



Omohundro Institute of  
Early American History and Culture  
WILLIAMSBURG, VIRGINIA

---

Men of Little Faith: The Anti-Federalists on the Nature of Representative Government

Author(s): Cecelia M. Kenyon

Source: *The William and Mary Quarterly*, Third Series, Vol. 12, No. 1 (Jan., 1955), pp. 3-43

Published by: [Omohundro Institute of Early American History and Culture](#)

Stable URL: <http://www.jstor.org/stable/1923094>

Accessed: 08/03/2014 08:03

---

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at

<http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Omohundro Institute of Early American History and Culture is collaborating with JSTOR to digitize, preserve and extend access to *The William and Mary Quarterly*.

<http://www.jstor.org>

# Men of Little Faith: The Anti-Federalists on the Nature of Representative Government

Cecelia M. Kenyon\*

ONE of the gravest defects of the late Charles Beard's economic interpretation of the Constitution is the limited perspective it has encouraged in those who have accepted it, and the block to fruitful investigation of the ideas and institutions of the Revolutionary Age to which it has been conducive. Like many theories influential in both the determination and the interpretation of historical events, Beard's thesis and its implications were never carefully analyzed either by himself or his followers. As a result, its impact on the study of American history produced certain effects not anticipated, which Beard himself must surely have regretted. The economic interpretation employed by him somewhat tentatively as a tool for analysis and research quickly became a methodological stereotype and led to a stereotypical appreciation of the Constitution and of the historical context in which it was created.

Beard's failure—perhaps it was deliberate refusal—to subject his thesis to rigorous analysis or to define it with precision makes it impossible to label him a clear-cut, thorough-going economic determinist. His position was always ambiguous and ambivalent, and in his later years he explicitly repudiated any monistic theory of causation.<sup>1</sup> Nevertheless, the thrust of *An Economic Interpretation of the Constitution* and the effects of its thesis

\* Miss Kenyon is a member of the Department of Government at Smith College.

<sup>1</sup> A critical and definitive study of Beard as an historian has not yet been done. Interesting commentaries on the ambiguity to be found in Beard's thesis are Max Lerner's "Charles A. Beard," in his *Ideas Are Weapons* (New York, 1939), pp. 161-162, and Richard Hofstadter's "Charles Beard and the Constitution," in *Charles A. Beard: An Appraisal*, edited by Howard K. Beale (University of Kentucky Press, 1954). Hofstadter also cites the different attitudes toward the Constitution and its framers reflected in the Beards' *The Rise of American Civilization* (1927) and their *Basic History of the United States* (1944). Beale's essay in the same collection, "Charles Beard: Historian," recounts in broad terms the shifts in Beard's historiographical thought throughout his career. It is with the Beard of the earlier period that this essay is concerned, for this was the period of his most influential works.

as applied have frequently been those of simple and uncritical commitment to a theory of economic determinism.

Of these effects, the most significant has been a disinclination to explore the theoretical foundations of the Constitution. In the chapter entitled "The Constitution as an Economic Document," Beard presented the structure of the government, particularly the system of separation of powers and checks and balances, as the institutional means chosen by the Founding Fathers to protect their property rights against invasion by democratic majorities.<sup>2</sup> This interpretation, or variations of it, has been widely accepted, though it has been frequently challenged both directly and indirectly.<sup>3</sup> Its tendency is to dispose of the institutional thought of the men who framed the Constitution as ideological response to economic interest. The present essay offers yet another challenge to this position, not by further examination of the Constitution or its authors, but by analysis of the Anti-Federalist position of 1787-1788.

<sup>2</sup> Charles A. Beard, *An Economic Interpretation of the Constitution* (New York, 1913), Ch. VI, especially pp. 154-164. See also the succinct statement in *The Economic Basis of Politics* (New York, 1922), pp. 66-67: "Under the circumstances the framers of the Constitution relied, not upon direct economic qualification, but upon checks and balances to secure the rights of property—particularly personal property—against the assaults of the farmers and the proletariat." In Charles and Mary Beard's *The Rise of American Civilization* (New York, 1927), the theme is continued: "Almost unanimous was the opinion that democracy was a dangerous thing, to be restrained, not encouraged, by the Constitution, to be given as little voice as possible in the new system, to be hampered by checks and balances." (p. 315; cf. p. 326.) It was this position which the Beards had apparently abandoned by the 1940's. The attitude of *The Republic* (1942), and of *The Basic History* (1944), is one of appreciation of the authors of the Constitution, not condemnation.

<sup>3</sup> In 1936 Maurice Blinkoff published a study of the influence of Beard on American historiography and came to the conclusion that authors of college history textbooks had adopted Beard's views "with virtual unanimity." *The Influence of Charles A. Beard upon American Historiography*, University of Buffalo Studies, XII (May, 1936), p. 36. I have not conducted a comprehensive survey, but it seems to me that Blinkoff's conclusions would probably not be accurate for today.

For challenges to the Beard position, the reader may consult the survey of reviews of *An Economic Interpretation of the Constitution* cited in Blinkoff, as well as some of the selections in the *Amherst Problems in American Civilization* series; Earl Latham, editor, *The Declaration of Independence and the Constitution* (Boston, 1949), though this collection is, in the opinion of the author, biased in favor of the Beard interpretation. See also B. F. Wright, "The Origin of Separation of Powers in America," *Economica*, May, 1933; and "The Federalist on the Nature of Political Man," *Ethics*, Vol. LIX, No. 2, Part II (January, 1949); and Douglass Adair, "The Tenth Federalist Revisited," *William and Mary Quarterly*, 3d Series, Vol. VIII (January, 1951).

Perhaps because theirs was the losing side, the political thought of the Anti-Federalists has received much less attention than that of the Founding Fathers. Since they fought the adoption of a Constitution which they thought to be aristocratic in origin and intent, and which by Beardian criteria was inherently anti-democratic in structure, there has been some tendency to characterize them as spokesmen of eighteenth-century democracy. But their theory of republican government has never been closely analyzed, nor have the areas of agreement and disagreement between them and the Federalists been carefully defined. It is the purpose of this essay to explore these topics. A very large proportion of the people in 1787-1788 *were* Anti-Federalists, and a knowledge of their ideas and attitudes is essential to an understanding of American political thought in the formative years of the republic.

Implicit in this purpose is the thesis that the ideological context of the Constitution was as important in determining its form as were the economic interests and motivations of its framers, and that the failure of Beard and his followers to examine this context has rendered their interpretation of the Constitution and its origin necessarily partial and unrealistic.

Beard's conclusions rested on two assumptions or arguments. One was that the framers of the Constitution were motivated by their class and perhaps their personal economic interests; a great deal of evidence, drawn from more or less contemporary records, was presented to support this part of the thesis. A second assumption was that the system of separation of powers and checks and balances written into the Constitution was undemocratic. In making this second assumption Beard was more influenced by the ideas of the Populist and Progressive movements of his own time, I think, than by a study of the political beliefs current in 1787. He was pre-occupied in 1913 with his period's interest in reforming the structure of the national government to make it more democratic, which by his standards meant more responsible to simple majority rule. Thus he judged an eighteenth-century frame of government by a twentieth-century political doctrine. The effect was to suggest by implication that the men who in 1787-1788 thought the Constitution aristocratic and antagonistic to popular government thought so for the same reasons as Beard.<sup>4</sup> The evidence shows

<sup>4</sup> There is no doubt at all that many of the Anti-Federalists did regard the Constitution as dangerous and aristocratic, and its framers and supporters likewise. They were acutely suspicious of it because of its class origin and were on the lookout for

clearly that their reasons were frequently and substantially different. These differences serve to illuminate the context of the Constitution and to illustrate the evolutionary character of American political thought.

## II

At the center of the theoretical expression of Anti-Federalist opposition to increased centralization of power in the national government was the belief that republican government was possible only for a relatively small territory and a relatively small and homogeneous population. James Winthrop of Massachusetts expressed a common belief when he said, "The idea of an uncompounded republick, on an average one thousand miles in length, and eight hundred in breadth, and containing six millions of white inhabitants all reduced to the same standard of morals, of habits, and of laws, is in itself an absurdity, and contrary to the whole experience of mankind."<sup>5</sup> The last part of this statement, at least, was true; history was on the side of the Anti-Federalists. So was the authority of contemporary political thought. The name of Montesquieu carried great weight, and he had taught that republican governments were appropriate for small territories only. He was cited frequently, but his opinion would probably not have been accepted had it not reflected their own experience and inclinations. As colonials they had enjoyed self-government in colony-size packages only and had not sought to extend its operation empire-wide. It is significant that the various proposals for colonial representation in Parlia-

---

every evidence of bias in favor of the "aristocrats" who framed it. Note, for example, the attitude of Amos Singletary expressed in the Massachusetts ratifying convention: "These lawyers, and men of learning and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be managers of this Constitution, and get all the power and all the money into their own hands, and then they will swallow up all us little folks like the great *Leviathan*; yes, just as the whale swallowed up Jonah!" Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia, in 1787*, Second Edition, 5 vols. (Philadelphia, 1896), II, p. 102. See also reference to this attitude in a letter from Rufus King to James Madison, January 27, 1888. This letter is to be found in the *Documentary History of the Constitution of the United States of America, 1786-1870* (Washington, 1894-1905), 5 vols.; IV, p. 459. A similar feeling was reported to exist in the New Hampshire convention. See John Langdon to George Washington, February 28, 1788, *ibid.*, p. 524.

