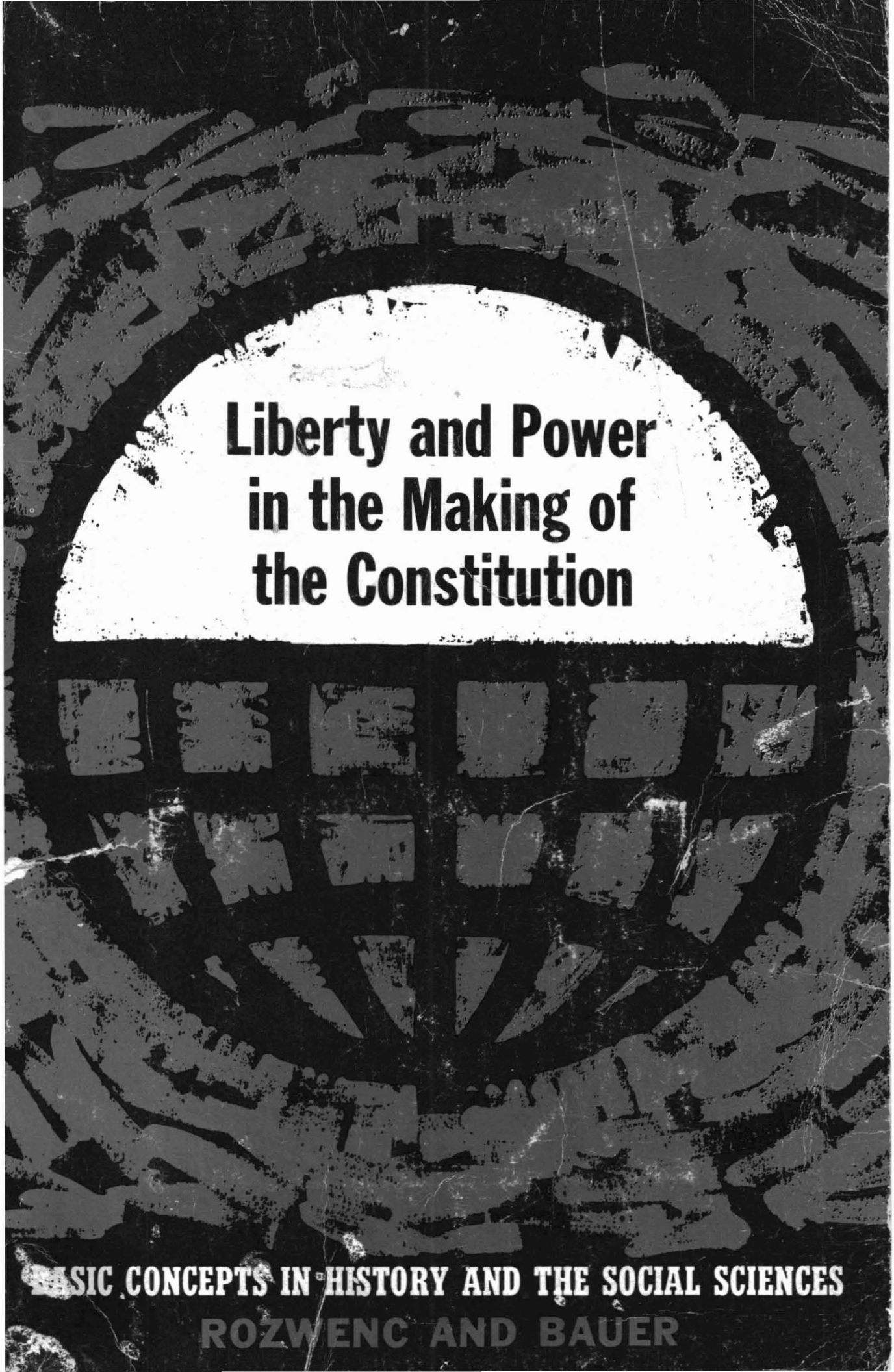
Liberty and Power
in the Making of
the Constitution
BASIC CONCEPTS IN HISTORY AND THE SOCIAL SCIENCES
ROZWENC AND BAUER

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Liberty and Power in the Making of the Constitution

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Part 1

The Concepts of Liberty and Power

A FEW years after the Constitution of the United States was ratified, James Madison declared, "Every word of [the Constitution] decides a question between power and liberty." This emphasis on the concepts of liberty and power in the making of the Constitution is particularly important because Madison has often been hailed as the "father" of the Constitution. He played an important role in the movement for a new constitution; he collaborated with Alexander Hamilton and John Jay in writing the Federalist papers to explain and defend the Constitution; and his journal of the proceedings of the Constitutional Convention is the most complete record of what the framers of the Constitution said and did at the Philadelphia Convention in 1787.

But "liberty" and "power" are high-sounding words. They are words that we call abstractions, and some people might want to dismiss Madison's statement as the kind of showy oratory that we expect from politicians who are trying to win friends and influence votes. After all, every student knows that the men who created the Constitution were troubled by the weaknesses of the government under the Articles of Confederation. According to the Articles of Confederation, the United States of America was to be simply "a firm league of friendship" in which "each state retains its sovereignty, freedom and independence." The Confederation government lacked the power to tax directly: it could not levy imposts or duties on articles of importation. Indeed it had no effective means by which to compel the states to comply with requisitions of money needed to carry on essential operations of the government or with requisitions of men needed for the armed forces.

Without the power of the purse and the

sword, the government under the Articles of Confederation was unable to deal with some of the most crucial problems of the new nation after independence had been achieved. It could not expel the British from military posts on American territory in the Northwest which they continued to occupy after the Revolution was over. Since the government lacked the power to levy imposts and tariff duties, it was deprived of the means to protect American trade and navigation; thus, American diplomats were deprived of the bargaining weapons to get satisfactory commercial treaties from Great Britain and other maritime powers. The Confederation government could not pay the public debt, and American citizens began to lose faith in the public securities of the United States. Neither could it give aid to the states in the suppression of such domestic insurrections as Shays' Rebellion in Massachusetts in 1786.

Consequently, the delegates to the Philadelphia Convention in 1787 sought to create a central government that could handle such problems more effectively. And our history textbooks remind us that while the framers of the Constitution sought to give the central government more power, they did not wish to give it so much power as to excite the opposition of the states which were determined to keep control over their internal affairs.

But the problem of power in the making of the Constitution was not limited to the question of finding a more workable distribution of powers between the central government and the separate states. If the powers of the central government were to be strengthened, and if the central government were to have the power to act directly upon the people rather than indirectly through the sovereign states as in the Articles of Confederation, then the question of power acquired another dimension. This second problem of power, therefore, was how to design a central government that would be strong enough to govern but not strong enough to jeopardize the equal right of all to "life, liberty and the pursuit of happiness" as proclaimed in the Declaration of Independence.

And so we begin to see that there is more than an oratorical flourish in Madison's statement that the purpose of the Constitution is to adjust the opposing claims of liberty and power. For Madison, this was the fundamental issue that must be faced by men in any time or place if they wish to create a free government based upon the consent of the people. As Madison saw it, the problem of mankind is to find a way of constructing a government that will defend "liberty against power, and power against licentiousness." In other words, the uncontrolled power of government is a standing danger, but liberty used to

the point of license is equally dangerous to justice and the rights of the people; liberty used to the point of excess tends to promote the disregard of law and propriety.

Consequently, this difficult question of the relationship between liberty and power can become a very useful way of discovering what the Constitution meant to Americans in 1787 and what it means to us in the twentieth century as we seek to interpret the ideas and actions of the Americans who took part in the Constitutional Convention and in the conflict over the ratification of the Constitution.

This will not be an easy task because the words "liberty" and "power" are abstract concepts of uncertain meaning. The word "liberty," for example, has often been used by political philosophers in a negative sense. "Liberty," wrote Thomas Hobbes, "or freedom, signifieth . . . the absence of opposition. . . A FREEMAN is he, that in those things, which by his strength and wit he is able to do, is not hindered to do what he has a will to do." According to the definition of this English philosopher of the seventeenth century, liberty is a condition which the individual enjoys when he is free of restraint and compulsion. Helvetius, an eighteenth century philosopher, tried to put Hobbes' definition in more concrete terms when he wrote, "The free man is a man who is not in irons, nor imprisoned in jail, nor terrorized like a slave by fear of punishment." This conception of liberty is still used by many people today.

Yet there are others who believe that the word "liberty" should be used in a broader sense. The twentieth century American philosopher, John Dewey, had something like this in mind when he said "freedom from restriction [is] only a means to a freedom which is power." What Dewey meant by this is that when you get down to concrete situations of human freedom, liberty really consists in the power or ability to *do* things. Hence the mere absence of direct compulsion is not a sufficient definition of freedom. The poorly-educated slum youth does not really have the freedom not to accept dirty and low-paying jobs, and the impoverished slum dweller does not really have the freedom to obtain living conditions that will protect his health and safety. Thus the liberty of men cannot be described only in terms of the absence of direct compulsion; it must also be described in terms of their *opportunity* to do things that enable them to obtain "life, liberty and the pursuit of happiness." Thus public education, or the right of collective bargaining, or public health measures, are provided by the government as a positive way to give men freedom to *do* things.

The word "power" also has several shadings of meaning when it is applied to politics or government. In its crudest sense, the concept of

power signifies the ability to coerce men by superior strength and superior weapons. But there are very few human societies in which life is lived literally "by tooth and claw." Hence in most political systems, power is the ability to bring about serious penalties for an individual or a group. Only in extreme cases does such penalizing lead to death or mutilation; more often it consists of imprisonment or of economic deprivations such as fines or heavy taxes.

Moreover, many political thinkers like to make a distinction between "power" and "authority." Authority is power-with-right. It is a power to coerce which people accept as *legitimate*. This means that, in some sense, the people have accepted the right of the government to coerce them to do things that they might not choose to do, such as driving on the right side of the road or limiting the number of women that a man might be married to at any one time. Hence power, if used properly, can promote the common good.

Ordinarily, then, the exercise of power by the government is an exercise of "authority." But the power of a brutal employer, or a labor racketeer, or a lynch mob is not rightful or legitimate even though it may be just as effective over a person or persons as the exercise of power by the government. Such forms of power can only be justified by arguments that are associated with the slogan "might makes right." Sometimes, the exercise of power by a government may be so brutal or so oppressive that no rational man would recognize the legitimacy or rightfulness of such power. Consequently, the American patriot leaders who drafted the Declaration of Independence declared that, in such cases, the people have the right to abolish such a government and replace it with one that will guarantee their safety and happiness.

These definitions help us to see that the men who made the Constitution of the United States were facing the fundamental questions that all men must face if they wish to create a free system of government. The liberty of men must be defended against the abuses of power; yet, at the same time, the abuse of liberty must be controlled by the creation of a legitimate power.

The main problem in this volume will be to discover how the framers of the Constitution sought to adjust liberty and power in the making of the Constitution. Did the men who made the Constitution have a limited or a broad conception of liberty? What abuses of power were they concerned to prevent? Did the men who opposed the Constitution have different conceptions of liberty? What abuses of power did they fear?

In addition, we shall try to find a way of explaining why there was a conflict between Federalists and Anti-Federalists over the ratification of the Constitution. To assist us with this problem of explanation, we shall read the interpretations of four twentieth-century historians. They can help us understand what kind of people the Federalists and Anti-Federalists were – their social backgrounds and their political and economic interests.

