The Founders' Constitution

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Introduction

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 (For all notes in the Introduction, see Endnotes [pp. xxxiii–xxxv].)

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. 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.

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. 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 as 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! 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.
Introduction

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 ratifying 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 confederal 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

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 and 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 "cramping 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 read-

ing 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. 30)

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” (p. 520) 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:
Introduction

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. 23–36: "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. 36), "that of providing for their safety seems to be first." He amplifies the thought in No. 8 (pp. 61–62): "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 (p. 63)."

Indeed, "nothing is more certain than the indispensable necessity of government" (No. 2, p. 31), 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. 92–93). 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. 149; No. 30, pp. 183–184, 186–187; No. 31, pp. 189–190).

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. 73), 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. 149).

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 champi-

oned by future presidents (No. 57, p. 348; No. 62, p. 378; No. 63, p. 380; No. 71, p. 430; No. 72, p. 436). 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. 36; No. 41, p. 252). From this point of view, the protection of the diverse “faculties of men, from which the rights of property originate” (No. 10, p. 73) 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. 220; No. 37, p. 222). 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 choice-worthy. 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 proclaiming, “Happy will
it be for ourselves, and most honorable for human nature, if we have wisdom and virtue enough to set so glorious an example to mankind!” The Union may be necessary for our “political prosperity,” but what is “most honorable for human nature” is disclosed by Publius in the case for the Constitution and its principles, not in the case for the Union (No. 1, p. 30; No. 36, p. 220).

In *The Federalist*’s second part, the “spirit of moderation” comes to the fore and with it the freedom to deliberate on the various means or institutions actually proposed in the Constitution. Thus in contrast to the proud confidence in human knowledge displayed in the first part, the second volume begins by questioning, in No. 37, how and what we can know. Human reason needs to reflect on its own limitations if it would grow wise. In politics, this means recognizing not only that “theoretical propriety” must often be sacrificed to “extraneous considerations,” but that “theoretical propriety” should not be expected in the first place (No. 37, pp. 221, 226). Prudence or practical wisdom is the god of this lower world, not mathematics. “Nothing can be more fallacious,” Publius concludes in No. 55, “than to found our political calculations on arithmetical principles” (p. 339). Nor is human nature simply or mainly “ambitious, vindictive, and rapacious” (No. 6, p. 48).

“As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust,” Publius acknowledges, “so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form” (No. 55, p. 343). Instead of emphasizing the “natural course of things” (No. 8, p. 63) from whose deterministic sway America is not exempt, Publius points to nature as a standard for human choice—and a support for, though by no means a guarantee of, human excellence. His reappraisal of nature is perhaps most telling in his defense of judicial review, where he invokes “the nature and reason of the thing” as a criterion or determination of “truth and propriety,” to which human laws and institutions ought to conform (No. 78, p. 467).

Publius’s defense of the Constitution culminates, then, in the description of high offices of government whose holders will need wisdom, temperance, respectability, courage, magnanimity, judgment, and other eminent qualities or qualifications in order to do their duty (No. 57, p. 348; No. 63, p. 382; No. 71, pp. 431, 433; No. 76, pp. 454–455). Earlier, in *Federalist* No. 10 (p. 75), Publius had warned that “enlightened statesmen will not always be at the helm,” But now he does his best to show that the very design of these offices—their powers, number, duration, and other constitutional characteristics—will help to attract “fit characters” to them, though the kind of character that is fitting will vary with the office. For instance, Publius affirms that the electoral college “affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.” In fact, he speaks of “a constant probability of seeing the station filled by characters pre-eminent for ability and virtue,” or “at least respectable” (No. 68, p. 412; No. 71, p. 431; No. 76, p. 454).

The second volume of *The Federalist* is concerned overwhelmingly with the articulation of this structure of offices, beginning with a general account of the separation of powers in Nos. 47–51, followed by the treatment of each power or branch in turn. In Publius’s account, the “particular structure” of the government, based on separated powers, is combined with or inserted into its “general form,” the republican and federal form (as defined in No. 39). Within the second part as a whole, the discussion moves from the standard of republican government to that of good government, as reflected in the order in which the branches are taken up, from the most to the least popular—the House, the Senate, the presidency, and finally the judiciary or Supreme Court. This ascent is not a rejection but a vindication of popular government, showing how it must be structured if it is to be good government, capable not only of responding to majority will but of securing the rights of individuals and minorities, thus achieving the common good.

That the proposed Constitution needed to be vindicated on the basis of the “true principles of republican
government implied, however, that there were false principles of republicanism to be contended with, too. One of *The Federalist's* main tasks, especially in the second volume, is to distinguish between the true and false notions and to refute the latter. This dispute arrays, in effect, the republicanism implicit in the Constitution against the rather different theory inherent in the state constitutions and presumed in the Articles of Confederation. At stake politically was the crucial question: Which account of republicanism was faithful to the principles for which Americans had fought the Revolution? And at the center of this controversy lay the proper relation between republicanism and responsibility.

“Responsibility” is a new word that received its classic definition in the ratification debate and, especially, in the pages of *The Federalist*. Although the term had appeared sporadically in eighteenth-century British politics, it was in America in the 1780s that it achieved its lasting political prominence. “Responsibility” is the noun form of a much older adjective, “responsible,” itself related to the verb “respond,” meaning to answer; its Latin ancestor is *respondeo*, whose root (*spondeo*) means to promise sacredly or to vow. To be responsible thus means to be answerable to someone else, implying the possibility of punishment; but it also means to be the cause of something, to be equal to a challenge or obligation, to live up to a vow or solemn promise. If republican government is to be responsible, it must be responsive to the people and answerable to their will. But if it is to be responsible in the more positive sense, it must go beyond mere responsiveness and be able to serve the people’s true interests or their reasonable will, even if this course of conduct is not immediately popular. The tension between these two senses of “responsibility” underlay the debate between Anti-Federalists and Federalists over the ratification of the Constitution.

For the Anti-Federalists, responsibility meant primarily and almost exclusively the first sense of the term: The essence of republican or representative government was that it be responsive to the people. In one of his great speeches denouncing the Constitution in the Virginia ratifying convention, Patrick Henry asked, “For where, Sir, is the responsibility?” “Where is the responsibility,” he repeated, “that leading principle in the British government?” Under the British Constitution, malfeasance in office had cost the heads of “some of the most saucy geniuses that ever were,” but under the new American Constitution “the preservation of our liberty depends on the single chance of men being virtuous enough to make laws to punish themselves.” The problem, as he and many other Anti-Federalists saw it, was that the Constitution, though boasting an elaborate scheme of separation of powers and checks and balances, did not manage to secure the new government against the danger of minority faction—tyranny by one man, or a few men, of enterprise, ambition, and wealth. This goal had been achieved, however precariously, by the British Constitution, which was why it had so much appeal to the Anti-Federalist writers. In fact, the whole question of responsibility in government was for them an extension of the British struggle for ministerial accountability, that is, for ministers who were answerable to Parliament rather than to the King. Ministerial accountability meant that Parliament had a direct say over the administration of British government, and thus an additional important check on royal power. A Maryland pundit expressed the point so: “In this new Constitution—a complicated system sets responsibility at defiance, and the Rights of Men . . . are left at the mercy of events.” For after all, he declared, representative government is “really only a scene of perpetual rapine and confusion” unless it is “confirmed in its views and conduct by the constant inspection, immediate superintendence, and frequent interference and control of the People themselves on one side, or an hereditary nobility on the other, both of which orders have fixed and permanent views.” The mixed regime of England had achieved this salutary self-control, and had been further perfected and “simplified by the introduction and regular formation of the effective administration of responsible ministers.”

Indeed, one possibility for securing responsible government was the mixed regime along British lines. Most Anti-Federalists admitted, however, that America did not have the proper materials—most important, a distinct class of wealthy aristocrats—out of which to construct a mixed regime based on well-established social
Introduction

classes.\textsuperscript{21} Besides, even in England, it was increasingly "the sense of the people at large" that formed "the only operative and efficient check upon the conduct of administration."\textsuperscript{22} Given these facts, the Anti-Federalists tended to advocate "simple" government, based as far as possible on the people at large. If "the body of the people are virtuous" and property "is pretty equally divided," the Anti-Federalist writer Centinel argued, then "the highest responsibility is to be attained in a simple structure of government." Although they recognized that direct democracy was impossible even for state governments, much less for the national government, the Anti-Federalists preferred representative forms that approximated direct democracy through such expedients as a numerous representation, short terms of office, and frequent rotation in office (term limits, we call it today). The Federal Farmer, one of the Constitution’s soberest opponents, expressed this ideal of representation as follows: "a full and equal representation is one that possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled."\textsuperscript{23}

While conceding the necessity of some sort of bicameralism and separation of powers in a representative government, most Anti-Federalists regarded these primarily as means of checking the ambitious few—the enemies or manipulators of direct democracy—rather than as means of restricting legislative power as such and consequently energizing executive and judicial power. Few went so far as Centinel, who advocated a unicameral legislature on the Pennsylvania model. But most would have agreed with him that the form of government that "holds those entrusted with power, in the greatest responsibility to their constituents" is "the best calculated for free men." The writer calling himself A Maryland Farmer put it succinctly: Responsibility is "the only test of good government."\textsuperscript{24}

The point of the strict separation of powers urged by most Anti-Federalists (and discussed in Federalist Nos. 47–50) was therefore to keep government responsible to the people by making the formal or "parchment" barriers between departments as clear and exact as possible. A written Bill of Rights (see Federalist No. 84) would serve as an additional safeguard. It would then be the people’s job to police those barriers, e.g., to keep the executive from encroaching on any part of the legislative power. After all, it was the people’s government to begin with, and it seemed strictly consonant with republican theory that they should judge what was allowed under it and what not, what was constitutional and what was not.

Quite different is The Federalist’s understanding of the nexus between responsibility and republicanism. The American Union is threatening to split up into separate confederacies of states, Publius argues, and each state is itself teetering on the brink of tyranny due to the danger of majority faction. By "majority faction," The Federalist means an unjust or tyrannical majority "of citizens," not just of legislators or elected officials. So that the Anti-Federalists’ favorite prescription for the ills of republicanism—responsibility to the superior power of the people—is inadequate in principle. What if the people, or a majority of the people, wishes to use its power unjustly? The Anti-Federalists’ reduction of responsibility to responsiveness leaves them without a good answer to this fundamental question. Civic education might be a traditional solution to this perplexity, and the Anti-Federalists did maintain that the states, through militia service, established churches, bills of rights, and various forms of direct participation in government, provided a republican education to their citizens that a national government could not equal. But Publius’s point was that civic education as carried on in the states manifestly had failed or was failing—else why were most of the state governments beset by majority factions?\textsuperscript{25}

Of course, the size of the states had something to do with the problem, as Publius argues in the famous No. 10. Neither direct democracy nor a small republic could solve the problem of majority faction, according to Federalist No. 10, because neither was large enough to embrace a saving multiplicity of interests. Extend the sphere of republican government to include more, and more various, interests, and it would be less probable that any one of them could form the basis for an enduring and impassioned majority. One could get rid of majority faction by getting rid of majorities, or at least those "united, and actuated, by some common impulse of passion, or of interest," adverse to private rights or
the public good. The difficulty of distinguishing between just majorities, whose opinions must direct the government, and unjust majorities, whose passions and interests must be prevented from directing the government, has long confused students of *The Federalist*, and accounts for many interpretations emphasizing the alleged propensity of American government to deadlock amid social pluralism and separated powers.26

But in the context of the book as a whole, the real agenda of *Federalist* No. 10 is to discredit direct democracy as the standard at which popular government ought to aim. Publius states this explicitly: “a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction” (No. 10, p. 76). Republican government, i.e., representative government, then becomes the best form, not just a diluted or second-best form, of popular government. What is good about republicanism, Publius claims, is two things: representation (the government will be administered by a chosen few) and size (it can cover an extended territory comprising many interests). Wishing to refute direct democracy on the most democratic grounds possible, however, Publius in No. 10 stresses the numbers of interests and sheer extent of territory that are necessary to make republican government work. He does not dwell on the subject of representation, which would (and does, in the second volume) lead to a more candid account of the limitations of direct democracy from the point of view of good government or aristocracy.

Publius lays the groundwork in No. 10 for a new kind of responsibility that means more than reporting back to the people, and for a new kind of republicanism that is more than direct democracy once removed.27 The *sine qua non* of such responsible republicanism is a properly structured separation of powers, which is (to repeat) the main organizing principle of the second part of *The Federalist*. Separation of powers performs three main functions in Publius’s argument.

First, it protects against governmental tyranny, i.e., the ability of one or more branches to encroach upon the other(s) and to breach the overall limits set to the national government by the Constitution. Though “a de-
must be the judge of constitutional demarcations, hence also of the character and extent of the three powers. By and large they did not think that energy ought to be the leading quality of the executive, nor that deliberative excellence as opposed to responsiveness or fidelity to the people’s will should be the mark of the legislature. To the Anti-Federalists, therefore, the new Constitution looked suspiciously like the British government redivivus, only without the effective checks and balances that it had evolved. A lofty legislature and an ambitious executive did not look to them like the government they had fought for.

Here *The Federalist* cautions that although it is essential to republican government that it be “derived from the great body of the society,” it is sufficient that “the persons administering it be appointed, either directly or indirectly, by the people.” Otherwise, every popular government “that has been or can be well organized or well executed” would be “degraded from the republican character” (No. 39, p. 237). In other words, representation is not a necessary evil but a positive good, bringing far-reaching benefits to popular government. In particular, the representative principle allows the separation of powers (originally a non-republican principle) to establish its republican bona fides, and so blesses the institutions necessary to combine energy and stability with liberty (*Federalist* No. 37, pp. 222–223). Republican government could not be good government without such institutions, and Publius defends them vigorously: a House of Representatives less numerous than the Anti-Federalists wanted; a senate with six-year terms; a President indefinitely eligible for re-election (since changed by the 22nd Amendment); and federal judges with “good behavior” tenure. These robust institutions, each shaped to its function or task, make republican government responsible in a larger, higher sense than the Anti-Federalists had in mind, and encourage the public to judge the government not only by its immediate actions, but by its long-range policies and tendencies.

Finally, *The Federalist* argues that separation of powers prevents or replaces direct recurrence to the people as the means of resolving conflicts among the branches. This is an advantage that needs further explanation. The people of the United States legislate the Constitution for themselves by ratifying it; but they never subsequently judge or execute it directly.29 There is no national initiative or referendum to decide whether a law is constitutional, for example. In fact, the people are excluded altogether from the administration of the government; operating the machinery of government is the job of our elected representatives and appointed officeholders (No. 63, p. 382). To be sure, the people have the precious right, under the Constitution, of exercising their sovereign opinion over the whole government through regular elections, and they may amend the Constitution according to the procedures outlined in Article V or new-model it according to their revolutionary right under the natural law (*Federalist* No. 43, p. 275). The political and constitutional soundness of particular laws, executive orders, and court decisions, however, is always decided in the course of conflict and cooperation among the departments.