<sup>5</sup> The *Agrippa* Letters in Paul Leicester Ford, *Essays on the Constitution of the United States* (Brooklyn, 1892), p. 65. See also pp. 91-92.

ment never grew deep roots during the debate preceding the Revolution. This association of self-government with relatively small geographical units reinforced Montesquieu's doctrine and led to further generalizations. A large republic was impossible, it was argued, because the center of government must necessarily be distant from the people. Their interest would then naturally decrease; and when this happened, "it would not suit the genius of the people to assist in the government," and "Nothing would support the government, in such a case as that, but military coercion."<sup>6</sup> Patrick Henry argued that republican government for a continent was impossible because it was "a work too great for human wisdom."<sup>7</sup>

Associated with the argument regarding size was the assumption that any people who were to govern themselves must be relatively homogeneous in interest, opinion, habits, and mores. The theme was not systematically explored, but it apparently stemmed from the political relativism prevalent at the time,<sup>8</sup> and from the recent experience of conflicts of interest between the colonies and Great Britain, and later between various states and sections of the new confederation.

It is not easy to measure the relative strength of national and state sentiment in either individuals or groups,<sup>9</sup> but it is clear that the Anti-Federalists were conscious of, and emphasized, the cultural diversity of the peoples in the thirteen states. They argued that no one set of laws could operate over such diversity. Said a Southerner, "We see plainly that men who come from New England are different from us."<sup>10</sup> He did not

<sup>6</sup> Elliot, IV, p. 52.

<sup>7</sup> Elliot, III, p. 164; cf. III, pp. 607 ff.; II, pp. 69, 335; the *Centinel* Letters in John Bach McMaster and Frederick D. Stone, editors, *Pennsylvania and the Federal Constitution, 1787-1788* (Historical Society of Pennsylvania, 1888), p. 572; R. H. Lee, "Letters of a Federal Farmer," in Paul Leicester Ford, *Pamphlets on the Constitution of the United States* (Brooklyn, 1888), p. 288; George Clinton, *Cato*, in Ford, *Essays*, pp. 256 ff.

<sup>8</sup> Political relativism had long been a part of the colonial heritage. Seventeenth-century Puritans, who were sure that God had regulated many aspects of life with remarkable precision, believed that He had left each people considerable freedom in the choice of their form of government. The secularized legacy of this belief prevailed throughout the era of framing state and national constitutions. Fundamental principles derived from natural law were of course universally valid, and certain "political maxims" regarding the structure of the government very nearly so, but the embodiment of these general truths in concrete political forms was necessarily determined by the nature and circumstances of the people involved.

<sup>9</sup> On this subject see John C. Ranney, "The Bases of American Federalism," *William and Mary Quarterly*, Series 3, Vol. III, No. 1 (January, 1946).

<sup>10</sup> Elliot, IV, p. 24.

wish to be governed either with or by such men. Neither did the New Englanders wish to share a political roof with Southerners. "The inhabitants of warmer climates are more dissolute in their manners, and less industrious, than in colder countries. A degree of severity is, therefore, necessary with one which would cramp the spirit of the other. . . . It is impossible for one code of laws to suit Georgia and Massachusetts."<sup>11</sup> To place both types of men under the same government would be abhorrent and quite incompatible with the retention of liberty. Either the new government would collapse, or it would endeavor to stamp out diversity and level all citizens to a new uniformity in order to survive. Such was the reasoning of the leading New England publicist, James Winthrop. His indebtedness to Montesquieu is obvious. His failure to grasp the principles of the new federalism is also clear; for the purposes of this argument, and indeed for almost all of their arguments, he and his colleagues refused to consider the proposed government as one of limited, enumerated powers. They constantly spoke and wrote as if the scope and extent of its powers would be the same as those of the respective state governments, or of a unified national government.<sup>12</sup>

In addition to the absence of cultural homogeneity, the Anti-Federalists emphasized the clash of specific economic and political interests. These were primarily sectional,<sup>13</sup> and were of more acute concern in the South than in the North. In Virginia, for example, George Mason expressed the fear that the power of Congress to regulate commerce might be the South's downfall. In Philadelphia he had argued that this power be exercised by a two-thirds majority, and he now feared that by requiring only a simple majority "to make all commercial and navigation laws, the five southern states (whose produce and circumstances are totally different from those of the eight northern and eastern states) will be ruined. . . ."<sup>14</sup> It was also argued in several of the Southern conventions that a majority of the Eastern states might conspire to close the Mississippi,<sup>15</sup> and that they might

<sup>11</sup> From the *Agrippa* Letters, Ford, *Essays*, p. 64.

<sup>12</sup> It was this misunderstanding of the proposed new system which Madison attempted to remove in *Federalist* 39.

<sup>13</sup> Curiously enough, the Big-Little State fight, which almost broke up the Convention, played very little part in the ratification debates. And ironically one of the evidences of ideological unity which made the "more perfect union" possible was the similarity of arguments put forth by the Anti-Federalists in their respective states.

<sup>14</sup> "Objections," Ford, *Pamphlets*, p. 331.

<sup>15</sup> Elliot, III, p. 326.

eventually interfere with the institution of slavery.<sup>16</sup> In New England and the Middle states, there was less feeling that the interests of the entire section were in jeopardy, and therefore less discussion of these concrete issues and their divisive effect. One writer did strike out at the Federalist plea for a transcendent nationalism and repudiated the notion of sacrificing local interests to a presumed general interest as unrealistic and prejudicial to freedom. "It is vain to tell us that we ought to overlook local interests. It is only by protecting local concerns that the interest of the whole is preserved." He went on to say that men entered into society for egoistic rather than altruistic motives, that having once done so, all were bound to contribute equally to the common welfare, and that to call for sacrifices of local interest was to violate this principle of equality and to subvert "the foundation of free government."<sup>17</sup>

There was much to be said for Winthrop's argument. It was an unequivocal statement of the principle that self-interest is the primary bond of political union. It was also an expression of an attitude which has always played a large part in our national politics: a refusal to sacrifice—sometimes even to subordinate—the welfare of a part to that of the whole. Pursuit of an abstract national interest has sometimes proved dangerous, and there was a healthy toughness in the Anti-Federalist insistence on the importance of local interests. But Winthrop skirted around the really difficult questions raised by his argument, which were also inherent in the Anti-Federalist position that the size of the United States and the diversity which existed among them were too great to be consistent with one republican government operating over the whole. No one would deny that a certain amount of unity or consensus is required for the foundation of popular, constitutional government; not very many people—now or in 1787—would go as far as Rousseau and insist on virtually absolute identity of interest and opinion. The Anti-Federalists were surprisingly close to Rousseau and to the notions of republicanism which influenced him, but they were sensible, practical men and did not attempt to define their position precisely. Consequently they left untouched two difficult questions: how much, and what kind of unity is required for the foundation of any republican government, large or small; and how, in the absence of perfect uniformity, are differences of opinion and interest to be resolved?

<sup>16</sup> Elliot, IV, pp. 272-273.

<sup>17</sup> *Agrippa Letters*, Ford, *Essays*, p. 73.

## III

The Anti-Federalist theory of representation was closely allied to the belief that republican government could operate only over a small area. The proposed Constitution provided that the first House of Representatives should consist of sixty-five members, and that afterwards the ratio of representation should not exceed one representative for thirty thousand people. This provision was vigorously criticized and was the chief component of the charge that the Constitution was not sufficiently democratic. The argument was two-fold: first, that sixty-five men could not possibly represent the multiplicity of interests spread throughout so great a country; second, that those most likely to be left out would be of the more democratic or "middling" elements in society. The minority who voted against ratification in the Pennsylvania Convention calculated that the combined quorums of the House and Senate was only twenty-five, and concluded that this number plus the President could not possibly represent "the sense and views of three or four millions of people, diffused over so extensive a territory, comprising such various climates, products, habits, interests, and opinions. . . ."<sup>18</sup> This argument, accompanied with the same calculus, was repeated many times during the ratification debate.

