

# The Political Theory Of The Framers *[Draft]*

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### ABOUT THIS DOCUMENT

This article is a much extended version of a three-page section in my book **THE 21ST CENTURY CONSTITUTION**. It was trimmed for reasons of space. This article is, in essence, a synopsis of the arguments made in *The Federalist* for the Constitution, the political classic written in defense of the Constitution. Because *The Federalist* is difficult to read, and fairly long, I digested its arguments into a more condensed and understandable form.

About 80% of the way through writing this, I realized that the section was too lengthy, so I wasn't going to be able to include it in the book. I stopped working on it. In particular, some of the formatting, such as bold and italic, is not what it should be. Consequently, this article is currently in draft form, in a pre-edited state. One day when I have more time, I'll do the necessary polishing, etc. In the meantime, I think it may be useful for many people, so I'm making it available.

This document is especially valuable for the analysis on pp. 32-43.

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*The Defective Articles of Confederation (our first Constitution)*

The Framers of our Constitution were faced with a decaying nation. They realized that their problems resulted from a defective constitutional structure, **“a system so radically vicious and unsound, as to admit not of amendment but by an entire change in its leading features and characters.”**<sup>1</sup> They were also aware of the significance of this problem. As Hamilton stated, **“the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.”**<sup>2</sup> The Framers knew that their constitution had to be re-written, but they also knew that the short-term interests of those in power would interfere with the national interest:

Happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good. But this is a thing more ardently to be wished than seriously to be expected. The plan offered to our deliberations affects too many particular interests, innovates upon too many local institutions, not to involve in its discussion a variety of objects foreign to its merits, and of views, passions, and prejudices little favorable to the discovery of truth.<sup>3</sup>

The other authors of *The Federalist* tried to impress upon the people of the magnitude of the decision they were about to make, and to strictly scrutinize the claims of the special interests who wished to obstruct change, and the arguments of those who favored change. As Jay stated, **“WHEN the people of America reflect that they are now called upon to decide a question, which, in its consequences, must prove one of the most important that ever engaged their attention, the propriety of their taking a very comprehensive, as well as a very serious, view of it, will be evident.”**<sup>4</sup>

So serious were the problems that a Federal Convention was called to amend the Articles of Confederation. The convention opened on May 29, 1787 with a speech by Governor Randolph of Virginia, which articulated the problems with the Articles. According to notes taken by McHenry, **“He observed that the confederation fulfilled *none* of the objects for which it was framed. 1st. It does not provide against foreign invasions. 2dly. It does not secure harmony to the States. 3d. It is incapable of producing certain blessings to the States. 4. it cannot defend itself against encroachments. 5th. It is not superior to State constitutions.”**<sup>5</sup> Randolph then specified the problems with the existing constitution:

1st It does not provide against foreign invasion.

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<sup>1</sup> *Federalist* 22, Hamilton

<sup>2</sup> *Federalist* 1

<sup>3</sup> *Federalist* 1

<sup>4</sup> *Federalist* 2

<sup>5</sup> *Records of the Federal Convention*, Farrand (RFC) V. 1, p. 24

**If a State acts against a foreign power contrary to the laws of nations or violates a treaty, it cannot punish that State, or compel its obedience to the treaty.** It can only leave the offending State to the operations of the offended power. It therefore cannot prevent a war. . . . A State may encroach on foreign possessions in its neighbourhood and Congress cannot prevent it. . . . None of the judges in the several States under the obligation of an oath to support the confederation, in which view this writing will be made to yield to State constitutions. . . . **Imbecility of the Confederation equally conspicuous when called upon to support a war. . . . The States in arrears to the federal treasury . . . Nothing short of a regular military force will answer the end of war, and this only to be created and supported by money.**

2. It does not secure harmony to the States.

It cannot preserve the particular States against seditions within themselves or combinations against each other. . . . **No provision to prevent the States breaking out into war. . . .**

3. Incapable to produce certain blessings.

**The benefits of which we are singly incapable cannot be produced by the union.** . . . Under this head may be considered the establishment of great national works — the improvement of inland navigation — agriculture — manufactures — a freer intercourse among the citizens.

4. It cannot defend itself against encroachments.

**. . . In every State assembly there has been a party opposed to federal measures. The States have been therefore delinquent.** To What expedient can congress resort, to compel delinquent States to do what is right. If force, this force must be drawn from the States, and the States may or may not furnish it.

5. Inferior to State constitutions.

State constitutions formed at an early period of the war, and by persons elected by the people for that purpose. . . . The confederation was formed long after this, and had its ratification not by any special appointment from the people, but from the several assemblies. **No judge will say that the confederation is paramount to a State constitution.**<sup>6</sup>

Here Randolph sounded the main themes. The Articles of Confederation did not *unite* the states. Consequently, America was subject to attack from foreign powers. Because the States were not obliged to contribute to the National Government, and there was no way to force them

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<sup>6</sup> RFC V. 1, May 29, 1991., p. 24-26

to pay, some States decided not to contribute. And, because there was no national power, it was difficult, if not impossible, to accomplish those goals only a national government would make possible. Randolph then went on to say, **“Thus we see that the confederation is incompetent to any one object for which it was instituted. The framers of it were wise and great men; but . . . [n]one of those vices that have since discovered themselves were apprehended.”**<sup>7</sup> Here Randolph asserted the obvious. It was impossible to expect men to be able to predict the future; thus, it was impossible for a Constitution to be good for all time, because times change. And considering the historical circumstances, the existing Constitution was *necessarily* flawed. Why? Because the States were formed out of colonies, and each State had its own separate form of government. Thus, the politicians in every state were jealous of their power, and were not liable to give it up. Thus, a Constitution had to give power to the States — more power than they were due, as it turned out. Randolph recognized this: “. . . perhaps nothing better could be obtained from the jealousy of the states with regard to their sovereignty.”<sup>8</sup>

Due to this historical background, Hamilton, Madison, and Jay had to write *The Federalist*, and demonstrate to the people that they were living under a defective political system. *The Federalist* attempted to enumerate these defects, of which Randolph had given only a partial listing. For example, legislation by 13 different States was unnecessarily *duplicative*, and unnecessarily *expensive*:

[T]he 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 person . . . 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 State, and will not have to sit in any proportion as long as they have heretofore done.<sup>9</sup>

The Articles had produced division; the Articles were inefficient; and the Articles produced economic stagnation:

[T]here are material imperfections in our national system, and . . . something is necessary to be done to rescue us from impending anarchy. The facts that support this opinion are no longer objects of speculation. They have forced themselves upon the sensibility of the people at large, and have at length extorted from those, whose mistaken policy has had the principal share in precipitating the extremity at which we are arrived, a reluctant confession of the reality of those defects in the

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<sup>7</sup> RFC V. 1, May 29, 1991., p. 24-26

<sup>8</sup> RFC v. 1, pp. 18-19

<sup>9</sup> *Federalist* 84, Hamilton

scheme of our federal government, which have been long pointed out and regretted by the intelligent friends of the Union. . . .

We may indeed with propriety be said to have reached almost the last stage of national humiliation. . . . These are the subjects of constant and unblushing violation. Do we owe debts to foreigners and to our own citizens contracted in a time of imminent peril for the preservation of our political existence? These remain without any proper or satisfactory provision for their discharge. . . . The price of improved land in most parts of the country is much lower than can be accounted for by the quantity of waste land at market, and can only be fully explained by that want of private and public confidence, which are so alarmingly prevalent among all ranks, and which have a direct tendency to depreciate property of every kind . . . .<sup>10</sup>

Hamilton began by focusing on the economic problems with the country. These resulted from a set of inadequate laws passed because the laws were not passed for *people*, but for *states*:

The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. . . . the United States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either, by regulations extending to the individual citizens of America. The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option. . . .

