North America, generating conflict that the imperial government struggled (and failed) to contain. In 1086, the new sovereign, King William, sought to impose his authority over England as it was, a stable agrarian kingdom. But in 1783, the now-sovereign former colonies sought to transform a continent. Their aspirations were based on territorial boundaries promised in their colonial charters that extended far beyond what they currently controlled. Although colonization had barely reached the Appalachians, the Treaty of Paris that ended the Revolutionary War in 1783 confirmed the United States' claims all the way west to the Mississippi River. The new nation aimed to displace Indigenous authority over the trans-Appalachian West to make way for white American settlers to develop the land and for new states to join the expanding union. Americans developed their new constitution with

the *purpose* of creating a frame of government aligned with this envisioned transformation of the land and people of a continent.

The remarkable dynamism of the body of colonial American society, its extraordinary population growth and territorial expansion, was itself a challenge for English constitutionalism. When Benjamin Rush worried that the Tea Act crisis would “fix the constitution of America forever” and urged his fellow colonists to think of their “ancestors” and their “posterity,” he was participating in a long tradition of constitutional discourse that staked claims to permanence and eternal validity. The Domesday Book, which was the result of William’s efforts to consolidate his rule over England, acquired its name because its judgments were imagined to be as final and permanent as God’s judgment of sinners at the Second Coming; English rights were believed to be unchanged from time out of mind. The liberties granted in Magna Carta in 1215 were to extend “in perpetuity.” When Parliament declared the people’s “ancient rights” in the Bill of Rights of 1689, they claimed to be acting “as their ancestors in like case have usually done.” The constitutions drafted by the newly independent American states followed this tradition: Pennsylvania’s new constitution would “remain in force therein forever, unaltered”; the Virginia constitution’s Bill of Rights would “pertain to the good people of Virginia and their posterity.” The Northwest Ordinance of 1787 claimed that its terms would “forever remain unalterable.” And of course the Articles of Confederation created a “Perpetual Union.” It lasted seven years.²¹

Two factors encouraged this rhetoric of permanence while also revealing tensions within it. First, the authors of constitutional documents across the generations were always aware that these were mere words on paper—“parchment barriers,” as James Madison called them in *Federalist* no. 48. Words alone could never restrain “the encroaching spirit of power,” let alone prevent the world itself from changing. Bold claims for permanence, assertions in writing that rights were both ancient and eternal, were nonetheless aspirational ways to lend force and durability to the agreements of a moment, to cast the resolution of a current crisis as a form of enduring truth. Second, during the long centuries of the premodern British world, it was more than plausible to think that the

body of society went along relatively unchanged. There was no reason that rights or liberties already believed to be ancient at the time of Magna Carta should not be equally valid and applicable centuries into the future. Why not call them perpetual or eternal? In the premodern historical imagination, time's cycle of recurrence and return loomed larger than time's arrow flying forward into an unknown future.

By contrast, one of the most significant factors driving the American Revolution and the constitutional order created in its wake was the dynamic growth of the colonial population and its capacity to transform the land of North America. This is what changed the political meaning of the term "revolution" from a restoration—a turn of the wheel back to an earlier condition—to the creation of an utterly new and altered condition, a sharp break from the past after which people could, in the words of Tom Paine's *Common Sense*, "begin the world over again." As a result, the constitutional frameworks and documents produced during the American Revolution have a speculative, forward-looking quality. The express language of the Philadelphia Constitution's preamble looks to "ourselves and our posterity" as its audience, but not, as Benjamin Rush recommended, to our ancestors. Despite this tension with the tradition, the ancestors are present in the U.S. Constitution, lurking in the most fundamental aspects of how this new frame of government defines the sources of the nation's wealth and power in the relationships between land and people even as it tries to imagine their future.