In this way, the deliberative give-and-take among the branches replaces direct appeals to the people as the means to decide questions of constitutional propriety. This effect of separated powers, Publius explains in No. 49, encourages reverence for the law and veneration of the Constitution: Though public opinion or the consent of the governed is the originating authority of the Constitution, the public learns gradually to measure its opinions by the Constitution. The Constitution itself becomes authoritative for public opinion. The Constitution and the public opinion that reflects it—what Publius calls “the reason for the public”—then become sovereign over the government. In the words of *Federalist* No. 49, “it is the reason, alone, of the public, that ought to control and regulate the government. The passions [of the public] ought to be controlled and regulated by the government” (p. 314).

So the reason of the public controls the government, which in turn regulates the public’s passions. Notice that this is not a formula for the direct rule of reason over passion in politics. It calls rather for the reason “of the public” to control the passions through the mediation of the government. The direct rule of reason over passion in politics might be said to dictate the suppression of
rights and freedom in the name of duties or virtues. Publius does not endorse this, but neither does he allow rights to sink to their lowest common denominator, to become expressions of mere self-interest or passion. Instead, he calls for the “reason of the public” to become responsible for the passions of the public. He defends a form of government that will encourage rights to be claimed and exercised responsibly. The Federalist’s concern for veneration of the Constitution shows that a purely calculative or self-interested attachment to government is not sufficient to secure republicanism. The Constitution must attract the loyalty, admiration, pride, and even reverence of American citizens if the rule of law is to be firmly grounded—if republicanism is to be responsible.

In the end, then, one needs an opinion of the Constitution’s goodness to attract, define, and hold Americans’ passions and interests in a decent republican order. This means a politics of public opinion, not just of fractured interests à la Federalist No. 10. Majority faction, in other words, cannot finally be defeated except by a healthy majority opinion, the formation of which is Publius’s chief educational and political goal. This implies not so much a politics of virtue as of responsibility, which is consistent with men’s natural rights understood in light of “the honor of the human race” (No. 11, p. 85) rather than in light of man’s dishonorable necessities. The Federalist elucidates the kind of politics and constitutionalism that are needed in order to rescue the cause of the American Revolution and to vindicate the Declaration of Independence, which after all proclaimed not only “that all men are created equal” and “are endowed by their Creator” with certain unalienable rights, but that in defense of those sacred rights, good men ought to pledge their “sacred honor.”

This pledge goes beyond the requirements of responsibility, of course, but it suggests how responsibility points beyond itself to virtue or statesmanship. Responsibility comes into its own, after all, when some sort of action must be taken: It strives to bring interest and duty together in order to do the right thing, often in disagreeable situations where someone must act with a view to a remote and long-term good (act responsibly, we call it) or must take charge (take responsibility, as we say today). The Constitution provides platforms for both kinds of responsibility in the offices of the national government, particularly the Senate (see Federalist No. 63) and the presidency (No. 70). Responsibility is the only virtue or quasi-virtue that has entered our moral language from the American Founding, and in large measure it is The Federalist that has defined and still defines its contemporary meaning. Publius shows us what it means, and what it takes, to live as responsible republicans under a written Constitution. This is The Federalist’s lesson in self-government.

—Charles R. Kesler
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The Federalist Papers #’s 10, 51, 84

NO. 10: THE SAME SUBJECT CONTINUED (MADISON)

Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils have, in truth, been the mortal diseases under which popular governments have every-
where perished, as they continue to be the favorite and
fruitful topics from which the adversaries to liberty de-
rive their most specious declamations. The valuable
improvements made by the American constitutions on the
popular models, both ancient and modern, cannot cer-
tainly be too much admired; but it would be an unwarr-
rantable partiality to contend that they have as
effectually obviated the danger on this side, as was
wished and expected. Complaints are everywhere heard
from our most considerate and virtuous citizens, equally
the friends of public and private faith and of public and
personal liberty, that our governments are too unstable,
that the public good is disregarded in the conflicts of
rival parties, and that measures are too often decided,
not according to the rules of justice and the rights of the
minor party, but by the superior force of an interested
and overbearing majority. However anxiously we may
wish that these complaints had no foundation, the evi-
dence of known facts will not permit us to deny that
they are in some degree true. It will be found, indeed,
on a candid review of our situation, that some of the
distresses under which we labor have been erroneously
charged on the operation of our governments; but it will
be found, at the same time, that other causes will not
alone account for many of our heaviest misfortunes; and,
particularly, for that prevailing and increasing distrust of
public engagements and alarm for private rights which
are echoed from one end of the continent to the other.
These must be chiefly, if not wholly, effects of the un-
steadiness and injustice with which a factious spirit has
tainted our public administration.

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

There are two methods of curing the mischiefs of fac-
ton: the one, by removing its causes; the other, by con-
trolling its effects.

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

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

The second expedient is as impracticable as the first
would be unwise. As long as the reason of man contin-
ues fallible, and he is at liberty to exercise it, different
opinions will be formed. As long as the connection sub-
sists between his reason and his self-love, his opinions
and his passions will have a reciprocal influence on each
other; and the former will be objects to which the latter
will attach themselves. The diversity in the faculties of
men, from which the rights of property originate, is not
less an insuperable obstacle to a uniformity of interests.
The protection of these faculties is the first object of
government. From the protection of different and un-
equal faculties of acquiring property, the possession of
different degrees and kinds of property immediately re-
sults; and from the influence of these on the sentiments
and views of the respective proprietors ensues a division
of the society into different interests and parties.

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

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

shilling with which they overburden the inferior number is a shilling saved to their own pockets.

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

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

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which alone this form of government can be rescued from the opprobrium under which it has so long labored and be recommended to the esteem and adoption of mankind.

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

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

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

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

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

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

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

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

The other point of difference is the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former than in the latter. 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; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. 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 own strength and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears that the same advantage which a republic has over a democracy in controlling the effects of faction is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it. Does this advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree, does the increased variety of parties comprised within the Union increase this security? Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here again the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.

In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government. And according to the degree of pleasure and pride we feel in being republicans ought to be our zeal in cherishing the spirit and supporting the character of federalists. Publius

No. 51: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments (Madison)

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

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

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

But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for 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 in the distribution of the supreme powers of the State.

But it is not possible to give to 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 perniciously 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?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion to the several State constitutions, and to the federal Constitution, it will be found that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are, moreover, two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.

First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizen, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it is obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger
individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self-government. And happily for the republican cause, the practicable sphere may be carried to a very great extent by a judicious modification and mixture of the federal principle.

No. 84: Certain General and Miscellaneous Objections to the Constitution Considered and Answered (Hamilton)

In the course of the foregoing review of the Constitution, I have taken notice of, and endeavored to answer most of the objections which have appeared against it. There however remain a few which either did not fall naturally under any particular head or were forgotten in their proper places. These shall now be discussed; but as the subject has been drawn into great length, I shall so far consult brevity as to comprise all my observations on these miscellaneous points in a single paper.

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

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

work corruption of blood, or forfeiture, except during the life of the person attainted."

It may well be a question whether these are not, upon the whole, of equal importance with any which are to be found in the constitution of this State. The establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and of titles of nobility, to which we have no corresponding provision in our Constitution, are perhaps greater securities to liberty and republicanism than any it contains. The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone,* in reference to the latter, are well worthy of recital: "To bereave a man of life [says he] or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls "the bulwark of the British Constitution."†

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.

To the second, that is, to the pretended establishment of the common and statute law by the Constitution, I answer that they are expressly made subject "to such alterations and provisions as the legislature shall from time to time make concerning the same." They are therefore at any moment liable to repeal by the ordi-

† Idem, Vol. 4, Page 438.
nary legislative power, and of course have no constitutional sanction. The only use of the declaration was to recognize the ancient law and to remove doubts which might have been occasioned by the Revolution. This consequently can be considered as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself.

It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was Magna Charta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by subsequent princes. Such was the Petition of Right assented to by Charles the First in the beginning of his reign. Such, also, was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations, "We, the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights and which would sound much better in a treatise of ethics than in a constitution of government.

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

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

On the subject of the liberty of the press, as much as has been said, I cannot forbear adding a remark or two: in the first place, I observe, that there is not a syllable concerning it in the constitution of this State; in the next, I confound that whatever has been said about it in that or any other State amounts to nothing. What signifies a declaration that "the liberty of the press shall be inviolably preserved"? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the
general spirit of the people and of the government.* And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

There remains but one other view of this matter to conclude the point. The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. The several bills of rights in Great Britain form its Constitution, and conversely the constitution of each State is its bill of rights. And the proposed Constitution, if adopted, will be the bill of rights of the Union. Is it one object of a bill of rights to declare and specify the political privileges of the citizens in the structure and administration of the government? This is done in the most ample and precise manner in the plan of the convention; comprehending various precautions for the public security which are not to be found in any of the State constitutions. Is another object of a bill of rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to in a variety of cases

* To show that there is a power in the Constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said that duties may be laid upon the publications so high as to amount to a prohibition. I know not by what logic it could be maintained that the declarations in the State constitutions, in favor of the freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by the State legislatures. It cannot certainly be pretended that any degree of duties, however low, would be an abridgment of the liberty of the press. We know that newspapers are taxed in Great Britain, and yet it is notorious that the press nowhere enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend on legislative discretion, regulated by public opinion; so that, after all, general declarations respecting the liberty of the press will give it no greater security than it will have without them. The same invasions of it may be effected under the State constitutions which contain those declarations through the means of taxation, as under the proposed Constitution, which has nothing of the kind. It would be quite as significant to declare that government ought to be free, that taxes ought not to be excessive, etc., as that the liberty of the press ought not to be restrained.

in the same plan. Adverting therefore to the substantial meaning of a bill of rights, it is absurd to allege that it is not to be found in the work of the convention. It may be said that it does not go far enough though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens if they are to be found in any part of the instrument which establishes the government. And hence it must be apparent that much of what has been said on this subject rests merely on verbal and nominal distinctions, entirely foreign from the substance of the thing.

Another objection which has been made, and which, from the frequency of its repetition, it is to be presumed is relied on, is of this nature: "It is improper [say the objectors] to confer such large powers as are proposed upon the national government, because the seat of that government must of necessity be too remote from many of the States to admit of a proper knowledge on the part of the constituent of the conduct of the representative body." This argument, if it proves anything, proves that there ought to be no general government whatever. For the powers which, it seems to be agreed on all hands, ought to be vested in the Union, cannot be safely intrusted to a body which is not under every requisite control. But there are satisfactory reasons to show that the objection is in reality not well founded. There is in most of the arguments which relate to distance a palpable illusion of the imagination. What are the sources of information by which the people in Montgomery County must regulate their judgment of the conduct of their representatives in the State legislature? Of personal observation they can have no benefit. This is confined to the citizens on the spot. They must therefore depend on the information of intelligent men, in whom they confide; and how must these men obtain their information? Evidently from the complexion of public measures, from the public prints, from correspondences with their representatives, and with other persons who reside at the place of their deliberations. This does not apply to Montgomery County only, but to all the counties at any considerable distance from the seat of government.
It is equally evident that the same sources of information would be open to the people in relation to the conduct of their representatives in the general government, and the impediments to a prompt communication which distance may be supposed to create will be overbalanced by the effects of the vigilance of the State governments. The executive and legislative bodies of each State will be so many sentinels over the persons employed in every department of the national administration; and as it will be in their power to adopt and pursue a regular and effectual system of intelligence, they can never be at a loss to know the behavior of those who represent their constituents in the national councils, and can readily communicate the same knowledge to the people. Their disposition to apprise the community of whatever may prejudice its interests from another quarter may be relied upon, if it were only from the rivalship of power. And we may conclude with the fullest assurance that the people, through that channel, will be better informed of the conduct of their national representatives than they can be by any means they now possess, of that of their State representatives.

It ought also to be remembered that the citizens who inhabit the country at and near the seat of government will, in all questions that affect the general liberty and prosperity, have the same interest with those who are at a distance, and that they will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project. The public papers will be expeditious messengers of intelligence to the most remote inhabitants of the Union.

Among the many extraordinary objections which have appeared against the proposed Constitution, the most extraordinary and the least colorable one is derived from the want of some provision respecting the debts due to the United States. This has been represented as a tacit relinquishment of those debts, and as a wicked contrivance to screen public defaulters. The newspapers have teemed with the most inflammatory railings on this head; and yet there is nothing clearer than that the suggestion is entirely void of foundation, and is the offspring of extreme ignorance or extreme dishonesty. In addition to the remarks I have made upon the subject in another place, I shall only observe that as it is a plain dictate of common sense, so it is also an established doctrine of political law, that “States neither lose any of their rights, nor are discharged from any of their obligations, by a change in the form of their civil government.”*

The last objection of any consequence, which I at present recollect, turns upon the article of expense. If it were even true that the adoption of the proposed government would occasion a considerable increase of expense, it would be an objection that ought to have no weight against the plan.

The great bulk of the citizens of America are with reason convinced that Union is the basis of their political happiness. Men of sense—of all parties now with few exceptions agree that it cannot be preserved under the present system, nor without radical alterations; that new and extensive powers ought to be granted to the national head, and that these require a different organization of the federal government—a single body being an unsafe depositary of such ample authorities. In conceding all this, the question of expense must be given up; for it is impossible, with any degree of safety, to narrow the foundation upon which the system is to stand. The two branches of the legislature are, in the first instance, to consist of only sixty-five persons, which is the same number of which Congress, under the existing Confederation, may be composed. It is true that this number is intended to be increased; but this is to keep pace with the increase of the population and resources of the country. It is evident that a less number would, even in the first instance, have been unsafe, and that a continuance of the present number would, in a more advanced stage of population, be a very inadequate representation of the people.

Whence is the dreaded augmentation of expense to spring? One source pointed out is the multiplication of offices under the new government. Let us examine this a little.

