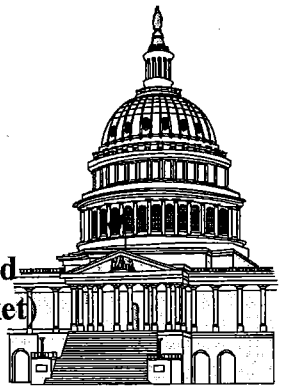
Advanced Placement American Government
Unit II: The Constitution



Monday 9/5 **No School-Labor Day**

Tuesday 9/6 **Class Discussion:** Do we want a Push Button Democracy? Article in Unit I packet.

Wednesday 9/7 **Origins of Constitutional Principles and Rights Group work: Ludlum #4 (in unit packet)**

Thursday 9/8 **Finish** Constitutional Principles Packet
Begin class notes on the Constitutional Convention.

Friday 9/9 **Quiz** over Ch2, pp 21-31 Closed **Book**
Class notes on the Constitutional Convention.

Monday 9/12 Quiz: 31-40 **Open Book.** Finish class notes on the Constitutional Convention.

Tuesday 9/13 The Structure of the Constitution
Finish class notes on the Constitutional Convention and **summarize** the seven articles which make up the Constitution proper.

Wednesday 9/14 **Quiz**: 40-47. **Partial Open Book Ratifying the Constitution!**
Video: ***Liberty: Part 6 (worksheet due Thursday) Food?***

Thursday 9/15 ***Liberty Worksheet due. Start 9/11 Documentary: United 93***

Friday 9/16 **9/11 Documentary. United 93.**

Monday 9/19 **Finish 9/11 Documentary.** Class Discussion: Impact of 9/11 on society, on government, on politics.

Tuesday 9/20 "***An Economic Interpretation of the Constitution of the United States***," by Charles Beard
Class discussion of the article/ Hand out Roche Beard Questions: Due **Wednesday**

Wednesday 9/21

Short essay answers (½ to 1 page each) on sheet at end of packet.
"***The Founding Fathers: A Reform Caucus in Action***," by Roche (Ciglar/Loomis p. 5).
Class discussion of article. Comparing ideas of Roche and Beard.

Thursday 9/22 **Constitution Day!!! Extra Credit Constitution quiz! Cake??**

Friday 9/23

Answers due to five short answer essay questions over James Madison's ***Federalists #47, #48, and #51*** (Woll p.44). Questions are in packet. Class discussion of ***Federalist #47, #48, and #51.***

Monday 9/26 ***Charles Kesler's Intro to Federalist Papers: (In Packet)***
Seminar Discussion: Will be graded on participation.

Tuesday 9/27 Critical review due for "***Omnipotence of the Majority in the United States and Its Effects***" from ***Democracy in America*** by Alexis de Tocqueville (in unit packet). **Seminar discussion** of the article.

Charles Kesler's Intro to Federalist Papers is a good read that helps you understand what the Fed Papers are all about.

2

The Constitution

I. Reviewing the Chapter

A. Chapter Focus

The purpose of this chapter is to introduce you to the historical context within which the United States Constitution was written and in particular to the colonists' quest for liberties they felt had been denied under British rule. After reading and reviewing the material in this chapter, you should be able to do each of the following:

1. Compare the American and French revolutions of the same era with respect to the ideals that motivated each.
2. Explain the notion of higher law by which the colonists felt they were entitled to certain natural rights. List these rights.
3. Discuss the Declaration of Independence as a lawyer's brief prepared for court argument of a case.
4. Compare what the colonists believed was a legitimate basis for government with what monarchies—such as that in Great Britain at the time—believed was a legitimate basis for government.
5. List and discuss the shortcomings of government under the Articles of Confederation.
6. Discuss the backgrounds of the writers of the Constitution, and explain why these men tended to be rather mistrustful of the notion of democracy.
7. Compare and contrast the Virginia and New Jersey plans, and show how they led to the Great Compromise.
8. Explain why separation of powers and federalism became key parts of the Constitution. Hint: The Framers' intention was not to make the system more democratic, nor was it to make it more efficient.
9. Show how James Madison's notions of human nature played an important role in the framing of the Constitution.
10. Explain why the Constitution did not include a bill of rights. Then explain why one was added.
11. Explain why the Founders failed to address the question of slavery in a definitive way.
12. Discuss whether "women were left out of the Constitution."
13. Summarize Charles Beard's analysis of the economic motivations of the Framers and the counteranalyses of those who disagree with Beard.
14. List and explain the two major types of constitutional reform advocated today, along with specific reform measures.

B. Study Outline

I. The problem of liberty
   A. The colonial mind
      1. Belief that because British politicians were corrupt, the English constitution was inadequate
      2. Belief in higher law of natural rights
         a. Life
         b. Liberty
         c. Property (Jefferson notwithstanding)
      3. A war of ideology, not economics
      4. Specific complaints against George III for violating unalienable rights
   B. The real revolution
      1. The "real" revolution was the radical change in belief about what made authority legitimate and liberties secure.
      2. Government by consent, not by prerogative
      3. Direct grant of power: written constitution
      4. Human liberty before government
      5. Legislature superior to executive branch
   C. Weaknesses of the confederation
      1. Could not levy taxes or regulate commerce
      2. Sovereignty, independence retained by states
      3. One vote in Congress for each state
      4. Nine of thirteen votes in Congress required for any measure
      5. Delegates picked, paid for by legislatures
      6. Little money coined by Congress
      7. Army small; dependent on state militias
      8. Territorial disputes between states
      9. No national judicial system
      10. All thirteen states' consent necessary for any amendments

II. The Constitutional Convention
   A. The lessons of experience
      1. State constitutions
         a. Pennsylvania: too strong, too democratic
         b. Massachusetts: too weak, less democratic
      2. Shays's Rebellion led to fear states about to collapse
   B. The Framers
      1. Who came: men of practical affairs
      2. Who did not come
      3. Intent to write an entirely new constitution
      4. Lockean influence
      5. Doubts that popular consent could guarantee liberty
      6. Results: "a delicate problem"; need strong government for order but one that would not threaten liberty
         a. Democracy of that day not the solution
         b. Aristocracy not a solution either
         c. Government with constitutional limits no guarantee against tyranny

III. The challenge
   A. The Virginia Plan
      1. Design for a true national government
      2. Two houses in legislature
      3. Executive chosen by legislature
      4. Council of revision with veto power
      5. Two key features of the plan
         a. National legislature with supreme powers
         b. One house elected directly by the people

B. The New Jersey Plan
   1. Sought to amend rather than replace Articles
   2. Proposed one vote per state
   3. Protected small states' interests
C. The compromise
   1. House of Representatives based on population
   2. Senate of two members per state
   3. Reconciled interests of big and small states
   4. Committee of Detail

IV. The Constitution and democracy
A. Founders did not intend to create pure democracy
   1. Physical impossibility in a vast country
   2. Mistrust of popular passions
   3. Intent instead to create a republic with system of representation
B. Popular rule only one element of new government
   1. State legislators to elect senators
   2. Electors to choose president
   3. Two kinds of majorities: voters and states
   4. Judicial review another limitation
   5. Amendment process
C. Key principles
   1. Separation of powers
   2. Federalism
D. Government and human nature
   1. Aristotelian view: government should improve human nature by cultivating virtue
   2. Madisonian view: cultivation of virtue would require a government too strong, too dangerous; self-interest should be freely pursued
   3. Federalism enables one level of government to act as a check on the other

V. The Constitution and liberty
A. Whether constitutional government was to respect personal liberties is a difficult question
   1. Ratification by conventions in at least nine states a democratic feature but a technically illegal one
B. The Antifederalist view
   1. Liberty could be secure only in small republics
      a. In big republics national government would be distant from people
      b. Strong national government would use powers to annihilate state functions
   2. There should be many more restrictions on government
   3. Madison's response: personal liberty safest in large ("extended") republics
      a. Coalitions likely more moderate there
      b. Government *should* be somewhat distant to be insulated from passions
   4. Reasons for absence of bill of rights
      a. Several guarantees in Constitution
         (1) Habeas corpus
         (2) No bill of attainder
         (3) No ex post facto law
         (4) Trial by jury
         (5) Privileges and immunities
         (6) No religious tests
         (7) Obligation of contracts
      b. Most states had bills of rights
      c. Intent to limit federal government to specific powers
C. Need for a bill of rights
   1. Ratification impossible without one
   2. Promise by key leaders to obtain one
   3. Bitter ratification narrowly successful

VI. The Constitution and slavery
  A. Slavery virtually unmentioned
  B. Apparent hypocrisy of Declaration signers
  C. Necessity of compromise: otherwise no ratification
    1. Sixty percent of slaves counted for representation
    2. No slavery legislation possible before 1808
    3. Escaped slaves to be returned to masters
  D. Legacy: Civil War, continuing problems
VII. The motives of the Framers
  A. Acted out of a mixture of motives; economic interests played modest role
  B. Economic interests at the Convention
    1. Economic interests of Framers varied widely
    2. Beard: those who owned government debt supported Constitution
    3. However, no clear division along class lines found
    4. Recent research: state considerations outweighed personal considerations
      a. Exception: slaveholders
  C. Economic interests and ratification
    1. Played larger role in state ratifying conventions
    2. In favor: merchants, urban, owned western land, held government IOUs, no slaves
    3. Opposed: farmers, held no IOUs, owned slaves
    4. But remarkably democratic process because most could vote for delegates
    5. Federalists versus Antifederalists on ideas of liberty
  D. The Constitution and equality
    1. Critics: government today is too weak
      a. Bows to special interests
      b. Fosters economic inequality
      c. Liberty and equality are therefore in conflict
    2. Framers more concerned with political inequality
      a. Weak government reduces political privilege
VIII. Constitutional reform—modern views
  A. Reducing the separation of powers to enhance national leadership
    1. Urgent problems remain unresolved
    2. President should be more powerful, accountable, to produce better policies
    3. Government agencies exposed to undue interference
    4. Proposals
      a. Choose cabinet members from Congress
      b. Allow president to dissolve Congress
      c. Empower Congress to require special presidential election
      d. Require presidential/congressional teams
      e. Establish single six-year term for president
      f. Lengthen terms in House to four years
    5. Contrary arguments: results uncertain, worse
  B. Making the system less democratic
    1. Government does too much, not too little
    2. Attention to individual wants over general preferences
    3. Proposals
      a. Limit amount of taxes collectible
      b. Require a balanced budget
      c. Grant president a line-item veto
      d. Narrow authority of federal courts
    4. Contrary arguments: unworkable or open to evasion
  C. Who is right?
    1. Decide nothing now
    2. Crucial questions
      a. How well has it worked in history?
      b. How well has it worked in comparison with other constitutions?

C. Key Terms Match

Match the following terms and descriptions:

Set 1

a. Articles of Confederation
b. Beard, Charles A.
c. constitution
d. Constitutional Convention
e. Declaration of Independence
f. federalism
g. the *Federalist* papers
h. Great Compromise
i. Locke, John
j. Madison, James
k. Massachusetts Constitution
l. natural rights
m. New Jersey Plan
n. Pennsylvania Constitution
o. separation of powers
p. Shays's Rebellion
q. Virginia Plan

1. ____ A set of principles, either written or unwritten, that makes up the fundamental law of the state
2. ____ Rights of all human beings that are ordained by God, discoverable in nature and history, and essential to human progress
3. ____ A document written in 1776 declaring the colonists' intention to throw off British rule
4. ____ The governing charter of the states from 1776 until the Constitution of 1787
5. ____ A meeting of delegates in Philadelphia in 1787 charged with drawing up amendments to the Articles of Confederation
6. ____ A governing document considered to be highly democratic yet with a tendency toward tyranny as the result of concentrating all powers in one set of hands
7. ____ A state constitution with clear separation of powers but considered to have produced too weak a government
8. ____ An armed attempt by Revolutionary War veterans to avoid losing their property by preventing the courts in western Massachusetts from meeting
9. ____ An English philosopher whose ideas on civil government greatly influenced the Founders
10. ____ A series of political tracts that explained many of the ideas of the Founders
11. ____ A constitutional proposal that the smaller states' representatives feared would give permanent supremacy to the larger states
12. ____ A constitutional proposal that would have given each state one vote in a new congress
13. ____ A constitutional proposal that made membership in one house of Congress proportional to each state's population and membership in the other equal for all states
14. ____ A constitutional principle separating the personnel of the legislative, executive, and judicial branches of government
15. ____ A constitutional principle reserving separate powers to the national and state levels of government
16. ____ A principal architect of the Constitution who felt that a government powerful enough to encourage virtue in its citizens was too powerful
17. ____ A historian who argued that the Founders were largely motivated by the economic advantage of their class in writing the Constitution

Set 2

a. amendment (constitutional)
b. Antifederalists
c. bill of attainder
d. Bill of Rights
e. checks and balances
f. coalition
g. confederation
h. Constitutional Convention
i. ex post facto law
j. faction
k. *Federalist* papers
l. Federalists
m. judicial review
n. line-item veto
o. Madisonian view of human nature
p. republic
q. unalienable rights
r. writ of habeas corpus

1. ____ A meeting of delegates in 1878 to revise the Articles of Confederation
2. ____ The power of the legislative, executive, and judicial branches of government to block some acts by the other two branches
3. ____ A form of democracy in which leaders and representatives are selected by means of popular competitive elections
4. ____ An alliance between different interest groups or parties to achieve some political goal
5. ____ Rights thought to be based on nature and providence rather than on the preferences of people
6. ____ Change in, or addition to, a constitution
7. ____ A group of people sharing a common interest who seek to influence public policy for their collective benefit
8. ____ The power of the courts to declare acts of the legislature and of the executive unconstitutional and therefore null and void
9. ____ The first ten amendments to the U.S. Constitution
10. ____ A series of eighty-five essays published in New York newspapers to convince New Yorkers to adopt the newly proposed Constitution
11. ____ Supporters of a stronger central government who advocated ratification of the Constitution and then founded a political party
12. ____ The power of an executive to veto some provisions in an appropriations bill while approving others
13. ____ Those who opposed giving as much power to the national government as the Constitution did, favoring instead stronger states' rights
14. ____ A law that would declare a person guilty of a crime without a trial
15. ____ A law that would declare an act criminal after the act was committed
16. ____ A philosophy holding that accommodating individual self-interest provided a more practical solution to the problem of government than aiming to cultivate virtue
17. ____ An agreement among sovereign states that delegates certain powers to a national government
18. ____ A court order requiring police officials to produce an individual held in custody and show sufficient cause for that person's detention

AP GOVERNMENT

JOHN P. ROCHE "THE FOUNDING FATHERS: A REFORM CAUCUS IN ACTION"

Essay Questions

1. John Roche states that some writers have characterized the Constitutional Convention as a "counter-revolutionary junta" and the Constitution as a "coup d'état." What arguments does Roche make to refute this view? Do you find his arguments convincing?
2. Discuss John Roche's argument that the differences of opinion between the founders were "structural" rather than "ideological." On what issues did the founders fundamentally disagree?

