

education and political and legal activism about our constitutional rights and obligations. That large blocs of the people allowed the Bush administration seemingly to stir their emotions for political advantage—whether by confusingly changing the color-coded threat levels meant to describe homeland security risks in advance of the 2004 presidential election, staging redundant and divisive state-based referenda on gay marriage in 2004, or forcing the vote to authorize force in Iraq a mere three weeks before the 2002 mid-term elections—was equally unsettling.

At the same time, the tremendous agitation these abuses triggered among other blocs of people suggests that America's constitutional conscience is alive and well. While caricaturing Bush as Hitler substantially overstates the case, it's a symptom of America's historical, and sometimes overzealous, vigilance against those who would bully our Constitution. The fact that Bush's approval ratings were solidly mired in the low thirtieth percentile, dipping even into the twenties during his last months in office, indicates that, although he held the office of the presidency, he did not hold the American people.

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While the Bush years warrant a certain amount of pessimism, we should still be optimistic in a broader, historical sense about the sweep of American constitutional accomplishments and the strength of the country today. Success was not foreordained in the land of liberty. The growth of Americans' constitutional conscience took years to fully develop and, for a time, was touch and go. The story of Americans' struggle with the demagogue, then, is also the story of America herself.

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## WATERING THE TREE OF LIBERTY

IN 1780, A WEALTHY GROUP OF MERCHANTS, FINANCIERS, AND political officers passed a new state constitution in Massachusetts. The

new constitution dramatically increased the property qualification for office-holding. You could run for the state senate only if you owned a freehold estate of 300 pounds or a personal estate of 600 pounds; to be governor, you needed a freehold of 1,000 pounds.<sup>4</sup> In several property-poor Berkshire towns, not one single citizen qualified to hold statewide office. By the summer of 1786, Boston had piled more injuries on that insult. Aggressive entrepreneurial bankers had been lending to the desperately poor agrarians at usuriously high rates. Amid a general, devastating recession, farmers began defaulting *en masse*. Special debtors' prisons were built and quickly filled, so more were built. Financiers continued to grow wealthy, and the gap between the rich and poor—between the elite and the common—widened.

An unlikely demagogue—a Revolutionary War veteran and farmer who had never before been involved in politics—rose on the tide of the people's fury. With Daniel Shays as their leader, a group of farmers soon resolved to strike against the judges who met periodically in each town to imprison debtors. Through his identity as an anti-elite farmer, his passionate relationship with the common people, and his ambition to create a political force, Shays revealed himself as a demagogue to be reckoned with. Through the fourth rule—the unlawfulness he threatened against an intrinsically unjust regime—Shays became the rare beneficial demagogue, wielding the power of the people against a system that was holding them down and striking a blow that shook the Founding Fathers to their classically educated cores.

On August 29, 1786, Shays led a crowd of 1,500 men to the Northampton Courthouse and delivered a petition demanding that the judges adjourn. The judges, alarmed by the sudden mob, relented. Four days later, Governor James Bowdoin issued a proclamation condemning efforts “to subvert all law and government and introduce riot, anarchy and confusion, which would probably terminate in absolute despotism, consequently destroying the fairest prospects of political happiness that any people was ever favored with.”<sup>5</sup> Bowdoin's iron-fisted response met with nods of approval from elites throughout the Northern states, who thought the revolt, however tiny, might “light up the pass, and throw the whole union into a flame.”<sup>6</sup>

They were partly right. By the end of the year, almost 9,000 militants—about one-quarter of the “fighting men” in rural New England—had

joined Shays' uprising against the courts, the merchants, and the political class.<sup>7</sup> But the state proved too strong. After the Northampton uprising, the rebels quickly lost momentum. Bowdoin commissioned the former Secretary of War, Benjamin Lincoln, to summon a force of several thousand mercenaries against the "Shaysites," as they came to be called. Early the next year, Lincoln's forces briefly clashed with the rebels, killing four. From that point forward, the insurrectionists were in a permanent state of flight. During the subsequent months, they periodically reemerged for brief skirmishes with Lincoln's forces. All were ultimately apprehended by the summer of 1787, just when the Founding Fathers were convening in Philadelphia.