The measures of the Union have not been executed; the delinquencies of the States have . . . arrested all the wheels of the national government, and brought them to an awful stand. Congress at this time scarcely possess the means of keeping up the forms of administration, till the States can have time to agree upon a more substantial substitute for the present shadow of a federal government. Things did not come to this desperate extremity at once. The causes which have been specified produced at first only unequal and disproportionate degrees of compliance with the requisitions of the Union. The greater deficiencies of some States furnished the pretext of example and the temptation of interest to the complying, or to the least delinquent States. Why should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the common burden? These were suggestions which human selfishness could not withstand, and which even speculative men, who looked forward to remote consequences, could not, without hesitation, combat.<sup>11</sup>

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<sup>10</sup> *Federalist* 15

<sup>11</sup> *Federalist* 15

Due to their focus on their short-term self-interest, some states did not pay the national government what they owed. And, because State A was delinquent, State B said, “Why should we cooperate?” The Framers realized that it was useless to ask States to make voluntary contributions to the national welfare. They had to be *compelled* to make contributions. Without a penalty for disobedience, laws were for naught:

Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.<sup>12</sup>

But there was no sanction in the Articles of Confederation:

The United States, as now composed, [has] no powers to exact obedience, or punish disobedience to the resolutions, either by pecuniary mulcts, by a suspension or divestiture of privileges, or by any other constitutional mode. . . . the United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws.<sup>13</sup>

In a grouping of confederated states, where no formal constitutional sanctions were provided, punishments would not be *civil*, but *military*:

In an association where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war; and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.<sup>14</sup>

In a grouping of confederated states, the members would do what they wanted to do. There would be no uniform standard that all would be required to comply with; rather, each State would set its own standards:

The rulers of the respective members, whether they have a constitutional right to do it or not, will undertake to judge of the propriety of the measures themselves. They will consider the conformity of the thing proposed or required to their immediate interests or aims; the momentary conveniences or inconveniences that would attend its adoption. All this will be done . . . without that knowledge of national circumstances and reasons of state, which is essential to a right judgment,

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<sup>12</sup> *Federalist* 15

<sup>13</sup> *Federalist* 21

<sup>14</sup> *Federalist* 15

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and with that strong predilection in favor of local objects, which can hardly fail to mislead the decision.<sup>15</sup>

But obviously, the same people who benefited from the problem would be the same people to oppose a solution for the problem:

It is a singular instance of the capriciousness of the human mind, that after all the admonitions we have had from experience on this head, there should still be found men who object to the new Constitution, for deviating from a principle which has been found the bane of the old, and which is in itself evidently incompatible with the idea of GOVERNMENT. . .

**[F]acts, too stubborn to be resisted, have produced a species of general assent to the abstract proposition that there exist material defects in our national system;** but the usefulness of the concession, on the part of the old adversaries of federal measures, is destroyed by a strenuous opposition to a remedy, upon the only principles that can give it a chance of success. **While they admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy.** They seem still to aim at things repugnant and irreconcilable; at an augmentation of federal authority, without a diminution of State authority; at sovereignty in the Union, and complete independence in the members. **They still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio*.** This renders a full display of the principal defects of the Confederation necessary, in order to show that **the evils we experience do not proceed from minute or partial imperfections, but from fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.**<sup>16</sup>

To maintain this attitude against substantive change in the face of reason was to court disaster:

This is the melancholy situation to which we have been brought by those very maxims and councils which would now deter us from adopting the proposed Constitution; and which, not content with having conducted us to the brink of a precipice, seem resolved to plunge us into the abyss that awaits us below. Here, my countrymen, impelled by every motive that ought to influence an enlightened people, let us make a firm stand for our safety, our tranquillity, our dignity, our reputation. Let us at last break the fatal charm which has too long seduced us from the paths of felicity and prosperity.<sup>17</sup>

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<sup>15</sup> *Federalist* 15

<sup>16</sup> *Federalist* 15

<sup>17</sup> *Federalist* 15

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After presenting a important doctor/patient analogy, “[t]o form a safe and satisfactory judgment of the proper remedy, it is absolutely necessary that we should be well acquainted with the extent and the malignity of the disease,”<sup>18</sup> Hamilton went on to note other problems with the Articles:

A circumstance which crowns the defects of the Confederation remains yet to be mentioned,—the want of a judiciary power. To produce uniformity . . . [laws] ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. . . . To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

**This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. . . . The treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?**<sup>19</sup>

Thus, a Supreme Court would be necessary to bring order to the determinations of the Nation, by binding the States with its decisions.

But how could a government so defective be adopted in the first place? The Articles, after all, were not adopted hastily. They were first proposed in 1777, but did not go into effect until 1781, when Maryland became the last state to ratify them.<sup>20</sup> The Articles were not ratified by the *people*, but by the *states*. One of the reasons the Articles were so inadequate is that the people who were bound by them were not consulted. Minority rule produced the Articles, but only *Majority* rule could produce an effective Constitution:

It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. . . . The fabric of

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<sup>18</sup> *Federalist* 21

<sup>19</sup> *Federalist* 22

<sup>20</sup> *The Anti-Federalist Papers*, p. 357.

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American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.<sup>21</sup>

To solve the problems, the people were to ratify a government which would give the government the powers it needed: “. . . **government ought to be clothed with all the powers requisite to complete execution of its trust.**”<sup>22</sup> Without a strong national government, there was little point in having a Union:

Is there not a manifest inconsistency in devolving upon the federal government the care of the general defence, and leaving in the State governments the effective powers by which it is to be provided for? Is not a want of co-operation the infallible consequence of such a system? And will not weakness, disorder, and undue distribution of the burdens and calamities of war, an unnecessary and intolerable increase of expense, be its natural and inevitable concomitants? . . . it is both unwise and dangerous to deny the federal government and unconfined authority, as to all those objects which are intrusted to its management. It will indeed deserve the most vigilant and careful attention of the people to see that it be modelled in such a manner as to admit of its being safely vested with the requisite powers. If any plan which has been, or may be, offered to our consideration, should not, upon a dispassionate inspection, be found to answer this description, it ought to be rejected. A government, the constitution of which renders it unfit to be trusted with all the powers which a free people ought to delegate to any government, would be an unsafe and improper depository of the NATIONAL INTERESTS.<sup>23</sup>

*The New Constitution to Cure the Prisoners' Dilemma Disease*

While their arguments for unity made eminent sense, the authors of *The Federalist* had to counter an argument made by many: true, the Articles of Confederation were imperfect, but it would be impossible to create any government that can control one nation of the size and scope of the United States. The only answer, as these individuals saw it, was to divide up the United States into three or four separate Nations, each distinct and supreme within its own sphere. Though on looking back we can see that this would have been a disaster (considering the Civil War as just one example of what might have happened), certain men of the time were not similarly enlightened. But Jay, Hamilton, and Madison were intuitively and empirically aware of the Prisoners' Dilemma. It was truly naive to think that separating the states would preserve harmony — in fact, the contrary was true:

The history of Great Britain is the one with which we are in general the best

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<sup>21</sup> *Federalist* 22

<sup>22</sup> *Federalist* 23

<sup>23</sup> *Federalist* 23, Hamilton

acquainted, and it gives us many useful lessons. We may profit by their experience without paying the price which it cost them. Although it seems obvious to common sense that the people of such an island should be but one nation, yet we find that they were for ages divided into three, and that those three were almost constantly embroiled in quarrels and wars with one another. Notwithstanding their true interest with respect to the continental nations was really the same, yet by the arts and policy and practices of those nations, their mutual jealousies were perpetually kept inflamed, and for a long series of years they were far more inconvenient and troublesome than they were useful and assisting to each other. . . .

**Should the people of America divide themselves into three or four nations, would not the same thing happen? Would not similar jealousies arise, and be in like manner cherished? Instead of their being "joined in affection" and free from all apprehension of different "interests," envy and jealousy would soon extinguish confidence and affection, and the partial interests of each confederacy, instead of the general interests of all America, would be the only objects of their policy and pursuits. Hence, like most other bordering nations, they would always be either involved in disputes and war, or live in the constant apprehension of them.**<sup>24</sup>

Hamilton echoed Jay's insights:

[If the] States should either be wholly disunited, or only united in partial confederacies, the subdivisions into which they might be thrown would have frequent and violent contests with each other. To presume a want of motives for such contests as an argument against their existence, would be to forget that men are ambitious, vindictive, and rapacious. To look for a continuation of harmony between a number of independent, unconnected sovereignties in the same neighborhood, would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.<sup>25</sup>

There were many pretexts for states to subdivide and disagree, and a disunited America would be prey to them all:

**The causes of hostility among nations are innumerable.** There are some which have a general and almost constant operation upon the collective bodies of society. Of this description are **the love of power** or the desire of preeminence and dominion--the jealousy of power, or the desire of equality and safety. . . .

There are others which have a more circumscribed though an equally operative influence within their spheres. Such are **the rivalships and competitions of commerce between commercial nations.** . . .