Almost all of the leaders of the opposition laid down what they believed to be the requisites of adequate representation, and there is a remarkable similarity in their definitions. George Mason, speaking in the Virginia Convention against giving the central government the power of taxation, based his argument on the inadequacy of representation as measured by his criteria: "To make representation real and actual, the number of representatives ought to be adequate; they ought to mix with the people, think as they think, feel as they feel,—ought to be perfectly amenable to them, and thoroughly acquainted with their interest and condition."<sup>19</sup> In his *Letters of a Federal Farmer*, Richard Henry Lee developed the same idea further:

. . . a full and equal representation is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled—a fair representation, therefore, should be so regulated, that every

<sup>18</sup> "Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents," reprinted in McMaster and Stone, *Pennsylvania and the Constitution*, p. 472.

<sup>19</sup> Elliot, III, p. 32.

order of men in the community, according to the common course of elections, can have a share in it—in order to allow professional men, merchants, traders, farmers, mechanics, etc. to bring a just proportion of their best informed men respectively into the legislature, the representation must be considerably numerous.<sup>20</sup>

It was the contention of the Anti-Federalists that because of the small size of the House of Representatives, the middle and lower orders in society would not be elected to that body, and that consequently this, the only popular organ of the government, would not be democratic at all. It would, instead, be filled by aristocrats, possibly by military heroes and demagogues.<sup>21</sup> Why should this be? Lee asserted simply that it would be “in the nature of things.” Mason seems to have assumed it without any comment or argument. Patrick Henry reasoned that since the candidates would be chosen from large electoral districts rather than from counties, they would not all be known by the electors, and “A common man must ask a man of influence how he is to proceed, and for whom he must vote. The elected, therefore, will be careless of the interest of the electors. It will be a common job to extort the suffrages of the common people for the most influential characters.”<sup>22</sup> This argument reflects one of the basic fears of the Anti-Federalists: loss of personal, direct contact with and knowledge of their representatives. They sensed quite accurately that an enlargement of the area of republican government would lead to a more impersonal system, and that the immediate, individual influence of each voter over his representative would be lessened.

The most elaborate explanation of the anticipated results of the electoral process was given by the moderate Anti-Federalist in New York, Melancton Smith. He argued that very few men of the “middling” class would choose to run for Congress, because the office would be “highly elevated and distinguished,” the style of living probably “high.” Such circumstances would “render the place of a representative not a desirable one to sensible, substantial men, who have been used to walking in the plain and frugal paths of life.” Even if such should choose to run for election, they

<sup>20</sup> Ford, *Pamphlets*, pp. 288-289.

<sup>21</sup> This idea appeared frequently in Anti-Federalist arguments. See, for example, the “Address and Dissent of the Minority. . .,” McMaster and Stone, *Pennsylvania and the Constitution*, pp. 472, 479; Lee, “Letters of a Federal Farmer,” Ford, *Pamphlets*, p. 295; Elliot, III, pp. 266-267, 426 (George Mason).

<sup>22</sup> Elliot, III, p. 322.

would almost certainly be defeated. In a large electoral district it would be difficult for any but a person of "conspicuous military, popular, civil, or legal talents" to win. The common people were more likely to be divided among themselves than the great, and "There will be scarcely a chance of their uniting in any other but some great man, unless in some popular demagogue, who will probably be destitute of principle. A substantial yeoman, of sense and discernment, will hardly ever be chosen."<sup>23</sup> Consequently, the government would be controlled by the great, would not truly reflect the interests of all groups in the community, and would almost certainly become oppressive.

Anti-Federalists in Massachusetts were also uneasy about the capacity of the people to elect a legislature which would reflect their opinions and interests. The arguments emphasized geographical as well as class divisions, and expressed the fear and suspicion felt by the western part of the state toward Boston and the other coastal towns. It was predicted that the latter would enjoy a great advantage under the new system, and this prediction was supported by a shrewd analysis in the *Cornelius* Letter:

The citizens in the seaport towns are numerous; they live compact; their interests are one; there is a constant connection and intercourse between them; they can, on any occasion, centre their votes where they please. This is not the case with those who are in the landed interest; they are scattered far and wide; they have but little intercourse and connection with each other. To concert uniform plans for carrying elections of this kind is entirely out of their way. Hence, their votes if given at all, will be no less scattered than are the local situations of the voters themselves. Wherever the seaport towns agree to centre their votes, there will, of course, be the greatest number. A gentleman in the country therefore, who may aspire after a seat in Congress, or who may wish for a post of profit under the federal government, must form his connections, and unite his interest with those towns. Thus, I conceive, a foundation is laid for throwing the whole power of the federal government into the hands of those who are in the mercantile interest; and for the landed, which is the great interest of this country to lie unrepresented, forlorn and without hope.<sup>24</sup>

<sup>23</sup> Elliot, II, p. 246.

<sup>24</sup> The *Cornelius* Letter is reprinted in Samuel Bannister Harding, *The Contest over the Ratification of the Federal Constitution in the State of Massachusetts* (New York, 1896). See pp. 123-124.

What the Anti-Federalists feared, in other words, was the superior opportunities for organized voting which they felt to be inherent in the more thickly populated areas. They shared with the authors of *The Federalist* the fear of party and faction in the eighteenth-century American sense of those words. But they also feared, as the preceding analyses show, the essence of party in its modern meaning, i.e., organizing the vote, and they wanted constituencies sufficiently small to render such organization unnecessary.

This belief that larger electoral districts would inevitably be to the advantage of the well-to-do partially explains the almost complete lack of criticism of the indirect election of the Senate and the President. If the "middling" class could not be expected to compete successfully with the upper class in Congressional elections, still less could they do so in state-wide or nation-wide elections. It was a matter where size was of the essence. True representation—undistorted by party organization—could be achieved only where electoral districts were small.

#### IV

The conception of the representative body as a true and faithful miniature of the people themselves was the projection of an ideal—almost a poetic one. Very few of its proponents thought it could actually be realized. In the Anti-Federalist attack on the Constitution, it served as a foil for an extraordinary picture of anticipated treachery on the part of the representatives to be elected under the proposed government. No distinction was made on the basis of their method of election, whether directly or indirectly by the people. All were regarded as potential tyrants.

This attack stemmed directly from the Anti-Federalist conception of human nature. They shared with their opponents many of the assumptions regarding the nature of man characteristic of American thought in the late eighteenth century. They took for granted that the dominant motive of human behavior was self-interest, and that this drive found its most extreme political expression in an insatiable lust for power. These were precisely the characteristics with which the authors of *The Federalist Papers* were preoccupied.<sup>26</sup> Yet the Anti-Federalists chided the Federalists for their excessive confidence in the future virtue of elected officials, and criticized the Constitution for its failure to provide adequate protection

<sup>26</sup> See B. F. Wright, "The Federalist on the Nature of Political Man," *Ethics* (January, 1949).

against the operation of these tyrannical drives. There is surely an amusing irony to find the Founding Fathers, who prided themselves on their realism, and who enjoy an enviable reputation for that quality today, taken to task for excessive optimism. But they had to meet this charge again and again. Thus Caldwell in the North Carolina Convention found it "remarkable,—that gentlemen, as an answer to every improper part of it [the Constitution], tell us that every thing is to be done by our own representatives, who are to be good men. There is no security that they will be so, or continue to be so."<sup>26</sup> In New York Robert Lansing expressed the same feeling in a passage strikingly reminiscent of the famous paragraph in Madison's *Federalist* 51:

Scruples would be impertinent, arguments would be in vain, checks would be useless, if we were certain our rulers would be good men; but for the virtuous government is not instituted: its object is to restrain and punish vice; and all free constitutions are formed with two views—to deter the governed from crime, and the governors from tyranny.<sup>27</sup>

This and many other similar statements might have been used interchangeably by either side in the debate, for they symbolized an attitude deeply embedded and widely dispersed in the political consciousness of the age. There were frequent references to "the natural lust of power so inherent in man";<sup>28</sup> to "the predominant thirst of dominion which has invariably and uniformly prompted rulers to abuse their power";<sup>29</sup> to "the ambition of man, and his lust for domination";<sup>30</sup> to rulers who would be "men of like passions," having "the same spontaneous inherent thirst for

<sup>26</sup> Elliot, IV, p. 187; cf. pp. 203-204, and III, p. 494. Caldwell's statement is very similar to Madison's comment in *Federalist* 10: "It is in vain to say that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm."

<sup>27</sup> Elliot, II, pp. 295-296. Madison's declaration was this: "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>28</sup> Mason in Virginia, Elliot, III, p. 32.

