

# THE FORECLOSURE OF DEMOCRACY IN AMERICA

*Peter T. Manicas*

## Introduction

Joyce Appleby has recently written that it was 'one of the great ironies' of American history that 'those gentlemen who supported the [US] Constitution because they wanted to remove power from the local level where it was exposed to manipulation by popular majorities actually created the national forum that made possible the democratization of American politics'.<sup>1</sup> There is paradox in this, of course, but for Appleby, as for countless other writers, it is the paradox of unintended consequences working out for the best. As my title suggests, I am less sure of this and, of course, much depends upon what one means by 'the democratization of politics'. I want to argue quite the opposite of Appleby, that a consequence of the American Founding and the decade which followed is an enduring ideological triumph, a victory of 'democratic' ideology *against* democracy. But the victory was not confined to America's self-understanding of its institutions; it was a triumph over all the people in the modern states which thereafter came into existence, French, Soviet and Chinese.

Everyone knows, of course, that modern democracy, 'representative democracy', is not the same as classical, 'direct' democracy, and everyone also knows that the US Constitution was a remarkable achievement, in crucial ways a radical and innovative document. In particular, it created an entirely new kind of 'democratic' politics, a 'democratic' politics for 'an extended republic'. It was just this, of course, which made America the model for the world. But taken for granted in this is the idea of the modern state, and worse, that the American solution to the problem of government in the era of the modern state was not merely *a* solution but that it was the best possible solution, democratic without the tyrannies of ancient democracies. On this view, the US Constitution was a natural and logical outgrowth of the development of older arrangements in America and of a successful War of Independence.

Yet, as the modern state is not merely a larger *polis*, the American 'extended republic' under the Constitution was not the only possibility. That is, while it has been a prominent feature of a sizeable portion of American historiography, that the Constitution was motivated by anti-democratic sentiment,<sup>2</sup> more can be said about the differences, in actuality and in possibility, between the arrangements under the

<sup>1</sup> Joyce Appleby, *Capitalism and a New Social Order: The Republican Vision of the 1790s* (New York and London, 1984), p. 76.

<sup>2</sup> See Charles Beard, *An Economic Interpretation of The Constitution of the United States* (New York, 1913); Jackson Turner Main, *The Anti-Federalists* (Chapel Hill, 1961); Merrill Jensen, *The New Nation* (New York, 1950); Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, 1969); William Appleman Williams, *The Contours of American History* (New York, 1971).

Articles and the Constitution. Moreover, we need here to consider the subtle --and radical --conceptual shifts which came with ratification and in the decade which followed ratification, shifts which turned out to be monumental as regards the world's understanding of democracy. While there is no way to assess sweeping counterfactual judgments in history, and thus there is no way to know what might have been the consequences had the Constitution failed, the consequences for democracy might well have been enormous; not because the US would have failed, but because it might have succeeded with far more radical democratic institutions. But however this may be, unless we want to live in an Orwellian world of double-think, we need to see more clearly how, in the modern world of the nation-state, non-democracy came to be thought of as the most realizable form of political democracy.

My account amends or extends earlier discussions in three main ways. First, insufficient notice has been given to the concept of the state as it was in transition in the late-eighteenth century. We need to see more clearly what, in contrast to older forms of association, the modern state is. In the fully developed modern state, people are not ruled, though they are governed. In what follows I identify the key features of the modern state, and I argue that we must pay close attention to Montesquieu's *L' Esprit des Lois*. It codified the crucial assumptions of eighteenth-century politics and, as important, it provided the alternatives for eighteenth-century state-builders.<sup>3</sup> The events of 1787 and 1789 made Montesquieu's brilliant classification of forms of political association instant anachronisms, a fact not appreciated by, for example, Hegel, nor understood by many today.<sup>4</sup> I then show that the ideas and institutions which Americans created were fundamental in this: that our modern ideas about the state owe very much to this critical period. The difference between Montesquieu's *Spirit of the Laws* (1748) and Tocqueville's 1830 *Democracy in America* is a difference in worlds. The events of 1776, 1787 and 1789 made this difference, a difference fully obscured by failure to see what was at stake during this crucial transitional period.

Second, while numberless writers have seen Jefferson as the American democrat *par excellence*, his exact role in promoting the shift in the denotation of 'democracy' is either overlooked or misunderstood. Both Jefferson and Madison were, of course,

<sup>3</sup> See Peter T. Manicas, 'Montesquieu and the Eighteenth Century Vision of the State', *History of Political Thought*; II (1981), pp. 313--47.

<sup>4</sup> Hegel believed that the French Revolution had raised the problem of sovereignty in a critical way, the problem with which 'history is now occupied, and whose solution it has to work out in the future'. He saw clearly that the era of the ancient republic was over and that therefore it could offer no solution. He wrote: 'If by "sovereignty of the people" is understood a republican form of government, or to speak more specifically,...a democracy...we can no longer speak of such a nation in the face of the Idea of the state in its full development' (Hegel, *Philosophy of Right*, trans. T.M. Knox (Oxford, 1952), para. 279). Failing to see that the Americans had solved the problem, making Montesquieu's work passé, he opted for what was by then a reactionary solution, a constitutional monarchy. For Hegel, 'the sovereignty of the people is one of the confused notions based on the wild idea of the "people"', so that 'taken without its monarch and the articulation of the whole which is the indispensable and direct concomitant of monarchy, the people is a formless mass and no longer a state' (*ibid.*).

'liberals' and both believed in 'the sovereign people', in 'representative government' and in a 'federal system of government', but their understandings of the possibilities of democracy in the real world and of what the Constitution had wrought were leagues apart. Yet Jefferson's election in 1800, what he called 'the Revolution of 1800', exactly because it was not a revolution, was decisive, both as regards America's understanding of itself, and others' understanding of it as a democracy. Moreover, as Jefferson was influenced by French radicalism, the French were to be influenced by the 'experiment' in America. They too could have a Democratic Republic: in conditions radically unlike America's, they would, indeed, have a series of them. At the moment of France's second effort at a Republic, in 1848, Tocqueville wrote of *Democracy in America* that 'it was written...with a mind constantly preoccupied with one thought: the thought of the approaching irresistible and universal spread of democracy in the world'. But the democracy of which he thought was not the vision of either classical or eighteenth-century democrats, nor of the democracy which Jefferson seems to have had in his mind. These ideas of democracy were all incompatible with the alienated politics of the modern state. These ideas, which I try to clarify against the background of the disputes between 'ancients' and 'moderns', between 'court' and 'country', and between 'modems' and 'moderns' remain visions; and if so, then as Jefferson rightly feared, political democracy, abstractly considered, lacks concrete organs.

Finally, then, as part of the foregoing, I try to show that the US Constitution, which was by no means a historical inevitability, became an instrument for a version of democracy which at the same time foreclosed the necessary conditions for far more democratic forms. This was, then, a remarkable sort of fraud even if the 'democracy' Americans got was far better than the democracy they thought they had and which indeed they might have had. The American founders were extraordinarily successful; not just because they did create an enduring form of modern polity but because, as suggested at the beginning, their ideological victory was so complete that it remains nearly impossible for us to take seriously forms of polity which, in the era of the modern state, are more democratic. In this sense then, this essay is an effort in democratic theory.

## I

Peoples have always been politically organized in one way or another: *ancient poleis*, African 'empires', feudal kingdoms and medieval communes, to name but a few. But the roots of the state are visible no earlier perhaps than 1300. Even so, it will not be before the Treaty of Westphalia (1648) that the shape and future dominance of the state as a form of polity will be assured. In 1500, after all, Europe comprised some five hundred more or less independent political units answering to a variety of descriptions. In all of them, some ruled and others were ruled. None of them were properly states; in none of them could it be said that there was a government.

