The Contemporary Anti-Federalist:

Contextualizing Snowden's Allegations into the Intricate Framework of American Governance

A Thesis

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Honors Bachelor of Arts

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In-Text Citation Abbreviations

AF: Herbert Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981).[1]

CL: Thomas Gordon and John Trenchard. "Cato's Letters," 1723-1720. http://classicliberal.tripod.com/cato.

Coke: Edward Corwin, "The 'Higher Law' Background of American Constitutional Law." *Harvard Law Review* 42, no. 3 (January 1929): 365-409.

Fed: Alexander Hamilton, John Jay, James Madison, George Wescott Carey, and James McClellan, eds. *The Federalist*. Gideon ed. (Indianapolis: Liberty Fund, 2001).

ST: John Locke, *Second Treatise of Government* (Indianapolis: Hackett Publishing Company, 1980).

[1] Though the name "*AF*," and the title *What the Anti-Federalists Were For*, lends to the obvious interpretation that the work's primary concern is to articulate the Anti-Federalist political ideology, Story's work also offers some incredible insights into the Federalists' theoretical views. Thus, please note that even if a quote or footnote is attributed to "*AF*," there is a chance that it is being used to substantiate either a Federalist or Anti-Federalist position.

Acknowledgments

When I began this laborious process last Fall, my sole intention for writing a thesis was to fulfill a certain egotistical milestone of receiving Honors to serve as the icing on what I considered the perfect law school application. In this spirit, my original topic was as contrived as its prescribed end, thereby captivating me about as much as any other paper I'd written throughout my college career. Yet last winter, I took two classes that completely changed my conception of life, inspiring me to take on a project that I was interested in rather than focusing solely on the idealized end of receiving Honors.

Though this shift in perspective has manifested itself in many different forms throughout my college career, my most significant changes have stemmed from University of Michigan Professors Bob Pachella and Arlene Saxonhouse. Bob, thank you for opening my eyes to the world, challenging my unsubstantiated views of life, and serving as my mentor over the past year. Arlene, your class on the variances between the Federalists and Anti-Federalists truly sparked my interest in political theory, and can be seen as the inspiration for this work. In addition, I will be forever indebted to you for all of your help throughout this year as my advisor, and particularly for standing by me and believing in me first semester when my topic was about as concrete as my ability to differentiate between *people's* and *peoples'* (amongst many other things).

Along with Arlene and Bob, I would also like to thank Mika LaVaque-Manty. Mika, though I doubt you remember the "Zak" from 4 years ago, your Political Science 101 class was the first time I'd ever studied the works of Hobbes, Locke and Rousseau. While my own naivety prevented any true comprehension, your class undoubtedly led me down the dangerous path

towards qualitative political theory. Throughout this year you've matched my sarcasm, embodied the perfect cheerleader, and have had a profound impact on my own developing ideas.

Additional thanks to Paul Pillar (28-year veteran of the CIA, Georgetown University, Brookings Institute) and Benjamin Wittes (Brookings Institute) for taking the time to speak with me about the NSA, and for helping me properly contextualize Snowden's allegations from a governmental perspective. I would also like to thank the Gerstein family for their generous donation to the Honors Political Science Program, which allowed me to purchase books that had an immense impact on this particular work.

Last — but most certainly not least — I would like to thank my family for their relentless and everlasting support, the departments of Philosophy and Political Science at the University of Michigan for allowing me to develop and cultivate my interest in political theory, Eaghan Davis for his grammatical prowess, and my friends for dealing with my thesis-related mood swings.

In describing the writing process, George Orwell candidly remarked that, "Writing a book is a horrible, exhausting struggle, like a long bout of some painful illness. One would never undertake such a thing if one were not driven on by some demon whom one can neither resist nor understand." When I put my own ego aside and actually pursued a topic out of genuine interest, I think I finally began to understand the import of his words. Writing is exhausting, but when you find a topic that keeps you awake at night purely out of excitement, you begin to understand how incredible it truly is. Above all else, I learned that in order to write something good, pure, and real, one must have an insatiable curiosity about the subject matter. Thus, in this thesis, I followed the Federalist view and made my "interest coincide with my duty," and that has made all the difference. Thank you again to everyone who made this incredible experience possible. Any mistakes in this project are my own.

Preface

The first brush stroke on the canvas of one of the most polarizing political controversies in recent memory was applied on June 5, 2013, under the guise of a newspaper article printed by Britain's *Guardian*. Using text from a previously classified governmental order from the relatively unknown Foreign Intelligence Surveillance Court (FISC), the article alluded to the existence of intelligence programs that secretly condoned the warrantless collection of American citizen's phone records. Despite touching on the inherent legality of the order under the "business records" provision of the Patriot Act,[2] the article insinuated that the disclosure was merely the beginning of a charge to reopen "debates in the US over the proper extent of the government's domestic spying powers."[3]

Without missing a beat, the *Guardian* followed up the story the next day with yet another leaked document that extended the allegations of the National Security Agencies' (NSA) spying to encompass internet providers like Apple, Facebook, and Google.[4] After only a few days of coverage, the *Guardian's* stories evoked an international media frenzy that left Americans questioning how a government agency could possibly justify such gross infringements against the civil liberties of its own citizens. In an exclusive interview with the *Guardian* on June 9, whistleblower Edward Snowden articulated that his ultimate motivation was to provide the public with access to the information he had encountered through his dealings as an NSA

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[2] *The Patriot Act. 50 USC § 1861.*
[3] Glenn Greenwald, "NSA Collecting Phone Records of Millions of Verizon Customers Daily." *The Guardian*, June 5, 2013. http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order.
[4] Glenn Greenwald, and Ewen MacAskill, "NSA Prism Program Taps in to User Data of Apple, Google and Others," June 6, 2013. http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data.

contractor, as a means to ensure that everyone could adequately understand and assess these governmental programs.

Upon first learning about Edward Snowden's actions, I couldn't help but laud what the young security analyst was attempting to accomplish. In what seemed like the quintessential David and Goliath parable, Snowden challenged one of the world's preeminent powers, and bolstered his credibility by substantiating his worrisome claims with a horde of classified government documents. Prior to the leaks I had a very rudimentary understanding of the NSA, inevitably leaving my own opinions unguarded from the bias associated with the media's one-sided reporting approach. This incomplete understanding marred my perception, and led me to view Snowden as a rebellious American hero, who — much like the men who drafted the Declaration of Independence — risked his life and honor to ensure that the American people could be acutely aware of the US government's surveillance activities.

As a consequence of my early views, I originally intended to advance a theoretical argument that supported the merits of Snowden's actions. Though I full-heartedly believed in my preliminary position, I started seeing the situation from a different lens as I began to pore over the works of John Locke and the other political theorists whose ideas inspired our Constitution. Whereas my initial postulations mirrored the momentary shock of the profound leaks, the more I began to understand our government in terms of its underlying necessity, the more I began to understand the NSA's programs and their specific purposes. As I continued to interact with the theoretical underpinnings of the Constitution, I refined my inquiry and reversed my original sentiments towards the NSA's programs. In this spirit, by mirroring this argument to my own personal experience, my ultimate aim is to provide a logical and thought provoking defense of the NSA's actions as a necessary consequence of the current national security landscape.

Introduction

Suspicion is a virtue as long as its object is the public good, and as long as it stays within proper bounds…Guard with jealous attention the public liberty. Suspect every one who approaches that jewel.

Patrick Henry

It seems difficult to deny that Edward Snowden's leaks have profoundly shaped the world's perception of the NSA. In the course of providing international media outlets with access to more than a million and a half classified government documents that verified the existence of intelligence programs that secretly collected American citizen's private data, Snowden has ultimately succeeded in igniting numerous debates in Congress, amongst the public, and between the US government and its allies.[5] Altogether, these leaks allege that the NSA's data collection programs are incompatible with the privacy rights that underlie the US Constitution, charging that the agency's domestic collection methods violate particular Fourth Amendment rights through precedent stemming from the Foreign Intelligence Surveillance Act of 1978 (FISA). Though it now appears almost inevitable that the leaks will result in significant legislative changes focused on increasing the NSA's transparency, this paper will argue that Snowden's allegations are ultimately inconsequential because they reflect a shortsighted over-adherence to the protection of individual liberties that is eerily reminiscent of the Anti-Federalist ideology that was invalidated with the ratification of our current Constitution.

Before Snowden's revelations surfaced, the clandestine nature of the NSA's operations cloaked the agency under a veil of secrecy that left the public largely unaware of its role in our government's operations. Though this collective ignorance was imperative for the NSA to

[5] John Miller, "NSA Speaks Out on Snowden Spying." *60 Minutes*, December 15, 2013. http://www.cbsnews.com/news/nsa-speaks-out-on-snowden-spying/.

adequately achieve its articulated goals of collecting foreign intelligence, Snowden's charges allowed the entire nation to scrutinize the agency's activities without properly contextualizing the necessity behind the programs in question. This incomplete portrayal inevitably roused the public's fear that the US government was overstepping its constitutionally prescribed bounds, consequently imbuing a false sense of worry across the nation.

Though the basic tenants of both *law* and *government* are considered common knowledge in the United States, their mutual presence in our daily lives has drastically morphed how we perceive their existence. Given this reality, instead of basing our judgments on "the spirit of the laws," we tend to take the "indispensable necessity" behind their existence for granted, and focus our attention solely on their perceived side effects.[6] In particular, while the cursory view depicted by the present situation illuminates the problems associated with the government's ability to provide for the nation's general welfare at the expense of encroaching on certain individual rights, the public's ardent focus on the effects of the NSA's programs has fallaciously led us to forget *why* they actually exist in the first place.[7]

Through this heightened discourse between the dichotomous notions of freedom and safety, Snowden's allegations shed light on a philosophical question that was heavily debated by the Federalists and Anti-Federalists during the 1787 Constitutional Convention: namely, is a strong central government conducive to protecting individual liberty? Though the Federalists'

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[6] Matthew Bergman, "Montesquieu's Theory of Government and the Framing of the American Constitution." *Pepperdine Law Review* 18, no. 1 (1990): 2.

[7] In an extremely unscientific survey, I asked upwards of 20 University of Michigan Political Science students about their opinions on both Snowden and the NSA's breach of the Fourth Amendment. Of the people questioned, not a single person brought up the contextualized understanding of the Bill of Rights as an Anti-Federalist concession or the inherently complex understanding associated with the Constitution's "Necessary and Proper Clause." As such, I decided that the only way people would actually be able to make an objective valuation would be if they were supplied with all the requisite historical and theoretical considerations that make this issue so interesting.

view of an *energetic* federal government ultimately prevailed, the positive public reception to Snowden implies that the centerpiece of the Anti-Federalist position still subsists in the United States. By opposing the NSA's programs on the grounds that they violate distinct Fourth Amendment rights, Snowden's supporters are unknowingly endorsing a passive view of government that reflects the same fears of centralized power that were embodied in the Anti-Federalists' preference for the Articles of Confederation. With this distinction in mind, instead of analyzing the current legal framework to adjudicate whether the NSA's programs are in line with the Constitution, this argument will position Snowden as "the Contemporary Anti-Federalist" by tracing the ideological progression of American political thought.

If we operate under the premise that political associations are expressed "in different forms"[8] and these forms vary depending on the people, circumstance, and history of a given place, it seems practical to begin by following S.E. Morison's view that the derivation of "these [political] ideas" in America,

> Can be traced back to the mother country. In England these ideas [of politics] persisted through the centuries despite a certain twisting and thwarting at the hands of the Tudor monarchs and Whig aristocrats; In America they found opportunity for free development…It was an unconscious mission of the Untied States to make explicit what had long been implicit in the British Constitution, and to prove the value of principles that had largely been forgotten in the England of George III.[9]

Thus, while the United States as a nation was officially born in July of 1776, it is virtually impossible to asses our own laws without examining their pre-colonial roots in England. Heeding this understanding, the first chapter following this introduction will trace the evolution of British political thought from the Norman invasion in 1066, to the Glorious Revolution in 1688. By

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[8] Aristotle, "Politics." In *Classic of Political & Moral Philosophy*. Second ed. (New York: Oxford University Press, 2002), 213.
[9] Ernst Cassier, *An Essay on Man: An Introduction to a Philosophy of Human Culture* (New Haven, CT: Yale University Press, 1992).

pairing this historical portrayal with overviews of the political philosophies of John Locke, and John Trenchard and Thomas Gordon's *Cato*, this section will provide the theoretical background for the American conception of government.

