Jefferson and the Separation of Powers in the States, 1776-1787

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During and after the American Revolution the theory of separation of powers was established as one of the three main principles to preserve liberty.[1] No infallible answer can be given to the question why this theory appealed to the Americans, but perhaps more light can be shed upon this pertinent subject.

That concentration of powers results in despotism and that separation of powers is necessary for liberty were popular theories derived from the Europeans, especially Locke and Montesquieu. Their authority was used because the idealized picture of colonial America with Rights of Englishmen had a certain separation among three branches of government (assembly, courts, and executive); and European authorities were useful to secure support for the American cause in England and France. Though there is a great difference between a theory and its actual operation, the two have the same spark of life.[2] The development of the American system of separation of powers largely took place in the new American states between 1776 and 1784. It can be traced in the reasoning of individuals and also in the framing of state constitutions.

Thomas Jefferson (1743-1826) may be selected as representing the change in the individual thinking which paralleled the change in the working of organizations.

Jefferson's political philosophy evolved, usually in harmony with the majority of the voters and politicians in the political unit in which he was working, as he gained experi-

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[1] Edward S. Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," *American Historical Review*, XXX (1925), 511-536. The other two were federalism and bills of rights.

[2] William Bondy, *The Separation of Governmental Powers* (New York, 1896), 39-47; Benjamin F. Wright, Jr., "The Origin of Separation of Powers in America," *Economica*, XIII (1933), 169-185; William Holdsworth, *A History of English Law* (12 vols., London, 1938), X, 713, 716, 722. Holdsworth concludes that separation of powers was a substantially true analysis of the English constitution during the greater part of the eighteenth century.

ence. What made it possible for him to change with experience and keep firmness of purpose was that he always centered on liberty as a precious way of life within reach.

In 1769 Jefferson was first elected to the Virginia House of Burgesses where he promptly alligned himself with the liberal, often called radical, group. It was not long until he was recognized as one of their leaders, and when preparing for service in the First Continental Congress he wrote a pamphlet entitled *Summary View of the Rights of British America.*[3] This *Summary View* was a courageous and inspiring blowing of the trumpet for American liberty, and a withering criticism of the despotism of the king and the tyranny of Parliament. On page after page Jefferson listed and condemned policies and laws that violated liberty, bluntly stating that the "true ground on which we declare these acts void is that the British parliament has no right to exercise authority over us."[4] Except where Parliament could be controlled by representative government, he considered its tryanny worse than the despotism of the king. Jefferson maintained that the American assemblies had authority within their areas similar to that of Parliament in England, that the king was "no more than the chief officer of the people. . . and consequently subject to their superintendence,"[5] that he was the servant rather than the proprietor of the people, and that his task was to keep harmony in the Empire.

Jefferson championed the colonial legislative point of view, for the "god who gave us life, gave us liberty at the same time." Since the king and Parliament were expected by Jefferson to do what the Americans would accept as "just,"[6] not only was the king reduced to a servant instead of an executive but also the high court of Parliament (king, lords, and commons) was confronted with American assemblies determining what was just. Since both George III and Parliament were prepared to use force to uphold their powers, the Americans had the choice of submission or revolution.

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[3] This document may be found in Julian P. Boyd (ed.), *The Papers of Thomas Jefferson* (13 vols., Princeton, N.J., 1950-1956), I, 121-137.

[4] *Ibid.*, I, 125.

[5] *Ibid.*, I, 121.

[6] *Ibid.*, I, 135; Anthony M. Lewis, "Jefferson's *Summary View* as a Chart of Political Union," *William and Mary Quarterly*, V (1948), 51.

The Americans chose liberty and revolution. To meet this crisis in Virginia the revolutionary Committee of Safety exercised all of the powers of government—legislative, executive, and judicial—that had formerly been exercised by the assembly, courts, royal governor, king, and Parliament. Jefferson was a member of this Committee. Moreover, he approved the Articles of Confederation (1775) proposed by Benjamin Franklin which provided for a central organization with legislative supremacy and no suggestion of separation of powers.[7] However, the colonies were too jealous of their provincialism to accept Franklin's proposal. Consequently, the states exercised sovereignty and drafted the first constitutions; and in the states, after the first shock of the crisis, the situation was more favorable than in the central government for a real separation of powers to develop. It was his experience in the state that changed Jefferson's thinking from the support of concentration of powers to the support of separation of powers.

