CHAPTER ONE

FOUNDING LAWYERS:
ENTHRONING LAW AS KING

THE DECLARATION AS A LEGAL TEXT: THOMAS JEFFERSON

As all Americans know, an assembly of men in Philadelphia on July 4, 1776, pledged to one another their lives, their fortunes, and their sacred honors. It is not frequently noticed that their action that day marked the beginning of a distinctive profession, of which many present were members: American law.

Its creation was marked by language appearing in two sentences of the Declaration of Independence that all present signed:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness—that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

The words were principally written, as the world knows, by Thomas Jefferson, who may accordingly be recognized as the first American lawyer. But he had help, and the ideas he advanced were not original to him—as must be true of all professional utterances of lawyers.

Three legal ideas were expressed in those two sentences of the Declaration: equal rights, natural law, and the right of the people to self-government. None of these ideas was new, but the notion that they were somehow interrelated was new. Law within such a social order would not be the same nor would the roles of those making, administering, and enforcing it.

Not all who signed the Declaration were equally committed to all three of these ideas, and the three cannot always be reconciled to one another. Like most other legal texts, the Declaration was a compromise. Its words were chosen in the heat of the moment for the political purposes of rallying as many colonials as possible to the revolutionary cause and gaining support in England and in Europe.

The idea of self-government, which had classical origins, was attractive to eighteenth-century Americans for four reasons. First, most colonists were committed to the Protestant vision of a direct, individual relationship to God unimpeded by clerical interpretation. Second, most colonists (save for the many slaves), who were individual
landowning farmers or shopkeepers, were economically independent. Third, every member of the Continental Congress making the Declaration had participated in the election of a colonial legislature. While their colonial legislatures were typically dominated by large landowners and were subordinate to the powers of the imperial government in distant London, they had long been regarded as representative bodies, and it was those legislatures that had combined to form the Continental Congress for which Jefferson wrote the Declaration. Finally, most colonists regarded the English Revolution of 1688 establishing the dominant role of Parliament as “the modern summit of human political experience.”

Despite its conventionality in embracing self-government, the Declaration was extraordinary in its optimism regarding the capacity of people to govern themselves because all known previous experiments in popular self-government had failed. Its words reversed the customary relationship between the law’s commands and those to whom commands were addressed. American law would be celebrated as law derived from the consent of the governed. No longer were the ordinary folk for whom the Declaration spoke mere livestock belonging to chiefs and lords and subject to their direction. Even today, most other people, even those living in parliamentary republics, tend to “think of law as something imposed from above.”

Self-government, as envisioned in the Declaration, is a communitarian idea. Most humans are not instinctively thoughtful about their relationships with distant others. This reality is a chronic challenge for community leadership. And the citizens of large nations encounter great difficulty in weighing sensibly and taking necessary account of the interests of distant fellow citizens. It is a purpose of this work to suggest that this challenge is one for which lawyers may be especially helpful if they bring to the public task reasonably sound instincts and professional experience in weighing the interests of adversaries engaged in civil disputes. Effective advocacy and sensible dispute resolution call for a measure of that talent; on that account, many lawyers are equipped by their experience to be helpful in guiding government to serve a common good.

Concurrent with the idea of self-government as the source of law, there was a secondary implication that even the elected representatives of the people might be disempowered if they exceeded the authority conferred upon them by the people, an authority limited by its announcement that some rights of the people are natural and therefore “unalienable.” The Declaration did not specify a means of retaining those unspecified rights, but it expressed a premise of the constitutions then being drafted for most of the thirteen colonies to replace their royal charters, i.e., individual rights with the apparent expectation that those rights would be judicially enforced against miscreant legislation. Naturally, the implementation of such rights would require courts and judges to enforce laws against kings and lords or even popular assemblies. It was this understanding of judicial oversight that caused Thomas Paine to exult “that in America the law is king.”

The third idea of law expressed in the Declaration was the equality of citizens. Jefferson, the principal draftsman, proposed to go further and include in the itemized indictment against the king the charge that the Crown was responsible for the introduction
of slavery in North America. Those assembled in the Continental Congress struck that charge in order to keep the support of slave owners in the South and slave traders in the North for the Revolution. But the preamble proclaimed the equality of rights with clarity unmistakable, especially to those familiar with the work of John Locke, the philosopher of the English revolution of 1688, who proclaimed it the purpose of government to protect life, liberty, and property. The Continental Congress understood that the substitution of the pursuit of happiness for property implied a future end for the institution of slavery. There were, indeed, stirrings of emancipation throughout the thirteen colonies. Thus, the text of the Declaration foretold the Equal Protection Clause of the Fourteenth Amendment, ratified only after the bitter Civil War.

However, even as stated in the Declaration, equality of rights was not a proclamation of full equality of status. Jefferson and those of his persuasion clearly favored government by a “natural aristocracy”; and the role they envisioned for the people was one of informed watchfulness, i.e., a readiness to “throw the rascals out” when the chosen few ventured too far from the people’s common values and understanding.

Moreover, slavery was an obvious and critical problem. Although often expressing the hope and expectation that slavery would somehow be abolished, Jefferson himself owned many slaves and could not bring himself to diminish his lifestyle by emancipating them. He even fathered slave children. That fact became public in 1802 when Jefferson became president of the United States. His friends denied the allegation, and he proclaimed it unworthy of response. DNA evidence has since confirmed it to be fact. Notwithstanding his personal failings in these respects, Jefferson’s words were a challenge to the institution of slavery and a prophecy of its doom.

While the right to self-government and the concept of individual rights were clearly congenial to the Protestantism of the Enlightenment, the source of the egalitarianism expressed in the Declaration is less obvious. It was no coincidence that Jefferson’s revered teacher and co-signer of the Declaration, George Wythe, was raised and educated by a Quaker mother. The Quakers were the most radical of Protestants—so radical that they abolished the clergy altogether, leaving the scriptures to the interpretation of every man, with one man’s (or woman’s!) beliefs having the same value as those of the next. In addition, Wythe, like most Quakers, could not abide slavery. Quakers were thus committed to the equal worth of individuals and equal respect for each adult human’s moral and political judgment, although not to any equality of rights to enjoy wealth. As a battle cry, the egalitarian idea was congenial to most who waged the war for independence even though they were not pacifist Quakers.

Even the Virginia gentry who owned slaves retained ancestral memory of subordination. Most of those from Europe who settled the American colonies were the children of Protestant peasants residing in England, Scotland, Ireland, or France. Many were indentured or otherwise in debt. Some were criminals in exile. Many in New England and Pennsylvania were refugees from the religious intolerance of the feudalistic Anglican church.