It is evident that the principal departments of the administration under the present government are the same

* Vide Rutherforth’s Institutes, Vol. 2, book II, Chapter X, Sections XIV and XV. Vide also Grotius, Book II, Chapter IX, Sections VIII and IX.
which will be required under the new. There are now a Secretary of War, a Secretary for Foreign Affairs, a Secretary for Domestic Affairs, a Board of Treasury, consisting of three persons, a treasurer, assistants, clerks, etc. These offices are indispensable under any system and will suffice under the new as well as under the old. As to ambassadors and other ministers and agents in foreign countries, the proposed Constitution can make no other difference than to render their characters, where they reside, more respectable, and their services more useful. As to persons to be employed in the collection of the revenues, it is unquestionably true that these will form a very considerable addition to the number of federal officers; but it will not follow that this will occasion an increase of public expense. It will be in most cases nothing more than an exchange of State officers for national officers. In the collection of all duties, for instance, the persons employed will be wholly of the latter description. The States individually will stand in no need of any for this purpose. What difference can it make in point of expense to pay officers of the customs appointed by the State or those appointed by the United States? There is no good reason to suppose that either the number or the salaries of the latter will be greater than those of the former.

Where then are we to seek for those additional articles of expense which are to swell the account to the enormous size that has been represented to us? The chief item which occurs to me respects the support of the judges of the United States. I do not add the President, because there is now a president of Congress, whose expenses may not be far, if anything, short of those which will be incurred on account of the President of the United States. The support of the judges will clearly be an extra expense, but to what extent will depend on the particular plan which may be adopted in practice in regard to this matter. But it can upon no reasonable plan amount to a sum which will be an object of material consequence.

Let us now see what there is to counterbalance any extra expense that may attend the establishment of the proposed government. The first thing that presents itself is that a great part of the business which now keeps Congress sitting through the year will be transacted by the President. Even the management of foreign negotiations will naturally devolve upon him, according to general principles concerted with the Senate, and subject to their final concurrence. Hence it is evident that a portion of the year will suffice for the session of both the Senate and the House of Representatives; we may suppose about a fourth for the latter and a third, or perhaps a half, for the former. The extra business of treaties and appointments may give this extra occupation to the Senate. From this circumstance we may infer that, until the House of Representatives shall be increased greatly beyond its present number, there will be a considerable saving of expense from the difference between the constant session of the present and the temporary session of the future Congress.

But there is another circumstance of great importance in the view of economy. The business of the United States has hitherto occupied the State legislatures, as well as Congress. The latter has made requisitions which the former have had to provide for. Hence it has happened that the sessions of the State legislatures have been protracted greatly beyond what was necessary for the execution of the mere local business of the States. More than half their time has been frequently employed in matters which related to the United States. Now the members who compose the legislatures of the several States amount to two thousand and upwards, which number has hitherto performed what under the new system will be done in the first instance by sixty-five persons, and probably at no future period by above a fourth or a fifth of that number. The Congress under the proposed government will do all the business of the United States themselves, without the intervention of the State legislatures, who thenceforth will have only to attend to the affairs of their particular States, and will not have to sit in any proportion as long as they have heretofore done. This difference in the time of the sessions of the State legislatures will be all clear gain, and will alone form an article of saving, which may be regarded as an equivalent for any additional objects of expense that may be occasioned by the adoption of the new system.

The result from these observations is that the sources
everyone carves for himself. But the likeness is there, because children grow up, and because great men and rulers are still men. Washington's chosen form of fatherhood complemented his political theory and his manners. The rights of man and the rules of civility urged him to the conclusion that he should be the father of a country whose people would rule their own lives.

The most theatrical and theater-loving of presidents kept quoting Addison, but he could have seen more of himself, and his choice of fatherhood, in Shakespeare. *King Lear*, even with its eighteenth-century happy ending, is a tragedy that is set in motion when a political father steps aside incompletely, without realizing the implications of the act. "...'tis our fast intent/ To shake all cares and business from our age,/ Conferring them on younger strengths," Lear announces in the first scene, and proceeds to divide his kingdom among his daughters. But a few speeches later, he adds a condition: he will keep his royal title and one hundred knights. It doesn't work, because it couldn't. Goneril and Regan, the wicked daughters, did not have to throw him out into a storm, but even if they had been Cordelias, he could not have continued to keep power over them after giving it up.

*The Tempest*, which Washington saw in Dryden's version and to which he alluded in letters, is the dream version of a father and a ruler stepping aside; perhaps because it is a dream, it goes better. Prospero, the duke/magician driven into exile before the play begins, rules with his charms his daughter, the rebellious subjects who have fallen into his hands, a spirit, and a slave; the problems of politics, and family politics, are transmuted into symbols and managed by magic. But in the last act, Prospero releases everyone, with full consciousness of what he is doing. His daughter will marry, Ariel will vanish, Caliban and his enemies, all chastened, will be pardoned. "My charms I'll break,
Washington dealt with men in all their gnarled reality, not archetypes. Even so, he found the way to let go successfully. Living after Washington, and under the principles he upheld, we think of letting go as the easy choice, yet it could not have been. Retirement is a foretaste of mortality. (“Now he terrifies me,” Rilke would write of Prospero: “The way he draws/ the wire into his head, and hangs himself/ beside the other puppets. . . .”) It is no accident that *resignation* means leaving office and accepting fate. How difficult resignation must have been for a man who loved uniforms, activity, and office as much as he loved his vine and fig tree—for though he always came back to Mount Vernon, he always left it, when the call came. How much more difficult it must have been when, in order to work out the moral proposition to which he had committed himself, he proposed to let most of Mount Vernon go.

But Washington was not the only one for whom letting go was difficult; it was difficult for his contemporaries and for the unborn millions. When a political father lets go, then his political children are on their own, with all the uncertainty that entails. Washington foresaw their situation in the third paragraph of his first Farewell Address, the Circular to the States. In a lifetime of solid paragraphs, buttressed with precise, sometimes intricate, clauses, this is the most carefully wrought, as well as the most startling. It is worth quoting in full, because it is about us.

The paragraph consists of only three sentences, the first two of them enormously long. It opens with a panoramic establishing shot.

“The Citizens of America, placed in the most enviable conditions, as the sole Lords and Proprietors of a vast Tract of Continent, comprehending all the various soils and climates of the World, and abounding with all the necessaries and conveniences of life, are now by the late satisfactory pacification, acknowledged to be possessed of absolute freedom and Independence; They are, from this period, to be considered as the Actors [the favorite metaphor] on a most conspicuous Theatre, which seems to be peculiarly designated by Providence for the display of human greatness and felicity; Here, they are not only surrounded with every thing which can contribute to the completion of private and domestic enjoyment, but Heaven has crowned all its other blessings, by giving a fairer opportunity for political happiness, than any other Nation has ever been favored with.”

Washington has set a scene of thousands of miles and metaphysical importance, for he has established North America as the stage and Providence as the producer. But he also, at the end, introduces a human concept, “political happiness,” which is the business of the next sentence.

“Nothing can illustrate these observations more forcibly, than a recollection of the happy conjuncture of times and circumstances, under which our Republic assumed its rank among the Nations; The foundation of our empire was not laid in the gloomy age of Ignorance and Superstition, but at an Epocha when the rights of mankind were better understood and more clearly defined, than at any former period; the researches of the human mind, after social happiness, have been carried to a great extent; the Treasures of knowledge, acquired through a long succession of years, by the labours of Philosophers, Sages and Legislatures, are laid open for our use, and their collected wisdom may be happily applied in the Establishment of our forms of Government; the free cultivation of Letters, the unbounded extension of Commerce, the progressive refinement of Manners, the growing liberality of sentiment, and above all, the pure and benign light of Revelation, have had a meliorating influence on mankind and increased the blessings of Society.”
He is like a lawyer, enumerating bequests, or a team of long-shoremen, tirelessly loading a ship. He began by giving us a continent and invoking Providence; here he credits to our account the rights of man, abstract and practical knowledge, the arts, trade, good behavior, and Christianity (so long as it is not superstitious). Now for the climax:

"At this auspicious period, the United States came into existence as a Nation, and if their Citizens should not be completely free and happy, the fault will be entirely their own."³

The shock of this sentence is partly stylistic. After its long compound predecessors, as relentless as breakers on a beach, it seems terse, almost curt. The real shock is the thought. After such a stem-winding warm-up, we expect an affirmation; a keynote speech to end all keynotes; Fourth of July rhetoric seven years after the first Fourth of July, when it was still fresh. Instead, we get a warning so blunt that it is almost a rebuke. With so many blessings, how could we fail? Easily enough, he tells us; see that you don't.

It is one of the most sobering moments in any major American speech—even more sobering than the bleak mysticism of Lincoln's Second Inaugural. Washington is saying that America's political success is problematic. In saying so, he fingers a paradox in the doctrine of natural rights. If you believe in the rights of man, you believe that they are grounded in nature—that they are, as Jefferson put it, "inalienable." But that does not necessarily mean—and Washington did not believe—that establishing a government based on those rights is easy, or even possible. This is why, in his First Inaugural Address, six years later, he spoke of the "Republican model of government" in its American form as an "experiment." It was as much of an experiment as Franklin's key and his kite; more so, since Franklin was pretty sure beforehand that the key would glow. Washington was not sure that the United States would work. What were the precedents? The Greek example, as Hamilton said, was "disgust[ing]." The Roman Republic had fallen. There were a few republics in recent European history, none of them large. The United Netherlands collapsed in 1787; France would have a revolution in 1789, Santo Domingo (or Haiti) in 1791—hardly encouraging examples. Like Unitarians in theology, Washington as a political philosopher believed in at most one right form of government.

Washington was also saying that responsibility for the experiment's success was only partly his. He would do what he could. When he distributed the Circular to the States, he believed that his task as a founder and father was done. It turned out to be less than half done. But even when it was finished, it was only all that he could do. The rest was up to the "Citizens of America"; is up to us. When he passed through Trenton on his way to his first inauguration, the hopeful banner over the bridge at Assunpink Creek said that the defender of the mothers would be the protector of the daughters. He cannot protect the daughters of the daughters.

This may be the deepest source of our distance from him—the resentment and puzzlement that come from being let go. He seems cryptic, like an oracle that has fallen silent. We feel bereaved. He fought for self-government; we govern ourselves; what now?

Henry Adams (John's great-grandson) captured this sense of abandonment in a recollection of his first visit to Mount Vernon, which he had made in 1850, when he was twelve years old. The mansion was a pilgrimage site, and a move to restore it had begun. So had the final struggle between slave states and free states. The road young Adams took from Washington, D.C., to Mount Vernon was bad. "To the New England mind . . . [b]ad roads meant bad morals. The moral of this Virginia road was clear. . . . Slavery was wicked, and slavery was the cause of this road's badness which amounted to social
crime—and yet, at the end of the road and product of the crime stood Mount Vernon and George Washington.” Adams is having fun with the certainties and the perplexities of his preadolescent self. But the perplexities were real, and later he strikes a more anxious note. Washington was “like the Pole Star . . . Mount Vernon always remained where it was, with no practicable road to reach it.” Adams put his memory of the unreachable Washington in the context of the debate over slavery, where Washington’s accomplishment was entirely private and the least useful publicly. But the feeling of loss and withdrawal clings to the entire career of a political father like Washington. He committed few blunders, and no crimes. He performed every task that came to him, even retirement. His character, as Jefferson put it in his final, measured judgment, “was, in its mass, perfect, in nothing bad, in few points indifferent.”

Is that all? What good does that do us when we are grown, and he is gone?

It is easier to deal with the legacies of heroes whose careers have been cut short. Murder was a great boost to the reputations of Martin Luther King, Jr., and Abraham Lincoln. Even the death of sixty-two-year-old Franklin Roosevelt seemed untimely, because it occurred in office. Sudden death leaves room for fantasy. What if Lincoln had presided over Reconstruction? Would Roosevelt have fought the Cold War? Martyrs become our companions; they keep us in thrall. When a hero concludes his career and Nature concludes his life, we feel excluded.

One way we try to keep in touch with the famous dead is through their words. If their words ring in our ears, we can talk with them in our imaginations. This is why the eloquent fare so well in American history: Lincoln foremost, with Jefferson a close second; Hamilton, Madison, and perhaps Franklin leading the pack. It will be interesting to see what survives of the fireside chats when the last Americans who heard them have
Madison and Jefferson embarked on their undeclared mission in the late spring of 1791. They took a trip through New York and New England—north from New York City to Lake Champlain, then back via Vermont, Massachusetts, Connecticut, and Long Island. They fished for trout and shot squirrels. Jefferson ordered trees from a nursery and Madison took the longest open-water voyage of his life—across Long Island Sound. They investigated the Hessian fly, a grain pest, at the behest of the American Philosophical Society (Jefferson was one of its vice presidents).

One of Hamilton’s friends, Robert Troup, a New York lawyer, thought they were up to more than that. “There was every appearance of a passionate courtship between the Chancellor, Burr, Jefferson and Madison when the two latter were in town,” Troup wrote Hamilton.

The chancellor of Troup’s letter was Robert Livingston, who presided over New York’s Court of Chancery. Livingston was a disappointed man. He had not gotten any post in the Washington administration. As partial compensation, he had expected one of New York’s Senate seats to be awarded to a member of his large, powerful family. But Hamilton had arranged with the state legislature, which made the selections, for one seat to go to Hamilton’s father-in-law, Philip Schuyler, and the other to go to one of Hamilton’s friends from the Constitutional Convention, a transplant from Massachusetts no less, Rufus King. Livingston had been an ally of Hamilton’s in the fight to ratify the Constitution in New York state, but once he felt disrespected, that was that. Livingston began to get his own back in January 1791, when Schuyler was up for a new term. (The first senators had drawn lots to pick short or long terms, so that their tenure would be staggered.) This time Livingston teamed with Governor George Clinton to throw Schuyler out of office.

The man who benefited from this maneuver was Aaron Burr, a thirty—five-year-old veteran and lawyer. He had attended Princeton with Madison, though they seem not to have known each other well there. Burr’s father had been president of Princeton a decade before John Witherspoon, and Philadelphia, they could draw sustenance from liberty’s progress in Paris.

There is no record to tell us when exactly Madison and Jefferson decided to push back against the mistaken policies and opinions of their colleagues. Perhaps there was no single moment. One thing happens, then another; then one realizes war has been declared.

Madison and Jefferson certainly had no intention of founding a party, or “faction,” as a political party was then often called. Although Madison thought factions were inevitable—the latent causes of faction,” he had written in Federalist #10, were “sown in the nature of man”—he also believed they were unjust. “By a faction I understand a number of citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” Factions were like germs—ubiquitous and unhealthy.

Madison was not alone. His dislike of factions was a universal prejudice—parties/factions were corrupt and corrupting; they led to commotion and war. “[I would] quarrel with both parties, and with every individual of each” before joining either, Adams wrote of parties in Massachusetts when he was young. “Let me . . . warn you in the most solemn manner against the baneful effects of the spirit of party,” said Washington at the end of his career. “I never submitted the whole system of my opinions to the creed of any party of men whatever,” declared Jefferson. “Such an addiction is the last degradation of a free and moral agent.”