If we study the making of the Constitution in this way, we can discover the meaning and the purposes of the Constitution as the framers conceived of them. We shall also be in a better position to understand the new adjustments between liberty and power that we have had to make in the development of American life and institutions in the 175 years since the making of the Constitution. And this is no more and no less than the framers of the Constitution expected of us, for it was none other than James Madison who said, "In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce."

Part 2

The Federalists

THE men who made and supported the Constitution were called Federalists, and our first step in the analysis of liberty and power in the making of the Constitution will be an examination of the ideas of the Federalists. We shall look at two fundamental aspects of Federalist thought as they were developed in their debates in the Philadelphia Convention and in the Federalist papers written to explain and defend the new Constitution. First, we shall try to discover why the Federalists believed that a new Constitution was necessary. In particular, we shall try to find out what uses and abuses of power were pointed to by the Federalists when they complained about conditions in America under the Articles of Confederation. Secondly, we shall investigate the proposals that the Federalists made for a better adjustment of power and liberty in the organization of a new government for the United States. This examination of the ideas of the Federalists will not tell us all that we need to know about the problem of liberty and power in the making of the Constitution, but we must begin by letting the Federalists speak for themselves.

1. Edmund Randolph: "The Defects of the Confederation"*

Edmund Randolph was governor of Virginia and the leader of the Virginia delegation to the Constitutional Convention in Philadelphia. On May 29, 1787 he introduced the first proposal for a drastic revision of the Articles of Confederation – a proposal known as the Virginia Plan. But, before he presented the outlines of the Virginia Plan, Governor Randolph made a speech in which he enumerated the defects of the government under the Articles of Confederation. As you read James Madison's brief notes on Governor Randolph's speech, you should keep in mind the following questions:

1. **What powers did he think were lacking in the government of the Confederation?**
2. **What did he think were the most serious abuses of power that had arisen under the Confederation?**

Mr. Randolph then opened the main business: –
He expressed his regret that it should fall to him, rather than those who were of longer standing in life and political experience, to open the great subject of their mission. But as the Convention had originated from Virginia, and his colleagues supposed that some proposition was expected from them, they had imposed this task on him.

He then commented on the difficulty of the crisis, and the necessity of preventing the fulfilment of the prophecies of the American downfall.

He observed, that, in revising the federal system, we ought to inquire, first, into the properties which such a government ought to possess; secondly, the defects of the Confederation; thirdly, the danger of our situation; and, fourthly, the remedy.

1. The character of such a government ought to secure, first, against foreign invasion; secondly, against dissensions between members of the Union, or seditions in particular states; thirdly, to procure to the several states various blessings, of which an isolated situation was in-

* From James Madison's *Debates in the Federal Convention of 1787* as reprinted in Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* (Philadelphia, 1859), Vol. V, pp. 126–127 abridged.

capable; fourthly, it should be able to defend itself against encroachment; and, fifthly, to be paramount to the state constitutions.

2. In speaking of the defects of the Confederation, he professed a high respect for its authors, and considered them as having done all that patriots could do, in the then infancy of the science of constitutions and of confederacies; when the inefficiency of requisitions was unknown – no commercial discord had arisen among any states – no rebellion had appeared, as in Massachusetts – foreign debts had not become urgent – the havoc of paper money had not been foreseen – treaties had not been violated; and perhaps nothing better could be obtained, from the jealousy of the states with regard to their sovereignty.

He then proceeded to enumerate the defects: –

First, that the Confederation produced no security against foreign invasion; Congress not being permitted to prevent a war, nor to support it by their own authority. Of this he cited many examples; most of which tended to show that they could not cause infractions of treaties, or of the law of nations, to be punished; that particular states might, by their conduct, provoke war without control; and that, neither militia nor drafts being fit for defence on such occasions, enlistments only could be successful, and these could not be executed without money.

Secondly, that the federal government could not check the quarrel between states, nor a rebellion in any, not having constitutional power, nor means, to interpose according to the exigency.

Thirdly, that there were many advantages which the United States might acquire, which were not attainable under the Confederation; such as a productive impost, counteraction of the commercial regulations of other nations, pushing of commerce *ad libitum*, &c., &c.

Fourthly, that the federal government could not defend itself against encroachments from the states.

Fifthly, that it was not even paramount to the state constitutions, ratified as it was in many of the states.

3. He next reviewed the danger of our situation; and appealed to the sense of the best friends of the United States – to the prospect of anarchy from the laxity of government every where – and to other considerations.

4. He then proceeded to the remedy; the basis of which, he said, must be the republican principle.

2. Elbridge Gerry: "The evils we experience flow from the excess of democracy."*

Elbridge Gerry was a delegate to the Constitutional Convention from Massachusetts. He was a difficult and changeable man in his political activities. The other delegates called him a "grumbletonian" and eventually he refused to sign the Constitution because there were some features of it that he did not like. Nevertheless, he took an active part in the debates at the Convention and his ideas often reflected the views of other delegates. The following speech was made by Gerry at the beginning of the Convention and expresses his view of the problem which makes a new Constitution necessary. Read it with these questions in mind:

1. **What does Gerry think is the main cause of the difficulties which existed under the Articles of Confederation?**
2. **Do you remember what important crisis took place in Massachusetts the year before the Constitutional Convention?**

Mr. Gerry. The evils we experience flow from the excess of democracy. The people do not want virtue, but are the dupes of pretended patriots. In Massachusetts, it had been fully confirmed by experience, that they are daily misled into the most baneful measures and opinions, by the false reports circulated by designing men, and which no one on the spot can refute. One principal evil arises from the want of due provision for those employed in the administration of government. It would seem to be a maxim of democracy to starve the public servants. He mentioned the popular clamor in Massachusetts for the reduction of salaries, and the attack made on that of the governor, though secured by the spirit of the constitution itself. He had, he said, been too republican heretofore: he was still, however, republican, but had been taught by experience the danger of the levelling spirit.

* From James Madison's *Debates in the Federal Convention of 1787* as reprinted in Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* (Philadelphia, 1859), Vol. V, p. 136.

3. JAMES MADISON: "What has been the source of those unjust laws complained of among ourselves?"*

James Madison, delegate from Virginia, was one of the busiest men in the Convention at Philadelphia. He went to the Convention determined to work for a strong central government and wrote much of the draft of the Virginia Plan which was presented to the Convention by Governor Randolph. At the same time, he was the only delegate who kept a full journal of all of the proceedings and speeches in the Convention. He also made many carefully prepared speeches of his own that did much to influence the ideas of the framers of the Constitution. The following selection comes from a speech which he made in the early days of the Convention. Think about the following question as you read this selection:

1. **What does Madison believe is the chief abuse of power which has been causing the evils experienced in the country?**

Mr. MADISON . . . What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The holders of one species of property have thrown a disproportion of taxes on the holders of another species. The lesson we are to draw from the whole is, that, where a majority are united by a common sentiment, and have an opportunity, the rights of the minor party become insecure. In a republican government, the majority, if united, have always an opportunity. The only remedy is, to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that, in the first place, a majority will not be likely, at the same moment, to have a common interest separate from that of the whole, or of the minority; and, in the second place, that, in case they should have such an interest, they may not be so apt to unite in the pursuit of it. It was incumbent on us, then, to try this remedy, and, with that view, to frame a republican system on such a scale, and in such a form, as will control all the evils which have been experienced.

* From James Madison's *Debates in the Federal Convention of 1787* as reprinted in Jonathan Elliot, *Debates on the Adoption of the Federal Constitution* (Philadelphia, 1859), Vol. V, pp. 162–163 abridged.

4. James Madison: "A republican remedy for the diseases most incident to republican government."*

James Madison developed one of the most complete statements of the problem of liberty and power expressed by any Federalist when he wrote the famous essay No. 10 in the Federalist papers during the battle over the ratification of the Constitution. This is an extremely important essay and should be read with great care. If you keep the following questions in mind as you read the selection from Federalist *No. 10, you will be able to understand each step in Madison's line of argument without much difficulty.*

1. **What is the main vice of popular governments?**
2. **What is a faction?**
3. **Why is liberty the essential cause of faction?**
4. **Why do men develop different kinds of property?**
5. **What kind of interests in civil society tend to become the most common and durable source of factions and parties?**
6. **Why are all legislators likely to be biased?**
7. **Why does a republican government provide the best means for controlling the effects of faction?**

[The Vice of Popular Governments]

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have everywhere perished, as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality to contend that they have as effectually obviated the danger on this side, as was wished and ex-

* From Henry Cabot Lodge (ed.), *The Federalist* (New York, 1888), Essay No. 10, pp. 51–58 abridged.

pected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith and of public and personal liberty, that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found, indeed, on a candid review of our situation, that some of the distresses under which we labor have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and, particularly, for that prevailing and increasing distrust of public engagements and alarm for private rights which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice with which a factious spirit has tainted our public administrations.

[The Problem of Faction]

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

[Liberty and Faction]

It could never be more truly said than of the first remedy that it was worse than the disease. Liberty is to faction what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the

connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

[The Varying Interests of Civil Society as a Source of Factions]

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of the government.

[The Bias of Legislators]

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are

unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes, and probably by neither with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice. Every shilling with which they overburden the inferior number is a shilling saved to their own pockets.

It is in vain to say that enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good. Enlightened statesmen will not always be at the helm. Nor, in many cases, can such an adjustment be made at all without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole.

[Controlling the Effects of Faction]

The inference to which we are brought is that the *causes* of faction cannot be removed and that relief is only to be sought in the means of controlling its *effects.*

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object

to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the Union.

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens and greater sphere of country over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose. On the other hand, the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people. The question resulting is, whether small or extensive republics are most favorable to the election of proper guardians of the public weal; and it is clearly decided in favor of the latter by two obvious considerations.

In the first place it is to be remarked that however small the republic may be the representatives must be raised to a certain number in order to guard against the cabals of a few; and that however large it may be they must be limited to a certain number in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the two constituents, and being proportionally greatest in the small republic, it follows that if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.

It must be confessed that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representative too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular to the State legislatures.

5. James Madison: "Ambition must be made to counteract ambition."*

In No. 51 of The Federalist, *Madison returns again to the problem of power he had raised in essay No. 10. In essay No. 10, Madison had emphasized that a republican form of government would control the effects of faction "by refining and enlarging the public views" through a body of chosen representatives. The election of representatives to make the laws provides the people with a chance to discuss and compare candidates and issues. By such discussion and comparison, they will be able to develop a more enlarged understanding of the real merit of candidates and to separate truth from falsity in the discussion of public affairs. But such advantages in the republican form of government are not enough; in essay No. 51, Madison argues that additional safeguards are needed to protect the people in case designing men are able to get into public office. As you read this selection, think about the following questions:*

1. **What structure of government does Madison say is necessary to provide additional safeguards against the abuses of power and the dangerous ambitions of men?**
2. **What does he mean when he says that "ambition must be made to counteract ambition"?**

To what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is

* From Henry Cabot Lodge (ed.), *The Federalist* (New York, 1888), Essay No. 51, pp. 322–323 abridged.

evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

6. Alexander Hamilton: "A vigorous and independent executive"*

Alexander Hamilton had taken the lead in the movement for the Constitutional Convention at Philadelphia. He was among those in the Annapolis Convention of 1786 who had worked hardest to rally more support for a continued effort to strengthen the central government. His attendance at the Philadelphia Convention was irregular, however, and his work there was not very effective. His greatest contribution to the new Constitution came in the battle over ratification. He was one of the authors of The Federalist *and wrote at least fifty of the eighty-five essays in that important collection of Federalist ideas. Hamilton was always interested in the effective use of power. To him, weak government was bad government. In the selection below, he is explaining the importance of the executive power provided for in the new Constitution. As you read these selections from essays No. 70 and 71, keep the following question in mind:*

1. **Why does Hamilton believe that an energetic executive is necessary for a good government?**

There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. The enlightened well-wishers to this species of government must at least hope that the supposition is destitute of foundation; since they can never admit its truth, without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. Every man the least conversant in Roman history, knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of Dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the com-

* From Henry Cabot Lodge (ed.), *The Federalist* (New York, 1888), Essays No. 70 and 71, pp. 436–437; 446–447 abridged.

munity whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.