Usage here, as often, is suggestive. All languages, it is my guess, have some pair which answers roughly to our 'ruler/ruled' distinction, but like the term 'state' (*lo stato*, '*etat*, *der Staat*), 'government' makes its first appearances in Europe some-time in the early modern period. As Hexter has shown, for Machiavelli, *lo stato* is

not yet a body politic.<sup>5</sup> For him, there are *principati* and there are *cittè*. One has a *patria* and one gains *impero* over others. For Machiavelli, *lo stato* is an instrument, an apparatus by means of which rulers command the ruled. Later, this instrument, used by rulers, is conceptualized as the government; at the same time, 'the state' takes on its present equivocal meaning, as both the body politic and 'the government'. 'Government', as Tilly suggests, comes to refer to a centralized authority of coordinated institutions, differentiated from other institutions operating in the same territory and subserved, as Finer remarks, by 'specialized personnel; one the *civil* service, to carry out decisions, the other- the *military* service to back up by force where necessary and to protect the association from other similarly constituted associations'.<sup>6</sup>

Moreover, the differentiation from other organizations and the centralized coordination by specialized personnel--government--is the institutional embodiment of what a number of nineteenth-century writers discerned as the decisive feature of the modern state, viz. the radical separation of 'civil society' and 'the state'. 'Civil society' (*bürgerliche Gesellschaft*) is the realm of private persons engaged in private activities: work, exchange, worship, consumption, etc. The state, by contrast, is that central authority which exactly because civil society is fragmented, heterogeneous and anonymous, becomes the primary, even exclusive instrumentality of integration and cohesion in society. But it is exactly these conditions which demand very different and very special mechanisms for legitimating the modern state, a fact of some importance for the period of central concern here. It is in just this sense that in the modern state people are not ruled though they are governed. While from at least Bodin (1571), theory had made the effort to comprehend these changes, we have the retrospective advantage which the eighteenth century lacked. Critical in this regard was the work of Montesquieu.

## II

Montesquieu, whose *L'Esprit* was the point of departure for almost every important figure writing in France and America between 1748 and 1789,<sup>7</sup> recognized that the

<sup>5</sup> J.H.Hexter, *The Vision of Politics on the Eve of the Reformation* (New York, 1973).

<sup>6</sup> Charles Tilly, 'Reflections on the History of European State-Making'; and Samuel E. Finer, 'State and Nation-Building in Europe: The Role of the Military', in *The Formation of National States in Europe*, ed. C.Tilly (Princeton, 1975).

<sup>7</sup> Paul Merrill Spurling *Montesquieu in America, 1760-1801* (Baton Rouge, 1940). John Adams read the *Spirit* in 1760 and pledged 'to write, in the margins, a sort of index to every paragraph' (p. 88). Samuel Adams and James Madison had memorized Montesquieu. Madison wrote (in a letter to Jefferson, in 1793), 'I use Montesquieu also, from memory, tho' I believe, without inaccuracy' (p. 90). Jefferson read the *Spirit* between 1774 and 1776 and copied extensive amounts of it in his Commonplace Book. Significantly, he omitted altogether text and references to Book XI, Chapter 6, Montesquieu's famous discussion--and approbation--of the constitution of England. This section, repeatedly cited in debates of the period, was copied verbatim in Adam's *Defense of the Constitutions of the United States* (1787). These facts constitute important evidence for a thesis of the present essay. For the eighteenth-century 'republican' Chapter 6 of XI was the best in Montesquieu; for the democrat who hankered after a version of the ancient republic, it was the worst in Montesquieu.

classification of politics which had been bequeathed by the Greeks could no longer suffice, that the new monarchies of the early modern period had provoked a re-analysis. Montesquieu rejected the traditional three- (or six-) part classification based on rule of one (Monarchy), few (Aristocracy) or many (Democracy) and offered instead *Republics*, *Monarchies* and *Despotisms*. It is clear that Montesquieu was interested not simply in forms of government in the narrow sense in which we use that term, but in forms of society as politically organized. For him, the traditional classification was bound to the ancient world of the *polis* (Latin: *respublica*) and could not be amended to identify the polities of his time.

Republics had to be small and they were characterized by equality and by virtue. There were two types: either 'the body or only part of the body is possessed of supreme power'.<sup>8</sup> If the former, the republic is a democracy, if the latter an aristocracy. Montesquieu exactly followed Aristotle in holding that in republics, the fundamental question was, 'who should be citizen?' where crucially, 'the citizen participated in judicial functions and ruling'.<sup>9</sup> The citizens *were* 'the government'. Republics were subject to a fundamental dilemma: 'If a republic be small, it is destroyed by a foreign force; if it be large, it is ruined by internal imperfection.'<sup>10</sup> Montesquieu held that confederation was a solution to this dilemma, of which more later. Finally, as a direct consequence of the foregoing, republics were characterized by 'peace and moderation'.<sup>11</sup>

Monarchies were those kingdoms which had emerged in the sixteenth century from western feudalism. France was archetypical. In monarchies and despotisms, the prince is the 'source' of all power, but only in monarchies is there an independent nobility which institutionalizes 'intermediate, subordinate and dependent power'.<sup>12</sup> Sovereignty rested with the king, even if power, understood as the effective means to realize one's ends, was in the monarchic polity diffuse and dispersed. By contrast, despotisms lacked institutions which embodied intermediate powers. Characteristically, they were empires: the classical Persian, the Ottoman or the Prussian. The military basis and structure of despotisms is clear: 'Strength does not lie in the state, but in the army which founded it.'<sup>13</sup> In contrast to 'peaceful republicans', both monarchies and despotisms could be expansionist.<sup>14</sup>

Montesquieu's trichotomy was not entirely satisfactory, however, as his peculiar discussion in Book XI suggests. In that famous and influential book, Montesquieu discussed 'political liberty' and gave a detailed account of the constitution of

<sup>8</sup> Montesquieu, *Spirit of the Laws* (New York, 1966), II. 1.

<sup>9</sup> Aristotle, *Politics*, 1275a.

<sup>10</sup> Montesquieu, *Spirit*, IX, 1.

<sup>11</sup> *Ibid.*, XI. 2.

<sup>12</sup> *Ibid.*, XXII, 4.

<sup>13</sup> *Ibid.*, V.

<sup>14</sup> *Ibid.*, X, 9.

England, that 'republic disguised as a monarchy'.<sup>15</sup> Montesquieu had asserted in Book II that 'the English, to favor their liberty, have abolished all intermediate powers of which their monarchy was composed';<sup>16</sup> yet England was clearly no despotism. How could it be that England had all the appearances of a monarchy yet like only republics, it was the 'one nation...in the world that had for the direct end of its constitution political liberty'?'<sup>17</sup> Explaining this was the task of Book IX. While I cannot prove it here, it seems that Montesquieu recognized that England had evolved from a feudal kingdom to become what, in our terms, is a modern nation-state, a polity with a national government, centralized and effective, yet hardly despotic. The point is critical. England was no typical monarchy because the 'intermediate powers--the feudal nobility--no longer represented fiefdoms, but it was not a despotism either, precisely because England had discovered a unique solution to the problem of power and its legitimation. This development and Montesquieu's effort at comprehending it was to be of considerable importance for the Americans.

Montesquieu correctly identified the key elements of this unique solution. First, 'the executive power' was, as it ought to be, 'in the hands of the Monarch'. Second, 'the executive power...ought to have a share in the legislature by the power of rejecting'. Third, 'the legislative body being composed of two parts, they check one another by the mutual privilege of rejecting' and 'they are both restrained by the executive power, as the executive is by the legislative'. The final and most critical feature depended upon the 'Gothic' discovery of two ideas entirely unknown to the ancients: first, 'a government founded on a body of nobles' (Lords) and second, 'a legislative body composed of representatives of the nation' (Commons). These remarkable ideas --and Montesquieu was correct in seeing them to be innovations--made it possible to correct the 'great faults' of ancient republics. In ancient republics, 'the people had a right to active resolutions, ...a thing of which they are absolutely incapable'. Montesquieu was emphatic: 'They ought to have no share in the government but for the choosing of representatives, which is within their reach.'<sup>18</sup> But that they could be a party in the 'choosing' of a government was important.

Montesquieu's analysis had not only outlined the prevailing possible alternative forms of polity but also the conditions for their realization. This no one in the eighteenth century doubted. To be sure, England did not quite fit the classification exactly because as Montesquieu saw, she was neither 'monarchy' nor 'republic'. In terms of the present analysis, this was because England, the first of the 'modern states was but equivocally a modern state. Still a kingdom and still rooted in the older order, England nonetheless had what must be called a modern government, a 'government founded on a body of nobles' and a 'legislative body composed of representatives of the nation'; indeed, while still a kingdom it had, since 1688, a government fully legitimated by Whig theories of 'consent'.

<sup>15</sup> *Ibid.*, V, 19.

<sup>16</sup> *Ibid.*, II, 4.

<sup>17</sup> *Ibid.*, XI, 5.

<sup>18</sup> *Ibid.*, 6.