Multiple-Choice Questions

PRACTICE

1. John Roche describes the founders as
   a. superb democratic politicians.
   b. Burkean conservatives.
   c. members of a self-interested elite.
   d. Platonic philosopher-kings.

2. According to John Roche, federalism was
   a. designed to promote a form of pluralist democracy.
   b. a necessary compromise to ensure state support for the Constitution.
   c. never seriously considered by the founders.
   d. designed to promote majoritarian democracy.

3. According to John Roche, the framework of discussion at the Constitutional Convention was based on
   a. the Articles of Confederation.
   b. the New Jersey Plan.
   c. Madison's Virginia Plan.
   d. the Declaration of Independence.

4. The Federalist papers, Roche argues, were
   a. an intellectual justification for the overall plan of dispersing power in order to prevent tyranny of the majority.
   b. based primarily on a close reading of Montesquieu's ideas about separation of powers.
   c. written by opponents of the Constitution to encourage the state conventions to reject the document.
   d. propaganda that supported the compromises made at the Constitutional Convention by promoting them into a political theory.

5. John Roche describes the Constitution as
   a. an apotheosis of constitutionalism.
   b. a triumph of architectonic genius.
   c. a patchwork sewn together by a group of extremely talented democratic [illegible]s.
   d. a[illegible]t that primarily benefitted the economic elite.

AP GOVERNMENT

CHARLES A. BEARD "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"

Essay Questions

1. Compare and contrast Charles Beard's conception of the motives of the founders with that of John Roche. Which argument do you find more compelling?
2. Both Charles Beard and John Roche refer to the founders as elites. How do their conceptions of the term *elite* differ?

Multiple–Choice Questions

PRACTICE

1. According to Charles Beard, the Constitution was ratified by a vote of
   a. a majority of the population.
   b. about one-sixth of all adult males.
   c. the delegates to the Constitutional Convention.
   d. one-half of the state ratifying conventions.

2. Charles Beard describes the founders as
   a. a consolidated group comprising members of an economic elite.
   b. democratic reformers.
   c. advocates of states' rights.
   d. a fragmented group with a variety of interests.

3. According to Charles Beard, the major goal of the founders was to
   a. limit popular majorities to protect the interests of property owners.
   b. create a majoritarian democracy responsive to the people.
   c. create a pluralistic democracy responsive to a variety of interests.
   d. protect individual civil liberties from arbitrary state interference.

4. Charles Beard argues that one of the primary motivations of the founders was to
   a. prevent anarchy.
   b. maintain the sovereignty of the thirteen states.
   c. serve their own economic self-interest.
   d. break formal ties with Great Britain.

Origins of Constitutional Principles and Rights

Read the following excerpts and complete the first two columns in the chart provided by your teacher.

Magna Carta
1215

John, by the grace of God, King of England . . . Know that we, out of reverence for God and for the salvation of our soul and those of all our ancestors and heirs, for the honour of God and the exaltation of holy church, and for the reform of our realm . . .

[1] . . . We have also granted to all free men of our kingdom, for ourselves and our heirs for ever, all the liberties written below, to be had and held by them and their heirs of us and our heirs.

[14] And to obtain the common counsel of the kingdom about the assessing of aid . . . or of a scutage . . .

[38] No bailiff shall in future put anyone to trial upon his own bare word, without reliable witnesses produced for this purpose.

[39] No free man shall be arrested or imprisoned or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land.

[61] . . . if we, or our justiciar, or our bailiffs or any one of our servants offend in any way against anyone or transgress any of the articles of the peace or the security and the offence be notified to four of the aforesaid twenty-five barons, these four barons shall come to us, or to our justiciar if we are out of the kingdom, and, laying the transgression before us, shall petition us to have that transgression corrected without delay . . .

[63)] Wherefore we wish and firmly enjoin that the English church shall be free, and that the men in our kingdom shall have and hold all the aforesaid liberties, rights and concessions well and peacefully, freely and quietly, full and completely, for themselves and their heirs from us and our heirs, in all matters and in all places for ever, as is aforesaid . . . [1]

[1] *The New Encyclopedia Britannica*, 1989, s.v. "Magna Carta."

Petition of Right

3 Chas. 1, c. 1, 7 June 1628

X. They do therefore humbly pray your most excellent Majesty, That no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such-like charge, without common consent by act of parliament; (2) and that none be called to make answer, or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof; (3) and that no freeman, in any such manner as is before-mentioned, be imprisoned or detained; (4) and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burthened in time to come; (5) and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects to destroyed, or put to death contrary to the laws and franchise of the land.

XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, That the awards, doings and proceedings, to the prejudice of your people in any of the premisses, shall not be drawn hereafter into consequence or example; (2) and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, That in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the Prosperity of this kingdom. *Qua quidem petitione lecta & plenius intellecta per dictum dominum regem taliter est responsum in pleno parliamento*, viz. Soit droit fait come est desire.[2]

[2]Philip B. Kurland and Ralph Lerner, eds., *The Founders' Constitution*, Vol. 5 (Chicago: the University of Chicago Press, 1987), 487–488.

Bill of Rights

1 W. & M., 2d sess., c. 2, 16 Dec. 1689

An act for declaring the rights and liberties of the subject, and settling the succession of the crown.

Whereas the lords spiritual and temporal, and commons assembled at *Westminster*, lawfully, fully, and freely representing all the estates of the people of this realm, did upon the thirteenth day of *February*, in the year of our Lord one thousand six hundred eighty eight, present unto their Majesties, then called and known by the names and stile of *William* and *Mary*, prince and princess of *Orange*, being present in their proper persons, a certain declaration in writing, made by the said lords and commons, in the words following: *viz.*

Whereas the late King *James* the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate the protestant religion, and the laws and liberties of this kingdom.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King *James* the Second having abdicated the government, and the throne being thereby vacant, his highness the prince of *Orange* (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the lords spiritual and temporal, and divers principal persons of the commons) cause letters to be written to the lords spiritual and temporal, being protestants; and other letters to the several counties, cities, universities, boroughs, and cinque-ports, for the choosing of such persons to represent them, as were of right to be sent to parliament, to meet and sit at *Westminster* upon the two and twentieth day of *January*, in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws, and liberties might not again be in danger of being subverted; upon which letters, elections have been accordingly made.

And thereupon the said lords spiritual and temporal, and commons, pursuant to their respective letters and elections, being now assembled in a full and free representative of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid; do in the first place (as their ancestors in like case have usually done) for the vindicating and asserting their ancient rights and liberties, declare;

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.
2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.
3. That the commission for erecting the late court of commissioners for ecclesiastical causes, and other commissions and courts of like nature are illegal and pernicious.
4. That levying money for or to the use of the crown, by pretence of prerogative, without grant of parliament, for longer time, or in other manner than the same is or shall be granted, is illegal.
5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.
6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament is against law.

7. That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law.
8. That election of members of parliament ought to be free.
9. That the freedom of speech, and debates or proceedings in parliament, ought not be impeached or questioned in any court or place out of parliament.
10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.
11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.
12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.
13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premisses, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premisses, ought in any wise to be drawn hereafter into consequence or example.[3]

[3] Kurland and Lerner, *The Founders' Constitution*, Vol. 1, 433–434.

John Locke, Second Treatise
4 & 6
1689

4. To understand Political Power right, and derive it from its Original, we must consider what State all Men are naturally in, and that is, a State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think fit, within the bounds of the Law of Nature, without asking leave, or depending upon the Will of any other Man.

   A State also of Equality, wherein all the Power and Jurisdiction is reciprocal, no one having more than another . . .

6. But though this is a State of Liberty, yet it is not a State of License, though Men in that State have an uncontrollable liberty, to dispose of his Person or Possessions, yet he has not liberty to destroy himself, or so much as any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it. The State of Nature has a Law of Nature to govern it, which obliges every one: and Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, Health, Liberty, or Possessions . . . And being furnished with like Faculties, sharing all in one Community of Nature, there cannot be supposed any such Subordination among us, that may Authorize us to destroy one another, as if we were made for another's uses. . . . Every one as he is bound to preserve himself and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an Offender, take away, or impair the life, or what ends to the Preservation of the Life, Liberty, Health, Limb or Goods of another.[4]

[4] Ibid., 42–43.

John Locke, Second Treatise
95–99
1689

95. Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own consent . . . When any number of Men has so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politick, wherein the Majority have a Right to Act and conclude the rest . . .

97. And thus every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the majority, and to be concluded by it; or else this original Compact, whereby he with others incorporates into one Society, would signify nothing, and be no compact . . .

98. For if the consent of the majority shall not in reason, be received, as the act of the whole, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole; but such a consent is next impossible ever to be had . . .

99. Whosoever therefore out of a state of Nature unite into a Community, must be understood to give up all the power, necessary to the ends for which they unite into Society, to the majority of the Community, unless they expressly agreed in any number greater than the majority . . . And thus that, which begins and actually constitutes any Political Society, is nothing but the consent of any number of Freemen capable of a majority to unite and incorporate into such a Society. And this is that, and that only, which did, or could give beginning to any lawful Government in the World.[5]

[5]Ibid., 98–99.

Montesquieu—Spirit of Laws
Bk. 11—Ch. 6
1748

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on civil law.

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power, and the other simple the executive power of the state.

The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression . . .[6]

[6]Ibid., 624.

AP United States Government and Politics
Lesson 4
Handout 4

Name_____

Date_____

Origins of Constitutional Principles and Rights

Complete the chart by listing basic principles of government or rights as citizens in the column headed "Basic Principle or Right." In the center column headed "Historical Source" indicate the document or writing where this right can be found. Finally, in the third column headed "Constitutional Location" indicate the specific section of the United States Constitution where the right or principle cited was incorporated.

Basic Principle or Right	Historical Source	Constitutional Location

1.3

An Economic Interpretation of the Constitution of the United States

Charles A. Beard

One central problem in establishing a new constitutional order in 1787 was that of limiting the power of the majority within a centralized political system that drew ultimate legitimacy from the approval of its citizens. Indeed, this was a major task that the framers addressed in writing and seeking ratification for the document. Charles A. Beard argues that the framers, "by the force of circumstances, [were] compelled to convince large economic groups that safety and strength [lay] in the adoption of the new system." This was a neat trick given Beard's assessment of the framers as economic elitists who relentlessly pursued their own interests throughout the process.

Among interpreters of the creation of the Constitution, few scholars have had more impact than Charles Beard. Despite shortcomings in Beard's analysis, his approach has been extremely important in opening up the subject to subsequent demythologizing interpretations. In addition, you should bear in mind Hofstadter's assertion that the framers saw prosperity as virtually essential for the protection of liberty.

The Constitution as an Economic Document

It is difficult for the superficial student of the Constitution, who has read only the commentaries of the legists,* to conceive of that instrument as an economic document. It places no property qualifications on voters or officers; it gives no outward recognition of any economic groups in society; it mentions no special privileges to be conferred upon any class. It betrays no feeling, such as vibrates through the French constitution of 1791; its language is cold, formal, and severe.

Charles A. Beard (1874–1948), a professor of history at Columbia University, helped found the New School for Social Research in New York City.

* A *legist* is one learned in law, and particularly ancient and Roman law.

The true inwardness of the Constitution is not revealed by an examination of its provisions as simple propositions of law; but by a long and careful study of the voluminous correspondence of the period, contemporary newspapers and pamphlets, the records of the debates in the Convention at Philadelphia and in the several state conventions, and particularly, *The Federalist*, which was widely circulated during the struggle over ratification. The correspondence shows the exact character of the evils which the Constitution was intended to remedy; the records of the proceedings in the Philadelphia Convention reveal the successive steps in the building of the framework of the government under the pressure of economic interests; the pamphlets and newspapers disclose the ideas of the contestants over the ratification; and *The Federalist* presents the political science of the new system as conceived by three of the profoundest thinkers of the period, Hamilton, Madisón, and Jay.