Probably the two main reasons that separation of powers changed from a popular theory to a vital principle of government were (1) that the state leaders had within their reach, through election either by the houses or by the people, the office of governor, and (2) it was generally accepted that the executive office was the place for leaders whether they were radical or conservative. Consequently, radical leaders such as Patrick Henry and Thomas Jefferson became governors and supporters of separation of powers in their efforts to strengthen the executive. On the other hand, the conservative Roger Sherman did not become governor and continued to oppose separation of powers.[8] Had the executive office been unattainable in America because a king occupied the executive position, or weak because a king controlled the incumbent, then the services of popular leaders would have been limited to the legislative branch. Under these circumstances the supremacy of the legislative branch would probably have been established.

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[7] Claude Halstead Van Tyne, "Sovereignty in the American Revolution," *American Historical Review*, XII (1907), 529-545; Walter F. Dodd, "The First State Constitutional Conventions, 1775-1783," *American Political Science Review*, II (1907-1908), 545-561.

[8] Margaret Burnham Macmillan, *The War Governors in the American Revolution* (New York, 1943), 61, 63.

Patrick Henry, one of the most influential and active members of the convention that drafted the Virginia constitution of 1776, worked hard to vest the executive with a veto in order to defend the office from the usurpations of the legislature. No one but the radical Patrick Henry had enough prestige to urge anything so unpopular with the convention. Yet even he was unable to accomplish it. Nevertheless, although they elected him governor on the same day the constitution was adopted (June 29, 1776), the constitution did provide for enough executive power so that a man with the strong executive ideas of Patrick Henry could succeed as governor. He always paid the greatest deference to the legislative branch and in turn received its support during his three-year term in the governor's office.

Patrick Henry's successor, Thomas Jefferson, approached the governor's office with a very different attitude toward the power of the executive. This attitude lessened the effectiveness of the support that the legislative branch continued to give to the executive.

The emergency act passed by the general assembly of Virginia in May, 1780, granted to the governor and council the power to appoint officers, remove disaffected persons, use martial law in case of insurrection, seize needed supplies, and engage a printer at public expense.[9] If Jefferson had held the strong executive and military ideas of George Clinton, this statute would have provided ample basis for vigorous action when the British invaded Virginia in 1780. Instead, Jefferson declared that "we can only be answerable for the orders we give and not for their execution." It is no wonder that Steuben or an aide-de-camp underscored such an amazing statement from an executive.[10] The result was a poor showing in the face of the enemy and loss of popular support.

It was under these circumstances that Jefferson left office after only two years instead of the three consecutive years allowed by the constitution. For many men this would

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[9] William Wirt Henry (ed.), *Patrick Henry: Life, Correspondence and Speeches* (3 vols., New York, 1891), I, 438; William Waller Hening (ed.), *The Statutes at Large: Being a Collection of the Laws of Virginia from . . . 1619* (13 vols., New York, 1823), IX, 112-119, 491, 503; X, 233.

[10] Jefferson, *Papers*, V, 120.

have been the termination of public life, but for Jefferson the insight received was invigorating. Moreover, his ability to write helped him rebuild his reputation. He used his freedom from the burdens of office to prepare *Notes on Virginia,*[11] his "most serious piece of book-making, and the one on which the larger part of his philosophical reputation was based during his lifetime."[12]

Jefferson's adverse criticism of the constitution because it concentrated powers in the Virginia Assembly showed that he was defending his administration, for the constitution adopted did not grant the assembly substantially greater powers or the executive less power than the drafts of constitutions that Jefferson had prepared for the convention. Nevertheless, his reasoning went beyond personal consideration. Pushing for an organization that would preserve liberty, he proclaimed that "elective despotism was not the government we fought for . . . the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectively checked and restrained by the others."[13] When Jefferson drafted another proposed constitution in 1783, which will be considered in more detail later, the use of separation of powers as a fundamental principle became even more apparent. Although he had learned while he was governor that the executive needed to be strong, he still viewed with horror the idea of the executive being a dictator even for an emergency.[14]