After thoroughly differentiating the British understanding of political power from the theoretical views of human nature and individual liberty that provided the infrastructure for our Founding Fathers' understanding of government, the second chapter will use the arguments articulated in our own founding documents to show how these theoretical views were encapsulated within the post-revolutionary American Constitution. In addition, the section will highlight the differences between the Anti-Federalist and Federalist political philosophies, as a primary means to articulate the rationale behind the necessity of the government's undefined powers to counteract the unknown nature of the means necessary to complete its charge.

With this refined constitutional understanding in place, the third and concluding chapter will return to the present situation to re-assess Snowden's accusations against the differences between the Federalist and Anti-Federalist positions.

I. Constitutional Foundations

Nothing appears more surprising to those who consider affairs with a philosophical eye, than the ease with which the many are governed by the few.

David Hume

Evolution of British Political Thought (1066-1689)

Despite being specifically rebuked in America's Declaration of Independence, King George III's power during the American Revolution had been vastly reduced from the Crown's original peak. Unlike his shared sovereignty with Parliament in the late 18th century, the King's power at the onset of feudal rule following the Norman invasion of 1066 was attributed solely to a divine right to rule from God. Seen as the *natural* protector of the land and its inhabitants, many theorists operate under the normatively described Lockean conception that the British Monarch's rise to power can be fashioned as a consequence of the prevailing paternalistically dominated family structure (*ST,* §78). Much like the father's assumed dominance in the sphere of the family, the King was seen as divinely superior to other men, thereby allowing him to exert his will over the masses.[10]

While the King's grant of power was virtually uncontested during this period of British history, the introduction of English common law — through Henry II's legal reforms in 1158 — added a greater emphasis on judicial proceedings and criminal enforcement, correspondingly binding the King to carefully delineated restraints meant to protect certain moral rights of

[10] The following review of British history relies heavily on information provided by the British Monarchy's historical timeline, as well as the recently re-done overview of British history done by the BBC. These two sources are cited respectively as follows: 1) "History of the Monarch," The Official Website of the British Monarchy, accessed February 27, 2014, https://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheStuarts/CharlesI.aspx. 2) "Common Law - Henry II and the Birth of a State," BBC, accessed February 26, 2014, http://www.bbc.co.uk/history/british/middle_ages/henryii_law_01.shtml.

individuals. Albeit still a divine ruler, the advent of these laws forced the King to at least consider the people's rights according to a defined set of objective standards.

As the continuing crusades brought varying degrees of instability to English society, tensions began to rise in the early 13th century between King John II and Britain's upper class barons. Whereas the previous legal reforms gave common men the ability to withstand the encroachments of the aristocratic landowners, the barons were beginning to feel the effects of the King's virtually boundless grant of power. In 1215, the barons' protests ceded to rebellion, placing King John and the British Crown at a great impasse. While the masses and barons both understood and even believed that the King had a certain *right* to be the ruler, they also believed that there were certain rights, which no King could appropriately infringe upon. As described first by Aquinas as the "part of the eternal law which man's nature reveals," these rights became enshrined in the Magna Carta, which was enacted by King John to end the baron-led rebellion.[11] Though the Magna Carta did not place significant limits on the Monarch's powers, it did create a basic formulation of man's rights, meant to protect the barons from the ill effects of the King's arbitrarily imposed laws.

Perhaps as its most substantial effect, the Magna Carta bound British law to some semblance of a written *constitution* that defined the King's powers and guaranteed citizens rights. As the cornerstone of Britain's legal code, it must be understood that "in respect of the great weightiness and weighty greatness of the matter contained in it," the Magna Carta is "the fountain of all the fundamental laws" in the modern English State.[12] Unlike the American government's reliance on the Constitution, the "unwritten" nature of Britain's pre-18th century

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[11] Roscoe Pound, "Common Law and Legislation." *Harvard Law Review* 21, no. 6 (April 1908): 390.

[12] Edward Corwin, "The 'Higher Law' Background of American Constitutional Law." *Harvard Law Review* 42, no. 3 (January 1929), 378.

version of constitutional laws "consisted of fundamental principles of free government drawn from a complex maze of parliamentary statutes, common law judicial proceedings, and ancient political customs or conventions."[13] In addition, the Magna Carta also necessitated the introduction of Britain's Parliament as a means to help the King attain the consent of his subjects before levying taxes.

As Parliament's powers continued to expand through the Tudor era, the institution began to encompass more responsibilities besides merely approving taxation. In particular, by Queen Elizabeth's reign in the late 16th century, Parliament had the ability to pass laws (with the assent of the Crown), rule in judicial proceedings, and serve as the link between the people of England and the Monarchy. By this time, many had begun to understand Parliament's influence as the beginning of a major power shift in England's traditionally monarch-centered philosophy. As described by Sir Thomas Smith during Elizabeth's reign,

> The most high and absolute power of the realme of Englande, consisteth in the Parliament…That which is doone by this consent is called firme, stable, and sanctum, and is taken for lawe. The Parliament abrogateth olde lawes, maketh newe…and hath the power of the whole realme, both the head and the body. For everie English-man is entended to bee there present, either in person or by procuration and attornies.[14]

Despite the nation's growing financial problems that strapped the crown following Elizabeth's death in 1603, her successor, James I, attempted to re-establish monarchial supremacy by restoring Parliament to its original taxation-based responsibilities. Though his actions were legal because of the King's ultimate authority in any matter, certain members of Parliament began arguing that even though the King held absolute power, he was still subject to

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[13] George Wescott Carey and James McClellan, "Editor's Introduction" in *The Federalist*, The Gideon Edition (Indianapolis: Liberty Fund, 2001), xvii.
[14] Thomas Smith, *De Republica Anglorum* (Alston ed. i906) bk. ii. *See* Corwin's "Higher Law" supra 7.

the "supremacy of common law."[15] Amongst these activists, Edward Coke led the charge to curb the King's powers, operating under the belief that the "King hath no prerogative but the law of the land."[16] Under this description, Coke attested that since the British common law "Corrects, Allows, and Disallows, both Statute Law, and Custom," the King was bound to the basic precepts of this law, just like everyone else (*Coke*, 374).

In his articulation of the King's subservience to the prevailing common law, Coke appealed to the *Law of Nature*, which was given to man by God, and was considered the "moral law, "which governed before the law was written." Using this view of Natural Law, Coke cited four premises that established the supremacy of these fundamental laws over British laws established by both the King and Parliament (*Coke*, 369):

1. That ligeance or obedience of the subject to the Sovereign is due by the law of nature.[17]
2. That this law of nature is part of the laws of England.
3. That the law of nature was be-fore any judicial or municipal law in the world.
4. That the law of nature is immutable, and cannot be changed.

Besides critiquing the supremacy of the King's powers, Coke also sought to implore politicians to realize that like the King, Parliament's actions were also subject to this overarching moral law. To this end, in the famous 1610 ruling in *Dr. Bonham's Case*, Coke ruled "the common law will controul acts of parliament, and sometimes adjudge them to be utterly void" (*Coke*, 368). By deeming acts of Parliament subject to "common right and reason," Coke's view

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[15] Douglass North and Barry Weingast, "Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England," *The Journal of Economic History,* Vol. 49, No. 4 (Dec., 1989), pp. 814.

[16] The following review of Edward Coke's writings relies heavily on the portrait of Coke in: Edward Corwin, "The 'Higher Law' Background of American Constitutional Law." *Harvard Law Review* 42, no. 3 (January 1929): 365-409. Hereafter, all of Coke's quotes that can be attributed to Corwin's review will be cited in text as *Coke.*

[17] Refers to the divine right to rule as well as the alternate modern view that appeals to the tenants of social contract theory.

simultaneously placed limits on the nature and content of the laws passed by the British government.[18]

While Coke's view was preceded by the 14th century view that a governing body, even with the King's grant of power, "could not keep them [certain statutes] in case those statutes were contrary to the laws and customs of the realm, which they were sworn to keep," his arguments were extremely timely given the vast changes between the Tudor reign prior to 1603, and the Stuart tenure that followed.[19] Though Elizabeth's successor, James I, still managed to maintain a certain semblance of stability during his reign, his 1625 death left his successor, Charles I, on the brink of war with Spain. From these contentious origins, Charles' dismissive view of Parliament only worsened his plight, eventually resulting in a Parliament-led rebellion as retribution for the Crown's gross abuses of power.

Whereas Charles firmly believed that, "the liberty and freedom [of the people] consists in having of Government, those laws by which their life and their goods may be most their own…it is not for having share in Government…[for] that is nothing pertaining to them," supporters of Parliament advocated against notions of the King's absolute sovereignty and argued that popular representation was necessary for the protection of civil liberties.[20] In consequence of these vastly differing interpretations of power, the two sides' arguments were completely incompatible, and climactically ended with Charles' execution in 1649. As one would assume, Charles' fall to Oliver Cromwell and Parliament caused a seismic ideological shift in British political thought. While the Monarchy had once stood as this larger than life beacon of opulence ordained by the

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[18] Pound, "Common Law and Legislation," 391.
[19] Corwin, "The 'Higher Law' Background of American Constitutional Law." *372.*
[20] "History of the Monarch," The Official Website of the British Monarchy, accessed February 27, 2014, https://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheStuarts/CharlesI.aspx.

divine power of God himself, its fall mirrored the historical magnificence of its origins, and suddenly allowed men to realize their ability to withstand the arbitrary will of a subjective ruler. Stemming from this initial cause, the refinement of this Cambrian realization eventually translated into massive reforms to Britain's dated governance structure.

Though the Monarchy was reinstated after Cromwell's failed 10-year experiment of unitary Parliamentary rule, the two post-1660 Stuart Kings still attempted to use their Royal Prerogative to sidestep Parliament and rule as they pleased. As conditions continued to worsen throughout the 1680s, the balance between the two political bodies became increasingly strained. In a final attempt to re-establish the Monarch's supremacy and lessen the checks on his own powers, James II re-chartered England's local governments to oust his rival, Whig party. The King's re-chartering transformed "what had been a formidable, aggressive and highly organized opposition party into an impotent collection of a few individuals,"[21] and resulted in only one Whig occupying the 104 available seats in Parliament.[22]

Even with the crown's opposition virtually destroyed, James was eventually removed by his own supporters in 1688 because of his changing religious affiliations. Fearing that his newborn son would eventually become King and attempt to rule England as a Catholic State, Whigs and Tories came together and extended the crown to William and Mary, on the condition that the two would agree to sign Parliament's revised Declaration of Rights to reflect the ideological changes of the revolution. Though many expected war, James surprisingly abdicated the throne, and the Glorious Revolution symbolized a peaceful transfer of power between sovereigns.

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[21] Ibid.
[22] North and Weingast, "Constitutions and Commitment," pp. 815.

While the Declaration of Rights was merely a compact that carried no enforceable legal authority, William and Mary signed the Bill of Rights into law a year later, permanently enacting the import of the Civil War's ideological message. In particular, these new laws "limited the Sovereign's power, reaffirmed Parliament's claim to control taxation and legislation, and provided guarantees against the abuses of power which James II and the other Stuart Kings had committed."[23] Most importantly, the primary sovereign in England became the "King in Parliament," which consisted of a refined role for Parliament as a direct check on the King.[24] Taken as a whole, the underlying intentions of the reforms were twofold: to strengthen Parliament so it could properly legislate without having to rely solely on the King's opinion, while also further fortifying the defenses against arbitrary encroachments on the rights of individuals. Following the Glorious Revolution and its far-reaching reforms, the King in Parliament became the absolute sovereign of England, laying the foundations for Britain's modern constitutional monarchy. In this system, though the Monarch still held power, the reforms transformed the King into "a sovereign who reigns but does not rule," implying the heightened position of Parliament.[25]

Locke and the Rise of Civil Government

In response to the ideological changes beginning with Charles' death in 1649, new political treatises began to surface, articulating strong notions of individual liberty, and vehemently arguing against arbitrary rule. Among these writers was John Locke, whose S*econd*

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[23] "History of the Monarch," The Official Website of the British Monarchy, https://www.royal.gov.uk/HistoryoftheMonarchy/KingsandQueensoftheUnitedKingdom/TheStuarts/CharlesI.aspx.
[24] North and Weingast, "Constitutions and Commitment," pp. 816.
[25] Carey and McClellan, editor's introduction, xxxix.

