# THE PRINCIPLES OF CONSTITUTIONAL GOVERNANCE

The seven Articles of the Constitution rest on a few fundamental principles of governance that were created and tested through centuries of struggle in the countries of Europe and in the American colonies. As articulated in the Constitution, these principles have proven robust enough to provide for order and social stability, yet capable of considerable flexibility and responsiveness in a changing society. The fundamental principles of constitutional governance include the concepts of national sovereignty, limited government, democratic representation, federalism with reserved State powers, and separation of powers within the three branches of the national government.

Each of these principles is affected by modern technology. National sovereignty is fundamentally challenged by the effects of extensive international transactions and transborder data flows, and by the necessity of multinational cooperation to cope with environmental problems related to technology. The structure of the relationships between elected representatives and their constituents, the various interest groups, and the other branches of government has been substantively changed by the use of communications and information technologies. Federalism continues to change as effects of technologies continually override jurisdictional boundaries. Cooperation in using databases and communications systems could erode some of the checks and balances protecting separation of powers.

## National Sovereignty

Sovereignty may be defined as the exclusive and supreme control by a government over its territory and inhabitants. Under the Constitution, sovereignty in the United States is shared between the State and Federal Governments. The powers of the Federal Government are primarily those "necessary and proper' to carry out the functions listed in Article I, section 8. Under the 10th Amendment, the remainder of the power that can be exercised by government is reserved to the States.

> **Do powerful translational businesses, using global networks, make the concept of "national sovereignty" obsolete?**

Since the mid-1800s, the scale of technology and the scope of its impacts have changed American life; first in transportation systems (e.g., the railroad), then in manufacturing and production (the steel industry, the automobile industry), and in communications systems (telegraph and telephone lines, radio, television). A concomitant broadening of the role of Federal Government and diminution of the autonomy of State governments in controlling technology has occurred in each instance. Federal power was used first to build and regulate national transportation and communications systems, then to protect health, safety, and employee welfare as manufacturing and commerce have matured. Federal power has been used to recover economic stability during the economic crisis of the 1930s, to set up a complex social security system, to deal with global wars, to put men on the moon.

Just as the development of a national transportation and communications infrastructure in past centuries expanded the Federal Government role in local and State affairs, technology is today expanding the theater of commerce and politics to global dimensions. In the process, it is diminishing the degree to which any nation, including the United States, may act as an autonomous sovereign.

Today, large-scale enterprises and the consequences of industrialization continue to force issues from the local to the national to the international level. Global communications networks are contracting the Federal Government's power by interlocking national economies, facilitating transnational business, and increasing the necessity of political and economic cooperation among nations. The world-

wide nature of today's technology-oriented problems, such as pollution of air and water, depletion of natural resources, global drug traffic, and intercontinental weaponry, all combine to force cooperative actions in the international arena and surrender of some national sovereignty.

The evolution of the translational corporation over the last 20 years illustrates the shift of power away from sovereign nations that accompanies global technology. Transnational enterprise is subtly but significantly different from the post-World War II multinational corporation that was or is still essentially based in and identified with one country —i.e., an "American multinational. " New transportation and communications technologies, including high-speed air travel, bulk shipping facilities, flexible manufacturing and automation, distributed data processing and communications capabilities, and high-speed transmission of information, have allowed transnational corporations to shift operations between countries, depending on contingencies such as labor costs, availability of resources, and the political and economic climate of their host nation. These developments have increased the power of the transnational corporation, as economies of scale have allowed the internationalization and vertical integration of their markets.

Deregulation of the international monetary system, rapid movement of investment funds around the world, the trading of stock on foreign exchanges, and international corporate ownership and mergers make transnational businesses even more independent of national policies. In addition, the exchange of television shows, movies, fashions, music, and other forms of entertainment tends to homogenize cultures and consumer demand throughout the world, and could erode national loyalties and dependencies.

These developments parallel the rise of national corporations during the 19th and early 20th centuries, which brought about the expansion of Federal power and the resulting shift from the private power of corporations to the public power of the Federal Government.

The internationalization of economic power may now be causing at least a temporary shift back from public power to private power at the international level.

The United States has responded to the development of translational corporate power by trying to extend the exercise of sovereignty outside of its own borders, by, for example, controlling or regulating foreign subsidiaries of U.S. corporations. But, as nationality of corporations has faded, these efforts have proved ineffective. Companies move. The nationalities or loyalties of their top management are not necessarily coincident with where they are headquartered. Some corporations become essentially independent of geographic sites, production facilities, and national charters.

However, in spite of this erosion of sovereignty, national boundaries remain very real economical and political limitations. Private corporations may be caught in intolerable binds between conflicting laws and policies in the different countries in which they do business. The control of databanks and flow of information by, for example, the Council of Europe, can impact adversely on American companies doing business in Europe.

The picture of national sovereignty that emerges in 1987 is thus very different from the picture that was accepted in 1787. The challenges to national sovereignty in the future will be very different from those that were possible in the past, and will be shaped by the need for international response to continuing technological development.