A development parallel to the progression in the thinking of Jefferson can be traced in the state constitutions. Since all of these constitutions were understood to be in accord with the theory of separation of powers, the interpretation of this theory much have been very broad indeed. It is difficult to find more than two critical points on which there was general agreement. In all states three departments were organized, and in nearly every constitution there was the

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[11] Paul Leicester Ford (ed.), *The Writings of Thomas Jefferson* (10 vols., New York, 1892-1899), III, 68-295.

[12] *Ibid.*, III, 68. Comment by the editor.

[13] *Ibid.*, III, 224.

[14] *Ibid.*, III, 231-232.

provision that no person would exercise the duties of more than one department at a time.

In the wording of the theory there was more similarity, although a different emphasis did indicate a change in the distribution of powers. When the Virginia statement (1776) is compared with that of Massachusetts (1780) it is easy to see that the latter went further in actual separation. In the Virginia bill of rights: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercises the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time; except that the justices of the County Courts shall be eligible to either House of Assembly."[15] But the Massachusetts declaration of rights stated: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial power, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."[16]

Other aspects of the state constitutions important for separation of powers may be considered in the order in which they were drafted. When the English authority was rejected, the colonists, needing governments, organized what were called conventions. These exercised all of the powers of government until the constitutions were adopted.

The constitution of Virginia, the first one drafted with independence in view, was especially important because it laid the pattern for all of the states either to follow or change as they preferred. Well aware of the significance of what was to take place, John Adams of Massachusetts and Richard Henry Lee of Virginia, members of Congress meeting at Philadelphia, discussed constitutions. Lee was impressed with the ideas of John Adams, and requested him to form a plan for government. This led to the publication of

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[15] Francis Newton Thorpe (ed.), *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (7 vols., Washington, 1909), VII, 3815. This constitution did not use articles and sections.

[16] *Ibid.*, III, 1893, Part I, article 30.

Thoughts on Government Applicable to the Present State of the American Colonies, the first important publication dealing with the best form of government.[17] It plainly stated that "a single assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interests, and adjudge all controversies in their own favor."[18] Among other provisions to keep the executive and judicial branches strong he proposed a veto for the governor and office for life for the judges. But John Adams was one of the few Americans who had recovered enough from the quarrels with the royal governors to believe that the executive could be powerful without being dangerous.

The members of the convention which drafted the constitution for Virginia based their work on the draft of George Mason. Their legal statements were summaries of what they had been saying for years. Consequently, the power of the legislative branch they drafted with ease and precision because in this branch they had long experience in the colonial assemblies. But the colonial governors had been shrouded in the mystery of and the hostility to the Crown; and the judicial authority within the colony and in the high court of Parliament had not been clearly defined. Thus, as an effect, the executive and judicial branches were left vague in the Virginia constitution.

The Virginia legislature consisted of two houses, the House of Delegates and the Senate. Each house chose its speaker, appointed its own officers, settled its own rules of procedure, directed writs of election for vacancies, and voted on all bills. The houses were instructed to settle an adequate but modest salary on the governor. The House of Delegates could prosecute cases, and the two houses could pass laws directing the use of pardons and reprieves. Each house adjourned itself. A joint ballot was used to choose a governor, a privy council, delegates to the Continental Congress, judges, a secretary, and an attorney general.

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[17] Allan Nevins, *The American States During and After the Revolution, 1775-1789* (New York, 1924), 122. The pamphlet may be found in Charles Francis Adams (ed.), *The Works of John Adams* (10 vols., Boston, 1850-1856), IV, 193-200.

[18] Adams, *Works,* IV, 196.