Treatise of Government refined Coke's insistence on man's natural rights, and stressed the inherent link between freedom and revolution.[26]

From the first pages of his *Second Treatise*, Locke makes his reader acutely aware that the work's primary purpose is to justify and "establish the throne [of]…King William," lending insights into Locke's personal lauding of Parliament's restraints on the British Monarchy (*ST,* Preface). In the wake of this shift in power, Locke's treatise focused its attention on man's relationship to a governing structure as an ultimate means to describe his own theory of politics and the social contract.

Using his theological belief in God, Locke's theory begins with the basic premise that since God gave the world to Adam, and because it is impossible to trace a clear lineage stemming from Adam to a more current heir who would "have the right of inheritance," it becomes impossible to properly justify the legitimacy of divine rule (*ST,* §1). Without a clear organization of a divine rule that stems directly from the "workmanship of [our] one omnipotent and infinitely wise maker" (*ST,* §6), the state of nature in the absence of organized government is by definition a "state also of equality, wherein all the power and jurisdiction is reciprocal" (*ST,* §4).

In this state of nature void of government, Locke argued that God endowed men — unlike the animals who also inhabit the world — with the faculty of reason, which allowed them to learn and understand how to ensure and provide for their own preservation. In particular, in the absence of codified laws, reason allows us to understand and interpret the Law of Nature, which tells us, "that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions" (*ST,* §6). Essentially as a consequence of our collective equality as

[26] Corwin, "The 'Higher Law' Background of American Constitutional Law." *393.*

a function of our similar origins, Locke argues that hierarchies based on trivial notions of mortal supremacy were incompatible with the natural liberty of man, further implying that all men were naturally "free from any superior power on earth" (*ST,* §22).

Since the lack of governmental rule allowed men to "order their actions, and dispose of their possessions and persons…within the bounds of the Law of Nature," we must now turn our attention to the implications stemming from this law (*ST,* §4). As the products and therefore property[27] of the God who created everyone and everything, each human inhabitant is simultaneously "bound to preserve himself…[and] when his own preservation comes not in competition, ought he, as much as he can, preserve the rest of mankind" (*ST,* §6). On the contrary, by "declaring by word or action…a sedate settled design upon another man's life," the transgressor is put "in a state of war" with the injured party (*ST,* §16). Since the Law of Nature can be understood as a direct corollary of the rational thought given to men by God as the source for their own right to self preservation, the violation by the transgressor can correspondingly be viewed as a direct contradiction to the inherent and prevailing "common-law of reason" derived from God (*ST,* §16).

As a basis of this *unnatural* offense, since the transgressor sought to use the victim as a means to further his own apparent ends, Locke likens this instance to a condition of slavery because the victim's God-given right to freedom in the state of nature is impeded. From this position and the previously delineated view that reason allows us to do what is necessary to preserve our own lives, the Law of Nature grants the victim the right to seek reparations from the transgressor. In such a situation, since the "safety of the innocent is to be preferred" and thereby carries with it a more heavily weighted consideration than the safety of the guilty, the victim is

[27] This refers to Locke's argument for the right for the unlimited accumulation of private property, which will be properly expanded upon as the argument progresses.

justified in both judging the extent of the crime, and executing the law of nature with respect to his own judgments (*ST,* §17). Through this right, one can fully understand Locke's justification for man's two distinct powers in the state of nature: to live by the Law of Nature as a means of self-preservation, and to have the power to justly punish anyone who attempts to usurp this law by means of a criminal encroachment.

While the simultaneous right of the victimized individual to *judge* and to *execute* can be understood as necessary components of justice in the state of nature, this dual right also serves as one of the most prominent causes of instability. By giving a single man this twofold task, the punishment is inevitably subject to the individual's personal bias. Since it is clear that the passionate biases associated with any situation have the tendency to outweigh objective impartiality in judging, placing these rights in the hands of the same man has the potential to create further instability. Even with these weighty objections, without an organized government, this form of crime and punishment is the only practical portrayal of a system of justice that can both punish transgressors, and serve as a threat to hinder future encroachments.

Another inherent problem evident in this natural state can be fashioned as a function of the precarious nature of the accumulation of property.[28] Namely, if we all have the same right to natural reason, "which tells us, that men, once being born, have a right to their preservation, and consequently to…such…things as nature affords for their substance" (*ST,* § 25), in addition to also understanding that God gave "the world to men in common" to allow everyone "to make use of it to the best advantage of life, and convenience," how are we supposed to fairly decide who receives the "things" in nature that help us preserve our lives (*ST,* § 26)? Since our own equality

[28] Before I begin expanding on the following discussion regarding Locke's argument for the accumulation of private property, I'd like to thank Peter Railton and his Moral and Political Philosophy (442) class Fall 2013 at the University of Michigan. His insights, lectures and notes deserve an immense amount of credit for their influence on this section.

as individuals translates to an equal claim to the world, the answer to this question resides in determining how the "freedom to acquire" can be remedied with the corresponding notion that consumption necessitates the exclusion of others from that which they too claim an equal right.

Rather than invoking the impractical principle of securing universal consent before procuring a good from the natural world, Locke's view of property is justified through the normative notion that *ought implies can*. Since consumption is a necessary condition of survival, and each man is similarly "bound to preserve himself, and not quit his station willfully," the argument follows that we all have an equal right to do so. Thus, given that "every man has a property in his own person," Locke circumvents this problem by positing that through "mixing one's labor" (where labor is a function of each man, and therefore also a pure reflection of each man's ownership over himself) with the substances of nature, man has essentially "joined to it something that is his own, and thereby makes it his property…[and] excludes the common right of other men" (*ST,* § 27).

Consequently, as society continued to expand and money surfaced as a viable medium of exchange, man became able to "fairly possess more land than he himself [could] use the product of" (*ST,* §50). Since the accumulation of goods through the exchange of money does not cause injury as an action in its own right (due to its purpose as a *means*), and because men consented to the "unequal possession of the earth" by tacitly agreeing to the effects of the monetary system by merely taking part in the exchange themselves, Locke justified an unlimited right to accumulate private property in the state of nature (*ST,* §50). Using the same logical framework that granted man the natural right to defend himself from the aggression of others, it follows that this precedent also gave man a natural right to defend his acquired property.

Given the inherent implications drawn from the monetary system, it becomes clear that by inserting one's labor into a portion of the natural world, man also increases the value of the good. In turn, it follows that as men's accumulations began to increase in the wake of the rise of monetary exchange, the risk posed by the encroachment of others became simultaneously more worrisome. In the course of establishing that the natural right to self-ownership and the intuitive right to accumulate property were both evident in the state of nature, the theory lends credence to the manifestation of these ideals as anterior to the emergence of civil society. Thus, ultimately for Locke, "the reason why men enter into society, is the preservation of their property; and the end why they choose and authorize a legislative, is, that there may be laws made, and rules set, as guards and fences to the properties of all the members of society" (*ST,* §222).

In direct contraction to the Hobbesian assertion of man's rational self-interest serving as the impetus behind the necessity that embodies man's mutual conformity to civil society, Locke's theory paints man's nature in a much kinder light. Rather than viewing the majority as being predisposed to these wicked tendencies, Locke's argument implores us to believe instead, that the "corruption, and vitiousness" of the minority who disobeys reason, necessitates the separation from the "very unsafe, [and] very unsecure" state of nature, as a means to ensure collective protection (*ST,* §123).

As a cost of leaving this natural state and consenting to this governmental contract, men were required to relinquish their natural ability "to judge, and punish the breaches of law," simply because "no political society can be, nor subsist, without having in itself the power to preserve the property, and in order to thereunto, punish the offenses of all those of that society" (*ST,* §87). In exchange for these rights from the people, Locke's view states that the government binds itself to preserve each of its citizens' rights to "life, liberty, and property," by providing the

necessary means of safety through its abilities to execute and judge the law of nature.[29] Under this conception of the social contract, though the instituted government gains the power to enforce the Law of Nature within its borders as a means to pursue its ultimate charge, it is simultaneously "not free to do as it pleases" because it is forever bound to "the Law of Nature, [which] stands as an eternal rule to all men, legislators, as well as all others" (*ST,* §135).

Bound by this overarching law and man's equality, Locke redefined the conception of political power to be understood as, "…A *right* of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community, in the execution of such laws, and in the defence of the common-wealth from foreign injury; and all this only for the public good" (*ST*, §3). By constructing his definition to encompass the "public good," Locke invariably strengthened the bond between the individual and the governing body, representing a strong departure from the political ideas of King Charles I less than half a century before. Coupled with consent, and guarded by the overarching duty that necessitates that a government work solely for the common good, Locke's view allowed the connection between man and government to shift away from arbitrary rule, and towards a more self-reflective view.

Since this necessary adherence to the Law of Nature implies that there exists a superior standard of *right* and *wrong* that is separate from the laws imposed by the government, it follows that a government is a fallible structure whose existence relies on the will of those who are subject to its laws. Considering again that all the government's actions are supposed "to be directed to no other end, but the peace, safety, and public good of the people," when the government usurps its contractually delineated functions by exerting "absolute power over the

[29] Harold Laski, *Political Thought in England from Locke to Bentham* (New York: Henry Holt and Company, 1920), 13.

lives, liberties, and estates of the people," Locke counters with the insistence of the natural right to dissolution (*ST,* §131). Though this withdrawal of the public's trust would inherently drive the societies' inhabitants back into the insecurities of life without government depicted in the state of nature, the contractual basis of Locke's civil society allows us to see that since entering the collective was an option, and "no rational creature can be supposed to change his condition with an intention to be worse" (*ST,* §131), men are correspondingly allowed to counteract the sovereign's "force without authority" with their own "opposing force," contingent on the majority belief in the necessity behind governmental change (*ST,* §87).

Essentially, Locke's primary argument debunks the view of a divine right to rule and challenges the nature of the relationship between a citizen and a government. Taken as a whole, his arguments also posed a challenge to Parliament's sovereignty because of his reliance on Natural Law and man's mutual equality. Though his work did not directly change the nature of England's government, his conception of consent spurred a tremendous following and is often considered as a major impetus behind many of the Revolutionary movements between the late 18th and early 19th centuries.

Cato's Letters and the Importance of Liberty

In the same liberalized spirit as Locke, John Trenchard and Thomas Gordon penned a series of letters between 1720-1723, refining the understanding of liberty in a political context as a condemnation of the British government's role in the South Sea Bubble Crisis. Under the pseudonym *Cato* in reference the Roman statesman who opted to kill himself instead of submitting to an unfree life in Caesar's Republic, Trenchard and Gordon's letters were published

in more than 80% of colonial newspapers,[30] and are consistently cited as one of the most influential political treatises of the 18th century.[31] Like the conclusions drawn from Locke's *Second Treatise*, *Cato* argued that the "sole end of men's entering into political societies, was mutual protection and defense," deriving the *just* government purely as a function of man's ceded powers from the state of nature (*CL,* No. 11). By placing a high value on man's natural liberties and ultimately invalidating tyrannical rule on the basis that "whoever pretends to be naturally superior to other men, claims from nature what she never gave to any man" (*CL,* No. 45), *Cato's* political association can best be understood as a means meant to "protect the innocent, and punish the oppressors" (*CL,* No. 11).