The Lords in Parliament had continued to treat American colonists as peasants who could be made to bend their interests to the mercantile ambitions of the mother country
and its ruling class. The response of many colonials to the Lords was class hatred unmitigated by humanizing personal contact. The slogan of those radicals, appearing on the battle flags of their first warships, was “Don’t Tread on Me,” words inscribed beneath the image of a coiled rattlesnake.

Those of the king’s American subjects who did not share that sentiment remained loyal to the Crown; many of these “Tories,” not supporting the Declaration, left the warring colonies for Canada or England. Although the coiled rattlesnake was soon replaced by the stars and stripes still in use, the sentiment that it expressed was voiced in the Declaration that was celebrated throughout the colonies. Indeed, the Declaration moved the radical disbeliever Paine to prayer:

O ye that love mankind! Ye that dare oppose not only the tyranny but the tyrant, stand forth! . . . Freedom hath been hunted round the globe. Asia and Africa have long expelled her. Europe regards her like a stranger, and England hath given her warning to depart. O receive the fugitive, and prepare in time an asylum for mankind.9

President Abraham Lincoln, the most widely revered American, saluted Jefferson’s literary talent thus:

All honor to Jefferson—to the man who, in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, applicable to all men and all times, and so to embalm it there, that to-day, and in all coming days, it shall be a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression.10

The “abstract truth” embalmed in the Declaration was, among other things, a call for a new legal profession suited to the enforcement of inalienable rights, the protection of the right to self-government by the people, and the future protection of the right of citizens to equal legal status. Without law and a profession to enforce it, the Declaration would undeniably have been, as some have proclaimed it to be, a hollow mockery. Certainly, the promises of the Declaration have not all been fulfilled, but the efforts of many American lawyers over the ensuing two and a quarter centuries have made law, and sometimes justice, a king of sorts.

But it bears notice, that Jefferson remained unimpressed by the Declaration. The convention representatives who had signed it had not only interfered with his protest against slavery, but had made many other editorial changes in his numerous protests against the conduct of the king. Thus, he signed the Declaration, but with dissatisfaction.11

**Writing Constitutions to Empower Law Courts: James Madison**

Independence required each of the thirteen former colonies to form a new government in lieu of the one imposed upon it by the imperial government. The excitement of the task led John Adams to write to George Wythe:
You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making an election of government, more than of air, soil, or climate, for themselves or their children! When, before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?

It was this sense, perhaps, that had brought lawyers to the political fore in the colonies and in their legislatures. As early as 1760, they had begun to use litigation in the colonial courts as a means of protesting the practices of the royal government. An important difference in the social context surrounding those forming governments for the thirteen former colonies in 1776 and those who had formed the English government in 1688 was the dissemination of printing and literacy. The printing press had not made its full impression on the English in 1688, although there were then a growing number of readers who were with increasing frequency insisting on reading the Bible for themselves. Seventeenth-century Puritans came to America with “irrefragable confidence in the written word.” In 1776 it was not accidental that one of the coauthors of the Declaration and of the Constitution was a printer, Benjamin Franklin, whose presence among the most influential colonists was in part a reflection of the still-growing importance of printing, a technology not yet taken for granted. The relationship between printing and the development of law and the legal profession was newly visible at the time.

New state constitutions were ratified in eleven states in 1776. Connecticut and Rhode Island instead retained their royal charters, but with important revisions deleting expressions of subordination to the king and his Privy Council. All thirteen states opted for a republican form of government, as foretold by the Declaration. The eleven states with new constitutions created new judicial institutions, while Connecticut and Rhode Island merely substituted their existing state courts for the Privy Council in London that had been the institution responsible to the king for enforcement of their royal charters. There was no written constitution in England, so enforcement of the 1688 agreement with the Crown had been left to the Parliament. Thus, only colonial legislatures had been subject to control by a forum exercising the power of review to enforce a higher law.

Baron de Montesquieu’s *The Spirit of Laws* was in 1776 the most widely read and admired work on politics and law. Montesquieu warned, on the basis of the experience of earlier republics such as those of Athens, Rome, and Venice, that greed fed by demagoguery would soon destroy a republic. He reminded his readers that all republics had disintegrated in civil strife between factions seeking to advance their interests over those of their rivals. To maintain a republic required a willingness on the part of citizens virtuously to sacrifice private interest for public good; this would require a transfer of some loyalty from self or family or tribe to the republic. Plato, he recalled, had Socrates questioning the possibility of the requisite civic virtue in any state. Accordingly, Montesquieu insisted that a republican spirit could be maintained only in a state that was small, egalitarian, and thrifty. He thought that the chances of civilized government were better for a monarchical government in which political powers were divided, a feature he attributed to the unwritten British constitution that had so fully empowered Parliament.
Many Americans joined Montesquieu in doubting that republican virtue could be shared among fellow citizens, and they remained skeptical that a republic cast in the model of Athens or Rome could ever be made to work in America. Although John Adams was a codrafter of the Declaration who had acknowledged on the eve of the Revolution that public virtue was essential to republican governance, his more mature thought as the political champion of Massachusetts Puritans was to dismiss as “celestial” any hope for a population imbued with republican virtue.\(^\text{16}\) He expressed the strongly held view of many New England Calvinists when he denied the perfectibility of humankind; for them, salvation was to be the reward received only by God’s select few. “If the absence of avarice is necessary to republican virtue,” Adams asked, “can you find any age or country in which republican virtue existed?” James Madison reluctantly agreed: “Individuals of extended views\[^\text{17}\] and of national pride” might practice public virtue, but never “the multitude.”\(^\text{17}\)

The brief experience of the Continental Congress provided a basis for such skepticism. Benjamin Franklin had observed that “[t]here is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding government.”\(^\text{18}\) Corruption became evident during the war. Indeed, one member of the Continental Congress, Samuel Chase (later Mr. Justice Chase), was dismissed from the assembly for his illicit use of inside information to turn a profit for himself.\(^\text{19}\) Other citizens sold to Washington’s army not only muskets without triggers but also rotten food.

By 1787 the doubts expressed by Adams and Madison had been confirmed in the minds of many. The new legislators, elected by farmers and shopkeepers and perhaps intoxicated with their new powers, had enacted some zany laws. Citizens were dispirited by the factionalism, greed, and vanity exhibited by popular legislators. And Shays’s Rebellion in Massachusetts, an uprising of farmers against creditors threatening to foreclose mortgages on their farms, seemed to demonstrate the tendency of factions to dissolve the fragile bonds of trust holding that commonwealth together. Monetary deflation had elevated the friction between debtors and creditors by making the dollars to be repaid larger than the dollars borrowed. The economic trend was visible everywhere, promising similar uprisings elsewhere. It was in many minds the multitude that was, above all, to be feared. Some former revolutionaries had come to believe that “had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.”\(^\text{20}\)

In addition to the frailties and disorders of the thirteen states, there was the weakness of the Articles of Confederation purporting to bind thirteen states together until all should agree to dissolve their bonds. The Articles and the Continental Congress established by the Articles had barely sufficed to get the colonies through the war and were in a state of near collapse.