The provisions for the governor were not only shorter but also were marked by what he could *not* do. In addition to the provision for his election for only one year by joint ballot of the legislature was the restriction that he could hold office no longer than three successive years, and only after a lapse of four years was he again eligible. He was not, under any pretext, to exercise any power or prerogative by virtue of any law, statute, or custom of England. Nor was he to prorogue or adjourn the assembly. Nevertheless, he had substantial powers, usually to be exercised with the advice of the council. The governor exercised executive powers according to the laws of the commonwealth, granted pardons, called the assembly, appointed officers to the militia, was authorized to embody the militia, and appointed justices of the peace for the counties. Moreover, the governor alone directed the militia when it was embodied.

Little was stated about the judicial department, except that the judges were to be appointed by a joint ballot of the houses, to have fixed and adequate salaries, and to hold office during good behavior. Provision was made for their impeachment by the House of Delegates if this action should ever be necessary.

The Pennsylvania constitution (completed September 28, 1776) was the next constitution important for establishing the organization of the powers of government. Though there were three departments, nearly all of the powers were granted to a unicameral assembly.[19] There were good features in the constitution, such as the abolition of property qualifications for voting, and it has been praised as the most democratic of the state constitutions.[20] But the government under it functioned so poorly that both the one-house legislature and concentration of powers were discredited. Moreover, the conservatives popularized the idea of the need for an increased separation of powers as an argument for a new constitution.

Without doubt the Pennsylvania constitution was faulty, although it is open to question whether this was because of

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[19] Thorpe (ed.), *Constitutions*, V, 3085. Especially the elastic clause in Section 9 was to the advantage of the assembly.

[20] J. Paul Selsam, *The Pennsylvania Constitution of 1776* (Philadelphia, 1936), 183; Robert Levere Brunhouse, *The Counter-Revolution in Pennsylvania, 1776-1790* (Philadelphia, 1942), 87.

the concentration of powers. The radicals had no talented individual to do the drafting; their one great man, Benjamin Franklin, was too busy in Congress. Perhaps this explains why neither the provisions for the publication of bills nor the council of censors that was established functioned effectively. Only an idealist without experience in government would have believed that the council of censors, who had only public censure and recommendations to enforce their decisions, could secure the enforcement of the constitution.[21] But even had there been no defects in the constitution, it is doubtful whether government under it could have been successful for the simple reason that the party antagonisms in Pennsylvania were more violent than in any other state.

The inability of radicals and conservatives to work together in the legislature made more disastrous the weak executive branch. The one-house legislature, which with political parties working together could have been efficient, contrasted with a plural executive selected in an ingenious manner. An executive council of twelve was chosen by the electors; then the assembly and council by joint vote annually chose a president from the council. The president could only act with the consent of the council. This proved to be about as weak as anything could be and still be called an executive branch. As Joseph Reed, an able radical and a military man who served as president, explained, successful political action was impossible when it was constantly necessary to have a council concur.[22]

Unlike the Pennsylvania constitution, the New York constitution (April 20, 1777) was influential because it was successful. Three probable causes for this accomplishment in New York were that John Jay provided the basic draft, that the radicals and conservatives worked together, and that George Clinton became the first governor.

The political skill of Clinton even made usable two unlikely provisions that had been inserted in the constitution—a council of revision and a council of appointments. The council of revision, composed of the governor, chancellor, and

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[21] Thorpe (ed.), *Constitutions*, 3091, article 47.

[22] Jared Sparks (ed.), *Correspondence of the American Revolution, Being Letters of Eminent Men to George Washington* (4 vols., Boston, 1853), III, 16.

judges of the Supreme Court, had a veto which could be overridden only by a two-thirds vote of the assembly. At the time of adoption this pleased the radical majority, led by John Morin Scott, because it placed a check on the executive. It also pleased the conservatives because it placed a check on the legislative branch.[23] However, the radicals elected their own governor, Clinton, who did not identify himself clearly with the vetoes, and the conservatives found that many bills were passed over the veto of the council. As for the council of appointments, on paper it might seem that control was granted to the assembly which selected senators to form the council. Actually, as the governor was president of the council and had a "casting voice but no other vote," Clinton was able to dominate the council.[24]