The significance of Shays' Rebellion lay not in the actual threat it posed to the government, but in the consequences it held for the Founding Fathers' plans for democracy. Shays' Rebellion never really involved more than a few thousand farmers and only led to a single actual military confrontation. Yet it truly panicked many of the Framers. In a letter to George Washington in 1786, the New York lawyer John Jay wrote, "Our affairs seem to lead to some crisis—some Revolution—something that I cannot foresee, or conjecture." Jay continued, "A State of uncertainty and Fluctuation must disgust and alarm such men, and prepare their minds for almost any change that may promise them Quiet & Security."<sup>8</sup> General Washington's mail was rarely cheerful the summer of Shays' Rebellion. "Having proceeded to this length for which they are now ripe, we shall have a formidable rebellion against reason, the principle of all government, and the very name of liberty," wrote General Henry Knox. "This dreadful situation has alarmed every man of principle and property in New England. They start as from a dream, and ask what has been the cause of our delusion? [W]hat is to afford us security against the violence of lawless men?"<sup>9</sup>

Washington generally regarded the minutiae of the everyday with the calm of a man who knows that his page in history is already written. But each day's post probably shook even this benevolent, methodical man. It's easy to imagine Washington fitfully waking in the middle of a humid August night to scrawl this response to Jay: "Your sentiments, that our affairs are drawing rapidly to a crisis, accord with my own. What the event will be is also beyond the reach of my foresight. . . . We have probably had too good an opinion of human nature in forming

our confederation.”<sup>10</sup> Some went as far as to suggest that Shays would actually overthrow the nation’s government. A general named William Shepherd said the rebellion would “overturn the very foundations of our government and our constitution, and on their ruins exert the unprincipled and lawless domination of one man.”<sup>11</sup> One wealthy creditor named William Williams said that Shays had designs to “conquer” Massachusetts and to become “the tyrant of America.”<sup>12</sup>

Why did these ragged rebels terrify the Founding Fathers so much? Part of the fear was certainly simply about economics, with one class defending itself against another. America’s wealthy merchants were absolutely panicked at the thought of losing economic control, and naturally employed political language to make their case. But there was a deeper issue related to democracy itself. Scholars like Bruce Ackerman, the Yale Law School professor, have referred to the Constitutional Convention as a “constitutional moment”—a discrete period of time with heightened sensibility about our ideals and their consequences.<sup>13</sup> At the time of Shays’ Rebellion, the United States was entering such a constitutional moment, defined by an overarching mission even bolder than the Revolution: to design a hopeful new country from scratch. The Framers hoped to gather all their accumulated knowledge about human nature, the progress of history, and the lessons of classical political theory in a single document that would shape a great nation.

It was enough to make the men who gathered in Philadelphia understandably nervous about demagogues, with a notable exception. The third character in our story, after Plato and Aristotle, is the American farmer, philosopher, and statesman Thomas Jefferson. Jefferson believed the demagogue could best be defeated not through elaborate government controls, but through a more modest but profound avenue: the people themselves.

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When Shays’ Rebellion boiled over, Thomas Jefferson was in Paris. France was seething at the time (the French Revolution would erupt the next year), but considering the turmoil around him, Jefferson was strikingly relaxed about the rebellion back at home. Shays’ Rebellion was

the event that prompted one of Jefferson's most famous arguments. In a letter to Madison at the very beginning of the year of the Constitutional Convention, Jefferson expanded on his deep conviction that the people were the ultimate safeguard of the Constitution. The people were so essential to the chastening of authority and the maintenance of a healthy republic that Jefferson famously argued in favor of violence. "I hold it that a little rebellion now and then is a good thing," he told Madison, "and as necessary in the political world as storms in the physical."<sup>14</sup> He expressed his contrarian view of Shays' Rebellion: "The tumults in America," he wrote, "I expected would have produced in Europe an unfavorable opinion of our political state. But it has not." The reason was that the people ultimately sided with the constitutional process instead of attempting to undermine the state: "The interposition of the people themselves on the side of government has had a great effect on the opinion here."