Primary on the list of matters needing attention was the inability of the Continental Congress to conduct foreign relations effectively, for it lacked the means to secure compliance with its agreements from those whom it purported to represent. As George Washington put it in 1785, foreign nations surely “see and feel that the Union or the States individually are sovereigns as best suits their purpose; in a word, that we are one nation today, and thirteen tomorrow.”\(^\text{21}\)
Thus worried, a convention of representatives gathered in Philadelphia in the summer of 1787 to forestall the political disintegration of their little republics and their frail federation. James Madison convened the meeting, and he recruited George Washington, the most celebrated citizen and hero of the war, to chair the meeting. The representatives were convened to stabilize the existing federation in order to preserve it, but as Madison and Washington strongly urged, they instead proposed to replace the existing government with one resting on a new charter. Although Madison was very close to Jefferson, who was on diplomatic duty in Paris that summer, Madison placed more value on order and less on liberty and was far more adept than Jefferson at understanding and accommodating the diverse views of others. He was at the time very much in favor of a federal union.

By means of Madison's political skill, a new constitution was drafted and proposed for ratification by the thirteen states. Historian Joseph Ellis observed the records of the event and accurately explains that Madison exhibited the “mentality of a lawyer defending a client” in negotiating an agreement of a majority of those present at the convention. But Madison and Washington, like Jefferson as author of the Declaration, were sorely disappointed with the resulting compromises. Only gradually over months did either achieve the will to advocate its ratification.

Many of the provisions of the new law that had been negotiated over two months failed to attract unanimous support. On one side, some who attended the convention shared Montesquieu's preference for monarchy, but no one had any idea how to identify an American king except to name General Washington, who had no taste for the role. On the other side were those who favored the existing states and insisted on the concession that the members of the Senate would be representatives of their state governments notwithstanding the shared assessment that those state governments had failed in many respects to send suitably instructed representatives to the Continental Congress. Madison and Washington despaired over this compromise.

In the end, Madison's disappointing colleagues had built less upon Roman and English traditions than on their experiences in colonial government and with their new state constitutions. Colonists had been able to seek relief from official abuse in violation of the charters by appeal from the king's governing agents to the king's Privy Council. At least in theory, the king might reverse a rule or decision made by his judicial representatives, especially if made in disobedience to the king's commands expressed in those charters. And so it was everywhere presumed that state courts would enforce state constitutions limiting legislative powers. And the eleven new state constitutions provided not only for separation of powers to be judicially enforced but also for some enumerated individual rights to be judicially enforced that would constrain their legislatures and serve as models for the Bill of Rights.

Madison and the other Founders also knew of the somewhat similar role performed by the highest court of France, which had for over a century claimed the prerogative of refusing to register unacceptable royal edicts pending reconsideration in light of the court's remonstrance. The independent professional avocats who appeared in that historic forum thus played a substantial political role. In 1730 avocats had gone on strike in support of the court. And when the Crown dissolved the court in 1770, many avocats left their profession rather than appear before the newly disabled and degraded court.
Many of the representatives at the Philadelphia Convention (also called the Constitutional Convention) counted themselves as members of such a professional group. Efforts were already under way to organize in the thirteen states legal professions that would be capable of enforcing constitutional texts. In the mind of Jefferson at least, the French avocats were the profession of lawyers that needed to be replicated in America.

Drawing on Montesquieu and the state constitutions, a majority of representatives at the Philadelphia Convention agreed to so divide power within the federal government that no faction would be able to marshal control sufficient to gain a private advantage. They did not abandon the idea of popular sovereignty; indeed, they guaranteed to every member state a republican form of government. But they sought to constrain the submission of the new federal government to the popular will by pitting the new government against itself. Thus, the bicameral legislature. Thus, the independent executive branch. Thus, the explicit enumeration of federal powers. Thus, the indirect election of senators by state legislatures and of the president by electors chosen by those legislatures. And thus, the appointed Supreme Court of the United States established to enforce the numerous bounds of power.

In order to secure ratification, it was obvious that the instrument needed to address the issue of slavery. There were slaves in all thirteen states but also a shared sense that the institution was destined somehow to come to an end. The compromise wrought by the convention was to count three-fifths of the slaves when measuring the populations to be represented in Congress. This provided, at least for the moment, a reassurance that the new federal government would not prohibit slavery even though it was expected that many of the states would. And it was agreed that no more slaves would be imported after 1808.

Although Madison organized and led the convention, it was Gouverneur Morris, a New York lawyer, who did most of the drafting of the text. That text expressed numerous compromises made to secure the assent of those present. And some of the text, notably Article III providing for a federal judiciary, had received very little attention. It was signed by only two-thirds of those who were still in Philadelphia at the conclusion of the convention. Washington signed with reluctance.

Christopher Eisgruber’s assessment of the text they negotiated is correct:

The Constitution isn’t a credo. Nor is it a work of political philosophy or a sacred text or an architectural blueprint or a great work of literature. It was created by human beings for practical purposes, and it has all the characteristics one would expect from a political document. It was written by committees. It is occasionally vague, turgid, or redundant. It contains pedestrian provisions and unfortunate errors. It is full of compromises—some of them nasty, since it was written when the country was divided by slavery. And it is incomplete.26

None of the signers took pride in their handiwork. And few who have since written the many constitutions of other nations have adopted the text of the Constitution of the United States as a model to be replicated.
Ratification: Politics and the Bill of Rights

Resistance to the ratification of the Constitution was generally led by lawyers, some of whom had been in attendance at Philadelphia. Luther Martin of Baltimore gave strong voice to the observation that the convention had been called to propose amendments to the Articles of Confederation and all the signers had exceeded their legal authority in proposing the Constitution. He and others of like mind generally favored the autonomy of the local political institutions in which they were previously engaged.