And there are others, not less numerous than either of the former, which

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<sup>24</sup> *Federalist* 5, Jay

<sup>25</sup> *Federalist* 6, Hamilton

take their origin entirely in **private passions**; in the attachments, enmities, interests, hopes, and fears of leading individuals in the communities of which they are members. **Men of this class, whether the favorites of a king or of a people, have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquillity to personal advantage or personal gratification.** <sup>26</sup>

And with division into separate entities would come the inevitable concomitant of such divisions, WAR:

**IT IS sometimes asked, with an air of seeming triumph, what inducements could the States have, if disunited, to make war upon each other? It would be a full answer to this question to say--precisely the same inducements which have, at different times, deluged in blood all the nations in the world.** But, unfortunately for us, the question admits of a more particular answer. There are causes of differences within our immediate contemplation, of the tendency of which, even under the restraints of a federal constitution, we have had sufficient experience to enable us to form a judgment of what might be expected if those restraints were removed.<sup>27</sup>

The unowned territory in the West would provide a prize that divided nations would fight over:

**In the wide field of Western territory, therefore, we perceive an ample theatre for hostile pretensions, without any umpire or common judge to interpose between the contending parties. To reason from the past to the future, we shall have good ground to apprehend, that the sword would sometimes be appealed to as the arbiter of their differences. . . .**

The circumstances of the dispute between Connecticut and Pennsylvania, respecting the land at Wyoming, admonish us not to be sanguine in expecting an easy accommodation of such differences. The articles of confederation obliged the parties to submit the matter to the decision of a federal court. The submission was made, and the court decided in favor of Pennsylvania. But Connecticut gave strong indications of dissatisfaction with that determination; nor did she appear to be entirely resigned to it, till, by negotiation and management, something like an equivalent was found for the loss she supposed herself to have sustained. Nothing here said is intended to convey the slightest censure on the conduct of that State. **She no doubt sincerely believed herself to have been injured by the decision; and States, like individuals, acquiesce with great reluctance in determinations to their disadvantage.**<sup>28</sup>

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<sup>26</sup> *Federalist* 6, Hamilton

<sup>27</sup> *Federalist* 7, Hamilton

<sup>28</sup> *Federalist* 7, Hamilton

And, of course, the competitive nature of trade and business would very quickly turn brother against brother, as each divided entity sought to increase its profits at the expense of the other:

**The competitions of commerce would be another fruitful source of contention. The States less favorably circumstanced would be desirous of escaping from the disadvantages of local situation, and of sharing in the advantages of their more fortunate neighbors. Each State, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent. . . .**

**[P]articular States might endeavor to secure exclusive benefits to their own citizens. The infractions of these regulations, on one side, the efforts to prevent and repel them, on the other, would naturally lead to outrages, and these to reprisals and wars.**

**The opportunities which some States would have of rendering others tributary to them by commercial regulations would be impatiently submitted to by the tributary States.** The relative situation of New York, Connecticut, and New Jersey, would afford an example of this kind. New York, from the necessities of revenue, must lay duties on her importations. A great part of these duties must be paid by the inhabitants of the two other States in the capacity of consumers of what we import. New York would neither be willing nor able to forego this advantage. Her citizens would not consent that a duty paid by them should be remitted in favor of the citizens of her neighbors; nor would it be practicable, if there were not this impediment in the way, to distinguish the customers in our own markets. **Would Connecticut and New Jersey long submit to be taxed by New York for her exclusive benefit?**<sup>29</sup>

And while all would desire to benefit from union, the States would, like the animals in the fable, seek to consume the harvest without pulling their own weight. Financial defections of State A, which may have resulted from necessity, would provide a perfect excuse for State B to likewise defect:

**[D]elinquencies in payments on the part of some of the States would result from a diversity of other causes--the real deficiency of resources; the mismanagement of their finances; accidental disorders in the management of the government; and, in addition to the rest, the reluctance with which men commonly part with money for purposes that have outlived the exigencies which produced them, and interfere with the supply of immediate wants. Delinquencies, from whatever causes, would be productive of complaints, recriminations, and quarrels. . . .**

**There is, perhaps, nothing more likely to disturb the tranquillity of nations than their being bound to mutual contributions for any common**

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<sup>29</sup> *Federalist 7*, Hamilton

**object that does not yield an equal and coincident benefit. For it is an observation, as true as it is trite, that there is nothing men differ so readily about as the payment of money.<sup>30</sup>**

Thusly formed, America would divide itself, and thus conquer itself, and be a perfect prey for America's European enemies:

**America, if not connected at all, or only by the feeble tie of a simple league, offensive and defensive, would by the operation of such jarring alliances, be gradually entangled in all the pernicious labyrinths of European politics and wars; and by the destructive contentions of the parts into which she was divided, would be likely to become a prey to the artifices and machinations of powers equally the enemies of them all. *Divide et impera* [Divide and Command] must be the motto of every nation that either hates or fears us.<sup>31</sup>**

Some contemporaries of the Framers acknowledged that these effects were possible, but said that with the rise of commerce and trade between states, people would become more unified through their business dealings, and the effect would be obliterated. Hamilton saw this argument as wholly "visionary":

[N]otwithstanding the concurring testimony of experience, in this particular, there are still to be found visionary or designing men, who stand ready to advocate the paradox of perpetual peace between the States, though dismembered and alienated from each other. The genius of republics (say they) is pacific; the spirit of commerce has a tendency to soften the manners of men, and to extinguish those inflammable humors which have so often kindled into wars. Commercial republics, like ours, will never be disposed to waste themselves in ruinous contentions with each other. They will be governed by mutual interest, and will cultivate a spirit of mutual amity and concord.

**Is it not . . . the true interest of all nations to cultivate the same benevolent and philosophic spirit? If this be their true interest, have they in fact pursued it? Has it not, on the contrary, invariably been found that momentary passions, and immediate interests, have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice?<sup>32</sup>**

The Framers knew that there was no evidence to support this view; it was nothing more than a form of "wishful thinking." This argument had been made before, and was found wanting:

**[W]e were told that breaches, by the States, of the regulations of the federal**

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<sup>30</sup> *Federalist* 7, Hamilton

<sup>31</sup> *Federalist* 7, Hamilton

<sup>32</sup> *Federalist* 6, Hamilton

**authority were not to be expected; that a sense of common interest would preside over the conduct of the respective members, and would beget a full compliance with all the constitutional requisitions of the Union. [But] . . . we shall have received further lessons from that best oracle of wisdom, experience.** It at all times betrayed an ignorance of the true springs by which human conduct is actuated, and belied the original inducements to the establishment of civil power.

**Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons.** Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number, than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity.<sup>33</sup>

The fact that the responsibility for an action would be divided up among many members increased the probability that any one individual would defect, and, since there were compelling short-term reasons for defection, it was not surprising that the States began to defect:

From this spirit it happens, that in every political association which is formed upon the principle of uniting in a common interest a number of lesser sovereignties, there will be found a kind of eccentric tendency in the subordinate or inferior orbs, by the operation of which there will be a perpetual effort in each to fly off from the common center. This tendency is not difficult to be accounted for. It has its origin in the love of power. Power controlled or abridged is almost always the rival and enemy of that power by which it is controlled or abridged. This simple proposition will teach us, how little reason there is to expect, that the persons intrusted with the administration of the affairs of the particular members of a confederacy will at all times be ready, with perfect good-humor, and an unbiased regard to the public weal, to execute the resolutions or decrees of the general authority. The reverse of this results from the constitution of human nature. . . .

**Each State, yielding to the persuasive voice of immediate interest or convenience, has successively withdrawn its support, till the frail and tottering edifice seems ready to fall upon our heads, and to crush us beneath its ruins.**<sup>34</sup>

The Framers knew that the *primary* Prisoner's Dilemma effects preventing the formation

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<sup>33</sup> *Federalist* 15, Hamilton

<sup>34</sup> *Federalist* 15, Hamilton

of a strong national government would lead to *secondary* Prisoner's Dilemma effects, the consequences of a lack of strong national government. Such a government would be wracked by internal conflict. As Madison stated, “. . . **a weak government, when not at war, is ever agitated by internal dissensions . . .**”<sup>35</sup> This situation was sure to endure where it was **“impossible to unite the public councils in reforming the known, the acknowledged, the fatal evils of the existing constitution.”**<sup>36</sup> And the consequences would be tragic indeed: **“Let us pause, my fellow-citizens, for one moment, over this melancholy and monitory lesson of history; and with the tear that drops for the calamities brought on mankind by their adverse opinions and selfish passions . . .”**<sup>37</sup>

One of the measurements of the adequacy or inadequacy of the government that was to be formed was, indeed, this ability or inability of the government to put the national interest over special, local interests:

Every one knows that **a great proportion of the errors committed by the State legislatures proceeds from the disposition of the members to sacrifice the comprehensive and permanent interest of the State, to the particular and separate views of the counties or districts in which they reside.** And if they do not sufficiently enlarge their policy to embrace the collective welfare of their particular State, how can it be imagined that they will make the aggregate prosperity of the Union, and the dignity and respectability of its government, the objects of their affections and consultations? For the same reason that the members of the State legislatures will be unlikely to attach themselves sufficiently to national objects, **the members of the federal legislature will be likely to attach themselves too much to local objects.** The States will be to the latter what counties and towns are to the former. **Measures will too often be decided according to their probable effect, not on the national prosperity and happiness, but on the prejudices, interests, and pursuits of the governments and people of the individual States. . . .**

**What is the spirit that has in general characterized the proceedings of Congress?** A perusal of their journals, as well as the candid acknowledgments of such as have had a seat in that assembly, will inform us, that the **members have but too frequently displayed the character, rather of partisans of their respective States, than of impartial guardians of a common interest;** that where on one occasion improper sacrifices have been made of local considerations, to the aggrandizement of the federal government, **the great interests of the nation have suffered on a hundred, from an undue attention to the local prejudices, interests, and views of the particular States.**<sup>38</sup>

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<sup>35</sup> *Federalist* 18, Madison

<sup>36</sup> *Federalist* 20, Madison

<sup>37</sup> *Federalist* 20, Madison

<sup>38</sup> *Federalist* 46, Madison

*The Benefits of Union*

The Framers believed, along with Hamilton that “[a] nation, without a national government, is . . . an awful spectacle.”<sup>39</sup> Madison believed that “. . . the vigor of government is essential to the security of liberty . . .”<sup>40</sup> To the Framers, the union would have very palpable benefits:

**If [foreign nations] see that our national government is efficient and well administered, our trade prudently regulated, our militia properly organized and disciplined, our resources and finances discreetly managed, our credit re-established, our people free, contented, and united, they will be much more disposed to cultivate our friendship than provoke our resentment.**<sup>41</sup>

Perhaps the primary benefit of Union in the eyes of the Framers was *financial*:

**[T]he adventurous spirit, which distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe.** They seem to be apprehensive of our too great interference in that carrying trade, which is the support of their navigation and the foundation of their naval strength. Those of them which have colonies in America look forward to what this country is capable of becoming, with painful solicitude. They foresee the dangers that may threaten their American dominions from the neighborhood of States, which have all the dispositions, and would possess all the means, requisite to the creation of a powerful marine. **Impressions of this kind will naturally indicate the policy of fostering divisions among us, and of depriving us, as far as possible, of an ACTIVE COMMERCE in our own bottoms.** This would answer the threefold purpose of preventing our interference in their navigation, of monopolizing the profits of our trade, and of clipping the wings by which we might soar to a dangerous greatness. . . .