Eleven months later, his opinion had strengthened. In a letter to his friend William Smith dated November 13, 1787, Jefferson famously wrote, "We have had thirteen states independent for eleven years. There has been one rebellion." About Shays' Rebellion, Jefferson was strikingly sanguine: "What signify a few lives lost in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure."<sup>15</sup>

Jefferson could not be accused of supporting occasional violence out of either naïveté or idealism. A rigorous classical education informed his political observations. From the ages of nine to fourteen, he attended the Reverend William Douglas's Latin School in Virginia, where he learned "the rudiments" of Latin and Greek. While a student at the College of William and Mary, he learned to read Greek and Roman authors in the original, which he later called a "sublime luxury."<sup>16</sup> He also brought a wealth of practical experience to his observation of politics. He served in the Virginia House of Burgesses from 1769 to 1776, when he authored the brilliant and poetic Declaration of Independence. In 1783, Jefferson also drafted the constitution for Virginia, and he served as governor of Virginia from 1779 to 1781. In 1783, he was elected to the Continental Congress in Philadelphia, and set upon the path of helping the young nation eventually design a constitution. In 1784, Jefferson was chosen by Congress to serve as Minister in Paris. He set sail for the foreign capital, but always kept an eye on events back home.<sup>17</sup> During these years, he maintained an

epic struggle with the brilliant and charismatic Alexander Hamilton, who believed that America should be an aristocratic monarchy just as strongly as Jefferson believed it should be a citizen-led democracy.

The battle to control the direction of the new nation helped to drive the formation of Jefferson's philosophy. His argument that a "little rebellion now and then is a good thing" was part of a broader stream of forceful commentary on constitutional events in America. While in Paris, Jefferson maintained an extensive and elaborate correspondence with friends in the United States who were drafting a constitution for adoption in 1789. He was particularly close to Madison, who went on to do more than anyone else to craft the actual Constitution. Perhaps Jefferson's remove afforded him the necessary intellectual distance and forcefulness he needed to shape the Constitution, which is what he did. Jefferson was eight years Madison's senior, and the slight, shy, intellectually powerful young Congressman would constantly look to Jefferson for guidance from Paris. Were it not for the paradoxical and hypocritical exclusion of African Americans (when Jefferson himself owned slaves and fathered children with Sally Hemings), his eloquent and expansive vision of participatory democracy would stand as an almost completely successful defense of the democratic principle.

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After receiving a copy of the Constitution that had been passed in Philadelphia, Jefferson wrote Madison on December 20, 1787, that "The late rebellion in Massachusetts has given more alarm than I think it should have done." After all, Jefferson wrote, "a great deal more blood was spilt" in France and England's revolutions. He contrasted the "ferocious depredations of their insurgents" with the "moderation and the almost self extinguishment" of America's.<sup>18</sup>

It's clear that Daniel Shays the demagogue played a special part in Jefferson's thinking about democracy in America. Jefferson's underlying principle, like Aristotle's, was simple and uncompromising: So long as people are well-educated and hold deep constitutional values, if they are given power and trust, they will, in general, use it responsibly: "After all," Jefferson wrote, "it is my principle that the will of the majority should always prevail."<sup>19</sup> In this influential letter, Jefferson suggested Madison include in the Constitution an entirely new device

that would establish forever his goal of giving the people ultimate power. Jefferson told Madison, “Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.”<sup>20</sup> A bill of rights would give the people a check on the government itself—reserving to them both specific and general powers and never allowing the government to slip toward autocracy.

