

## *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy*

By Bruce Ackerman

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REVIEWED BY MICHAEL COBLENZ

Many people are in awe of the Founders of our country. Some go so far as to suggest that they were nearly superhuman — perhaps even divinely inspired — and that the document they produced was miraculous (see, for example, Catherine Drinker Bowen's 1966 book, *Miracle at Philadelphia*). Therefore, these people suggest that not only the system of government that the Founders created but also their every deed should bind us some two centuries later.

Bruce Ackerman is clearly not one of those people. In fact, the word he uses most often to describe the creation of the Constitution is "blunder." Not that he thinks that the whole thing was a failure, but he uses the word to suggest that the Founders made some very serious mistakes. The most egregious, according to Ackerman, was their failure to predict the rise of political parties, which nearly destroyed the experiment barely a decade after it began.

The failure to foresee political parties might seem odd in hindsight, because many of the disagreements that led to the creation of the first political parties were the same disagreements that vexed the framers as they worked to craft the Constitution. The main conflict — then and later — was between those who wanted a strong national government with the power to deal with any potential problem and those who wanted a weaker national government in order to ensure the greatest possible degree of individual rights.

### Drafting the Constitution

The framers drafted the Constitution

with one eye on the practical realities of democratic institutions (gained through years of Colonial self-rule) and the other eye on the lessons of history. Throughout history, successful revolutions had ultimately descended into chaos, and the most common reason was that one faction or another would inevitably attempt to seize power. Ackerman writes, "The great republican writers of the past — Aristotle and Cicero and Machiavelli and [James] Harrington — equated party division with factional strife. As they saw it, republics died when leaders separated into factions, each cabal placing its narrow interests ahead of the public good."

History taught that factions were dangerous but inevitable, so the framers did everything they could to limit the power of factions. The framers' solution was to create a system that forced factions to fight among themselves, thereby preventing any single faction from gaining too much control over any branch of government. The framers created a government with two representative bodies and established an executive to run the day-to-day affairs of the government. The framers thought that regional factions would fight one another in Congress, but that members of Congress would jealously guard their power against the interests of the executive branch.

The framers were particularly worried that one faction would gain control over the executive branch; therefore, they crafted a convoluted system to prevent this from happening. Each state would select a group of electors who would ultimately choose the President and vice president. The President would be the person who received the most electoral votes and the vice president would be the runner-up. The framers thought that if one faction were able to gain the power to select the President, then the vice president would be from a different faction, thus pitting two factions against each other within the executive branch.

### The New Government

The conflict between those seeking a strong national government and those advocating a weak one only intensified during the administration of President George Washington. Vice President John Adams and Secretary of the Treasury Alexander Hamilton advocated a strong national government (they and their allies became known as the Federalists), and Secretary of State Thomas Jefferson led those who favored a weak national government (soon called Republicans).

In 1796, as Washington's term neared its end, the growing partisanship became open as Jefferson ran against Adams for the presidency. Jefferson and the Republicans argued that the federal government was growing too powerful and encroaching upon individual liberties, and Adams and his allies argued that an active federal government was necessary to create a healthy economy and otherwise secure the blessings of liberty. Adams won, but Jefferson received the second most electoral votes and became vice president. The Founders had envisioned a bipartisanship that would force compromise, but Adams' and Jefferson's views of government were just too divergent, and their proximity only exacerbated partisan hostility.

At the time, Europe was struggling with the aftermath of the French Revolution, and there were concerns that the conflict might spill over into America. The Federalists passed the Sedition Act ostensibly to control foreign agents, but it was used to quash political opposition. The tactic backfired, and, in the election of 1800, Jefferson and the Republicans handily beat Adams and the Federalists.

### The Election of 1800

Problems with the original system came to a head with the election of 1800. In order to prevent the awkward situation of the split executive branch, both Jefferson and Adams named running mates — candidates specifically

REVIEWS continued on page 50

running for vice president! Jefferson ran with Aaron Burr and Adams with Charles Cotesworth Pinckney.

In an odd twist (and another blunder, according to Ackerman), Thomas Jefferson, in his role as president of the Senate, counted the votes cast by the electors. The Georgia ballot (which was for Jefferson) was facially invalid, but Jefferson counted it anyway. Had Jefferson not counted it, he and Burr would not have received a majority of votes, and the House would have chosen the President and vice president. That would have meant that the Federalists, who dominated the House, might have chosen Adams, despite his having received significantly fewer electoral votes than Jefferson. In any event, with the Georgia ballot, the result was 73 votes for Jefferson, 73 for Burr, 65 for Adams, 64 for Pinckney, and one for John Jay.