## III

The break with the English Monarchy gave each of the thirteen colonies unique opportunities to establish constitutions for themselves. These were continuous with past practices and deeply reflected inherited British constitutional practice. But as Bailyn has emphasized, prior to the war the American experience had led the colonies to move in a direction opposite from that of Britain.<sup>19</sup> In particular -and Montesquieu had already seen this -from its early beginnings, the Parliament of England had been transformed from a feudal gathering of nobles into a national assembly. Burke was to put it well; Parliament was not 'a *congress* of ambassadors from different and hostile interests...but...a *deliberative* assembly of *one* nation, with *one* interest, that of the whole'.<sup>20</sup>

By contrast, the Americans, 'starting with seventeenth century assumptions, out of necessity...drifted backward, as it were, toward the medieval forms of attorneyship in representation...The colonial towns and counties...were largely autonomous, and they stood to lose more than they were likely to gain from a loose acquiescence in the action of central government'.<sup>21</sup>

Secondly, as Pole, Greene and others have amply demonstrated,<sup>22</sup> in America the representative house had thoroughly engrossed legislative power, upsetting fundamentally the teachings of Montesquieu and inferences drawn from the British constitution. The factors accounting for this were many. In part it stemmed from the commitment to localism. In part it resulted from the drive for power of an increasingly large group of planters, merchants and professionals. In part it was the result of the fact that the American colonies were colonies, so that while the King was 'represented' by his appointees, the lower houses 'represented' the people of the colonies. After 1763, of course, this was crucial.

Finally, in the ideological struggle with the English parliament over taxation, the Americans made another discovery: they discovered that all the people should be 'represented' and that if a representative was to represent, he--and they were males--*must* be elected. At first, of course, Americans did not believe that every male had to have suffrage rights, and there were some, John Adams for example, who saw--and did not like--the implications of the new ideas. As regards the principle of voting as a vehicle of consent, Adams wrote:

But to what extent shall we carry this principle? Shall we say that every individual of the community, old and young, male and female, as well as rich and poor, must consent, expressly to every act of legislation? No, you will say, this

<sup>19</sup> Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Mass., 1967).

<sup>20</sup> These remarks are from Burke's 1774 Speech to the Electors of Bristol, quoted from Bailyn, *ibid.*, p.163.

<sup>21</sup> *Ibid.*, p. 164.

<sup>22</sup> J.R. Pole, *Political Representation in England and the Origins of the American Republic* (London, 1966), Ch. 3; Jack P. Greene, 'The Role of the Lower Houses of Assembly in Eighteenth Century Politics', *Journal of Southern History*, XXVII (1961).

is impossible. How, then, does the right arise in the majority to govern the minority, against their will? Whence arises the right of the men to govern the women, without their consent?<sup>23</sup>

That these ideas about representation were new to the late eighteenth century may seem surprising, but critically, as Adams saw, they were utterly foreign to standard Whig theory. Whig doctrine from at least Locke had, of course, insisted on the indispensability of constitutionally fixed meetings of parliament, but nothing in the *Two Treatises* presupposed that *individuals* were to be represented by parliament, still less that 'representatives' had to be periodically elected. On the standard Whig view, boroughs and communes might be represented. So too, as Burke had said, 'the great and legitimate interests of the nation'. As Pole points out, until at least the nineteenth century 'English history had never known a period in which the common people, considered as a mass, or with more dignity, as an estate, had been formally represented as a matter of right'.<sup>24</sup> There was a great deal of difference between representing communes and representing commoners. Finally, from the Septennial Act of 1716, it was widely held that

Parliament...was not created in order to express the will of the variety of shires or corporations; it did not exist to find the desires of the different constituencies and translate them into legislative action....Parliament existed because the nation needed government; the duty of the House of Commons was to take its share in the burden of providing good government, regardless of popularity or local opposition.<sup>25</sup>

The British practice of 'rotten boroughs', the abandonment of residency requirements for MPs and the idea of 'virtual representation' are all perfectly plausible once we see what 'representation meant -and what it did not mean.

These ideas sufficed for that 'republic disguised as a monarchy', but they did not suffice for the colonists in the struggle over taxation. Initially, it was not a complaint of the Americans that they did not *elect* representatives, they argued rather that because they were a people distinct, their interests differed. As Americans, they could not be 'virtually represented' by non-Americans. This was consistent with Whig theory, but when this argument did not evoke what seemed to be the right response -after all, the colonists were Englishmen -the Americans, reinforced by Paine's incendiary *Common Sense*, shifted ground. Because, clearly, Americans elected no one to England's parliament, this became the appeal of last resort. Indeed, because they saw that the implications could be radical, it was an appeal reluctantly made.<sup>26</sup>

<sup>23</sup> John Adams, Letter to James Sullivan, 26 May 1776, in *The Life and Works of John Adams* (10 vols., Boston, 1856), Vol. IX.

<sup>24</sup> Pole, *Political Representation*, p. 398. See also Hannah Pitkin, *The Concept of Representation* (Berkeley, 1967).

<sup>25</sup> Pole, *Political Representation*, p. 412. This is a modern idea, unintelligible in pre-modern politics.

<sup>26</sup> Wood, *Creation*, pp. 173-96; E.S. Morgan, 'Colonial Ideas of Parliamentary Power', in *The Challenge of the American Revolution*, ed. E.S. Morgan (New York, 1976). The American idea of proportional representation begins to make sense when one assumes that individuals are to be represented. Similarly the

These three factors, then, localism, the aggrandisement of government by the representative body and the shift in the meaning of representation, were all signs of what was seen to be a shift towards democracy. As Gordon Wood argues, by 1780 many Americans believed that representatives were indeed ambassadors, elected and controlled by quasi-independent local constituencies. Worse, where a representative did not act in accordance with the wishes of his constituency, Americans were willing to complement or replace the constitutional forms with conventions and associations. Wood writes: 'So prevalent did the usurpation of governmental functions by conventions and associations become that some Americans began to fear that the whole society would "shortly be overrun by committees."' He concludes: 'The people were becoming a permutable force whose will could never be embodied by any representative institution.'<sup>27</sup>

It is not the object of this essay to assess the extent of this radical drift, but it is clear that it was the fundamental fear of America's leading elites. Washington's oft quoted remark, 'we are fast verging to anarchy and confusion', is a good example of this sentiment. But America was not verging to anarchy, even if it was verging to democracy -and perhaps even to confusion. Such democracy was not, however, a function of the enlarged franchise or of its altered social character. Nor was it merely the engrossment of government by the legislative body. Rather, it most fundamentally regarded the perception, unleashed during this period, that the power of making laws ought to remain entirely with the whole body of the people. This was, of course, the classical idea of democracy and it was being expressed loudly and clearly by Americans in the 1780s.

Wood writes: 'there is scarcely a newspaper, pamphlet, or sermon of the 1780's that does not dwell on the breakdown of confidence between the people-at-large and their representative governments.' For example, a Boston newspaper exclaimed: 'The confidence of the people has been transferred from weir Representatives in Court, to county *Conventions*, and from thence to a mob.' Notwithstanding the polemical point, the idea was clear: the people had decided they wanted to rule them- selves. Indeed, 'the mechanics of New York City went so far as to deny the efficacy of representation altogether, arguing that the power of "approving or disapproving, their own laws...ought forever to remain with the whole body of the people.'<sup>28</sup>

---

idea, new also to the period, that, as James Wilson put it, 'the legislature ought to be the most exact transcript of the whole society' -a miniature of the society writ large -makes sense where actual participation is considered desirable but has given way to 'representatives'. See Pitkin, *The Concept of Representation*, p. 84.

<sup>27</sup> Wood, *Creation*, pp. 326, 331. Parallels and differences with the French Revolution might be mentioned. The spontaneous *sociétés populaires* 'contained the germs ...of a new type of political organization' (H. Arendt, *On Revolution* (New York, 1965), p. 247). But significantly, while in France these existed in the absence of a popularly elected representative body, in America the constitutional organization of society had already provided the essential structure for the flowering of a new type of participatory democratic political organization: the thirteen states in confederation. Compare also Rosa Luxemburg's defence of 'the constituent assembly' in November of 1917. See Rosa Luxemburg, 'The Russian Revolution' in *Rosa Luxemburg Speaks*, ed. Mary-Alice Waters (New York, 1970).

<sup>28</sup> Wood, *Creation*, pp. 368, 366; see also Main, *Anti-Federalists*, pp. 104 f.