Jefferson’s idea was not his alone, and the hard political battles for a bill of rights were fought primarily by others. The Framers George Mason had authored Virginia’s Declaration of Rights in 1776, which became the model for the federal effort. Mason refused to sign the 1787 Constitution because it lacked a bill of rights. In large part because of his ardent activism and Jefferson’s persuasion during the four years that followed, a bill of rights was finally incorporated into the Constitution in 1791. Jefferson’s dream finally became a political reality.

Jefferson’s ultimate goal was to empower the people, rather than the state, through a self-sustaining hunger for constitutionalism. “Where is our republicanism to be found?” Jefferson asked. “Not in the constitution, but merely in the spirit of the people.”<sup>21</sup> As one Jefferson scholar has observed, Jefferson’s constitutionalism “placed less emphasis on mechanics . . . than it did on the character of the people themselves.”<sup>22</sup> Jefferson once quoted a poem to make the point:

What constitutes a state?  
 Not high-raised battlements, or labor’d mound,  
 Thick wall, or moated gate;  
 Not cities proud, with spires and turrets crown’d;  
 No: men, high minded men;  
 Men, who their duties know;  
 But know their rights; and knowing, dare maintain.  
 These constitute a State.

Jefferson’s words about “high minded men . . . who their duties know” were similar to Thomas Paine’s declaration that “A constitution is a thing *antecedent* to a government, and a government is only the creature of a constitution. The constitution of a country,” Paine argued, putting similar faith in the people, “is not the act of its government, but of the people constituting a government.”<sup>23</sup> The gift of freedom, in

other words, came with strings. It required the people to take an active role, cherishing and caretaking democracy itself.

Jefferson's invocation of a constitutional state grounded on free individuals seems, at first glance, unqualified. But he did, in fact, include a critical catch with implications for governance then and for the promotion of democracy today: the people, Jefferson believed, couldn't realize their constitutional conscience solely on their own. They would need consistent assistance from the state through strong public education and the inculcation, by government, of an ethos of moral and, by implication, civic responsibility. Jefferson concluded one letter with an admonition about the connection between moral education and the citizens' commitment to their own liberty "Above all things," he wrote, "I hope the education of the common people will be attended to; convinced that on their good sense we may rely with the most security for the preservation of a due degree of liberty."<sup>24</sup> The state had an especially important role in Jefferson's constitutional scheme: to equip the people with the education necessary for them to govern themselves and keep their leaders on a short leash. The judgment of the people—in his day, of course, that meant only white, property-owning men—could be trusted if the nation enabled them to be trusted. But they would require excellent public schools and a wide access to colleges and universities.<sup>25</sup> It was, in short, a reciprocal relationship.

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I graduated from the University of Virginia School of Law and, like any other graduate, firmly believe that the University's "Grounds" (never "campus") in Charlottesville is one of the most bewitching places in the world. Graceful columns and domes gently frame "Mr. Jefferson's University," as it is still called. Students stroll along the quiet lengths of Jefferson's "Academical Village," framed by columns that impart a dignity and historical sensibility to the University. Students readily embrace the Honor Code, a Jeffersonian institution generally prohibiting the supervision of most exams on the assumption that students—as free citizens in a free society—ought to take active responsibility for cultivating ethical rules. There is no better parallel than the Code for the spirit Jefferson sought to inspire in America's political society at large.

Jefferson's spirit infuses almost everything not only about the University but about Virginia itself. Virginia politicians, lawyers, and judges can barely get through a speech without citing Jefferson, perhaps because so many of them have attended the University of Virginia. This is surely how Jefferson would have wanted it. True to form, he gave extremely specific instructions for his gravesite, including the text he wanted engraved on his tombstone. The words he wanted are telling:

HERE WAS BURIED  
THOMAS JEFFERSON  
AUTHOR OF THE DECLARATION OF INDEPENDENCE  
OF THE STATUTE OF VIRGINIA FOR RELIGIOUS FREEDOM  
& FATHER OF THE UNIVERSITY OF VIRGINIA<sup>26</sup>

Taken together, these three accomplishments clearly signaled Jefferson's wish to be remembered for his commitment to constitutionalism. But it's noteworthy that Jefferson concluded his list for posterity with his founding of the great public institution of the University of Virginia.