There can be no need, however, to multiply arguments or examples on this head. A feeble Executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

Taking it for granted, therefore, that all men of sense will agree in the necessity of an energetic Executive, it will only remain to inquire, what are the ingredients which constitute this energy? How far can they be combined with those other ingredients which constitute safety in the republican sense? And how far does this combination characterize the plan which has been reported by the convention?

The ingredients which constitute energy in the Executive are, first, unity; secondly, duration; thirdly, an adequate provision for its support; fourthly, competent powers.

The ingredients which constitute safety in the republican sense are, first, a due dependence on the people; secondly, a due responsibility.

Those politicians and statesmen who have been the most celebrated for the soundness of their principles and for the justice of their views, have declared in favor of a single Executive and a numerous legislature. They have, with great propriety, considered energy as the most necessary qualification of the former, and have regarded this as most applicable to power in a single hand; while they have, with equal propriety, considered the latter as best adapted to deliberation and wisdom, and best calculated to conciliate the confidence of the people and to secure their privileges and interests.

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished. . . .

There are some who would be inclined to regard the servile pliancy of the Executive to a prevailing current, either in the community or in the legislature, as its best recommendation. But such men entertain very crude notions, as well of the purposes for which government was instituted, as of the true means by which the public happiness may be promoted. The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every

transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation, that the people commonly *intend* the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always *reason right* about the *means* of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure.

But however inclined we might be to insist upon an unbounded complaisance in the Executive to the inclinations of the people, we can with no propriety contend for a like complaisance to the humors of the legislature. The latter may sometimes stand in opposition to the former, and at other times the people may be entirely neutral. In either supposition, it is certainly desirable that the Executive should be in a situation to dare to act his own opinion with vigor and decision.

7. ALEXANDER HAMILTON: "The complete independence of the courts of justice is peculiarly essential in a limited Constitution."*

Hamilton was interested in the judicial power as much as he was in the executive power that was established in the new Constitution. He believed that the people would be misled frequently in popular elections and that they would elect demagogues and de-

* From Henry Cabot Lodge (ed.), *The Federalist* (New York, 1888), Essay No. 78, pp. 484–486; 487–488 abridged.

signing men to the legislature. Hence, he was anxious to support the idea of additional checks on the possible abuse of power by legislative majorities. In the selection below, Hamilton explains the role which the judges should have under the new Constitution. As you read this selection from essay No. 78, think about the following questions:

1. **Why does Hamilton believe that the independence of the courts of justice is so essential?**
2. **What great function does he assume that the judges will perform in the new constitutional system?**

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Consitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not

to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. . . .

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had

proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act. But it is easy to see, that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

8. Alexander Hamilton: "An injudicious zeal for bills of rights"*

The final draft of the Constitution that was signed by the delegates at Philadelphia on September 7, 1787 did not contain a Bill of Rights. The Articles of Confederation had not contained a Bill of Rights either because the major portion of "power, jurisdiction and right" was retained by the states. But, when the people of the states read the new Constitution prepared at Philadelphia, many of them expressed alarm over the absence of a Bill of Rights. After all, the new government was to be much more powerful than the government of the Confederation.

In one of the final essays in the Federalist papers, Hamilton tries to defend the Constitution against the charge that because the Constitution did not contain a Bill of Rights, the Federalists were seeking to establish a dangerous concentration of power. As you read this selection from essay No. 84, consider the following questions:

1. **How does Hamilton try to meet this charge made by the opponents of the Constitution?**
2. **Do you think that he has made a convincing case?**

The most considerable of the remaining objections is that the plan of the convention contains no bill of rights. Among other answers

* From Henry Cabot Lodge (ed.), *The Federalist* (New York, 1888), Essay No. 84, pp. 533–534; 536–537 abridged.

given to this, it has been upon different occasions remarked that the constitutions of several of the States are in a similar predicament. I add that New York is of the number. And yet the opposers of the new system, in this State, who profess an unlimited admiration for its constitution, are among the most intemperate partisans of a bill of rights. To justify their zeal in this matter, they allege two things: one is that, though the constitution of New York has no bill of rights prefixed to it, yet it contains, in the body of it, various provisions in favor of particular privileges and rights, which, in substance, amount to the same thing; the other is, that the Constitution adopts, in their full extent, the common and statute law of Great Britain, by which many other rights, not expressed in it, are equally secured.

To the first I answer, that the Constitution proposed by the convention contains, as well as the constitution of this State, a number of such provisions.

Independent of those which relate to the structure of the government, we find the following: Article 1, section 3, clause 7 – "Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law." Section 9 of the same article, clause 2 – "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Clause 3 – "No bill of attainder or *ex-post-facto* law shall be passed." Clause 7 – "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state." Article 3, section 2, clause 3 – "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place of places as the Congress may by law have directed." Section 3, of the same article – "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court." And clause 3, of the same section – "The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.". . .

But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal and private concerns. If, therefore, the loud clamors against the plan of the convention, on this score, are well founded, no epithets of reprobation will be too strong for the constitution of this State. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.

9. The Constitution of 1787

No one can understand fully the Federalists' conception of the proper adjustment between power and liberty unless he analyzes the Constitution that was drafted at the Philadelphia Convention in 1787. The Constitution itself is the greatest handiwork of the Federalists and it has often been said that the Constitution of

1787 and The Federalist, *taken together, represent America's most important contribution to the history of political thought in modern times.*

Although the full text of the Constitution appears below and should be read in its entirety, the problem of liberty and power will lead us to focus our attention on particular sections of that document. Let us look first of all at Article I, Section 8 and ask:

1. **What powers are given to the Congress under the new organization of government?**
2. **How would the exercise of such powers enable the Congress to deal with some of the problems that had existed under the Confederation?**

Now read Article I, Section 10 and answer this question:

3. **How would these limitations on the use of power by the states enable the new government to eliminate some of the evils which the Federalists had criticized under the Articles of Confederation?**

Now read Article VI and (remembering Article I, Sections 8 and 10) consider these questions:

4. **What had happened to the distribution of power between the central government and the states?**
5. **Where were the greatest powers located—in the states or in the central government?**

Let us also consider how power is organized and distributed within *the national government. Read Article II, Sections 2, 3 and Article I, Section 7 with this question in mind:*

6. **Does the President have any powers which will enable him to influence Congress or to check any abuses of power by the Legislature?**

Now read Article III and consider this question:

7. **Does the Federal Judiciary, and particularly the Supreme Court, have any means of checking the abuses of power by either the President or Congress?**

Now that we have looked at the major definitions and allocations of power in the Constitution of 1787, we need to examine the way in which the framers of the Constitution adjusted the relationship of liberty to power. Read Article I, Section 9 and try to answer these questions:

8. **What limitations are placed on the powers of Congress?**
9. **Do these provisions protect individual liberty in any way?**
10. **Do you think that these guarantees would be enough without a Bill of Rights?**

Read the views of the Anti-Federalists and the Bill of Rights in Part 3 before you make a final judgment about this question.

Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I. [The Legislative Department]

Section I. [The Congress]

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. [The House of Representatives]

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]* The actual Enumeration shall be made within three

* Replaced by the 14th Amendment.

Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. [The Senate]

The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,]† for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, [which shall then fill such Vacancies].

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When

† Repealed by the 17th Amendment.

the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

Section 4. [Congressional Elections and Meetings]

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. [Organization and Rules of Each House]

Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties, as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. [Privileges and Restrictions of Senators and Representatives]

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and

returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased, during such time; and no Person holding any Office under the United States shall be a Member of either House during his continuance in Office.

Section 7. [The Making of Laws]

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. [Powers Granted to Congress]

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties,

Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. [Powers Denied to Congress]

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each Person.

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto law shall be passed.

No capitation, or other direct, Tax shall be laid unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. [Powers Denied to the States]

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II. [The Executive Department]

Section 1. [The President]

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and, together with the Vice-President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall chuse from them by Ballot the Vice-President.]**

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No person except a natural-born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that

** Replaced by the 12th Amendment.

Office who shall not have attained to the Age of thirty-five years, and been fourteen years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice-President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice-President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the execution of his Office, he shall take the following Oath or Affirmation: —"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will, to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

Section 2. [Presidential Powers]

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. [Presidential Duties]

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. [The Procedure for Removing a President]

The President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III. [The Judicial Department]

Section 1. [The Federal Courts]

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. [Judicial Power]

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting ambassadors, other public ministers and consuls; — to all cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more states; [— between a State and Citizens of another State];†† — between Citizens of different States, — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

†† Modified by the 11th Amendment.

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. [The Definition and Punishment of Treason]

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV. [The Relations of States]

Section 1. [Full Faith and Credit for Each State's Laws and Court Decisions]

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. [The Privileges of Citizens]

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. [New States and the Organization of Territories]

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other States; nor any State be formed by the Junction of two or more States, or parts of states, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. [The Guarantee of a Republican Form of Government]

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V. [Amendments]

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI. [The Supremacy of the Constitution]

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution; but no religious Test shall ever be required as a qualification to any Office or public Trust under the United States.

ARTICLE VII. [Ratification]

The Ratifications of the Conventions of nine States shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Part 3

The Anti-Federalists

Our second step in the analysis of the problem of liberty and power in the making of the Constitution will be an examination of the ideas of the Anti-Federalists, as the opponents of the Constitution were called, in the battle over the ratification of the Constitution. As with the Federalists, we shall look at two fundamental aspects of Anti-Federalist thought. First we shall look at a statement by a leading Anti-Federalist in which he explains why America seems to be in a crisis and why he distrusts the movement for a new Constitution. Then we shall look at some Anti-Federalist ideas about the proper adjustment of liberty and power as they were expressed in the debates over the new Constitution. For it is only by looking at both sides in the battle over ratification that we can get a clearer conception of what problems concerning liberty and power were really crucial in the minds of the generation of Americans that adopted the Constitution.