Even though the governor shared the veto and power of appointment with a council, the New York constitution marked the beginning of a strong executive department. The governor, elected for three years by the freeholders and eligible to be re-elected any number of times, had the supreme executive power. He had authority to convene the legislature for extraordinary occasions, to prorogue the legislature for not longer than sixty days in one year, to grant reprieves and pardons, to make recommendations to the legislature at every session, and to correspond with the Continental Congress and other states.[25]

After Clinton was elected governor the oath of office had to be delayed because of the impracticality of Brigadier General George Clinton leaving his post until the designs of the enemy were known. Re-elected for the entire period covered by this study, Clinton was a very popular radical leader who secured and kept the support of the people because he had good judgment, a strong character, a vigorous personality, and was a skillful politician. Washington had confidence in him.[26]

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[23] E. Wilder Spaulding, *New York in the Critical Period 1783-1789* (New York, 1932), 88; Alexander Flick (ed.), *History of the State of New York* (10 vols., New York, 1933-1937), IV, 151-183.

[24] E. Wilder Spaulding, *His Excellence George Clinton, Critic of the Constitution* (New York, 1933), 95; Thorpe (ed.), *Constitutions*, V, 2633, article 23.

[25] Thorpe (ed.), *Constitutions*, V, 2632-2633, articles 17-19.

[26] George Clinton, *Public Papers* (10 vols., New York, 1899-1914), II, 122; Charles Z. Lincoln, *The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905. . .* (5 vols., Rochester, N.Y., 1906), I, 572-576.

No man was clearer in concept or firmer in support of the principle of separation of powers than Clinton, who worked in harmony with the legislature and respected the judicial power. On September 10, 1777, in an address to the legislature Clinton gave careful attention to the plan of government. He considered it the duty of those who were entrusted with the operation of legislative, executive, and judicial powers to remain within their departments and repay the trust placed in them by their constituents.[27]

Massachusetts was the last state where important changes were made in the organization of powers before the Constitutional Convention in 1787. The Massachusetts constitution (1780) was carefully drafted and shows some of the best thinking of the conservative John Adams, then at the height of his influence in the state and its main architect.[28] He had the advantage of working with delegates who were instructed to support separation of powers.[29] Several steps further than New York had gone were taken in the direction of separation. The two most important were that the governor was granted a veto and was allowed to appoint certain officials. On the other hand, the governor of Massachusetts was elected for only one year.[30]

The reader may have observed that there has been little mention here of the judicial branch. The reason for this is that there were few provisions for the judiciary in the constitutions, and a better understanding of the development of the judiciary can be secured by examining the court decisions. For a time the judicial departments were weak because of the unsettled war conditions, and the fact that earlier final judicial control in England had linked the judicial branch with English injustice. But in a few years the state courts had made a remarkable recovery.

It is usually agreed that the members of the Constitutional Convention in 1787, as well as later men influential in shaping the growth of the constitutions, were familiar with

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[27] Clinton, *Papers*, II, 300.

[28] Albert Bushnell Hart (ed.), *Commonwealth History of Massachusetts* (5 vols., New York, 1927-1930), III, 189.

[29] Henry A. Cushing, *History of the Transition from Provincial to Commonwealth Government in Massachusetts* (New York, 1896), 229.

[30] Thorpe (ed.), *Constitutions*, III, 1893, Part II, chap. I, section 1; Part II, chap. II, section 1, articles 2, 9,

these early state decisions. However, the extent of the influence of these early decisions has been a matter of controversy. It is often stated, with ample evidence, that the men at the Constitutional Convention of 1787 did not mention these cases. But such a fact is of doubtful importance because in so doing these men were following the custom in the state conventions of having little discussion on the judicial branch. Some consider it even more significant that Alexander Hamilton writing in *The Federalist*, that the Supreme Court of the United States in the case of *Hylton* v. *United States* (1796),[31] and that John Marshall in his famous decisions did not mention these state cases. One thing is certain: the American concept of judicial power in the separation of powers was first used in the individual states.