Doubtless, the most illuminating of these sources on the economic character of the Constitution are the records of the debates in the Convention, which have come down to us in fragmentary form; and a thorough treatment of material forces reflected in the several clauses of the instrument of government created by the grave assembly at Philadelphia would require a rewriting of the history of the proceedings in the light of the great interests represented there. But an entire volume would scarcely suffice to present the results of such a survey, and an undertaking of this character is accordingly impossible here.

The Federalist, on the other hand, presents in a relatively brief and systematic form an economic interpretation of the Constitution by the men best fitted, through an intimate knowledge of the ideals of the framers, to expound the political science of the new government. This wonderful piece of argumentation by Hamilton, Madison, and Jay is in fact the finest study in the economic interpretation of politics which exists in any language; and whoever would understand the Constitution as an economic document need hardly go beyond it. It is true that the tone of the writers is somewhat modified on account of the fact that they are appealing to the voters to ratify the Constitution, but at the same time they are, by the force of circumstances, compelled to convince large economic groups that safety and strength lie in the adoption of the new system.

Indeed, every fundamental appeal in it is to some material and substantial interest. Sometimes it is to the people at large in the name of protection against invading armies and European coalitions. Sometimes it is to the commercial classes whose business is represented as prostrate before the follies of the Confederation. Now it is to creditors seeking relief against paper money and the assaults of the agrarians in general; now it is to the holders of federal securities which are depreciating toward the vanishing point. But above all, it is to the owners of personalty* anxious to find a foil against the attacks of levelling democracy, that the authors of *The Federalist* address their most cogent arguments in favor of ratification. It is true there is much discussion of the details of the new frame-

* *Personalty* is a legal term for personal property.

work of government, to which even some friends of reform took exceptions; but Madison and Hamilton both knew that these were incidental matters when compared with the sound basis upon which the superstructure rested.

In reading the pages of this remarkable work as a study in political economy, it is important to bear in mind that the system, which the authors are describing, consisted of two fundamental parts—one positive, the other negative:

I. A government endowed with certain positive powers, but so constructed as to break the force of majority rule and prevent invasions of the property rights of minorities.

II. Restrictions on the state legislatures which had been so vigorous in their attacks on capital.

Under some circumstances, action is the immediate interest of the dominant party; and whenever it desires to make an economic gain through governmental functioning, it must have, of course, a system endowed with the requisite powers.

Examples of this are to be found in protective tariffs, in ship subsidies, in railway land grants, in river and harbor improvements, and so on through the catalogue of so-called "paternalistic" legislation. Of course it may be shown that the "general good" is the ostensible object of any particular act; but the general good is a passive force, and unless we know who are the several individuals that benefit in its name, it has no meaning. When it is so analyzed, immediate and remote beneficiaries are discovered; and the former are usually found to have been the dynamic element in securing the legislation. Take, for example, the economic interests of the advocates who appear in tariff hearings at Washington.

On the obverse side, dominant interests quite as often benefit from the prevention of governmental action as from positive assistance. They are able to take care of themselves if let alone within the circle of protection created by the law. Indeed, most owners of property have as much to fear from positive governmental action as from their inability to secure advantageous legislation. Particularly is this true where the field of private property is already extended to cover practically every form of tangible and intangible wealth. This was clearly set forth by Hamilton:

> It may perhaps be said that the power of preventing bad laws includes that of preventing good ones. . . . But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period, as more likely to do good than harm. . . . The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones.

The Underlying Political Science of the Constitution

Before taking up the economic implications of the structure of the federal government, it is important to ascertain what, in the opinion of *The Federalist*, is

the basis of all government. The most philosophical examination of the foundations of political science is made by Madison in the tenth number. Here he lays down, in no uncertain language, the principle that the first and elemental concern of every government is economic.

1. "The first object of government," he declares, is the protection of "the diversity in the faculties of men, from which the rights of property originate." The chief business of government, from which, perforce, its essential nature must be derived, consists in the control and adjustment of conflicting economic interests. After enumerating the various forms of propertied interests which spring up inevitably in modern society, he adds: "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 ordinary operations of the government."

2. What are the chief causes of these conflicting political forces with which the government must concern itself? Madison answers. Of course fanciful and frivolous distinctions have sometimes been the cause of 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."

3. The theories of government which men entertain are emotional reactions to their property interests. "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 society into different interests and parties*." Legislatures reflect these interests. "What," he asks, "are the different classes of legislators but advocates and parties to the causes which they determine." There is no help for it. "The causes of faction cannot be removed," and "we well know that neither moral nor religious motives can be relied on as an adequate control."

4. Unequal distribution of property is inevitable, and from it contending factions will rise in the state. The government will reflect them, for they will have their separate principles and "sentiments"; but the supreme danger will arise from the fusion of certain interests into an overbearing majority, which Madison, in another place, prophesied would be the landless proletariat—an overbearing majority which will make its "rights" paramount, and sacrifice the "rights" of the minority. "To secure the public good," he declares, "and private rights against the danger of such a faction and at the same time preserve the spirit and the form of popular government is then the great object to which our inquiries are directed."

5. How is this to be done? Since the contending classes cannot be eliminated and their interests are bound to be reflected in politics, the only way out lies in making it difficult for enough contending interests to fuse into a majority, and in

balancing one over against another. The machinery for doing this is created by the new Constitution and by the Union. (a) Public views are to be refined and enlarged "by passing them through the medium of a chosen body of citizens." (b) The very size of the Union will enable the inclusion of more interests so that the danger of an overbearing majority is not so great. "The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party. . . . Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their strength and to act in unison with each other."

Q.E.D. [which was to be demonstrated], "in the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government."

The Economic Conflict over Ratification as Viewed by Contemporaries

. . . No one can pore for weeks over the letters, newspapers, and pamphlets of the years 1787–1789 without coming to the conclusion that there was a deep-seated conflict between a popular party based on paper money and agrarian interests, and a conservative party centered in the towns and resting on financial, mercantile, and personal property interests generally. It is true that much of the fulmination in pamphlets was concerned with controversies over various features of the Constitution; but those writers who went to the bottom of matters, such as the authors of *The Federalist*, and the more serious Anti-Federalists,* gave careful attention to the basic elements in the struggle as well as to the incidental controversial details.

The superficiality of many of the ostensible reasons put forth by the opponents of the Constitution was penetrated by Madison. Writing to Jefferson, in October, 1788, he says: "The little pamphlet herewith inclosed will give you a collective view of the alterations which have been proposed by the State Conventions for the new Constitution. Various and numerous as they appear, they certainly omit many of the true grounds of opposition. The articles relating to Treaties, to paper money, and to contracts, created more enemies than all the errors in the system, positive and negative, put together."

Naturally the more circumspect of the pamphleteers who lent their support to the new system were careful about a too precise alignment of forces, for their

* The term *antifederalists* has attached itself to opponents of the Constitution. Ironically, Madison and Hamilton were nationalists who appropriated the federalist title. True federalists, who desired more power for the states, were left with the less attractive antifederalist label.

strength often lay in the conciliation of opponents rather than in exciting a more deep-seated antagonism. But even in such conciliatory publications the material advantages to be expected from the adoption of the Constitution are constantly put forward.

Take, for example, this extract from a mollifying "Address to the Freemen of America" issued while the Convention was in the midst of its deliberations:

> Let the public creditor, who lent his money to his country, and the soldier and citizen who yielded their services, come forward next and contribute their aid to establish an effective federal government. It is from the united power and resources of America only that they can expect permanent and substantial justice. . . . Let the citizens of America who inhabit the western counties of our states fly to a federal power for protection [against the Indians]. . . . Let the farmer who groans beneath the weight of direct taxation seek relief from a government whose extensive jurisdiction will enable it to extract the resources of our country by means of imposts and customs. Let the merchant, who complains of the restrictions and exclusions imposed upon his vessels by foreign nations, unite his influence in establishing a power that shall retaliate those injuries and insure him success in his honest pursuits by a general system of commercial regulations. Let the manufacturer and mechanic, who are everywhere languishing for want of employment, direct their eyes to an assembly of the states. It will be in their power only to encourage such arts and manufactures as are essential to the prosperity of our country. . . .

Conclusions

. . . The movement for the Constitution of the United States was originated and carried through principally by four groups of personalty interests which had been adversely affected under the Articles of Confederation: money, public securities, manufactures, and trade and shipping.

The first firm steps toward the formation of the Constitution were taken by a small and active group of men immediately interested through their personal possessions in the outcome of their labors.

No popular vote was taken directly or indirectly on the proposition to call the Convention which drafted the Constitution.

A large propertyless mass was, under the prevailing suffrage qualifications, excluded at the outset from participation (through representatives) in the work of framing the Constitution.

The members of the Philadelphia Convention which drafted the Constitution were, with a few exceptions, immediately, directly, and personally interested in, and derived economic advantages from, the establishment of the new system.

The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities.

The major portion of the members of the Convention are on record as recognizing the claim of property to a special and defensive position in the Constitution.

In the ratification of the Constitution, about three-fourths of the adult males failed to vote on the question, having abstained from the elections at which delegates to the state conventions were chosen, either on account of their indifference or their disfranchisement by property qualifications.

The Constitution was ratified by a vote of probably not more than one-sixth of the adult males.

It is questionable whether a majority of the voters participating in the elections for the state conventions in New York, Massachusetts, New Hampshire, Virginia, and South Carolina, actually approved the ratification of the Constitution.

The leaders who supported the Constitution in the ratifying conventions represented the same economic groups as the members of the Philadelphia Convention; and in a large number of instances they were also directly and personally interested in the outcome of their efforts.

In the ratification, it became manifest that the line of cleavage for and against the Constitution was between substantial personalty interests on the one hand and the small farming and debtor interests on the other.

The Constitution was not created by "the whole people" as the jurists have said; neither was it created by "the states" as Southern nullifiers long contended; but it was the work of a consolidated group whose interests knew no state boundaries and were truly national in their scope. Roche?

Summary Questions

[redacted]!

1. Compare Roche's and Beard's characterizations of the framers. Do these scholars reach fundamentally different conclusions, or are they essentially in accord on the nature of the framers' actions and motivations?
2. Why was a strong central government so important for a propertied economic elite? Do you think the framers acted solely on economic grounds?

1.1

The Founding Fathers: A Reform Caucus in Action

John P. Roche

After two hundred years, the American Constitution remains a vital document, subject to continuing reinterpretation in the courts. At the same time, its status in American mythology has become more firmly enshrined. A balance between tangible and symbolic elements has been central to the success of the Constitution, but we need to put down our rose-colored glasses to view its creation in ways that contribute to both our contemporary and our historic understanding of it.

In this selection, John P. Roche argues that the framers of the Constitution were above all "superb democratic politicians" who constituted an elite—but a democratic elite. Roche objects to viewing the framers solely through the lens of *The Federalist*, the collection of articles in support of ratification that he regards as a brilliant set of post hoc rationalizations. Instead, James Madison should be seen as a clever tactical politician and an "inspired propagandist," whose writing in *The Federalist* only incidentally emerges as brilliant political theory. We might well wonder what our political system would have looked like, absent the framers' political acumen.

◆ ◆ ◆ The Convention has been described picturesquely as a counter-revolutionary junta and the Constitution as a *coup d'état*, but this has been accomplished by withdrawing the whole history of the movement for constitutional reform from its true context. No doubt the goals of the constitutional elite were "subversive" to the existing political order, but it is overlooked that their subversion could only have succeeded if the people of the United States endorsed it by regularized procedures. Indubitably they were "plotting" to establish a much stronger central government than existed under the Articles, but only in the sense in which one could argue equally well that John F. Kennedy was, from 1956 to 1960, "plotting" to become President. In short, on the fundamental *procedural* level, the Constitutionalists had to work according to the prevailing rules of the game. . . .

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I

The history of the United States from 1786 to 1790 was largely one of a masterful employment of political expertise by the Constitutionalists as against bumbling, erratic behavior by the opponents of reform. Effectively, the Constitutionalists had to induce the states, by democratic techniques of coercion, to emasculate themselves. To be specific, if New York had refused to join the new Union, the project was doomed; yet before New York was safely in, the reluctant state legislature had . . . to take the following steps: (1) agree to send delegates to the Philadelphia Convention; (2) provide maintenance for these delegates . . . ; (3) set up the special *ad hoc* convention to decide on ratification; and (4) concede to the decision of the *ad hoc* convention that New York should participate. New York admittedly was a tricky state, with a strong interest in a *status quo* which permitted her to exploit New Jersey and Connecticut, but the same legal hurdles existed in every state. . . . that the *only* weapon in the Constitutionalist arsenal was an effective mobilization of public opinion.

The group which undertook this struggle was an interesting amalgam of a few dedicated nationalists with the self-interested spokesmen of various parochial bailiwicks. The Georgians, for example, wanted a strong central authority to provide military protection for their huge, underpopulated state . . . ; Jerseymen and Connecticuters wanted to escape from economic bondage to New York; the Virginians hoped to establish a system which would give that great state its rightful place in the councils of the republic. . . . There was, of course, a large element of personality in the affair: there is reason to suspect that Patrick Henry's opposition to the Convention and the Constitution was founded on his conviction that Jefferson was behind both, and a close study of local politics elsewhere would surely reveal that others supported the Constitution for the simple (and politically quite sufficient) reason that the "wrong" people were against it.

To say this is not to suggest that the Constitution rested on a foundation of impure or base motives. It is rather to argue that in politics there are no immaculate conceptions, and that in the drive for a stronger general government, motives of all sorts played a part. Few men in the history of mankind have espoused a view of the "common good" or "public interest" that militated against their private status; even Plato with all his reverence for disembodied reason managed to put philosophers on top of the pile. Thus it is not surprising that a number of diversified private interests joined to push the nationalist public interest; what would have been surprising was the absence of such a pragmatic united front. And the fact remains that, however motivated, these men did demonstrate a willingness to compromise their parochial interests in behalf of an ideal which took shape before their eyes and under their ministrations.