A. *The Anti-Federalist View of the Uses and Abuses of Power*

10. Richard Henry Lee: "Those parties . . . which have misused their powers."*

Richard Henry Lee was a member of a prominent Virginia family and had played a leading role in political affairs during the American Revolution. He was appointed as a delegate to the Constitutional Convention in Philadelphia, but declined to serve. He was one of the foremost leaders of the opposition to the Constitution both in the Virginia ratifying convention and before

* From *Letters of a Federal Farmer* in Paul Leicester Ford, *Pamphlets on the Constitution of the United States* (Brooklyn, 1888), pp. 283–285 abridged.

the people. The five Letters of the Federal Farmer *were written by Richard Henry Lee during the battle over the ratification of the Constitution and they represent a moderate and reasoned criticism of the Constitution which was equal in intellectual quality to* The Federalist. *In the following selection, Lee is expressing his criticism of the way in which the movement for a new Constitution was organized. As you read this selection, think about the following questions:*

1. **What misuses of power does he believe paved the way for the movement for a new Constitution?**
2. **What kind of men does he think were most interested in changing the government?**
3. **Does he think that the people were adequately represented at Philadelphia?**

The confederation was formed when great confidence was placed in the voluntary exertions of individuals, and of the respective states; and the framers of it, to guard against usurpation, so limited, and checked the powers, that, in many respects, they are inadequate to the exigencies of the union. We find, therefore, members of congress urging alterations in the federal system almost as soon as it was adopted. It was early proposed to vest congress with powers to levy an impost, to regulate trade, &c. but such was known to be the caution of the states in parting with power, that the vestment even of these, was proposed to be under several checks and limitations. During the war, the general confusion, and the introduction of paper money, infused in the minds of people vague ideas respecting government and credit. We expected too much from the return of peace, and of course we have been disappointed. Our governments have been new and unsettled; and several legislatures, by making tender, suspension, and paper money laws, have given just cause of uneasiness to creditors. By these and other causes, several orders of men in the community have been prepared, by degrees, for a change of government; and this very abuse of power in the legislatures, which in some cases has been charged upon the democratic part of the community, has furnished aristocratical men with those very weapons, and those very means, with which, in great measure, they are rapidly effecting their favourite object. And should an oppressive government be the consequence of the proposed change, prosperity may reproach not only a few overbearing, unprincipled men, but those parties in the states which have misused their powers.

The conduct of several legislatures, touching paper money, and tender laws, has prepared many honest men for changes in government, which otherwise they would not have thought of – when by the evils, on the one hand, and by the secret instigations of artful men, on the other, the minds of men were become sufficiently uneasy, a bold step was taken, which is usually followed by a revolution, or a civil war. A general convention for mere commercial purposes was moved for – the authors of this measure saw that the people's attention was turned solely to the amendment of the federal system; and that, had the idea of a total change been started, probably no state would have appointed members to the convention. The idea of destroying ultimately, the state government, and forming one consolidated system, could not have been admitted – a convention, therefore, merely for vesting in congress power to regulate trade was proposed. This was pleasing to the commercial towns; and the landed people had little or no concern about it. September, 1786, a few men from the middle states met at Annapolis, and hastily proposed a convention to be held in May, 1787, for the purpose, generally, of amending the confederation – this was done before the delegates of Massachusetts, and of the other states arrived – still not a word was said about destroying the old constitution, and making a new one – The states still unsuspecting, and not aware that they were passing the Rubicon, appointed members to the new convention, for the sole and express purpose of revising and amending the confederation – and, probably, not one man in ten thousand in the United States, till within these ten or twelve days, had an idea that the old ship was to be destroyed, and he put to the alternative of embarking in the new ship presented, or of being left in danger of sinking – The States, I believe, universally supposed the convention would report alterations in the confederation, which would pass an examination in congress, and after being agreed to there, would be confirmed by all the legislatures, or be rejected. Virginia made a very respectable appointment, and placed at the head of it the first man in America. In this appointment there was a mixture of political characters; but Pennsylvania appointed principally those men who are esteemed aristocratical. Here the favourite moment for changing the government was evidently discerned by a few men, who seized it with address. Ten other states appointed, and tho' they chose men principally connected with commerce and the judicial department yet they appointed many good republican characters – had they all attended we should now see, I am persuaded, a better system presented. The non-attendance of eight or nine men, who were appointed members of the convention, I shall ever consider as a very unfortunate

event to the United States. – Had they attended, I am pretty clear that the result of the convention would not have had that strong tendency to aristocracy now discernable in every part of the plan. There would not have been so great an accumulation of powers, especially as to the internal police of this country in a few hands as the constitution reported proposes to vest in them – the young visionary men, and the consolidating aristocracy, would have been more restrained than they have been. Eleven states met in the convention, and after four months' close attention presented the new constitution, to be adopted or rejected by the people. The uneasy and fickle part of the community may be prepared to receive any form of government; but I presume the enlightened and substantial part will give any constitution presented for their adoption a candid and thorough examination; and silence those designing or empty men, who weakly and rashly attempt to precipitate the adoption of a system of so much importance – We shall view the convention with proper respect – and, at the same time, that we reflect there were men of abilities and integrity in it, we must recollect how disproportionately the democratic and aristocratic parts of the community were represented –

B. *Anti-Federalist Conceptions of Liberty and Power*

11. Melancton Smith: Liberty and Representation*

Melancton Smith was a delegate to the New York ratifying convention who opposed the Constitution. Smith ultimately voted for the Constitution, but he did so in the hope that changes would be made in the Constitution either by revision in another convention or by amendments. The following selection is taken from a speech which he made in the New York ratifying convention. As you read this selection, keep the following questions in mind:

1. **What fears does he express about the method of representation provided for Congress in the new Constitution?**
2. **Why does he think that the government under the proposed Constitution would be a "government of oppression"?**

* From Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Philadelphia, 1859), Vol. II, pp. 245–249 abridged.

To determine whether the number of representatives proposed by this Constitution is sufficient, it is proper to examine the qualifications which this house ought to possess, in order to exercise their power discreetly for the happiness of the people. The idea that naturally suggests itself to our minds, when we speak of representatives, is, that they resemble those they represent. They should be a true picture of the people, possess a knowledge of their circumstances and their wants, sympathize in all their distresses, and be disposed to seek their true interests. The knowledge necessary for the representative of a free people not only comprehends extensive political and commercial information, such as is acquired by men of refined education, who have leisure to attain to high degrees of improvement, but it should also comprehend that kind of acquaintance with the common concerns and occupations of the people, which men of the middling class of life are, in general, more competent to than those of a superior class. To understand the true commercial interests of a country, not only requires just ideas of the general commerce of the world, but also, and principally, a knowledge of the productions of your own country, and their value, what your soil is capable of producing, the nature of your manufactures, and the capacity of the country to increase both. To exercise the power of laying taxes, duties, and excises, with discretion, requires something more than an acquaintance with the abstruse parts of the system of finance. It calls for a knowledge of the circumstances and ability of the people in general – a discernment how the burdens imposed will bear upon the different classes.

From these observations results this conclusion – that the number of representatives should be so large, as that, while it embraces the men of the first class, it should admit those of the middling class of life. I am convinced that this government is so constituted that the representatives will generally be composed of the first class in the community, which I shall distinguish by the name of the *natural aristocracy* of the country. I do not mean to give offence by using this term. I am sensible this idea is treated by many gentlemen as chimerical. I shall be asked what is meant by the *natural aristocracy,* and told that no such distinction of classes of men exists among us. It is true, it is our singular felicity that we have no legal or hereditary distinctions of this kind; but still there are real differences. Every society naturally divides itself into classes. The Author of nature has bestowed on some greater capacities than others; birth, education, talents, and wealth, create distinctions among men as visible, and of as much influence, as titles, stars, and garters. In every society, men of this class will

command a superior degree of respect; and if the government is so constituted as to admit but few to exercise the powers of it, it will, according to the natural course of things, be in their hands. Men in the middling class, who are qualified as representatives, will not be so anxious to be chosen as those of the first. When the number is so small, the office will be highly elevated and distinguished; the style in which the members live will probably be high; circumstances of this kind will render the place of a representative not a desirable one to sensible, substantial men, who have been used to walk in the plain and frugal paths of life.

Besides, the influence of the great will generally enable them to succeed in elections. It will be difficult to combine a district of country containing thirty or forty thousand inhabitants, – frame your election laws as you please, – in any other character, unless it be in one of conspicuous military, popular, civil, or legal talents. The great easily form associations; the poor and middling class form them with difficulty. If the elections be by plurality, – as probably will be the case in this state, – it is almost certain none but the great will be chosen, for they easily unite their interests: the common people will divide, and their divisions will be promoted by the others. There will be scarcely a chance of their uniting in any other but some great man, unless in some popular demagogue, who will probably be destitute of principle. A substantial yeoman, of sense and discernment, will hardly ever be chosen. From these remarks, it appears that the government will fall into the hands of the few and the great. This will be a government of oppression. I do not mean to declaim against the great, and charge them indiscriminately with want of principle and honesty. The same passions and prejudices govern all men. The circumstances in which men are placed in a great measure give a cast to the human character. Those in middling circumstances have less temptation; they are inclined by habit, and the company with whom they associate, to set bounds to their passions and appetites. If this is not sufficient, the want of means to gratify them will be a restraint: they are obliged to employ their time in their respective callings; hence the substantial yeomanry of the country are more temperate, of better morals, and less ambition, than the great. The latter do not feel for the poor and middling class; the reasons are obvious – they are not obliged to use the same pains and labor to procure property as the other. They feel not the inconveniences arising from the payment of small sums. The great consider themselves above the common people, entitled to more respect, do not associate with them; they fancy themselves to have a right of preëminence in every thing. In short, they possess the same

feelings, and are under the influence of the same motives, as an hereditary nobility. I know the idea that such a distinction exists in this country is ridiculed by some; but I am not the less apprehensive of danger from their influence on this account. Such distinctions exist all the world over, have been taken notice of by all writers on free government, and are founded in the nature of things. It has been the principal care of free governments to guard against the encroachments of the great. Common observation and experience prove the existence of such distinctions. Will any one say that there does not exist in this country the pride of family, of wealth, of talents, and that they do not command influence and respect among the common people? Congress, in their address to the inhabitants of the province of Quebec, in 1775, state this distinction in the following forcible words, quoted from the Marquis Beccaria: "In every human society there is an essay continually tending to confer on one part the height of power and happiness, and to reduce the other to the extreme of weakness and misery. The intent of good laws is to oppose this effort, and to diffuse their influence universally, and equally." We ought to guard against the government being placed in the hands of this class. They cannot have that sympathy with their constituents which is necessary to connect them closely to their interests. Being in the habit of profuse living, they will be profuse in the public expenses. They find no difficulty in paying their taxes, and therefore do not feel public burdens. Besides, if they govern, they will enjoy the emoluments of the government. The middling class, from their frugal habits, and feeling themselves the public burdens, will be careful how they increase them.

But I may be asked, Would you exclude the first class in the community from any share in legislation? I answer, By no means. They would be factious, discontented, and constantly disturbing the government. It would also be unjust. They have their liberties to protect, as well as others, and the largest share of property. But my idea is, that the Constitution should be so framed as to admit this class, together with a sufficient number of the middling class to control them. You will then combine the abilities and honesty of the community, a proper degree of information, and a disposition to pursue the public good. A representative body, composed principally of respectable yeomanry, is the best possible security to liberty. When the interest of this part of the community is pursued, the public good is pursued, because the body of every nation consists of this class, and because the interest of both the rich and the poor are involved in that of the middling class. No burden can be laid on the poor but what will sensibly affect the middling class. Any law rendering property insecure would be injuri-

ous to them. When, therefore, this class in society pursue their own interest, they promote that of the public, for it is involved in it.

In so small a number of representatives, there is great danger from corruption and combination. A great politician has said that every man has his price. I hope this is not true in all its extent; but I ask the gentleman to inform me what government there is in which it has not been practised. Notwithstanding all that has been said of the defects in the constitution of the ancient confederacies in the Grecian republics, their destruction is to be imputed more to this cause than to any imperfection in their forms of government. This was the deadly poison that effected their dissolution. This is an extensive country, increasing in population and growing in consequence. Very many lucrative offices will be in the grant of the government, which will be objects of avarice and ambition. How easy will it be to gain over a sufficient number, in the bestowment of offices, to promote the views and the purposes of those who grant them! Foreign corruption is also to be guarded against. A system of corruption is known to be the system of government in Europe. It is practised without blushing; and we may lay it to our account, it will be attempted amongst us. The most effectual as well as natural security against this is a strong democratic branch in the legislature, frequently chosen, including in it a number of the substantial, sensible yeomanry of the country. Does the House of Representatives answer this description? I confess, to me they hardly wear the complexion of a democratic branch; they appear the mere shadow of representation. The whole number, in both houses, amounts to ninety-one; of these forty-six make a quorum; and twenty-four of those, being secured, may carry any point. Can the liberties of three millions of people be securely trusted in the hands of twenty-four men? Is it prudent to commit to so small a number the decision of the great questions which will come before them? Reason revolts at the idea.