Liberty for *Cato* was like property for Locke, and its embodiment almost single-handedly constituted the difference between a *just* civil government and an *unjust* tyranny. Since government was "intended to protect men from the injuries of one another, and not to direct them in their own affairs," *Cato* defined liberty as the power "which every man has over his own actions, and his right to enjoy the fruit of his labour, art and industry, as far as by it he hurts not the society or any members of it" (*CL,* No. 62). By placing individual liberty and autonomy at the centerpiece of their theory on government, Trenchard and Gordon's institution was not put in place to "alter the natural right of men to liberty," but rather to provide "for the security and impartial distribution of that right" (*CL,* No. 60). Though this deviates from Locke's view of the social contract, *Cato* believed that since "the love of liberty is an appetite so strongly implanted in the nature of all living creatures," it surpassed even self-preservation as "the parent of all

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[30] Heather E. Barry, *A Dress Rehearsal for Revolution: John Trenchard and Thomas Gordon's Works in Eighteenth-century British America* (Lanham, Md: University Press of America, 2007), 103.

[31] Rothbard, Murray. "The Growth of Libertarian Thought in Colonial America." In *Conceived in Liberty*, n.d. http://mises.org/content/cil2ch33.asp.

virtues" because it allowed men to "enjoy the means of preserving themselves" according to their own passions and desires as individuals (*CL,* No. 62). Whereas the tyrant can be likened to a master over a population of slaves, a *just* government protects these private rights and refrains from "meddling with the private thoughts and actions of men" (*CL,* No. 62).

As is often the case, this fairly simple understanding becomes inherently complicated by the notion that a government (as a mechanism) does not specifically execute the law. Unlike a machine that is pre-programmed to create the perfect balance between safety and liberty, a government's actions are executed by the men given the reins of its power, who are in turn, ruled by their passions, "which being boundless and insatiable, are always terrible when they are not controlled" (*CL,* No. 33). Moving along these same grounds, *Cato* attributes these tendencies to man's self-interested nature by invoking the simple truism that since "men are never satisfied with their present condition," they constantly seek more by believing that their "greatest pleasures are always to come" (*CL,* No. 40). By incessantly looking forward to the future instead of merely focusing of their own present condition, man's "highest enjoyment is of that which is not," thereby implying that man's own nature seems to provoke him to consistently desire more than life has to offer (*CL,* No. 40).

While of course "men who are advanced to great stations…ought to look upon themselves as creatures of the public," *Cato* argues that this ideal goal is thwarted because men have successfully used "pomp, titles and wealth" as a means to "make the world think that [those] who possess them [are] in superior merit to those that want them" (*CL,* No. 45). Whereas a normative portrayal shows us that a *just* leader makes serving his country his highest personal pleasure, allowing him "to make mankind his mistress" and prompting him to gratify his own desires through his services to the common good (*CL,* No. 40), the descriptive, historical

account, shows that there are "but few instances of men trusted with great power without abusing it" (*CL,* No. 60). Given these complications, *Cato*'s argument follows the theoretical lead of Locke by advocating for the existence of checks on individual power to limit the potential for usurpations.

In the course of ensuring the integral preservation of liberty, *Cato* professed that "the strongest cables are made out of loose hemp and flax" (*CL,* No. 61), invoking the belief that "the people's jealousy tends to preserve liberty" by allowing the individualized interests of the masses to necessitate their own watchful glance on the government's actions (*CL,* No. 33). Since "liberty chastises and shortens power," the jealousies of the people against the government must be counteracted with a mirror power on the part of the government, requiring the magistrate to be jealous for his citizens, instead of being jealous of them (*CL,* No. 33). As such, Cato's solution is relatively simple: "the only secret therefore in forming a free government, is to make the interests of the governors and of the governed the same" (*CL,* No. 33).[32] By viewing government as the ever-possible transgressor waiting in the dark to act against man's natural liberties, *Cato's* arguments effectively depict the problems associated with balancing the government's predisposed role of protection, while also heeding each man's right to live free from the arbitrary rule of another.

The Parliamentary Fountain Power

Though Parliament did not adequately represent all of the diverse interests that characterized the entirety of Britain's population, its revolutionary overthrow of Charles, and its

[32] In this context, *Cato* is implying that the institutional government needs to harness the jealousies of the people charged with executing its powers, and align this cumulative jealousy back towards the people. This description has many corollaries with the Madisonian view from Federalist #51, that a *just* government is a “reflection of human nature” that succeeds by making the individual interests of the politicians coincide with their occupational duty.

continued insistence on a new executive who provided more protection for man's individual liberties, highlights the Whig's more conservative interpretation of natural rights. Whereas Coke's view classified Parliament's position essentially as a legal court that had the ability to "make new law as well as declare the old," the sovereignty of the King in Parliament after 1688 completely changed the justification of the British government's existence. Since the Monarch's divine right to rule had been invalidated with Parliament's acceptance of William and Mary, the new political institution was forced to re-justify its own powers and relationship with the British people. Though this newly articulated view also appealed to a Law of Nature that was "coeval with mankind and dictated by God himself, [and] is of course superior in obligation to any other,"[33] instead of trusting the people to wield the power of the nation, Parliament was viewed as an extension of the people; in place to protect the masses from monarchial tyranny.[34]

As noted by famed English theorist William Blackstone, though all men are granted the natural liberty to "act as one thinks fit, without any restraint or control, unless by the Law of Nature," every man transfers this right to the sovereign upon agreeing to enter into a civil society.[35] Specifically, "when he enters into society, [and] gives up a part of his natural liberty as the price" for "civil liberty," man simultaneously agrees to be "re-strained by human laws as is necessary and expedient for the general advantage of the public." Operating under Hobbes' view of man's inherently self-interested nature, Blackstone argued that "there is and must be in all of them [states] a supreme, irresistible, absolute, uncontrolled authority," which in Britain's post-

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[33] Dennis Nolan, "Sir William Blackstone and the New American Republic: A Study of Intellectual Impact," New *York University Law Review* 51 (November 1976): 742.
[34] Arnold Lutz, "The Articles of Confederation as the Background to the Federal Republic," *Publius: The Journal of Federalism* 20 (Winter 1980): 57.
[35] This brief description of Blackstone is based off of the information and textual evidence found in: Edward Corwin, "The 'Higher Law' Background of American Constitutional Law." *Harvard Law Review* 42, no. 3 (January 1929). The quotes in this paragraph can be traced back to page 406 of Corwin's article, and the block quote can be found on page 407.

1688 case was Parliament. Thus, Parliament's position in Blackstone's view was described as the institution that,

> Hath sovereign and uncontrollable authority in the making, con-firming, enlarging, restraining, abrogating, repealing, reviving, and ex-pounding of laws…this being the place where that absolute, despotic power which must in all governments reside somewhere, is en-trusted by the Constitution of these kingdoms…It can, in short, do everything that is not naturally impossible, and there-fore some have not scrupled to call its power by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth no authority upon earth can undo.

Since Blackstone's description implies that Parliament held complete sovereign control over the interpretation and execution of England's complicated constitutional legal system, it feasibly had the power "to positively enact a thing to be done which is unreasonable," simply because there was nothing to say it couldn't. Given *Cato's* previously articulated view of man's forward-thinking nature, this simultaneously left British subjects under the complete jurisdiction of Parliament, forcibly binding them to follow the subjectivity of the institution's leaders. Heeding this understanding, the next chapter will shift its focus towards colonial America, to describe how the theoretical views of Locke and Cato inspired the colonies to revolt against the arbitrary nature of Britain's Parliamentary rule. In veering away from the "absolute sovereignty" of Parliament, "the Framers split the atom of sovereignty,"[36] and granted the sole power and right of "forming and Establishing a plan thereof [to] the People[37]."

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[36] Randy Holland, "State Constitutions: Purpose and Function," *The Temple Law Review*, Vol. 69, No. 3 (Fall 1996), pp. 992.

[37] Horst Dippel, "The Changing Idea of Popular Sovereignty in Early American Constitutionalism: Breaking Away from European Patterns," Journal of the Early Republic, Vol. 16, No. 1 (Spring, 1996), pp. 26.

II. The American Conception of Government

Europe was created by history. America was created by philosophy.
Margaret Thatcher

The End of British Rule

As was often the case with British imperialism, Britain's primary interest in North America resided in the land's rich commercial value. Heeding this end, in the course of establishing its thirteen colonial holdings in the New World, Britain's mercantile approach focused more on profitability than on the exertion of its political might. Thus, while the King appointed governors and drafted charters for each of his thirteen colonies, these actions were accompanied with the express understanding that the sheer size of the Atlantic Ocean made direct Parliamentary rule impossible. Though the British still maintained an active role facilitating the basic functions of their colonies' governments, the seeds of self-governance quickly spread across colonial America as each colony began to enact its own legislature to regulate their governor's authority. Under this system, while the British government maintained its control through the Crown's appointed governors, the colonial governments were able to pass legislative regulations so long as they did not interfere with any laws passed by Parliament.[38]

In these formative years, the colonies tended to maintain their own distinct identities, making the colonial body as a whole, a collection of people who were united much more by their diversity than their uniformity. Apart from the obvious geographical differences which created a clear divide between the industrial north and agrarian south, the highly localized cultural environment was amplified further by they sheer diversity of people immigrating to America. As the 18th century wore on, these localist tendencies permeated throughout the British colonies and

[38] Lutz, "The Articles of Confederation as the Background to the Federal Republic," 58.

remained virtually unchallenged until the unfolding of the French and Indian War (1754-1763). Notwithstanding the certain hardships and tragedies that stemmed from the conflict, the French and Indian War was pivotal for the American colonies because their collective efforts allowed the intercolonial differences to cede to a common recognition of their circumstantial similarities.[39]

Despite fighting side-by-side with the British throughout the drawn-out engagement against the French, colonial tempers flared when Parliament declared new taxes on the colonies to lessen the war's heavy debt burden on the Crown's purse. Enraged by Parliament's ability to arbitrarily levy these contested taxes "in all cases whatsoever,"[40] colonial America rallied behind the banner of "taxation without representation" and sought representation in Parliament to properly express their collective will. The crux of the colonists' argument was grounded in the belief that without proper representation in Parliament, the American colonies were subject to the whims of a governmental body located over 2,000 miles away that had no true conception of American life and their respective needs.[41]

As their diplomatic pleas continued to go unanswered and the taxation policies became increasingly more severe, the rumblings of revolution began to echo more and more throughout the colonies. Though diplomacy first appeared to be the most expedient means to repair their relationship with England, "the shot heard round the world" on April 19, 1775, in Lexington, Massachusetts, catapulted the colonies into an all-out military uprising.

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[39] Ibid., 58-61.
[40] Lee Ward, "Natural Law and the Colonial Roots of American Constitutionalism," *The Witherspoon Institute*, American Constitutionalism, (2014), 2. http://www.nlnrac.org/american/colonial-roots.
[41] Roland Young, "The Articles of Confederation," *American Bar Association Journal* 63 (November 1977): 1572.