A series of essays called The Federalist Papers, published by Madison and his coauthors Alexander Hamilton and John Jay (and nominally published by Publius), were elegant expressions of political theories favoring ratification, and these essays have survived as a text on the Constitution. What effect they had on ratification is not clear. The essays reflected personal differences among the authors that would persist. Madison, like Jefferson, mistrusted himself and therefore mistrusted others. Hamilton, in contrast, trusted himself as a person of superior intellect and civic virtue. He and his followers tended to believe that power could be centralized if it were entrusted to themselves and others like them. They tended to view Madison and his followers as “village tyrants” who feared the loss of their status and power if authority were centralized with benign rulers such as Hamilton. As presented in The Federalist Papers, the Constitution was a compromise between these differences.

The proponents of the Constitution had wisely called for ratification by popular conventions rather than by the existing legislatures, who had stakes in the results due to the reduction of their power and status that would follow from ratification. Those having a personal stake in the continuation of the Continental Congress would lose whatever advantage they had if the Constitution were ratified.

But much of the rising opposition to ratification focused on the absence of a bill of rights such as those set forth in many of the state constitutions specifying inalienable individual rights. A deal was cut in Massachusetts to charge the first Congress with responsibility for initiating amendments stating a bill of rights. With that condition, the Massachusetts convention ratified the Constitution.

In the crucial convention in the largest state, Virginia, Patrick Henry, a lawyer and celebrated orator in the old House of Burgesses, led the resistance. He contended that the resolution of the Continental Congress calling for the Philadelphia Convention had not authorized those assembled to propose a federal constitution. He suggested many changes to the text of the proposal. Attorney General James Innes, another student of George Wythe’s, argued successfully that the voters who had elected them to make the state’s decision on the Constitution had not considered any of Henry’s proposals, and they were therefore not on the agenda to be considered. Despite the rejection by Innes of any negotiations over the details of the proposed text, the Massachusetts compromise won the support of Virginia’s governor, Edmund Randolph. That support was sufficient to achieve a narrow majority for ratification, but with a long list of approved amendments to be considered by Congress and other states.

Patrick Henry
New York also ratified the Constitution by a narrow margin based on the Massachusetts compromise, thus making the nine requisite ratifications. Perhaps the most persuasive utterance at the New York convention was that of Robert Livingston, a representative of New York City:

Perfection, sir, is not the lot of humanity; and perhaps, were the gentlemen on this floor to compare their sentiments on this subject, no two of them would be found to agree. Nay, such is the weakness of our judgment, that it is more than probable that, if a perfect plan was offered to our choice, we should conceive it defective, and condemn it.28

DISABLING LEGISLATURES

Few, if any, draftsmen of the twelve new state and federal constitutions realized the extent to which their precautions against momentary lunacies disabled state and federal legislatures from fruitful deliberation and effective remedial action on serious public problems. The legislative power was so divided that coherent legislation was improbable. The Constitution made it difficult to enact bad laws but also equally difficult to enact good ones. In order to enact any law at all on disputed questions, a legislature would often have to leave unresolved issues that were very likely to arise in their enforcement. These unresolved issues would then appear on the agenda of judges and adversary lawyers.

The difficulties encountered by federal and state legislatures were intrinsic to any purportedly representative democracy. Political supporters expect their representatives to do their bidding, but predatory interests seek and expect to influence such legislative bodies. And elected representatives are inherently vulnerable to intimidation by those commanding significant popular support or with the means of marshaling public support. To overcome resistance even to legislation plainly serving a public interest, proponents often must trade their votes on other issues. The bicameral design magnifies the problems by relieving both houses not only of power but also of ultimate responsibility. Benjamin Franklin described the bicameral legislature as a loaded wagon with a team at each end.29

The design magnified the role of courts and of lawyers. It is instructive that few if any constitutions adopted since 1789 to serve other nations have adopted the features of the American Constitution that so limit the power and thus the responsibility of popularly elected legislators to do their constituents' bidding. But most constitutions were written to serve nations less afflicted with internal conflicts requiring concessions to secure adoption of the proposed system.

The Founders seem to have contemplated no role for political parties. Most were hostile to the possibility that self-created societies might organize to influence legislative decisions. Hence, they created no means of maintaining effective party discipline even on important issues. This lack tended to magnify the intrinsic weakness of Congress and, in due course, of state legislatures fashioned on the federal model. As a result of this chronic weakness, political leadership is often confounded by indiscipline, and political commitments are cheerfully made that no one expects to be able to fulfill. Demagogues in the American government enjoy a lesser risk of exposure than do demagogues in a system facilitating a measure of party discipline.
By 1848, however, the inevitable and indispensable role of political parties had been fully recognized. Frederick Grimké, a retired justice of the Supreme Court of Ohio, explained that year that

[it] is [not] true, that a government which is absolved from a dependence upon parties, is more impartial on that account. Parties are simply the representatives of the various interests of the community, and these interests will never be able to attain an adequate influence, unless they can make themselves felt and heard.30

Most citizens, though, would agree with Grimké’s assessment that political parties in the United States have seldom maintained sufficient discipline to provide effective leadership of legislatures.

At the same time, many eighteenth- and nineteenth-century state constitutional conventions designed, in contrast to the federal Constitution, state executive offices to be as impotent as their legislatures. Governors not given the veto powers needed to govern legislatures and not given the power to appoint either judges or high administrative officials such as their attorneys general or state treasurers were often weaker even than their lieutenant governors, who were at least given a vote in the upper chambers of their divided legislatures.

These weaknesses of the executive and legislative branches were further enhanced by short terms in office. Some early state legislators held office for only one year at a time, and some governors for only two years.

For all of these reasons, sober deliberation on important public issues was not the usual activity of early American legislatures—and this is still true today, even when they are staffed by the most intelligent and virtuous representatives. Only on occasional matters of dramatically grave consequence can members of large and undisciplined legislative bodies exhibit their capacity for wise and responsible decision making.

**EMPowering A Professional Elite**

In contrast to early state legislators, judicial officers appointed by the other branches of state government enjoyed tenure for the period of their “good behavior,” i.e., until their legislatures removed them from office for some form of misconduct. The term *good behavior* was drawn from the English Settlement Act of 1701, which had defined the relationship of Parliament to the royal judiciary. Thus, eighteenth-century American judges were not representatives obliged to do the bidding of constituents. Elected legislators could choose to defer to law courts for solutions to sensitive political problems that might put the legislators in jeopardy of making new political opponents.

The assurance offered in The Federalist Papers that the judiciary would be the “least dangerous branch”31 was therefore subject to question with respect to the eighteenth-century constitutions. Indeed, as Grimké proclaimed, the judiciaries were not the weakest branches of government. There was more truth in Thomas Paine’s proclamation that law was king than Paine could have known. The American judiciary was thus summoned to a higher calling than any such group had ever known, i.e., to serve as a collective monarch. Theirs was a heady assignment, and arrogance of a sort previously associated with
royalty and nobility was therefore found more frequently among American judges than among members of the other branches of government. For judges, justifying their role, even to themselves, would be an enduring challenge.