12. George Clinton: Decentralized Power*

George Clinton was governor of New York and a vigorous opponent of the Constitution. He was the leader of a powerful political faction that had controlled the politics of New York through-

* From "The Letters of 'Cato'," in Paul Leicester Ford, *Essays on the Constitution of the United States* (Brooklyn, 1892), pp. 255–257 abridged.

out the Confederation period. As soon as the Constitution was sent to the states for ratification, Clinton began to organize the opposition forces in New York. He, himself, wrote eight essays criticizing the Constitution which were printed in some of the same newspapers which published the Federalist papers. George Clinton's essays are known as the Cato Letters *because he signed himself as "Cato" following the custom of the day for political letters of this type. [The Federalist papers carried the signature of* Publius *even though the essays were written by three authors.] In the following selection, Clinton raises the problem of power. After you read this excerpt, try to answer the following questions:*

1. **What theory of power does he believe in?**
2. **Why does he think that the new form of government will inevitably lead America down the road to monarchy?**

The recital, or premises on which the new form of government is erected, declares a consolidation or union of all the thirteen parts, or states, into one great whole, under the firm of the United States, for all the various and important purposes therein set forth. But whoever seriously considers the immense extent of territory comprehended within the limits of the United States, together with the variety of its climates, productions, and commerce, the difference of extent, and number of inhabitants in all; the dissimilitude of interest, morals, and politics, in almost every one, will receive it as an intuitive truth, that a consolidated republican form of government therein, can never *form a perfect union, establish justice, insure domestic tranquility, promote the general welfare, and secure the blessings of liberty to you and your posterity,* for to these objects it must be directed: this unkindred legislature therefore, composed of interests opposite and dissimilar in their nature, will in its exercise, emphatically be like a house divided against itself.

The governments of Europe have taken their limits and form from adventitious circumstances, and nothing can be argued on the motive of agreement from them; but these adventitious political principles, have nevertheless produced effects that have attracted the attention of philosophy, which have established axioms in the science of politics therefrom, as irrefragable as any in Euclid. It is natural, says Montesquieu, *to a republic to have only a small territory, otherwise it cannot long subsist: in a large one, there are men of large fortunes, and consequently of less moderation; there are too great deposits to trust in the*

hands of a single subject; an ambitious person soon becomes sensible that he may be happy, great, and glorious by oppressing his fellow citizens, and that he might raise himself to grandeur, on the ruins of his country. In large republics, the public good is sacrificed to a thousand views; in a small one, the interest of the public is easily perceived, better understood, and more within the reach of every citizen; abuses have a less extent, and of course are less protected – he also shows you, that the duration of the republic of Sparta was owing to its having continued with the same extent of territory after all its wars; and that the ambition of Athens and Lacedemon to command and direct the union, lost them their liberties, and gave them a monarchy.

From this picture, what can you promise yourselves, on the score of consolidation of the United States into one government? Impracticability in the just exercise of it, your freedom insecure, even this form of government limited in its continuance, the employments of your country disposed of to the opulent, to whose contumely you will continually be an object – you must risk much, by indispensably placing trusts of the greatest magnitude, into the hands of individuals whose ambition for power, and aggrandizement, will oppress and grind you – where from the vast extent of your territory, and the complication of interests, the science of government will become intricate and perplexed, and too mysterious for you to understand and observe; and by which you are to be conducted into a monarchy, either limited or despotic; the latter, Mr. Locke remarks, *is a government derived from neither nature nor compact.*

13. Richard Henry Lee: "A free people . . . will fix limits to their legislators and rules."*

In this second selection from Richard Henry Lee's Letters of a Federal Farmer, *we are able to get a full statement of the problem of power and liberty as a great many Anti-Federalists viewed it. Consider the following questions as you read this excerpt:*

1. **What are the three forms of government which Lee thinks are possible for America?**
2. **Which does he prefer?**

* From *Letters of a Federal Farmer* in Paul Leicester Ford, *Pamphlets on the Constitution of the United States* (Brooklyn, 1888), pp. 286–288; 291–292 abridged.

3. **To which of these three categories does he assign the proposed Constitution?**
4. **What would be a better distribution of power between the central government and the state government in his opinion?**

There are three different forms of free government under which the United States may exist as one nation; and now is, perhaps, the time to determine to which we will direct our views. 1. Distinct republics connected under a federal head. In this case the respective state governments must be the principal guardians of the people's rights, and exclusively regulate their internal police; in them must rest the balance of government. The congress of the states, or federal head, must consist of delegates amenable to, and removable by the respective states: This congress must have general directing powers; powers to require men and monies of the states; to make treaties; peace and war; to direct the operations of armies, &c. Under this federal modification of government, the powers of congress would be rather advisory or recommendatory than coercive. 2. We may do away with the federal state governments, and form or consolidate all the states into one entire government, with one executive, one judiciary, and one legislature, consisting of senators and representatives collected from all parts of the union: In this case there would be a compleat consolidation of the states. 3. We may consolidate the states as to certain national objects, and leave them severally distinct independent republics, as to internal police generally. Let the general government consist of an executive, a judiciary, and balanced legislature, and its powers extend exclusively to all foreign concerns, causes arising on the seas to commerce, imports, armies, navies, Indian affairs, peace and war, and to a few internal concerns of the community; to the coin, post-offices, weights and measures, a general plan for the militia, to naturalization, *and, perhaps to bankruptcies,* leaving the internal police of the community, in other respects, exclusively to the state governments; as the administration of justice in all causes arising internally, the laying and collecting of internal taxes, and the forming of the militia according to a general plan prescribed. In this case there would be a compleat consolidation, *quoad* certain objects only.

Touching the first, or federal plan, I do not think much can be said in its favor: The sovereignty of the nation, without coercive and efficient powers to collect the strength of it, cannot always be depended on to answer the purposes of government; and in a congress of representatives of foreign states, there must necessarily be an unreasonable mixture of powers in the same hands.

As to the second, or compleat consolidating plan, it deserves to be carefully considered at this time by every American: If it be impracticable, it is a fatal error to model our governments, directing our views ultimately to it.

The third plan, or partial consolidation, is, in my opinion, the only one that can secure the freedom and happiness of this people. I once had some general ideas that the second plan was practicable, but from long attention, and the proceedings of the convention, I am fully satisfied, that this third plan is the only one we can with safety and propriety proceed upon. Making this the standard to point out, with candor and fairness, the parts of the new constitution which appear to be improper, is my object. The convention appears to have proposed the partial consolidation evidently with a view to collect all powers ultimately, in the United States into one entire government; and from its views in this respect, and from the tenacity of the small states to have an equal vote in the senate, probably originated the greatest defects in the proposed plan. . . .

But I do not pay much regard to the reasons given for not bottoming the new constitution on a better bill of rights. I still believe a complete federal bill of rights to be very practicable. Nevertheless I acknowledge the proceedings of the convention furnish my mind with many new and strong reasons, against a complete consolidation of the states. They tend to convince me, that it cannot be carried with propriety very far – that the convention have gone much farther in one respect than they found it practicable to go in another; that is, they propose to lodge in the general government very extensive powers – *powers* nearly, if not altogether, complete and unlimited, over the purse and the sword. But, in its organization, they furnish the strongest proof that the proper limbs, or parts of a government, to support and execute those powers on proper principles (or in which they can be safely lodged) cannot be formed. These powers must be lodged somewhere in every society; but then they should be lodged where the strength and guardians of the people are collected. They can be wielded, or safely used, in a free country only by an able executive and judiciary, a respectable senate, and a secure, full, and equal representation of the people. I think the principles I have premised or brought into view, are well founded – I think they will not be denied by any fair reasoner. It is in connection with these, and other solid principles, we are to examine the constitution. It is not a few democratic phrases, or a few well formed features, that will prove its merits; or a few small omissions that will produce its rejection among men of sense; they will enquire what are the essential powers in a

community, and what are nominal ones; where and how the essential powers shall be lodged to secure government, and to secure true liberty.

In examining the proposed constitution carefully, we must clearly perceive an unnatural separation of these powers from the substantial representation of the people. The state government will exist, with all their governors, senators, representatives, officers and expences; in these will be nineteen twentieths of the representatives of the people; they will have a near connection, and their members an immediate intercourse with the people; and the probability is, that the state governments will possess the confidence of the people, and be considered generally as their immediate guardians.

The general government will consist of a new species of executive, a small senate, and a very small house of representatives. As many citizens will be more than three hundred miles from the seat of this government as will be nearer to it, its judges and officers cannot be very numerous, without making our governments very expensive. Thus will stand the state and the general governments, should the constitution be adopted without any alterations in their organization; but as to powers, the general government will possess all essential ones, at least on paper, and those of the states a mere shadow of power. And therefore, unless the people shall make some great exertions to restore to the state governments their powers in matters of internal police; as the powers to lay and collect, exclusively, internal taxes, to govern the militia, and to hold the decisions of their own judicial courts upon their own laws final, the balance cannot possibly continue long; but the state governments must be annihilated, or continue to exist for no purpose.

14. The Bill of Rights

The Bill of Rights cannot be called the handiwork of the Anti-Federalists alone even though they were most vigorous in demanding that such guarantees for individual rights should be added to the Constitution. Many Federalists were impressed with the seriousness of the Anti-Federalist arguments about the lack of a bill of rights. Consequently, James Madison proposed the first ten amendments to the Constitution in September of 1789, shortly after the new government went into operation. These ten

amendments were ratified in 1791 and, taken together, they are known as the "Bill of Rights." These amendments impose restrictions on the Federal government in defense of the rights of the individual. Read the Bill of Rights carefully and try to answer the following questions:

1. **What liberties of the individual are protected by the Bill of Rights that were not protected by the Constitution of 1787?**
2. **Which of these rights do you think are most important? Why?**

ARTICLE I. [The Basic Personal Freedoms]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II. [The Right to Bear Arms]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

ARTICLE III. [The Quartering of Troops]

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV. [The Right to Personal Security]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V. [The Basic Procedural Rights]

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI. [Procedural Rights in Criminal Cases]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE VII. [Procedural Rights in Civil Cases]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reëxamined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII. [Restrictions Concerning Bail and Punishments]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX. [Rights Retained by the People]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X. [Powers Reserved to the States and to the People]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Part 4

Twentieth-Century Interpretations of the Problem of Liberty and Power in the Making of the Constitution

In our final group of readings, we shall be examining the efforts of four twentieth-century historians to interpret the ideas and actions of the men who took part in making and ratifying the Constitution. All four of these writers have read the same documents that are included in this volume and many others besides. Sometimes they may even refer directly to some of the documents which you have just read.

The interpretations of these historians are developed in the context of the events and institutions of the period in which the Constitution was adopted, particularly in the decade of the 1780's. Thus, as you read these selections, it would be well for you to remember what you already know about the historical events of the 1780's as well as the ideas about liberty and power which you have discovered from your reading of the previous selections in this volume. The following chronological table of events will help you refresh your historical memory.

1781 The Articles of Confederation were finally ratified.

1782 An Amendment to the Articles which would have permitted a tax of 5 per cent on imports was defeated by the vote of Rhode Island.