## IV

To understand the contested nature of the issue of representation, once voting had become critical to the idea, we need to see that there were two distinct and incompatible meanings. In one sense, a representative could be defined, as in Hobbes and Locke, in terms of his authority. It is a mark of the modern idea of government that those who 'govern' be 'authorized' by those 'governed'. In this sense, a representative need not be elected, though he might. A representative in this sense might be 'solicited, but not commanded. Including even the King, he might be 'petitioned'. By contrast, a representative could be conceived as *merely* an agent, 'a servant of the people', to be 'instructed' by those he represents. While the legal language of 'agency' might refer to either (or to both ambiguously), the idea of a 'servant', like that of 'instruction', was crystal clear. Both implied that the people retained their authority. Sovereignty was, as Rousseau had it, 'inalienable'.

Americans, little influenced if at all by Rousseau, had nevertheless a concrete sense of this latter idea since, as noted, it was a version of the medieval idea of 'attorneyship'. Both conceptions rested on 'compact' doctrine, a source of considerable confusion, then as now. But the issue was joined in a forceful and clear way in the Maryland debates of the winter of 1786. While in no way the most 'democratical' of the new states, the problem which precipitated the debate was typically 'democratic', having, indeed, the precedent of Solon: it was an attack on the institutions of private property in the form of debtor relief and paper money bills.

The House of Delegates in their November 1785 session had acted in favour of 'an emission of credit', but the Senate had refused to ratify. Did, then, the people have a right to instruct their representatives on the upper house? The defenders of instruction held, rightly, that during the time that Maryland had been a colony it was not denied, even by the Crown, that members of the lower house, the House of Delegates, were bound by their instructions from the people. Moreover, as Samuel Chase argued, no one then claimed the right to instruct the upper house since that body was not elected by Marylanders. Appointed by the Crown, the upper house properly represented the Crown. For Chase, the power to elect implied the power to bind the elected. If so, then the members of the upper house were now also 'servants', of the people of Maryland. On this view, as an opponent pointed out:

Planters, Farmers, Parsons, Overseers, Lawyers, Constables, Petifoggers, Physicians, Mechanicks, Shopkeepers, Merchants, Apprentices, Watchmen, Barbers, Beaux, Drayman, Porters, Labourers, Cobblers and Cooks, all are to order the honourable, the legislature of Maryland what they *must* do upon the most intricate questions in government...<sup>29</sup>

The idea was radical enough and that was just the trouble. But defenders of the idea showed their confusion, a confusion still with us, when they argued that this radical

<sup>29</sup> The text is by an anonymous contributor to the *Maryland Journal*, February 1787, quoted from *Representative Government and the Revolution: The Maryland Constitutional Crisis of 1787*, ed. Melvin Yazawa (Baltimore, 1975), p. 20. In addition to Yazawa's introduction, most of the pertinent documents are there collected.

notion was required by standard 'compact' arguments. The other side could show easily that this was not the case. Alexander Contee Hanson ('Aristides') insisted, rightly, that 'the doctrine of the binding force of instructions has been adopted upon a mistaken idea, that it is connected with the principles of the English and American revolution',<sup>30</sup> The 'mistake' was easily diagnosed. As an anonymous 'Constituent' insisted, Locke, for example, had held that no government was 'rightful' that did not rest on compact with the governed. Locke further had argued that when the legislature 'abuses its trust...there is a supreme power in the people to *remove* or *alter* the legislature'.<sup>31</sup> This was indeed the basis of the 'right of revolution' (as 'revolution' was then understood), but as Hanson also insisted, 'the right of the people to bind their representatives, chosen under this compact, is quite a different thing'.<sup>32</sup>

Hanson did not deny that representatives ought to listen to their constituents, that they might advise him or as Hume has said, 'much less, that he ought to despise the sentiments of *those* he represents'.<sup>33</sup> But to suppose that a representative was 'absolutely bound to follow instructions, as an ambassador or a general is bound by his orders', is 'wicked, slavish and absurd'. Such a practice, he concluded, was inconsistent with 'free government' as that had been understood by Locke, Sidney, Hume, Montesquieu and others, and indeed, if followed would soon put Maryland into 'a state of anarchy and confusion'.<sup>34</sup> It was not Hanson who had introduced a 'newfangled' and 'pernicious' doctrine, it was Chase, William Paca and the defenders of instruction. To be sure Hanson, as most Americans, had moved leftward from Locke's doctrine, since he accepted the idea, not found in Locke but by now familiar to Americans, that elections were the most appropriate machinery for 'choosing' a government. Suffrage did not, however, imply instruction.<sup>35</sup> This was not to be found in the Maryland constitution any more than it was to be found in Whig theory.

Of course, Chase and the others did not want a 'free government' as Locke and Montesquieu had defined it. They were surely republicans, but they were not 'classical republicans' in the mould of James Harrington, John Trenchard and Thomas Gordon either. That what they wanted smacked of democracy created all sorts of problems; nevertheless, this is the best description of what it was that they wanted. Two years before the Maryland debate, Benjamin Rush had rightly diagnosed the issue:

The people of America have mistaken the meaning of the word 'sovereignty'...  
It is often said that 'the sovereign and all other power is seated in the

<sup>30</sup> *Ibid.*, p. 89.

<sup>31</sup> *Ibid.*, p. 102.

<sup>32</sup> *Ibid.*, p. 89.

<sup>33</sup> *Ibid.*, p. 123.

<sup>34</sup> *Ibid.*, p. 127.

<sup>35</sup> *Ibid.*, p. 89.

people.' The idea is unhappily expressed. It should be--'all power is derived *from* the people. ' They possess it only on the days of their elections. After this it is the property of their rulers...<sup>36</sup>

If representatives were to be 'deputies', 'agents' or 'servants of the people', then the ancient democratic republic was the model, but as everyone also knew, no form of polity was more 'turbulent'. Democratic republics tended to tyranny: they attacked the institutions of private property, waiving debts, floating paper money, imposing taxes --perhaps worse. Moreover, they had to be small and comprised of citizens who were 'virtuous'. To be sure, there was ample room for argument on a host of questions: What are the ends of the association, the cultivation of human excellence or the effective promotion of individual 'interests'? Who should be admitted to the franchise and what were to be the qualifying conditions for office? Should the labouring classes, for example, be admitted to the franchise and should they be eligible for office? How free from instruction should representatives be? What mechanism of recall and referendum was best? Was any state, except perhaps Rhode Island, perhaps the most threateningly democratic state, small enough to be a republic? And what was the proper legislative relation between villages and towns and between these and the assembly of the state government? It is crucial to notice that the answers to these questions would almost certainly have had entirely different consequences had prevailing circumstances persisted, circumstances which changed radically, as I shall argue, with the ratification of the new Constitution.<sup>37</sup>

One might assent to this and make a principled argument that it was *then* recognized that collective rule by the people, even through 'deputies' is impossible. Rush was correct: either the people exercise power or they alienate it. But as Hanson acknowledged, generals and ambassadors are 'bound' and no one doubts that this is manageable. Indeed, as Marx was to write in reflection on the Paris Commune: 'Instead of deciding once in three or four years which member of the ruling class was to misrepresent the people in Parliament, universal suffrage was to serve the people, constituted in Communes, as individual suffrage serves every other employer in the search for workmen and managers in his business.'<sup>38</sup> It may be that *we* find

<sup>36</sup> Quoted from Wood, *Creation*, pp. 373 f. The text perfectly illustrates the transitional nature of the key ideas. How many Americans would you say today that President Reagan rules them, even if in concert with the Congress? Compare also, of course, Rousseau: 'The people of England regards itself as free: but it is grossly mistaken: it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing' (Rousseau, *Social Contract*, Bk. III, Ch. XV); and Marx, below.

<sup>37</sup> It is also a mistake to assume that the development of capitalism which occurred *after* the period under study would have had the same consequences if the political arrangements had been different. It is possible, of course, that property relations then existing in America, relations which, as I suggest below, were neatly legitimated by individualism -misidentified as 'democracy' -would have militated against even the possibility of some alternative form of democratic federalism. But one might equally hold that effective political participation might have promoted some form of socialism.

<sup>38</sup> K. Marx, 'The Civil War in France', in *On the Paris Commune*, ed. K. Marx and F. Engels (Moscow, 1971), p. 73.

the idea incredible but, if so, perhaps this should be credited to the triumph of ideology under consideration in this essay? But this triumph was not a 'bourgeois' triumph.