As Stanley Elkins and Eric McKitrick have suggested in a perceptive essay, what distinguished the leaders of the Constitutionalist caucus from their enemies was a "Continental" approach to political, economic and military issues. To the extent that they shared an institutional base of operations, it was the Continental

Congress (thirty-nine of the delegates to the Federal Convention had served in Congress), and this was hardly a locale which inspired respect for the state governments. . . . "Continental" ideology developed which seems to have demanded a revision of our domestic institutions primarily on the ground that only by invigorating our general government could we assume our rightful place in the international arena. Indeed, an argument with great force—particularly since Washington was its incarnation—urged that our very survival in the Hobbesian* jungle of world politics depended upon a reordering and strengthening of our national sovereignty. . . .

The great achievement of the Constitutionalists was their ultimate success in convincing the elected representatives of a majority of the white male population that change was imperative. A small group of political leaders with a Continental vision and essentially a consciousness of the United States' *international* impotence, provided the matrix of the movement. To their standard other leaders rallied with their own parallel ambitions. Their great assets were (1) the presence in their caucus of the one authentic American "father figure," George Washington, whose prestige was enormous; (2) the energy and talent of their leadership (in which one must include the towering intellectuals of the time, John Adams and Thomas Jefferson, despite their absence abroad), and their communications "network," which was far superior to anything on the opposition side; (3) preemptive skill which made "their" issue The Issue and kept the locally oriented opposition permanently on the defensive; and (4) the subjective consideration that these men were spokesmen of a new and compelling credo: *American* nationalism, that ill-defined but nonetheless potent sense of collective purpose that emerged from the American Revolution. . . .

The Constitutionalists got the jump on the "opposition" (a collective noun: oppositions would be more correct) at the outset with the demand for a Convention. Their opponents were caught in an old political trap: they were not being asked to approve any specific program of reform, but only to endorse a meeting to discuss and recommend needed reforms. If they took a hard line at the first stage, they were put in the position of glorifying the *status quo* and of denying the need for *any* changes. Moreover, the Constitutionalists could go to the people with a persuasive argument for "fair play"—"How can you condemn reform before you know precisely what is involved?" Since the state legislatures obviously would have the final say on any proposals that might emerge from the Convention, the Constitutionalists were merely reasonable men asking for a chance. Besides, since they did not make any concrete proposals at that stage, they were in a position to capitalize on every sort of generalized discontent with the Confederation.

* Thomas Hobbes (1588–1679) was an English philosopher who viewed human nature as brutish and self-seeking to the point of anarchy. The state, with an absolute ruler, thus becomes an agency for maintaining peace and order.

Perhaps because of their poor intelligence system, perhaps because of overconfidence generated by the failure of all previous efforts to alter the Articles, the opposition awoke too late to the dangers that confronted them in 1787. Not only did the Constitutionalists manage to get every state but Rhode Island . . . to appoint delegates to Philadelphia, but when the results were in, it appeared that they dominated the delegations. Given the apathy of the opposition, this was a natural phenomenon: in an ideologically nonpolarized political atmosphere those who get appointed to a special committee are likely to be the men who supported the movement for its creation. Even George Clinton, who seems to have been the first opposition leader to awake to the possibility of trouble, could not prevent the New York legislature from appointing Alexander Hamilton—though he did have the foresight to send two of his henchmen to dominate the delegation. Incidentally, much has been made of the fact that the delegates to Philadelphia were not elected by the people; some have adduced this fact as evidence of the "undemocratic" character of the gathering. But put in the context of the time, this argument is wholly specious: the central government under the Articles was considered a creature of the component states and in all the states but Rhode Island, Connecticut and New Hampshire, members of the national Congress were chosen by the state legislatures. This was not a consequence of elitism or fear of the mob; it was a logical extension of states'-rights doctrine to guarantee that the national institution did not end-run the state legislatures and make direct contact with the people.

II

With delegations safely named, the focus shifted to Philadelphia. While waiting for a quorum to assemble, James Madison got busy and drafted the so-called Randolph or Virginia Plan with the aid of the Virginia delegation. This was a political master-stroke. Its consequence was that once business got underway, the framework of discussion was established on Madison's terms. There was no interminable argument over agenda; instead the delegates took the Virginia Resolutions—"just for purposes of discussion"—as their point of departure. And along with Madison's proposals, many of which were buried in the course of the summer, went his major premise: a new start on a Constitution rather than piecemeal amendment. This was not necessarily revolutionary—a little exegesis could demonstrate that a new Constitution might be formulated as "amendments" to the Articles of Confederation—but Madison's proposal that this "lump sum" amendment go into effect after approval by nine states (the Articles required unanimous state approval for any amendment) was thoroughly subversive. . . . LAW VS. AMENDMENT

Basic differences of opinion emerged, of course, but these were not ideological; they were *structural*. If the so-called "states'-rights" group had not accepted the fundamental purposes of the Convention, they could simply have pulled out and

by doing so have aborted the whole enterprise. Instead of bolting, they returned day after day to argue and to compromise. An interesting symbol of this basic homogeneity was the initial agreement on secrecy: these professional politicians did not want to become prisoners of publicity; they wanted to retain that freedom of maneuver which is only possible when men are not forced to take public stands in the preliminary stages of negotiation. There was no legal means of binding the tongues of the delegates: at any stage in the game a delegate with basic principled objections to the emerging project could have taken the stump (as Luther Martin did after his exit) and denounced the convention to the skies. Yet Madison did not even inform Thomas Jefferson in Paris of the course of the deliberations and available correspondence indicates that the delegates generally observed the injunction. Secrecy is certainly uncharacteristic of any assembly marked by strong ideological polarization. This was noted at the time: the *New York Daily Advertiser*, August 14, 1787, commented that the ". . . profound secrecy hitherto observed by the Convention [we consider] a happy omen, as it demonstrates that the spirit of party on any great and essential point cannot have arisen to any height."

Commentators on the Constitution who have read *The Federalist* in lieu of reading the actual debates have credited the Fathers with the invention of a sublime concept called "Federalism." Unfortunately *The Federalist* is probative evidence for only one proposition: that Hamilton and Madison were inspired propagandists with a genius for retrospective symmetry. Federalism, as the theory is generally defined, was an improvisation which was later promoted into a political theory. . . .

It is indeed astonishing how those who have glibly designated James Madison the "father" of Federalism have overlooked the solid body of fact which indicates that he shared Hamilton's quest for a unitary central government.* To be specific, they have avoided examining the clear import of the Madison-Virginia Plan, and have disregarded Madison's dogged inch-by-inch retreat from the bastions of centralization. The Virginia Plan envisioned a unitary national government effectively freed from and dominant over the states. The lower house of the national legislature was to be elected directly by the people of the states with membership proportional to population. The upper house was to be selected by the lower, and the two chambers would elect the executive and choose the judges. The national government would be thus cut completely loose from the states.

The structure of the general government was freed from state control in a truly radical fashion, but the scope of the authority of the national sovereign as Madison initially formulated it was breathtaking. . . . The national legislature was to be empowered to disallow the acts of state legislatures, and the central

* *Unitary governments* such as that of Great Britain minimize the importance of local or regional units. Most major decisions are made at the national level.

government was vested, in addition to the powers of the nation under the Articles of Confederation, with plenary authority wherever ". . . the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Finally, just to lock the door against state intrusion, the national Congress was to be given the power to use military force on recalcitrant states. This was Madison's "model" of an ideal national government, though it later received little publicity in *The Federalist*.

The interesting thing was the reaction of the Convention to this militant program for a strong autonomous central government. Some delegates were startled, some obviously leery of so comprehensive a project of reform, but nobody set off any fireworks and nobody walked out. Moreover, in the two weeks that followed, the Virginia Plan received substantial endorsement *en principe*; the initial temper of the gathering can be deduced from the approval "without debate or dissent," on May 31, of the Sixth Resolution which granted Congress the authority to disallow state legislation ". . . contravening *in its opinion* the Articles of Union." Indeed, an amendment was included to bar states from contravening national treaties.

The Virginia Plan may therefore be considered, in ideological terms, as the delegates' Utopia, but as the discussions continued and became more specific, many of those present began to have second thoughts. After all, they were not residents of Utopia or guardians in Plato's Republic who could simply impose a philosophical ideal on subordinate strata of the population. They were practical politicians in a democratic society, and no matter what their private dreams might be, they had to take home an acceptable package and defend it—and their own political futures—against predictable attack. On June 14 the breaking point between dream and reality took place. Apparently realizing that under the Virginia Plan, Massachusetts, Virginia and Pennsylvania could virtually dominate the national government—and probably appreciating that to sell this program to "the folks back home" would be impossible—the delegates from the small states dug in their heels and demanded time for a consideration of alternatives. One gets a graphic sense of the inner politics from John Dickinson's reproach to Madison: "You see the consequences of pushing things too far. Some of the members from the small States wish for two branches in the General Legislature, and are friends to a good National Government; but we would sooner submit to a foreign power than . . . be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large States."

. . . Now the process of accommodation was put into action smoothly—and wisely, given the character and strength of the doubters. Madison had the votes, but this was one of those situations where the enforcement of mechanical majoritarianism could easily have destroyed the objectives of the majority: the Constitutionalists were in quest of a qualitative as well as a quantitative consensus. This was hardly from deference to local Quaker custom; it was a political imperative if they were to attain ratification.

III

According to the standard script, at this point the "states'-rights" group intervened in force behind the New Jersey Plan, which has been characteristically portrayed as a reversion to the *status quo* under the Articles of Confederation with but minor modifications. A careful examination of the evidence indicates that only in a marginal sense is this an accurate description. It is true that the New Jersey Plan put the states back into the institutional picture, but one could argue that to do so was a recognition of political reality rather than an affirmation of states'-rights. A serious case can be made that the advocates of the New Jersey Plan, far from being ideological addicts of states'-rights, intended to substitute for the Virginia Plan a system which would both retain strong national power and have a chance of adoption in the states. The leading spokesman for the project asserted quite clearly that his views were based more on counsels of expediency than on principle; said Paterson on June 16: "I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is not such a Governmt. as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve." This is Madison's version; in Yates' transcription, there is a crucial sentence following the remarks above: "I believe that a little practical virtue is to be preferred to the finest theoretical principles, which cannot be carried into effect." . . .

This was a defense of political acumen, not of states'-rights. In fact, Paterson's notes of his speech can easily be construed as an argument for attaining the substantive objectives of the Virginia Plan by a sound political route, *i.e.*, pouring the new wine in the old bottles. With a shrewd eye, Paterson queried:

> Will the Operation and Force of the [central] Govt. depend upon the mode of Representn.—No—it will depend upon the Quantum of Power lodged in the leg. ex. and judy. Departments—Give [the existing] Congress the same Powers that you intend to give the two Branches [under the Virginia Plan], and I apprehend they will act with as much Propriety and more Energy . . .

In other words, the advocates of the New Jersey Plan concentrated their fire on what they held to be the *political liabilities* of the Virginia Plan—which were matters of institutional structure—rather than on the proposed scope of national authority. Indeed, the Supremacy Clause of the Constitution first saw the light of day in Paterson's Sixth Resolution; the New Jersey Plan contemplated the use of military force to secure compliance with national law; and finally Paterson made clear his view that under either the Virginia or the New Jersey systems, the general government would ". . . act on individuals and not on states." From the states'-rights viewpoint, this was heresy: the fundament of that doctrine was the proposition that any central government had as its contituents the states, not the people, and could only reach the people through the agency of the state government.

Paterson then reopened the agenda of the Convention, but he did so within a distinctly nationalist framework. Paterson's position was one of favoring a strong

central government in principle, but opposing one which in fact *put the big states in the saddle*. (The Virginia Plan, for all its abstract merits, did very well by Virginia.) As evidence for this speculation, there is a curious and intriguing proposal among Paterson's preliminary drafts of the New Jersey Plan:

> Whereas it is necessary in Order to form the People of the U.S. of America in to a Nation, that the States should be consolidated, by which means all the Citizens thereof will become equally intitled to and will equally participate in the same Privileges and Rights . . . it is therefore resolved, that all the Lands contained within the Limits of each state individually, and of the U.S. generally be considered as constituting one Body or Mass, and be divided into thirteen or more integral parts.
>
> Resolved, That such Divisions or integral Parts shall be styled Districts.

This makes it sound as though Paterson was prepared to accept a strong unified central government along the lines of the Virginia Plan if the existing states were eliminated. He may have gotten the idea from his New Jersey colleague Judge David Brearley, who on June 9 had commented that the only remedy to the dilemma over representation was ". . . that a map of the U.S. be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts." According to Yates, Brearley added at this point, ". . . then a government on the present [Virginia Plan] system will be just."

This proposition was never pushed—it was patently unrealistic—but one can appreciate its purpose: it would have separated the men from the boys in the large-state delegations. How attached would the Virginians have been to their reform principles if Virginia were to disappear as a component geographical unit (the largest) for representational purposes? Up to this point, the Virginians had been in the happy position of supporting high ideals with that inner confidence born of knowledge that the "public interest" they endorsed would nourish their private interest. Worse, they had shown little willingness to compromise. Now the delegates from the small states announced that they were unprepared to be offered up as sacrificial victims to a "national interest" which reflected Virginia's parochial ambition. Caustic Charles Pinckney was not far off when he remarked sardonically that ". . . the whole [conflict] comes to this"[:] "Give N. Jersey an equal vote, and she will dismiss her scruples, and concur in the Natil. system." What he rather unfairly did not add was that the Jersey delegates were not free agents who could adhere to their private convictions; they had to take back, sponsor and risk their reputations on the reforms approved by the Convention—and in New Jersey, not in Virginia. . . .