## A Democratic Republic

The United States was not the first nation in history to try constitutional government, but it set the pattern for those that followed. It was the first successfully to establish a stable union of what were then sovereign States. The Founders, men of their times, did not envision universal suffrage or equal opportunist y for all, yet they gave us the means to move in that direction. As James Madison said, when proposing on June 8, 1789, that the first Congress adopt a Bill of Rights:

. . . the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.

"A more perfect union" was needed in 1787 because of the economic chaos caused by the constant competition between the 13 original States, because of the threat of alliances between States and foreign countries eager to regain control in the New World, and because of the inability of the existing Confederation to finance itself or to control the actions of individual States. A strong union was needed to provide the stability and cooperation necessary for the economic and technological development of the vast resources of the new country. At the same time, the Founders greatly feared a strong national government that might abuse its power. Constitutional history since that day in many ways reflects the effort to maintain a balance between these conflicting goals.

The principle of representation, whereby one individual gave voice to the interests of his constituency, was already well established in 1787, both in England and on this continent. Since then, the United States has steadily broadened the franchise to all adults and enabled people to make more direct choices, by eliminating the indirect election of Senators, creating primaries to select Presidential candidates, enforcing a principle of equal weight for each person's ballot, and putting decision propositions on State and local ballots. These changes have helped to compensate for the unavoidable dilution of representation as population grew and the number of States increased.

Modern technology has however introduced complexities that have a serious impact on the representative process. The effect of technology on government structure has been most noticeable in the development of a massive Federal bureaucracy to provide the expertise for applying, using, and regulating technologies. The constitutional problems of such a structure have been alleviated in part by the application by the Supreme Court of the due process clause to administrative procedures.

## Are information systems changing the nature of congressional representation?

But the growth of a "non-elected branch" of government has inevitably distanced the people from the day-to-day operations of government. The use of independent agencies—the Federal Communications Commission, the Interstate Commerce Commission, the Nuclear Regulatory Commission—to regulate technologies has also placed a serious strain on the boundary between legislative and executive functions. This further dilutes the representation process by diffusing responsibility within the government itself.

But effects of technology on representation are not limited to fostering the growth of a Federal bureaucracy. Technology also has direct effects on the very functions of representation, such as communicating with constituents, formulating policy, legislating, and overseeing executive agencies. The use of computerized mail systems, for example, has allowed the collection and analysis of data on constituent demographics and interests, and thus the segmentation and targeting of audiences to give political messages greater impact and saliency. The information available in computerized databases allows newly arrived Members to be more immediately knowledgeable and effective. Oversight of executive agencies can potentially be greatly enhanced by the use of electronic information and computer models to analyze budgets and evaluate programs, but it also becomes more difficult to evaluate highly technical management decisions about costly information systems operating at the edge of technological advance.

The mass media-newspaper, television, and radio—is a potent influence on the nature of representative democracy. The use of media to present a political image or personally to articulate and frame an issue has been expanded by C-Span and by the use of videotape by local stations, but has also been shaped by

the demands of the TV news format. The reporting of political news affects attitudes of the public and may distort the process of determining winners and setting agendas. Computerized analyses of voting trends in selected districts aid networks in predicting winners and losers long before the voting is finished, playing on the psychological tendencies of some people to jump on the bandwagon.

Television has also led to what might be called the industry of "image-making," in which more attention is paid to projecting a carefully designed political image than to explaining controversial policy positions. Critics charge that tracking and surveying public opinion has changed the focus of political news away from the substance of issues and reasoned analysis, and towards attention-grabbing headlines. The ability to inform and influence Congress may also have shifted from party loyalists with cross-cutting interests and motivations, towards organized interest groups —especially those that have the technological resources to mobilize public opinion in their favor—and towards "single-issue politics" under which organized groups of voters are able to exercise an influence greater than their number would suggest.

Does the proliferation of communications between elected representatives and their constituents enhance democracy? The Founding Fathers debated whether elected representatives were to reach decisions based on instructions from the public or were, by deliberation and debate, to arrive at some higher common good. The question of whether a representative should be 'instructed' by the sentiments of constituents, or whether he or she should lead popular opinion in a deliberative role continued in the First Congress, where Mr. Clymer, a member of the House of Representatives, said,

> If they have a constitutional right to instruct us, it infers that we are bound by those instructions. . . .This is a most dangerous principle, utterly destructive of all ideas of an independent and deliberative body.

Two hundred years later, this question continues to be debated. The use of telecommunications, either to survey public opinion or to

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**Would "electronic direct democracy" —public voting on issues by electronic systems—fit the constitutional concept of representative democracy?**

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send messages or protests to Congress, increases the likelihood of instructed representation. But the complexity of administering a technologically advanced society, the growth of population, the rise of bureaucracy, and the difficulty of maintaining public interest in political issues far removed from one's everyday life, tend to counter this trend toward instructed representation. They distance elected officials from the people, thereby allowing greater room for deliberation and independent judgment.

Technology may in the very near future present the Congress with a dramatic choice between these two theories of representation. New technologies, such as interactive TV and videotex, raise the possibility of direct voting by citizens on some national policy issues. Whether these methods should be used merely to collect in-depth opinions or to register actual binding votes is highly debatable.