Clearly implicit in judges’ duties to enforce constitutions against the wishes of the elected officers of their governments is a moral duty to strive to be as disinterested in public affairs as circumstances permit. Indeed, conducting a republican form of government in which law is king imposes a moral duty on judges to remain loyal to the sanctity of law even while participating professionally in the process of making and enforcing it. This requires a subordination of self to a discipline that is both intellectual and moral—and is not entirely possible.

This elevation of the role of the American judiciary incidentally elevated the legal profession of which the judiciary was to be a part. So it was that in the 1830s Alexis de Tocqueville would observe that American lawyers (at least those whom he met as a tourist) resembled the European elite more than they resembled either the English bar or the French avocats.

While American lawyers are advocates, they in some measure share the professional and moral duties of judges on the bench to subordinate their understandings and preferences to the realities of legal texts and to the circumstances in which the law is invoked. Lawyers, like judges, are thus members of a professional subculture; and, like judges, their compliance with the imperatives of professional morality is destined to be imperfect.

Lawyers were not, however, expected by this constitutional scheme to be in all respects more sensitive to moral restraints on their private conduct than were their fellow citizens. A clear distinction was made in the eighteenth century between public and private conduct. Jefferson and Madison, among other Founders, owned slaves. Many were womanizers, and many were known to have exhibited diverse other moral failings in their private lives. These matters were not considered appropriate for public discussion. Without regard for their private failings, the constitutions conferred on the legal profession the duty to supply a culture of public virtue that the self-governing people were perceived to lack. Perhaps on that account, lawyers sought and secured many public offices, including many seats in Congress and state legislatures. And it was not coincidental that every president of the United States before 1920 was a lawyer, save for four military heroes.

**Democratizing the Courts: Trial by Jury**

The power of royal judges sitting in colonial courts had been qualified by the right to trial by jury. That right, in civil as well as criminal cases, was embedded in the constitutions or charters of all thirteen colonies and was much more highly valued in the colonies than in England because the judges sent out from London commanded such slight regard. The War of Independence did nothing to diminish support for the jury.

The fear that the new federal judges would behave much as the king’s judges had aroused the fiercest opposition to ratification in every state. The antifederalists were
of a populist bent, less concerned about the possible risk of excess in democratic govern-
ernment by a mob than about the risk of self-serving manipulation by the greedy, self-
anointed elite.\textsuperscript{34} Many antifederalists feared formation of a national government stronger
than the Continental Congress as a threat to the rights of ordinary farmers and small
merchants and their families and as a threat to local government, in which many of them
were prominent. Of special concern to many was the prospect that an elitist federal gov-
ernment would commission its politically selected judges, chosen in all likelihood from
among an elite bar, to bring federal judicial power down on the necks of ordinary folks.
One pamphlet correctly observed about the prospective federal judges that

\[\text{[t]here is no power above them to [control] any of their decisions. There is no authority
that can remove them, and they cannot be [controlled] by the laws of the legislature. In
short, they are independent of the people, of the legislature, and of every power under
heaven.}\textsuperscript{35}\]

This concern was elevated by the social consequences of the economic deflation
increasing the cost of debt and elevating mistrust and hostility between debtors and
creditors. Antifederalists were not wrong to fear that the tenured federal judiciary
would represent the creditor class. At the top of their list of objections to the federal
Constitution as drafted in Philadelphia was its failure to guarantee the right to trial
by jury in civil cases to be tried by any federal court that Congress was authorized
to create. Among the ten amendments identified as the Bill of Rights, the Seventh
Amendment guaranteeing the right to a jury in civil cases was the most indispensable
to ratification. Thus, even the federal courts were certified as being in part instru-
ments of self-government.

The right to trial by jury linked the emerging legal profession to a populist insti-
tution and had a substantial, perhaps unintended, effect on the profession. A lawyer
unsuited to the task of arguing to a jury of randomly selected citizens was limited
in the professional roles he might be expected to be called upon to perform. Jury
argument became, for most laymen and many professionals, the paradigmatic feature
of American law practice, a paradigm that, despite its English origins, existed in no
other legal system. The sort of lawyers who were most successful in presenting cases
to juries were generally made of different stuff than were those most successful in
presenting legal arguments to a panel of judges learned in the technicalities of legal
doctrine. Thus, by elevating the civil jury, state and federal constitutions assured the
presence within the legal profession, and especially among those likely to be elevated
to the bench, of lawyers of homespun manners and values.

\textbf{Training a Political Profession: George Wythe
and St. George Tucker}

The fundamental change in the public role of lawyers was apparent to some members of
the founding generation. The place where that enlarged role was given the most thought
was in the largest and most populous state, Virginia.
A significant number of Virginians had studied at the University of Edinburgh, an institution much influenced by the Protestant Enlightenment. A few had studied at Oxford, and a number had studied English law at one of the four Inns of Court in London in the loosely contrived manner used to train English barristers. But most Virginia lawyers practicing before 1776 had been trained as apprentices to experienced lawyers in the manner of the English solicitors, i.e., lawyers who had no right of audience in royal courts. The professional training that they had received was technocratic and apolitical, directed at such skills as conveyancing and the drafting of wills. But after the loyalist Tory lawyers left for Canada, Virginia retained a cadre of lawyers having a high level of interest in politics and a strong commitment to the revolutionary cause.

Shortly after he drafted the Declaration of Independence, Jefferson was elected governor of the newly independent commonwealth of Virginia. He soon turned his attention to the public need for a legal profession suited to the tasks of self-government as established by the Virginia Constitution. He directed the trustees of the state’s College of William and Mary to appoint George Wythe as “Professor of Law and Police.” Jefferson deemed Wythe to be “one of the greatest men of the age.” He had not only been mentor to Jefferson’s law study but had then become rather a second father to his most precocious student. While he was a student at William and Mary, and for years after his graduation, Jefferson had met regularly with Wythe (then a Williamsburg lawyer) in Wythe’s home for private discussions of the best works on law and politics available in Greek, Latin, French, English, and Italian. For the remainder of Wythe’s life, he and Jefferson corresponded regularly and exchanged visits when they could. Jefferson inherited Wythe’s library, much of which had been received as gifts from Jefferson.