And yet founding a party is exactly what Jefferson and Madison now began to do, while never admitting, even to themselves, quite what they were doing. Soon enough, Hamilton and his allies would found a party of their own, which even Washington ultimately joined, all of them showing the same un-self-awareness.
and his maternal grandfather was the great theologian Jonathan Edwards. Burr's own talents ran to wit, reading, litigation, and politics, and in recognition of the last, Livingston and Clinton tapped him to replace Schuyler in the Senate.

Biographers of Madison and Jefferson deny that the northern vacation was about anything except relaxing in the beauties of nature. But sometimes contemporaries see what is under their noses. If the two Virginians wanted to exert a new force in national politics, they could not do it alone. They needed allies—peers in other states who shared their views, or their enemies. Jefferson, Madison, Livingston, and Burr had all clashed with Hamilton or his father-in-law. "Delenda est Carthago," Troup told Hamilton, was "the maxim adopted with respect to you." Every educated person then knew at least some Latin; you didn't have to know much to understand the old slogan, Carthage must be destroyed.

A party is made of more than just leaders. Another way that Madison and Jefferson built their party was to find instruments—like-minded men, not peers, who could do the work, much of it tedious, some of it dirty.

John Beckley had come to Virginia in 1769, the same year that Madison went to Princeton, as an indentured servant, sent from England because his parents were too poor to support him at home. He rose in the world thanks to his clear hand and clear reading voice. He clerked for Edmund Randolph and the Virginia legislature, and wanted to clerk for the Constitutional Convention, though Madison told Randolph that the job would go to someone "more conspicuous." Beckley tried to make himself more conspicuous by getting elected to the Virginia ratifying convention, as the owner of some land in a remote western county, but he failed. He did serve as the convention's secretary, and in April 1789 (this time with Madison's help) he won the job of his life, clerk of the House of Representa-tives. "Beckley Clerk," Madison noted in a letter to Randolph.

Once he was at the center of things, Beckley made himself useful to his Virginia patrons. He dealt with House documents and printers, and he knew people's handwriting. "From hints dropped," he learned when Hamilton had been writing pseudonymous essays for the newspapers; another time he "happened to see" a manuscript in the handwriting of one of Hamilton's clerks—another clue. Gentlemen would not read other people's manuscripts, but they would read analyses of them by people who had.

Beckley knew people's business, and shared what he knew. "The following list of paper men is communicated to me by Mr. Beckley," wrote Jefferson, on a document in his own hoard of intelligence (paper men were congressmen who were invested in U.S. securities, and thus beholden to Hamilton's wiles). It was Beckley who gave Madison the fateful copy of Rights of Man, and he gave both his exalted colleagues advice (all the more welcome because it confirmed what they already believed). "It would be wise to be watchful . . . of this extraordinary man," he wrote Madison of Hamilton. "[He has] a comprehensive eye, a subtle and continuing mind and a soul devoted to his object." Madison and Jefferson, in turn, introduced Beckley to allies of theirs: a letter of introduction to Burr described Beckley as "possess[ing] the confidence of our two illustrious patriots, Mr. Jefferson and Mr. Madison."

No politician can do everything himself. He needs intermediaries, and eyes and ears. Beckley filled all three functions.

Another man the illustrious patriots turned to was a sometime peer, for he had known Madison at Princeton, though he had since come down in life: he was a journalist.

Philip Freneau, a descendant of Huguenot merchants, went to Princeton to study for the ministry. There he met, in addition to Madison, the muse.

A second Pope, like that Arabian bird
Of which no age can boast but one, may yet
Awake the muse by Schuykill's silent stream.
The enjambment of the first two lines makes us hope that Freneau might write well one day, though the clunk of “Schuylkill’s silent stream” suggests that he will not.

After college he drifted from career to career—teacher, translator, pri-vateer, ship’s captain—interspersed with journalism and versifying. Early in 1791 Madison recommended him to Jefferson, who offered him work as the State Department’s clerk for foreign languages. The job required only “a moderate knowledge of French,” Jefferson explained, and would not “interfere with any other calling the person may choose.” The other calling Jefferson and Madison had in mind was for Freneau to edit a Philadelphia newspaper, with national circulation, that would be an “an-tidote” to “monarchy and aristocracy.”

The administration already had its own de facto mouthpiece, John Fenno’s Gazette of the United States, which ran Adams’s Discourses and made money from running Treasury Department notices. To take on the Gazette, Jefferson offered Freneau information and income: he could see “all my letters of foreign intelligence and foreign newspapers” and be paid to print all the State Department’s proclamations and notices—a bonus to his clerk’s salary, which was only $250 a year.

Madison hawked subscriptions for the new paper in Virginia. “With Mr. Freneau I have been long and intimately acquainted,” went one of his letters. “He is a man of acknowledged genius” whose qualifications “promise a vehicle of intelligence and entertainment to the public.” Jefferson, for his part, pushed Congress to cut the postal rate for newspapers. Freneau went to work as clerk for foreign languages in August 1791, and brought out the first issue of his paper, the National Gazette, on Halloween.

Madison did most of the reading in the early spring of 1791. He had brought a load of books to Philadelphia with him when the government moved there, and he told Jefferson that he would perform “the little task” of studying them before they set off on their northern vacation. He mar­inated his thoughts until the fall, when he began publishing them in the National Gazette three weeks after its debut issue; by April 1792 he had written more than a dozen essays.

Madison made a few simple points, and made them repeatedly. Coun­try life was good, cities and manufacturing were bad. “‘Tis not the coun­try that peoples either the Bridewells or the Bedlams”; such “mansions of wretchedness” belonged to “overgrown cities” (Bridewell was a London prison, Bedlam a London madhouse). Urban life was insecure as well as wretched, because the artisans and factory workers who populated cities depended on “the consumption and caprice” of the marketplace. “What a contrast . . . to the independent situation and manly sentiments” of those “who live on their own soil.”

This was a slap at Britain, whose industries depended on American and other foreign buyers. Madison calculated that more than 200,000 British workers were employed making exports for America. He filed the thought for future reference: the great economic superpower might be vulnerable to American pressure.

He was also slapping Hamilton, who had presented the Report on Manufactures to Congress at the end of 1791, singing the praises of eco­nomic diversity: “The spirit of enterprise . . . must be less in a nation of mere cultivators, than in a nation of cultivators and merchants; less in a nation of cultivators and merchants, than in a nation of cultivators, art­ificers [manufacturers] and merchants.” Madison believed this vision of prosperity was all a delusion; the enterprise of manufacturers was always vulnerable to uncontrollable market forces.
Madison admitted that human fertility caused overpopulation, which tended to flow into cities. His safety valve was emigration—from Europe to America, and from the eastern states to new states and territories farther west. This tracked his years-long interest in opening the Mississippi River valley. Population control provided a rationale for the second plank of Madison’s platform: western expansion.

He also made a bold prediction: the American and French Revolutions might put an end to war. Kings fought wars to gratify their ambitions. Republics would not have that temptation, and, as their peoples became more rational, they would no longer fight to gratify popular animosities. The “progress of reason” was “the only hope of UNIVERSAL AND PERPETUAL PEACE” (caps in the original).

This was another hit at Hamilton, for surely Madison remembered that only four years earlier, his then-friend had written Freedom’s #6, a survey, as grim as it was brisk, of ancient and modern wars. Hamilton found republics as bellicose as monarchies. “Are not the former administered by men as well as the latter? ... Is it not time to awake from the deceitful dream of a golden age” and admit “that we ... are yet remote from the happy empire of perfect wisdom and perfect virtue?” Remote indeed. In April 1792, France, Austria, and Prussia went to war, inaugurating two decades of universal bloodshed.

The most interesting thoughts in Madison’s National Gazette essays concerned public opinion (one of his essays was titled simply “Public Opinion”). Americans already had a rough-and-ready appreciation of public opinion: Why else did they write so much for the newspapers? Madison wanted to define its political and constitutional role.

He had touched on the importance of public opinion in The Federalist, when he remarked that better transportation would strengthen the “cords of affection” that bound Americans together. But the main guarantor of liberty he had put forward as Publius had been the very complexity of the government, and of the country itself. Now, four years later, he relied instead on public opinion. Americans could maintain their freedom by keeping in touch with one another, and with their own principles (via the National Gazette and like-minded newspapers). They should also keep watch over possible backsliders and seducers (Adams and Hamilton).

Madison called for “a general intercourse of sentiments ... favorable to liberty.” “Let it be the patriotic study of all ... to erect over the whole [country] one paramount empire of reason, benevolence and brotherly affection.” Then “every good citizen will be ... a sentinel over the rights of the people.” “Every citizen shall be an Argus to espy” threats to his rights. (Argus was a hundred-eyed giant of Greek mythology.)

Public opinion was so important that Madison felt entitled to correct Montesquieu, everyone’s favorite political philosopher. Montesquieu had proposed a classification of all governments into three kinds, each infused with a different spirit. Despotisms ran on fear, monarchies depended on honor, republics relied on virtue. Madison respectfully proposed his own tripartite system. Despotisms were ruled by force. Sham republics were ruled by corruption, with bounties and bribes upholding “the real domination of the few” (Hamilton and his paper men). Finally, true republics were ruled by an interplay between government and society: the “will” of society gave government its “energy,” while government’s “reason” in-structured society’s “understanding.” Public opinion was a loop, sustaining leaders even as they shaped it. “Such are the republican governments which it is the glory of America to have invented, and her unrivalled happiness to possess.”

Madison denied that his party was partisan at all. He blamed partisanship on his rivals, chiefly Adams (without naming him, though the reference was clear). The vice president’s fascination with titles and hereditary succession had introduced “new vices” into American political discourse. Madison admitted in passing that it might be necessary to create “one party [i.e., his own]” to be “a check on the other.” But the blame would rest with Adams and his ilk, who had started the escalation in the first place.
Most of the planks of Madison's platform were old ideas put to new uses. Poets had sung the virtues of rural life since ancient Greece and Rome (since the emergence of cities, in fact). Americans had been champing to push westward since they were colonists clinging to the east­ern seaboard. American history had been punctuated by conflict, and with the right leaders Americans could fight well. But Madison knew from his revolutionary experience that they tired of long wars. His thoughts on public opinion, however, were something new in political theory: an expression, and a defense of populism.

Madison scholars spend relatively little time on his National Gazette essays, and those who study them do not ask why they are so ignored. One reason surely is their quality. They are short, but not sweet. The writing is crude, and so are many of the thoughts. Madison relies on clanging verbal chimes (see Bridewells and Bedlams, above). One almost feels he is writing down, as if for readers who move their lips as they read.

Madison wrote better than Adams, but that was a low bar. For years his foil, politically and journalistically, would be Hamilton. Hamilton was not a great writer (the four great writers of the founding were Jefferson, Franklin, Paine, and Gouverneur Morris). But he was energetic, pro­lific, and versatile. Sometimes he wrote too much, and too vividly, for his own good. But he never sank to the childish level of the National Gazette pieces.

Yet Madison was not writing for the ages. He was not really writing to win specific arguments. He was getting his thoughts in order—laying out issues for the years and decades to come, identifying his enemies and ways to attack them. He did what every party platform does—he pointed with pride, and he viewed with alarm.

Most important, he was bringing his readers into the process. All Americans believed in government based on popular choice. Even Hamilton, arguing at the Constitutional Convention for an executive elected for life, pointed out that he would be elected. Even Adams, toying with hereditary succession, expected an elected bicameral legislature. Madison now believed in more than popular choice. He wanted the people to be consulted between elections, continually. They would be his partners in government. It was an insight appropriate to a family man, to the ideal partner of so many other founders. Madison put his faith in Argus.

He flattered his audience, playing to their pride. (When Argus was killed by Hermes, Hera put his hundred eyes in the peacock's tail.) But Madison knew from long experience that pride is a factor every good politician takes into account.

This is why Madison would win the battles of the next nine years, however often he lost. This is why Hamilton's arguments, however per­suasive, never won the larger contest for popular favor. Hamilton focused on opinions—his own, and those of his enemies—and whether they were right or wrong. Madison understood public opinion.
But Hamilton thought "ransack(ing)" it for items of "utility" was a good thing. Similarly, the change that nineteenth-century socialists and reactionaries alike would hurri against the factory system like a battering ram—that it employed women and children—awakened no pornographic echo in him. So impervious was he to it that he used it in a discussion of woman and child labor with no sense of rhetorical dissonance. Hamilton was writing from his own experience: he grew up in one of the garden spots of the earth, but its beauty had meant nothing for most of the people who lived there, because of the poverty and governmental flight from Philadelphia in the summer. All but Hamilton, who stayed in town to work on his third great report, which he presented to Congress at the end of the year. Formally, he was responding to a request made by the House in January 1790 that he prepare a plan to make the United States "independent of other nations . . . for military supplies." What he gave them, in his "Report on Manufactures," delivered in December 1791, was another window on his vision for America. Hamilton's research into the subject went back to his days as a colonel, jotting down facts from Malachy Postlethwayt in his old pay book. More recently, he drew on his correspondence with customs collectors, and with businessmen as far afield as Liverpool, Glasgow, and Canton. He also relied on the arguments of the man who had replaced William Duer as assistant treasury secretary, the Philadelphia merchant Tench Coxe. Coxe had been a Tory during the early years of the war; after Hamilton had warned Congress to flee Philadelphia in 1777, Coxe had reentered his hometown with the British army. But he had converted to patriotism, and even smuggled a model of Arkwright's spinning jenny out of Britain after the war. Cotton was the keystone of British manufacturing, and securing a model of British machinery was an important act of industrial espionage. In 1787, Coxe wrote An Enquiry into the Principles on Which a Commercial System for the United States of America Should Be Founded, in which he argued that manufactures might be "the means of our POLITICAL SALVATION." At his inauguration, George Washington had worn a suit of Connecticut broadcloth in symbolic support for American manufacturing, but there was as yet little to support. The great majority of Americans were farmers. In the cities, where there was a class of people engaged in business, merchants and their employees outnumbered manufacturers and artisans. Hamilton and Coxe were arguing a minority case. The "Report on Manufactures" was in two parts—visionary and programmatic. The more important visionary part was offered as an answer to the question whether manufacturing added to "the produce and revenue" of society or whether it merely diverted useful effort from agriculture. Hamilton listed seven proofs for the productivity of manufacturing. The division of labor—among artisans, and between artisans and farmers—led to greater concentration and skill. Machines were "an artificial force brought in aid of the natural force of man" ("unencumbered," he noted, "by the expense of maintaining the laborer"). Manufacturing encouraged the immigration of skilled workmen and businessmen—an important point in a still-barren country.