After months of heated discussion, the colonial Continental Congress eventually issued the Declaration of Independence on July 4, 1776, marking the birth of a new nation, free from British rule. Although the Declaration's bold issuance of freedom was not fully substantiated until the war ended in 1783, the document itself provides a striking depiction of the notion of liberty that was understood in the colonies at the time of our nation's founding. As a means to justify their decision to sever political ties with Britain, Jefferson and the other men who signed the sacred document expounded a list of grievances that proved how King George III's rule unjustly inhibited the colonists' abilities to pursue their unalienable rights to, "life, liberty and the pursuit of happiness."[42]

On the basis that British rule repressed "the opinions of mankind" that provided the foundation for civil society, these brave men built their claims on the more liberalized Lockean foundation of the "Law of Nature," which tells us "that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions" (*ST,* §6). From this theoretical view of government which emphasizes the institution's existence as a means meant solely to help men protect the rights "endowed by their creator," the Declaration aptly foreshadowed the creation of a *just* government built upon the bedrock of the "consent of the governed," and predicated on statutes "most likely to effect [the people's] Safety and Happiness."[43]

American Constitutionalism

After the American colonies overthrew British imperial rule, the infant nation was no longer under the jurisdiction of the British legal code that had previously bound the colonists to a similar set of basic assumptions regarding law and order. Stemming from this cause, though the

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[42] "The Declaration of Independence," in *The Federalist: A Collection*, James McClellan. (Indianapolis, IN: Liberty Fund, 2001), 495.
[43] Ibid.

state legislatures still remained independently functional, the mere issuance of the Declaration of Independence thrust the colonies as a collective whole into a *lawless* state of limbo that ultimately only held men accountable to "the common-law of reason" (*ST,* §16). Given the "inconveniences" posed by the mere potential for societal unrest, the question was not a matter of whether to install a government, but much more a function of *how* (*ST,* §127). Following the Declaration's view that in the course of securing each individual's right to, "life, liberty and the pursuit of happiness…governments are instituted among men, deriving their just powers from the consent of the governed,"[44] our Founding Fathers accepted the requisite importance of man's liberties, and ultimately heeded *Cato's* ideological message by creating a government that was "intended to protect men from the injuries of one another, and not to direct them in their own affairs" (*CL,* No. 62).

To this end, before the Declaration was issued in July, the Continental Congress collectively passed a resolution that allowed each state legislature to construct its own form of government.[45] Though the Congress did not specifically dictate a uniform political structure for all the individual legislatures to enact, all thirteen states predicated their constructions on the same widespread critiques of the British legal system.[46] Whereas England's "unwritten" constitution can be understood through Bolingbroke's definition as "that Assemblage of Laws, Institutions and Customs, derived from certain fix'd Principles of Reason, directed to certain fix'd Objects of Publick Good, that compose the general System, according to which the Communify

[44] "The Declaration of Independence," 495.
[45] Holland, "State Constitutions: Purpose and Function," pp. 989.
[46] Young, Roland, "The Articles of Confederation," 1573.

hath agreed to be governed," the American political leaders objected to this understanding because its complexity allowed too much room for manipulation.[47]

Instead of vesting the government's powers within a "single political unit" that held the "undivided [and] final"[48] say in all legislative matters, American constitutionalism sought to reduce the government's infringements on liberties by "considering the imperfection of Humane Nature and the unfore seen Changes of Humane Affairs," which showed the absolute necessity behind "clearly defining all the Restrictions and Limitations of Government, so as to admit of no Prevarication" prior to its enactment.[49] Through this necessity, American State legislatures believed that the first step "taken by a people in such a state [i.e. after the breakdown of the established order] for the Enjoyment or Restoration of Civil Government amongst them, is the formation of a fundamental Constitution as the Basis and ground work of Legislation."[50] Under this belief, since "the rights originate with the people," by way of both Constitutional Conventions that created the constitutions, and the ratifying conventions that required popular approval before their implementation, the people of the United States embodied the government's true fountain of power.[51]

Despite the fact that many early state constitutions described themselves as "social compacts" that were made by "a voluntary association of individuals," upon being ratified, these constitutions transformed themselves from social compacts to fundamental laws.[52] In describing the specificity of the differentiation between laws and compacts, Justice Story argued that,

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[47] Dippel, "The Changing Idea of Popular Sovereignty in Early American Constitutionalism," 25.
[48] Holland, "State Constitutions: Purpose and Function," pp. 992.
[49] Dippel, "The Changing Idea of Popular Sovereignty in Early American Constitutionalism," 30.
[50] Ibid., 23.
[51] Carey and McClellan, editor's introduction, xxxi.
[52] Douglas Smith, "An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution," *San Diego Law Review* 34 (1997): 304.

> In compacts we ourselves determine and promise what shall be done before we are obliged to do it. In laws we are obliged to act without ourselves determining or promising anything at all. It is a rule prescribed; that is, it is laid down, promulgated, and established. It is prescribed by the supreme power in a state, that is, among us, by the people, or a majority of them in their original sovereign capacity.[53]

In this capacity, these constitutions were "not the act of a government, but of a people constituting a government," through tacitly accepting the plan presented before them by the appointed legislatures.[54] To illustrate the true import granted by such a constitution that properly retains "the spirit of the law" and is itself "not a mere thing, but also a fact,"[55] perhaps the best parallel can be found in the episode between Odysseus and the Sirens, drawn from Homer's Odyssey[56]:

As Odysseus' ship barreled closer to the island dwelling of the Sirens, whose beautiful voices appealed to the desires of even the most rational men, Odysseus commanded his crew to fill their ears with beeswax to ensure that the deceitful voices would not be able corrupt their collective desire to return home to Ithaca. Given the Sirens' notoriously dangerous habit of wrecking passing ships, the beeswax represented the only thing protecting Odysseus and his crew from an almost certain death. Unlike his fellow shipmates, Odysseus followed the biddings of the goddess Circe and ordered his men to tie him to the ship's mast without the wax in his ears, so that he "alone could hear the voices" of the alluring temptresses.[57]

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[53] Ibid.
[54] Dippel, "The Changing Idea of Popular Sovereignty in Early American Constitutionalism," pp. 26.
[55] Castigilone, Dario. "The Political Theory of the Constitution." *Political Studies Association*, 1996, 417.
[56] This parallel to Odysseus and the Sirens is a relatively popular proposition in American Political Theory. I'd like to thank Arlene Saxonhouse for introducing the idea to me in a class on the Federalist Papers during Winter 2013. In addition the following NYU Law Review Article was extremely helpful: Blecker, Robert. "If I Implore You and Order You to Set Me Free." *New York Law School Law Review* 49, no. 2 (2005 2004): 17.
[57] Homer, and Robert Fagles. *The Odyssey*. New York: Penguin Books, 1997. pg. 276, line 173.

After all the precautions were taken and the ship approached the churning waters that adorned the Sirens' island, Odysseus stood, "bound hand in foot in the tight ship…lashed by ropes to the mast," and became instantaneously bewitched as the Sirens "sent their ravishing voices out across the air."[58] Yet even while standing before his men as their captain, pleading with them to disobey his previous instructions, and imploring them to redirect the ship's course, the crew remained unfazed and continued to sail past the island.[59] In the end, since the wax restrained the sailors from reacting to Odysseus' digressions of passion, the ship was able circumvent the dangers of the Sirens and continue on towards Ithaca.

In reflecting on this episode, the paramount feature to note is the temporal demarcation that separates Odysseus' two sets of contradictory orders. Though Odysseus issued a new set of orders after hearing the Sirens' call, his crew was collectively bound to the original precedent because of the wax strategically placed in their ears. If you put the hyperboles of the parallel aside for a moment, the scene inevitably portrays an episode where rational thought usurps the corrupting power of shortsighted passion. More specifically, while Odysseus' preliminary instructions were articulated primarily as a means to help his ship attain the sole end of their journey (returning home safely to Ithaca); Odysseus' orders after being bewitched by the Sirens were given only with respect to what he individually desired at that point in time, resulting in a certain end that deviated considerably from the end aim of the voyage. Using the wax, Odysseus was able to curb the virtually inescapable effects of passion and ensure that his crew would be able to follow the course to their true end.

With this understanding in place, the underlying intention of a constitution can be likened to Odysseus' instructions before he became influenced by the Sirens. Like Odysseus' original

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[58] Ibid. pg. 277, lines 194-95.
[59] Ibid. pg. 277, lines 208-10.

precedent and the wax that protected its reverence, one can deduce that a constitution's job is to serve as the "waxy" membrane that encapsulates our government's rationally conceived ends, and defends them from the voracious attacks of passion that accompany our ever-changing public opinion. Thus — much akin to Odysseus' faithful oarsmen — while the people we elect to serve in our government are tasked with the seemingly impossible job of heeding the public's views while simultaneously keeping our nation on a steady course, they are subservient to a rationally conceived road map to help them reach their end. And though the people in power might change, and crises may even momentarily corrupt our collective decision-making abilities, our Constitution perpetuates our founding ideals developed from the people's own views, and blocks out the passionate pitfalls that could lead to the end of our country and the destruction of our liberty.

Given this description, it seems rather obvious that any government ordained by such a constitution, correspondingly needs to be bound to some attainable end. Though the two federal American Constitutions — the Articles of Confederation and our current Constitution — were both established with the inherent purpose to serve as the force between men that would "protect the innocent, and punish the oppressors," the means created to pursue this particular end differed drastically between the two documents (*CL,* No. 11). In an attempt to properly contextualize both Constitutions and shed light on their theoretical diversions, the rest of this chapter will examine the varying philosophies of the Anti-Federalists (Pro-Articles of Confederation) and Federalists (Pro-Federal Constitution).

The Ideology of the Articles of Confederation

In the first chapter of his book dedicated solely to describing the oft overlooked Anti-Federalist position, Herbert Storing began by reminding his readers that although the Anti-

Federalist's arguments did not halt the ratification of the federal Constitution in 1787, these men "had reasons" for their positions, "and the reasons have weight" (*AF,* 6). Along a similar line, instead of merely labeling the Anti-Federalist endorsed Articles of Confederation as an inefficient constitution that was too focused on preserving states' rights to effectively govern, this portrayal will attempt to view the Articles from its historical perspective: a constitution that sought to unify an extremely diverse colonial body in the midst of a tumultuous revolution, whose message reflected the fearful abuses of England's arbitrary insurrections against innate individual liberties.[60]

Heeding the Declaration's call for a government "by the people, for the people,"[61] and veering away from the absolute sovereign rule of Britain's Parliament, the colonial leaders clung to the ideal that "liberty ought to be the direct end of government" (*AF,* 31), naturally causing their formulation to gravitate towards Montesquieu's position that "the government most comfortable to nature is that which best agrees with the humor and disposition of the people in whose favor it is established."[62] Operating under the popular Anti-Federalist belief that "the form of government, which holds those entrusted with power, in the greatest responsibility to their constituents, [would be] the best calculated for freemen," the preeminent localist views pointed towards the states as the best receptacles to protect the people's liberties (*AF,* 56).

Thus, while the colonial unity of the Revolution allowed the various colonies to work together to defeat their common enemy, their respective community-oriented tendencies resulted in the natural attachment to one's own colony instead of harboring a collective "American"

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[60] Lutz, "The Articles of Confederation as the Background to the Federal Republic," 55.
[61] This quote is taken from President Abraham Lincoln's Gettysburg Address, delivered on November 19th, 1863.
[62] Bergman, "Montesquieu's Theory of Government and the Framing of the American Constitution," 11.

identity. In particular, as noted by Anti-Federalist Luther Martin, "at the separation from the British Empire, the people of America preferred the establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one" (*AF,* 15). Since they understood that it would be "a very great accident if the laws of one nation" were "able to suit another,"[63] and they believed that the American collective's views were too diverse to be objectified into a coherent constitution that would provide "for the security and impartial distribution of the right" to liberty for all inhabitants (*CL,* No. 60), the Articles were designed such that each state retained its "sovereignty, freedom, and independence, and every power, jurisdiction and right," that was guaranteed through their own previously enacted constitutions.[64]

Guided by the classical ideas of republican government, to mitigate the inconveniences posed by a democratic meeting of the people, American popular sovereignty was expressed through representatives who met together in the state legislatures. Unlike the members of Britain's Parliament, early American representatives were expected to "be a true picture of the people; possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests" (*AF,* 17). Taken as a whole, the Anti-Federalists believed that a simple and local government that was close to the people's jealous eyes would be the best type of government to prevent the potentiality for an over-exertion of political power that might disrupt man's enjoyment of his own liberties.