However personal Jefferson’s conviction that Wythe was the right man and however overbearing Jefferson may have been in imposing his views on the college, few then disagreed with Governor Jefferson’s belief that the public would be well served by the appointment of Wythe. There was no person in America so qualified for the role of moral educator. He was not only a signer of the Declaration of Independence but was later selected with Madison to represent Virginia in 1787 at the Philadelphia Convention. Wythe’s intellectual energy was exemplified by the fact that he devoted much of his eighth decade to learning Hebrew, his seventh language. He was widely known as the American with the best knowledge of Roman law.

Classically minded Virginians compared Wythe to Aristides “the Just.” It was said of him, and apparently never questioned, that “not one dirty coin ever reached the bottom of George Wythe’s pocket.” Wythe made it his practice to resign a professional representation in any civil matter, and return a fee even though earned, if he belatedly concluded that his client was seriously in the wrong. William Wirt, another of Wythe’s students who was later an attorney general of the United States, observed that

[n]o man was ever more entirely destitute of art than Mr. Wythe. He knew nothing, even in his profession, and never would know anything of “crooked and indirect byways.” Whatever he had to do was done openly, avowedly, and above board. He would not even at the bar, have accepted of success on any other terms.

This simplicity and integrity of character, although it sometimes exposed him to the arts and sneers of the less scrupulous, placed him before his countrymen on the
ground which Caesar wished his wife to occupy: he was not only pure, but above all suspicion. 38

At the time of his appointment at William and Mary, Wythe was an esteemed judge. He had long been active in the antislavery movement, to which he seems to have brought Jefferson. He was among the first to liberate slaves under the 1782 act of the Virginia legislature authorizing manumission. He was surely one of the very few who ever provided his manumitted slaves with financial resources and literacy, even teaching one of them both Greek and Latin. As revisers of the colonial laws, Jefferson and Wythe joined in proposing the emancipation of all slaves born in Virginia after the date of their act’s adoption. Their bill was not presented to the legislature, however, because Governor Jefferson concluded that the public was not yet ready for such an enactment.

Among the works that Jefferson and Wythe had read together was The Spirit of Laws. In that work, Montesquieu had cautioned that education in law is essential if self-government is ever to be maintained. Montesquieu described the requisite teaching as “love of the laws and of [their] country”; such love, he contended, “requires a constant preference of public to private interest” 39 and can only result from effective moral instruction. Montesquieu supposed with John Locke 40 that such moral education would have to come from the republican family, or perhaps from a professional mentor such as Wythe was to Jefferson.

It was the aim of Jefferson and Wythe to deploy the public College of William and Mary to supply the needed moral training. Jefferson expressed the hope that those few “‘whom nature has endowed with genius and virtue’” could be “‘rendered by liberal education worthy to receive and able to guard the sacred rights and liberties of their fellow citizens.’” 41

Wythe and Jefferson agreed that the eighteenth-century English legal profession was not what the commonwealth of Virginia needed, nor could the politically antiseptic English legal tradition and method serve the need of Virginia for a politically responsible judicial method and style. The English tradition did not contemplate the role of courts in enforcing a new constitution against a governor and a legislature. In Virginia, even the interpretation of legislation would have to be performed with a sensitivity to political aims and consequences that the English tradition eschewed.

Wythe’s professorial lectures commenced in 1779 while the Revolutionary War was raging. He emphasized political economy and public law but also assigned the reading of Blackstone’s Commentaries, a work summarizing the common law as it was perceived in mid-eighteenth-century England. In his teaching, Wythe compared Blackstone’s English private law to Roman traditions. He also commented on the political economics of Adam Smith, on the Virginia constitution, and on the elementary principles of the still-emerging law of nations.

Wythe resurrected from medieval times the Roman practice of moot court. Students were required regularly to argue cases before Professor Wythe sitting as judge. In addition, he created the novelty of a moot legislature. It met fortnightly on Saturdays at the capitol to debate bills drafted by the students, with Wythe sitting in a high presidential seat that, according to one student at the time, “‘adds very much to [his] dignity . . . [and] has a greater effect in throwing a damp upon the spirits of the speaker than you can imagine. I was prodigiously alarmed to be sure.’” 42 Student John Brown, later himself a U.S. senator from Louisiana, expressed as a student the hope that the program would
“rub off that natural bashfulness which at present is extremely prejudicial to me.” Jefferson, not himself noted for his public speaking, especially applauded this aspect of the program because it made students “habituate[ed] themselves to think and to speak with method and lessen the shock of the premier debut at the bar...”

Jefferson took pride in Wythe’s program, boasting to Madison in 1780 that the program was

a success which has gained it universal applause. Wythe’s school is numerous. [He had 40 students.] They hold weekly courts and assemblies in the capitol. The professors join in it; and the young men dispute with elegance, method and learning. This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value.

Among the forty were John Marshall and numerous others destined to play important political roles. Wythe resigned his professorship in 1790 and moved to Richmond to serve Virginia as its judicial chancellor. Acting as chancellor, he was among the first judges ever to invalidate legislation as inconsistent with the higher law expressed in Virginia’s constitution. He rendered that courageous judgment alone, despite knowing that the law he invalidated had favored the interests of his friends and political allies in the revolutionary movement and benefited some of those despised English against whom the Revolution had been waged. It bears notice that among the legislators who had voted for the law that Wythe invalidated was his former student, John Marshall, who would in 1803 follow his teacher’s example in invalidating a federal law. While serving as chancellor, Wythe also provided instruction and guidance to young men seeking careers in law; among them was the immortal Henry Clay.

Wythe’s mission to train a public profession was replicated in most of the other colleges in the former colonies. But his vision did not fit comfortably with the Puritan religious faith that dominated the thinking of many in New England. Harvard and Yale had been established to train Puritan clergy and were committed to the idea that human affairs were controlled by God’s will. In that light, training lawyers to guide public affairs was seen by some as a breach of faith. Soon after the Revolution commenced, Ezra Stiles, a Jeffersonian, was appointed Yale’s president. He sought funds from the new state of Connecticut for the training of public lawyers. The stated purpose was to “enable such a multitude of Gentlemen among the body of people at large to judge on political matters as shall awe those into Fidelity whom the States may entrust with public and important negotiations.” The plan failed when the Yale governing board proved unwilling to surrender any control in exchange for state funds. Stiles nevertheless commenced teaching constitutional law to Yale seniors.

The College of New Jersey (later Princeton) had been established in 1746 to train Presbyterian clergy. When war came, the college owned one of the most impressive buildings on the continent. Its president, John Witherspoon, was formerly a Scottish theologian of high repute and the teacher of James Madison. Unexpectedly, Witherspoon became a leader of the revolutionary cause and himself undertook to teach constitutional law.