Two of Hamilton's proofs strike a modern ear as unsayably blunt. Manufacturing increased "the surplus produce of the soil . . . The bow-els as well as the surface of the earth are ransacked for articles which were before neglected. Animals, plants, and minerals acquire a utility" previously "unexplored." Manufacturing also prised the idle out of the home. "Women and children are rendered more useful, and the latter more early useful, by manufacturing establishments, than they would otherwise be. Of the number of persons employed" in British cotton mills, he went on enthusiastically, "it is computed that four sevenths, nearly, are women and children, of whom the greatest proportion are children, and many of them of a tender age." Later, he called the labor of women and children "a very pregnant and instructive fact." Opinions on both nature and the factory system were about to change, or were already changing, in ways that would make these sentiments seem wicked, or bizarre. Only seven years after Hamilton wrote, William Wordsworth would find in nature an anchor of my purest thoughts, the muse, The guide, the guardian of my heart, and soul Of all my moral being. But Hamilton thought "ransack[ing]" it for items of "utility" was a good thing. Similarly, the charge that nineteenth-century socialists and reactionaries alike would hurri against the factory system like a battering ram—that it employed women and children—awakened no premonitory echo in him. So impervious was he to it that he used pregnant in a discussion of woman and child labor with no sense of rhetorical dissonance. Hamilton was writing from his own experience: he grew up in one of the garden spots of the earth, but its beauty had meant nothing for most of the people who lived there, because of the poverty and
degradation of their condition. Hamilton, though not degraded to slavery, was poor enough to have gone to work at nine: why shouldn't American children, and their mothers, do the same?

The two remaining proofs also reflect Hamilton's experience, and his character. A diverse economy, he argued, develops society. "The spirit of enterprise . . . must be less in a nation of mere cultivators, than in a nation of cultivators and merchants; less in a nation of cultivators and merchants, than in a nation of cultivators, artificers, and merchants. . . . Every new scene which is opened to the busy nature of man to pursue and exert itself, is the addition of a new energy to the general stock of effort." Equally important, a diverse economy develops individuals. "Minds of the strongest and most active powers . . . fall below mediocrity, and labor without effect, if confined to uncongenial pursuits. [But] when all the different kinds of industry obtain in a community, each individual can find his proper element, and can call into activity the whole vigor of his nature." Busy, wise, exact, energy, effort, enterprise, strongest, active, activity, vigor—these are all Hamiltonian touchstones, field markings as distinctive as DNA or the folds of the ear. But they became so for him only because of luck and work: if Nicholas Cruger and the Reverend Hugh Knox had been different men, if Hamilton himself had been marginally less remarkable, he, with all his intelligence and talents, might have been buried in St. Croix. Hamilton wanted to improve the odds for future Hamiltons.

The balance of the report sketched how this might be done. He expected the necessary capital to come from domestic banks and foreign investors. Government would help by encouraging domestic manufacturers with bounties, or subsidies. Bounties were, "generally speaking, essential to the overcoming of the obstacles which arise from the competitions of superior skill and maturity" of foreign producers—especially when foreign governments awarded bounties of their own. Hamilton proposed to use protective tariffs more sparingly—so sparingly that some modern protectionists disown him as a false forerunner. He acknowledged that such regulations raised prices in the short run, but argued that competition among domestic manufacturers would lower them permanently over time.

A private venture in large-scale manufacturing, planned by Hamilton and Coxe, was already under way before Hamilton delivered his report: the Society for Establishing Useful Manufactures. The society planned to develop seven hundred acres beside the falls of the Passaic River in northeastern New Jersey. Hamilton and Washington had picnicked at the spot in July 1778, after the battle of Monmouth Court-house: there the river drops seventy feet from the ridges of the interior to the coastal plain, fifty feet in one steep swoop. Using the power of the falls, the society proposed to produce a range of items, from straw hats to iron wire. The charter granted by the State of New Jersey (drawn up by Hamilton) gave the society a ten-year exemption from property taxes, and perpetual freedom from taxes on its capital investments. In gratitude, the society named its site Paterson, after New Jersey's governor (the same William Paterson who had proposed the New Jersey plan at the Constitutional Convention). William Duer was chosen to preside over the board of directors, a collection of New York and Philadelphia money men. Pierre L'Enfant, who had remodeled Federal Hall, and who was already at work on plans for the new federal city along the Potomac, was hired to lay out Paterson. As a soldier, Hamilton had seen the nation's capital flit from Philadelphia to Princeton, and as treasury secretary, he had bargained it away from New York, to Philadelphia, to the swamps of Maryland. One can imagine that he was more invested in the location of its future economic center.

The report and the society together were the most ambitious of Hamilton's projects. There were some problems with them, especially on the practical side. Hamilton asked, without answering, the question of when bounties should end. Continuing them "on manufactures long established must almost always be . . . questionable," he admitted. On the other hand, "in new undertakings, they are as justifiable as they are oftentimes necessary." The implied resolution, as it often was with him, was, Leave it to me. Some modern historians have questioned whether American capitalists were ready, in the 1790s, to sustain a project like Paterson (the industrial cities of New England were still a generation away). The question would not get a fair trial, because of more immediate problems that the society encountered.
Hamilton's passionate analysis of economic diversity refutes charge that he was a tool of the rich— as well as the nobler estimate, that he was a pragmatist, using the economy to cement the union. "[Y]ou wanted to organize the country," wrote William Carlos Williams, author of Paterson, the modernist epic poem about the city Hamilton created, "so that we should all stick together and make a little money."  

Hamilton certainly was pragmatic. "Ideas of contrariety of interests" between the North and the South, he wrote hopefully in his report, are "as unfounded as they are mischievous. The diversity of circumstances" between the regions in fact leads to a "contrary conclusion," because "mutual wants constitute one of the strongest links of political connection." If the South wanted to be a region of farms, let the North supply her hats and wire. 

But he was also, and primarily, an idealist. Having risen from island poverty, he never forgot that economies are about the people who work in them. Like revolutions, they must compensate for whatever evils they produced by "bring[ing] to light talents and virtues which might otherwise have languished in obscurity." The "Report on Manufactures" was Hamilton's program for universalizing the trajectory he had outlined in his eulogy of Nathanael Greene in St. Paul's Chapel two and a half years earlier. 

Hamilton was busy with one other activity in the second half of 1791, which also reflected his experience and his character. He began an affair with a married woman.

Sometime in July, when Betsey had left the hot, unhealthy city to stay with her family in upstate New York, a Mrs. Maria Reynolds called at the Hamilton residence. She was twenty-three years old—eleven years younger than Hamilton—and came from a respectable New York family (her brother-in-law was a minor Livingston). Two extended descriptions of Mrs. Reynolds survive, both written years later—one by Hamilton himself; one by Richard Folwell, a Philadelphia publisher who was briefly her landlord. Hamilton mentions her "simplicity and
Session 2 Recommended Reading


Chapter 7

THE OMNIPOTENCE OF THE MAJORITY
IN THE UNITED STATES
AND ITS EFFECTS


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.1

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.

Having constituted the legislature in this way, almost all the powers of government were concentrated in its hands.

At the same time as the law increased the strength of naturally powerful authorities, it increasingly weakened those that were by nature feeble. It gave the representatives of the executive neither

1 In examining the federal Constitution we have seen that the lawgivers of the Union strove in the opposite direction. The result of their efforts has been to make the federal government more independent in its sphere than are the states in theirs. But the federal government is hardly concerned with anything except foreign affairs; it is the state governments which really control American society.

The Omnipotence of the Majority...
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.

How in America the Omnipotence of the Majority Increases the Legislative and Administrative Instability Natural to Democracies

How the Americans increase the legislative instability natural to democracies by changing their legislators every year and by giving them almost limitless power. The same effect on the administration. In America the drive toward social improvements is infinitely greater but less continuous than in Europe.

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.

The Omnipotence 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.2

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 had 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 seal 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.

A few years ago some pious people undertook to make the state
of the prisons better. The public was roused by their exhortations, and the reform of criminals became a popular cause.

New prisons were then built. For the first time the idea of reforming offenders as well as punishing them penetrated into the prisons. But that happy revolution in which the public cooperated with such eagerness and which the simultaneous efforts of the citizens rendered irresistible could not be accomplished in a moment.

Alongside the new penitentiaries, built quickly in response to the public's desire, the old prisons remained and housed a great number of the guilty. These seemed to become more unhealthy and more corrupting at the same rate as the new ones became healthy and devoted to reform. This double effect is easily understood: the majority, preoccupied with the idea of founding a new establishment, had forgotten the already existing ones. Everybody's attention was turned away from the matter that no longer held their master's, and supervision ceased. The salutary bonds of discipline were first stretched and then soon broken. And beside some prison that stood as a durable monument to the gentleness and enlightenment of our age, there was a dungeon recalling the barbarities of the Middle Ages.

Tyranny of the Majority

How the principle of the sovereignty of the people should be understood. Impossibility of conceiving a mixed government. Sovereign power must be placed somewhere. Precautions which one should take to moderate its action. These precautions have not been taken in the United States. Result thereof.

I regard it as an impious and detestable maxim that in matters of government the majority of a people has the right to do everything, and nevertheless I place the origin of all powers in the will of the majority. Am I in contradiction with myself?

There is one law which has been made, or at least adopted, not by the majority of this or that people, but by the majority of all men. That law is justice.

Justice therefore forms the boundary to each people's right.

A nation is like a jury entrusted to represent universal society and to apply the justice which is its law. Should the jury representing society have greater power than that very society whose laws it applies?

Consequently, when I refuse to obey an unjust law, I by no
in danger when that power finds no obstacle that can restrain its course and give it time to moderate itself.

Omnipotence in itself seems a bad and dangerous thing. I think that its exercise is beyond man's strength, whoever he be, and that only God can be omnipotent without danger because His wisdom and justice are always equal to His power. So there is no power on earth in itself so worthy of respect or vested with such a sacred right that I would wish to let it act without control and dominate without obstacles. So when I see the right and capacity to do all given to any authority whatsoever, whether it be called people or king, democracy or aristocracy, and whether the scene of action is a monarchy or a republic, I say: the germ of tyranny is there, and I will go look for other laws under which to live.

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. 4

4 At Baltimore during the War of 1812 there was a striking example of the excesses to which despotism of the majority may lead. At that time the war was very popular at Baltimore. A newspaper which came out in strong opposition to it aroused the indignation of the inhabitants. The people assembled, broke the presses, and attacked the house of the editors. An attempt was made to summon the militia, but it did not arrive in time. Finally, to save the lives of these wretched men threatened by the fury of the public, they were taken to prison like criminals. This precaution was useless. During the night the people assembled again; the magistrates having failed to bring up the militia, the prison was broken open; one of the journalists was killed on the spot and the others left for dead; the guilty were brought before a jury and acquitted.

I once said to a Pennsylvanian: "Please explain to me why in a state founded by Quakers and renowned for its tolerance, freed Negroes are not allowed to use their rights as citizens? They pay taxes; is it not right that they should vote?"

"Do not insult us," he replied, "by supposing that our legislators would commit an act of such gross injustice and intolerance."

The Omnipotence of the Majority

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.

Effect of the Omnipotence of the Majority on the Arbitrary Power of American Public Officials

The freedom which American law leaves to functionaries within the sphere marked out for them. Their power.

It is important to make the distinction between arbitrary power and tyranny. Tyranny can use even the law as its instrument, and then it is no longer arbitrary; arbitrary power may be used in the interest of the ruled, and then it is not tyrannical.

Tyranny ordinarily makes use of arbitrariness, but it can at need do without it.

In the United States that omnipotence of the majority which favors the legal despotism of the legislator also smiles on the arbitrary power of the magistrate. The majority, being in absolute command both of lawmaking and of the execution of the laws, and equally controlling both rulers and ruled, regards public functionaries as its agents.

"So, with you, Negroes do have the right to vote?"
"Certainly."
"Then how was it that at the electoral college this morning I did not see a single one of them in the meeting?"
"That is not the fault of the law," said the American. "It is true that Negroes have the right to be present at elections, but they voluntarily abstain from appearing."
"That is extraordinary modesty of them."
"Oh! It is not that they are reluctant to go there, but they are afraid they may be maltreated. With us it sometimes happens that the law lacks force when the majority does not support it. Now, the majority is filled with the strongest prejudices against Negroes, and the magistrates do not feel strong enough to guarantee the rights granted to them by the law-makers."
"What! The majority, privileged to make the law, wishes also to have the privilege of disobeying the law?"
passive agents and is glad to leave them the trouble of carrying out its plans. It therefore does not enter by anticipation into the details of their duties and hardly takes the trouble to define their rights. It treats them as a master might treat his servants if, always seeing them act under his eyes, he could direct or correct them at any moment.

In general, the law leaves American officials much freer than ours within the sphere marked out for them. Sometimes the majority may even allow them to go beyond that. Assured of the views and strengthened by the support of the greatest number, they then dare to do things which astonish a European, accustomed though he be to the spectacle of arbitrary power. Thus habits form in freedom that may one day become fatal to that freedom.

The Power Exercised by the Majority in America over Thought

In the United States, when the majority has irrevocably decided about any question, it is no longer discussed. Why? Moral authority exercised by the majority over thought. Democratic republics have turned despotism into something immaterial.

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 sets 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.

Princes made violence a physical thing, but our contemporary democratic republics have turned it into something as intellectual as the human will it is intended to constrain. Under the absolute government of a single man, despotism, to reach the soul, clumsily struck at the body, and the soul, escaping from such blows, rose gloriously above it; but in democratic republics that is not at all how tyranny behaves; it leaves the body alone and goes straight for the soul. The master no longer says: "Think like me or you die." He does say: "You are free not to think as I do; you can keep your life and property and all; but from this day you are a stranger among us. You can keep your privileges in the township, but they will be useless to you, for if you solicit your fellow citizens' votes, they will not give them to you, and if you only ask for their esteem, they will make excuses for refusing that. You
will remain among men, but you will lose your rights to count as one. When you approach your fellows, they will shun you as an impure being, and even those who believe in your innocence will abandon you too, lest they in turn be shunned. Go in peace. I have given you your life, but it is a life worse than death.”

Absolute monarchies brought despotism into dishonor; we must beware lest democratic republics rehabilitate it, and that while they make it more oppressive toward some, they do not rid it of its detestable and degrading character in the eyes of the greatest number.

In the proudest nations of the Old World works were published which faithfully portrayed the vices and absurdities of contemporaries; La Bruyère6 lived in Louis XIV’s palace while he wrote his chapter on the great, and Molière criticised the court in plays acted before the courtiers. But the power which dominates in the United States does not understand being mocked like that. The least reproach offends it, and the slightest sting of truth turns it fierce; and one must praise everything, from the turn of its phrases to its most robust virtues. No writer, no matter how famous, can escape from this obligation to sprinkle incense over his fellow citizens. Hence the majority lives in a state of perpetual self-adoration; only strangers or experience may be able to bring certain truths to the Americans’ attention.