**If we continue united, we may counteract a policy so unfriendly to our prosperity in a variety of ways. By prohibitory regulations, extending, at the same time, throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets.**<sup>42</sup>

For the Framers, superior national power would lead to superior *bargaining power* in international markets:

Suppose, for instance, we had a government in America, capable of excluding Great Britain (with whom we have at present no treaty of commerce) from all our

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<sup>39</sup> *Federalist* 85, Hamilton

<sup>40</sup> *Federalist* 39, Madison

<sup>41</sup> *Federalist* 4, Jay

<sup>42</sup> *Federalist* 11, Hamilton

ports; what would be the probable operation of this step upon her politics? Would it not enable us to negotiate, with the fairest prospect of success, for commercial privileges of the most valuable and extensive kind, in the dominions of that kingdom?

A mature consideration of the objects suggested by these questions will justify a belief that **the real disadvantages to Britain from such a state of things, conspiring with the prepossessions of a great part of the nation in favor of the America trade, and with the importunities of the West India islands, would produce a relaxation in her present system, and would let us into the enjoyment of privileges in the markets of those islands and elsewhere, from which our trade would derive the most substantial benefits.**

A further resource for influencing the conduct of European nations towards us, in this respect, would arise from the establishment of a federal navy. There can be no doubt that **the continuance of the Union under an efficient government, would put it in our power, at a period not very distant, to create a navy which, if it could not vie with those of the great maritime powers, would at least be of respectable weight if thrown into the scale of either of two contending parties.** This would be more peculiarly the case in relation to operations in the West Indies. **A few ships of the line, sent opportunely to the reinforcement of either side, would often be sufficient to decide the fate of a campaign, on the event of which interests of the greatest magnitude were suspended. . . .**

[A] situation so favorable would enable us to bargain with great advantage for commercial privileges. A price would be set not only upon our friendship, but upon our neutrality. By a steady adherence to the Union, we may hope, ere long, to become the arbiter of Europe in America, and to be able to incline the balance of European competitions in this part of the world as our interest may dictate.<sup>43</sup>

Without this increased power, we could fall prey to European “jealousy”:

**Under a vigorous national government, the natural strength and resources of the country, directed to a common interest, would baffle all the combinations of European jealousy to restrain our growth. This situation would even take away the motive to such combinations, by inducing an impracticability of success.**

**But in a state of disunion, these combinations might exist and might operate with success.** It would be in the power of the maritime nations, availing themselves of our universal impotence, to prescribe the conditions of our political existence; and as they have a common interest in being our carriers, and still more in preventing our becoming theirs, they would in all probability combine to embarrass our navigation in such a manner as would in effect destroy it, and confine us to a PASSIVE COMMERCE. **We should then be compelled to content ourselves with the first price of our commodities, and to see the**

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<sup>43</sup> *Federalist* 11, Hamilton

**profits of our trade snatched from us to enrich our enemies and persecutors. That unequalled spirit of enterprise, which signalizes the genius of the American merchants and navigators, and which is in itself in inexhaustible mine of national wealth, would be stifled and lost,** and poverty and disgrace would overspread a country which, with wisdom, might make herself the admiration and envy of the world.

**The speculative trader will . . . will acknowledge that the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen States without union or with partial unions.**

**A unity of commercial, as well as political, interests, can only result from a unity of government.<sup>44</sup>**

This new role for America in international markets would supplant the role of Europe as the leader in the world economy, and lead to the establishment of an American empire:

The world may politically, as well as geographically, be divided into four parts, each having a distinct set of interests. Unhappily for the other three, Europe, by her arms and by her negotiations, by force and by fraud, has, in different degrees, extended her dominion over them all. Africa, Asia, and America, have successively felt her domination. The superiority she has long maintained has tempted her to plume herself as the Mistress of the World, and to consider the rest of mankind as created for her benefit. Men admired as profound philosophers have, in direct terms, attributed to her inhabitants a physical superiority and have gravely asserted that all animals, and with them the human species, degenerate in America--that even dogs cease to bark after having breathed awhile in our atmosphere.

**Facts have too long supported these arrogant pretensions of the Europeans. It belongs to us to vindicate the honor of the human race, and to teach that assuming brother, moderation. Union will enable us to do it. Disunion will add another victim to his triumphs. Let Americans disdain to be the instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all transatlantic force or influence, and able to dictate the terms of the connection between the old and the new world!<sup>45</sup>**

To the Framers, these and other compelling advantages would be sacrificed by avoiding Union, avoiding a strong National Government, and continuing to maintain the power of the States:

**The adversaries to the plan of the convention, instead of considering in the**

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<sup>44</sup> *Federalist* 11, Hamilton

<sup>45</sup> *Federalist* 11, Hamilton

**first place what degree of power was absolutely necessary for the purposes of the federal government, have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union, as has been shown, be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States?<sup>46</sup>**

If this were to be the case, the American Revolution of 1776 would have been for naught, and the interests of *people* would be subservient to the interests of *governments*:

**Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape--that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? Is it too early for politicians to presume on our forgetting that **the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, Reject the plan.**<sup>47</sup>**

The framers recognized that there was a greater danger “resulting from a government which does not possess regular powers commensurate to its objects,”<sup>48</sup> than from a weak government: “Energy in government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws which enter into the very definition of good government.”<sup>49</sup> One of the drawbacks of strong governments, of course, was that wherever strong governments were to be found, people had to agree to abide by the rules of

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<sup>46</sup> *Federalist* 45, Madison

<sup>47</sup> *Federalist* 45, Madison

<sup>48</sup> *Federalist* 38, Madison

<sup>49</sup> *Federalist* 37, Madison

the government; and this meant agreeing to forego certain “natural rights,” by exchanging some of rights for a set of powers which could not be acquired other than by foregoing those rights. According to Jay, “**Nothing is more certain than the indispensable necessity of government, and it is equally undeniable, that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers.**”<sup>50</sup>

But this raised a problem. A strong national government may have been necessary, but under the existing, essentially *unitary* form of government under the Articles, it was too *dangerous* to give such extensive powers. A different form of government had to be found, which if also flawed, could be amended to correct their mistakes and misjudgments:

**[T]he existing Confederation is founded on principles which are fallacious; that we must consequently change this first foundation, and with it the superstructure resting upon it. . . . other confederacies which could be consulted as precedents have been vitiated by the same erroneous principles, and can therefore furnish no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued.** The most that the convention could do in such a situation, was to avoid the errors suggested by the past experience of other countries, as well as of our own; and **to provide a convenient mode of rectifying their own errors, as future experience may unfold them.**<sup>51</sup>

The Framers had the writings of Greek and Roman historians and of political theorists such as Montesquieu and Locke, the Iroquois Constitution, the unwritten Constitution of Great Britain, and the models of several State Constitutions, primarily the Massachusetts Constitution of 1780, to draw on in framing the Constitution. From the writings of these historians and political theorists, and the experience of other governments, the Framers implemented a theory that would allow a strong national government: the *separation of powers*.

#### *The Separation of Powers Principle*

In *Federalist 9*, Hamilton defined the separation of powers principle as it was contained in the proposed Constitution, and described how refinements in that principle made the *necessary* possible:

**The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal progress towards perfection in modern times. They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections**

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<sup>50</sup> *Federalist 2*, Jay

<sup>51</sup> *Federalist 37*, Madison

lessened or avoided.<sup>52</sup>

In one of the most famous essays in *The Federalist*, *Federalist 51*, Madison described how the principle would allow the requisite strength — in dividing the essential powers of government into three separate branches, and in allowing each branch a measure of independence from the others, the chances of a tyrannical government being formed would be greatly reduced:

To WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. . . .

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that **each department should have a will of its own**; and consequently should be so constituted that **the members of each should have as little agency as possible in the appointment of the members of the others**. . . .