Also in the 1780s, the College of Rhode Island (Brown) and the College of Philadelphia (Pennsylvania) offered legal education. The professor at Philadelphia was James
Wilson, a signer of the Declaration who would later serve on the Supreme Court. His opening lecture was attended by President Washington, Mrs. Washington, and the entire Congress of the United States. Wilson proclaimed the importance of “love of the law,” declaring thus:

Of no class of citizen can the education be of more public importance than of those who are destined to take an active part in public affairs [of a republic]. Those who have had the advantage of a law education are frequently destined to take this active part. This deduction clearly shows that in a free government, the principles of a law education are matters of the greatest public consequence.48

Other colleges joined in these efforts in the 1790s. Harvard was the one exception. Wythe was succeeded at William and Mary in 1790 by his student St. George Tucker, a native of Bermuda who had won fame during the war as a naval blockade runner. Like Wythe, Tucker was at the time a respected judge and an active politician. He wrote poetry and drama, invented a telegraph, and studied astronomy and agricultural economics as well as law. Tucker taught for fourteen years and in 1803 became for the time the premier published scholar of American law when he edited the work of William Blackstone for American readers, qualifying its royalisms with footnotes and adding substantial notes and comments on American law. Near the end of the school term, Tucker would engage his students in debate on public matters of interest to him; a list of topics debated in 1794 includes the issues of capital punishment, inheritance of wealth, the national debt, and trial by jury.

Tucker lectured regularly on the abolition of slavery, which was his “dearest wish.”49 In 1796 he published an argument and an elaborate plan for the abolition of slavery in Virginia, urging emancipation as “an object of the first importance, not only to our moral character and domestic peace but even to our political salvation.”50 The legislature of the commonwealth quickly rejected his plan. However, Tucker’s renowned antislavery sentiments did not preclude his appointment to the Virginia Supreme Court in 1804, nor did his personal sentiments reviling slavery prevent him, as a member of that court, from reversing Chancellor Wythe in 1806 to hold that emancipation was not required by the Virginia Constitutional Bill of Rights, which Tucker deemed inapplicable to African Americans.51 Interestingly, Tucker’s antislavery views did not prevent him from selling a slave.

A Skeptical Voice: Hugh Henry Brackenridge

Those who waged the Revolution and erected constitutional governments soon discovered not only the hazards of popular self-government but also the realities of the legal profession as a safeguard against them. For many, these observations confirmed a belief in human fallibility and mendacity. Among the skeptics was Hugh Henry Brackenridge.

Brackenridge was a Princeton classmate of James Madison. He trained for the Presbyterian ministry and served as chaplain to Washington’s beleaguered army at Valley Forge but left the ministry, first for poetry, then for journalism, and then to become a lawyer/politician in frontier Pittsburgh. While a journalist in Philadelphia, he edited and
published a magazine devoted to the idea that the honest husbandman who read his publication “would rapidly improve in every kind of knowledge.” In his youthful exuberance, he promised that every man would shortly be able “to arbitrate the differences that may arise among his neighbors. He would be qualified to be a magistrate. He would be equal to the task of legislation. He would be capable of any office to which the gale of popularity amongst his countrymen may raise him.”

Arriving as a lawyer in Pittsburgh, Brackenridge was a leader of the campaign to ratify the Constitution. In 1796, as a supporter of Vice President Jefferson, he was elected to the Pennsylvania legislature. There, he secured a state grant to establish what became the University of Pittsburgh. In 1798 he founded the Democratic Republican Party in western Pennsylvania and was elected to the legislature. He was, however, driven from office by a more radical antifederalist who persuaded the voters that Brackenridge was a moral and intellectual snob no less self-interested in public affairs than the demagogues he opposed. He was then appointed to the Supreme Court of Pennsylvania.

Brackenridge was perhaps the most literate of the revolutionaries. He was a pamphleteer and produced a political novel and a collection of essays on law. His published work comprised a sustained outcry against the hazards and evils of demagoguery and a summons to the legal profession to resist them. His novel, *Modern Chivalry*, appeared in segments beginning in 1792. It was widely read and later rated by Henry Adams as the most thoroughly American of all early American literature. It was picaresque and satirical, borrowing generously from Jonathan Swift and Miguel de Cervantes. Against the chance that his reader might miss the point of his satire, the author interlarded the story with essays ridiculing many features of law and politics in Pennsylvania.

Brackenridge took the title of his novel from the mystic purpose of Cervantes’s Don Quixote, whose sanity was defeated by the supremely foolish notion of chivalry. Quixote, it may be recalled, had read too many books of chivalry fantasizing about intrepid knights ever willing to risk all for remote but revered ladies. *Modern Chivalry* rediscovered the ubiquity of foolish grandiosity of the sort exemplified by Quixote. The novel recounts the adventures of Captain Farrago, a wise democrat selected by his fellow citizens as governor of the commonwealth, and Farrago’s foolish but ambitious servant, Teague O’Regan, who encountered a series of opportunities for unmerited advancement, each resulting in some misadventure. Another important character is the unnamed blind lawyer who is even wiser than Captain Farrago and from time to time intercedes with the voice of reason to save the people from their bovine stupidities.

Brackenridge saw the republic as an invitation to everyman to indulge his fancies much as Quixote had indulged his, to suppose that his personal dictum or prejudice could set the world right. In his novel, he ridiculed the ideology of pure democracy. He admitted that in the days of the Revolution, he had himself been imbued with the foolish notion that all citizens could participate equally and sensibly in democratic government. His novel drew on the orthodoxy of his time, not yet disproved, that “the human mind is a strange compound of the rational and the irrational and it is only by turns that the rational predominates.” “Human nature,” he wrote, “is capable of being brought to such absurdity by many causes. . . . Thus, who would think it possible were it not a fact established by ten thousand testimonies, that human sacrifice could ever have been
thought acceptable to the divinity? Unreason was, he said, an infectious disease with a way of spreading like a moral influenza:

It may be impossible to trace the very point in the community at which a wild idea took its rise, or what passion in the individual gave it birth, but its progress, like the influenza, may be traced; and its gradual march from north to south, or from east to west.

In Brackenridge’s imaginary village, some incendiaries decided to burn the college because, they said, all learning is a nuisance. When the captain, to forestall destruction, persuaded them that the school had been reduced to insignificance and its building would soon be available for other uses, they burned the church instead. One of the elected villagers complained to the captain of a cruel defamation:

Here I am, an honest republican; a good citizen, and yet it is reported of me that I read books. O! The tongues of men! Who can stop reproach? I am ruined; I am undone; I shall lose my election; and the good will of all my neighbors; and the confidence of posterity.