IV

On Tuesday morning, June 19, . . . James Madison led off with a long, carefully reasoned speech analyzing the New Jersey Plan which, while intellectually vigorous in its criticisms, was quite conciliatory in mood. "The great difficulty," he observed, "lies in the affair of Representation; and if this could be adjusted, all

others would be surmountable." (As events were to demonstrate, this diagnosis was correct.) When he finished, a vote was taken on whether to continue with the Virginia Plan as the nucleus for a new constitution: seven states voted "Yes"; New York, New Jersey, and Delaware voted "No"; and Maryland, whose position often depended on which delegates happened to be on the floor, divided. Paterson, it seems, lost decisively; yet in a fundamental sense he and his allies had achieved their purpose: from that day onward, it could never be forgotten that the state governments loomed ominously in the background and that no verbal incantations could exorcise their power. Moreover, nobody bolted the convention: Paterson and his colleagues took their defeat in stride and set to work to modify the Virginia Plan, particularly with respect to its provisions on representation in the national legislature. Indeed, they won an immediate rhetorical bonus; when Oliver Ellsworth of Connecticut rose to move that the word "national" be expunged from the Third Virginia Resolution ("Resolved that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive and Judiciary"), Randolph agreed and the motion passed unanimously. The process of compromise had begun.

For the next two weeks, the delegates circled around the problem of legislative representation. The Connecticut delegation appears to have evolved a possible compromise quite early in the debates, but the Virginians and particularly Madison (unaware that he would later be acclaimed as the prophet of "federalism") fought obdurately against providing for equal representation of states in the second chamber. There was a good deal of acrimony and at one point Benjamin Franklin—of all people—proposed the institution of a daily prayer; practical politicians in the gathering, however, were meditating more on the merits of a good committee than on the utility of Divine intervention. On July 2, the ice began to break when through a number of fortuitous events—and one that seems deliberate—the majority against equality of representation was converted into a dead tie. The Convention had reached the stage where it was "ripe" for a solution (presumably all the therapeutic speeches had been made), and the South Carolinians proposed a committee. Madison and James Wilson wanted none of it, but with only Pennsylvania dissenting, the body voted to establish a working party on the problem of representation.

The members of this committee, one from each state, were elected by the delegates—and a very interesting committee it was. Despite the fact that the Virginia Plan had held majority support up to that date, neither Madison nor Randolph was selected (Mason was the Virginian) and Baldwin of Georgia, whose shift in position had resulted in the tie, was chosen. From the composition, it was clear that this was not to be a "fighting" committee: the emphasis in membership was on what might be described as "second-level political entrepreneurs." On the basis of the discussions up to that time, only Luther Martin of Maryland could be described as a "bitter-ender." Admittedly, some divination enters into this sort of analysis, but one does get a sense of the mood of the delegates from these choices—including the interesting selection of Benjamin Franklin, despite his age and intellectual wobbliness, over the brilliant and

incisive Wilson or the sharp, polemical Gouverneur Morris, to represent Pennsylvania. His passion for conciliation was more valuable at this juncture than Wilson's logical genius, or Morris' acerbic wit.

. . . It should be reiterated that the Madison model had no room either for the states or for the "separation of powers": effectively *all* governmental power was vested in the national legislature. The merits of Montesquieu did not turn up until *The Federalist*; and although a perverse argument could be made that Madison's ideal was truly in the tradition of John Locke's *Second Treatise of Government*, the Locke whom the American rebels treated as an honorary president was a pluralistic defender of vested rights, not of parliamentary supremacy.*

It would be tedious to continue a blow-by-blow analysis of the work of the delegates; the critical fight was over representation of the states and once the Connecticut Compromise† was adopted on July 17, the Convention was over the hump. . . . Moreover, once the compromise had carried (by five states to four, with one state divided), its advocates threw themselves vigorously into the job of strengthening the general government's substantive powers—as might have been predicted, indeed, from Paterson's early statements. It nourishes an increased respect for Madison's devotion to the art of politics, to realize that this dogged fighter could sit down six months later and prepare essays for *The Federalist* in contradiction to his basic convictions about the true course the Convention should have taken. . . .

VI

Drawing on their vast collective political experience, utilizing every weapon in the politician's arsenal, looking constantly over their shoulders at their constituents, the delegates put together a Constitution. It was a makeshift affair; some sticky issues (for example, the qualification of voters) they ducked entirely; others they mastered with that ancient instrument of political sagacity, studied ambiguity (for example, citizenship), and some they just overlooked. In this last category, I suspect, fell the matter of the power of the federal courts to determine the constitutionality of acts of Congress. When the judicial article was formulated (Article III of the Constitution), deliberations were still in the stage where the legislature was endowed with broad power under the Randolph formulation, authority which by its own terms was scarcely amenable to judicial review. In

* John Locke (1632–1704) was an English philosopher whose writings served as a basis for government rooted in a social contract between citizens and their rulers. Montesquieu (1689–1755) was a French political philosopher whose work emphasized checks and balances in the exercise of authority.

† The Connecticut Compromise advanced the solution of a two-chamber legislature, with each state receiving two senators and House representation in proportion to its population.

essence, courts could hardly determine when ". . . the separate States are incompetent or . . . the harmony of the United States may be interrupted"; the National Legislature, as critics pointed out, was free to define its own jurisdiction. Later the definition of legislative authority was changed into the form we know, a series of stipulated powers, *but the delegates never seriously reexamined the jurisdiction of the judiciary under this new limited formulation*. All arguments on the intention of the Framers in this matter are thus deductive and *a posteriori*, though some obviously make more sense than others.

The Framers were busy and distinguished men, anxious to get back to their families, their positions, and their constituents, not members of the French Academy devoting a lifetime to a dictionary. They were trying to do an important job, and do it in such a fashion that their handiwork would be acceptable to very diverse constituencies. No one was rhapsodic about the final document, but it was a beginning, a move in the right direction, and one they had reason to believe the people would endorse. In addition, since they had modified the impossible amendment provisions of the Articles (the requirement of unanimity which could always be frustrated by "Rogues [Rhode] Island") to one demanding approval by only three-quarters of the states, they seemed confident that gaps in the fabric which experience would reveal could be rewoven without undue difficulty. . . .

Madison, despite his reservations about the Constitution, was the campaign manager in ratification. His first task was to get the Congress in New York to light its own funeral pyre by approving the "amendments" to the Articles and sending them on to the state legislatures. Above all, momentum had to be maintained. The anti-Constitutionalists, now thoroughly alarmed and no novices in politics, realized that their best tactic was attrition rather than direct opposition. Thus they settled on a position expressing qualified approval but calling for a second Convention to remedy various defects (the one with the most demagogic appeal was the lack of a Bill of Rights). Madison knew that to accede to this demand would be equivalent to losing the battle, nor would he agree to conditional approval (despite wavering even by Hamilton). This was an all-or-nothing proposition: national salvation or national impotence with no intermediate positions possible. Unable to get congressional approval, he settled for second best: a unanimous resolution of Congress transmitting the Constitution to the states for whatever action they saw fit to take. . . .

VII

. . . Victory for the Constitution meant simultaneous victory for the Constitutionalists; the anti-Constitutionalists either capitulated or vanished into limbo—soon Patrick Henry would be offered a seat on the Supreme Court and Luther Martin would be known as the Federalist "bull-dog." And irony of ironies, Alexander Hamilton and James Madison would shortly accumulate a reputation as the formulators of what is often alleged to be our political theory, the concept

of "federalism." Also, on the other side of the ledger, the arguments would soon appear over what the Framers "really meant"; while these disputes have assumed the proportions of a big scholarly business in the last century, they began almost before the ink on the Constitution was dry. One of the best early ones featured Hamilton versus Madison on the scope of presidential power, and other Framers characteristically assumed positions in this and other disputes on the basis of their political convictions.

Probably our greatest difficulty is that we know so much more about what the Framers *should have meant* than they themselves did. We are intimately acquainted with the problems that their Constitution should have been designed to master; in short, we have read the mystery story backwards. If we are to get the right "feel" for their time and their circumstances, we must, in Maitland's phrase, ". . . think ourselves back into a twilight." Obviously, no one can pretend completely to escape from the solipsistic web of his own environment, but if the effort is made, it is possible to appreciate the past roughly on its own terms. The first step in this process is to abandon the academic premise that because we can ask a question, there must be an answer.

Thus we can ask what the Framers meant when they gave Congress the power to regulate interstate and foreign commerce, and we emerge, reluctantly perhaps, with the reply that . . . they may not have known what they meant, that there may not have been any semantic consensus. The Convention was not a seminar in analytic philosophy or linguistic analysis. Commerce was *commerce*—and if different interpretations of the word arose, later generations could worry about the problem of definition. The delegates were in a hurry to get a new government established; when definitional arguments arose, they characteristically took refuge in ambiguity. If different men voted for the same proposition for varying reasons, that was politics (and still is); if later generations were unsettled by this lack of precision, that would be their problem. . . .

The Constitution, then, was not an apotheosis of "constitutionalism," a triumph of architectonic genius; it was a patch-work sewn together under the pressure of both time and events by a group of extremely talented democratic politicians. They refused to attempt the establishment of a strong, centralized sovereignty on the principle of legislative supremacy for the excellent reason that the people would not accept it. They risked their political fortunes by opposing the established doctrines of state sovereignty because they were convinced that the existing system was leading to national impotence and probably foreign domination. For two years, they worked to get a convention established. For over three months, in what must have seemed to the faithful participants an endless process of give-and-take, they reasoned, cajoled, threatened, and bargained amongst themselves. The result was a Constitution which the people, in fact, by democratic processes, did accept, and a new and far better national government was established. . . .

To conclude, the Constitution was neither a victory for abstract theory nor a great practical success. Well over half a million men had to die on the battlefields of the Civil War before certain constitutional principles could be defined—a

baleful consideration which is somehow overlooked in our customary tributes to the farsighted genius of the Framers and to the supposed American talent for "constitutionalism." The Constitution was, however, a vivid demonstration of effective democratic political action, and of the forging of a national elite which literally persuaded its countrymen to hoist themselves by their own boot straps. American pro-consuls would be wise not to translate the Constitution into Japanese, or Swahili, or treat it as a work of semi-Divine origin; but when students of comparative politics examine the process of nation-building in countries newly freed from colonial rule, they may find the American experience instructive as a classic example of the potentialities of a democratic elite.

Summary Questions [redacted]

1. How does Roche's approach to the framers affect our contemporary understanding of the Constitution? How might the framers have confronted difficult problems such as abortion and affirmative action?
2. What does Roche mean by a *democratic elite*? Is this phrase a contradiction in terms, or does it have real meaning?

1.2

The Founding Fathers: An Age of Realism

Richard Hofstadter

If the framers were, in John P. Roche's words, "a reform caucus," they were also realists who had witnessed more than a decade of severe economic, social, and political turbulence. They wanted some greater certainty for themselves and their new nation. At the same time, they remained steadfast in their desire to retain the liberty they had so recently won.

Historian Richard Hofstadter examines the interplay among liberty, stability, and property rights in this brief essay. As the framers saw it, the key to the long-term success of a democratic state (if it was to be possible) was to ensure that

Probably the pre-eminent American historian of his time, Richard Hofstadter (1916–1970) was DeWitt Clinton Professor of American History at Columbia University.

AP Government
New Roche and Beard Questions.

1. Charles Beard and John P. Roche clearly differ in their opinions of the motives of the Founders in creating the Constitution.

A) How does each author view human nature? How does this viewpoint affect their interpretation of the Founders' motives?
B) How does each conceive of and use the term "elite."
C) Which opinion do you find most compelling? Justify your answer with careful reasoning and support.

2. Could there be a John P. Roche without a Charles Beard? Be sure to include relevant information to support your position.

The Federalist Papers

ALEXANDER HAMILTON
JAMES MADISON
JOHN JAY

EDITED BY CLINTON ROSSITER,
WITH A NEW INTRODUCTION AND
NOTES BY CHARLES R. KESLER

A MENTOR BOOK

Introduction to *The Federalist Papers*

The Constitution that emerged from the Philadelphia Convention in September 1787 has been called a "bundle of compromises," but at the time it struck many Americans as something more ominous. In its opponents' eyes, the proposed Constitution was flawed at best and at worst downright sinister. George Mason, for example, the author of the Virginia Declaration of Rights and one of the most distinguished delegates to the Federal Convention, refused to sign the document because of the unfortunate mistakes he detected in it. "This Government will commence in a moderate Aristocracy," he predicted, and though it was impossible to tell whether "in its Operation" it would produce "a Monarchy, or a corrupt oppressive Aristocracy," it would probably "vibrate some years between the two, and then terminate in the one or the other." Other critics were less charitable. They discerned in the document an "insidious design to deprive us of our liberties." The Constitution, one wrote, was the "most daring attempt to establish a despotic aristocracy among freemen, that the world has ever witnessed."[1]

The Constitution's friends were not satisfied with the document, either. "No man's ideas were more remote from the plan than [mine] were known to be," Alexander Hamilton announced to the Convention on the day he signed the Constitution. James Madison confided to Thomas Jefferson "that the plan should it be adopted will neither effectually answer its national object nor prevent the local mischiefs which every where excite disgust against the state governments."[2] Its friends, in short, feared that the Convention's compromises had resulted in a plan of government too weak and incoherent to save American republicanism; its opponents suspected that the Constitution, whether by accident or by design,

was a formidable engine that would subvert republicanism in favor of some form of aristocratic domination.