**[T]he 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.**<sup>53</sup>

In other words, each department should not only be independent, but independent of the others for its salaries. This was not enough, however. A system of *checks and balances* had to be instituted, which allowed each one of the three branches of government, the *legislative* (the lawmakers), the *executive* (the enforcers of the law), and the *judicial* (the determinants of whether or not a law was broken) to restrict in some manner the actions of the other:

**[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack**. . . .

**Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.**<sup>54</sup>

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<sup>52</sup> *Federalist 9*, Hamilton

<sup>53</sup> *Federalist 51*, Madison

<sup>54</sup> *Federalist 51*, Madison

The Framers knew that it was not enough to rely on politicians to “do the right thing”; even the power of voting politicians out of office was not enough to secure such an essential criterion for good government. Thus, the Constitution would contain *within itself* the means of its self-preservation:

**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.<sup>55</sup>**

Thus, branch would be set against branch. Through the separation of powers, it was then possible to make those powers *confront* each other on a daily basis. Government was weakened under the *divide et impera* [divide and conquer] maxim referred to by Hamilton in *Federalist 7*. As the Framers had so carefully shown, division on a national level, under the Articles of Confederation would have been a disaster. But what was good for America, unity, was not good for America’s government. America needed a strong government, but the government needed to be weakened:

**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 powers, 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.<sup>56</sup>**

But due to the nature of each power, it was not possible for each to check each other equally. Since the legislative branch was seen to be the most powerful, it had to be subdivided as well, into a House of Representatives and Senate. And the executive power had to be given what was actually a legislative power, the *veto*, to stop “encroachments” by the legislative branch. But this veto itself had to be overrutable, to prevent undue concentration of power in the executive branch:

**[I]t is not possible to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency 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**

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<sup>55</sup> *Federalist 51*, Madison

<sup>56</sup> *Federalist 51*, Madison

**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 defence with which the executive magistrate should be armed. But perhaps it would be neither altogether safe nor alone sufficient. On ordinary occasions it might not be exerted with the requisite firmness, and on extraordinary occasions it might be perfidiously abused. May not this defect of an absolute negative be supplied by some qualified connection between this weaker department and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?<sup>57</sup>

With the principle of Separation of Powers had to go the subsidiary principle of Checks and Balances. Powers were not just separated (i.e. Congress legislates, the Supreme Court judges), they were also *divided*. For example, the power of impeachment was given to the House of Representatives, and the power of trial of those impeachments was given to the Senate. In the process of this division, however, the principle of strict separation of powers was violated, since the Congress was being given a *judicial* power. Giving the President the veto power would become a legislative power, if the Congress did not override the veto. The Framers knew this was a theoretical violation of an important principle, but they saw it as necessary, to ultimately *preserve* the Separation of Powers, by preventing any one branch from, through practice, usurping the power of another. Hamilton explained this in his defense of the impeachment power:

The first of these objections is, that the provision in question confounds legislative and judiciary authorities in the same body, in violation of that important and well-established maxim which requires a separation between the different departments of power. The true meaning of this maxim has been discussed and ascertained in another place, and has been shown to be entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected. This partial intermixture is even, in some cases, not only proper but necessary to the mutual defence of the several members of the government against each other. An absolute or qualified negative in the executive upon the acts of the legislative body, is admitted, by the ablest adepts in political science, to be an indispensable barrier against the encroachments of the latter upon the former. And it may, perhaps, with no less reason be contended, that the powers relating to impeachments are, as before intimated, an essential check in the hands of that body upon the encroachments of the executive.<sup>58</sup>

Hamilton argued that the legislative branch was the greatest threat, and that the primary

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<sup>57</sup> *Federalist* 51, Madison

<sup>58</sup> *Federalist* 66, Hamilton

purpose of the checks and balances was to check that branch:

The tendency of the legislative authority to absorb every other, has been fully displayed . . . In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.<sup>59</sup>

But the Separation of Powers principle as contained in the Constitution was different from the Massachusetts Constitution of 1780, which declared that such separation was *inviolable*. Madison didn't see inviolable separation as possible, since, in the first instance, it was sometimes difficult to tell a legislative power from an executive power:

[N]o skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces--the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.<sup>60</sup>

In the second instance, some violation was necessary if it would preserve the balance of the constitution. Montesquieu had stated that if the principle of separation of powers were violated, tyranny would result. Madison had to show that these *limited* violations of the principle, those contained in the Constitution, were both necessary and tolerable:

From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.<sup>61</sup>

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<sup>59</sup> *Federalist* 71, Hamilton

<sup>60</sup> *Federalist* 37, Madison

<sup>61</sup> *Federalist* 47, Madison

Unfortunately, Montesquieu had given contradictory information on this critical principle. On the one hand, Montesquieu had stated that complete separation of powers was desirable ("if the power of judging be not separated . . ."). On the other hand, the unwritten British Constitution which Montesquieu had praised had a *partial* intermixture of powers. Madison attempted to deal with this ambiguity, and stated that "the whole power" of one department could not be exercised by a body which held the "whole power" of another department, and went on to explain that what Montesquieu meant could only be discerned with reference to the phenomenon he was describing:

This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority. This, however is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; not administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.<sup>62</sup>

Madison showed that the State constitutions contained *specific and limited* violations of the Separation of Powers, which were necessary to prevent the amalgamation of two or more powers in one body:

The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.

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<sup>62</sup> *Federalist* 47, Madison

If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct. New Hampshire, whose constitution was the last formed, seems to have been fully aware of the impossibility and inexpediency of avoiding any mixture whatever of these departments, and has qualified the doctrine by declaring "that the legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other as the nature of a free government will admit; or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of unity and amity."

Madison then explained that the absolute separation of powers mandated in the Massachusetts Constitution of 1780 was not violated by the Constitution, since that Constitution also contained the only allowable exceptions to that principle:

The constitution of Massachusetts has observed a sufficient though less pointed caution, in expressing this fundamental article of liberty. It declares "that the legislative departments shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them." This declaration corresponds precisely with the doctrine of Montesquieu, as it has been explained, and is not in a single point violated by the plan of the convention. It goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted. The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches.<sup>63</sup>

Thus, with the Separation of Powers and Checks and Balances principles instituted in the Constitution, the integrity of the Constitution would be preserved from the actions of governmental branches seeking to enhance their power.

### *Controlling the Problem of Factions*

But the Framers did not confine themselves to checking *governments*; due to the nature of the American economic system, which consisted of a group of landowners (the "landed" interest), factory owners (the "manufacturing" interest), and the "well-born" (the "monied" interest), as well as the slave-owners, American society was divided into various classes, or *factions*. Government was a powerful tool; but in the wrong hands it could be used by the faction A to confiscate the wealth of faction B, by changing the laws to benefit A over B. In the other

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<sup>63</sup> *Federalist* 47, Madison

most famous essay of *The Federalist*, *Federalist* 10, Madison explained how the new system would solve the problems of factions:

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 the 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.

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

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves.

The diversity in the faculties of men, from which the rights or property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. **From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.**

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. **A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for preeminence 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 cooperate for their common good.** So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.<sup>64</sup>

The most obvious source of faction, and the source of faction leading to the greatest social unrest, was the division of wealth:

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<sup>64</sup> *Federalist* 10, Madison(capital emphasis supplied)

[T]he most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views.

**The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government.**<sup>65</sup>

This concern with the problems of wealth (and lack thereof) had been a recurring theme at the Convention. On June 26, Madison had stated that

In all civilized Countries the people fall into different classes . . . There will be particularly the distinction of rich and poor. . . . In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce. An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slip into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms, of a leveling spirit, as we have understood, have sufficiently appeared in a certain [quarter] to give notice of the future danger. <sup>66</sup>

On August 7, Madison reiterated this concern:

In future times a great majority of the people will not only be without landed, but any other sort of, property. These will either combine under the influence of their common situation; in which case, the rights of property & the public liberty, will not be secure in their hands . . . <sup>67</sup>

Gouverneur Morris, a delegate from Pennsylvania (who was *not* a Governor), agreed with Madison. As he stated on August 7, “[t]he time is not distant when this Country will abound with mechanics & manufacturers who will receive their bread from their employers. Will such men be the secure & faithful Guardians of liberty?”<sup>68</sup> But though Morris was concerned with the political power of the propertyless, he was also concerned with the power of people who owned a

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<sup>65</sup> *Federalist* 10, Madison

<sup>66</sup> RFC, v. 1, p. 422

<sup>67</sup> RFC, v. 2, pp. 203-04

<sup>68</sup> RFC, v. 2, p. 202

great deal of property. As he stated on July 2, "[t]he Rich will strive to establish their dominion & enslave the rest. They always did. They always will."<sup>69</sup> According to Morris, the people would not have enough information to resist the schemes of the Rich, and, since they could not communicate with each other, would be held hostage by a set of ideas spread throughout the country, which were *not designed* for their *benefit*:

[T]he people never act from reason alone. The Rich will take advantage of their passions & make these the instruments for oppressing them. The Result of the Contest will be a violent aristocracy, or a more violent despotism. The schemes of the Rich will be favored by the extent of the Country. The people in such distant parts can not communicate & act in concert. They will be the dupes of those who have more knowledge and intercourse.<sup>70</sup>

According to Morris, "[t]hey will have the same effect here as elsewhere if we do not by such a Govt. keep them within their proper sphere."<sup>71</sup> Because of the inherent conflict of interest involved between the propertyless and the many factions who owned property, no one propertyless or property-owning "special interest," or *group* of special interests, could be allowed to dominate the legislature:

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

**The apportionment of taxes on the various descriptions of property is an act which seems to require the most exact impartiality; yet there is, perhaps, no legislative act in which greater opportunity and temptation are given to a predominant party to trample on the rules of justice.** Every shilling with which they overburden the inferior number, is a shilling saved to their own

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<sup>69</sup> RFC, v. 1, p. 512

<sup>70</sup> RFC, v. 1, p. 514

<sup>71</sup> RFC, v. 1, p. 514

pockets.<sup>72</sup>

Madison completely rejected the theory that this problem (or any or the problems previously mentioned) could be solved merely by “electing the right people.” The problem was too important to leave to the chance event (and wholly *improbable* chance event) that the people would invariably and inevitably elect wise and good representatives:

It is 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.**<sup>73</sup>

Here was the crux of Madison’s view: special interests could never capture the government, because the people would vote out their representatives when that happened. If for some unknown reason they didn’t, the only adverse result would be that the administration of the government *might* be “clogged,” and that the society *might* be “convulsed.” However, special interests would be “unable” to “mask their violence” under the forms of the Constitution. Thus, the majority would be protected. But how would minorities, the creditors, the landed interest, the manufacturing interest, and the monied interest be protected from other minorities, such as debtors, or the *majority* — those without land or money? Whatever solution would be found, it was very important to preserve the “spirit and the form of popular government” to retain the legitimacy of the government, though to achieve the objective would mean *eliminating* the concept of a truly popular and representative government, since the solution would *necessitate the annihilation of the principle of majority rule*:

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**

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<sup>72</sup> *Federalist* 10, Madison

<sup>73</sup> *Federalist* 10, Madison

directed.<sup>74</sup>

Benjamin Franklin, who was representing Pennsylvania, knew that the form of the Constitution was important, to encourage immigration to America: "**[I]f [the Constitution] should betray a great partiality to the rich, [it] will not only hurt us in the esteem of the most liberal and enlightened men [in Europe], but discourage the common people from removing into this Country.**"<sup>75</sup> Thus, the government had to *appear* to be representative.

The solution, such as it was, could either go to the root of the problem, or treat the symptoms of the problem:

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.<sup>76</sup>

Democracy would not solve the problems of faction, it would make them worse:

[A] society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.

**[S]uch 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.<sup>77</sup>

Here we can see clearly that, notwithstanding the claims of our politicians and the claims of the media, establishing *democracy* was not on the agenda of the Framers of our Constitution, and is exceptionally unlikely to be on the agenda of our government, a government established under a Constitution that has eliminated the *possibility* of democracy.

Unfortunately for democracy, Madison's analysis of its inadequacy was based chiefly on the experiences of Massachusetts and Rhode Island. At the time, due to the fundamentally

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<sup>74</sup> *Federalist* 10, Madison

<sup>75</sup> RFC, v. 2, p. 249, August 10 (speaking of qualifications)

<sup>76</sup> *Federalist* 10, Madison

<sup>77</sup> *Federalist* 10, Madison

agrarian and rural nature of the States, people were tied together inexorably by very rigid bonds of occupation, point of view, and religion. The societies were homogeneous, not heterogeneous. In addition, and equally important, Massachusetts had a population of approximately 360,000 (less than that of Brooklyn today) and Rhode Island had a population of approximately 58,000.<sup>78</sup> Thus, in small, homogeneous societies, where farmers were burdened by a debt that was allowing creditors to confiscate their farms, it was no surprise that majorities (or, in the case of Shay's Rebellion, minorities who were losing their farms) were able or willing to combine to protect their interests, by passing laws creating "paper money" and "installment plans" to help ease their debt burden and save their farms. 1) A common interest, 2) a compelling interest, 3) with no real dissent, and over 4) a small area can produce what would otherwise be an enormously unlikely occurrence. However, Madison and the Framers were going to establish a government for *all* time based on the *only available evidence* at the time:

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. . . .

**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.**<sup>79</sup>

The first effect of a government in the Madisonian sense was that it would *filter* the will of the people. Decisions would not be made by the people themselves, but by their representatives. But there was a potential problem with this: **"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."**<sup>80</sup> In small districts, representatives would be able to combine people more readily. The solution for this was to create large districts, which would render politicians less able to appeal to people's short-term self-interest: **". . . 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**

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<sup>78</sup> RFC, V. 3, p. 253

<sup>79</sup> *Federalist* 10, Madison

<sup>80</sup> *Federalist* 10, Madison

**practice with success the vicious arts by which elections are too often carried . . .”<sup>81</sup>**

In this manner, Madison was able to marry the concept that “Union was necessary” with the concept that “the larger the district, the more difficult it would be for the majority would combine,” since creating a Union would radically increase the size of the area ruled by an homogeneous legal entity — that is, the United States Government:

[T]he 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. . . .

**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 country 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.<sup>82</sup>

In a large, united, country, it would be difficult, if not impossible, for the “majority” to combine against the “minority”:

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.<sup>83</sup>

There was, unfortunately, a problem with Madison’s analysis. If Madison was wrong,

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<sup>81</sup> *Federalist* 10, Madison

<sup>82</sup> *Federalist* 10, Madison, pp. 48-9

<sup>83</sup> *Federalist* 10, Madison

and if special interests *did* happen to capture the government against the interests of the majority, the majority would be *unable* to “discover their own strength” and “act in unison” to stop the problem. **Thus, if the minority interests captured the government, the majority was left with no remedy!** In the meanwhile, the minority interests were left with all the structural advantages created by the Framers to “protect” them, with none of the natural impediments to their combination such as lack of common interest, inability to communicate, and geographical dispersion that affected the majority. The final consequence would be the re-installation of the Prisoner’s Dilemma effect the Framers had so carefully argued against, where each special interest would attempt to re-write the laws to its own particular advantage, without regard to the common good. Now, instead of *States* fighting each other and attempting to control the government to the detriment of the general society, the U.S. would be prey to *special interests* who would attempt to manipulate the laws of government for their purposes, to the detriment of the general society. And if this happened, the *structure of the Constitution* would insure that *the problem would not be solved*, since the structure of the government, the dispersion of the laws over a wide sphere, and the system of checks and balances, would *protect* these special interests. Thus, under the system of government constituted by the Framers, the Majority would be checked, the States would be checked, and the three branches of government would be checked — but the special interests *would not*. As Madison said later in *Federalist 51*,

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. <sup>84</sup>

So, *if* the majority could be united by a common interest, *then* the “rights,” or *power* of minority interests such as landowners, creditors, and manufacturers would be insecure. But by increasing the size of the Nation, the majority of the people would no longer *have* a common interest, since they would be “broken into so many parts, interests and classes of citizens” that coalitions would be impossible. Into this huge melting pot would go the young, the old, the rich,

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<sup>84</sup> *Federalist 51*, Madison

the poor, the French, Spanish, Italians, Chinese, Vietnamese, African-Americans, the new immigrants, the old immigrants, the “yuppies,” the small businessmen, the employees, teachers, union members, the “middle-class,” executives, lawyers, doctors, the Christians, the Jews, the Moslems, the Atheists, “conservatives,” “liberals,” Democrats, Republicans, Libertarians, Women’s Liberationists, Abortion supporters, and Abortion opponents — an enormous range of varying philosophies and backgrounds, with each individual focused primarily on how the government could secure his or her own particular point of view. Thus, the existence of a monolithic “majority” in a wide-ranging geographical area, particularly one with the heterogeneity of America, was pure fantasy.