The two Republicans came out on top but tied with each other. Under the convoluted system that the framers had created, the election went to the House of Representatives to break the tie. In another quirk (or blunder) of the original system, Congress was elected in November but didn't take office until December of the following year, leaving the Federalist Congress a lame duck until that time. The framers' idea may have been to ensure continuity, but the practical result was that the losers of the election — the Federalists — got to choose the Republican President.

The Federalists hated Jefferson, with whom they had clashed frequently while he was vice president. Burr was another matter; the Federalists considered him a political charlatan and hoped that they could reach some accommodation with him and retain some influence despite their having lost the election.

The Republicans, by contrast, believed that Jefferson was the people's clear choice and should be Congress' obvious choice. The emergence of national political parties had created national platforms, and the Republicans had run against Adams' arrogant abuse of power and also as supporters of Jefferson. The Republicans' broad vic-

tory created the belief that the election had been a referendum on Republican ideas in general, and on Jefferson in particular. Ackerman views this result as making Jefferson the "plebiscite" President — the President as representative of the people. This ran counter to the framers' intent, which was that the legislative branch — not the executive branch — was the people's representative.

Clearly, a majority of the public favored Jefferson, and there was widespread concern that the Federalists in the House might thwart the popular will. Republican governors in Maryland and Pennsylvania even threatened to call out the militia and to march on Washington should the Federalists play some sort of trick and deny Jefferson the presidency.

The House went into a secret session to choose the President, which only heightened fears of a Federalist plot. Ackerman suggests that, with the House in secret session and states threatening to send troops to Washington, there was some concern that the aftermath of the American Revolution, like that of the French Revolution, might descend into chaos. Eventually, however, and in no small measure because of the influence of Alexander Hamilton (a point that Ackerman glosses over), the Federalist-dominated House narrowly selected Jefferson.

### The Federalists' Revenge

Jefferson was chosen as the new President, but he would not be sworn in for two weeks. Adams and the Federalists in Congress took the opportunity to try to retain some power: just a few days after electing Jefferson, the lame-duck Federalist Congress passed the Judiciary Act of 1801, which created a new (and needed) appellate court system that had 15 new judges and ended the Supreme Court justices' circuit-riding duties. Adams further infuriated the Republicans by nominating Federalist politicians to the new judgeships, and the Federalist Senate quickly confirmed them. The Judiciary Act of 1801 also created some minor positions, including justices of the peace, which Adams also filled with

Federalists.

These new appointees became known as the "midnight judges." Adams' secretary of state, John Marshall, worked closely with the Federalist Congress to fill these positions, and Adams rewarded him with a nomination to replace Oliver Ellsworth as chief justice.

### The Republicans' Retaliation

When Jefferson took office in March he was still smarting from the fight in the House and furious with the Federalists' judicial power grab. But, with the Federalists still in control of Congress, there was not much Jefferson could do. In December, when the new Congress was sworn in — with 69 Republicans and 34 Federalists in the House — Jefferson and the Republicans took their revenge.

The framers had envisioned, as one element of the separation of powers, that legislators and the President would run independent campaigns and serve independent interests. But the creation of political parties with unified interests dramatically altered this plan. No longer were the legislative and executive branches at odds; now Republicans in Congress worked closely with a Republican President. Congress' first order of business was to repeal the Judiciary Act of 1801.

The fight over repeal was partisan and nasty. Most judges were Federalists and actively opposed repealing the law. For Jefferson and the Republicans, this open hostility only confirmed the judges' partisanship and the need to remove them. The Federalist judges presented legitimate arguments against repeal. One of the more interesting and effective points was offered by Justice Samuel Chase, who argued that the Constitution provides that judges serve for life and can only be removed for cause and repeal would violate that stricture. (Republicans countered that they were abolishing the office and not removing the officeholder.) In addition, repeal would force Supreme Court justices to go back to riding circuit, and, because Article III gave the Supreme Court original jurisdiction only as to certain mat-

ters, which did not include those that came before justices riding circuit, the Federalist justices contended that riding circuit was unconstitutional. (The First Congress overlooked this point when it passed the first Judiciary Act.) Despite these arguments and the clear need for new courts, the Republicans repealed the Judiciary Act of 1801.

The Federalist justices were thus presented with a dilemma. Repeal sent them back out on circuit, where they would sit in trial courts in possible violation of the Constitution. Some justices - Chase in particular - advocated refusing to ride circuit. There was widespread concern that the outcome would lead to an open confrontation between the judiciary and the President, but Chief Justice Marshall avoided the crisis by overruling Chase and agreeing to ride circuit.