Jefferson founded the University when he was nearly eighty years old, but still dedicated himself to it with incredible energy. In a report to the Commissioners of the University of Virginia in 1819, Jefferson said that among his primary goals in founding the University was "to form the statesmen, legislators and judges, on whom public prosperity and individual happiness are so much to depend."<sup>27</sup> A broader spiritual ambition overarched his practical goals. Jefferson's ambition, he wrote a friend in 1820, was as large as America's itself. "This institution of my native state, the hobby of my old age," he said, "will be based on the illimitable freedom of the human mind, to explore and to expose every subject susceptible of it's [*sic*] contemplation."<sup>28</sup> The constitutional conscience would be America's overseer and protector, but success would require constant education to push the freedom of the human mind to "every subject susceptible of it's [*sic*] contemplation." America would require intellectual freedom, political liberty, and eternal vigilance against authoritarianism to succeed; strong civic

education would bond the three elements together for the life of the nation.

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Jefferson's vision of a populist constitution would be only partially realized. He was too late for the first draft of the Constitution, where, for the most part, the enemies of the common people carried the Convention. In presenting the "Virginia plan" that went to great lengths to separate the people from the machinery of power and would become the template for the Constitution, for instance, Edmund Randolph warned the delegates that "our chief danger arises from the democratic parts of our constitutions."<sup>29</sup> Alexander Hamilton argued at the Constitutional Convention that "the people are turbulent and changing; they seldom judge or determine right."<sup>30</sup> Declaring that "nothing but a permanent body can check the imprudency of democracy," Hamilton proposed that America follow the English model of government, with chief executives and senators serving life terms.<sup>31</sup>

A number of leaders took a hand in lashing democracy down with punishing stays and constraints. They included Elbridge Gerry of Massachusetts; Connecticut's Roger Sherman, who first proposed the compromise of an elite Senate and a popular House of Representatives; Delaware's John Dickinson; Charles Pinckney of South Carolina, who said even the House of Representatives ought to be selected by state legislatures because "the people were less fit judges"<sup>32</sup>; George Washington himself; James Madison; and, especially, the greatest advocate of centralized government, Alexander Hamilton, who once even proposed that the presidency be an office held for life. In the design of these elitists, the people would have a voice, but little power, and that power would be checked on all sides by powerful balances, negatives, and vetoes.

This context helps explain some episodes often neglected by our traditionally sunny hindsight. These Framers prevented the people from directly electing the president, weakening the popular will as it passed through the Electoral College. These now-archaic "electors" were meant to provide an elite barrier between the popular will and

the elective machinery of the state. Initially, the states voted, eight against two, against allowing the people directly to elect the members of the House of Representatives. They concluded that senators should be selected only by state legislatures, rather than the people. Randolph specifically argued that the “democratic licentiousness of the State Legislatures proved the necessity of a firm Senate,” because the Senate would “guard the Constitution against encroachments of the Executive who will be apt to form combinations with the demagogues of the popular branch.”<sup>33</sup> They created an independent, unelected judiciary as a check on the democratic excesses of legislative majorities, with Madison asserting that “the followers of different Demagogues” would be controlled by “provisions against the measures of an interested majority.”<sup>34</sup> They even considered—and came within a hair of accepting—property requirements not only of voters, but also of the candidates for office themselves.

Over time, however, Jefferson’s ideas would prevail. The states ratified the Bill of Rights in 1791, and the amendments gathered momentum and influence as the decades and centuries rolled on. But the American republic would endure several tests as Americans realized their constitutional conscience.