Yet even with these considerations, the backdrop of the Revolutionary War served as a constant reminder of the necessity behind the obvious advantages of union. In addition, just like how the citizens of each state were in a state of nature with each other before the ratification of their individual Constitutions, the founding fathers followed Vattel's understanding that, "since

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[63] Ibid., 10.
[64] The Articles of Confederation, Article II.

men are by nature equal, and their individual rights and obligations are the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights."[65] Constrained by this dangerous reality, the Articles cautiously created "a firm league of friendship" for the thirteen states to collectively utilize, "for their common defense, the security of their liberties, and their mutual and general welfare."[66] In effect, while "the state governments were to protect and regulate individual liberty," the "general government was formed to take care of essential common interests" (*AF,* 33). In this arrangement, each state was considered equal, and the "friendship" of the confederacy served merely as a Constitution based on the trust and cooperation of all thirteen-component parts.[67]

Though the Anti-Federalists justified their belief in the power of trust, and in "the American spirit," by pointing towards the unification driven by necessity during the Revolution, their views were also predicated on a very passive type of governance that greatly underestimated the threat of foreign encroachments (*AF,* 28). Considering that England invaded American soil less than 25 years after the revised Constitution's 1787 ratification, the Anti-Federalist view that the danger of European infringement was so slim, that "you may sleep in safety of them forever," seems grossly shortsighted (*AF,* 27). As described by Alexander Hamilton at the New York convention to ratify the refurbished Constitution, the Articles of Confederation was greatly influenced by the Revolution's wartime passions. Hamilton argued that,

> In the commencement of a revolution, which received its birth from the usurpations of tyranny, nothing was more natural than that the public mind should be influenced by an

[65] Smith, "An Analysis of Two Federal Structures," pp. 322.
[66] The Articles of Confederation, Article III.
[67] Ibid.

> extreme spirit of jealousy. To resist these encroachments and to nourish this spirit was the great object of all our public and private institutions. The zeal for liberty became predominant and excessive. In forming our Confederation this passion alone seemed to actuate us, and we appear to have had no other view than to secure ourselves from despotism. The object certainly was a valuable one, and deserved our utmost attention. But, sir, there is another object equally important and which our enthusiasm rendered us little capable of regarding; I mean a principle of strength and stability in the organization of our government, and vigor in its operations (*AF,* 71).

Despite being fashioned under the purest of pretenses, the Articles of Confederation ultimately failed because it called for a *passive* federal government in an era characterized by *active* European governments. In order to truly protect the liberties of its citizens, the confederation needed to be calibrated around a stronger central government that could properly conduct foreign affairs as a single unified body instead of a weakly connected confederacy of states. In addition to bolstering the protection of Americans' liberties through the utilization of a more appropriate means to conduct foreign affairs, a federal government that acted on the people could also serve as a check on the states' powers, by taking away the confederacy's mutual right to *judge* and *execute* decisions amongst themselves, for themselves. Though the Anti-Federalists clung to their rural roots and feared that a national government that acted on the people instead of the states would cause people to "forget [their] local habitats and attachments" and "be reduced to one faith and one government" (*AF,* 10), the Federalist argument prevailed, creating a "Confederate Republic" that experimented with a different means to reach the same underlying end the Articles of Confederation had fallen short of attaining (*Fed,* No. 9).

The Federalist Critique of the Articles

Much in line with Hamilton's aforementioned diagnosis that the Articles were a reflection of the fears of passions stemming from the Revolutionary War, historian Merrill Jensen noted that the pre-1787 government embodied the "governmental form of the Declaration of

Independence,"[68] insofar as its structural construction held the preservation of American liberty above the underlying belief in the importance of "American union" (*AF,* 24). In the course of following this view and placing the majority of political power under the jurisdiction of the states, the Articles' federal government appeared "neither fit for war nor peace," because the powers of its Congress were subservient to the "uncontrollable sovereignty [autonomy] in each state."[69]

Though this Constitution was designed with the understanding that intra-state unity was a necessity to accomplish certain mutual goals, the corresponding fear of a strong national government led to the creation of a congress that did not have the power to do what was necessary to ultimately live up to its greatest charge. As noted by George Washington before the 1787 Constitutional Convention, "unless adequate Powers are given to Congress for the *general* purposes of the Federal Union, we shall soon molder [decay] into dust" because of the absolute absurdity in believing that "the general concern of this Country can be directed by thirteen heads."[70]

Heeding the most basic understanding voiced by Anti-Federalist Charles Pinckney that "all government is a kind of restraint," instead of operating under the view that small and predominantly localized governments were the most naturally conducive to the preservation of the American people's liberties, the Federalists argued that the loose confederation created by the

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[68] Carey and McClellan, editor's introduction, xxvi.
[69] Hamilton, Alexander. *Founders on the Defects of the Articles of Confederation, Correspondence Selections, 1780-1787 Letters (Excerpts)*. National Humanities Center, September 3, 1780. http://nationalhumanitiescenter.org/ows/seminarsbha/Hamilton-Confederation.pdf.
[70] George Washington. *Founders on the Defects of the Articles of Confederation, Correspondence Selections, 1780-1787 Letters (Excerpts)*. National Humanities Center, September 3, 1780. http://nationalhumanitiescenter.org/ows/seminarsbha/Hamilton-Confederation.pdf.

Articles was defective for two reasons: 1) the lack of unity and powers afforded to the Federal government drastically increased the potentiality for the Confederacy to succumb to foreign invasions and domestic insurrections, and 2) the Articles' structure allowed for the development of factionalism in the states (*AF,* 42). In consequence, the Federalists believed that, "just as individuals have to give up some of their natural rights to civil government to enjoy peaceful enjoyment of civil rights, so states must give up some of theirs to federal government in order to secure peaceful enjoyment of federal liberties" (*AF,* 11).

Regarding the first charged deficiency, the Federalists purported that the federal government under the Articles of Confederation lacked the requisite *energy* to protect the nation from foreign invasions and domestic insurrections, simply because the framers allowed "an enlightened zeal for the energy and efficiency of government," to become "stigmatized" by the perennial fears evoked by the constant reminders of the relationship between Britain's powerful central government and its "temper[ed] fondness of power," that was irrevocably "hostile to the principles of liberty" (*Fed,* No. 1). In critiquing the cautionary "friendship" established between the states, the Federalists claimed that the Articles were fallaciously structured because the weak confederacy discounted "that the vigor of government is essential to the security of liberty" (*Fed,* No. 1).

Since the "friendly" alliance between the states created a federal system that was "destitute" of a means of coercion, the central government's powers were hindered because they weren't enforced by sanctions, which are "essential to the idea of law."[71] As such, by creating a government that was "in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States," it was nearly impossible to have faith that

[71] Madison, James. "Vices of the Political System of the United States." The University of Chicago, April 1787. http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html.

"a unanimous and punctual obedience of thirteen independent bodies," could be found with respect "to the acts of the federal Government.[72]" The Federalists believed that this was problematic because the loose unification did not have the ability to adequately provide for the safety of the infantile nation.

On this subject, John Jay noted in Federalist No. 3 that, "among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first. The *safety* of the people doubtless has relation to a great variety of circumstances and considerations, and consequently affords great latitude to those who wish to define it precisely and comprehensively." Following this view, if you recall *Cato's* argument outlined above, even though Trenchard and Gordon's argument was articulated for the end of protecting liberties, they still acknowledged that safety was the primary responsibility of any government that had the slightest chance of achieving this ideal goal.

Though the passive Congress of the Articles allowed the states to harbor the liberties of their respective inhabitants, the danger of foreign encroachment was a mutual problem for the American collective. Rather than bordering certain states, "the territories of Britain, Spain, and of the Indian nations…encircle the Union from Maine to Georgia" (*Fed,* No. 25), implying that self-defense for the "the safety of the whole is the interest of the whole" (*Fed,* No. 4). In order to stay in a situation of peace, "instead of inviting war," the Federalists believed that "union and a good national government" were necessary conditions to detract the watchful European eyes (*Fed,* No. 4).

In describing the relationship between war and peace, Hamilton reasoned that since war "is comprehensive of most, if not all mischiefs that do or can inflict mankind" because "it

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[72] Madison, James. "Vices of the Political System of the United States." The University of Chicago, April 1787. http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html.

depopulates nations; lays waste the finest countries; destroys arts and sciences, it many times ruins the best men, and advocates the worst, it effaces every trace of virtue, piety, compassion, and introduces all kinds of corruption in public affairs," it would be prudent for the American people to do everything in their power to avoid war at all costs (*AF,* 31). It was evident that the only solution was to revert away from passive governance in favor of an active government that acknowledged the importance of self-defense, and reflected this belief by granting the federal government the powers necessary to achieve this end.

In addition to inviting foreign interference, the weak central government under the Articles also lacked the ability to adequately legislate between the States. Though its short tenure was less than a decade long, the problems stemming from intra-state conflicts were symptomatic effects of the subservience of the weak central government to the individual states. Alluding to the "distractions" that riddled "the history of the petty republics of Greece and Rome" (*Fed,* No. 9), the Federalists' argument for a strengthened central government was grounded on the lesson shown by history, which continually pointed to the truism that "neighboring nations…are natural enemies of each other" (*Fed,* No. 25). Given this belief, they argued that unless the American people recognized their over-insistence on passive governments based on their mutually strong attachment to the preservation of localized liberties, it was virtually inevitable that like Athens and Sparta before them, the "secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors" (*Fed,* No. 25), would lead to the "natural death" of the union (*Fed.* No. 16).

Coupled with the inherent weaknesses associated with having a central government that lacked the authority to protect the nation, the "great and radical vice of the Articles" was that "it legislated for states, not individuals" (*Fed,* No. 16). By viewing the states "in their corporate or

collective capacities," instead of from the lens of the "individuals of whom they consist," factionalism had the ability to run virtually unchecked throughout the state governments (*Fed,* No. 16). The Federalists attributed the factionalism to the states' perceived "love of power," which forcibly prevented the people from serving their intended role as "the only proper objects of government" (*Fed,* No. 15). Since "experience is the only oracle of truth," the Articles' structure was problematic because as was shown in the Case of the United Netherlands, "a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity" (*Fed,* No. 20). In direct contradiction to the Anti-Federalist fears that an *energetic* central government would inevitably yield to governmental usurpation, the Federalists endorsed the view that a large centralized government that legislated over the states as entities and over the people as a collective would be more effectual in preserving liberties.

In light of these theoretical inaccuracies in the design of the US' first Constitution, the state legislatures sent representatives to Philadelphia in May of 1787 for the express purpose of devising "further provisions as shall appear to them [the representatives from each state] necessary to render the Constitution of the Federal Government adequate to the exigencies of the Union."[73]

Principal Aims of the Reinvigorated Constitution

Operating under the view that "weakness and divisions at home" were the surest way to arouse European attention, the Federalists argued "nothing would tend more to secure us from

[73] "Call by the Continental Congress for the Federal Convention of 1787." In *The Federalist: A Collection*, 519. James McClellan. Indianapolis, IN: Liberty Fund, 2001.

them [Europeans] than union, strength and good government within" (*Fed,* No. 5). To this end, the Constitution was predicated on the importance of harboring a semblance of national unity that had fallen by the wayside during the nation's first decade of existence. Rather than focusing on the vast differences that distinguished states like New York, Virginia, and Rhode Island, the revised Constitution emphasized the natural unity that connected the thirteen American states, implicating that union was natural for "a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence" (*Fed,* No. 2). By stressing the close ties that invariably connected the whole of the American people, the Federalists used "unity" as the factor that would quell the potentiality for "domestic faction and insurrection" and provide the mortar for the requisite level of collective safety (*Fed,* No. 9).

Concerning the problem of factionalism, the Federalists believed that, "among the numerous advantages promised by a well constructed union," the Constitution's ability to legislate over both the people and the states gave the central government the newfound power to "break and control the violence of faction" (*Fed*, No. 10). By enlarging the size of the union, the new Constitution insured that "a majority of the whole" would not be able to attain enough influence over the entire nation "to act in unison with each other" (*Fed,* No. 10) at the expense of minorities. In consequence, by using a larger population to "refine and enlarge the public views," the Federalists' Constitution reduced the effects of factionalism, drawing on the same concepts of republican government that had inspired both the state constitutions and the Articles.

In the course of naturally extending "the authority of the Union to the persons of the citizens" (*Fed,* No. 15), the new Constitution was a "composite" that blended certain characteristics of both "national" and "federal" government (*Fed,* No. 39). In terms of this dual nature, Madison described that,

> The proposed Constitution ... is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national (*Fed,* No. 39).