We need seek no other reason for the absence of great writers in America so far; literary genius cannot exist without freedom of the spirit, and there is no freedom of the spirit in America.

In Spain the Inquisition was never able to prevent the circulation of books contrary to the majority religion. The American majority’s sway extends further and has rid itself even of the thought of publishing such books. One finds unbelievers in America, but unbelief has, so to say, no organ.

One finds governments striving to protect mores by condemning the authors of licentious books. No one in the United States is condemned for works of that sort, but no one is tempted to write them. Not that all the citizens are chaste in their mores, but those of the majority are regular.

In this, no doubt, power is well used, but my point is the nature of the power in itself. This irresistible power is a continuous fact and its good use only an accident.

men are naturally worse there than elsewhere, but the temptation is greater and offered to more men at the same time. Consequently there is a much more general lowering of standards.

Democratic republics put the spirit of a court within reach of the multitude and let it penetrate through all classes at once. That is one of the main reproaches to be made against them.

This is particularly true of democratic states organized after the fashion of the American republics, where the majority has such absolute and irresistible sway that one must in a sense renounce one's rights as a citizen and, so to say, one's status as a man when one wants to diverge from the path it has marked out.

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.

I have heard talk of the motherland in the United States, and I have come across real patriotism among the people but have often looked in vain for any such thing among their rulers. An analogy will make this easily understandable: despotism corrupts the man who submits to it much more than the man who imposes it. In absolute monarchies the king may often have great virtues, but the courtiers are always vile.

It is true that American courtiers never say "Sire" or "Your Majesty," as if the difference mattered, but they are constantly talking of their master's natural brilliance; they do not raise the question which of all the prince's virtues is most to be admired, for they assure him that he possesses all virtues, without having acquired them and, so to say, without desiring them; they do not give him their wives or their daughters hoping that he will raise them to the rank of his mistresses, but they do sacrifice their opinions to him and so prostitute themselves.

American moralists and philosophers are not obliged to wrap their views in veils of allegory, but before hazarding an unpleasant truth they say: "We know that we are addressing a people so far above human weaknesses that they will always be masters of themselves. We would not use such language unless we knew that we were speaking to men whose virtues and enlightenment make them alone among all others worthy to remain free."

How could the flatterers of Louis XIV improve on that?

For my part, I think that in all governments whatsoever meanness will cling to strength, and flattery to power. And I know of only one way of preventing men from degrading themselves, namely, not to give anybody that omnipotence which carries with it sovereign power to debase them.

The Greatest Danger to the American Republics Comes from the Omnipotence of the Majority

It is not impotence but the ill use of power that threatens the existence of democratic republics. The government of the American republics is more centralized and more energetic than that of European monarchies. Consequential dangers. Views of Madison and Jefferson on the matter.

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.9

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.

President James Madison has given expression to just these thoughts. (The Federalist, No. 51.) [Everyman edition, pp. 266 f.]

"It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part ... Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the state of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it."

Jefferson also said: "The executive, in our government is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislature is the most formidable dread at present and will


* Authority may be centralized in an assembly, and in that case it is strong but not stable. Or it may be centralized in one man, and in that case it is less strong but more stable.

* There is no need to remind the reader that here, and throughout this chapter, I am speaking not of the federal government but of the governments of each state, where a despotic majority is in control.
THE RISE AND RISE OF THE ADMINISTRATIVE STATE

Gary Lawson*

The post-New Deal administrative state is unconstitutional,¹ and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.² The original New Dealers were aware, at least to some degree, that their vision of the national government’s proper role and structure could not be squared with the written Constitution:³ The Administrative Process, James Landis’s classic exposition of the New Deal model of administration, fairly drips with contempt for the idea of a limited national government subject to a formal, tripartite separation of powers.⁴ Faced with a choice between the administrative state and the Constitution, the architects of our modern government chose the administrative state, and their choice has stuck.

There is a perception among some observers, however, that this post-New Deal consensus has recently come under serious legal attack,

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² I use the word “unconstitutional” to mean “at variance with the Constitution’s original public meaning.” That is not the only way in which the word is used in contemporary legal discourse. On the contrary, it is commonly used to mean everything from “at variance with the private intentions of the Constitution’s drafter” to “at variance with decisions of the United States Supreme Court” to “at variance with the current platform of the speaker’s favorite political party.” These other usages are wholly unobjectionable as long as they are clearly identified and used without equivocation. The usage I employ, however, is the only usage that fully ties the words “constitutional” and “unconstitutional” to the actual meaning of the written Constitution.

³ A defense of this claim would require an extended essay on the philosophy of language, but I can offer some preliminary observations: consider a recipe that calls for “a dash of salt.” If one were reading the recipe as a poem or an aspirational tract, one might seek that meaning of “dash” that is aesthetically or morally most pleasing. But if one is reading it as a recipe, one wants to know what “dash” meant to an informed public at the time the recipe was written (assuming that the recipe was written for public consumption rather than for the private use of the author). Of course, once the recipe is understood, one might conclude that it is a bad recipe, either because it is ambiguous or, more fundamentally, because the dish that it yields simply isn’t very appealing. But deciding whether to try to follow the recipe and determining what the recipe prescribes are conceptually distinct enterprises. If the Constitution is best viewed as a recipe — and it certainly looks much more like a recipe than a poem or an aspirational tract — application of the methodology of original public meaning is the appropriate way to determine its meaning.

⁴ Cf. Cass R. Sunstein, Constitutionalism After the New Deal, 101 HARV. L. REV. 421, 447–48 (1987) (noting that the New Deal “altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place”).

⁵ See 1 Bruce Ackerman, WE THE PEOPLE 44 (1991); Sunstein, supra note 2, at 430.


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especially from the now-departed Reagan and Bush administrations. But though debate about structural constitutional issues has clearly grown more vibrant over the past few decades, the essential features of the modern administrative state have, for more than half a century, been taken as unchallengeable postulates by virtually all players in the legal and political worlds, including the Reagan and Bush administrations. The post-New Deal conception of the national government has not changed one iota, nor even been a serious subject of discussion, since the Revolution of 1937.

Part I of this Article sketches, in purely descriptive fashion, some of the most important ways in which the modern administrative state, without serious opposition, contravenes the Constitution’s design. Many elements of this design remain poorly understood even after more than two centuries, and my brief discussion here is unlikely to be satisfying. Nonetheless, my discussion at least touches on such important issues as the scope of Congress’s legislative powers, the contours and constitutional source of the nondelegation doctrine, the character of the unitary executive created by Article II, and the extent to which administrative adjudication is inconsistent with Article III.

Part II briefly ponders some possible responses to the enormous gap between constitutional meaning and constitutional practice. For those of us for whom the written Constitution (as validly amended) is the only Constitution, the seemingly irrevocable entrenchment of the post-New Deal structure of national governance raises serious doubts about the utility of constitutional discourse.

I. The Death of Constitutional Government

The United States Congress today effectively exercises general legislative powers, in contravention of the constitutional principle of limited powers. Moreover, Congress frequently delegates that general legislative authority to administrative agencies, in contravention of Article I. Furthermore, those agencies are not always subject to the direct control of the President, in contravention of Article II. In addition, those agencies sometimes exercise the judicial power, in contravention of Article III. Finally, those agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III.

In short, the modern administrative state openly flouts almost every important structural precept of the American constitutional order.

A. The Death of Limited Government

The advocates of the Constitution of 1789 were very clear about the kind of national government they sought to create. As James Madison put it: “The powers delegated by the proposed Constitution to the federal government are few and defined.” Those national powers, Madison suggested, would be “exercised principally on external objects, as war, peace, negotiation, and foreign commerce,” and the states would be the principal units of government for most internal matters.

The expectations of founding-era figures such as James Madison are instructive but not controlling for purposes of determining the Constitution’s original public meaning: the best laid schemes o’ mice, men and framers gang aft a-gley. The Constitution, however, is well designed to limit the national government essentially to the functions described by Madison.

Article I of the Constitution vests in the national Congress “[a]ll legislative powers herein granted,” and thus clearly indicates that the national government can legislate only in accordance with enu-

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5 This perception is evident more from the quantity and tone than from the specific content of recent discussions of the structural Constitution, but a few scholars have stated the point expressly. See Alfred C. Aman, Jr., Introduction, 77 CORNELL L. REV. 421, 427 (1982) (claiming that structural issues “of fundamental importance” “are again up for grabs”); Sunstein, supra note 2, at 509 noting that “[t]he last three decades have seen a growing rejection of the New Deal conception of administration”.


8 Cynthia Farina has aptly described this explicitly non-normative project as an exercise in “legal archaeology.”

9 It is possible to maintain that the phrase “the Constitution of the United States” refers not to the text of a specific document, but refers instead, in the fashion of England’s unwritten constitution, to a set of practices and traditions that have evolved over time. As a matter of practical governance, such unwritten practices are surely more important than the instructions contained in the written Constitution, but this Article is concerned solely with the written texts that have been submitted to and ratified by the American electorate. Cf. Akhil Reed Amar, Our Forgotten Constitution: A Bicentennial Comment, 57 YALE L.J. 281, 282–85 (1998) (noting discrepancies between the document produced by the constitutional convention and the document ratified by the electorate).


11 Id.

12 See id., at 292–93. In my favorite passage from The Federalist, Madison boldly proclaimed that the federal revenue collectors “will be principally on the seacoast, and not very numerous.” Id. at 293.

13 U.S. CONST. art. I, § 1 (emphasis added).
merations of power. Article I then spells out seventeen specific subjects to which the federal legislative power extends: such matters as taxing and borrowing, interstate and foreign commerce, naturalization and bankruptcy, currency and counterfeiting, post offices and post roads, patents and copyrights, national courts, piracy and offenses against the law of nations, the military, and the governance of the nation’s capital and certain federal enclaves. Article IV further grants to Congress power to enforce interstate full-faith-and-credit requirements, to admit new states, and to manage federal territories and property. Article V grants Congress power to propose constitutional amendments.

This is not the stuff of which Leviathan is made. None of these powers, alone or in combination, grants the federal government anything remotely resembling a general jurisdiction over citizens’ affairs. The Commerce Clause, for example, is a grant of power to regulate “Commerce ... among the several States,” not to regulate “all Activities affecting, or affected by, Commerce ... among the several States.” The Commerce Clause clearly leaves outside the national government’s jurisdiction such important matters as manufacturing (which is an activity distinct from commerce), the terms, formation, and execution of contracts that cover subjects other than the interstate shipment of goods, and commerce within a state’s boundaries.

Nor does the Necessary and Proper Clause, which the founding generation called the Sweeping Clause, grant general legislative powers to the national government. This clause contains two significant internal limitations. First, it only validates laws that “carry[ ] into Execution” other granted powers. To carry a law or power “into Execution” means to provide the administrative machinery for its enforcement; it does not mean to regulate unenumerated subjects in order to make the exercise of enumerated powers more effective. Second, and more fundamentally, laws enacted pursuant to the Sweeping Clause must be both “necessary and proper” for carrying into execution enumerated powers. As Patty Granger and I have elsewhere demonstrated at length, the word “proper” in this context requires executory laws to be distinctively and peculiarly within the jurisdictional competence of the national government — that is, consistent with background principles of separation of powers, federalism, and individual rights. Thus, the Sweeping Clause does not grant Congress power to regulate unenumerated subjects as a means of regulating subjects within its constitutional scope.

Nor does the power of the purse give Congress unlimited authority, though here the limits are a bit fuzzy. The Constitution contains a Taxing Clause, but it does not contain a “spending clause” as such. Nevertheless, Congress acquires the power to spend from two sources. First, the Sweeping Clause permits Congress to pass appropriations laws — provided that such laws “carry[] into Execution” an enumerated power and are “necessary and proper” for doing so. Second, as David Engdahl has pointed out, Congress’s power “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States” seems to provide a general spending power. But a general power to spend is not a general power to regulate. Even if Congress can impose whatever conditions it pleases on the receipt of federal funds, those conditions are contractual in nature, a fact that limits both their enforceability and their scope. Moreover, it is not obvious that the Property Clause gives Congress wholly unlimited power to enact spending conditions, though identifying any limits on such power would require careful consideration of the meaning of the phrase “dispose of,” the relationship between the Property Clause and the Sweeping Clause, and the viability of a general doctrine of unconstitutional conditions.

Admittedly, some post-1789 amendments to the Constitution expanded Congress’s powers beyond their original limits. For example, the Thirteenth and Fifteenth Amendments authorize Congress to enforce prohibitions against, respectively, involuntary servitude and racially discriminatory voting practices; the Fourteenth Amendment

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14 This understanding is expressly confirmed by the Tenth Amendment, which declares that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Id. amend. X.

15 See id. art. I, § 8, cls. 1–17.

16 See id. art. IV, §§ 1, 3.

17 See id. art. V.

18 See id. art. I, § 8, cls. 3.


20 U.S. CONST. art. I, § 8, cl. 18 (providing that Congress shall have the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

21 See Epstein, supra note 19, at 1397–98.
gives Congress power to enforce that Amendment's numerous substantive constraints on states; and the Sixteenth Amendment permits Congress to impose direct taxes without an apportionment requirement. These are important powers, to be sure, but they do not fundamentally alter the limited scope of Congress's power over private conduct.

Of course, in this day and age, discussing the doctrine of enumerated powers is like discussing the redemption of Imperial Chinese bonds. There is now virtually no significant aspect of life that is not in some way regulated by the federal government. This situation is not about to change. Only twice since 1937 has the Supreme Court held that a congressional statute exceeded the national government's enumerated powers, and one of those holdings was overruled nine years later. Furthermore, both cases involved the direct regulation of state governments in their sovereign capacities. To the best of my knowledge, the post-New Deal Supreme Court has never invalidated a congressional intrusion into private affairs on ultra vires grounds; instead the Court has effectively acquiesced in Congress's assumption of general legislative powers.