<sup>29</sup> Henry in Virginia, *ibid.*, p. 436.

<sup>30</sup> "Letters of Luther Martin," Ford, *Essays*, p. 379.

power with ourselves."<sup>81</sup> In Massachusetts, another delegate said, "we ought to be jealous of rulers. All the godly men we read of have failed; nay, he would not trust a 'flock of Moseses.'"<sup>82</sup>

It is to be noted that this dreadful lust for power was regarded as a universal characteristic of the nature of man, which could be controlled but not eradicated. The Anti-Federalists charged that the authors of the Constitution had failed to put up strong enough barriers to block this inevitably corrupting and tyrannical force. They painted a very black picture indeed of what the national representatives might and probably would do with the unchecked power conferred upon them under the provisions of the new Constitution. The "parade of imaginary horrors" has become an honorable and dependable technique of political debate, but the marvelous inventiveness of the Anti-Federalists has rarely been matched. Certainly the best achievements of their contemporary opponents were conspicuously inferior in dramatic quality, as well as incredibly unimaginative in dull adherence to at least a semblance of reality. The anticipated abuses of power, some real, some undoubtedly conjured as ammunition for debate, composed a substantial part of the case against the Constitution, and they must be examined in order to get at the temper and quality of Anti-Federalist thought as well as at its content. Their source was ordinarily a distorted interpretation of some particular clause.

One clause which was believed to lay down a constitutional road to legislative tyranny was Article I, Section 4: "The times, places, and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators." Here was the death clause of republican government. "This clause may destroy representation entirely," said Timothy Bloodworth of North Carolina.<sup>83</sup> If Congress had power to alter the times of elections, Congress might extend its tenure of office from two years to four, six, eight, ten, twenty, "or even for their natural lives."<sup>84</sup> Bloodworth and his colleagues feared the worst. In Massachusetts, where debate over this clause occupied a day and a half, the primary fear was that Congress, by altering the places of election, might rig them so as to interfere with a full and

<sup>81</sup> Barrell in Massachusetts, Elliot, II, p. 159.

<sup>82</sup> White in Massachusetts, Elliot, II, p. 28.

<sup>83</sup> Elliot, IV, p. 55.

<sup>84</sup> Elliot, IV, pp. 51-52, 55-56, 62-63, 87-88.

free expression of the people's choice. Pierce suggested that Congress could "direct that the election for Massachusetts shall be held in Boston," and then by pre-election caucus, Boston and the surrounding towns could agree on a ticket "and carry their list by a major vote."<sup>35</sup> In the same state the delegate who would not trust "a flock of Moseses" argued thus: "Suppose the Congress should say that none should be electors but those worth 50 or a £100 sterling; cannot they do it? Yes, said he, they can; and if any lawyer . . . can beat me out of it, I will give him ten guineas."<sup>36</sup> In Virginia, George Mason suggested that Congress might provide that the election in Virginia should be held only in Norfolk County, or even "go farther, and say that the election for all the states might be had in New York. . . ."<sup>37</sup> Patrick Henry warned, "According to the mode prescribed, Congress may tell you that they have a right to make the vote of one gentleman go as far as the votes of a hundred poor men."<sup>38</sup>

Any of these acts would have been a flagrant abuse of power, but no more so than that which Mason and others predicted under Article II, Section 2, which gave to the President the power to make treaties with the advice and consent of two-thirds of the senators present. This power was believed to be fraught with danger, particularly among Southerners, who feared that the majority of Northern states might use it to give up American rights of navigation on the Mississippi. The North would not have a two-thirds majority of the entire Senate, of course, but Mason suggested that when a "partial" treaty was involved, the President would not call into session senators from distant states, or those whose interests would be affected adversely, but only those he knew to be in favor of it.<sup>39</sup> His colleague, William Grayson, suggested the similarly treacherous prospect of such a treaty's being rushed through while members from the Southern states were momentarily absent from the floor of the Senate: "If the senators of the Southern States be gone but one hour, a treaty may be made by the rest. . . ."<sup>40</sup>

This fear at least had some foundation in fact—there *was* a conflict of interest between North and South over the Mississippi. It would seem that

<sup>35</sup> Elliot, II, p. 22.

<sup>36</sup> Elliot, II, p. 28.

<sup>37</sup> Elliot, III, pp. 403-404.

<sup>38</sup> Elliot, III, p. 175. Cf. *Centinel*, McMaster and Stone, *Pennsylvania and the Constitution*, p. 598, and James Winthrop in the *Agrippa* Letters, Ford, *Essays*, p. 105.

<sup>39</sup> Elliot, III, p. 499.

<sup>40</sup> Elliot, III, p. 502.

the fear expressed in North Carolina by Abbott on behalf of "the religious part of the society" was pure fantasy: "It is feared by some people, that, by the power of making treaties, they might make a treaty engaging with foreign powers to adopt the Roman Catholic religion in the United States. . . ." <sup>41</sup>

This was not the only provision objected to by "the religious part of the society." They were greatly displeased with the last clause of Article VI, Section 3: "but no religious test shall ever be required as a qualification to any office or public trust under the United States." In the same speech quoted above, Abbott reported, presumably on behalf of his constituents, "The exclusion of religious tests is by many thought dangerous and impolitic." For without such, "They suppose . . . pagans, deists, and Mahometans might obtain offices among us, and that the senators and representatives might all be pagans." <sup>42</sup> David Caldwell thought that the lack of a religious qualification constituted "an invitation for Jews and pagans of every kind to come among us," and that since the Christian religion was acknowledged to be the best for making "good members of society . . . those gentlemen who formed this Constitution should not have given this invitation to Jews and heathens." <sup>43</sup> Federalist James Iredell reported a pamphlet in circulation "in which the author states, as a very serious danger, that the pope of Rome might be elected President." <sup>44</sup> This unwittingly placed fresh ammunition at the disposal of the opposition. An Anti-Federalist admitted that he had not at first perceived this danger and conceded that it was not an immediate one. "But," said he, "let us remember that we form a government for millions not yet in existence. I have not the art of divination. In the course of four or five hundred years, I do not know how it will work. This is most certain, that Papists may occupy that chair, and Mahometans may take it. I see nothing against it. There is a disqualification, I believe, in every state in the Union—it ought to be so in this system." <sup>45</sup>

<sup>41</sup> Elliot, IV, pp. 191-192. Abbott was not an Anti-Federalist, but was, according to L. I. Trenholme, in *The Ratification of the Federal Constitution in North Carolina* (New York, 1932), something of an independent. See p. 178. He voted for ratification.

<sup>42</sup> Elliot, IV, p. 192.

<sup>43</sup> *Ibid.*, p. 199.

<sup>44</sup> *Ibid.*, p. 195.

<sup>45</sup> *Ibid.*, p. 215. This quotation transmits a sense of the method of Anti-Federalist debate admirably. A similar statement by Amos Singletary of Massachusetts gives something of the flavor of the thinking done by the honest and pious patriots of the

It is to be noted that these fears were fears of the majority of electors as well as of their elected representatives, and that these statements can hardly be said to glow with the spirit of liberty and tolerance. These beliefs were undoubtedly not shared by all Anti-Federalists, but they would not have been expressed so vigorously in the convention debates had they not represented a sizeable segment of constituent opinion.

Another provision severely and dramatically criticized was that which gave to Congress exclusive jurisdiction over the future site of the national capital and other property to be purchased for forts, arsenals, dockyards, and the like.<sup>46</sup> It was predicted that the ten-mile square area would become an enormous den of tyranny and iniquity. In New York George Clinton warned "that the ten miles square . . . would be the asylum of the base, idle, avaricious and ambitious. . . ."<sup>47</sup> In Virginia Patrick Henry pointed out that this provision, combined with the necessary and proper clause, gave Congress a right to pass "any law that may facilitate the execution of their acts," and within the specified area to hang "any man who shall act contrary to their commands . . . without benefit of clergy."<sup>48</sup> George Mason argued that the place would make a perfect lair for hit-and-run tyrants. For if any of the government's "officers, or creatures, should attempt to oppress the people, or should actually perpetuate the blackest deed, he has nothing to do but get into the ten miles square. Why was this dangerous power given?"<sup>49</sup> One man observed that the Constitution did not specify the location of this site, and that therefore Congress was perfectly free to seat itself and the other offices of government in Peking. All in all, a terrible prospect: the Pope as President, operating from a base in Peking, superintending a series of hangings without benefit of clergy! Or worse.