1782–83 The Congress of the Confederation asked the states for $10,000,000 in requisitions but received less than $1,500,000.

1783 The British Parliament adopted a Navigation Act which restricted American trade and placed heavy duties on American vessels in English ports.

1785 Boston merchants petitioned Congress for laws "putting our commerce on an equality" with other nations.

1786 The Annapolis Convention met in September to consider ways and means of establishing a uniform commercial system for the United States, but only 5 states were represented.

1786–87 Farmers and debtors in Massachusetts organized a rebellion against the courts and the legislature known as Shays' rebellion.

1787 The Constitutional Convention met in Philadelphia, May 25 to September 17.

1787–88 Eleven of the thirteen states ratified the Constitution and elections were held for the new government.

1789 George Washington took oath of office as President when the new government began operations April 30.

15. Charles Beard: "An Economic Interpretation of the Constitution"*

Charles A. Beard's famous book entitled An Economic Interpretation of the Constitution of the United States *was published in 1913 and became a widely-read book for the next thirty years. The selections that follow contain many of Beard's essential ideas about the framing of the Constitution. As you read these selections you should try to answer the following questions:*

1. **What were the most important economic groups represented in the Constitutional Convention?**
2. **How, in Beard's opinion, does the Constitution reflect the expectations of these economic interests?**
3. **Do you think that wealth and economic power lead to the possession of political power?**
4. **Do you think that he has emphasized economic interests more than the men of 1787–88 did in their public discussion of the Constitution?**

[The Economic Interests of the Members of the Constitutional Convention]

A survey of the economic interests of the members of the Convention presents certain conclusions:

A majority of the members were lawyers by profession.

Most of the members came from towns, on or near the coast, that is, from the regions in which personalty† was largely concentrated.

Not one member represented in his immediate personal economic interests the small farming or mechanic classes.

The overwhelming majority of members, at least five-sixths, were immediately, directly, and personally interested in the outcome of their labors at Philadelphia, and were to a greater or less extent economic beneficiaries from the adoption of the Constitution.

1. Public security interests were extensively represented in the Convention. Of the fifty-five members who attended no less than forty appear on the Records of the Treasury Department for sums varying from a few dollars up to more than one hundred thousand dollars. Among the minor holders were Bassett, Blount, Brearley, Broom, Butler, Carroll, Few, Hamilton, L. Martin, Mason, Mercer, Mifflin, Read, Spaight, Wilson, and Wythe. Among the larger holders (taking the sum of about $5000 as the criterion) were Baldwin, Blair, Clymer, Dayton, Ellsworth, Fitzsimons, Gilman, Gerry, Gorham, Jenifer, Johnson, King, Langdon, Lansing, Livingston, McClurg, R. Morris, C. C. Pinckney, C. Pinckney, Randolph, Sherman, Strong, Washington, and Williamson.

It is interesting to note that, with the exception of New York, and possibly Delaware, each state had one or more prominent representatives in the Convention who held more than a negligible amount of securities, and who could therefore speak with feeling and authority on the question of providing in the new Constitution for the full discharge of the public debt:

Langdon and Gilman, of New Hampshire.

Gerry, Strong, and King, of Massachusetts.

Ellsworth, Sherman, and Johnson, of Connecticut.

Hamilton, of New York. Although he held no large amount personally, he was the special pleader for the holders of public securities and the maintenance of public faith.

Dayton, of New Jersey.

Robert Morris, Clymer, and Fitzsimons, of Pennsylvania.

Mercer and Carroll, of Maryland.

Blair, McClurg, and Randolph, of Virginia.

Williamson, of North Carolina.

The two Pinckneys, of South Carolina.

Few and Baldwin, of Georgia.

† Beard uses the word *personalty* to mean those forms of property not represented by real estate (*realty*). Thus, investments represented by securities, shares, or certificates of any kind would be *personalty*.

2. Personalty invested in lands for speculation was represented by at least fourteen members: Blount, Dayton, Few, Fitzsimons, Franklin, Gilman, Gerry, Gorham, Hamilton, Mason, R. Morris, Washington, Williamson, and Wilson.

3. Personalty in the form of money loaned at interest was represented by at least twenty-four members: Bassett, Broom, Butler, Carroll, Clymer, Davie, Dickinson, Ellsworth, Few, Fitzsimons, Franklin, Gilman, Ingersoll, Johnson, King, Langdon, Mason, McHenry, C. C. Pinckney, C. Pinckney, Randolph, Read, Washington, and Williamson.

4. Personalty in mercantile, manufacturing, and shipping lines was represented by at least eleven members: Broom, Clymer, Ellsworth, Fitzsimons, Gerry, King, Langdon, McHenry, Mifflin, G. Morris, and R. Morris.

5. Personalty in slaves was represented by at least fifteen members: Butler, Davie, Jenifer, A. Martin, L. Martin, Mason, Mercer, C. C. Pinckney, C. Pinckney, Randolph, Read, Rutledge, Spaight, Washington, and Wythe.

It cannot be said, therefore, that the members of the Convention were "disinterested." On the contrary, we are forced to accept the profoundly significant conclusion that they knew through their personal experiences in economic affairs the precise results which the new government that they were setting up was designed to attain. As a group of doctrinaires, like the Frankfort assembly of 1848, they would have failed miserably; but as practical men they were able to build the new government upon the only foundations which could be stable: fundamental economic interests. . . .

[The Political Theory of the Federalists]

The fundamental theory of political economy . . . stated by Madison was the basis of the original American conception of the balance of powers which is formulated at length in four numbers of *The Federalist* and consists of the following elements:

1. No mere parchment separation of departments of government will be effective. "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republic . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is theatened by executive usurpations."

2. Some sure mode of checking usurpations in the government must be provided, other than frequent appeals to the people. "There appear to be insuperable objections against the proposed recurrence to the people as a provision in all cases for keeping the several departments of power within their constitutional limits." In a contest between the legislature and the other branches of the government, the former would doubtless be victorious on account of the ability of the legislators to plead their cause with the people.

3. What then can be depended upon to keep the government in close rein? "The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . . It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure." There are two ways of obviating this danger: one is by establishing a monarch independent of popular will, and the other is by reflecting these contending interests (so far as their representatives may be enfranchised) in the very structure of the government itself so that a majority cannot dominate the minority – which minority is of course composed of those who possess property that may be attacked. "Society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority."

4. The structure of the government as devised at Philadelphia reflects these several interests and makes improbable any danger to the minority from the majority. "The House of Representatives being to be elected immediately by the people, the Senate by the State legislatures, the President by electors chosen for that purpose by the people, there would be little probability of a common interest to cement these different branches in a predilection for any particular class of electors."

5. All of these diverse interests appear in the amending process but they are further reinforced against majorities. An amendment must receive a two-thirds vote in each of the two houses so constituted and the approval of three-fourths of the states.

6. The economic corollary of this system is as follows: Property interests may, through their superior weight in power and intelligence, secure advantageous legislation whenever necessary, and they may

at the same time obtain immunity from control by parliamentary majorities.

If we examine carefully the delicate instrument by which the framers sought to check certain kinds of positive action that might be advocated to the detriment of established and acquired rights, we cannot help marvelling at their skill. Their leading idea was to break up the attacking forces at the starting point: the source of political authority for the several branches of the government. This disintegration of positive action at the source was further facilitated by the differentiation in the terms given to the respective departments of the government. And the crowning counterweight to "an interested and overbearing majority," as Madison phrased it, was secured in the peculiar position assigned to the judiciary, and the use of the sanctity and mystery of the law as a foil to democratic attacks.

It will be seen on examination that no two of the leading branches of the government are derived from the same source. The House of Representatives springs from the mass of the people whom the states may see fit to enfranchise. The Senate is elected by the legislatures of the states, which were, in 1787, almost uniformly based on property qualifications, sometimes with a differentiation between the sources of the upper and lower houses. The President is to be chosen by electors selected as the legislatures of the states may determine – at all events by an authority one degree removed from the voters at large. The judiciary is to be chosen by the President and the Senate, both removed from direct popular control and holding for longer terms than the House.

A sharp differentiation is made in the terms of the several authorities, so that a complete renewal of the government at one stroke is impossible. The House of Representatives is chosen for two years; the Senators for six, but not at one election, for one-third go out every two years. The President is chosen for four years. The judges of the Supreme Court hold for life. Thus "popular distempers," as eighteenth century publicists called them, are not only restrained from working their havoc through direct elections, but they are further checked by the requirement that they must last six years in order to make their effects felt in the political department of the government, providing they can break through the barriers imposed by the indirect election of the Senate and the President. Finally, there is the check of judicial control that can be overcome only through the manipulation of the appointing power which requires time, or through the operation of a cumbersome amending system. . . .

These are the great powers conferred on the new government: taxation, war, commercial control, and disposition of western lands. Through them public creditors may be paid in full, domestic peace maintained, advantages obtained in dealing with foreign nations, manufactures protected, and the development of the territories go forward with full swing. The remaining powers are minor and need not be examined here. What implied powers lay in the minds of the framers likewise need not be inquired into; they have long been the subject of juridical speculation.

None of the powers conferred by the Constitution on Congress permits a direct attack on property. The federal government is given no general authority to define property. It may tax, but indirect taxes must be uniform, and these are to fall upon consumers. Direct taxes may be laid, but resort to this form of taxation is rendered practically impossible, save on extraordinary occasions, by the provision that they must be apportioned according to population – so that numbers cannot transfer the burden to accumulated wealth. The slave trade may be destroyed, it is true, after the lapse of a few years; but slavery as a domestic institution is better safeguarded than before. . . .

Equally important to personalty as the positive powers conferred upon Congress to tax, support armies, and regulate commerce were the restrictions imposed on the states. Indeed, we have the high authority of Madison for the statement that of the forces which created the Constitution, those property interests seeking protection against omnipotent legislatures were the most active.

In a letter to Jefferson, written in October, 1787, Madison elaborates the principle of federal judicial control over state legislation, and explains the importance of this new institution in connection with the restrictions laid down in the Constitution on laws affecting private rights. "The mutability of the laws of the States," he says, "is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects. A reform, therefore, which does not make provision for private rights must be materially defective."

Two small clauses embody the chief demands of personalty against agrarianism: the emission of paper money is prohibited and the states

are forbidden to impair the obligation of contract. The first of these means a return to a specie basis – when coupled with the requirement that the gold and silver coin of the United States shall be the legal tender. The Shays and their paper money legions, who assaulted the vested rights of personalty by the process of legislative depreciation, are now subdued forever, and money lenders and security holders may be sure of their operations. Contracts are to be safe, and whoever engages in a financial operation, public or private, may know that state legislatures cannot destroy overnight the rules by which the game is played.

A principle of deep significance is written in these two brief sentences. The economic history of the states between the Revolution and the adoption of the Constitution is compressed in them. They appealed to every money lender, to every holder of public paper, to every man who had any personalty at stake. The intensity of the economic interests reflected in these two prohibitions can only be felt by one who has spent months in the study of American agrarianism after the Revolution. In them personalty won a significant battle in the conflict of 1787–1788.

16. Henry Steele Commager: The Anti-Majority Theory*

Henry Steele Commager is a leading American historian who has written widely on all phases of American history. In 1943 he published some of his reflections about the conflicting claims of liberty and authority in a book entitled Majority Rule and Minority Rights. *As you read the following selection from his book, keep the following questions in mind:*

1. **When, according to Commager, did the fear of the tyranny of the majority originate in American history?**
2. **Why and by whom does he think that the anti-majority theory has been used in America?**

* From *Majority Rule and Minority Rights* by Henry Steele Commager (New York: Oxford University Press, 1943), pp. 10–14 abridged. Copyright 1943 by Oxford University Press, Inc., and reprinted by permission.