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There was an obvious hiccup in the evolution of America’s constitutional conscience: the Alien and Sedition Acts. These four laws were drafted by the Federalist Party, which supported a stronger central government during the war with France, purportedly to protect the United States from internal agents of foreign powers and to stop sedition. Congress passed the bills in 1798, and President John Adams signed them into law, immediately triggering a firestorm of controversy in the young nation. The laws allowed the president to expel foreign citizens suspected of treason and prohibited false or hostile words against the American government. In these respects alone, the bills were a shocking departure from the formal ambitions of the Constitution and the Bill of Rights. They egregiously subjected those hopes to the short-term political ambitions of a single party. The violations can perhaps be explained as the product of geopolitical anxiety

and of concern about France as a mortal enemy of the republic, but they cannot thereby be excused.

Fittingly, Thomas Jefferson himself put an end to the disappointing episode in America's early constitutional evolution, and the debate he initiated revealed the vigor of America's emerging constitutional conscience. His party, the Democratic-Republicans, attacked the laws as unconstitutional infringements on the Bill of Rights. In 1798, collaborating with James Madison, and at the risk of being charged with sedition himself, Jefferson wrote a resolution for the Virginia government charging that the Acts were unconstitutional and urging "a change by the people" as "the constitutional remedy."<sup>35</sup> The constitutional eclipse shadowed America for only about four years; with the exception of the Alien Enemies Act, the laws expired or were repealed by 1802. In 1801, however, Jefferson would get the opportunity to practice what he preached. On March 4, the day he was inaugurated president, Jefferson declared the laws unconstitutional, and pardoned and released those who had been convicted under them.<sup>36</sup>

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There is an instructive footnote to Shays' Rebellion: ultimately, most of the rebels' demands were addressed by the political process. Frustrated by a Massachusetts state legislature that paid itself stratospheric salaries, the farmers argued that voters should approve legislators' compensation. They asserted that the various fees that attended the process of the law—filing complaints, retaining lawyers—were unfair and prohibitively expensive. They resisted forced enrollment in militias that always were governed by far-away members of the elite. They said the debts the state legislature had undertaken were being paid off too slowly and at too high an interest rate, diluting the effective power of each taxpayer. High taxes required a greater money supply, but Boston refused to help through its monetary policy; the rebels therefore agitated for paper money.<sup>37</sup>

Less than a year after the rebels' defeat, almost all of their proposals were addressed through Massachusetts law.<sup>38</sup> And, while many defeated rebels were sentenced to brutal, sometimes capital, punishment by the

standing regime, the state legislature, succumbing to petitions for leniency from more than twenty towns across Massachusetts, ultimately pardoned all fourteen rebels originally condemned to death, including Daniel Shays himself.<sup>39</sup> Most incredible of all, when the new constitution came before the Massachusetts legislature in the fall of 1788—only a year and a half after the final sputtering of the rebellion—more than twenty members in Massachusetts’ legislature were former rebels.<sup>40</sup>

In other words, Shays was absorbed into the constitutional republic, as he himself had poked and prodded it to action. Revealingly, he described his role in the rebellion in democratic terms. In one conversation about his role, he shouted: “I at their head! I am not.” When describing a particular siege of a courthouse, he said he “never had any hand in the matter; it was done by a committee.”<sup>41</sup>

The fact is that Jefferson was right. Shays’ Rebellion was more important as a prod for America’s emerging constitutional conscience than as a threat to the nation. By expanding the rule of law to incorporate citizens who might otherwise attack the political structure itself, Americans were developing a home-grown solution to demagogues that echoed the Athenian answer from over 2,000 years before. Over time, Americans’ constitutional culture would moot the harsh features of a system originally designed to limit demagogues. Today, for instance, the Electoral College is a historical oddity: its “electors” are not the deliberative elites that the Framers imagined would militate against a “victorious demagogue” attempting to seize the entire national government. Rather, they are usually ordinary political party activists unmindful of their historic charge. Elites in the Electoral College are no longer needed to prevent a demagogue from taking over the country. In the end, America arrived at a deceptively simple resolution of democracy’s paradox: the people themselves.