There was no bill of rights in the Constitution. This caused genuine fear for the security of some of the liberties thus left unprotected. The

---

back country, in which opposition to the Constitution was strong: "The Hon. Mr. Singletary thought we were giving up all our privileges, as there was no provision that men in power should have any *religion*, and though he hoped to see Christians, yet by the Constitution, a Papist, or an Infidel, was as eligible as they. It had been said that men had not degenerated; he did not think that men were better now than when men after God's own heart did wickedly. He thought, in this instance, we were giving great power to we know not whom." Elliot, II, p. 44.

<sup>46</sup> Article I, Section 8.

<sup>47</sup> The *Cato* Letters; reprinted in Ford, *Essays*, p. 265.

<sup>48</sup> Elliot, III, p. 436.

<sup>49</sup> *Ibid.*, p. 431.

fear itself, though real and well founded, frequently found expression in melodramatically picturesque terms. The Anti-Federalists sometimes mentioned freedom of the press and freedom of conscience,<sup>50</sup> but they were primarily preoccupied with the failure of the Constitution to lay down the precious and venerable common-law rules of criminal procedure. The Constitution guaranteed the right of trial by jury in all criminal cases<sup>51</sup> except impeachment, but it did not list the procedural safeguards associated with that right. There was no specification that the trial should be not merely in the state but in the vicinity where the crime was committed (which was habitually identified with the neighborhood of the accused); there were no provisions made for the selection of the jury or of the procedure to be followed; there were no guarantees of the right to counsel, of the right not to incriminate oneself; there was no prohibition against cruel and unusual punishments. In short, there were few safeguards upon which the citizen accused of crime could rely.<sup>52</sup> Apprehension concerning the latitude left to Congress in this matter was expressed in several conventions;<sup>53</sup> it was Holmes of Massachusetts who painted the most vivid and fearful picture of the possible fate of the unfortunate

<sup>50</sup> The expressed fear that Roman Catholicism might be established by treaty did not reflect any strong belief in religious freedom. It was nothing more than simple anti-Catholicism, as the remarks about the lack of a religious qualification for office-holding clearly indicate. On the other hand, there was some concern expressed in Pennsylvania over the rights of conscientious objectors to military service. See McMaster and Stone, *Pennsylvania and the Constitution*, pp. 480-481.

<sup>51</sup> Article III, Section 2. The Constitution made no provision for jury trial in civil cases, because different procedures in the several states had made the formulation of a general method difficult. The Anti-Federalists leaped to the conclusion that the lack of a written guarantee of this right meant certain deprivation of it, and they professed to be thoroughly alarmed. But their primary fear centered around what they regarded as the inadequate guarantees of the right of trial by jury in criminal cases.

<sup>52</sup> If George Washington's word is to be trusted, the actions of the Founding Fathers with respect to trial by jury and a bill of rights did not stem from any sinister motives. In a letter to Lafayette on April 28, 1788, he gave this explanation: ". . . There was not a member of the convention, I believe, who had the least objection to what is contended for by the Advocates for a *Bill of Rights* and *Trial by Jury*. The first, where the people evidently retained everything which they did not in express terms give up, was considered nugatory. . . . And as to the second, it was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment." *Documentary History of the Constitution*, Vol. IV, pp. 601-602.

<sup>53</sup> In New York, see Elliot, II, p. 400; Virginia, III, pp. 523 ff., North Carolina, IV, pp. 143, 150, 154-155.

citizen who ran afoul of federal law. Such an individual might be taken away and tried by strangers far from home; his jury might be hand-picked by the sheriff, or hold office for life; there was no guarantee that indictment should be by grand jury only, hence it might be by information of the attorney-general, "in consequence of which the most innocent person in the commonwealth may be . . . dragged from his home, his friends, his acquaintance, and confined in prison. . . ." "On the whole," said Holmes, ". . . we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*. . . . They are nowhere restrained from inventing the most cruel and unheard-of punishments and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline."<sup>54</sup>

Should Congress have attempted any of these actions, it would have amounted to a virtual *coup d'état* and a repudiation of republicanism.<sup>55</sup> The advocates of the Constitution argued that such abuse of power could not reasonably be expected on the part of representatives elected by the people themselves. This argument was not satisfactory to the Anti-Federalists. They reiterated again and again the universal perfidy of man, especially men entrusted with political power, and emphasized the necessity of providing adequate protection against manifestations of human depravity. They charged that the authors and advocates of the Constitution were about to risk their liberties and those of all of the people on the slim possibility that the men to be elected to office in the new government would be, and would always be, good men.<sup>56</sup>

The Federalists also argued that election would serve as a check, since

<sup>54</sup> Elliot, II, pp. 109-111.

<sup>55</sup> This method of arguing drove the Federalists to exasperation more than once, as when one delegate in the Virginia Convention, an infrequent speaker, lost patience with Patrick Henry's "bugbears of hobgoblins" and suggested that "If the gentleman does not like this government, let him go and live among the Indians." Elliot, III, p. 580; cf. pp. 632, 644. Also note the reporter's tongue-in-cheek note on Henry's opposition to the President's power of Commander-in-Chief: "Here Mr. Henry strongly and pathetically expatiated on the probability of the President's enslaving America, and the horrid consequences that must result." *Ibid.*, p. 60. But Henry, who was so good at this technique himself, attacked it in his opponents. See *ibid.*, p. 140.

<sup>56</sup> See above, pp. 13-15.

the people could remove unfaithful or unsatisfactory representatives, and since knowledge of this would make the latter refrain from incurring the displeasure of their constituents. This argument was flatly rejected. Patrick Henry stated his position emphatically during the course of his objection to Congressional power of taxation:

I shall be told in this place, that those who are to tax us are our representatives. To this I answer, that there is no real check to prevent their ruining us. There is no actual responsibility. The only semblance of a check is the negative power of not re-electing them. This, sir, is but a feeble barrier, when their personal interest, their ambition and avarice, come to be put in contrast with the happiness of the people. All checks founded on anything but self-love, will not avail.<sup>67</sup>

In North Carolina the same opinion was expressed in a rather remarkable interchange. Taylor objected to the method of impeachment on the ground that since the House of Representatives drew up the bill of indictment, and the Senate acted upon it, the members of Congress themselves would be virtually immune to this procedure. Governor Johnston answered that impeachment was not an appropriate remedy for legislative misrule, and that "A representative is answerable to no power but his constituents. He is accountable to no being under heaven but the people who appointed him." To this, Taylor responded simply, "that it now appeared to him in a still worse light than before."<sup>68</sup> Johnston stated one of the great principles of representative government; it merely deepened Taylor's fear of Congress. He and his fellow Anti-Federalists strongly wished for what Madison had referred to as "auxiliary precautions" against possible acts of legislative tyranny.

## V

These additional safeguards were of two kinds: more explicit limitations written into the Constitution, and more institutional checks to enforce these limitations.

In recent years the Constitution has been much admired for its brevity, its generality, its freedom from the minutiae which characterized nineteenth-century constitutions. These qualities were feared and not admired by the Anti-Federalists. They wanted detailed explicitness which would

<sup>67</sup> Elliot, III, p. 167; cf. p. 327.

<sup>68</sup> Elliot, IV, pp. 32-34.

confine the discretion of Congressional majorities within narrow boundaries. One critic complained of "a certain darkness, duplicity and studied ambiguity of expression running through the whole Constitution. . . ." <sup>59</sup> Another said that "he did not believe there existed a social compact on the face of the earth so vague and so indefinite as the one now on the table." <sup>60</sup> A North Carolinian demanded to know, "Why not use expressions that were clear and unequivocal?" <sup>61</sup> Later, he warned, "Without the most express restrictions, Congress may trample on your rights." <sup>62</sup> Williams of New York expressed the general feeling when he said in that state's convention, "I am, sir, for certainty in the establishment of a constitution which is not only to operate upon us, but upon millions yet unborn." <sup>63</sup> These men wanted everything down in black and white, with no latitude of discretion or interpretation left to their representatives in Congress. It was an attitude which anticipated the later trend toward lengthy constitutions filled with innumerable and minute restrictions on the legislatures.

To no avail did the Federalists argue that if future representatives should indeed prove to be so treacherous and tyrannical as to commit the horrible deeds suggested, then mere guarantees on paper would not stop them for a minute. It is easy to call the Anti-Federalist attitude unrealistic, but to do so is to miss a large part of its significance. Like the Founding Fathers, like all men of their age, they were great constitutionalists. They were also first-generation republicans, still self-consciously so, and aware that their precious form of government was as yet an experiment and had not proved its capacity for endurance. Its greatest enemy was man's lust for power, and the only thing which could hold this in check, they were convinced, was a carefully written and properly constructed constitution. They placed even greater emphasis on the structure of government than did the Founding Fathers, and refused to take for granted, as the latter did, that the "genius" of the country was republican, and that the behavior of the men to be placed in office would in general be republican also.