The great accomplishment of *The Federalist* (popularly known as *The Federalist Papers*) was to show that the Constitution was both coherent and republican. Suppressing their private doubts and disappointments, Hamilton and Madison, joined by John Jay, undertook the series of essays in order to expound the merits of the new Constitution and to answer the objections to it that had already begun to appear in newspaper columns in New York and across the United States. More than any other speech or writing in defense of the new plan of government, *The Federalist* showed that the Constitution contained an inherent *constitutionalism*, which gave a purpose to the whole document and to each of its parts.[3] To put it differently, *The Federalist* articulated the overall integrity of the Constitution, showing how it fit the requirements of republican government as a whole. Without denying the plan's origin in political give-and-take, *The Federalist* thus interpreted the Federal Convention as having been a forum not for (at least not mostly for) self-interested bargaining, but for public-spirited deliberation. The product of those deliberations was a "fundamental law," sufficiently rational and coherent to be regarded almost as the product of a single wise mind or legislator.[4]

The U.S. Constitution, unlike the laws of many ancient cities, was not of course the work of one wise lawgiver, a point that *The Federalist* emphasizes.[5] Moreover, the Constitution contained compromises, obscurities, imperfections; "I never expect to see a perfect work from imperfect man," the final *Federalist* paper admitted. But the obscurities and imperfections were turned to account additional reasons why this law needed the elaboration, explanation, and defense of a single commentator, whose commentary soon became accepted as authoritative and so helped to fix the meaning of the Constitution itself. This commentator was "Publius," the pen name chosen by the then-anonymous authors of *The Federalist*. By drawing out the reasoning latent in the text and completing it with his reasoning, Publius presented the Constitution as an achievement in good government—a plan

worthy not only of momentary applause but of the rational and enduring consent of an enlightened public.

In fact, Publius quickly became accepted as the best guide not only to how the framers had understood the Constitution when they wrote it, but also to how the people of the United States had understood the Constitution when they ratified it. Thomas Jefferson described *The Federalist* in 1788 as "the best commentary on the principles of government, which ever was written." In 1825, he recommended it as an authority on the "distinctive principles" of the governments of Virginia and the United States, second in importance only to the Declaration of Independence. Writing then almost forty years after its first publication, Jefferson endorsed *The Federalist* as "an authority to which appeal is habitually made by all, and rarely declined or denied by any as evidence of the general opinion of those who framed, and of those who accepted the Constitution of the United States, on questions as to its genuine meaning." In this case, in fact, he recommended *The Federalist* as a guide to the Constitution without bothering to recommend the Constitution itself![6] Little wonder, then, that the political scientist Clinton Rossiter, writing in 1961, acknowledged *The Federalist* as "the most important work in political science that has ever been written, or is likely ever to be written, in the United States. It is, indeed, the one product of the American mind that is rightly counted among the classics of political theory."

Yoked together then as "Publius," Hamilton and Madison were encouraged not only to downplay their sense of the Constitution's inadequacies, but to review in a new light the Constitution as a whole and to construct the strongest possible argument on its behalf, stretching "the chance of good to be expected from the plan" (Hamilton's words) into an account of the consistent good that would result from it—if only it were properly understood and administered.[7]

The Federalist appeared in New York newspapers beginning on October 27, 1787. Addressed "To the People of the State of New York"—the popular salutation reflected the fact that the state legislature had decreed universal male suffrage for the election to the state rati-

fying convention, whereas voting for state offices had property qualifications attached—the first essay joined a debate already in progress. Hamilton had himself published two letters in July and September attacking Governor George Clinton, the leader of the state's Anti-Federalists. Essays by the Anti-Federalist writer "Cato" had begun appearing on September 27, followed by the first of the powerful Anti-Federalist "Brutus" papers on October 18. Probably disappointed with the rather petulant tone of his own letters, and impressed with the seriousness of these new Anti-Federalist sallies, Hamilton resolved to launch a new, extensive series of essays under a pen name and with the help of collaborators.[8]

As a title for the series, *The Federalist* stole a march on its opponents by claiming the good name of federalism for the new Constitution and its supporters. This usage was not novel, for those who earlier in the 1780s had wanted to strengthen the powers of the federal Congress established by the Articles of Confederation had often called themselves "federalists" and their opponents "anti-federalists." Still, the Constitution's opponents—now the defenders of the Articles of Confederation against the much stronger central government proffered in the Constitution—thought themselves entitled to be called "federalists." After all, they were advocates of loose con-federal government, and (as they saw it) the Constitution's supporters were pushing consolidated or centralized government. Hamilton beat them to it, however, and his opponents were left in an awful political limbo: History knows them only as the Anti-Federalists.[9] Confederal vs. Federal

He chose "Publius" as the pseudonym, trumping his adversaries' invocation of heroes of the late Roman republic (Brutus and Cato) with a reference to one of the founders and saviors of republican Rome—Publius Valerius Publicola, whose biography was paired with that of Solon in Plutarch's famous *Parallel Lives*. Solon, the democratic lawgiver of Athens, had lived to see his polity overthrown by a tyrant; but the Roman Publius firmly established his republic, which endured and expanded for centuries. Moreover, after making his laws, Solon had left Athens for ten years in order to avoid having to interpret his legislation. By contrast, Publius had remained in Rome in order to serve as consul, to improve (at a critical moment) the city's primitive republican laws, and to impart his own spirit of moderation, justice, and wisdom to the regime.[10] What did this imply for the American Publius? At least this, that he wished to seize a fleeting moment favorable to constitution-making—when the wise and moderate men of the Federal Convention would have their greatest influence—in order to form a just an enduring republic in an extensive land. To accomplish this he had to speak or, rather, write moderately, which meant, *inter alia,* confining his ingenuity to the defense and explanation of the proposed Constitution. By offering himself as their prudent counselor, Publius clearly subordinated himself to the people of New York and, by extension, the United States. But insofar as the people were persuaded by his interpretation of the Constitution and of republicanism, his own authority grew—as did the authority of wise statesmen who in the future would seek to guide their country by following his example.

It was clear from the beginning that Hamilton intended *The Federalist* to match and overmatch the Anti-Federalists' arguments. He promised in *Federalist* No. 1 "a satisfactory answer to all the objections . . . that may seem to have any claim to your attention," and arranged for the papers to be printed and reprinted in the New York City press. At the height of the series, three or four new essays by Publius appeared every week, and each essay would eventually appear in two or three of the city's five newspapers. Small wonder that frustrated readers sometimes complained (stop "cramming us with the voluminous Publius," groaned "twenty-seven subscribers" to the *New York Journal*). Not content with dominating the New York discussion, Hamilton also encouraged republication in out-of-state newspapers. To maintain this pace, he needed collaborators. He enlisted John Jay, who early fell ill; he apparently offered a spot to Gouverneur Morris, who declined; and William Duer submitted three essays, which Hamilton rejected. Hamilton and Jay recruited Madison, who was in New York as a Virginia delegate to Congress, at some point (we do not know exactly when) and their collaboration lifted *The Federalist* to greatness. It also probably extended

the series, which initially may have been slated to comprise twenty or twenty-five papers, not the eighty-five that finally resulted.[11]

We do not know the details of their collaboration. Hamilton (1755–1804) and Madison (1751–1836) had been prominent participants in the debates at the Philadelphia Convention, advocating quite different versions of a stronger and more coherent national government; and they had served together on the Committee of Style, which had prepared the final draft of the Constitution. Jay (1745–1829), the oldest and at that time most distinguished of the group, was a prominent lawyer who had drafted the New York Constitution of 1777 and who had negotiated, alongside Benjamin Franklin and John Adams, the Treaty of 1783 that had officially ended the Revolutionary War. Madison much later famously recalled the haste with which the papers were written, which prevented active collaboration, but he also remembered consulting with Hamilton on some of them.[12] Each writer drew on materials he had prepared for, or during, the Convention, and each worked on topics congenial to him. Hamilton tackled the weaknesses of the Articles of Confederation, especially regarding domestic stability, war powers, taxation, and commercial regulation, and he surveyed the more energetic and high-toned branches of the government—the executive and the judiciary, along with a few aspects of the Senate. Madison expounded his theory of the extended republic, the delicacy of the Convention's task, federalism, republicanism, the general theory of the separation of powers, the House of Representatives, and important features of the Senate. (Called back to Virginia, he ceased to contribute after *Federalist* 63). Jay stuck to foreign policy in his five essays.[13]

Given their famous falling out a few years later, after which they remained bitter political enemies, Hamilton and Madison might seem unlikely co-authors. Indeed, several scholars in the twentieth century have exercised themselves over the alleged schizophrenia of Publius, straining to identify latent disagreements between the principal co-authors.[14] This approach clearly risked reading back into the 1780s the fierce partisan disputes of the 1790s. Besides, it has actually proved very difficult to determine who wrote several numbers of *The Federalist*

(particularly Nos. 55–58 and 62–63) claimed by both Madison and Hamilton. Even more scholarly ink has been spilled on this authorship controversy than on the book's supposed "split personality." External evidence is inconclusive, and internal evidence (drawing on subject matter, arguments, style) has not dispelled the ambiguity.[15] Researchers have resorted to computer analysis of the text in the attempt to settle who wrote what, but they have been hard-pressed to find a distinction they could rely on—sentence length, "marker" words—all the more obvious tests failed to turn up a distinction that made a difference. Finally, a statistical difference was found in the use of utterly trivial words, but this threatened to make the differences between Hamilton and Madison utterly trivial.[16]

So similar, then, were the two men's arguments and writing style in *The Federalist* that their efforts to disguise themselves as Publius must be judged an extraordinary success. They clearly did not regard this as a personal or idiosyncratic work. Indeed, they kept their authorship secret (at least publicly) for many years, and later in their careers, each more or less disclaimed the book as an adequate statement of his own political principles.[17] So there is a very real sense in which Publius *is* the author of *The Federalist,* because each writer strove to write as "Publius," to write to the collective mark being set in the accumulating papers of *The Federalist.* After all, Hamilton, Madison, and Jay were in New York City together from October 1787 to March 1788. And although they did not look over each other's shoulder while composing, it is likely that they did consult with one another on the general direction of the series and the division of labor emerging within it, and they may occasionally have edited one another's copy. They certainly read one another's essays eventually, if only in order to maintain the series' consistent argument and tone.

When Hamilton decided to issue the collected papers in two hardcover volumes (published on March 22 and May 28, 1788), he added a Preface to the first volume in which he apologized for the "violations of method and repetitions of ideas" involved in the transformation of a newspaper series into a book. He admitted, however, that the "latter defect" had been "intentionally indulged" for rhetorical purposes—that is, in order to

more effectively persuade the readers. It was not "anxiety for the literary character of the performance" that compelled the apology, he added, but "respect for public opinion," which would recognize repetition when it saw it. Hamilton intended the series to appeal to both "a critical reader" and the public, then, and the two audiences were compatible because the latter, the public, was respectable, i.e., itself aspiring to if never quite reaching the standards of "a critical reader." Nor, it should be added, did these "critical" or more enlightened readers disdain the cause of the respectable public. Part of the enduring glory of the debate over the Constitution in 1787–1788 was that it showed at what a high level the cause of popular government could be, indeed *had* to be defended if it was to be something honorable (see *Federalist* No. 39). *The Federalist* represented the high point of this high-level debate, but it served also as a model of candor, civility, and deliberation for future American political disputes. Unlike Solon, the American Publius would never desert his country, but would always be present, in literary form, to counsel it.

Hamilton restated the point in the Preface's concluding sentence: "The great wish is that it may promote the cause of truth and lead to a right judgment of the true interests of the community." *The Federalist* was at once a practical work designed to persuade the community of its interests, and a more theoretical work serving "the cause of truth." The cause of popular or republican government depended on the capacity of "societies of men," and particularly "the people of this country," in the words of *Federalist* No. 1, to establish "good government from reflection and choice." Otherwise the cause of the people would collapse, and they would be "forever destined to depend for their political constitutions on accident and force." But the ability of the people to govern themselves depended on their willingness to allow "reflection" to guide their "choice"—depended, in other words, on their willingness to take seriously the debate over the Constitution, to abide by the deliberative style of democratic or republican politics that *The Federalist* did so much to establish, and to heed the counsels of *The Federalist* in choosing to ratify, and later to uphold, the Constitution of the United States.

Throughout their labors, the authors of *The Federalist* adhered fairly closely to the outline of the series announced in *Federalist* No. 1. "I propose, in a series of papers, to discuss the following interesting particulars," Publius wrote:

> *The utility of the UNION to your political prosperity—The insufficiency of the present Confederation to preserve that Union—The necessity of a government at least equally energetic with the one proposed, to the attainment of this object—The conformity of the proposed Constitution to the true principles of republican government—Its analogy to your own State constitution*—and lastly, *The additional security which its adoption will afford to the preservation of that species of government, to liberty, and to property.* (No. 1, p. 4)

This outline was followed, though not without modification. The fourth topic, on the Constitution's conformity to "the true principles of republican government," grew to be a survey of the "particular structure" of the whole government, encompassing *Federalist* Nos. 47–84. The fifth and sixth topics, "anticipated and exhausted" (pp. 488–489) in the previous section, shrank accordingly to the dimensions of a single paragraph apiece in the concluding paper, *Federalist* No. 85.