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Less than two weeks before he died, Jefferson wrote that America’s fifty years of constitutional success had been a “Signal of arousing men to burst the chains, under which Monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self government. . . .” Ten days later, on July 4,

1826, Jefferson died—on the same day as his old nemesis John Adams, sponsor of the Alien and Sedition Acts. For the time being, at least, Jefferson had prevailed. His message to America, and his legacy for the world, was intact and secure.

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## A PECULIAR INSTITUTION

ONE CANNOT FAIRLY TALK ABOUT JEFFERSON, OR ABOUT AMERICAN democracy, without considering slavery. Well in advance of the Civil War, de Tocqueville said slavery was the “most dreadful of evils” and blamed it for almost all of the “present troubles and future dangers of the Union.”<sup>42</sup> Slavery’s injury to America is an inexhaustible topic. It breached the basic commitment of the Constitution and of Americans to each other in shockingly formal ways. During the Constitutional Convention, for instance, the Founding Fathers decided to count slaves as full human beings for population purposes yet discount their value as citizens by defining a slave as three-fifths of a person. The Constitution determined that the slave trade would be phased out as an active institution yet made no provision for the millions of living slaves who were denied political and civil rights.

The contradictions were as stunning as Jefferson’s own double life and represent the dualism of the American constitutional experience. Jefferson owned about 200 slaves.<sup>43</sup> In 1784, he sponsored a Congressional bill to outlaw slavery in any new state, which almost passed; but almost forty years later, in 1820, he said that the new state of Missouri should be allowed to have slavery. The contradictions are infuriating, leading the historian Joseph Ellis to describe Jefferson as an “American Sphinx.”<sup>44</sup> In the words of one Jefferson critic,

On one hand, Jefferson wrote that slavery was an abomination. On the other hand, he seldom freed slaves. On the one hand, he argued that slaves could not be freed because they were like children. On the other hand, he saw to it that many slaves on his plantation became skilled craftsmen. . . . On one hand, Jefferson

seems to have been revolted by the notion of amalgamation and made them favored members of his household. . . . The truth is that Thomas Jefferson can be cited to support almost any position on slavery and the race question that could exist.<sup>45</sup>

Perhaps Jefferson can only be understood as embodying the contradictions of America itself. Each nation's constitutionalism, like each nation, will have its own character, complications, nuances, and contradictions. There have been tremendous injuries to African Americans through *de jure* discrimination. The list includes the Supreme Court's *Dred Scott* decision in 1857, which found that slaves were less than full citizens and therefore subject to re-capture in states where slavery was illegal; the Civil War, where states separated from the Union in part to hold onto the legal regime of slavery; Reconstruction and Jim Crow, which put African Americans under a regime of *de jure* and *de facto* oppression; and Massive Resistance, during which states and their leaders politically and legally defied federal rulings and laws that countered or weakened Jim Crow.

During these dark passages in American history, majorities and pluralities of the American people committed themselves to racism, to cruelty, and to institutional discrimination. Racist demagogues emerged from these depths, especially in the first decades of the twentieth century. "Pitchfork Ben" Tillman, the brutally racist U.S. senator from South Carolina, first elected governor in 1890, once said, "We of the South have never recognized the right of the negro to govern white men, and we never will. We have never believed him to be the equal of the white man, and we will not submit to his gratifying his lust on our wives and daughters without lynching him."<sup>46</sup> Eugene Talmadge, a bombastic "wild man" white supremacist, was elected governor of Georgia in 1934. He once answered a heckler who asked if a man should be punished for beating his wife: "Depends on how hard you hit her." When he died, his funeral featured a gigantic Ku Klux Klan wreath.<sup>47</sup> Theodore Bilbo, a U.S. senator from Mississippi elected in 1934, said it was "practically impossible, without loss of life, to prevent lynchings of negro rapists"<sup>48</sup> and promised, during his Senate campaign, "Let me get into that Senate and I'll strike a match that will dim every blaze."<sup>49</sup> As recently as 1963, Governor George Wallace of Alabama pronounced in his inaugural gubernatorial address, "In the