By endowing the Constitution with an expansive enumerated power allowing Congress to "make all Laws which shall be necessary and proper" for carrying out "the powers vested in the Constitution,"[74] the framers also reinforced the nation's ability to "provide for the common defense of members" (*Fed,* No. 23). Aptly named the "necessary and proper" clause, this proposition was predicated under the basic logical connection, that in order to be successful, the United States' government needed to have "the means" available to be "proportioned to the end" of protecting the nation and its inhabitants (*Fed.* No. 23). Though some opponents saw this clause as a potentially dangerous grant of power to an untested centralized force, the Federalists argued that since "the circumstances that endanger the safety of nations are infinite," in order to ensure that the government has the means to counteract any threat, it follows that "no constitutional shackles can be wisely imposed on the [government's] power" (*Fed,* No. 23). As defended by Madison,

> Had the Constitution been silent on this head, there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; whenever a

[74] U.S. Constitution, Article 1, Section 8, Clause 18.

> general power to do a thing is given, every particular power necessary for doing it is included (*Fed,* No. 44).

In contrast to the British government whose Parliament granted specific rights to the people to protect their natural liberties, the Federalists argued that the Constitution "is nothing more than a bill of rights — a declaration of the people in what manner they choose to be governed" (*AF,* 68). As a preliminary endeavor to expand the application of these theoretical descriptions of man's natural liberties into a theory on American government, take a moment and imagine the rules and laws that an engineer or architect must take into account in the course of designing a building. Since,

> Engineers reason that, *given* the force that gravity exerts on a building, *if* we want a building that will enable persons to live or work inside it, *then* we need to provide a foundation, walls, and roof of a certain strength. The physical law of gravity leads to the following "natural law" injunction for human action. The principles of engineering, though formulated by human beings, are not a product of their will. These principles must come to grips with the nature of human beings and the world in which human beings live.[75]

To bring this example full circle, in order to fashion a *good* government, modern political theories — expressed through works like Locke's *Second Treatise* and *Cato's Letters* — tell us that the framers must heed these natural rights evident in man's natural state like an engineer has to heed the effects of gravity when constructing a building. These views follow that without barriers to account for the nature of the men whose existence necessitated the institution, it is impossible to construct a government that can correctly serve its role as a means for mankind's preservation and advancement. Though this implies an endorsement of some variation of popular sovereignty so the people can exert their will on their own government, this type of government

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[75] Randy Barnett, "A Law Professor's Guide to Natural Law and Natural Rights." *Harvard Journal of Law & Public Policy* 20, no. 655. Harvard Society for Law & Public Policy, Inc. (1997). http://randybarnett.com/Guide.htm.

designed as "a reflection of human nature" must also account for the fallibility of men by formulating restraints on the powers of those in charge (*Fed,* No. 51).

Along these lines, as a function of the paradoxical relationship between protecting the people's liberty while also ensuring the stability of the collective whole, the Federalists endorsed the doctrine of separation of powers on the basis that in addition to deriving all power from the people, "those entrusted with it [political power] should be kept in dependance on the people" (*Fed,* No. 37). "The only answer," the Federalists contended, consisted in "contriving the interior structure of government" such that the departments "by their mutual relations" would keep "each other in their proper places" (*Fed,* No. 51). The Federalists created a "partition of power among the several departments" (*Fed,* No. 51) to counteract the inevitability of tyranny that would come from "the accumulation of all powers, legislative, executive, and judiciary, in the same hands" (*Fed,* No. 47). In this construction, they sought to use the "ambition" of one branch to "counteract ambition" in the other branches, thereby protecting a government created for the purpose of "controlling the governed," by obliging "it to control itself" (*Fed*, No. 51).

Stemming from the fact that the American Constitution was an original compact that placed the people (via their representatives) in control of all facets of the nation's operations, this separation was imperative to protect the American people's liberty, since "government is never abused and perverted" except from the personal ambition derived from "every man taking care of himself" (*CL,* No. 40). In the course of ensuring this division of power and providing "those who administer each department" with "the necessary constitutional means, and personal motives to resist the encroachment of others," the Founding Fathers also recognized that the legislature — not the executive branch — was the most dangerous to liberty because it reflected the passions of the masses. In consequence, the Constitution created an *energetic* executive, endowed with the

necessary ingredients of "unity," "duration," "an adequate provision for its support," and "competent powers," to serve as a check on the passionate pleas echoing through the diverse Congressional chambers (*Fed,* No. 70). Unlike the previously held fears against the centralization of political power, the Federalists argued "energy in the executive" was "a leading character in the definition of good government" (*Fed,* No. 70).

The Great Concession

Though the Federalist philosophy implied that good representation would be the oil that would keep the constitutional machine running smoothly, the Anti-Federalists insisted that the Constitution needed to include a Bill of Rights, on the grounds that its broad grant of power failed to fully protect the most intrinsic principles that constituted human liberty. Despite recognizing that the addition of a bill of rights had the potential to weaken the government by constraining the institution's means of countering the unknown ends of providing for the nation's safety, the Federalists eventually used the bill as a concession to ensure that the Anti-Federalists would ratify the constitutional plan. In effect, the addition of the "declarative and restrictive clauses" that embodied the Bill of Rights was intended to extend "the ground of public confidence in the government" as an ultimate means, "to prevent misconstruction or abuse of [the government's] powers."[76]

From a theoretical standpoint, the Federalists' argument against the addition of the Bill of Rights can be understood through the differences between American constitutionalism and the British legal code. In particular, since the Magna Carta "was the fountain of all fundamental laws" in English society, its implementation represented a granting of rights *by* the British

[76] The Preamble to the US Bill of Rights. http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.

government to reflect the edicts derived from the overarching conception of Natural Law. Along the same vein, Britain's 1689 Bill of Rights served a similar role, insofar as it was granted by the nation's "absolute sovereign" to protect the people's most basic rights against government encroachment.

Though these rights were absolutely necessary in England because of the nature of the British political system, the American government was instituted through a constitution where the people reasoned together to create the government, and where all rights that were not expressly ceded to the government were inherently reserved by the people. Since the Founding Fathers created a government "founded upon the power of the people, and executed by their immediate representatives," the Federalists' contended, "the people surrender nothing; and as they retain everything, they have no need of particular reservations" (*Fed,* No. 84). In sum, unlike the British construction of these bills as "stipulations between kings and their subjects," that represented "abridgments of prerogative in favor of privilege" (*Fed,* No. 84), the Federalists believed that the government ordained through the Constitution sufficiently protected the American people's liberties, implying that bills of rights were not applicable to the US Constitution because they were simply remnants of the English system.

In large part, it seems hard to deny that the Anti-Federalists' views reflected their fears of submitting to a strengthened federal government that protected the people’s liberty simply through "fixing and delineating the powers" to the different branches (*AF,* 67). The experience under Britain's Parliament left a sour taste in many American's mouths, and predominately fostered a fear of the government's powers instead of an understanding behind its necessity. Given man's nature, they argued that tyranny was a virtually inevitable feature of government, thereby necessitating "due limits on those powers" to provide complete protection of man's

natural liberties (*AF*, 67). In addition, the Anti-Federalists also argued that amongst the "infinite advantages" of the Bill of Rights, was its role in educating the populace about the preeminent principles of free government (*AF, 69)*. Derived as a function of their localist views, the Anti-Federalists' believed that providing the people with an education on politics would help foster attachment between man and government that would ensure the institution's continued existence. Arguing that the Bill of Rights served this exact function, the Anti-Federalist *Federal Farmer* contended,

> We do not by declarations change the nature of things, or create new truths, but give existence, or at least establish in the minds of the people the truths and principles which they might never otherwise have thought of, or soon forgot. If a nation means its systems, religious or political, shall have duration, it ought recognize the leading principles of them in the front page of every family book (*AF, 70)*.

By accepting that the Bill of Rights would not "change the nature of things" it becomes clear that despite its lofty aspirations, the American Bill of Rights was still subservient to the ideals expressed through the Constitutional Convention. In particular, as described by Anti-Federalist Samuel Chase, "A declaration of rights alone will be of no essential service [because] some of the powers will be abridged, or public liberties will be endangered" (*AF*, 67). Taken as a whole, though many Anti-Federalists believed that the Bill of Rights was a necessary additional check on the government's powers, its primary purpose was to increase the American people's attachment to the government, to ensure that people would remain interested and thus watchfully jealous of the institution's actions.

With this understanding in place, the final chapter of this thesis will return to the present situation to reassess Snowden's charges against the previously articulated theoretical considerations that underlie the US Constitution.

III. Readdressing Snowden's Allegations

Truth is by nature self-evident. As soon as you remove the cobwebs of ignorance that surround it, the truth shines clear.

Mahatma Gandhi

The NSA's Defense

By virtue of its status as an intelligence agency, the NSA operates as a corollary of the Executive branch and is tasked with aiding the President's constitutionally prescribed mission to "preserve, protect and defend the Constitution of the United States," specifically within the confines of foreign affairs.[77] The NSA's specific creation can be attributed to President Truman, who created the agency in 1952 to serve as our government's designated Signals Intelligence (SIGNIT) agency in response to the increasingly important role of cryptology and data collection following the end of World War II.[78] Though the NSA's surveillance activities were largely unchecked through its infancy, the Watergate scandal opened the door for criticism of the nations' intelligence programs, prompting Senator Frank Church to lead the charge for reform. His committee, known as the "Church Committee," worked on solutions for more than three years, eventually culminating in the 1978 passage of the Foreign Intelligence Surveillance Act (FISA). All in all, these reforms created a rigid framework of oversight that sought to balance the necessity of secrecy with a parallel system that allowed for both judicial and congressional oversight.[79]

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[77] U.S. Constitution, Article 2, Section 1, Clause 8.
[78] Thomas Burns, *The Origins of the National Security Agency 1940-1952*. Declassified Top Secret Memorandum. Early Postwar Period. Center for Cryptographic History - National Security Agency (NSA), 1990.
[79] James Bamford, *Body of Secrets: Anatomy of the Ultra-secret National Security Agency*. New York: Anchor Books, 2002.

In terms of judicial oversight, FISA created the Foreign Intelligence Surveillance Court (FISC), which was originally composed of seven federal district court judges who were appointed by the Chief Justice of the Supreme Court for the sole purpose of reviewing "applications for warrants related to national security investigations."[80] The act was amended following the attacks of September 11th through the USA Patriot Act of 2001, which increased the number of judges from seven to eleven, and expanded the court's abilities to authorize surveillance activities.

Given the NSA's status as an international surveillance agency, the FISC is only designated to permit surveillance warrants with probable cause (in adherence to the Fourth Amendment) stating that a particular subject is either a "foreign power," or an "agent of a foreign power."[81] As a function of the increasingly advanced technological methods of data collection and the similarly increasing margin for error, 50 U.S.C. § 1801(h) carefully dictates certain "minimization requirements" meant to limit the incidental collection of irrelevant data, including "wholly domestic" communications between innocent American citizens.[82]

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[80] "Foreign Intelligence Surveillance Court." *Federal Judicial Center*, n.d. http://www.fjc.gov/history/home.nsf/page/courts_special_fisc.html.
[81] *Foreign Intelligence Surveillance Act. 50 U.S.C. § 1801 (h)*.
[82] *Ibid*. According to US Legal Code, the 4 minimization requirements are as follows: (1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information; (2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance; (3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and (4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802 (a) of

On the other end of the oversight spectrum, Congress imposes its check through the House and Senate select committees on intelligence. Contrary to common belief, in addition to these specific committees, recently declassified documents from the Director of National Intelligence (DNI) carefully elucidate that the Obama administration, as well as the preceding Presidential administrations, firmly believed that releasing specific information about oversight forces should be "made available to all members of Congress" as a means to "inform the legislative debate."[83] Besides declassifying the May 2012 letter from the Department of Justice to Congress, the DNI also opted to declassify three separate FISA court opinions (from October 2011, November 2011, and September 2012, respectively) as well as multiple documents detailing communications between Congress and the Executive's intelligence agencies. Despite the inherently classified nature of the documents themselves, the federal government believed that when taken as a whole, this group of documents could help counter the charges brought forth by the Snowden leaks.[84]

The released FISC opinions illustrate a correspondence between the NSA and the FISC that depicts a much stronger semblance of oversight than Snowden's leaks led the public to believe. Though Judge Bates' October 2011 opinion found the agencies' programs to be

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this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

[83] Kathleen Turner, and Robert Weich. "The Intelligence Community's Collection Programs Under Title VII of the Foreign Intelligence Surveillance Act." Office of the Director of National Intelligence and the Department of Justice, May 4, 2012. http://www.dni.gov/files/documents/Ltr%20to%20HPSCI%20Chairman%20Rogers%20and%20Ranking%20Member%20Ruppersberger_Scan.pdf.