Before 1787 in five states (Virginia, Rhode Island, New Jersey, Massachusetts, and North Carolina) the judges decided whether legislation was constitutional or unconstitutional. These cases were: 1778 or 1782, Case of Josiah Phillips, Virginia; 1782, *Commonwealth* v. *Caton*, Virginia; 1786, *Trevett* v. *Weeden*, Rhode Island; 1780 or 1787, *Holmes* v. *Walton*, New Jersey; 1786 or 1787, Anonymous Case, Massachusetts; and 1787, *Bayard* v. *Singleton*, North Carolina.

Not much has been learned about the case of Josiah Phillips. There has been some dispute whether this case or *Holmes* v. *Walton* was the first in American judicial history after the Declaration of Independence in which a legislative enactment was held void by a court.[32] In the case of *Holmes* v. *Walton* Chief Justice David Brearly probably gave the decision orally and it was never written; at least the decision has not been found. However, other evidence shows that the judgment was clearly announced after careful consideration with the desire to fix the scope of judicial power, and that

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[31] 3 Dallas, *Supreme Court Reports*, 171 (1796); Edward S. Corwin, *The Doctrine of Judicial Review* (Princeton, N.J., 1914), 63; Robert K. Carr, *The Supreme Court and Judicial Review* (New York, 1942), 43; Brinton Coxe, *An Essay on Judicial Power and Unconstitutional Legislation* (Philadelphia, 1892), 220; Arthur T. Vanderbilt, *The Doctrine of Separation of Powers and Its Present Day Significance* (Lincoln, Nebr., 1953), 46.

[32] Austin Scott, "Holmes v. Walton: The New Jersey Precedent: A Chapter in the History of Judicial Power and Unconstitutional Legislation," *American Historical Review*, IV (1895-1899), 456. Scott gives the date for the actual settling of the case *Holmes* v. *Walton* as September 7, 1780. He concluded that this was the first case.

the judgment was received with general approbation by the people and acquiescence by the legislature. Also it is known that, when judicial problems were under discussion at the Constitutional Convention in 1787, David Brearly, still chief justice of his state, was the one man at the federal convention who had given a judicial decision that a law was unconstitutional.[83]

In the Anonymous Case in Massachusetts the judges declared a statute unconstitutional, and in the next session the law was repealed. *Trevett* v. *Weeden* has attracted much attention. Not only did the court set aside an act of the legislature as unconstitutional, on the ground that the legislature had no power to change the constitution, but also the decision favored the conservative view of property rights as against the radical attempts to use paper money. This case did much to convince the conservatives that there should be a strong central government with a strong judiciary.[84]

Especially important was the reasoning in the case *Commonwealth* v. *Caton*. George Wythe, who as chancellor was *ex officio* a member of the Virginia Supreme Court of Appeals, based his reasoning on separation of powers. This principle, he affirmed, sapped tyranny, kept the departments within their spheres, protected the citizens, and preserved liberty. These beneficial results, he reasoned, were attained when the tribunals declared the law impartially between those who hold the purse and those who hold the sword; in this way the pretensions of each party were fairly examined, their respective powers ascertained, and the boundaries of authority peaceably established. If the whole legislature, an event which he deprecated, should attempt to overlap the bounds prescribed to them by the people, he was ready to meet their united powers at the seat of his tribunal; here he would tell them that the state constitution determined the limits of their authority. Wythe only went so far as to say that the courts had the power to declare an act unconstitutional. James Mercer went further and declared that an act

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[83] Scott, "Holmes v. Walton," 459-469.