The fear of the tyranny of the majority has haunted many of the most distinguished and respectable American statesmen and jurists since the days of the founding of the Republic; it persists today, after a century and a half of experience. It was first formulated, in elaborate and coherent fashion, by John Adams in his famous *Defense of the Constitutions of Government of the United States of America* (1786). The people, Adams urges, are not to be trusted, nor are their representatives, without an adequate system of checks and balances:

> If it is meant by the people . . . a representative assembly, . . . they are not the best keepers of the people's liberties or their own, if you give them all the power, legislative, executive and judicial. They would invade the liberties of the people, at least the majority of them would invade the liberties of the minority, sooner and oftener than any absolute monarch.

Anticipating the arguments to be used again and again in the next century, Adams appealed to the experience of the past and conjured up hypothetical dangers in the future:

> The experience of all ages has proved, that they [the people] constantly give away their liberties into the hands of grandees, or kings, idols of their own creation. The management of the executive and judicial powers together always corrupts them, and throws the whole power into the hands of the most profligate and abandoned among them.

And if the majority were to control all branches of the government:

> Debts would be abolished first; taxes laid heavy on the rich, and not at all on the others; and at last a downright equal division of everything be demanded and voted. The idle, the vicious, the intemperate, would rush into the utmost extravagance of debauchery, sell and spend all their share, and then demand a new division of those who purchased from them. The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.

That other great apostle of conservatism, Alexander Hamilton, approached the subject of majority rule in far more circumspect fashion.

> It was a thing hardly to be expected [he wrote in No. 26 of the *Federalist*] that in a popular revolution the minds of men should stop at that happy mean which marks the salutary boundary between POWER and PRIVILEGE, and combines the energy of government with the security of private rights. A failure in this delicate and important point is the great source of the inconveniences we experience, and if we are not

> cautious to avoid repetition of the error, in our future attempts to rectify and ameliorate our system, we may travel from one chimerical project to another . . .

And, in No. 51, he warned his countrymen that

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure . . . Justice is the end of government. It is the end of civil society . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature where the weaker individual is not secured against the violence of the stronger.

In the privacy of the Federal Convention Hamilton has been even more candid. 'The voice of the people,' he said in his famous diatribe against the Virginia and New Jersey plans,

> has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true to fact. The people are turbulent and changing, they seldom judge or determine right. Give therefore to the [rich] a distinct, permanent share in the government. They will check the unsteadiness of the second . . . Can a democratic Assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy. Their turbulent and uncontrolling disposition requires checks.

Later publicists were to ring the changes on this theme again and again: the majority would surrender its power to a despot — or a boss — ; it would plunder the rich; it would oppress minorities; it would destroy the liberties of men. Thus doughty old Chancellor Kent, resisting the proposal for broadening the suffrage in New York State:

> By the report before us we propose to annihilate, at one stroke, all those property distinctions and to bow before the idol of universal suffrage. That extreme democratic principle, when applied to the legislative and executive departments of government, has been regarded with terror, by the wise men of every age, because in every European republic, ancient and modern, in which it has been tried, it has terminated disastrously, and been productive of corruption, injustice, violence, and tyranny. And dare we flatter ourselves that we are a peculiar people, who can run the career of history, exempted

from the passions which have disturbed and corrupted the rest of mankind?

So, too, the learned Justice Story threw the great weight of his prestige against the proposal that a majority had a right to alter their form of government. So Calhoun dedicated his splendid talents to the formulation of an ingenious system designed to arrest the exercise of the tyranny of the majority against the peculiar institution, and his great opponent, Daniel Webster, was no less zealous to protect the inherited rights of well-entrenched minorities against majority interference. By mid-century the anti-majority theory was fully formulated and it is pertinent to recall why and by whom it was formulated. It was formulated in defense of property interests allegedly threatened by majority greed by those who put property rights above human rights. It was formulated by those who already had political privileges and were determined that the common man should not share them. It was formulated in defense of slavery in the just fear that slavery and majority rule were ultimately incompatible. It was formulated, in short, by those who proved themselves completely out of harmony with the fundamental tendencies of American society and who have been rejected by the American people.

17. Richard Hofstadter: "An Age of Realism"*

Richard Hofstadter's book, entitled The American Political Tradition and the Men Who Made It (*first published in 1948*), *begins with an important chapter on the Founding Fathers. When you read the selection from this chapter, keep the following questions in mind:*

1. **How does Hofstadter explain what the Founding Fathers meant when they spoke of liberty?**
2. **Does his interpretation seem to have a different emphasis from that developed by Charles Beard?**
3. **What was the conception of man in the political philosophy of the Founding Fathers?**
4. **Would you agree that the Founding Fathers spoke for an "age of realism"?**

It is ironical that the Constitution, which Americans venerate so deeply, is based upon a political theory that at one crucial point stands in direct antithesis to the main stream of American democratic faith. Modern American folklore assumes that democracy and liberty are all but identical, and when democratic writers take the trouble to make the distinction, they usually assume that democracy is necessary to liberty. But the Founding Fathers thought that the liberty with which they were most concerned was menaced by democracy. In their minds liberty was linked not to democracy but to property.

What did the Fathers mean by liberty? What did Jay mean when he spoke of "the charms of liberty"? Or Madison when he declared that to destroy liberty in order to destroy factions would be a remedy worse than the disease? Certainly the men who met at Philadelphia were not interested in extending liberty to those classes in America, the Negro slaves and the indentured servants, who were most in need of it, for slavery was recognized in the organic structure of the Constitution and indentured servitude was no concern of the Convention. Nor was the regard of the delegates for civil liberties any too tender. It was the opponents of the Constitution who were most active in demanding such vital liberties as freedom of religion, freedom of speech and press, jury trial, due process, and protection from "unreasonable searches and seizures." These guarantees had to be incorporated in the first ten amendments because the Convention neglected to put them in the original document. Turning to economic issues, it was not freedom of trade in the modern sense that the Fathers were striving for. Although they did not believe in impeding trade unnecessarily, they felt that failure to regulate it was one of the central weaknesses of the Articles of Confederation, and they stood closer to the mercantilists than to Adam Smith. Again, liberty to them did not mean free access to the nation's unappropriated wealth. At least fourteen of them were land speculators. They did not believe in the right of the squatter to occupy unused land, but rather in the right of the absentee owner or speculator to pre-empt it.

The liberties that the constitutionalists hoped to gain were chiefly negative. They wanted freedom from fiscal uncertainty and irregularities in the currency, from trade wars among the states, from economic discrimination by more powerful foreign governments, from attacks on the creditor class or on property, from popular insurrection. They aimed to create a government that would act as an honest broker among a variety of propertied interests, giving them all protection from their common enemies and preventing any one of them from becoming too

powerful. The Convention was a fraternity of types of absentee ownership. All property should be permitted to have its proportionate voice in government. Individual property interests might have to be sacrificed at times, but only for the community of propertied interests. Freedom for property would result in liberty for men – perhaps not for all men, but at least for all worthy men. Because men have different faculties and abilities, the Fathers believed, they acquire different amounts of property. To protect property is only to protect men in the exercise of their natural faculties. Among the many liberties, therefore, freedom to hold and dispose property is paramount. Democracy, unchecked rule by the masses, is sure to bring arbitrary redistribution of property, destroying the very essence of liberty.

The Fathers' conception of democracy, shaped by their practical experience with the aggressive dirt farmers in the American states and the urban mobs of the Revolutionary period, was supplemented by their reading in history and political science. Fear of what Madison called "the superior force of an interested and overbearing majority" was the dominant emotion aroused by their study of historical examples. The chief examples of republics were among the city-states of antiquity, medieval Europe, and early modern times. Now, the history of these republics – a history, as Hamilton said, "of perpetual vibration between the extremes of tyranny and anarchy" – was alarming. Further, most of the men who had overthrown the liberties of republics had "begun their career by paying an obsequious court to the people; commencing demagogues and ending tyrants."

All the constitutional devices that the Fathers praised in their writings were attempts to guarantee the future of the United States against the "turbulent" political cycles of previous republics. By "democracy," they meant a system of government which directly expressed the will of the majority of the people, usually through such an assemblage of the people as was possible in the small area of the city-state. . . .

There is a common agreement among modern critics that the debates over the Constitution were carried on at an intellectual level that is rare in politics, and that the Constitution itself is one of the world's masterpieces of practical statecraft. On other grounds there has been controversy. At the very beginning contemporary opponents of the Constitution foresaw an apocalyptic destruction of local government and popular institutions, while conservative Europeans of the old regime thought the young American Republic was a dangerous leftist experiment. Modern critical scholarship, which reached a high point in Charles A. Beard's *An Economic Interpretation of the Constitution of the United States,* started a new turn in the debate. The antagonism,

long latent, between the philosophy of the Constitution and the philosophy of American democracy again came into the open. Professor Beard's work appeared in 1913 at the peak of the Progressive era, when the muckraking fever was still high; some readers tended to conclude from his findings that the Fathers were selfish reactionaries who do not deserve their high place in American esteem. Still more recently, other writers, inverting this logic, have used Beard's facts to praise the Fathers for their opposition to "democracy" and as an argument for returning again to the idea of a "republic."

In fact, the Fathers' image of themselves as moderate republicans standing between political extremes was quite accurate. They were impelled by class motives more than pietistic writers like to admit, but they were also controlled, as Professor Beard himself has recently emphasized, by a statesmanlike sense of moderation and a scrupulously republican philosophy. Any attempt, however, to tear their ideas out of the eighteenth-century context is sure to make them seem starkly reactionary. Consider, for example, the favorite maxim of John Jay: "The people who own the country ought to govern it." To the Fathers this was simply a swift axiomatic statement of the stake-in-society theory of political rights, a moderate conservative position under eighteenth-century conditions of property distribution in America. Under modern property relations this maxim demands a drastic restriction of the base of political power. A large portion of the modern middle class – and it is the strength of this class upon which balanced government depends – is propertyless; and the urban proletariat, which the Fathers so greatly feared, is almost one half the population. Further, the separation of ownership from control that has come with the corporation deprives Jay's maxim of twentieth-century meaning even for many propertied people. The six hundred thousand stockholders of the American Telephone & Telegraph Company not only do not acquire political power by virtue of their stock-ownership, but they do not even acquire economic power: they cannot control their own company.

From a humanistic standpoint there is a serious dilemma in the philosophy of the Fathers, which derives from their conception of man. They thought man was a creature of rapacious self-interest, and yet they wanted him to be free – free, in essence, to contend, to engage in an umpired strife, to use property to get property. They accepted the mercantile image of life as an eternal battleground, and assumed the Hobbesian war of each against all; they did not propose to put an end to this war, but merely to stabilize it and make it less murderous.

They had no hope and they offered none for any ultimate organic change in the way men conduct themselves. The result was that while they thought self-interest the most dangerous and unbrookable quality of man, they necessarily underwrote it in trying to control it. They succeeded in both respects: under the competitive capitalism of the nineteenth century America continued to be an arena for various grasping and contending interests, and the federal government continued to provide a stable and acceptable medium within which they could contend; further, it usually showed the wholesome bias on behalf of property which the Fathers expected. But no man who is as well abreast of modern science as the Fathers were of eighteenth-century science believes any longer in unchanging human nature. Modern humanistic thinkers who seek for a means by which society may transcend eternal conflict and rigid adherence to property rights as its integrating principles can expect no answer in the philosophy of balanced government as it was set down by the Constitution-makers of 1787.