[84] James Clapper, "DNI James Clapper's Cover Letter Announcing the Document Release," August 21, 2013. http://www.dni.gov/files/documents/DNI%20Clapper%20Section%20702%20Declassification%20Cover%20Letter.pdf.

"deficient on statutory and constitutional grounds" because the minimization standards allowed for too much leeway in the collection of "wholly domestic communications," his second opinion points towards a vigorous system of oversight evidenced by the compliance and refined dialogue between the NSA and the FISC.[85] The November ruling showed that the NSA made three significant revisions to its minimization standards before resubmitting their warrant, which met the "requirements of both 50 U.S.C. § 1801(h)(1) and the Fourth Amendment," thereby illustrating that the NSA had "adequately corrected the deficiencies" evident in the previous month's opinion.[86] While this only represents a single example, it is hard to imagine that this was the *only* time that these measures were taken by the court, further implying that given the current regulatory framework, the oversight measures have the capacity to work successfully.

In reference to the two major accusations stemming from Snowden's initial leaks, respectively focused on the bulk collection of telephony metadata records, and the Prism program's controversial certification to gather electronic communications, the government has also taken additional lengths to demonstrate how the leaked programs adhere to both constitutional and codified legal precedents. The critique of the telephony collection centers on the notion that the US government used a broad interpretation of the Patriot Act to empower the NSA to require third party business entities (including phone companies like Verizon), to hand over mass quantities of their customer's phone records in the form of metadata. Though the collection of metadata does not make the government privy to the actual details of calls, but instead only "the transactional information that phone companies retain in their systems for a period of time in the ordinary course of business," represented purely as "data fields showing

[85] John Bates. "Memorandum Opinion." Foreign Intelligence Surveillance Court, October 3, 2011. http://www.lawfareblog.com/wp-content/uploads/2013/08/162016974-FISA-court-opinion-with-exemptions.pdf.
[86] Ibid.

which phone numbers called which numbers and the time and duration of the calls," Snowden supporters allege that the mere existence of these bulk programs opens the door for wide-ranging debates on the government's ability to infringe on its citizens' privacy rights.[87]

Unlike criminal investigations, which allow the government to use grand jury subpoenas to extract certain records, the sensitive information gathered in foreign intelligence investigations is classified, and cannot rely on the same methods of oversight. As such, the FISC is intended to serve in place of these subpoenas, and is tasked with ensuring the constitutionality of the NSA's warrants based on their relevancy to ongoing national security investigations.[88] Upon further review, this substitution can be understood as a judicial check on the executive's power to collect foreign intelligence because of the Chief Justice's role in nominating the court's presiding officers. While it certainly does not provide the same level of objectivity as federal subpoenas, the FISC must be given some due credit as a means to fill a role that runs so contrary to the nature of intelligence investigations.

With regard to phone records, the FISC approved the warrants for the mass collection of metadata because it allowed analysts to implement "call chaining," which is "used to develop targets for electronic surveillance," and has become a vital counter-terrorism tool since 9/11.[89] When given access to such a large sample of data, the NSA uses call chaining as an early warning system to establish links between suspected foreign terrorists and their domestic counterparts. In addition, since metadata falls under the property rights of third party businesses,

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[87] Steven Bradbury, "Understanding the NSA Programs: Bulk Acquisition of Telephone Metadata Under Section 215 and Foreign Targeted Collection Under Section 702." *Lawfare Research Paper Series* 1, no. 3 (September 1, 2013): 18.
[88] Bob Litt, *Privacy, Technology and National Security: An Overview of Intelligence Collection*. Brooking's Institution, 2013. http://www.lawfareblog.com/2013/07/odni-gc-bob-litt-speaking-at-brookings/#.UtdHUGStlKk.
[89] John Miller, "NSA Speaks Out on Snowden Spying."

the issuance of expansive warrants to phone companies for access to these "business records" that are established through contractual obligations between customers and providers, cannot be viewed as encroachments on an individual's Fourth Amendment rights. Put simply, these exchanges can be seen as an individual contractually agreeing to release their telephony metadata to their service provider, who is then handed a judicially approved warrant seeking access to the previously procured data for national security purposes.

While this scene points towards the disparity in the public's response to metadata held by a third party and metadata held by the government, the Supreme Court's 1995 ruling in *Vernonia School District v. Acton* legitimizes the program's actions as a function of the necessity involved with "balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests."[90] Though the ruling still stands, its relevance to intelligence investigations has recently been questioned given the criminal nature of the case that established the precedent. Regardless of the interesting implications stemming from what might become an impending Supreme Court battle, the only portion that is relevant to this particular debate is the current law established through *Vernonia*.[91]

Whereas the telephony metadata is collected from third parties, the Prism program has ignited much harsher criticisms because of its direct extraction methods. Critics predominately cite the Fourth Amendment and specifically its protection against "unreasonable search and seizure" without warrants built "upon probable cause" as the primary critique against these programs, since individual warrants are not typically required for each suspect. Instead, the

[90] Antonin Scalia, *Vernonia School District v. Acton* (The Supreme Court 1995).
[91] Litt, *Privacy, Technology and National Security.*

programs operate under annual, "blanket," orders from the FISC court as a means to justify certain types of more intrusive data collection.[92]

The legal justification for the Prism program can be found in Section 702 of FISA. Passed into law in 2008 as a portion of the FISA Amendment Acts (reauthorized by Congress again in 2012), this authorization allowed the NSA to conduct foreign electronic surveillance under annual certifications instead of individualized warrants. While one could reasonably construe these annual certifications to resemble "blanket warrants," the government has argued its legal basis by tracing the historical progression of FISA. From this perspective, the necessity of Section 702 can be understood as the legislative response to the technological advancements that have changed American society since FISA's initial passage in 1978. Since FISA's limitations needed to be revised to ensure that the nation's intelligence agencies could be equipped to thwart attacks from the new mediums of communication made available by the internet, the 2008 revisions allowed the NSA to systematically track any number of foreign targets that matched the FISC's codified "certification" criterion.[93] As the law specifically dictates:

> Notwithstanding any other provision of law, upon the issuance of an order in accordance with subsection (i)(3) or a determination under subsection (c)(2), the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year from the effective date of the authorization, the targeting of persons *reasonably believed* to be located outside the United States to acquire foreign intelligence information.[94]

Though this type of collection does not necessitate individual warrants for the program's targets, it does include the aforementioned "minimization" requirements to minimize the

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[92] Chelsea Carter, "Report: Secret Court Order Forces Verizon to Turn over Telephone Records of Millions." *CNN Politics*, June 6, 2013. http://www.cnn.com/2013/06/05/politics/nsa-verizon-records/.
[93] Bradbury, "Understanding the NSA Program."
[94] *Foreign Intelligence Surveillance Act, Section 702. 50 U.S.C. § 1881a*, n.d.

potentiality for encroachments on the civil liberties of innocent American citizens. While accounts differ on the exact number of these incidental collections, the government's defense implies that since the programs were created in a way where the means were "proportioned to the end" of protecting "the care of the common defence" of the American people (*Fed,* No. 23), the minimization requirements serve the role of "balancing the [government's] intrusion on the individual's Fourth Amendment interests." As such, whereas Snowden's argument is grounded on the belief that the NSA's data collection programs are incongruent with the government's constitutionally ordained responsibilities not to infringe on its citizens' rights, the government's rebuttal allows us to understand the NSA's insistence that its programs are solely in place for the "promotion of legitimate governmental interests," necessary for our collective safety.[95]

Applied Theoretical Defense

Though the Anti-Federalist position has faded into the periphery of modern political thought, the disparity between the public response to metadata held by service providers and metadata held by the government proves that certain features of their ideology are still very much alive today. In particular, this disparity seems to reflect our collective fear about what the government can and will do with access to our personal information. Unlike cell phone companies, the government has the ability to deliver sanctions against breaches of the law, thereby evoking a natural worry that the government can effectually use this information against us in legal proceedings. Given the implications of the government's powers, it comes as no surprise that this fear has allowed the rights guaranteed through the Bill of Rights to rise to a position of prominence, simply because our collective attachment has rendered them virtually untouchable.

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[95] Scalia, *Vernonia School District v. Acton* (The Supreme Court 1995).

Whereas most laws are implemented to constrain our actions, we cling to the Bill of Rights because we construe its declarative statements as strict constraints on the government's powers. Stemming from our struggle against the tyranny of the British, it follows that these rights have become enshrined as the truest reminder of the freedoms guaranteed by the American government. While this substantiates the Anti-Federalists' claim that the Bill of Rights would serve the role of fostering the public's attachment to the government, it also intensifies our perception of their importance in the context of the American political system. Putting aside the momentary passions evoked by Snowden's revelations, the only way to properly assess the NSA's actions is to contextualize them into the theoretical foundation that underlies our nation's Constitution and political system.

As referenced above, the decision to break away from the jurisdiction of Britain's imperialistic rule can be traced back to objections against the "absolute sovereignty" of Parliament.[96] Following the theoretical lead of Locke and *Cato*, the Declaration of Independence substantiated the colonial right to rebellion, setting the stage for the fulfillment of the document's call for the construction of a new government, founded on principles "most likely to effect [the people's] safety and happiness."[97] Though the nation's first collective constitution reflected the overarching fear of centralized power, the Articles' inability to legislate invalidated this shortsighted understanding. In contrast to the localist views encapsulated in the Articles of Confederation, the revised Constitution recognized the inherent necessity of *energy* in government, ultimately leading to a strengthened centralized force that was supplied with the appropriate means to fulfill its ultimate charge of providing "for the security and impartial distribution" of the "natural right of men to liberty" (*CL*, No. 60). Using Cato's definition of

[96] Corwin, "The 'Higher Law' Background of American Constitutional Law." *406.*
[97] "The Declaration of Independence," 495.

liberty as the power "which every man has over his own actions, and his right to enjoy the fruit of his labor, art and industry, as far as by it he hurts not the society or any members of it," the new Constitution sought to provide the adequate level of protection as a means to allow its citizens to live in safety and free from the arbitrary rule (*CL,* No. 62).

Since the Articles were predicated on a passive construction of government that over-emphasized the protection of localized liberties at the expense of endowing the centralized force with the requisite power to provide for the nation's safety, the Federalists' Constitution recognized that the people's rights had to be properly protected before they could actually be enjoyed. Thus, while the Bill of Rights grants certain rights to the people, the Supreme Court's ruling in *Vernonia* verifies that these rights are subservient to the federal government's grant of power, furthering implying that the government has the power to infringe on these rights in the "promotion of legitimate governmental interests."[98]

Heeding this precedent, though the media's portrayal of Snowden's leaks focused predominantly on the effects of the NSA's programs, our collective ignorance of the agency's necessity exacerbated our fears of the government's intentions. Notwithstanding the immense impact that the Bill of Rights has had on our nation's legislative history, since the NSA infringed on our privacy rights as a means to prevent another 9/11, its actions embody the Federalists' insistence that *energy* is essential to good governance. Thus, by focusing on *intent* rather than simply the effects, my hope is that this thesis has shed light on the theoretical considerations that substantiate the NSA's actions.

[98] Scalia, *Vernonia School District v. Acton* (The Supreme Court 1995).

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