<sup>59</sup> Thomas B. Wait to George Thatcher, January 8, 1788, in "The Thatcher Papers," selected from the papers of Hon. George Thatcher, and communicated by Captain Goodwin, U.S.A., *The Historical Magazine*, November and December, 1869 (Second Series, Vols. 15-16), No. V, p. 262.

<sup>60</sup> Elliot, III, p. 583.

<sup>61</sup> Elliot, IV, p. 68; cf. pp. 70, 153, 154-155, 168.

<sup>62</sup> *Ibid.*, p. 167.

<sup>63</sup> Elliot, II, p. 339.

The Anti-Federalists wanted a more rigid system of separation of powers, more numerous and more effective checks and balances, than the Founding Fathers had provided.<sup>64</sup> They thought this elementary principle of good government, this "political maxim," had been violated, and that corruption leading to tyranny would be the inevitable result. That the doctrine celebrated by Montesquieu did enjoy the status of "maxim" seems unquestionable. Violation of separation of powers was one of George Mason's major objections to the Constitution.<sup>65</sup> Richard Henry Lee made the same protest,<sup>66</sup> and further lamented that there were no "checks in the formation of the government, to secure the rights of the people against the usurpations of those they appoint to govern. . . ."<sup>67</sup> James Monroe said that he could "see no real checks in it."<sup>68</sup> It is no wonder that an obscure member of the Virginia Convention, when he rose with great diffidence to make his only speech, chose safe and familiar ground to cover:

That the legislative, executive, and judicial powers should be separate and distinct, in all free governments, is a political fact so well established, that I presume I shall not be thought arrogant, when I affirm that no country ever did, or ever can, long remain free, where they are blended. All the states have been in this sentiment when they formed their state constitutions, and therefore have guarded against the danger; and every schoolboy in politics must be convinced of the propriety of the observation; and yet, by the proposed plan, the legislative and executive powers are closely united. . . .<sup>69</sup>

In Pennsylvania, whose Revolutionary state constitution had embodied very little of separation of powers, an apparent return to Montesquieu's doctrine led to criticism of the Constitution. In the ratifying convention, one of the amendments submitted had for its purpose "That the legislative, executive, and judicial powers be kept separate. . . ."<sup>70</sup> In that same state, the leading Anti-Federalist pamphleteer "Centinel," who is believed

<sup>64</sup> Thus in *The Federalist* 47, Madison felt obliged to defend the Constitution against this charge. This was first pointed out to me by B. F. Wright and was the origin of the present essay. See the discussion in his article "The Federalist on the Nature of Political Man," *Ethics* (January, 1949), especially pp. 7 ff.

<sup>65</sup> "Objections of the Hon. George Mason, to the proposed Federal Constitution. Addressed to the Citizens of Virginia." Ford, *Pamphlets*, p. 330.

<sup>66</sup> "Letters of a Federal Farmer," Ford, *Pamphlets*, p. 299.

<sup>67</sup> *Ibid.*, p. 318.

<sup>68</sup> Elliot, III, p. 219.

<sup>69</sup> *Ibid.*, p. 608.

<sup>70</sup> McMaster and Stone, *Pennsylvania and the Constitution*, p. 423. See also pp. 475-477 for discussion back of this.

to have been either George Bryan, a probable co-author of the 1776 Constitution and formerly in sympathy with the ideas of Tom Paine on this subject, or his son Samuel, now expressed himself in the usual manner:

This mixture of the legislative and executive moreover highly tends to corruption. The chief improvement in government, in modern times, has been the complete separation of the great distinctions of power; placing the *legislative* in different hands from those which hold the *executive*; and again severing the *judicial* part from the ordinary *administrative*. "When the legislative and executive powers (says Montesquieu) are united in the same person, or in the same body of magistrates, there can be no liberty."<sup>71</sup>

The Anti-Federalists were just as unequivocal about the inadequacy of the Constitution's system of checks and balances. Patrick Henry hit top form when he took up the matter in Virginia: "There will be no checks, no real balances, in this government. What can avail your specious, imaginary balances, your rope-dancing, chain-rattling, ridiculous ideal checks and contrivances?"<sup>72</sup> Later in the Convention he argued that what checks there were had no practical value at all—for reasons which must cloud his reputation as a spokesman for the masses imbued with the radical spirit of Revolutionary democracy: "To me it appears that there is no check in that government. The President, senators, and representatives, all, immediately or mediately, are the choice of the people."<sup>73</sup> His views were echoed by his colleague, William Grayson.<sup>74</sup>

<sup>71</sup> McMaster and Stone, *Pennsylvania and the Constitution*, p. 587.

<sup>72</sup> Elliot, III, p. 54.

<sup>73</sup> *Ibid.*, p. 164. He then went on to point out that the British House of Lords constituted a check against both the King and the Commons, and that this check was founded on "self-love," i.e., the desire of the Lords to protect their interests against attack from either of the other two branches of the government. This consideration, he said, prevailed upon him "to pronounce the British government superior, in this respect, to any government that ever was in any country. Compare this with your Congressional checks. . . . Have you a resting-place like the British government? Where is the rock of your salvation? . . . Where are your checks? You have no hereditary nobility—an order of men to whom human eyes can be cast up for relief; for, says the Constitution, there is no title of nobility to be granted. . . . In the British government there are real balances and checks: in this system there are only ideal balances." *Ibid.*, pp. 164-165.

<sup>74</sup> *Ibid.*, pp. 421, 563. Grayson also expressed his preference for a form of government—if there was to be a national government at all—far less popular than the one proposed. He favored one strikingly similar to the plan Hamilton had suggested in Philadelphia, a president and senate elected for life, and a lower house elected for a three-year term. See Elliot, III, p. 279.

In New York, Melancton Smith returned to the subject several times, arguing, because there would eventually be corruption in Congress, "It is wise to multiply checks to a greater degree than the present state of things requires."<sup>75</sup> In Massachusetts James Winthrop tied up the concept of separation of powers with checks and balances very neatly. "It is now generally understood that it is for the security of the people that the powers of the government should be lodged in different branches. By this means publick business will go on when they all agree, and stop when they disagree. The advantage of checks in government is thus manifested where the concurrence of different branches is necessary to the same act. . . ."<sup>76</sup>

There can be little doubt that the Anti-Federalists were united in their desire to put more checks on the new government. This was natural, since they greatly feared it. Expressions of the opposite opinion were extremely rare. Rawlins Lowndes in South Carolina remarked casually and without elaboration that it was possible to have too many checks on a government.<sup>77</sup> George Clinton and the Pennsylvanian "Centinel" both warned that a government might become so complex that the people could not understand it,<sup>78</sup> but both men expressed the usual fear of abuse of power,<sup>79</sup> and "Centinel" paid his respects to Montesquieu and explicitly criticized the inadequacy of checks by the President or the House of Representatives on the Senate.<sup>80</sup>

Thus no one, so far as I have been able to discover, attacked the general validity of the system of separation of powers and checks and balances. The Anti-Federalists were staunch disciples of Montesquieu on this subject, and they would have found quite unacceptable J. Allen Smith's dictum that "The system of checks and balances must not be confused with democracy; it is opposed to and cannot be reconciled with the theory of popular government."<sup>81</sup>

Although there was much oratory about the Founding Fathers' devia-

<sup>75</sup> Elliot, II, pp. 259, 315.

<sup>76</sup> *Agrippa* Letters in Ford, *Essays*, p. 116.

<sup>77</sup> Elliot, IV, pp. 308-309.

<sup>78</sup> Clinton's *Cato* Letters in Ford, *Essays*, p. 257; *Centinel* in McMaster and Stone, *Pennsylvania and the Constitution*, p. 569. "Centinel" expressed a desire for a unicameral legislature.

<sup>79</sup> Clinton in Ford, *Essays*, pp. 261, 266; *Centinel* in McMaster and Stone, *Pennsylvania and the Constitution*, p. 617.

<sup>80</sup> McMaster and Stone, *Pennsylvania and the Constitution*, pp. 586-587, 475-477.

<sup>81</sup> *The Spirit of American Government* (New York, 1907), p. 9.

tion from Montesquieu's doctrine, there were surprisingly few proposals for specific alterations in the structure of the new government. Of these, the most important was a change in the relationship between President and Senate. The latter's share in the treaty-making and appointing powers was believed to be a dangerous blending of executive and legislative power which ought to have been avoided. Possibly because of their recent memory of the role of the colonial governor's council, possibly because there was no clear provision in the Constitution for an executive cabinet or council, the Anti-Federalists saw the Senate very much in the latter's role and expected it to play a very active and continuous part in giving advice to the President. This was clearly contrary to the doctrine of the celebrated Montesquieu—at least it seemed so to them.