The courts, of course, are not the only, or even the principal, interpreters of the Constitution. Under the Constitution, it is emphatically the province and duty of the President to say what the law

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31 See id. amend. XIV, § 2.
32 See id. amend. XVI. Other amendments also grant power to Congress. See id. amend. XIX, § 2 (giving Congress the power to enforce a prohibition on gender-based discriminatory voting practices); id. amend. XXIII, § 2 (giving Congress the power to enforce the District of Columbia's participation in the electoral college); id. amend. XXIV, § 2 (giving Congress the power to enforce a prohibition against poll taxes); id. amend. XXVI, § 2 (giving Congress the power to enforce a prohibition against denying eighteen-year-old people the vote on account of age).
35 See, e.g., Perez v. United States, 402 U.S. 146, 156-57 (1971) (holding the Consumer Credit Protection Act to be within Congress's power to regulate interstate commerce); Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (holding regulation of the production of wheat grown for personal consumption to be within Congress's power to regulate interstate commerce). The lower federal courts have basically followed suit, though there has been a modest counterrevolution in the past two years. See Hoffmann Homes, Inc. v. Administrator, United States EPA, 961 F.2d 1310, 1311 (7th Cir. 1992); United States v. Cortner, 834 F. Supp. 242, 244 (M.D. Tenn. 1993) (holding that Congress could not make carjacking a federal criminal offense, because the activity "lacks any rational nexus to interstate commerce"); cf. United States v. Lopez, 2 F.3d 1342, 1366-68 (5th Cir. 1993) (holding that Congress could not, in the absence of explicit legislative findings of an effect on interstate commerce, prohibit knowing possession of a firearm within one thousand feet of a school).
37 See infra Part I.A.3.
38 See infra Part I.A.3.
39 See infra Part I.A.3.
40 See infra Part I.A.3.
41 The President, through the presentment and veto provisions, see id. art. I, § 7, cls. 2-3, is given a sui generis role in the legislative process that deifies classification along tripartite lines. See Gary Lawson, Territorial Governments and the Limits of Formalism, 78 CAL. L. REV. 853, 858 n.19 (1990). The Vice President is made an officer of the Senate and is given the power to break ties in that body. See U.S. CONST. art. I, § 3, cl. 4. The Senate is also given very significant judicial power to try impeachments. See id. art. I, §§ 3, 6. Certain other powers, such as the power to make treaties and to appoint national officers, are shared among the various departments. See id. art. II, §§ 2, 1.
42 See, e.g., id. amends. XV, §§ 1, 2 (giving Congress the power to enforce a prohibition on gender-based discriminatory voting practices); id. amend. XIV, § 2 (giving Congress the power to enforce the District of Columbia's participation in the electoral college); id. amend. XXIV, § 2 (giving Congress the power to enforce a prohibition against poll taxes); id. amend. XXVI, § 2 (giving Congress the power to enforce a prohibition against denying eighteen-year-old people the vote on account of age).
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the three Vesting Clauses in assigning responsibility for governmental functions that are not specifically allocated by the constitutional text. Although the Constitution does not contain an express provision declaring that the Vesting Clauses’ allocations of power are exclusive, it is a mistake in principle to look for such an express declaration. The institutions of the national government are creatures of the Constitution and must find constitutional authorization for any action. Congress is constitutionally authorized to exercise “[a]ll legislative Power herein granted,” the President is authorized to exercise “[t]he executive Power,” and the federal courts are authorized to exercise “[t]he judicial Power of the United States.” Congress thus cannot exercise the federal executive or judicial powers for the simple reason that the Constitution does not vest such power in Congress. Similarly, the President and the federal courts can exercise only those powers vested in them by the Constitution: the general executive and judicial powers, respectively, plus a small number of specific powers outside those descriptions. Thus, any law that attempts to vest legislative power in the President or in the courts is not “necessary and proper” for carrying into Execution constitutionally vested federal powers and is therefore unconstitutional.

Although the Constitution does not tell us how to distinguish the legislative, executive, and judicial powers from each other, there is clearly some differentiation among the three governmental functions, which at least generates some easy cases. Consider, for example, a statute creating the Goodness and Niceness Commission and giving it power “to promulgate rules for the promotion of goodness and niceness in all areas within the power of Congress under the Constitution.” If the “executive power” means simply the power to carry out legislative commands regardless of their substance, then the Goodness and Niceness Commission’s rulemaking authority is executive rather than legislative power and is therefore valid. But if that is true, then there never was and never could be such a thing as a constitutional principle of nondelegation — a proposition that is belied by all available evidence about the meaning of the Constitution. Accordingly, the nondelegation principle, which is textually embodied in the command that all executory laws be “necessary and proper,” constrains the substance of congressional enactments. Certain powers simply cannot be given to executive (or judicial) officials, because those powers are legislative in character.

A governmental function is not legislative, however, merely because it involves some element of policymaking discretion: it has long been understood that some such exercises of discretion can fall within the definition of the executive power. The task is therefore to determine when a statute that vests discretion in an executive (or judicial) officer has crossed the line from a necessary and proper implementing statute to an unnecessary and/or improper delegation of distinctively legislative power. While I cannot complete that task here, the core of the Constitution’s nondelegation principle can be expressed as follows: Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them. Although this circular formulation may seem farcical, it recognizes that a statute’s required degree of specificity depends on context, takes seriously the well-recognized distinction between legislating and gap-filling, and corresponds reasonably well to judicial application of the nondelegation principle in the first 150 years of the nation’s history. If it does not precisely capture other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry . . . .) See generally William B. Gwyn, The Indeterminacy of the Separation of Powers and the Federal Courts, 57 GEO. WASH. L. REV. 474, 474 (1989).


47 Circularity of this kind is neither fatal nor unprecedented. For example, under relevant (and correct) case law, a federal employee is an officer subject to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, if he or she is sufficiently important to be subject to the Appointments Clause. See Lawson, supra note 41, at 865 n.63.

the true constitutional rule of nondelegation, it is a plausible first approximation.49

In any event, it is a much better approximation of the true constitutional rule than is the post-New Deal positive law. The Supreme Court has not invalidated a congressional statute on nondelegation grounds since 1935.50 This has not been for lack of opportunity. The United States Code is filled with statutes that create little Goodness and Niceness Commissions—each confined to a limited subject area such as securities,51 broadcast licenses,52 or (my personal favorite) imported tea.53 These statutes are easy kills under any plausible interpretation of the Constitution's nondelegation principle. The Supreme Court, however, has rejected so many delegation challenges to so many utterly vacuous statutes that modern nondelegation decisions now simply recite these past holdings and wearily move on.54 Anything short of the Goodness and Niceness Commission, it seems, is permissible.55

49 Marty Redish has independently formulated a very similar principle for distinguishing the legislative and executive powers, which he calls the "political commitment principle." See MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (forthcoming 1994) (manuscript chapter 5, on file with author). This principle requires of valid legislation "some meaningful level of normative political commitment by the enacting legislators, thus enabling the electorate to judge its representatives." Id. ch. 5, at 4; see also David Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance?, 83 MICH. L. REV. 1223, 1252-58 (1985) (distinguishing between statutes that prescribe rules of conduct and invalid statutes that merely state legislative goals).

50 See Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935). The Court does occasionally invoke delegation concerns in the course of statutory interpretation. See, e.g., Industrial Union Dep't v. American Petroleum Inst. (Benzene), 448 U.S. 607, 646 (1980) (plurality opinion) (holding that an OSHA statute, if interpreted broadly, would be a sweeping and unconstitutional delegation of power).

51 See 15 U.S.C. § 78j(b) (1988) (proscribing the use or employment, "in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

52 See 47 U.S.C. § 307(a) (1988) (prescribing that the Federal Communications Commission shall grant broadcast licenses to applicants "if public convenience, interest, or necessity will be served thereby").

53 See 21 U.S.C. § 41 (1988) (forbidding the importation of "any merchandise as tea which is inferior in purity, quality, and fitness for consumption to the standards" set by the Secretary of Health and Human Services).


55 The problem with the Goodness and Niceness Commission under current law (if indeed there is a problem) would be that it had been delegated too much of Congress's power in one fell swoop. Modern law, in other words, will permit Congress to create a set of miniature Goodness and Niceness Commissions, no one of which has authority over all aspects of life, but would likely balk at a single agency exercising unconstrained legislative authority over too broad a range of subjects. See Industrial Union Dep't, AFL-CIO v. American Petroleum Inst. (Benzene), 448 U.S. 607, 646 (1980) (plurality opinion) (narrowly construing the Occupational Safety and Health Act because a broad construction would give the Secretary of Labor "unprecedented power over American industry" and would thus constitute "such a "sweeping delegation of legislative power" that it might be unconstitutional") (quoting Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935)).

56 488 U.S. 361 (1980).

57 Id. at 372.

58 David Schoenbrod has documented that President Reagan never vetoed a bill on nondelegation grounds nor did his Justice Department ever oppose such legislation. See David Schoenbrod, How the Reagan Administration Trivialized Separation of Powers (and Shot Itself in the Foot), 57 GEO. WASH. L. REV. 459, 464-65 (1989). I have confirmed that this same fact is true of the Bush administration through my own recollections and those of several Bush administration officials and by consulting published opinions of the Office of Legal Counsel.

59 U.S. CONST. art. II, § 1, cl. 1.

Other clauses of the Constitution, such as the requirement that the President "take Care that the Laws be faithfully executed,"61 assume and constrain this power to execute the laws,62 but the Article II Vesting Clause is the constitutional source of this power — just as the Article III Vesting Clause is the constitutional source of the federal judiciary's power to decide cases.63

Significantly, that power to execute the laws is vested, not in the executive department of the national government, but in "a President of the United States of America."64 The Constitution thus creates a unitary executive. Any plausible theory of the federal executive power must acknowledge and account for this vesting of the executive power in the person of the President.

Of course, the President cannot be expected personally to execute all laws. Congress, pursuant to its power to make all laws "necessary and proper for carrying into Execution" the national government's powers, can create administrative machinery to assist the President in carrying out legislatively prescribed tasks. But if a statute vests discretionary authority directly in an agency official (as do most regulatory statutes) rather than in the President, the Article II Vesting Clause seems to require that such discretionary authority be subject to the President's control.65

This model of presidential power is not without its critics. Indeed, most contemporary scholars believe that Congress may vest discretionary authority in subordinate officers free from direct presidential control,66 and early American history and practice reflect this view to a considerable extent.67 Nonetheless, the Vesting Clause inescapably vests "the executive Power" directly and solely in the person of the President. Accordingly, scholars sometimes deny that the Article II Vesting Clause is a grant of power to the President to execute the laws,68 but none has yet adequately rebutted the compelling textual and structural arguments for reading the Vesting Clause as a grant of power69 — a grant of power specifically and exclusively to "a President of the United States."

Thus, the important question is what form the President's power of control over subordinates must take in order to ensure a constitutionally unitary executive. There are two evident possibilities. First, the President might be thought to have the power personally to make all discretionary decisions involving the execution of the laws. On this understanding, the President can step into the shoes of any subordinate and directly exercise that subordinate's statutory powers.70 Second, one might think that, although the President cannot directly exercise power vested by statute in another official, any action by that subordinate contrary to presidential instructions is void.71 Either alternative is plausible, though the latter is perhaps more consistent with Congress's power under the Sweeping Clause to structure the executive department.72

69 See Lessig & Sunstein, supra note 66, at 40–42; McGarity, supra note 66, at 456; Rosenberg, supra note 67, at 1209.
60 Steve Calabresi has recently formulated and marshalled these arguments. See Calabresi, supra note 63, at 4–21; Steven G. Calabresi, The Trinity of Powers and the Lessig/Sunstein Heresy passim (March 6, 1994) (unpublished manuscript, on file with the Harvard Law School Library).
61 See Calabresi & Rhodes, supra note 60, at 1198 n.221.
63 U.S. CONST. art. II, § 3, cl. 1.
64 The qualifier "discretionary" is important. If a statute requires a ministerial act, such that a writ of mandamus would properly lie to compel its performance, it does not matter in whom the statute vests power. See Kendall v. United States, 37 U.S. (12 Pet.) 524, 610–13 (1838).
65 See, e.g., Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 AM. U. L. REV. 443, 455–72 (1987) (arguing that Congress "may provide that the President may not substitute his judgment . . . for that of the official to whom Congress has delegated decisionmaking power"); cf. Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 44 COLUM. L. REV. 1, 53 (1994) (claiming that, under an originalist interpretation of the Constitution, "Congress has wide discretion to vest . . . [administrative powers] in officers operating under or beyond the plenary power of the President").
68 The executive power, unlike the legislative and judicial powers, has always been understood to be delegable by the President. See Mistretta v. United States, 488 U.S. 361, 424–25 (1988) (Scalia, J., dissenting); 2 ANNALS OF CONG. 712 (1792) ("[i]t is of the nature of Executive power to be transferrable to subordinate officers; but Legislative authority is incommunicable, and cannot be transferred.") (statement of Representative Findley). Accordingly, if the President can directly exercise all powers vested by statute in executive officials, the President can presumably delegate any such power that is subject to a statute. Judicial review over authority to promulgate standards for workplace safety in the Secretary of Labor, the President...
Congress and the President have fought hard in recent years over control of the federal administrative machinery, and the courts have adjudicated such disputes in some high-profile cases. 73 Significantly, however, neither of the two possible constitutional mechanisms of presidential control has played a role in those battles. No modern judicial decision specifically addresses the President's power either directly to make all discretionary decisions within the executive department or to nullify the actions of insubordinate subordinates. Instead, debate has focused almost exclusively on whether and when the President must have unlimited power to remove subordinate executive officials. That is an interesting and important question, but it does not address the central issue concerning the executive power. Even if the President has a constitutionally unlimited power to remove certain executive officials, that power alone does not satisfy the Article II Vesting Clause. If an official exercises power contrary to the President's directives and is then removed, one must still determine whether the official's exercise of power is legally valid. If the answer is "no," then the President necessarily has the power to nullify discretionary actions of subordinates, and removal is therefore not the President's sole power of control. If the answer is "yes," then the insubordinate ex-official will have effectively exercised executive power contrary to the President's wishes, which contravenes the vesting of that power in the President. A presidential removal power, even an unlimited removal power, is thus either constitutionally superfluous or constitutionally inadequate. 74 Congress, the President, and the courts could, on this understanding, personally assume that power and then delegate it to the Secretary of Defense. Perhaps this is the correct view of the President's power, but it seems more plausible to suppose that Congress can determine which subordinate officials, if any, are permitted to exercise delegated executive power. See Geoffrey P. Miller, The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation, 15 CARDOZO L. REV. 201, 205 (1993). On this supposition, if a statute vests power to promulgate workplace standards in the Secretary of Labor, the President cannot personally promulgate such standards without obtaining the Secretary's consent to an officer's appointment, it must also consent to that officer's removal. supra note 41

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power does not ensure compliance with the Article II Vesting Clause, any such inference of a constitutionally based presidential removal power seems hard to justify. 73 See 1 ANNALS OF CONG. 384-412, 473-608, 614-31, 633-39 (1789). Should this fact give pause to advocates of the unitary executive? Probably, although the framers' silence is not decisive in the face of the textual and structural arguments for presidentialism. See supra note 15. If a statute vests power to promulgate workplace standards in the Secretary of Labor, the President cannot personally promulgate such standards without obtaining the Secretary's consent to an officer's appointment, it must also consent to that officer's removal. supra note 41

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opinion of the Office of Legal Counsel from the Reagan-Bush era have sometimes insisted that congressional attempts to place executive authority beyond presidential supervision are unconstitutional, 78 but neither President Reagan nor President Bush ever made either of the two plausible conceptions of
the unitary executive the focal point of a separation of powers dispute. The unitary executive has met its fate almost as meekly as have the principles of enumerated powers and nondelegation.