Some interpreters, pointing to manifest difficulties in applying 'class analyses' to this period, replace it with an even more strained 'dialectic of virtue and commerce'.<sup>39</sup> But it is hardly necessary to argue that there was some sort of class consensus, 'bourgeois' or 'proletarian' to see that 'popular radicalism' included all sorts of Americans who were agreed perhaps only in their view that that rule ought not to be in the hands of an elite leadership governing a passive citizenry.

Nor need we fall into the trap of supposing that those who we (oddly) call 'anti-federalists' were all 'democrats'. The anti-federalists were disunited organizationally and ideologically.<sup>40</sup> For anti-democratic anti-federalists, the choice was between the new Constitution and Montesquieu's balanced form within each of the sovereign states. England was still the model: thirteen consolidated states would be closer to a despotism than to any sort of Montesquievian republic. For some of these, the issue divided between 'ancients' and 'moderns', over whether 'republican liberty' primarily regarded the expression of public virtue or, as the 'moderns' had it, the protection of rights and interests. For still others, perhaps the majority of those elites whose writings scholarly activity so thrives on, the debate was a wholly 'modern' debate, over whether these rights (not virtues) are best secured in an extended republic or in a 'classic' balanced republic. Indeed, the sheer diversity of ideas, a straightforward result of the transitional nature of the period, cannot be under-stated; but to recognize this should not turn us from the obvious fact that there was a popular groundswell in the direction of democracy. The ideological confusion, coupled with the utter novelty of some of the key concepts are sufficient for holding that the defeat at Philadelphia of the New Jersey plan was crucial. Once the debate was couched in terms of an ineffective federation versus a federation with the 'improvements' of the document drawn at Philadelphia, the anti-democratic forces had all the polemical advantages. Not only could they argue that the new constitution provided all the desirable features of the state constitutions, but as well, they could appropriate the language of 'federation', 'representation' and of democracy itself. As Wood points out, it was not that the Federalists were self-consciously manipulative of the language of popular democracy, for even to the extent that they were, they were not wrong in insisting that their vision of representative government was the most 'democratic' experiment in the modern world. Moreover, it was radical precisely in its institutionalization of new meanings of 'federation' and 'representation', a fact

<sup>39</sup> See Jeffrey Isaac, 'Republicanism and Liberalism: A Reexamination', *History of Political Thought* (forthcoming); Isaac Kramnick, 'English Middle Class Radicalism in the Eighteenth Century', in *Literature of Liberty*, ill (1980), pp. 5-48; Appleby, *Capitalism and a New Social Order*.

<sup>40</sup> See H.J. Storing, *What the Anti-Federalists Were For* (Chicago, 1981); Alfred F. Young, 'Conservatives, the Constitution, and "The Spirit of Accommodation"', in *How Democratic is the Constitution*, ed. R.A. Goldwin and W.A. Schambra (Washington and London, 1980), pp. 117-47.

which today bedevils even informed discussion.<sup>41</sup> The idea that sovereignty *resides in, originates with, or derives from* 'the people', along with the mechanisms which the American Federalists generated as implementations of these ideas, were advanced, as the French radicals accurately saw.<sup>42</sup> But it was just this which explains how the older idea of democracy, democracy as direct participation, was undermined. Put succinctly, once America had a national government, it was both institutionally and ideologically impossible for the movement towards the older idea to survive. Not only was it the case that democratic republics had to be small but, as well, given the sheer size of the 'extended republic', it was easy to think of voting as participation; indeed, what else could one hope to have?

## V

In this section, I try to give some additional substance to this argument by concentrating on the debate over the distinction between 'confederation' and, 'consolidation', the centre of the confusion, still with us, over the idea of 'federalism'.

The New Jersey plan offered a strengthened confederation as that had been classically understood. It was, as Patterson rightly said, 'purely federal' in contradistinction to the Virginia plan. Regarding the Virginia plan, as Lansing noted: 'There is no parallel...to be found'. Lansing and Randolph, on opposite sides of the debate in Philadelphia, both correctly grasped the difference between the two plans--even if Hamilton, Madison and others will succeed in convincing Americans that 'in principle' there was no difference. In a Federation, as that had been understood, a 'congress' represents states, not the people of states; it legislates over states, not the

<sup>41</sup> See Cecelia Kenyon, 'Republicanism and Radicalism in the American Revolution: An Old-fashioned Interpretation', in *The American Past*, ed. S. Fine and G.S. Brown, Vol. 1 (New York, 3rd edn., 1970), pp. 139-64. Kenyon notes that 'if we accept the reasoning and conclusions of the Anti-Federalists ...then we must conclude that the House of Representatives is not and never has been democratic' from which it follows that 'United States is not a democracy, has never been one since 1789 and can never be one' (pp. 146 f.). This she admits, is 'plausible', but not a 'useful' conclusion. Useful for whom? Kenyon simply assumes that there were no genuine alternatives to the Constitution that were more democratic.

<sup>42</sup> Clear evidence that French intellectuals quickly grasped the significance of the new ideas came with the proposed publication of Adams' *Defense*. Jefferson, in Paris, had promised to arrange its publication there, but soon discovered that his French friends saw that the *Defense* was pure Montesquieu and that, by this time, his influential ideas were reactionary. Perhaps most remarkable in this regard is the little noticed tract of Destutt de Tracy, *le Commentaire sur Montesquieu*, composed in 1807 but published initially in English translation, with the significant help of Jefferson, in 1811. Tracy attacked head-on Montesquieu's trichotomy as 'essentially erroneous' (Destutt de Tracy, *A Commentary and Review of Montesquieu's Spirit of the Laws* (Philadelphia, 1811), p. 9). For Tracy there were but two types of polity, either 'national' in which 'social rights are common to all' or 'special'. Adopting a pure federalist formula, Tracy wrote that in national governments, 'all rights and power originate in, reside in, and belong to, the entire body of the people or nation' (*ibid.*). These governments take several forms, depending on who actually exercises power. 'Representative democracy' is clearly preferred by Tracy who considers the idea of representative government to be 'unknown in Montesquieu's time' (p. 19). In this handwritten marginal notes on his copy of the text, Jefferson here wrote: 'This is almost certainly an error, for Montesquieu gives us a very clear exposition of the theory of representative government'. Surely both men knew what Montesquieu had written. The most obvious explanation of the disparity, it seems to me, is that Tracy recognized, but Jefferson did not, that in the American debate everything had changed.

individuals in states. In a 'national' or 'consolidated' government the opposite is the case--even if, as later writers will argue, there is 'dual jurisdiction'.<sup>43</sup> The clearest test of this difference was, as Lansing had argued, whether or not laws made within states regarding the citizens of states could be overturned by the national government. The classical confederation was a league of independent entities joined together to satisfy some common purpose or purposes. Traditionally, this was usually confined to foreign policy, to questions of mutual defense and war. In this sense, states in confederation were not sovereign if that meant, as from Bodin on, that they maintained the right to make war and peace. In a classic defensive league, it was precisely this right which was yielded to a 'congress' of 'ambassadors' which 'rep-resented' the states of the confederation. When it decided to make war, the units were bound. On all other matters, the units unilaterally made decisions. Indeed, the idea had worked well enough during the War of Independence --even in the absence of ratification of the Articles, and thereafter.

It is by now widely agreed that the 'ineffectiveness' of the Congress during the so-called 'crisis period' regarded the perception, noted above, that American republicanism was altogether too democratic. After Shay's little 'rebellion', the perception --perhaps paranoid --that 'a conflagration' or 'a contagion' had been unleashed, pervaded the thinking of America's leading elites. The 'ineffectiveness' of the Congress did not, however, refer to an inability to weld the states together for purposes of defense against a common enemy nor to secure the legitimate interests of states either in co-operation or *vis-a-vis* one another.

In this regard, what should have been a problem serious enough to degenerate the States into a prophesized 'state of war', did not. This problem, of course, was the problem of the territorial claims of the States, of the Western lands, of claims of separatists and jurisdictional disputes between existing states. As Peter S. Onuf has recently argued, 'the American states could never live up to the dire predictions of their bloody demise because, however willing, they were unable to act like true states'.<sup>44</sup> Congress did have 'a superintending jurisdiction' which made possible the peaceful resolution of territorial problems. That this did occur defied all previous experience. The states united were, as Onuf argues, 'a community of states',

<sup>43</sup> This was completely obvious to a host of writers. Patrick Henry put it simply: 'The question turns, sir, on that poor little thing- the expression, We the *people*, instead of the *states* of America.' K.C. Wheare has said that 'what the authors of *The Federalist* claimed for the Constitution of 1787 was not that it substituted a federation for a league but that it substituted an efficient federation for an inefficient federation', (K.C. Wheare, *Federal Government* (Oxford, 4<sup>th</sup> edn., 1964, p. 11). Of course, this is what they claimed, but Wheare's endorsement of this claim cannot be excused.