The problem did not go away, however. Many Federalist lawyers challenged the constitutionality of repealing the law by appealing the rulings that the Supreme Court justices made while riding circuit. Two cases challenging repeal came before the Supreme Court within a week of each other.

#### *Marbury v. Madison* and *Stuart v. Laird*

Ackerman suggests that the first case, *Marbury v. Madison* (1803), can be understood only in the context of the ongoing power struggles between the Federalist court and the Republican President. William Marbury was one of the midnight judges (technically a justice of the peace) whom Adams had appointed. Unfortunately, Adams' secretary of state, John Marshall, failed to deliver his appointment, so Marbury brought an action to force the new secretary of state, James Madison, to do so. Marbury brought the matter to the Supreme Court on a writ of mandamus.

In his opinion in *Marbury v. Madison*, Justice Marshall skimmed over the issue of the repeal the Judiciary Act of 1801 (thereby avoiding a direct challenge to the Republicans) and focused on a technical question: Did the Supreme Court have the power to take Marbury's case on mandamus? The Judiciary Act of 1789 provided for the writ, but Article III of the Constitu-

tion did not. Marshall said that the Constitution was the supreme law of the land and held that an act of Congress that was inconsistent with the Constitution was invalid. Therefore, even though Marbury had a legal right to the appointment, the Supreme Court did not have the authority to force the administration to deliver it.

The case is most famous, of course, for Marshall's assertion that the Supreme Court has the power to determine the constitutionality of an act of Congress. Even though modern scholars consider the ruling to be broad, it was actually an attempt to reduce the hostility between Jefferson and the judiciary. Marshall tacitly accepted the repeal of the Judiciary Act of 1801 but sought to create a check on the new combined power of the presidency and the Congress - which had been created by the emergence of political parties - by holding that the courts could invalidate acts of Congress.

The next case, *Stuart v. Laird* (1803), involved a direct challenge to the repeal of the Judiciary Act of 1801, but the Court, in a decision by Justice Paterson (Marshall had sat on the case on circuit and did not participate in the appeal), again skimmed over the question of the constitutionality of the repeal of the 1801 act. Paterson found that the issue was whether Congress had the power to transfer a case from one court (established under the 1801 act) to another (established by the repeal of the 1801 act) and ruled that Congress clearly did. Ackerman notes that history has long forgotten *Stuart* but suggests that *Stuart* is more important historically than *Marbury* is, because it was clearly an effort by the Federalist judiciary to prevent a constitutional crisis.

#### Policy by Impeachment

Although *Marbury* and *Stuart* were attempts by the Court to avoid a conflict between the Federalists and the Republicans, Jefferson was not satisfied. His main target was Marshall, and *Marbury* only exacerbated Jefferson's hostility. But the President knew that he had to start with a judge on a lower level. As a test case, Jefferson's allies in Congress brought impeach-

ment charges against District Judge John Pickering. Pickering was incompetent, habitually drunk, and arguably insane, and the House quickly voted to impeach him. There was some debate in the Senate over whether incompetence, drunkenness, or insanity constituted "high crimes and misdemeanors," but Pickering had few defenders and was convicted.

According to Ackerman, "within an hour" of the removal of Pickering, Jefferson and his congressional allies voted along party lines to impeach Justice Samuel Chase. Chase, who was perhaps the most partisan of the Federalist judges, not only had advocated a "judicial strike" against being sent back to circuit riding but also routinely engaged in partisan harangues in open court. Again, the question was what constituted "high crimes and misdemeanors," and whether it included odious political commentary in a grand jury charge. This time, even some Republican senators balked, and decided that political speech - even when grossly inappropriate - was not a crime. Chase was narrowly acquitted. Jefferson and his allies weren't happy and introduced a constitutional amendment to eliminate the requirement of "high crimes and misdemeanors" for impeachment. But the Chase affair had caused the Republicans to reconsider the wisdom of impeachment, and there was little support for the idea of amending the Constitution. The idea faded away when other matters - particularly the spreading war in Europe and Aaron Burr's shenanigans - took center stage.

The Chase trial was the final skirmish in the partisan war between the Federalists and the Republicans. Had the framers considered the possibility of political parties and incorporated them into their electoral system, the crisis might not have been so severe. But the framers had not done so, and their failure to do so caused the system they had created to become convoluted, to heighten rather than diminish the conflict, and to lead nearly to the collapse of the whole experiment in democracy.