D. The Death of the Independent Judiciary

Article III provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."79 The judges of all such federal courts are constitutionally guaranteed tenure during good behavior as well as assurance that their salaries will not be diminished during their time in office.80 One of the principal functions of administrative agencies is to adjudicate disputes, yet "administrative adjudicators plainly lack the essential attributes that Article III requires of any decisionmaker invested with 'the judicial Power of the United States.'"81 Is adjudication by administrative agencies therefore another instance of abandonment of a fundamental constitutional principle?

Maybe. Administrative adjudication is problematic only if it must be considered an exercise of judicial power. But an activity is not exclusively judicial merely because it is adjudicative — that is, because it involves the application of legal standards to particular facts. Much adjudicative activity by executive officials — such as granting or denying benefits under entitlement statutes is execution of the laws by any rational standard,82 though it also fits comfortably within the concept of the judicial power if conducted by judicial officers.83 This overlap between the executive and judicial functions is not surprising; under many pre-American conceptions of separation of powers, the judicial power was treated as an aspect of the executive power.84

Agency adjudication is therefore constitutionally permissible under Article III as long as the activity in question can fairly fit the definition of executive power, even if it also fairly fits the definition of judicial power. Some forms of adjudication, however, are quintessentially judicial. The conviction of a defendant under the criminal law, for example, is surely something that requires the exercise of judicial rather than executive power. Although it is difficult to identify those activities that are strictly judicial in the constitutional sense, perhaps Justice Curtis had the right answer in Murray's Lessee v. Hoboken Land & Improvement Co.85 when he suggested that the Article III inquiry merges with questions of due process: if the government is depriving a citizen of "life, liberty, or property,"86 it generally must do so by judicial process, which in the federal system requires an Article III court;87 but if it is denying a citizen (to use discredited but useful language) a mere privilege, it can do so by purely executive action. Wherever the line is drawn, however, at least some modern administrative adjudication undoubtedly falls squarely on the judicial side. Most notably, the imposition of a civil penalty or fine is very hard to distinguish from the imposition of a criminal sentence (especially when the criminal sentence is itself a fine). If the latter is judicial, it is difficult to see why the former is not as well.

Some scholars believe that administrative adjudication is constitutionally permissible as long as the administrative decisions are subject to Article III appellate court review that is "adequately searching"88 and "meaningful."89 And there's the rub. An agency's interpretation of a statute that it administers receives considerable deference under current law.90 More fundamentally, agency fact-finding is generally subject to deferential review under numerous statutes that expressly require courts to affirm agency factual conclusions that are supported by "substantial evidence."91 This kind of deferential review arguably fails to satisfy Article III. Article III certainly would not be satisfied if Congress provided for judicial review but ordered the courts to affirm the agency no matter what. That would effectively vest the judicial power either in the agency or in Congress. There is no reason to think that it is any different if Congress instead simply orders courts to put a thumb (or perhaps two forearms) on the

79 U.S. Const. art. III, § 1.
80 See id.
83 See Freytag, 111 S. Ct. at 2655; Murray's Lessee, 59 U.S. at 284.
84 See REIDISH, supra note 49, ch. 5, at 9-11 discussing Locke and Montesquieu.
85 59 U.S. (18 How.) 272 (1855).
86 U.S. Const. amend. V.
87 Legislation that does not require executive and judicial adherence to principles of due process is not "proper" under the Sweeping Clause and thus would have been unconstitutional even before ratification of the Fifth Amendment in 1791. See Lawson & Granger, supra note 22, at 320-30.
agency's side of the scale. I do not make this claim with full confidence (and thus do not emphasize the Reagan and Bush administrations' failure to advance it), but it seems to me that Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as "judicial" activity. Much of the modern administrative state passes this test, but much of it fails as well.

E. The Death of Separation of Powers

The constitutional separation of powers is a means to safeguard the liberty of the people. In Madison's famous words, "[t]he 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." The destruction of this principle of separation of powers is perhaps the crowning jewel of the modern administrative revolution. Administrative agencies routinely combine all three governmental functions in the same body, and even in the same people within that body.

Consider the typical enforcement activities of a typical federal agency — for example, of the Federal Trade Commission. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.

This is probably the most jarring way in which the administrative state departs from the Constitution, and it typically does not even raise eyebrows. The post-New Deal Supreme Court has never seriously questioned the constitutionality of this combination of functions in agencies. Nor, to the best of my knowledge, did Presidents Reagan or Bush ever veto or object to legislation on this ground.

II. What Is to Be Done?

The actual structure and operation of the national government today has virtually nothing to do with the Constitution. There is no reasonable prospect that this circumstance will significantly improve in the foreseeable future. If one is not prepared (as I am) to hold fast to the Constitution though the heavens may fall, what is one supposed to do with that knowledge?

One option, of course, is to argue directly that the Constitution, properly interpreted in accordance with its original public meaning, is actually flexible enough to accommodate the modern administrative state. But although some of the claims I make in Part I with respect to Articles II and III may ultimately prove to be wrong in some important respects, the most fundamental constitutional problems with modern administrative governance — unlimited federal power, rampant delegations of legislative authority, and the combination of functions in administrators — are not even remotely close cases. The Commerce Clause does not give Congress carte blanche to structure the government any way it chooses.

99 See supra p. 1234.
100 Although, as Lawrence Lessig and Cass Sunstein point out, the Sweeping Clause gives Congress substantial power to control the manner in which the executive department executes the laws, see Lessig & Sunstein, supra note 66, at 66-69, that power is limited by the Sweeping Clause's terms. Congress is permitted to create a particular governmental structure if, but only if, other constitutional provisions or background understandings establish that such a structure conforms to a "proper" conception of separation of powers. See Lawson & Granger, supra note 71, at 293-342; see also Lessig & Sunstein, supra note 66, at 67 n.218, 69 (noting that there are constitutional limits on Congress's power under the Sweeping Clause). Thus, the scope of Congress's power to structure the national government depends largely on the extent to which the Vesting Clauses of Articles II and III do or do not grant power to the President and the federal courts, respectively — and thus do or do not leave governmental powers unallocated by the constitutional text. Accordingly, Professors Lessig and Sunstein's conclusion that "the framers wanted to constitutionalize just some of the array of power a constitution-maker must allocate, and as for the rest, the framers intended Congress (and posteriority) to control as it saw fit," id. at 1554.
A second option is to insist that the administrative state can be reconciled with the Constitution if only we reject the methodology of original public meaning. I cannot enter here into a discussion of interpretative theory, but for those of us who believe that “a dash of salt” refers to some identifiable, real-world quantity of salt, 100 originalist interpretivism is not simply one method of interpretation among many — it is the only method that is suited to discovering the actual meaning of the relevant text. 101

A third option, pursued at length by Bruce Ackerman, is to argue that the Constitution has been validly amended, through means other than the formal process of Article V, in a fashion that constitutionalizes the administrative state. 102 Professor Ackerman claims that the

100 See supra note 68.
101 See supra note 1.
102 See ACKERMAN, supra note 3, at 34-57; Bruce Ackerman, Constitutional Politics/ConstitutionalYSTICK.
Those who believe in some form of precedent have the fifth option, ingeniously advanced in a recent manuscript by Peter McCutchen, of seeking "a form of constitutional damage control." According to McCutchen, the administrative state is here to stay, and even a very weak theory of precedent ratifies this result. But our goal, his theory continues, should be to approximate the "first-best" world as nearly as we can from within a state of constitutional disequilibrium. As McCutchen puts it:

Where unconstitutional institutions are allowed to stand based on a theory of precedent, the Court should allow (or even require) the creation of compensating institutions that seek to move back toward the constitutional equilibrium. The Court should allow such institutions even where the compensating institutions themselves would have been unconstitutional if considered standing alone.

For example, the legislative veto, standing alone, is plainly unconstitutional because it violates the Article I presentment requirement. But the legislative veto helps compensate for widespread, unconstitutional delegations to agencies. A first-best world would have neither delegations nor legislative vetoes, but a world with both delegations and legislative vetoes is closer to the correct constitutional "baseline" than is a world with only delegations.

If there is any proper role for precedent in constitutional theory, McCutchen is probably right: if an incorrect precedent creates a constitutional disequilibrium, it is foolish to proceed as though one were still in an equilibrium state. As discussed above, however, I do not believe that there is any proper role for horizontal precedent in constitutional theory.

There remains a sixth option: acknowledge openly and honestly, as did some of the architects of the New Deal, that one cannot have allegiance both to the administrative state and to the Constitution. If, however, one then further follows the New Deal architects in choosing the administrative state over the Constitution, one must also acknowledge that all constitutional discourse is thereby rendered problematic. The Constitution was a carefully integrated document, which contains no severability clause. It makes no sense to agonize over the correct constitutional application, for example, the Appointments Clause, except as a matter of normative political theory, simply is not the Constitution. One can certainly take bits and pieces of the Constitution and incorporate them into a new, hypothetical document, but nothing is fostered other than intellectual confusion by calling that new document the Constitution.

Modern champions of the administrative state, however, seem loathe to abandon the sheltering language of constitutionalism. But tactical considerations aside, it is not at all clear why this is so. Perhaps instead of assuming that the label "unconstitutional" should carry normative weight, the constitutional problems of the administrative state can lead us to ask whether it should carry any weight — with judges or anyone else. After all, the moral relevance of the Constitution is hardly self-evident.
And at that point, the humble lawyer must plead incompetence. Questions about the Constitution’s normative significance, as with all questions about how people ought to behave, are distinctively within the domain of moral theory. A legal scholar qua legal scholar can tell us, as a factual matter, that one must choose between the Constitution and the administrative state. He or she can tell us that the architects of the New Deal chose the administrative state and that that choice has been accepted by all institutions of government and by the electorate. But only the best of moral philosophers can tell us which choice is correct.

117 Political candidates seeking office typically do not call for abolishing administrative government in the name of the Constitution, which suggests that such a platform probably would not garner a large percentage of the popular vote.

Our Subversive Founders

A warning label on the Federalist Papers? It's not such a crazy idea.

By Fred Schwarz

Recently my colleague Jay Nordlinger wrote about a new edition of the Federalist Papers that comes equipped with a disclaimer for unwary readers:

This book is a product of its time and does not reflect the same values as it would if it were written today. Parents might wish to discuss with their children how views on race, gender, sexuality, ethnicity, and interpersonal relations have changed since this book was written before allowing them to read this classic work.

As the reader who tipped Jay off writes, “I will be rereading this work very carefully — it seems that the first few times through I’ve completely missed the sex!” To be sure, the Federalist Papers were written in the 1780s and embody the customs and beliefs of the times. “Man” is used generically to mean “person,” and the existence of slavery, while not endorsed, is accepted as a given (among other things, slavery was still legal in New York, whose citizens the papers were addressed to). If that bothers you, and your kids are sensitive and easily influenced, it might be a good idea to explain these points beforehand — subtly stressing the “sexuality” part if you want them to pay close attention.

Yet the warning is not as overblown as it seems, because the Federalist Papers do, in fact, contain messages that, if taken seriously by impressionable youths, could upset the very basis on which our society is founded. Consider, for example, this passage from the 23rd Federalist about the role of the federal government:

The principal purposes to be answered by union are these — the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.

Nothing in there about redistribution of wealth, insulating houses, selling insurance, running car companies, or making kids eat their vegetables. Imagine the mischief this antiquated line of thought could inspire!
Then there are these extracts, from the 32nd . . .

As the plan of the convention aims only at a partial union or consolidation, the State
governments would clearly retain all the rights of sovereignty which they before had,
and which were not, by that act, exclusively delegated to the United States.

. . . and the 33rd:

If the federal government should overpass the just bounds of its authority and make a
tyrranical use of its powers, the people, whose creature it is, must appeal to the
standard they have formed and take such measures to redress the injury done to the
Constitution as the exigency may suggest and prudence justify. . . .

It is said that the laws of the Union are to be the supreme law of the land. . . . But it
will not follow from this doctrine that acts of the larger society [i.e. the Union] which
are not pursuant to its constitutional powers, but which are invasions of the residuary
authorities of the smaller societies [i.e. the states], will become the supreme law of the
land. These will be merely acts of usurpation, and will deserve to be treated as such.

A federal government with specified, limited powers — and a populace that treats a violation of these
limits as usurpation! I need hardly explain the chaos that would result if Americans took this outdated
notion to heart.

Yet another troublesome anachronism is found in the 41st:

It has been urged and echoed that the power “to lay and collect taxes, duties, imposts,
and excises, to pay the debts, and provide for the common defence and general
welfare of the United States,” amounts to an unlimited commission to exercise every
power which may be alleged to be necessary for the common defence or general
welfare. No stronger proof could be given of the distress under which these writers
labour for objections, than their stooping to such a misconstruction.

The 18th century was a simpler time. Nowadays we live in a complicated world with many problems,
and who better than the federal government to solve them all? That’s why enlightened modern judges
interpret the General Welfare Clause to give Congress virtually unlimited power to do whatever it likes.
Students should be cautioned in advance against swallowing Hamilton’s vigorously stated but naïve
argument.

The 57th Federalist yields still more material that is distressing to modern sensibilities:
The House of Representatives . . . can make no law which will not have its full operation on themselves and their friends, as well as on the great mass of the society. . . . If it be asked, what is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? I answer: the genius of the whole system; the nature of just and constitutional laws; and above all, the vigilant and manly spirit which actuates the people of America, a spirit which nourishes freedom, and in return is nourished by it.

If this spirit shall ever be so far debased as to tolerate a law not obligatory on the legislature, as well as on the people, the people will be prepared to tolerate any thing but liberty.

The Founders didn’t understand that Congress does very important work — work that must not be hamstrung with rules that govern hiring practices, working conditions, affirmative action, freedom of information, and various other matters. Private citizens and businesses, on the other hand, being less vital to the nation’s well-being, can be freely regulated with little or no cost. Anyone who studies American government must be made to grasp this crucial distinction.

Strangest of all to modern ears is this passage, from the 81st, which summarizes and then refutes one objection to the proposed Constitution:

“The authority [opponents say] of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the SPIRIT of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. . . . the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless.” This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact. . . . there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution . . .

Okay, now they’re getting ridiculous. Judges should be restricted to following a bunch of dumb old words written hundreds of years ago, instead of simply ordering what they know is best for the country? The publisher of this edition had it right — children need to be carefully warned against such dangerous thoughts.

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