Britain's constitutional order broke apart rather suddenly in the decade after 1763, unable to contain its expanding North American empire. But in remaking their own constitution, the newly independent former colonies built upon their historical legacy while attempting to apply it to a society experiencing rapid expansion. Neither the state constitutions begun in 1776 nor the Philadelphia Convention of 1787 was a stroke of originary genius, the creation of an utterly new constitutional order. Rather, independent American constitutionalism began as an effort to realign the bodies of their particular societies—the land and

people of America, shaped by the outcome of the War of Independence and the Treaty of Paris that defined the new boundaries of the United States—with frames of government suitable to their new conditions. These would be drawn from the former colonies’ historical past but modified to fit the challenges of the present and expressed in written instruments suited to their changed situation.

To understand the great realignment of 1776–87, we need to begin with the emergence of England’s (and later Britain’s) constitutional traditions and how they framed the colonists’ inheritance, the institutional and ideological toolkit they brought to bear on the challenge of constitution making. This side of the story, the making of the “garment,” has long been a focus of the work of early American historians and has produced an extremely rich body of scholarship. But we also need to consider more deeply a less studied element: the land and people of eastern North America and the unique challenges the states and incipient nation faced in aligning the ever-growing body with the garments they were fabricating from the torn remnants of their constitutional past.

Part I begins with the Domesday Book, the massive document generated by William the Conqueror’s survey of England in 1086. By cataloguing the land and enumerating its people, the Domesday Book defined the relationship between the productive power of the land and people of England and the pyramid of dependencies by which the king’s government was organized. The colonies transferred these British assumptions about constitutional relationships to a North America remarkably ill suited to their replication. Nonetheless, Britain’s colonies embarked on a project to remake America into a landscape resembling the one recorded in the Domesday Book. The long-term success of these efforts so transformed the colonies that the fabric of Britain’s constitution could no longer contain them.

The U.S. Constitution of 1787 was the product of that long transformation, a realignment of British constitutional principles to suit the land and people that the colonies had become across two centuries. Part II describes this realignment, following the process of state constitution making between 1776 and 1789 and the creation and reform of a federal union designed to meet the new nation’s challenges. The resulting

constitution fostered the continuous expansion of this new frame of government and form of land ownership across the continent and into the indefinite future. Part III follows the unfolding of this project across the nineteenth century, as the “Domesday Machine” of American expansion altered the constitution, drove the union into civil war, and transformed the land and people. Expansion radically altered the body of American society, but its frame of government and written constitution changed very little. The twentieth century, as part IV describes, witnessed yet another massive transformation of the body of society: the rise of modern, urban, industrial America and the wholesale redistribution of the country’s population. An enormous and enduring expansion of the national government and its functions mirrored the changing society. Yet the nation barely adjusted the written instrument, the third element of the constitutional relationship, to redefine the structure, powers, and limits of national government in line with this century of dramatic change in the government itself.

By 1990, at the end of the second century under the Philadelphia constitutional order, a widening gulf separated the body of the land and people from the frame of government and from the written instrument. The representational structure of the elective branches of national government failed to adapt to the nation’s changing populations. Within the written constitution’s simple structure of three branches of government—legislative, executive, and judicial—there was little explicit provision for the administrative capacity necessary to carry out the government’s immense new range of tasks. The capacious garment of the Philadelphia Constitution, designed by American citizens in 1787 to empower an agrarian nation to transform a continent, has more recently become a straitjacket in the hands of courts, lawyers, and politicians who see the constitution as nothing but words in a written text and use the written text to prevent a modern nation from pursuing the ends its people desire.

We are now only a third of the way through a third century under the Philadelphia constitutional order. The epilogue of this book, looking forward toward 2090, is, needless to say, speculative. The past thirty-five years have shown at first steady and now rapidly accelerating signs that

the American constitutional relationship has, like its British predecessor in the 1770s, come apart. Can the American people in our current configuration defend the best constitutional traditions of our ancestors and preserve them for our posterity? Can we realign the body of the nation under new frameworks of government and new written instruments? To address these questions, let alone find answers to them, promises to be a difficult political and intellectual challenge. It will also be an emotionally wrenching one, given the faith and trust Americans have placed in their constitution. It will require courage to embrace the beliefs held by the framers of America's constitutions of the 1770s and '80s: that a society deserves a constitution suited to its own needs and challenges, not those of its distant ancestors, and that it lies within the power of a free people to alter a broken constitutional relationship, even in radical ways, to form a more perfect union.

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