[84] Coxe, *An Essay on Judicial Power*, 219; John R. Wilson, "The Origin of the Power of Courts to Declare Legislative Acts Unconstitutional," in *Report of the Third Annual Meeting of the State Bar Association of Indiana*, III (1899), 20-44; Peleg W. Chandler, *American Criminal Trials* (2 vols., Boston, 1844), II, 267.

was unconstitutional. Edmund Pendleton asserted that the assembly should adhere to separation of powers lest the courts be compelled to decide against them. But Pendleton, and a majority of the eight judges in this case, gave the opinion that the Treason Act was a proper exercise of legislative power. Pendleton, along with Wythe and others, was a firm believer in a strong, independent, upright judiciary.[35]

The case of *Bayard* v. *Singleton* came too late in 1787 to influence the drafting of the United States Constitution. Reasoning in this case was not fundamentally different from that used by Wythe although the language was less impassioned; it was simply stated that the constitution was the fundamental law of the state and that the judicial power was bound to take full notice of fundamental law as well as any other law.[36]

These cases show that some state courts were declaring state laws to be unconstitutional. However, in some other states the conclusions were very different, as is shown by two cases. In conservative South Carolina the courts held the first two constitutions to be no more than acts of the legislature which the legislature could revise and amend,[37] and in New York the case of *Rutgers* v. *Waddington* had occasioned the court to declare that no court could declare a questionable statute constitutional or unconstitutional.[38]

These constitutions were the fundamental laws defended by John Adams, when he was minister to England, against the attacks of the celebrated philosopher and minister of France, M. Turgot, who advocated all authority in one chamber.[39] The first volume of the *Defense* was published in time to circulate among the members of the Constitutional Convention in 1787. This statement by John Adams revived and freshened the belief of the members of the Convention in separation of powers.

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[35] *Commonwealth* v. *Caton*, 4 Call 5, *Virginia Reports* (1782); David John Mays, *Edmund Pendleton, 1721-1803, A Biography* (2 vols., Cambridge, Mass., 1952), II, 105, 198, 200.

[36] *Bayard and Wife* v. *Singleton*, 1 Martin, *North Carolina Reports*, 48 (1787).

[37] Thorpe (ed.), *Constitutions*, VI, 3248n.

[38] Wilson, "Power of Courts," 20-44.

[39] Adams, *Works*, IV, 299.

In 1783, when he drafted another proposed constitution for Virginia, Jefferson's work showed his own experience and the influence of other state constitutions. He provided for stronger executive and judicial departments, and stated plainly that the general assembly should have no authority to infringe upon the constitution.[40] A more specific limitation was that the removal of a judge should require a two-thirds vote. The executive, elected by joint ballot of both houses, had a term of five years and was ineligible for a second term. In a less elaborate statement than in 1776 Jefferson listed the powers denied the governor. But Jefferson had deep memories of the king as the destroyer of liberty and denied the governor any power based on the prerogative of the Crown. Moreover, the governor was chosen by joint ballot of both houses of assembly, remainded in office five years but was ineligible a second time, had a council which was also chosen by joint ballot, and exercised a limited veto as a member of a council of revision. What power the executive was to have still gave Jefferson trouble, which he resolved by an appeal to reason: "We give him those powers only which are necessary to carry into execution the laws, and which are not in their nature either legislative or Judiciary. The application of this idea must be left to reason."[41]

One careful student of the draft of Jefferson was James Madison who also was conversant with the state constitutions. Madison, in agreement with Jefferson that to secure proper separation of powers required limits on the power of the legislature, suggested that this could be secured by denying to the legislature any power to appoint other than their own officers, and by the election of the executive by the people, as in New York and several other states, or through any other channel than the legislature. Madison also believed that the judicial department should be limited. He proposed that bills should be separately communicated to the executive and judicial departments; and that if a bill were passed by a two-thirds or three-fourths majority, the exact vote necessary to be decided later, over either or both of their

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[40] Jefferson, *Papers*, VI, 298 *et passim.*

[41] *Ibid.*, VI, 299.

objections, neither the judges nor the executive should be allowed to pronounce the law unconstitutional. As it was,

> In the State Constitutions and indeed in the Federal one also, no provision is made for the case of a disagreement in expounding them; and as the Courts are generally the last in making their decisions, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper.[42]

Thus in the states between 1776 and 1787 the European theory of separation of powers was Americanized and became a fundamental principle operating in the organization of government.

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[42] *Ibid.*, VI, 315.