The result would certainly be some form of joint Presidential-Senatorial tyranny, it was argued, but as to which of the two departments would be the stronger of the "partners in crime," the Anti-Federalists were not agreed. Patrick Henry said that the President, with respect to the treaty-making power, "as distinguished from the Senate, is nothing."<sup>82</sup> Grayson, with the North-South division in mind, predicted a *quid pro quo* alliance between the President and "the seven Eastern states." "He will accommodate himself to their interests in forming treaties, and they will continue him perpetually in office."<sup>83</sup> Mason predicted a "marriage" between the President and Senate: "They will be continually supporting and aiding each other: they will always consider their interest as united. . . . The executive and legislative powers, thus connected, will destroy all balances. . . ."<sup>84</sup> "Centinel" of Pennsylvania also feared that the President would not be strong enough to resist pressure from the Senate, and that he would join with them as "the head of the aristocratic junto."<sup>85</sup> Spencer of North Carolina, in support of a remedy in which all of the above men concurred, argued that with an advisory council entirely separate from the legislature, and chosen from the separate states, the President "would have that independence which is necessary to form the intended check upon the acts passed by the legislature before they obtain the sanction of laws."<sup>86</sup>

Although the prevailing opinion thus seemed to be that the President

<sup>82</sup> Elliot, III, p. 353.

<sup>83</sup> *Ibid.*, p. 492.

<sup>84</sup> *Ibid.*, pp. 493-494.

<sup>85</sup> McMaster and Stone, *Pennsylvania and the Constitution*, p. 586.

<sup>86</sup> Elliot, IV, pp. 117-118.

was not strong enough, there were some who believed that he was too strong. George Clinton argued that the extensive powers given to him, combined with his long tenure of office, gave him both "power and time sufficient to ruin his country." Furthermore, since he had no proper council to assist him while the Senate was recessed, he would be without advice, or get it from "minions and favorites"—or "a great council of state will grow out of the principal officers of the great departments, the most dangerous council in a free country."<sup>87</sup>

One man in North Carolina, the only one to the best of my knowledge, departed from the ordinary Anti-Federalist line of attack and criticized the executive veto from a clear majoritarian position. It was Lancaster, who projected the hypothetical case of a bill which passed the House of Representatives unanimously, the Senate by a large majority, was vetoed by the President and returned to the Senate, where it failed to get a two-thirds vote. The House would never see it again, said Mr. Lancaster, and thus, "This is giving a power to the President to overrule fifteen members of the Senate and every member of the House of Representatives."<sup>88</sup>

Except for Lancaster, most Anti-Federalists feared the Senate more than the President, but all feared the two in combination and wanted some checks against them. The separate advisory council for the President was one, and shorter terms and/or compulsory rotation for Senators and President, plus the power of state recall of the former, were others. Direct, popular election of either was *not* proposed.

Since most of the state executives and legislators held office for annual or biennial terms, one would naturally expect the substantially longer tenure of the President and Senate to be severely criticized. There were numerous objections to the six-year term of Senators, some to the four-year term of the President, and a few to the two-year term of members of the House of Representatives. It is to be noted, however, that there was no serious attempt to shorten the length of term of any of these officers, nor was there any attempt to make the tenure of either the President or the Senate correspond with that of the House. It was agreed that the two houses should "afford a mutual check" on each other,<sup>89</sup> and that the "stability" provided by the Senate "was essential to good government."<sup>90</sup>

<sup>87</sup> *Cato Letters*, Ford, *Essays*, pp. 261-262.

<sup>88</sup> Elliot, IV, p. 214.

<sup>89</sup> Elliot, II, p. 308 (Lansing).

<sup>90</sup> *Ibid.*, p. 309 (Smith).

The most insistent and repeated criticism was the failure of the Constitution to provide for the compulsory rotation of office for Senators and the President. "Nothing is so essential to the preservation of a republican government as a periodical rotation," said George Mason,<sup>91</sup> and Melancton Smith pronounced it "a very important and truly republican institution."<sup>92</sup> They greatly feared that President and Senators would be perpetually re-elected, and in effect hold office for life. Mason, for example, was quite content for the Senate to serve six years, and the President even eight, but he believed that without rotation, the new government would become "an elective monarchy."<sup>93</sup> The President would be able to perpetuate himself forever, it was assumed, because his election would always be thrown into the House of Representatives. In that body, corruption, intrigue, foreign influence, and above all else, the incumbent's use of his patronage, would make it possible for every man, once elected, to hold office for life. Senators would "hold their office perpetually,"<sup>94</sup> by corrupting their electors, the state legislatures. In New York, where the subject was debated very thoroughly, the Anti-Federalists were challenged to show how such corruption could take place, and continue for life, among a group which was continuously subject to popular election, and which would presumably not be permanent. To this challenge Lansing replied, "It is unnecessary to particularize the numerous ways in which public bodies are accessible to corruption. The poison always finds a channel, and never wants an object."<sup>95</sup> No distinction as to comparative corruptibility was made between national and state representatives.

To Federalist objections that compulsory rotation constituted an abridgment of the people's right to elect whomsoever they wished, Melancton Smith replied impatiently, "What is government itself but a restraint upon the natural rights of the people? What constitution was ever devised that did not operate as a restraint on their natural liberties?"<sup>96</sup> Lansing conceded that rotation placed a restriction on the people's free choice of rulers, but he thought this beneficial: "The rights of the people will be best supported by checking, at a certain point, the current of popular favor, and preventing the establishment of an influence which may leave to elections little more than the form of freedom."<sup>97</sup>

<sup>91</sup> Elliot, III, p. 485.

<sup>94</sup> Elliot, II, p. 309 (Smith).

<sup>92</sup> Elliot, II, p. 310.

<sup>95</sup> Elliot, II, p. 295.

<sup>93</sup> Elliot, III, p. 485.

<sup>96</sup> *Ibid.*, p. 311.

<sup>97</sup> *Ibid.*, p. 295. It was in this debate that Lansing made the Madisonian statement quoted above, p. 20.

The power of recall by state legislatures was associated with compulsory rotation as a means of preventing senatorial abuse of power. Not only would it enforce strict responsibility of senators to their electors, but in so doing it would protect the interests and preserve the sovereignty of the separate states. For these reasons, its adoption was strongly pressed in several of the ratifying conventions. Beyond these reasons, which were primary, recall combined with rotation would have a secondary beneficent result. It would serve to prevent the perpetuation of intra-legislative parties and factions—something which the Anti-Federalists feared quite as much as their opponents. Even if the power of recall should not actually be used, said Lansing, it would “destroy party spirit.”<sup>98</sup> When his opponents turned this argument against him, and suggested that factions within the state legislatures might use the power to remove good, honorable, and faithful men from the Senate, the answer was that the legislatures had not abused the power under the Articles of Confederation and would almost certainly not do so in the future, and that even if they did, ample opportunity would be provided for the displaced senator to defend himself. The influence of “ambitious and designing men” would be detected and exposed, and the error easily corrected.<sup>99</sup> A curious “Trust them, trust them not” attitude toward the state legislatures is thus revealed. They could not be trusted to refuse re-election to unfaithful or ambitious senators, though they could be trusted to remove the same and to leave in office all those who deserved well of them and of their constituents.

From this it is clear that the Anti-Federalists were not willing to trust either upper or lower house of the proposed national Congress; neither were they willing to trust their own state legislatures completely, though they had less fear of the latter because these could be kept under closer observation.

The same attitude is indicated by Anti-Federalist reaction to the restrictions placed on state legislatures by Article I, Section 10 of the Constitution, and to the then potential review of both state and national legislation by the Supreme Court.

Of the latter prospect, frequently said to have been one of the great bulwarks erected against the democratic majority, very little was said during the ratification debate. There was no explicit provision for judicial review in the Constitution, and it is probably not possible to prove

<sup>98</sup> Elliot, II, p. 290.

<sup>99</sup> *Ibid.*, p. 299.

conclusively whether or not its authors intended the Supreme Court to exercise this power. The evidence suggests that they probably assumed it would. Hamilton's *Federalist* 78 supports this view. The issue was never debated in the state conventions, and there are almost no references to it in any of the Anti-Federalist arguments. Since *Federalist* 78 was published before the Virginia, New York, and North Carolina Conventions met, this lack of discussion is significant and would seem to reflect lack of concern. There was severe criticism of Article III, particularly in Virginia, but it centered around the jurisdiction of the lower federal courts to be established by Congress, not around the Supreme Court. The issue was entirely one of state courts versus federal courts, not of courts versus legislatures.