name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny and I say segregation now, segregation tomorrow, segregation forever.”<sup>50</sup>

These political leaders clearly met the four rules of the demagogue. They (1) fashioned themselves as leaders of the masses, (2) triggered great emotional reactions from the people, (3) exploited those reactions for political benefit, and (4) threatened or broke the rules. These modern demagogues were a product of racist and bigoted Americans. They were enabled by thousands of common American citizens, mostly from the southern states, who saw African Americans as inferior and were ready to hand over authority to leaders who championed this belief.

Yet then, as now, broad local pluralities and majorities of ordinary Americans were strongly committed to freedom, equality, and justice for slaves, their descendants, and African Americans in general. Committed communities of abolitionists and their followers changed laws, brought lawsuits, helped create social institutions such as the Underground Railroad, formed the Republican Party, and put their own lives at risk for the Union during the Civil War. John Brown, a charismatic but bloody demagogue, led a revolt against the oppressive system in Harpers Ferry; he lost his life but was rewarded with the thanks of history. In the wake of the Civil War, the Fourteenth and Fifteenth Amendments were passed to provide African Americans with legal and civil rights, which were, of course, denied throughout most of the southern and border states during Reconstruction and Jim Crow. However, in a curious twist on America’s conflicted constitutional conscience, these same amendments would ultimately be used to expand rights not only to African Americans, but also to women and any insular minorities with a history of discrimination. The right of “substantive due process” was created by the Supreme Court to give individuals and groups more sway over a government that could otherwise oppress them.

In this way, America’s constitutional conscience, like a vine, wrapped around even the knottiest problems. Those Americans who believed in expanding constitutional rights undertook a pitched battle with those who did not. Those who placed their own bigotry above their commitment to the shared constitutional experience readily supported racist demagogues and *de jure* and *de facto* discrimination.

Even today, well into the nation's third century, the constitutionalism we have is far from perfect and is riddled with practical and philosophical contradictions, missteps, and pain. This constitutionalism is *ours*—it is American, shaped and defined by the ongoing struggle to reconcile the divisions that have riven the American people themselves. Even though the U.S. Supreme Court has consistently found intentional *de jure* discrimination against African Americans illegal, it has also ruled that the laws themselves cannot be invalidated if only their effect is discriminatory. We therefore have a number of practices that operate systematically, if not intentionally, to discriminate against African Americans, including the effectively discriminatory practices of political redistricting, which can weaken African Americans' political power, and the underfinancing of many public schools, which can devastate the educational foundation of African American communities. By undermining these citizens' ability to participate in our political system, these practices directly damage our democracy. As recently as 1972, a demagogue like George Wallace could still capitalize on these divisions within the populace and make the intentional infringement of African Americans' rights a central plank in his platform. Fortunately, we have not seen such demagogues on a broad scale in recent years, but the underlying shortcomings of our constitutional conscience mean there always will be work to do.

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### “KING MOB”

IN THE *FEDERALIST PAPERS*, ALEXANDER HAMILTON WORRIED MOST about the “military despotism of a victorious demagogue.” The ancient scenario of a general like Cleon who, by militating against a foreign enemy, would play to the passions of the masses and use the military to take over the government, was a real fear as the young nation got on its feet.

The first great contest in America's struggle with the demagogue arrived with a popular hero who seemed to emerge, fully formed, from the darkest recesses of the Founding Fathers' imagination. Andrew