As indicated in the beginning agenda, Publius's discussion was organized around two broad subjects, "UNION" and "the proposed Constitution." These subjects in turn corresponded to the two volumes of the collected *Federalist* papers: "UNION" was the subject of the first thirty-six numbers of *The Federalist,* assembled in the first bound volume, and "the merits of this Constitution" absorbed the next forty-nine papers, Nos. 37–85, published in the second. In general outline, then, the argument of the book takes this form:

I. The Union
- Nos. 1–14: Introduction and *"the utility of the UNION to your political prosperity"*
- Nos. 15–22: *"The insufficiency of the present Confederation to preserve that Union"*
- Nos. 23–26: *"The necessity of a government at least equally energetic with the one proposed, to the attainment of this object"*

II. The Merits of this Constitution or *"The conformity of the proposed Constitution to the true principles of republican government"*
- Nos. 37–40: The delicate work of the Convention and the "general form" of the proposed government (i.e., its republicanism and federalism)
- Nos. 41–46: The "quantity" or "general mass of power" invested in the new government and whether this is dangerous to the States
- Nos. 47–84: The "particular structure" of the government and the distribution" of its mass of power
- Nos. 47–51: The separation of powers in general
- Nos. 52–58: The House of Representatives
- Nos. 59–61: The regulation of elections
- Nos. 62–66: The Senate
- Nos. 67–77: The Executive
- Nos. 78–83: The Judiciary
- No. 84: Miscellaneous objections, including the lack of a Bill of Rights
- No. 85: Conclusion, including the Constitution's *"analogy to your own State constitution"* and *"The additional security which its adoption will afford to the preservation of that* [republican] *species of government, to liberty, and to property"*

The two volumes or main divisions of *The Federalist* thus have different themes that dictate different points of view and kinds of argument. The theme of the first volume is the Union, meaning the necessity of maintaining a "firm" and "well-constructed" Union as opposed to allowing its dissolution into separate confederacies of states (e.g., a Southern Confederacy, Northern Confederacy, etc.). Publius announces "that it seems to have

been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice." But reflective men know that politics cannot ignore the role of "accident and force" in human affairs, and the first volume of *The Federalist* is a long tutorial in the ways in which American republicans should anticipate the threats that will, inevitably, be posed by "accident and force." Publius concentrates his arguments, therefore, on the forceful necessities that require Union. "Among the many objects to which a wise and free people find it necessary to direct their attention," he observes in No. 3 (p. 10), "that of providing for their *safety* seems to be first." He amplifies the thought in No. 8 (p. 35): "Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates." These are not "vague inferences," Publius notes, but "solid conclusions, drawn from the natural and necessary progress of human affairs."

Indeed, "nothing is more certain than the indispensable necessity of government" (No. 2, p. 5), which is made necessary precisely by the problem of safety or self-preservation. Throughout *The Federalist*'s first volume or first part, the Constitution seems to be for the sake of the Union, and the Union seems to be for the sake of safety or self-preservation. Nature is always close to necessity in these papers, and politics close to physics or mathematics in its calculus of the human passions. Publius describes representation, for example, as a "great mechanical power" by which the will of society may be concentrated and "its force directed to any object which the public good requires." The emphasis is on concentrating and projecting society's will, not on refining or shaping it. The problem of politics seems to be how to arrange "the momentum of civil power" so that it acts on individuals, moving their passions in the proper direction (No. 13, pp. 65–66). Similarly, he argues that the national government's powers to levy taxes and to raise and maintain an army ought to exist "without limitation" because it is impossible to foresee the extent and variety of national emergencies or the means necessary

to meet them. This reasoning, he insists, is axiomatic, resting on such "simple" and "universal" truths as that "the *means* ought to be proportioned to the *end*." So though the principles of morals and politics do not have "the same degree of certainty with those of the mathematics," Publius assures his readers that "they have much better claims in this respect" than men usually think (No. 23, p. 121; No. 30, pp. 156, 158–159; No. 31, pp. 161–162).

In Nos. 9 and 10, however, Publius shows that the Union, besides being necessary for our survival, is also useful to liberty. But even these famous papers remain in decisive respects within the horizon of the first volume. According to No. 10, the protection of the unequal faculties of men is "the first object of government" (p. 46), though earlier we had been instructed that "safety" is the first object of a people's attention. Self-preservation may be first in the sense of being the earliest or most urgent object of government, then, but what is first in time need not remain first in rank. The protection of the unequal faculties of men "from which the rights of property originate" may thus become "the first object of government" once safety has been attended to; government does have higher, though not more urgent, ends than the protection of mere life. Still, in No. 10 these higher ends embrace essentially the rights of property and the protection of the diverse faculties of men that give rise to these rights. In other words, the ends of government or of the Constitution appear more or less confined to the objects of the Union, which he defines as "the common defense of the members," "the preservation of the public peace," "the regulation of commerce with other nations and between the States," and the conduct of foreign policy (No. 23, p. 121).

It is only in *The Federalist*'s second volume, which turns to the merits of the proposed Constitution as such, that Publius begins consistently to look at matters from a higher point of view. Here we learn that the Constitution strives to secure "the common good of the society," "the happiness of the people," and a complex "public good" that incorporates such elements as "a due sense of national character," the cultivation of "the deliberate sense of the community," and even "extensive and arduous enterprises

for the public benefit" that will be championed by future presidents (No. 57, p. 318; No. 62, p. 348; No. 63, p. 350; No. 71, p. 400; No. 72, p. 405). Security against foreign danger, which earlier had been singled out as the first object of a wise and free people's attention, is downgraded to "one of the primitive objects of civil society" (No. 3, p. 10; No. 41, p. 224). From this point of view, the protection of the diverse "faculties of men, from which the rights of property originate" (No. 10, p. 46) appears now as an intermediate goal, somewhere between securing the mere "safety" and the "happiness" of society.

The change in tone is heralded in the concluding paragraph of the first volume: "a further and more critical investigation," Publius promises, "will serve to recommend [the Constitution] still more to every sincere and disinterested advocate for good government." This "more critical and thorough survey of the work of the convention," as he calls it in *Federalist* No. 37, occupies the rest of the book, and is addressed to "the candid and judicious part of the community," those who "add to a sincere zeal for the happiness of their country, a temper favorable to a just estimate of the means of promoting it" (No. 36, p. 192; No. 37, pp. 192–193). Rather than teaching men to heed their passions so that they may gratify their fundamental passion for self-preservation—rather than using necessity as an effective substitute for moderation, in other words—Publius chooses to speak in moderate tones to moderate men. He encourages his readers to listen to moderation's counsel and, bit by bit, to yield to it.

The "sincere and disinterested advocate for good government" will not be satisfied with proofs of the necessity of the plan, because in order for government to be "good" it should be worthy of choice. Accordingly, the question posed in Nos. 37–85 is whether and why the proposed Constitution is choiceworthy. Whereas in the first volume Publius tries to show that the American people have no choice (in any rational sense) but to preserve the Union by adopting the Constitution, in the second he attempts to persuade them not only of the "expediency" but of the "propriety" of ratifying it. The first volume ends by looking forward to the "further and more critical investigation of the system" and then pro-

from gaining control of the national governmental apparatus. The selections reprinted here from *The Federalist,* which was written between October 1787 and August 1788, outline the theory and mechanism of the separation of powers.

4

James Madison

FEDERALIST 47

I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.

One of the principal objections inculcated by the more respectable adversaries to the constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments, ought to be separate and distinct. In the structure of the federal government, no regard, it is said, seems to have been paid to this essential precaution in favor of liberty. The several departments of power are distributed and blended in such a manner, as at once to destroy all symmetry and beauty of form; and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.

No political truth is certainly of great intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that on which the objection is founded. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal constitution, therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system. I persuade myself, however, that it will be made apparent to every one, that the charge cannot be supported, and that the maxim on which it relies has been totally misconceived and misapplied.

The oracle who is always consulted and cited on this subject, is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit of at least displaying and recommending it most effectually to the attention of mankind. . . .

From . . . facts, by which Montesquieu was guided, it may clearly be inferred, that in saying, "there can be no liberty, where the legislative and executive powers are united in the same person, or body of magistrates"; or "if the power of judging

be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. . . .

If we look into the constitutions of the several states, we find, that notwithstanding the emphatical, and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. . . .

The constitution of Massachusetts has observed a sufficient, though less pointed caution, in expressing this fundamental article of liberty. It declares, "that the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu. . . . It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very constitution to which it is prefixed, a partial mixture of powers has been admitted. . . .

FEDERALIST 48

. . . I shall undertake in the next place to show, that unless these departments be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that neither of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next, and most difficult task, is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some

more adequate defense is indispensably necessary for the more feeble, against the more powerful members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. . . .

In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended on some favorable emergency, to start up in the same quarter. But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachment which it makes on the coordinate departments. It is not infrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature; and the judiciary being described by landmarks, still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence over the pecuniary rewards of those who fill the other departments; a dependence is thus created in the latter, which gives still greater facility to encroachment of the former. . . .

FEDERALIST 51

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. . . .

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 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. . . .

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 defense 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.

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is, to divide and arrange the several offices in such a manner, as that each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights. These inventions of prudence cannot be less requisite to the distribution of the supreme powers of the state.

But it is not possible to give each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconvenience is, to divide the legislature into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments, by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative on the legislature, appears, at first view, to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions, it might not be exerted with the requisite firmness; and on extraordinary occasions, it might be perfidiously abused. May not this defect of an absolute negative be supplied by some

qualified connection between this weaker department, and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

Interpreting the Constitution

The preceding selections have offered contrasting views on the framing, nature, and purpose of the Constitution. As background, John Locke's political philosophy expressed in his *Second Treatise, Of Civil Government* (1690) supported the political beliefs of many eighteenth-century Americans in government as a social contract between rulers and ruled to protect the natural rights of citizens to life, liberty, and, very importantly, property.

To John Roche, the Constitution was a practical political document reflecting compromises among state delegations with contrasting political and economic interests, and being advocates of strong national power and proponents of states' rights. Charles Beard saw the Constitution as a reflection of the interests of property owners and creditors who feared that the rule of the debtor majority would inflate currency, cancel debts, and deprive creditors of their rightful property. James Madison's selections from *The Federalist* suggest a mistrust of government, a wary view of both political leaders and the people, and an emphasis upon the need for governmental checks and balances to prevent the arbitrary exercise of political power. Madison also distrusted what he termed "faction," by which he meant political parties or special-interest groups, which he considered intrinsically to be opposed to the national interest (see *Federalist 10,* Chapter 4).

The separation of powers among the executive, legislative, and judicial branches is an outstanding characteristic of our constitutional system. A uniquely American separation of powers incorporated an *independent* executive, pitting the president against Congress and requiring their cooperation to make the government work. The separation of powers was a constitutional filter through which political demands had to flow before they could be translated into public policies.

James Madison clearly saw the separation-of-powers system, incorporating checks and balances among the branches of government, as a process that would help to prevent arbitrary and excessive governmental actions. The three branches of the government, but particularly the president and Congress, would have independent political bases, motivations, and powers that would both enable and encourage them to compete with each other.

While Madison saw the separation of powers as an important limit upon arbitrary government, Alexander Hamilton represented a different point of view. He viewed the independent presidency, a central component of the separation of powers, as an office that could make the national government energetic and effective. "Energy in the executive is the definition of good government," wrote Hamilton in *The Federalist,* No. 70, and the constitutional separation of powers would provide that energy rather than simply making the

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AP Government

Questions: Federalist #47, #48, & #51 by James Madison

1. Madison points out in Federalist 47 that the powers of the three branches of government are distributed and blended together in certain ways. At the same time he notes that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary , self-appointed, or elective, may justly be pronounced the very definition of tyranny."

How does Madison justify the intermixture of powers with his theory of the separations of powers?

2. What is Madison's view of the inherent power potentials of the legislative, executive, and judicial branches of government?

3. What does Madison mean when he says (Federalist 51), "The great security against the 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 encroachment of others"?

4. How did Madison's view of human nature affect his theory of government?

5. The entire thrust of Madison's argument in Federalist 47, 48, and 51 seems to be in the direction of controlling and even weakening the exercise of governmental power. This is a negative view of the role of government . The main question The Federalist raises seems to be how to prevent the arbitrary exercise of political power, rather than how to guarantee effective political leadership.

Do you accept Madison's goal as the primary one in establishing a governmental system?
Is the Constitution really as negative as Madison implies?

Part Two/Classic Statement

"The Omnipotence of the Majority in the United States and Its Effects" from Democracy in America, by Alexis de Tocqueville[1]

Introduction

Tocqueville's classic on American democracy is in many ways an admiring work: he was particularly taken with the spirit of equality and energy that he met from his first days here. But by the same token, he discerned flaws and dangers in the world's newest democracy as well, and some of these were in his view very much bound up with the nation's strengths.

Nowhere is this more true than in his discussion of the will of the majority. While the principle of majority rule was inseparable from the workings of a democratic system, that majority rule could, if not challenged or limited, lead to tyranny and to the undoing of the democratic experiment. Over a century and a half later, and in an era very different from the days of Jacksonian democracy, see whether you find that any of Tocqueville's thoughts on this subject still ring true.

The absolute sovereignty of the will of the majority is the essence of democratic government, for in democracies there is nothing outside the majority capable of resisting it.

Most American constitutions have sought further artificially to increase this natural strength of the majority.

Of all political powers, the legislature is the one most ready to obey the wishes of the majority. The Americans wanted the members of the legislatures to be appointed *directly* by the people and for a *very short* term of office so that they should be obliged to submit not only to the general views but also to the passing passions of their constituents.