**REVIEWS** continued on page 52

Despite a few flaws — confusing chronology, minimizing some important matters (Hamilton's impact on Jefferson's election), and spending far too much time on trivial issues (an entire chapter devoted to the disputed Georgia ballot) — *The Failure of the Founders* reminds us of this important episode in our history. His both a cautionary tale of out-of-control partisanship and a reminder of the humanity and fallibility of our Founders. TFL

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***Institutions and the Path to the Modern Economy: Lessons from Medieval Trade***

By Avner Greif

Cambridge University Press, New York, NY, 2006. 503 pages, \$34.99.

REVIEWED BY CHRISTOPHER FAILLE

Suppose two people are under interrogation in separate rooms at police headquarters, each charged with conspiracy to commit a crime. If each refuses to talk, the evidence will be inadequate for a conviction, but the authorities will be able to put each of them away for a year on a lesser charge. If both confess, each will receive an eight-year sentence for the main crime. But if one talks and the other remains silent, the authorities will reward the snitch and punish the holdout — freedom in the first case, 15 years in prison in the other.

The above scenario is the classic "prisoner's dilemma," in which the rational self-interested thing to do is to snitch, because it forecloses the worst result (15 years in prison) and makes possible the best result (freedom). The point of the example is that, by acting rationally, both parties create a situation that is worse (an eight-year sentence) than it would be if each had acted irrationally and remained silent (a one-year sentence). Only if the prisoners had been able to cooperate (and trust each other!) would remaining silent have been rational.

Opponents of free-market economics often invoke the prisoner's dilemma (PD) as an example of how rational self-interested and uncoordinated behavior has negative consequences. Indeed, in the movie "A Beautiful Mind," game theorist John Nash is portrayed as having a moment of blinding insight in the course of a bull session with his friends in a bar, causing him to shout, "Adam Smith was wrong!" Nash describes a version of the above story that one might call the "bachelor's dilemma," in which competitive self-interested behavior would end in the disaster of each lounge lizard's going home alone for the night, whereas cooperation might get them all female companionship. That's simply what happens when Hollywood tries to get intellectual.

In generalizing the PD, gametheorists have developed variants in which the dilemma isn't a one-time situation — in which the same two players (called a "coalition") deal with each other and with adverse anti-coalition realities on a regular basis. A particular coalition member can either "defect" from the coalition (snitch to the cops, for example) or "cooperate" (stay silent in the presence of hostile elements, for example). In an "iterated" prisoner's dilemma (IPD), the coalition members are allowed to remember how their partners acted in the previous rounds.

One strategy that any partner might well adopt in an IPD is called, simply, "tit for tat." It means: "I'll cooperate in the first round as a default option and will cooperate in any round thereafter in which I know that my partner has done likewise in the most recent round. I'll defect if my partner defected in the most recent round." In this situation, one possible result is an optimizing equilibrium, in which both parties cooperate round after round, because the results are good and each knows that the other is cooperating. If you believe that this is a model for real-world situations, then you might shout back at the fictionalized Nash, "No, Adam Smith was right after all!"

Avner Greif, a professor and senior fellow at Stanford University's Institute

for International Studies, employs game theory as part of a new model of institutional economic history, and he applies it to the study of Europe and the Mediterranean basin from roughly A.D. 1050 to 1350. In Greif's model, institutions are the engines of history and are socially irreducible wholes. In other words, this book is on one level a contribution to the everlasting reductionism-versus-holism debate. For Greif, an institution is a set of rules, beliefs, and norms shared by people in a specific time and place.

But Greif doesn't want to treat institutions as if they are lowered onto the stage of history from above, as in Greek stagecraft. He seeks to explain how they come about — and this is precisely why he evokes game theory. Game theory is his effort to explain institutions *without* reducing them to anything other than themselves.

Notice that, although tit-for-tat as a game strategy is retaliatory, it is also forgiving. A player employing this strategy cares only about his partner's action (cooperation or defection) in the most recent round and not about the round before that. Bygones are bygones.

With that in mind, let's say something about England in 1241, the year a Flemish merchant accused an English trader of not repaying a loan. A mob of English merchants enraged by the accusation attacked the lodgings where their Flemish counterparts had congregated. According to a contemporary account, the mob dragged out the lender who had made the accusation along with five other men "whom they foully beat and wounded and then set in the stocks. All the other Flemings they beat," and looted their property.

In Greif's model, we can see the English Crown and its Flemish merchant invitees as prisoners playing the IPD game. Cooperation in this context means that the Crown will provide security, and the Flemish merchants will do a profitable business that is of value to the realm. But the English mob's attack on the Flemish merchants may be viewed as the Crown's defection. In the next round, the other prisoner defected — Flemish merchants with-