<sup>44</sup> Peter S. Onuf, *The Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia, 1983), p. 5. Onuf's very useful book is seriously burdened by his assumption that because the states did not act like 'true states', the Constitution was 'truly an unremarkable achievement'. Onuf, as almost everyone else, fails to see the enormous differences in possible consequences in alternative 'articulations' and 'embodiments' of the then widely shared view that America was a 'community of states' (p. 172). He sees, however, that Jefferson had in mind 'an equally "complicated"' alternative for a new union, but Jefferson is chided as being 'trapped by an outmoded and highly abstract theory of the union' (p. 168). Such is the power of federalist ideology.

different, collectively and individually, from previous associations. In particular, the American states accepted the limitations of their sovereignty both in regard to matters of war and peace and in regard to the settlement of disputes over territory. The importance of this should not be underestimated.

The idea was extendable to other matters of common interest, as the New Jersey plan offered. The key idea is that the units contract to alienate the rights to make certain decisions and agree to provide the monies requisite to implementing what is jointly decided. There is no dual jurisdiction. Citizens of (say) Virginia are not also citizens of some larger political entity. They are bound only by the laws of Virginia. Presumably, the state of Virginia can decide what powers it will yield and under what conditions. Presumably as well, it then has the responsibility to enforce decisions on its citizens which the 'congress' rightfully makes.

The New Jersey plan would have altered the then existing confederation from being as it had been called 'a league of friendship', because it would have specifically given to Congress some substantial means to carry out its delegated purposes. But it would have remained a confederation. Indeed, a radically decentralized and layered arrangement of building blocks, in which constitutive units yield increasingly specific powers as the territory and scope is enlarged had already been intimated in America, albeit in the nostalgic terms of 'Anglo-Saxon government'. In 1776, a Pennsylvania radical writing as 'Demophilus' had argued that 'the peculiar excellence' of Anglo-Saxon government 'consisted in its incorporating small parcels of the people into little communities by themselves'. The writer continued:

In their small republics they often met in council upon their common concerns ...From this view of the gradual progression of the Saxon government from the smallest combinations of meer neighborhoods to the most extensive Commonwealth of the United Colonies, they conceived the power of all civil government as derived only from the voluntary delegations of the whole People.<sup>45</sup>

This text, emphatic in its contractual basis regarding the delegation of powers, is not perfectly clear regarding the principle of federation, but it is a mistake to suppose that the only coherent sense is the sense offered by the American Federalists. Taking advantage of unclarity was, of course, a key Federalist move. They argued that a distinction between the older arrangement and the new, based on legislating over states versus individuals, was 'arbitrary', that 'there is no absolute rule on the subject', and that 'so long as the separate organizations of the members be not abolished ...it would still be, in fact and theory, an association of states, or a confederacy'. So, Hamilton's *Federalist no.9* concluded, the proposed constitution 'fully corresponds, in every rational import of the terms, with the idea of a federal government'.

The move was brilliant. On the one hand, it was plain that legislation regarding war and peace by a national congress, even in a classic defensive league, had direct *effects* on individuals in the several states; and since, as for example Melancthon

<sup>45</sup> Cited by Wood, *Creation*, pp. 227 f.

Smith had admitted, 'the general government ought to operate on individuals to a certain degree',<sup>46</sup> what was the quarrel about? On the other hand, the Constitution did not abolish' the separate organizations of the members', down indeed to the most local of organizations. Nevertheless, it was more than intuition and confusion which prompted the anti-federalists to stick to their guns. They discerned that once the national government could legislate over individuals, the effective control by local units would be lost and that inevitably their powers would be 'residual'. It was pure nonsense to argue, as Hamilton did (*Federalist no.* 84), that in the United States constitution 'in strictness, the people surrender nothing'; or, as James Wilson had argued, that the problem of divided sovereignty was a non-problem because 'it resides in the PEOPLE, as the fountain of government'.<sup>47</sup>

From a democrat's point of view, the people could be sovereign only as they had power. To have power they must have control over decisions which affect them, and this meant, as everyone knew, that the units had to be relatively small. But as there might be purposes shared by such units which could not be satisfied without each alienating authority over such matters, it would then be rational enough to yield what was necessary to satisfy those purposes. There is no mystification here. The idea was both fully coherent and historically available. Indeed, that it was the view held by Jefferson seems unarguable. In a famous letter of 1816 written to Samuel Kercheval, Jefferson wrote:

We should...marshall our government into, 1, the general federal republic, for all concerns foreign and federal; 2, that of the State, for what relates to our own citizens exclusively; 3, the county republics, for the duties and concerns of the county; and 4, the ward republics, for the small, yet numerous and interesting concerns of the neighborhood.<sup>48</sup>

Jefferson wrote this after it was too late--as he himself came to see. Indeed, because nothing changed with his 'revolution of 1800', he was decisive in promoting a critical, and ideologically useful, confusion.

<sup>46</sup> Cited from *The Revolution in America. 1754-1788. Documents on the Internal Development of America*, ed., J.R. Pole (Stanford, 1970), p. 203.

<sup>47</sup> Wood, *Creation*, pp. 529 f. Adams, no democrat, also saw that it was nonsense. Wood judges that Wilson invented the foregoing 'solution' to the problem of divided sovereignty. The same argument showed that a bill of rights was unnecessary since the people' did not need to be protected against themselves. Wilson reported that he tried to get more information for the Philadelphia assembly on the Lycian Republic, Montesquieu's favourite example, but failed. He nevertheless argued that the United States had 'evinced ...even on that model, immense improvements' (Spurling, *Montesquieu in America*, p. 226).

<sup>48</sup> Jefferson, Letter to Kercheval, 12 July 1816. References to Jefferson are from *Basic Writings of Thomas Jefferson*, ed. Philip s. Foner (New York, 1944), unless otherwise noted. See also the letter to Major John Cartwright, 5 June 1824. 'As Cato concluded every speech with the words, *Carthago delenda est*, so do I every opinion, with the injunction, "divide the counties into wards.'" In this letter he expressed the hope that the Virginia constitution might be changed so that 'each ward would be ...a small republic in itself, and every man in the State would thus become an acting member of the common government, transacting in person a great portion of its rights and duties within itself, subordinate indeed, yet important, and entirely with his competence.' Cf. Arendt, *On Revolution*, pp. 252 f.

## VI

Jefferson's political philosophy has been much discussed and no doubt he has become a special symbol in America; but Merrill Peterson grasped a significant part of this in writing that 'men like Jefferson, deceived by the French Revolution, taught people to think of their government as a democracy rather than a balanced republic after Adam's vision'.<sup>49</sup> Strange as it may seem he was able to do this exactly because, like so many of his fellow Americans, he seems to have failed--at least until too late in life--to have had a clear grasp of what the Constitution had wrought.

Jefferson was always a localist and it may be that his localism was influenced by Scottish ideas of 'the affectionate community'.<sup>50</sup> However this may be, his 'anarchism' is also clear enough. One evidence of this is his repeated praise of the Indian mode of social organization. 'It will be said', he wrote in the Notes of Virginia (1783) that 'the great societies cannot exist without government. The savages, therefore, break them into smaller ones'; and in a letter to Madison (1787) he pursued this idea by means of his often quoted--and misunderstood--classification of societies. There were three types: 'without government, as among our Indians'; 'under governments, wherein the will of everyone has a just influence; in England in a slight degree, and in our states, in a great one'; and finally, 'under governments of force'. 'It is a problem', he continued, 'not clear in my mind, that the first condition is not the best.' This is, of course, hardly an endorsement of political individualism or of contemporary possessive liberalist 'get the government off my back'. As Jefferson saw it, Indian societies were compact communities of like-minded persons 'governed' by consensus *-instead* of by the apparatus of the modern state.<sup>51</sup> It was in this sense that the absence of 'government' is 'inconsistent with any great degree of population'.