A particular notion that Brackenridge took pains explicitly to ridicule was the dogma of Dugald Stewart, a learned Scotsman whose works were popular in the time of Brackenridge. Stewart wrote that human nature was improving over time and that our baser instincts were declining as a result of some natural process. Brackenridge feared that “there are, and I suppose ever will be, irrational optimists like Stewart who refuse to see the ubiquitous dark side of human nature.” Such people, he affirmed, have blinded themselves to the need for the discipline of law, society’s response to the “dark side of human nature.” He also noted that it is nonsense to conduct government on the assumption that one’s fellow citizens are by nature less selfish or less cruel than their parents or grandparents: “Men in all ages are the same,” he said, “and nature is herself to blame.” What is different in time and place in this view are the social and political institutions that serve to constrain our common bestiality: “The cupiditive of man continues . . . and unless well managed, will terminate in the overthrow of liberty.”

Brackenridge ridiculed the optimism of Stewart by advancing in his novel a proposal that suffrage in Pennsylvania be extended to quadrupeds. He argued that if Stewart were right, then other mammals must surely also be improving in their morals and intellect and should therefore participate in our political process on equal terms with us. Thus, one of his citizens argued with the voting registrar that his horse should vote because the horse served with General Wayne against the Iroquois in 1793. Another tried to register an ox named Thomas Jefferson. Yet another urged the admission of a panther to the Pennsylvania bar; Teague O’Regan was once cloaked in a panther skin in the hope that he might be mistaken for one competent to practice law. An experiment was conducted with canine advocates in court, and some were found to have precisely the right snarl.

Brackenridge preached against Stewart’s doctrine not merely because he thought it wrong but because it misled the public about the need for constitutional law and lawyers
in a democracy. By unduly enlarging hopes for wisdom and moral probity, Stewart was nourishing the impulse of officials and their constituents to exaggerate their moral and intellectual competence. It is “precisely because the universal dark side of humanity sooner rather than later makes despots of all rulers that democracy is and should be the favored form of social organization,” said Brackenridge.

With particularity, Brackenridge called attention to three widely shared human failings that often defeat reason in public affairs. The first failing was the tendency to lie and thus the frequent tendency of people to deceive themselves. The second was intolerance. Brackenridge asserted that democratic government must be inclusive: “[W]e the people can admit of no exclusion.” Democratic politics is therefore a process of conciliation between factions. On that account, he urged democrats to resist impulses “that caused good Christians to have burnt each other because the one would say off and the other from.”

The third failing was vanity. If some of his contemporaries were insensitive to the interests of fellow citizens, others contributed to the spirit of unreason by being unduly sensitive to supposed slights. Democracy, Brackenridge contended, requires a degree of emotional toughness that enables citizens to withstand the inevitable offenses given by their fellows. He counted on lawyers serving the public good to supply the truth, respect, and modesty needed.

Because of these human failings, Brackenridge feared that public offices would often be filled by the wrong people. The servant O’Regan, as the antihero, was incapable of knowing the public interest had it ever entered his mind to serve it, yet he was forever attracting political support. Because law is too often made by such people, “democratic legislation is sometimes a farce.” One example cited by Brackenridge is timeless: in 1779, legislatures, oblivious to market economics, “from the one end of the continent to the other Institut[ed] regulations of the prices of commodities at a standing value while the medium of circulation continued to depreciate.” Although strongly reaffirming his own commitment to the republic, the author of Modern Chivalry, perhaps anticipating Andrew Jackson or the twenty-first-century Tea Party, sought to demonstrate that people who took the notion of popular democracy too seriously were in danger of losing their minds, of mistaking windmills or wineskins for hostile giants, and of doing much harm to others and to themselves. “O, Israel,” his hero cried, “thou are destroyed for lack of knowledge, . . . O, my people, they which lead thee cause thee to err, and destroy the way of thy path.”

While Brackenridge denied the possibility that everyman could be expected to govern wisely or even reasonably, he was equally mistrustful of people claiming power or influence on account of their social status or wealth. Indeed, he had little respect for wealth, observing that “there is often wealth without taste or talent.” He blamed Treasury Secretary Alexander Hamilton for the emergence of “a class of selfish persons who do not see that their own welfare and happiness, and especially that of their children, is linked to that of those less fortunate than themselves.” Brackenridge had “no idea that because a man lives in a great house and has a cluster of bricks or stones about his backside that he is therefore fit” to be a judge or even a democratic legislator. Genius and virtue, he believed, are independent of rank and fortune, and “it is neither the opulent nor the indigent, but the man of ability and integrity that ought to be called forth to serve their country.”
Because people cannot be expected to sustain reason in government and are destined to be victimized by their own failings and the failings of their leaders, Brackenridge found hope only in a republic governed by law. The blind lawyer in *Modern Chivalry* was at last elevated to the office of Chief Justice because it became apparent to all that he was badly needed in that role. He was presented as a role model for young lawyers. His defining talent was his ability to understand the adversary interests and motives of those with whom conflicts must be resolved.

Notes to Chapter 1

5. Thomas Paine, Common Sense 32 (1776).
9. Paine, supra note 5, at 84.
23. Ellis, supra note 11, at 103.
30. Id. at 416.
33. Timothy Walker, Introduction to American Law Designed as a First Book for Students 18 (2d ed. 1846).
34. Saul Cornell, Turning Losers into Winners: What Can We Learn If Anything from the Antifederalists (1999).
41. Herbert Baxter Adams, Thomas Jefferson and the University of Virginia 89 (1888) (quoting Thomas Jefferson).
42. Brown, supra note 37, at 203–05 (quoting Thomas Lee Shippen).
44. Id. (quoting Thomas Jefferson).
45. 3 Papers of Thomas Jefferson 507 (July 26, 1780).
52. Hugh Henry Brackenridge, Introduction to Hugh Henry Brackenridge, Modern Chivalry, Containing the Adventures of a Captain and Teague O’Regan, His Servant, at xiii–xiv (1804) (republished as Hugh Henry Brackenridge, Modern Chivalry (Claude M. Newlin ed., 1937)).
54. Brackenridge, supra note 52, at 719.
55. Id. at 717.
56. Id. at 642.
57. Id. at 419.
59. Brackenridge, supra note 52, at 676.
60. Id. at 648.
61. Id. at 531–32.
62. Id. at 543. The sermon based on these texts was published in the Pittsburgh Gazette, Mar. 22, 1788, quoted in Daniel A. Marder, Hugh Henry Brackenridge 44 (1967).
63. Brackenridge, supra note 52, at 544.
64. Hugh Henry Brackenridge, Law Miscellanies, at xxv (1814).
65. Brackenridge, supra note 52, at 19.