The members of both houses have been chosen from the same class and appointed in the same way, so that the activity of the legislative body is almost as quick and just as irresistible as that of a single assembly. . . .

[1] *Democracy in America* was published as a result of the French author's trip to America in 1831, to observe the workings of this New World democracy. His observations from the early days of Jacksonian democracy, published in two separate volumes, would be hailed as "the greatest book ever written on America." The excerpts presented here are taken from Volume I, Part II, Chapter 7, as presented in *Democracy in America* (New York: Harper and Row, 1966).

In America several particular circumstances also tend to make the power of the majority not only predominant but irresistible.

The moral authority of the majority is partly based on the notion that there is more enlightenment and wisdom in a numerous assembly than in a single man, and the number of the legislators is more important than how they are chosen. It is the theory of equality applied to brains. This doctrine attacks the last asylum of human pride; for that reason the minority is reluctant in admitting it and takes a long time to get used to it. Like all powers, and perhaps more than any other of them, the power of the majority needs to have proved lasting to appear legitimate. When it is beginning to establish itself, it enforces obedience by constraint; it is only when men have long lived under its laws that they begin to respect it.

The idea that the majority has a right based on enlightenment to govern society was brought to the United States by its first inhabitants; and this idea, which would of itself be enough to create a free nation, has by now passed into mores and affects even the smallest habits of life.

Under the old monarchy the French took it as a maxim that the king could do no wrong, and when he did do wrong, they thought the fault lay with his advisers. This made obedience wonderfully much easier. One could grumble against the law without ceasing to love and respect the lawgiver. The Americans take the same view of the majority.

The moral authority of the majority is also founded on the principle that the interest of the greatest number should be preferred to that of those who are fewer. Now, it is easy to understand that the respect professed for this right of the greatest number naturally grows or shrinks according to the state of the parties. When a nation is divided between several great irreconcilable interests, the privilege of the majority is often disregarded, for it would be too unpleasant to submit to it.

If there existed in America one class of citizens whom the legislators were trying to deprive of certain exclusive privileges possessed for centuries and wanted to force them down from a high station to join the ranks of the crowd, it is probable that that minority would not easily submit to its laws.

But as men equal among themselves came to people the United States, there is as yet no natural or permanent antagonism between the interests of the various inhabitants.

There are states of society in which those who are in the minority cannot hope to win the majority over, for to do so would involve abandoning the very aim of the struggle in which they are engaged against it. An aristocracy, for instance, could not become a majority without giving up its exclusive privileges, and if it did let them go, it would no longer be an aristocracy.

In the United States, political questions cannot arise in such general and absolute fashion, and all the parties are ready to recognize the rights of the majority because they all hope one day to profit themselves by them.

Hence the majority in the United States has immense actual power and a power of opinion which is almost as great. When once its mind is made up on any question, there are, so to say, no obstacles which can retard, much less halt, its progress and give it time to hear the wails of those it crushes as it passes.

The consequences of this state of affairs are fate-laden and dangerous for the future. . . .

I have spoken before of the vices natural to democratic government, and every single one of them increases with the growing power of the majority.

To begin with the most obvious of all:

Legislative instability is an ill inherent in democratic government because it is the nature of democracies to bring new men to power. But this ill is greater or less according to the power and means of action accorded to the legislator.

In America the lawmaking authority has been given sovereign power. This authority can carry out anything it desires quickly and irresistibly, and its representatives change annually. That it is to say, just that combination has been chosen which most encourages democratic instability and allows the changing wishes of democracy to be applied to the most important matters.

Thus American laws have a shorter duration than those of any other country in the world today. Almost all American constitutions have been amended within the last thirty years, and so there is no American state which has not modified the basis of its laws within that period.

As for the laws themselves, it is enough to glance at the archives of the various states of the Union to realize that in America the legislator's activity never slows down. Not that American democracy is by nature more unstable than any other, but it has been given the means to carry the natural instability of its inclinations into the making of laws.

The omnipotence of the majority and the rapid as well as absolute manner in which its decisions are executed in the United States not only make the law unstable but have a like effect on the execution of the law and on public administrative activity.

As the majority is the only power whom it is important to please, all its projects are taken up with great ardor; but as soon as its attention is turned elsewhere, all these efforts cease; whereas in free European states, where the administrative authority has an independent existence and an assured position, the legislator's wishes continue to be executed even when he is occupied by other matters.

Much more zeal and energy are brought to bear in America on certain improvements than anywhere else.

In Europe an infinitely smaller social force is employed, but more continuously. . . .

My greatest complaint against democratic government as organized in the United States is not, as many Europeans make out, its weakness, but rather its irresistible strength. What I find most repulsive in America is not the extreme freedom reigning there but the shortage of guarantees against tyranny.

When a man or a party suffers an injustice in the United States, to whom can he turn? To public opinion? That is what forms the majority. To the legislative body? It represents the majority and obeys it blindly. To the executive power? It is appointed by the majority and serves as its passive instrument. To the police? They are nothing but the majority under arms. A jury? The jury is the majority vested with the right to pronounce judgment; even the judges in certain states are elected by the majority. So, however iniquitous or unreasonable the measure which hurts you, you must submit.

But suppose you were to have a legislative body so composed that it represented the majority without being necessarily the slave of its passions, an executive power having a strength of its own, and a judicial power independent of the other two authorities; then you would still have a democratic government, but there would be hardly any remaining risk of tyranny.

I am not asserting that at the present time in America there are frequent acts of tyranny. I do say that one can find no guarantee against it there and that the reasons for the government's gentleness must be sought in circumstances and in mores rather than in the laws. . . .

It is when one comes to look into the use made of thought in the United States that one most clearly sees how far the power of the majority goes beyond all powers known to us in Europe.

Thought is an invisible power and one almost impossible to lay hands on, which makes sport of all tyrannies. In our day the most absolute sovereigns in Europe cannot prevent certain thoughts hostile to their power from silently circulating in their states and even in their own courts. It is not like that in America; while the majority is in doubt, one talks; but when it has irrevocably pronounced, everyone is silent, and friends and enemies alike seem to make for its bandwagon. The reason is simple: no monarch is so absolute that he can hold all the forces of society in his hands and overcome all resistance, as a majority invested with the right to make the laws and to execute them can do.

Moreover, a king's power is physical only, controlling actions but not influencing desires, whereas the majority is invested with both physical and moral authority, which acts as much upon the will as upon behavior and at the same moment prevents both the act and the desire to do it.

I know no country in which, speaking generally, there is less independence of mind and true freedom of discussion than in America.

There is no religious or political theory which one cannot preach freely in the constitutional states of Europe or which does not penetrate into the others, for there is no country in Europe so subject to a single power that he who wishes to speak the truth cannot find support enough to protect him against the consequences of his independence. If he is unlucky enough to live under an absolute government, he often has the people with him; if he lives in a free country, he may at need find shelter behind the royal authority. In democratic countries the aristocracy may support him, and in other lands the democracy. But in a democracy organized on the model of the United States there is only one authority, one source of strength and of success, and nothing outside it.

In America the majority has enclosed thought within a formidable fence. A writer is free inside that area, but woe to the man who goes beyond it. Not that he stands in fear of an *auto-da-fé*, but he must face all kinds of unpleasantness and everyday persecution. A career in politics is closed to him, for he has offended the only power that holds the keys. He is denied everything, including renown. Before he goes into print, he believes he has supporters; but he feels that he has them no more once he stands revealed to all, for those who condemn him express their views loudly, while those who think as he does, but without his courage, retreat into silence as if ashamed of having told the truth.

Formerly tyranny used the clumsy weapons of chains and hangmen; nowadays even despotism, though it seemed to have nothing more to learn, has been perfected by civilization. . . .

The influence of what I have been talking about is as yet only weakly felt in political society, but its ill effects on the national character are already apparent. I think that the rareness now of outstanding men on the political scene is due to the ever-increasing despotism of the American majority.

When the Revolution broke out, a crowd of them appeared; at that time public opinion gave direction to men's wills but did not tyrannize over them. The famous men of that time, while they freely took part in the intellectual movement of the age, had a greatness all their own; their renown brought honor to the nation, not vice versa. . . .

Among the immense thrusting crowd of American political aspirants I saw very few men who showed that virile candor and manly independence of thought which often marked the Americans of an earlier generation and which, wherever found, is the most salient feature in men of great character. At first glance one might suppose that all American minds had been fashioned after the same model, so exactly do they follow along the same paths. A foreigner does, it is true, sometimes meet Americans who are not strict slaves of slogans; such men may deplore the defects of the laws and the unenlightened mutability of democracy; often they even go as far as to point out the defects which are changing the national character and suggest means by which this tendency could be corrected, but no one, except yourself, listens to them, and you, to whom they confide these secret thoughts, are only a stranger and will pass on. To you they will disclose truths that have no use for you, but when they go down into the marketplace they use quite different language.

If these lines ever come to be read in America, I am sure of two things; first, that all readers will raise their voices to condemn me; secondly, that in the depths of their conscience many will hold me innocent. . . .

Governments ordinarily break down either through impotence or through tyranny. In the first case power slips from their grasp, whereas in the second it is taken from them.

Many people, seeing democratic states fall into anarchy, have supposed that government in such states was by nature weak and impotent. The truth is that once war has broken out between the parties, government influence over society ceases. But I do not think a lack of strength or resources is part of the nature of democratic authority; on the contrary, I believe that it is almost always the abuse of that strength and the ill use of those resources which bring it down. Anarchy is almost always a consequence either of the tyranny or of the inability of democracy, but not of its impotence.

One must not confuse stability with strength or a thing's size with its duration. In democratic republics the power directing society is not stable, for both its personnel and its aims change often. But wherever it is brought to bear, its strength is almost irresistible.

The government of the American republics seems to me as centralized and more energetic than the absolute monarchies of Europe. So I do not think that it will collapse from weakness.

If ever freedom is lost in America, that will be due to the omnipotence of the majority driving the minorities to desperation and forcing them to appeal to physical force. We may then see anarchy, but it will have come as the result of despotism.

Questions for Understanding and Discussion

1. What did various American states, and the federal Constitution, do to make legislative bodies even more responsive to the wishes of the majority than the basic principle of democracy might demand?
2. Why are Americans, more than members of more traditional societies, likely to recognize the rights of the majority?
3. On what grounds does Tocqueville expect to find greater legislative instability in the United States than in other countries?
4. Explain why the author, unlike others, is more fearful of the power of democratic regimes than of their weakness.
5. How do you react to Tocqueville's assertion that there is more mind control in this country than in any other?
6. What is his explanation for his observation that few truly outstanding individuals seek political office in this country?
7. How, according to Tocqueville, might the "omnipotence" of the majority lead to anarchy?
8. Of the various observations presented here by Tocqueville, which ones seem to you particularly relevant today? Why?

Advanced Placement U.S. Government
Question Sheet for Liberty: Part 6

1. In the opening minutes of Episode 6, Historian Gordon Wood remarked that George Washington's resignation of his commission and taking leave of public life at the end of the Revolutionary War was an "electrifying event throughout the world." In fact even Napoleon knew this when he said on his deathbed, "They wanted me to be another Washington." Why was it so electrifying?

2. Wood also mentions the difficulty of "bringing together separate states." Why do you think the states might have resisted having a national government instead of 13 separate governments? Can you cite a modern example where similar challenges exist?

3. In Episode 6, Abigail Adams writes a letter to her sister in which she refers to the "inherited power" of British nobility and aristocracy saying, "There's a servility of manners here, a distinction between nobility and common citizens, which , happily, is foreign to Americans." Do you agree with Abigail Adams's statement? Explain your view.

4. Later in the episode, Alexander Hamilton laments the inaction of the government to enforce the law put forth by the Articles of Confederation. Review the Articles. List at least three issues or problems you see that would back up Hamilton's view.

5. After Shays's Rebellion, it became obvious that something needed to be changed, so the Constitutional Convention was called to revise the Articles of Confederation. The first vote of this Convention was to, in the words of the narrator, "~~keep their~~ proceedings absolutely secret". Why do you feel the convention was not open to the public? Could this be done today? Explain your answers.

6. Compare the preamble to the Articles of Confederation with the preamble to the US Constitution. Why would the framers of the Articles write the names of all the states in the preamble, while the framers of the Constitution simply wrote, "We, the People…"?

7. In Episode 6, the narrator mentions that the role of checks and balances in a large democracy is to protect the rights of minorities from potential tyranny. How do you think checks and balances might accomplish this? Give at least two examples, either hypothetical or historical, from your reading and/or studies of the Constitution.

8. As the Constitution is completed and submitted for ratification, the supporters of the document are known as "Federalists" and the opponents as "Anti-Federalists". One issue that divided the two groups was whether the Constitution should contain a "Bill of Rights". What arguments both for and against a Bill of Rights might the two groups have developed?

9. Gordon Wood notes that the Bill of Rights is "what makes us a single people... We're the first nation, I suppose, in modern times, to make ideology the basis of our existence." In your view, does the Bill of Rights fill that role? Explain your answer.

10. Historian Pauline Maier states in the closing minutes of ***Are We to be a Nation*** that, "I think it's one of the greatest ironies of human history that the American Revolution is sometimes considered no revolution at all (a.k.a. the Kirchhoff's argument). That honor goes to others -- the French Revolution, the Russian Revolution -- revolutions that fail to realize their promise of liberty, revolutions that ultimately failed. Our revolution, I think, is underestimated mainly because it succeeded." Do you agree with this assessment? Explain your answer.