Corresponding from France, Jefferson liked some of the features of the new Constitution, the presidential 'negative' and the division of powers. His concern over the absence of a Bill of Rights was motivated by his fear that the national government, not the state governments, would threaten individual rights. In a lengthy 1787 letter to Madison he wrote:

In a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights become necessary by way of supplement. This is the case with our new federal Constitution. This instrument forms us into one State, *as to certain objects*, and gives us a legislative and *executive for these objects*. It [i.e. a bill of rights] should, therefore, guard

<sup>49</sup> Merrill D. Peterson, *Adams and Jefferson, A Revolutionary Dialogue* (Athens, GA, 1976), p. 94.

<sup>50</sup> See Gary Wills, *Inventing America* (New York, 1978); R. Hameway, 'Jefferson and the Scottish Enlightenment, A Critique of Gary Wills', *William and Mary Quarterly*, XXXVI (1979).

<sup>51</sup> It is because the modern state is discerned that 'anarchism'- easily defined as an *anti-statist political philosophy* -emerges. Comte rightly referred to Rousseau as the founder of 'the anarchical school' exactly because, for Rousseau, sovereignty could not be alienated to *government*. See J.B. Noone, Jr., *Rousseau's Social Contract* (Athens, GA, 1980). With the modern state and with the appropriation of 'democracy' by theories of government, 'democrats' in the Greek sense become 'anarchists'!

us against their abuses of power, within the field submitted to them. (My emphasis.)

In a classical federation, states would alienate powers as to certain objects; but what if the central government then infringed on individual rights within that domain? What redress could there be? A bill of rights, directed at the central government could provide legal machinery for protecting these.<sup>52</sup>

At this time, Jefferson believed that any needed changes could be made, but was ambivalent on how best to accomplish this: whether the constitution should now be adopted, as Madison was vigorously urging, 'in hopes of future amendment'; or better, whether having been 'duly weighed and canvassed by the people', we ask them 'to send deputies again' to 'establish [their] fundamental rights by a sacrosanct declaration'. These were, evidently, remarkably different processes and it is at least odd that Jefferson seems not to have assessed the very different consequences that might have obtained.

By 1791 the Constitution had been ratified. In 1790 Congress had approved twelve amendments: the ninth affirms 'the enumeration...of certain rights, shall not be construed to deny or disparage others retained by the people'; the tenth affirms that 'power not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people'. Jefferson was not satisfied -nor should he have been. What did it mean to say 'retained by the people'? As he then (1791) wrote, 'it is important to strengthen the State governments', but 'as this cannot be done by any change in the federal constitution..., it must be done by the states themselves, erecting such barriers at the constitutional line as cannot be surmounted either by themselves or by the general government'.

This was not a helpful suggestion. If the constitution could not be changed *in its essentials*, there was very little that states could do to guard against appropriation of their powers by the general government. 'Residual powers' are just that: whatever is left for the states. Indeed, as is clear, Jefferson's Kentucky Resolution of 1798 is *inconsistent* with the Constitution. His 'compact' arguments and his thesis that each state had a right to judge for itself if the infractions incurred by the federal government against its delegated authority are--as Madison, author of the similar but weaker Virginia resolution, must surely have known--patently *subversive*. Of course, in a classical federation, the arguments and their conclusions are just what one would expect.

It will pay to dwell briefly on the question of the differences between Madison's and Jefferson's views on this score. Not only do these shed considerable light on the problem of Jefferson's understanding of the United States Constitution but, as well, subsequent secessionist doctrines drew critical ammunition from Jefferson's Kentucky Resolution.

<sup>52</sup> It is not quite true, as Storing asserts, that 'a truly federal government needs no bill of rights' (Storing, *What the Anti-Federalists Were For*, p. 65). There would be differences in such a bill over against the present American bill. Amendment One might read: 'Neither Congress nor the States shall...'. On the other hand, Storing is correct that 'the whole emphasis on reservations of rights of individuals implied a fundamental acceptance of the "consolidated" character of the new government' (*ibid.*).

Jaffa points out that Madison subsequently glossed his Virginia solution,<sup>53</sup> claiming that in the original text 'states' had been used ambiguously. He had meant 'states' to refer to 'the people composing those political societies in their highest capacity'. The phrase, 'it views the powers of the Federal Government as resulting from the compact to which the states are parties' did *not* mean that 'the societies organized by particular governments' compact, but that 'the people of the United States' compact. The difference was critical since on the latter view of the matter, the compact was analogous to one entered by *individuals* in a state of nature. If so, then, each state was bound by the principle of majority rule of the *whole* people of the United States and hence, if the national government usurps power, then recourse to these same people is possible by any of the modes included in the Constitution, the vehicle of the original compact of 'the people'. It follows then that any attempt of any one state (or minority of states) to decide on its own is usurpation.<sup>54</sup>

The contrast to Jefferson is fundamental. He held that the Constitution was a compact to which 'each state acceded as a State, and is an integral party, its co-states forming, as to itself, the other party...' Thus, as in all other cases of compact among parties having no common judge, each party has a right to judge for itself, as well of infractions as of the mode and measure of redress.' This is as clear as it can be--and contrary to Jaffa, it is perfectly consistent. Indeed, it is a consequence of the classic notion of confederation. Each state compacted with every other, and neither the Congress nor the Court was a 'third party'; if Virginia decided that the Congress has usurped power, that it was exercising prerogatives not delegated to it by Virginia, then who was to decide but Virginia? One might argue here that this was the Achilles heel of a traditional confederation, showing that it could not work. But that would surely be presumptuous. With the greatly strengthened 'federal system' of the Constitution and with a Supreme Court, the issue of slavery broke the system down. Indeed, more generally, whether a confederation will be stable or not depends upon the objects to be served by confederation and the extent to which the parties share in acknowledging these to be proper objects. In a 1787 letter to Carrington, Jefferson made clear that he believed that under the *Articles*, the Congress had a right to coerce contributions of money and to use compulsion to secure other legitimate, i.e. *delegated*, ends. As he noted, to will the ends is to will the means. Nor finally does it follow, under either the *Articles* or the Constitution, that the 'majority' had a right to keep members from seceding. As Jaffa points out, not even Madison (*Federalist no.43*) was prepared to argue that Rhode Island and North Carolina, prior to ratification, could be rightfully compelled to be part of the new union or rightly prevented from making separate alliances with one another or 'foreign powers'. Surely Jefferson did not hold to Lincoln's doctrine that 'in contemplation of universal law, and of the Constitution, the Union of these states is perpetual', since that idea could be grounded on ideas expressly contradicted by Jefferson, that consent was

<sup>53</sup> Harry Jaffa, 'The Political Theory of the Civil War', in *A Nation of States*, ed. R.A. Goldwin (Chicago, 2nd edn., 1974), pp. 109-37. Citations from the pertinent texts following are from Jaffa's essay.

<sup>54</sup> Madison's argument is plainly sophistical, but it saves what would otherwise be an inconsistent position. See Madison, *Federalist* 39.

absolute and perpetual. This idea, not incidentally, even confounded the Lockean notion of consent, still less the one which, as I shall argue, Jefferson seems clearly to have held. The differences between Jefferson and Madison were fundamental and it may be wondered how in those critical years--and since--they have been thought to represent a minor quarrel between essentially like-minded men. The federalism of the Constitution was entirely novel; that cannot be emphasized strongly enough: and perhaps had not Jefferson become President, the differences between the two Virginians on this issue, and on others even more fundamental to the problem of democracy, would have more clearly emerged and been more critical.

## VII

America's first two Presidents, Washington and John Adams, had been Federalists, perhaps despite themselves.<sup>55</sup> The development of political parties, propelled by the events in France, made the election of 1800 hotly ideological-- a campaign between Adams, portrayed as 'the champion of rank, titles and hereditary distinctions' and Jefferson, imaged as the democratic 'man of the people'. Yet with Jefferson's ascendancy to the Presidency, *nothing changed*.