18. Cecelia Kenyon: "Men of Little Faith"*

Cecelia Kenyon is interested in the history of American political thought. Her article on the political ideas of the Anti-Federalists, published in 1955, is an important contribution to our knowledge of the Anti-Federalist conceptions of liberty and power; by contrast, it clarifies our understanding of the Federalist ideas of liberty and power. As you read this selection, consider the following questions:

1. **How did the Anti-Federalist proposals concerning representation and the limitations on political power differ from the Federalists'?**
2. **Were Anti-Federalist conceptions of man and human nature different from those of the Federalists?**
3. **Why does Miss Kenyon believe that the Federalists, more than the Anti-Federalists, laid the foundations of a national framework which would accommodate the later rise of democracy?**

* Cecelia Kenyon. "Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," *William and Mary Quarterly*, 3rd Ser., XII (January 1955), pp. 38–43. By courtesy of the Institute of Early American History and Culture, Williamsburg, Virginia, and the author.

The fundamental issue over which Federalists and Anti-Federalists split was the question whether republican government could be extended to embrace a nation, or whether it must be limited to the comparatively small political and geographical units which the separate American states then constituted. The Anti-Federalists took the latter view; and in a sense they were the conservatives of 1787, and their opponents were radicals.

The Anti-Federalists were clinging to a theory of representative government that was already becoming obsolete, and would have soon become so even had they been successful in preventing the establishment of a national government. Certainly it was a theory which could never have provided the working principles for such a government. For the Anti-Federalists were not only localists, but localists in a way strongly reminiscent of the city-state theory of Rousseau's *Social Contract.* According to that theory, a society capable of being governed in accordance with the General Will had to be limited in size, population, and diversity. The Anti-Federalists had no concept of a General Will comparable to Rousseau's, and they accepted the institution of representation, where he had rejected it. But many of their basic attitudes were similar to his. Like him, they thought republican government subject to limitations of size, population, and diversity; and like him also, they thought the will of the people would very likely be distorted by the process of representation. In fact, their theory of representation and their belief that republican government could not be extended nation-wide were integrally related.

They regarded representation primarily as an institutional substitute for direct democracy and endeavored to restrict its operation to the performance of that function; hence their plea that the legislature should be an exact miniature of the people, containing spokesmen for all classes, all groups, all interests, all opinions, in the community; hence, too, their preference for short legislative terms of office and their inclination, especially in the sphere of state government, to regard representatives as delegates bound by the instructions of constituents rather than as men expected and trusted to exercise independent judgment. This was a natural stage in the development of representative government, but it contained several weaknesses and was, I think, already obsolete in late eighteenth-century America.

Its major weaknesses were closely akin to those of direct democracy itself, for representation of this kind makes difficult the process of genuine deliberation, as well as the reconciliation of diverse interests and opinions. Indeed, it is notable, and I think not accidental, that the

body of Anti-Federalist thought as a whole showed little consideration of the necessity for compromise. The Founding Fathers were not democrats, but in their recognition of the role which compromise must play in the process of popular government, they were far more advanced than their opponents.

It is clear, too, that the same factors limiting the size and extent of direct democracies would also be operative in republics where representation is regarded only as a substitute for political participation by the whole people. Within their own frame of reference, the Anti-Federalists were quite right in insisting that republican government would work only in relatively small states, where the population was also small and relatively homogeneous. If there is great diversity among the people, with many interests and many opinions, then all cannot be represented without making the legislature as large and unwieldy as the citizen assemblies of ancient Athens. And if the system does not lend itself readily to compromise and conciliation, then the basis for a working consensus must be considerable homogeneity in the people themselves. In the opinion of the Anti-Federalists, the American people lacked that homogeneity. This Rousseauistic vision of a small, simple, and homogeneous democracy may have been a fine ideal, but it *was* an ideal even then. It was not to be found even in the small states, and none of the Anti-Federalists produced a satisfactory answer to Madison's analysis of the weaknesses inherent in republicanism operating on the small scale preferred by his opponents.

Associated with this theory of representation and its necessary limitation to small-scale republics was the Anti-Federalists' profound distrust of the electoral and representative processes provided for and implied in the proposed Constitution. Their ideal of the legislature as an "exact miniature" of the people envisaged something not unlike the result hoped for by modern proponents of proportional representation. This was impossible to achieve in the national Congress. There would not and could not be enough seats to go around. The constituencies were to be large – the ratio of representatives to population was not to exceed one per thirty thousand – and each representative must therefore represent not one, but many groups among his electors. And whereas Madison saw in this process of "filtering" or consolidating public opinion a virtue, the Anti-Federalists saw in it only danger. They did not think that a Congress thus elected could truly represent the will of the people, and they particularly feared that they themselves, the "middling class," to use Melancton Smith's term, would be left out.

They feared this because they saw clearly that enlarged constituen-

cies would require more pre-election political organization than they believed to be either wise or safe. Much has been written recently about the Founding Fathers' hostility to political parties. It is said that they designed the Constitution, especially separation of powers, in order to counteract the effectiveness of parties. This is partly true, but I think it worth noting that the contemporary opponents of the Constitution feared parties or factions in the Madisonian sense just as much as, and that they feared parties in the modern sense even more than, did Madison himself. They feared and distrusted concerted group action for the purpose of "centering votes" in order to obtain a plurality, because they believed this would distort the automatic or natural expression of the people's will. The necessity of such action in large electoral districts would work to the advantage of the upper classes, who, because of their superior capacity and opportunity for organization of this kind, would elect a disproportionate share of representatives to the Congress. In other words, the Anti-Federalists were acutely aware of the role that organization played in the winning of elections, and they were not willing to accept the "organized" for the "real" majority. Instead they wanted to retain the existing system, where the electoral constituencies were small, and where organization of this kind was relatively unnecessary. Only then could a man vote as he saw fit, confident that the result of the election would reflect the real will of the people as exactly as possible.

Distrust of the electoral process thus combined with the localist feelings of the Anti-Federalists to produce an attitude of profound fear and suspicion toward Congress. That body, it was felt, would be composed of aristocrats and of men elected from far-away places by the unknown peoples of distant states. It would meet at a yet undesignated site hundreds of miles from the homes of most of its constituents, outside the jurisdiction of any particular state, and protected by an army of its own making. When one sees Congress in this light, it is not surprising that the Anti-Federalists were afraid, or that they had little faith in elections as a means of securing responsibility and preventing Congressional tyranny.

Their demand for more limitations on Congressional power was perfectly natural. These were believed to be necessary in any government because of the lust for power and the selfishness in its use which were inherent in the nature of man. They were doubly necessary in a government on a national scale. And so the Anti-Federalists criticized the latitude of power given to Congress under Article I and called for more detailed provisions to limit the scope of Congressional discretion. We are certainly indebted to them for the movement that led to the

adoption of the Bill of Rights, though they were more concerned with the traditional common-law rights of procedure in criminal cases than with the provisions of the First Amendment. They were at the same time forerunners of the unfortunate trend in the nineteenth century toward lengthy and cumbersome constitutions filled with minute restrictions upon the various agencies of government, especially the legislative branch. The generality and brevity which made the national Constitution a model of draftsmanship and a viable fundamental law inspired in the Anti-Federalists only fear.

They repeatedly attacked the Constitution for its alleged departure from Montesquieu's doctrine of separation of powers, emphasized the inadequacy of the checks and balances provided within the governmental structure, and lamented the excessive optimism regarding the character and behavior of elective representatives thus revealed in the work of the Founding Fathers. It is significant, in view of the interpretation long and generally accepted by historians, that *no one* expressed the belief that the system of separation of powers and checks and balances had been designed to protect the property rights of the well-to-do. Their positive proposals for remedying the defects in the system were not numerous. They objected to the Senate's share in the appointive and treaty-making powers and called for a separate executive council to advise the President in the performance of these functions. Shorter terms were advocated for President and Congress, though not as frequently or as strongly as required rotation for senators and President. No one suggested judicial review of Congressional legislation, though Patrick Henry attacked the Constitution because it did not explicitly provide for this safeguard to popular government.

Had the Constitution been altered to satisfy the major structural changes desired by the Anti-Federalists, the House of Representatives would have been considerably larger; there would have been four rather than three branches of the government; the President would have been limited, as he is now, to two terms in office; the senators would have been similarly limited and also subject to recall by their state governments. These changes might have been beneficial. It is doubtful that they would have pleased the late Charles Beard and his followers; it is even more doubtful that they would have facilitated the operation of unrestrained majority rule. Certainly that was not the intention of their proponents.

The Anti-Federalists were not latter-day democrats. Least of all were they majoritarians with respect to the national government. They were not confident that the people would always make wise and correct choices in either their constituent or electoral capacity, and many

of them feared the oppression of one section in the community by a majority reflecting the interests of another. Above all, they consistently refused to accept legislative majorities as expressive either of justice or of the people's will. In short, they distrusted majority rule, at its source and through the only possible means of expression in governmental action over a large and populous nation, that is to say, through representation. The last thing in the world they wanted was a national democracy which would permit Congressional majorities to operate freely and without restraint. Proponents of this kind of majority rule have almost without exception been advocates of strong, positive action by the national government. The Anti-Federalists were not. Their philosophy was primarily one of limitations on power, and if they had had their way, the Constitution would have contained more checks and balances, not fewer. Indeed it seems safe to say that the Constitution could not have been ratified at all had it conformed to the standards of democracy which are implicit in the interpretation of Beard and his followers. A national government without separation of powers and checks and balances was not politically feasible. In this respect, then, I would suggest that his interpretation of the Constitution was unrealistic and unhistorical.

The Anti-Federalists may have followed democratic principles within the sphere of state government and possibly provided the impetus for the extension of power and privilege among the mass of the people, though it is significant that they did not advocate a broadening of the suffrage in 1787–1788 or the direct election of the Senate or the President. But they lacked both the faith and the vision to extend their principles nation-wide. It was the Federalists of 1787–1788 who created a national framework which would accommodate the later rise of democracy.

Part 5

Conclusion

Now that you have completed the readings in this volume, a good way for you to organize what you have learned is to write a paper on this final question:

Do you think that the Founding Fathers made a good adjustment between liberty and power in the Constitution, or do you think that they were too fearful that the majority of the people might misuse their liberty?

If you wish to write a longer research paper on this topic, the following books should be helpful.

I. Primary Sources.

See if you can find these primary sources in your school library or your public library:

Max Farrand (ed.), *Records of the Fedederal Convention.* 3 vols. (1911)

Jonathan Elliot (ed.), *Debates in the Several State Conventions on the Adoption of the Federal Constitution.* 5 vols. (1859)

The Federalist Papers of Hamilton, Madison and John Jay, published in numerous editions.

Paul Leicester Ford (ed.), *Pamphlets on the Constitution of the United States* (1888)

Paul Leicester Ford (ed.), *Essays on the Constitution of the United States* (1892)

II. Secondary Works

Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1913)

Robert E. Brown, *Charles Beard and the Constitution* (1956)

Robert L. Schuyler, *The Constitution of the United States* (1923)

Charles Warren, *The Making of the Constitution* (1928)

Max Farrand, *The Fathers of the Constitution* (1921)
Merrill Jensen, *The New Nation* (1950)
Edmund S. Morgan, *The Birth of the Republic* (1950)
Robert A. Rutland, *The Birth of the Bill of Rights, 1776–1791* (1962)
W. V. Solberg, *The Federal Constitution and the Formation of the Union of the American State* (1958)