Advocates of direct electronic democracy claim that people would take more interest in government and become better educated on the issues, and that democracy would be the better for it. Where limited trials have been made, people do show increased interest in policy issues. But these issues have been local, and relatively simple ones. There has never been a national referendum, though one was proposed in 1907.

Those against the idea of direct voting on issues cite the assumed disinterest and inability of the average citizen to understand the complex subjects involved. This in turn could make the voice of educated, socioeconomic elites stronger. Alternatively, it could make for uninformed resolution of important matters of policy.

But technology may allow a move to direct democracy in incremental steps, rather than

all at once. Other methods of electronic participation, including electronic town meetings, public teleconferencing, and public access to legislative databases are being used in some State and local governments. This kind of access to government could increase greatly in the future as information technologies become more usable and more accessible to more people.

The impact of technology on the principle of representative government thus can cut both ways. The increased complexity of government, in the 21st century and beyond, leads to governmental structures that can dilute its representative character. Yet technology offers compensating advantages that can increase the ability of government to serve the people it represents.

## Federalism

Federalism in the United States is marked by:

- a union of autonomous political entities for common purposes;
- divided powers, with the Federal Government having enumerated powers and the States retaining residual power;
- operation of each of these governments within its assigned sphere upon all persons and property within its territorial limits;
- law enforcement powers for each level of government;
- supremacy for the national government within its assigned sphere in any conflict with state power;
- a dual system of State and Federal courts; and
- dual citizenship, national and state.

Since the Civil War, Federal power has clearly been in the ascendancy, and the same trends that are now challenging national sovereignty-expanding markets and centers of production, telecommunications networks, a mobile citizenry, and the homogenization of culture across boundaries-have contributed to the shrinkage in the role and authority of State governments.

Transportation and communications systems, tying this nation together physically, also tied the country together economically and politically, requiring an interdependence and cooperation that could only come from national action. Autonomous States could not coordinate the commercial development of navigable waterways, interstate roads, railways, and airports. The lack of uniformity in laws and the competition among State interests has led to Federal Government preemption of many areas of commerce, and precluded State control of nationwide systems necessary to ensure orderly and efficient economic development. Today, as a practical matter, the government of commerce is national and not local.

Current technological problems, such as nuclear and toxic waste disposal, water rights in the semi-arid areas of the West, and air pollution spreading from one region to another, need cooperation between the States and leadership, refereeing, and adjudication by the Federal Government.

This does not mean that federalism is thwarted or that there is no major role for St ate government. The criminal justice system, particularly as it relates to violent crime, remains within State control. Property ownership, the law of descent and distribution, and family relations are largely the province of State or local law. Fundamental government services—fire, police, water, zoning–by and large are provided by State or local government. Technological change will however influence how the States will govern in these respects and how the Constitution will guide that governing.

Moreover, new information and telecommunications technologies may again operate to change the balance within federalism by enhancing the ability of States to act independently or cooperatively, reducing the need for national solutions to problems. Information systems, for example, have allowed States to cooperate much more effectively in the areas of civil and criminal justice and public health.

Future technologies will, as they have in the past, most likely cut both ways; concentrating some powers in the Federal Government and enabling the States to retain and expand

> **Has technology undermined the province of the legislature to "make and declare war?"**

others. While the use of information systems and computerized databases provides additional power to the States, additional Federal regulation may be required to protect individuals' privacy rights in an era of nearly unlimited surveillance ability and ability to combine information. This tension, too, presents challenges to constitutional interpretation.

## Separation of Powers

> In framing a government. . . you must first enable the government to control the governed and in the next place, oblige it to control itself.
> –*Federalist, No.* 51

The hard-won power of the English Parliament to control the excesses of the Throne was for the Founding Fathers a valuable heritage. As structured by the Constitution, political power and function in the Federal Government is separated among three distinct and mutually dependent branches—the legislature, the executive branch, and the courts. Moreover, a set of institutional and procedural checks was created to make it difficult for one branch to act rashly or independently of the other two branches.

The power balance in the U.S. Government has shifted many times, sometimes by a President's initiative, at other times by Congress' reassertion of its powers or duties, at yet other

> **In an emergency, need Congress assemble in Washington to act, or could it use telecommunications?**

times by the intervention of the courts. War and technological change have been two dramatic factors in changing the locus of power between the President and Congress. Both have tended to pose threats to public safety that required swift, decisive action based on expert knowledge, and thus to shift responsibility toward the Executive rather than the more deliberative Legislative Branch of Government. War has been the greatest promoter of presidential power, but until World War II, this was usually temporary. More recently, the power, the range, and the speed of modern weapons have favored a continued shift in power toward the Presidency.

As technological advances give rise to constitutional challenges, moreover, the powers exerted by the Supreme Court are likely to increase. Never before in our history have so many aspects of daily life been subject to litigation, both over the respective powers of the President and Congress and over the relationship of government to the individual. It is a unique feature of American democracy to rely so extensively on courts to monitor the authority of elected branches of government. Exercise of this power will likely ebb and flow as it has in the past, but it is nonetheless certain that technological change will place new and continuing demands on the courts to interpret the fundamental charter of American government.