This is not to charge Jefferson and the Republicans with apostasy, for not only could his predecessors 'work not be undone' at once but, more important, there was the Constitution and the institutional patterns which had already been established. Perhaps as crucial there was the fact that, because the Federal government was then small, even a major change in policy would not have exhibited the true nature of the Constitution as against the older ideas of federalism. The point deserves emphasis. The fundamental concerns of the day were over foreign policy and on these matters there would be no difference. Nor at that time was there an enormous federal bureaucracy nor gigantic federal budget. Only two events in the Washington administration seemed to have outraged Americans sufficiently to raise questions about what had been wrought, the so-called Whiskey Rebellion and Washington's ill-advised assertion that 'certain self-created societies' had fomented the rebellion. In both instances, it is clear that many Americans were already misunderstanding the nature of the new system. *The Otsego Herald* insisted, for example, that 'in Representative governments, the people are masters, all their officers from the highest to the lowest are servants to the people'. A Pennsylvania paper used the same metaphor and a number of writers insisted that 'whatever the United States might have been previous to the American Revolution, it is pretty evident that since their emancipation from British rapacity, they are a great self-created society'.<sup>56</sup>

Indeed, that was just the problem with the rhetoric of Jefferson's candidacy and the first decade of the century. In the struggle over ratification, the argument had been miscouched, at that time, in terms of the relative 'effectiveness' of the two

<sup>55</sup> See in addition to Peterson's *Adams and Jefferson*, his *Thomas Jefferson and the New Nation* (New York, 1970); Lance Banning, *The Jeffersonian Persuasion: Evolution of a Party Ideology* (Ithaca, 1978); Appleby, *Capitalism and a New Social Order*.

<sup>56</sup> These are quoted from Appleby, *Capitalism and a New Social Order*, pp. 66, 67 f.

modes of 'federation " not as it might have been, in terms of basic assumptions which had prompted the revision of the articles in the first place. In the 90s, the French Revolution, as Appleby has said, brought to the surface two 'opposing conceptions of society', but this critical debate took place *after the power of the people had been curbed*. It was thus the case that its only consequence was ideological. Jefferson's role here was special for, as I have been suggesting, Jefferson spoke with a consistent democratic rhetoric which was discernibly different from the rhetoric of the Federalist party opposition.

A great deal has been written about his rejection of 'aristocratic values', of his commitment to equality of opportunity and of his belief that the liberation of 'the free and independent man ' would be a sufficient guarantee of prosperity, but these are not what I have in mind here. However important these ideas have been in defining the ideology of democracy, they have little to do with democracy as that was traditionally understood. Jefferson's views on representation and on the Constitution, however, had a great deal to do with democracy. Indeed, in the absence of these views, we might have come to think of Jefferson as a great liberal, but *not* as a great American democrat. American society was and is liberal, and we are accustomed to think of American society as a liberal democracy; but in the absence of confusion as regards 'representative government' and the Constitution, confusion powerfully promoted by Jefferson, it would have been very much more difficult to define the American system of government as a democracy.

Jefferson's utterances about 'representation' have a perfectly consistent meaning. He persistently avoided the federalist formula of power 'originating in' or 'deriving from' the people. He always spoke of representatives as delegates, deputies, functionaries or agents. His most formal definition of a republic may be this:

I would say, purely and simply, it means a government by its citizens in mass, acting directly and personally, according to rules established by the majority; and that every other government is more or less republican, in proportion as it has in its composition more or less of this ingredient of the direct action of its citizens.<sup>57</sup>

This famous text continues, of course, with Jefferson's acknowledgement that 'such a government is evidently restrained in very narrow limits of space and population, and accordingly, he argued that we must take 'the first shade from this pure element'. The 'first shade', of course, was not the federalist sense of representation, representation as authorization, for indeed, on this sense it will be relatively easy for any modern government to be 'democratic'. As Marshall Tito was said to have jested, the difference between a one party system and a two party system is just one party! I am not saying, of course, that this is the whole story, that voting is merely ritual in

<sup>57</sup> Jefferson. Letter to Taylor (1816). In another letter to Taylor in the same year, he wrote: 'If, then, the control of the people over the organs of their government be the measure of republicanism, and I confess I know of no other measure, it must be agreed that our governments have much less of republicanism than ought to have been expected; in other words, the people have less regular control over their agents, than their rights and their interests require.'

all modern systems.<sup>58</sup> Nevertheless, none of the Whig theorists of 'rightful government' thought that a rightful government had to be a 'democracy'. Indeed, *no one had demanded that they be so*; but by the end of the eighteenth century this was no longer the case. Americans demanded democracy and it was the Americans who showed how people could have democracy without having it!

To do this they had also to solve the Montesquieuvian restraints on the size of republics; but Jefferson never seems to have been clear that the way that it had been solved by the Constitution made democracy in *his* sense impossible. Indeed, he persistently spoke as if the United States was a *traditional* confederation; he thereby also contributed to obliterating *that* idea as a real possibility in the modern world.

Thus, he repeatedly spoke of the states as the basis of the United States government and insisted that they were 'single and independent as to their internal administration'. In 1800, for example, he wrote: 'let the General Government be reduced to foreign concerns only...and our General Government may be reduced to a very simple organization and a very inexpensive one'.<sup>59</sup> He repeated this in a remarkable 1811 letter to Destutt de Tracy, where he instructed his friend as regards the 'true barriers of our liberty'. Tracy had argued that they resided in the principle of frequent elections and a plural executive. Jefferson countered that this was not the case, that the true barriers were 'our State governments; and the wisest conservative power ever contrived by man, is that which *our Revolution* and *present* government found us possessed. Seventeen distinct states, amalgamated into one as to their foreign concerns but singly and independent as to their internal administration. (My emphasis.)'<sup>60</sup> As late as 1826, he could still write: 'The Constitution of the United States is a compact of independent nations subject to rules acknowledged in similar cases.'

These startling remarks are easily joined to his increasingly strident criticisms of the direction of American politics and to the conviction, expressed in 1823, that the problem had begun in Philadelphia, that the federalists had there 'endeavored to draw the cords of power as tight as they could obtain them' --indeed, as Madison had all but said in *Federalist no. 10*, 'to lessen the dependence of the general functionaries on their constituents', and 'to weaken the means of maintaining a steady equilibrium with the majority of the convention had deemed statuary for both branches, general and local'. At the same time, Jefferson's despair over federalism is easily joined to his 1816 positive discovery of 'pure, elementary republics -all together making the state a democracy'. On this purely confederal view:

We think experience has proved it safer, for the mass of individuals composing society, to reserve for themselves personally the exercise of all rightful power to which they are competent, and to delegate those to which they are

<sup>58</sup> See R.A. Dahl, *A Preface to Democratic Theory* (Chicago, 1965); Murray Edelman, *The Symbolic Uses of Politics* (Urbana, 1964).

<sup>59</sup> Jefferson, Letter to Gideon Granger (12 August 1800).

<sup>60</sup> Quoted from Gilben Chinard, *Jefferson et les ideologues* (Paris and Baltimore, 1925), pp. 77 f.

not competent to deputies named and removable for unfaithful conduct, by themselves immediately.<sup>61</sup>

These ideas are widely shared by Americans, but it is clear that they do not represent the reality of American democracy. One might say that when America was young, small and uncomplicated, it was not difficult to believe that large numbers of Americans did rule themselves, that the Federal government in New York and then in Washington had very little to do with a farmer in New Hampshire or a seaman of New York. It may also be that Jefferson, the voice of American democrats, could believe that the Constitution was not flawed in its essentials and that if we did not look upon it 'with sanctimonious reverence', it could be changed so as to provide the institutional possibilities for a flowering of participation in the affairs of life.

Americans had achieved a large and powerful state, a state which no longer would be an embarrassment in the expansionist and aggrandizing modern world. No doubt Jefferson spoke for many Americans when, in 1809, he wrote to Madison that 'no constitution was ever before as well calculated as ours for extensive empire and self-government'. On grounds set out by Montesquieu, a confederacy was indefinitely expandable, but in the manner of the Lycian confederacy not that of Rome. Rome was an empire and, after it expanded beyond Italy, it was in no sense a republic of self-governing citizens. The Americans could have both, as long as one was not too critical of the idea of 'self-government'; but Jefferson was absolutely correct in arguing that the constitution had 'rendered useless almost everything written before on the structure of government'. That is, the United States constitution and its ideological defense made America the first fully modern state. In it people were not ruled, though they were governed. In it, power was exercised by democratic consent and political equality made all 'citizens' equal. For it, foreign policy would be primary and would be in the name of 'the nation'.

Finally, while the idea of democracy, understood as the freedom which comes with the capacity of self-government, has become, with Tocqueville, an irresistible force in the world, we remain trapped in the ideological categories examined in this essay. In the modern world, we are told that democracy is 'free elections', or on the other side, that it is 'the party acting in the name of the oppressed class'. In the modern world, we are instructed that our only choice is between the forms of alienated politics.

*Peter T. Manicas*

QUEENS COLLEGE, C.U.N.Y

<sup>61</sup> Jefferson, Letter to Johnson (1823).