Unfortunately, given that no strong national government had yet been instituted, the effect of special interests on a national government could not be analyzed. Madison was well aware of the dangers of allowing strong special interests to dominate government, but believed, based on recent experiences, and in a homogeneous society of 3,000,000 people, that the greater danger came from the majority:

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 . . . 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.<sup>85</sup>

Madison well understood the problems of allowing factions to capture a government. The faction which was powerless, whether majority or minority, would exist under the rule of law; but the faction which wielded power existed in a state of *anarchy*. It was free to do what it wanted, since it *created law*. But notwithstanding his analysis of the powerlessness of the majority over a wide-ranging geographical area, Madison believed that *majority* factions were inherently stronger, and that *minority* factions were most in danger, based on *his most recent historical experience*. Thus, because Rhode Island, with a population of 58,000, had displayed problems with majority rule (for example, Rhode Island issued paper money which benefited people who owed money versus people who had lent money, by creating inflation which decreased the value of money), the sphere of government was to be extended. As a consequence, *just the size* of the country alone was enough to insure that if majorities ever combined, they would only combine when it was in the national interest:

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 . . .<sup>86</sup>

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<sup>85</sup> *Federalist* 51, Madison

<sup>86</sup> *Federalist* 51, Madison

However, the separation of powers and checks and balances system instituted by the Framers *checked* the majority: it *prevented* a coalition of disorganized and fragmented minorities from securing the general good. Thus, the majority was checked in two ways: from the very structure of the government, and from their geographical dispersion. And, as population increased, the effect would get worse and worse. As more states were added, and as more citizens were given the vote, it would become more and more difficult to forge majority coalitions. And, by degrees, *a system appropriate for 1787 became inappropriate for 1992, or any year thereafter*. Hamilton understood the dangers of appeal to authority when the authority made recommendations based on current population. To follow rigidly the recommendations of an authority who was not considering the immediate historical circumstances was to *invite trouble*:

When Montesquieu recommends a small extent for republics, the standards he had in view were of dimensions far short of the limits of almost every one of these States. Neither Virginia, Massachusetts, Pennsylvania, New York, North Carolina, nor Georgia can by any means be compared with the models from which he reasoned and to which the terms of his description apply. **If we therefore take his ideas on this point as the criterion of truth, we shall be driven to the alternative either of taking refuge at once in the arms of monarchy, or of splitting ourselves into an infinity of little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt.**<sup>87</sup>

Thus, had the Framers followed Montesquieu's advice that Republics could not encompass a wide area, the Nation would have divided into several separate Countries, with the inevitable byproducts of such division. Wisely, they rejected Montesquieu's advice, since it was *inappropriate for their time*. And, wisely, they framed a system appropriate for *their* time. Under this system, the legislative authority would be divided in two, between a House of Representatives, who were to represent the people at large, and the Senate, which was to represent the States and the "aristocratic" interests. So, in the unlikely prospect that the "majority," (that is, a disorganized people dispersed throughout the United States) could somehow capture the House of Representatives, the Senate would be able to make less probable the passage of legislation against the special interests, since no law could be passed unless both bodies agreed. And, even in the unlikely event that such legislation made it through, the President could veto the legislation. Even if the two bodies managed to pass the law over the President's veto, the President, who had the executive power, could simply refuse to enforce the law. And if the President decided to enforce the law, the Supreme Court, as it later developed, would claim that it had the power to declare laws *unconstitutional*. And since the Supreme Court members were appointed, and served for indefinite terms, they did not have to consider the public interest when they were reaching their decisions. In this manner, the short-term self-interest of certain minority groups would be preserved.

### *The Great Compromise*

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<sup>87</sup> *Federalist* 9, Hamilton

In forging their government, the Framers had to other issues to contend with other than the problems of factions. At the Convention, it had become readily apparent that the smaller States feared that the larger States would overwhelm them, since both the Senate and the House were intended to proportionally represent their population. Thus, the four largest states, Virginia, Massachusetts, Pennsylvania, and New York, though a minority when state representation was considered, would actually have a majority of the votes, since their population, when totaled (counting black people as 3/5 of a person), was 1,373,000, vs. 1,195,000 for the nine smaller states (boldface type indicates that the state's population includes 3/5 of the slaves who resided in the state):

State	Population	Representatives	District Population per Rep.
Virginia	<b>420,000</b>	10	42,000
Massachusetts	360,000	8	45,000
Pennsylvania	360,000	8	45,000
New York	233,000	6	38,833
Maryland	<b>218,000</b>	6	36,333
Connecticut	202,000	5	40,400
North Carolina	<b>200,000</b>	5	40,000
South Carolina	<b>150,000</b>	5	30,000
New Jersey	138,000	4	34,500
New Hampshire	102,000	3	34,000
Georgia	<b>90,000</b>	3	30,000
Rhode Island	58,000	1	58,000
Delaware	37,000	1	37,000 <sup>88</sup>

The Framers, perhaps to assuage this concern, initially gave the top four states 32 representatives, vs. 33 for the bottom nine — it is unlikely that this was an accident. However, the smaller states could not be sure that this largess would continue throughout history. They were concerned that the large states would combine against them. Roger Sherman, a delegate from Connecticut, believed in the concept of “one state, one vote” — to give one state more votes than another was to endanger the liberties of the smaller states:

The rich man who enters into Society along with the poor man, gives up more than the poor man, yet with an equal vote he is equally safe. Were he to have more votes than the poor man in proportion to his superior stake, the rights of the poor man would immediately cease to be secure. This consideration prevailed when the articles of confederation were formed.<sup>89</sup>

But Madison argued at the Convention that the smaller states had nothing to fear from the larger states. As his reading of history showed, the most powerful entities would fight amongst themselves, and not seek to prey on the weaker entities:

It had never been seen that different counties in the same State, conformable in

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<sup>88</sup> RFC, v. 3, p. 253

<sup>89</sup> RFC, v. 1, p. 450

extent, but disagreeing in other circumstances, betrayed a propensity to such combinations. Experience rather taught a contrary lesson. Among individuals of superior eminence & weight in society, rivalships were much more frequent than coalitions. Among independent nations preeminent over their neighbours, the same remark was verified. Carthage & Rome tore one another to pieces instead of uniting their forces to devour the weaker nations of the Earth. The Houses of Austria and France were hostile as long as they remained the greatest powers of Europe. England & France have succeeded to the pre-eminence & to the enmity. To this principle we owe perhaps our liberty. A coalition between those powers would have been fatal to us.<sup>90</sup>

Gunning Bedford, a delegate from Delaware, rejected this reasoning, based in parts on the votes at the Convention:

If political Societies possess ambition, avarice, and all the other passions which render them formidable to each other, ought we not to view them in this light here? Will not the same motives operate in America as elsewhere? **If any gentleman doubts it let him look at the votes. Have they not been dictated by interest, by ambition?** Are not the large States evidently seeking to aggrandize themselves at the expense of the small? . . . Will it be said that an inequality of power will not result from an inequality of votes. Give the opportunity, and ambition will not fail to abuse it. The whole history of mankind proves it.<sup>91</sup>

In Bedford's view, it was easy for Madison, a delegate from the *largest* state, to argue that the largest states should not be feared. But Bedford, who was representing the *smallest* State, took the opposing view. As he continued later in the day,

Our deliberations here are a confirmation of the position; and I may add to it, that each of them act[s] from interested, and many from ambitious motives. Look at the votes which have been given on the floor of this house, and it will be found that **their numbers, wealth and local views, have actuated their determinations**; and that the larger states proceed as if our eyes were already perfectly blinded. Impartiality, with them, is already out of the question — the reported plan is their political creed, and they support it, right or wrong. Even the diminutive state of Georgia has an eye to her future wealth and greatness — South Carolina, puffed up with the possession of her wealth and negroes, and North Carolina, are all, from different views, united with the great states. And these latter, although it is said they can never, from interested view, form a coalition, we find closely united in one scheme of interest and ambition, notwithstanding they endeavor to amuse us with the purity of their principles and the rectitude of their intentions, in asserting that the general government must be drawn from an equal representation of the people. Pretences to support ambition are never found

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<sup>90</sup> RFC, v. 1, p. 448

<sup>91</sup> RFC, v. 1, June 30, p. 491

wanting. Their cry is, where is the danger? and they insist that altho' the powers of the general government will be increased, yet it will be for the good of the whole; and although the three great states form nearly a majority of the people of America, they never will hurt or injure the lesser states. *I do not, gentlemen, trust you. If you possess the power, the abuse of it could not be checked; and what then would prevent you from exercising it to our destruction?* You gravely alledge that there is no danger of combination, and triumphantly ask, how would combinations be affected? "The larger states," you say, "all differ in productions and commerce; and experience shows that instead of combinations, they would be rivals, and counteract the views of one another." This, I repeat, is language calculated only to amuse us. Yes, sir, the larger states will be rivals, but not against each other — they will be rivals against the *rest of the states*.<sup>92</sup>

To mollify the smaller States, the framers had to consider instituting in the Constitution the Connecticut Compromise (otherwise known as the Great Compromise) made by Sherman on June 20:

If the difficulty on the subject of representation can not be otherwise got over, [I] would agree to have two branches, and a proportional representation in one of them, provided each State had an equal voice in the other. This [is] necessary to secure the rights of the lesser States; otherwise three or four of the large States would rule the others as they please. Each State like each individual had its peculiar habits, usages, and manners, which constituted its happiness. It would not therefore give to others a power over this happiness, any more than an individual would do, when he could avoid it.<sup>93</sup>

In this Compromise, the House would have proportional representation, and the Senate would have equal representation — as it later developed, each State would be allotted two Senators, even though their population was radically different. This may have obeyed the principle of "one *state*, one vote," but it violated the principle of "one *man*, one vote." On June 29, Oliver Ellsworth, another delegate from Connecticut, suggested that unless the Compromise was accepted, the smaller states would not agree to sign the Constitution.<sup>94</sup> James Wilson, a delegate from Pennsylvania, stated that he could not go along with any such compromise, since it would embody the discredited concept of minority rule in the Constitution:

[S]hould the deplored event happen, it would neither stagger [my] sentiments nor [my] duty. If the minority of the people of America refuse to coalesce with the majority on just and proper principles, it could never happen on better grounds. The votes of yesterday agst. the just principle of representation, were as 22 to 90 of the people of America. . . . Such an equality will enable the minority to

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<sup>92</sup> RFC, v. 1, pp. 500-501, June 30

<sup>93</sup> RFC, v. 1, p. 343

<sup>94</sup> RFC v. 1, pp. 468-69, June 29

controul in all cases whatsoever, the sentiments and interests of the majority. Seven States will controul six; seven States according to the estimates that had been used, composed 24/90 of the whole people. **It would be in the power then of less than 1/3 to overrule 2/3 whenever a question should happen to divide the States in that manner. Can we forget for whom we are forming a government? Is it for *men*, or for the imaginary beings called *States*?**<sup>95</sup>

Wilson went on to say that if the compromise were instituted, it would “prove a fundamental Defect in the constitution.”<sup>96</sup>

Madison too had originally opposed this compromise, and the idea that the smaller States should have an equal representation, [agreeing] with Wilson that it re-introduced the concept of minority rule contained in the Articles: that four states, or even one state, would be empowered to obstruct the most salutary proposals. On June 29, Madison rejected the idea that the States should have equal representation:

I would always exclude inconsistent principles in framing a system of government. The difficulty of getting its defects amended are great and sometimes insurmountable. . . . The great danger to our general government *is the great southern and northern interests of the continent being opposed to each other. Look to the votes in congress, and most of them stand divided by the geography of the country, not according to the size of the states.*

Suppose the first branch granted money, may not the second branch, from the state views, counteract the first? In congress, the single state of Delaware prevented an embargo, at the time that all the other states thought it absolutely necessary for the support of the army. Other powers, and those very essential, besides the legislative, will be given to the second branch — such as the negating all state laws. I would compromise on this question, if I could do it on correct principles, but otherwise not — if the old fabric of the confederation must be the ground-work of the new, we must fail.<sup>97</sup>

Madison asked the small states to “renounce a principle wch. was confessedly unjust,” and which, if admitted, would “**infuse mortality into a Constitution which we wished to last forever.**”<sup>98</sup> The smaller states refused to accept this analysis, however, and threatened to break up the convention if the compromise was not instituted.<sup>99</sup> After additional debate, the Compromise was considered on July 16, and accepted, in an extremely close vote: 5 for, 4 against, with one of the four largest States, Massachusetts, divided. New Hampshire and Rhode Island did not vote, nor did New York, one of the other four largest states. The remaining two

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<sup>95</sup> RFC, v. 1, pp. 482-83

<sup>96</sup> RFC, v. 1, p. 503

<sup>97</sup> RFC, v. 1, p. 476

<sup>98</sup> RFC, v. 1, p. 464

<sup>99</sup> SEE the debate of June 29.

large states, Pennsylvania and Virginia, voted no. Our Constitution in its current form was thus given to us by Connecticut, New Jersey, Delaware, Maryland, and North Carolina. This vote was so close that, if either Elbridge Gerry or Caleb Strong, the two delegates of the four representing Massachusetts who voted “yes,” had changed their “yes” votes to “no,” the motion would not have carried, at least not at that time, since under the rules of the Convention tie votes resulted in a loss.<sup>100</sup>

In writing *The Federalist*, Madison noted one of the chief problems with the compromise he had so bitterly opposed, and undoubtedly voted against:

There is a peculiarity in the federal Constitution which insures a watchful attention in a majority both of the people and of their representatives to a constitutional augmentation of the latter. The peculiarity lies in this, that **one branch of the legislature is a representation of citizens, the other of the States: in the former, consequently, the larger States will have most weight; in the latter, the advantage will be in favor of the smaller States.** From this circumstance it may with certainty be inferred that the larger States will be strenuous advocates for increasing the number and weight of that part of the legislature in which their influence predominates. And it so happens that four only of the largest will have a majority of the whole votes in the House of Representatives. **Should the representatives or people, therefore, of the smaller States oppose at any time a reasonable addition of members, a coalition of a very few States will be sufficient to overrule the opposition;** a coalition which, notwithstanding the rivalry and local prejudices which might prevent it on ordinary occasions, would not fail to take place, when not merely prompted by common interest, but justified by equity and the principles of the Constitution.<sup>101</sup>

According to Madison, it would be difficult for the House of Representatives to grow to the size necessary to keep up with population, since all laws had to be passed by the House *and* Senate. Since the small states would prefer to not lose power in the House of Representatives, they would be able to prevent an augmentation of members in that House. In Madison’s time, the average representation was 1 representative for approximately every 40,000 people. In our time, as of 1987, the average district size is **525,000**. Thus, there is has been less and less representation over time in the House of Representatives. In fact, Virginia, the largest state, had a population of 532,000 in 1787 (counting a person with black skin as one person). Since Virginia had two senators, this was one Senator for every 266,000 people. This means that today’s average representation of population in the House is actually *half* as representative as the Senate was for the largest State in 1787! Over time, the House of Representatives has become, with reference to the ratio of representation in 1787, a Second Senate.

Thus, one of the unfortunate by-products of the compromise was that it radically altered the original role of the House of Representatives, by making that branch of government less representative and less responsive to the will of the people, whose interests it was supposed to

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<sup>100</sup> SEE RFC, v. 2, p. 17, July 16

<sup>101</sup> *Federalist* 58, Madison

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*The Need to Decrease the Velocity of the Passage of Legislation*

The Framers wanted to balance the need for rapid decisionmaking with the need to retain stability: to keep the laws from changing too slowly or too rapidly. One of the purposes of the bicameral requirement for the passage of all laws was that the people would have a check on the government, through the House of Representatives, and the Government would have a check on the people, through the Senate, the Presidential Veto, and, as it later turned out, the Supreme Court. As Madison stated:

The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people, by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands. Stability, on the contrary, requires that the hands in which power is lodged should continue for a length of time the same. A frequent change of men will result from a frequent return of elections; and a frequent change of measures from a frequent change of men: whilst energy in government requires not only a certain duration of power, but the execution of it by a single hand.<sup>102</sup>

Hamilton saw a check on the people as good, in preventing Prisoner's Dilemma effects that could occur if the people were united for purposes of securing their short-term self-interest:

The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation, that the people commonly intend the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always reason right about the means of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.<sup>103</sup>

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<sup>102</sup> *Federalist* 37, Madison

<sup>103</sup> *Federalist* 71, Hamilton

Of course, any government that could prevent the passage of *short-term* legislation could prevent the passage of *long-term* legislation. One of the problems with the bicameral requirement was pointed out by Hamilton in the context of the Executive branch. At the time, some had proposed that the Constitution should create two or three Presidents. Hamilton argued that inefficiency in the legislative branch was tolerable, even desirable, but that it was not in the Executive branch:

Upon the principles of a free government, inconveniences from the source just mentioned must necessarily be submitted to in the formation of the legislature; but it is unnecessary, and therefore unwise, to introduce them into the constitution of the Executive. It is here too that they may be most pernicious. **In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.** When a resolution too is once taken, the opposition must be at an end. That resolution is a law, and resistance to it punishable. But no favorable circumstances palliate or atone for the disadvantages of dissension in the executive department. Here, they are pure and unmixed. There is no point at which they cease to operate. **They serve to embarrass and weaken the execution of the plan or measure to which they relate, from the first step to the final conclusion of it.** They constantly counteract those qualities in the Executive which are the most necessary ingredients in its composition,—vigor and expedition, and this without any counterbalancing good. In the conduct of war, in which the energy of the Executive is the bulwark of the national security, every thing would be to be apprehended from its plurality.<sup>104</sup>

Thus, the price of stability was *delay*, and a reduction in the power of the legislature to *legislate*. The Executive branch, however, was not saddled with any such Constitutional inefficiencies. We will see the consequences of this draftsmanship later on in this chapter.

#### *Federalism: the Final Check Against the Federal Government*

The final security for Americans was the principle of *federalism*: there would be not one government in America, but two — State and Federal. Thus, the Federal government would check the State governments, and the State governments would check the Federal:

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.<sup>105</sup>

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<sup>104</sup> *Federalist* 70, Hamilton, p. 358

<sup>105</sup> *Federalist* 51, Madison

The strong Union that was necessary would be made possible since the power of the Union would be strictly limited. Those powers not given to the Federal government would be given to the States. The power of the State governments was to be protected from Federal invasion, since the power of Congress were strictly limited under the grant of legislative power in Article 1, Section 8:

[I]t is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.

**The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.**<sup>106</sup>

In addition to this check, Senators were to be appointed by the State Legislatures, which was a further protection for the state governments. And the States were protected from each other, since Article 4, Section 4 of the Constitution guaranteed the States protection against invasion, whether from a foreign power or themselves.

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<sup>106</sup> *Federalist* 14, Madison

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