The single direct reference to judicial review made in the Virginia Convention—at least the only one I have found—suggests that this institution was, or would have been, thoroughly congenial to the Anti-Federalists. The statement was made by Patrick Henry:

Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. Are you sure that your federal judiciary will act thus? Is that judiciary as well constructed, and as independent of the other branches, as our state judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary.<sup>100</sup>

There was nothing equivocal about Henry's attitude. It elicited no comment. Possibly neither side wished to commit itself; more likely the statement was lost and forgotten after brighter flames had issued from the great orator's fire. What is really significant, however, is the complete absence of debate over judicial review. The Anti-Federalists probed the Constitution for every conceivable threat, explicit or implicit, to their conception of free and popular government. If they had considered judicial review such a threat, they would surely have made the most of it, and particularly after *Federalist* 78 was published.

There was also comparatively little attention given to the restrictions which Article I, Section 10 of the Constitution placed on the state legis-

<sup>100</sup> Elliot, III, p. 325.

latures. Among other things, the states were forbidden to coin money, emit bills of credit, make anything but gold or silver legal tender for the payment of debts, or pass any law impairing the obligations of contracts. These are the provisions which recent historians have emphasized as designed to protect the property of the conservative class against the onslaughts of the radical democratic majority. The Anti-Federalists had very little to say about these provisions. The notation of the New York Convention's action is significant: "The committee then proceeded through sections 8, 9, and 10, of this article [I], and the whole of the next, with little or no debate."<sup>101</sup> In Virginia and the Carolinas there was more discussion, but nothing like a full-dress debate, and very little indication of any strong or widespread opposition. In fact, Patrick Henry said that the restrictions were "founded in good principles,"<sup>102</sup> and William Grayson said of the prohibition against paper money, "it is unanimously wished by every one that it should not be objected to."<sup>103</sup> Richard Henry Lee expressed his preference for paper money to be issued by Congress only.<sup>104</sup> Of the few objections or doubts expressed, these were typical. Henry in Virginia and Galloway in North Carolina both expressed a fear that the contract clause might be interpreted to force the states to redeem their respective shares of the depreciated Continental currency and of state securities at face value.<sup>105</sup> Henry was also angry because of the necessary implication that the states were too "depraved" to be trusted with the contracts of their own citizens.<sup>106</sup> With regard to the prohibition of paper money, two men in North Carolina defended the previous state issue as having been a necessary expedient in troublesome times, but did not seem to object to the prohibition of future issues.<sup>107</sup> One man argued against this clause and the supreme law clause on the ground that the effect might be to destroy the paper money already in circulation and thereby create great confusion.<sup>108</sup> His contention was denied.<sup>109</sup> These remarks, none of which expressed direct opposition, were typical. In South Carolina,

<sup>101</sup> Elliot, II, p. 406.

<sup>102</sup> Elliot, III, p. 471.

<sup>103</sup> *Ibid.*, p. 566.

<sup>104</sup> J. C. Ballagh, editor, *The Letters of Richard Henry Lee*, 2 vols. (New York, 1911-1914), pp. 421-422.

<sup>105</sup> Elliot, III, pp. 318-319; IV, p. 190.

<sup>106</sup> Elliot, III, p. 156.

<sup>107</sup> *Ibid.*, IV, pp. 88, 169-170.

<sup>108</sup> *Ibid.*, pp. 180, 184-185.

<sup>109</sup> *Ibid.*, pp. 181-185.

however, Rawlins Lowndes came out flatly against this restriction, defended the previous issue of paper money and the right of the state to make further issues in the future.<sup>110</sup> His position appears to have been the exception, at least of those which were expressed openly and publicly on the various convention floors.<sup>111</sup>

The response of the Anti-Federalists to these important limitations on the power of the states can accurately be described, I think, as one of overall approbation tempered by some doubts caused by fear that they would be applied retroactively. This attitude is in rather curious contrast with the extremely jealous reaction to other changes in federal-state relations for which the Constitution provided. There were violent objections to federal control over state militia, to Congressional power to tax and to regulate commerce, to the creation of an inferior system of federal courts. All these things brought forth loud cries that the states would be swallowed up by the national government. These important restrictions on the economic powers of the states were received with relative silence. There was apparently very little objection to these limitations on the power of state legislative majorities.

It remains to consider the extent to which the general Anti-Federalist distrust of their representatives, particularly those who were to serve in the national government but also those who served in their state legislatures, reflected also a distrust of the majorities who elected them, that is to say, of the people themselves. The answer is partly wrapped up in the whole complex of ideas constituting the Anti-Federalist conception of re-

<sup>110</sup> *Ibid.*, pp. 289-290.

<sup>111</sup> There appears to have been more opposition to the provisions of Article I, Section 10 expressed outside of the Convention than inside. See Trenholme, *Ratification in North Carolina*, p. 42, and Clarence E. Miner, *The Ratification of the Federal Constitution in New York*, Studies in History, Economics and Public Law, Vol. XCIV, No. 3, Whole No. 214, Columbia University (New York, 1921), for the extra-convention debate in New York. It may be that this was one of the subjects the Anti-Federalists preferred not to debate for the official record. See Trenholme, pp. 166-167, for a discussion of the refusal of North Carolina Anti-Federalists to state in the Convention objections to the Constitution being made outside. There was also apparently a similar situation during the Virginia Convention, where the Federalists objected to what was happening "outdoors." See Elliot, III, p. 237. See also the remarks of Alexander C. Hanson, a member of the Maryland Convention. In discussing these provisions, of which he strongly approved, he wrote, "I have here perhaps touched a string, which secretly draws together many of the foes to the plan." In *Aristides*, "Remarks on the Proposed Plan of a Federal Government," Ford, *Pamphlets*, p. 243.

publican government, which I shall attempt to draw together in the concluding section of this essay. Some parts of the answer can be put into the record here.

The attitude of the Anti-Federalists toward the people as distinguished from their representatives, and toward the general problem of majority rule, was not radically different from that of their opponents. It is a curious and remarkable fact that during the course of this great debate in which the most popular national constitution ever framed was submitted to the public for the most popular mode of ratification yet attempted, there was very little tendency on either side to enthrone "the people" or to defer automatically to their judgment. Neither side showed the slightest inclination to use as its slogan, "Vox populi vox Dei." Rather was the contrary true, and some of the Anti-Federalist expressions of this attitude could easily have fitted into the dark picture of human nature presented in *The Federalist*. Indeed, the speeches and essays of the Anti-Federalists were peculiarly lacking in the great expressions of faith in the people which are to be found in the writings of Jefferson, and even occasionally in *The Federalist* itself. This is partly to be accounted for because their position was a negative one; they attacked the proposed system on the ground that it would be destructive of liberty.

It was therefore perhaps natural that they sometimes expressed fear about what may be called the constituent capacity of the people—the capacity of the people to act wisely in the actual choice of a constitution. They were afraid that the people might not see in the proposed new government all of the dangers and defects which they themselves saw. And there were gloomy comments about lack of stability. Said George Clinton in the New York Convention, "The people, when wearied with their distresses, will in the moment of frenzy, be guilty of the most imprudent and desperate measures. . . . I know the people are too apt to vibrate from one extreme to another. The effects of this disposition are what I wish to guard against."<sup>112</sup> His colleague, Melancton Smith, spoke in a similar vein:

Fickleness and inconstancy, he said, were characteristic of a free people; and, in framing a constitution for them, it was, perhaps, the most difficult thing to correct this spirit, and guard against the evil effects of it. He was persuaded it could not be altogether prevented without destroying their free-

<sup>112</sup> Elliot, II, p. 359.

dom. . . . This fickle and inconstant spirit was the more dangerous in bringing about changes in the government.<sup>113</sup>

It was "Centinel," author or son of the author of Pennsylvania's revolutionary Constitution, who expressed the gravest doubts about the capacity of the people to make a wise choice in the form of government, and who expounded a kind of Burkeian conservatism as the best guarantor of the people's liberties. In a passage apparently aimed at the prestige given to the proposed Constitution by the support of men like Washington and Franklin, "Centinel" wrote that "the science of government is so abstruse, that few are able to judge for themselves." Without the assistance of those "who are competent to the task of developing the principles of government," the people were "too apt to yield an implicit assent to the opinions of those characters whose abilities are held in the highest esteem, and to those in whose integrity and patriotism they can confide. . . ." This was dangerous, because such men might easily be dupes, "the instruments of despotism in the hands of the *artful and designing*." "Centinel" then continued:

If it were not for the stability and attachment which time and habit gives to forms of government, it would be in the power of the enlightened and aspiring few, if they should combine, at any time to destroy the best establishments, and even make the people the instruments of their own subjugation.

The late revolution having effaced in a great measure all former habits, and the present institutions are so recent, that there exists not that great reluctance to innovation, so remarkable in old communities, and which accords with reason, for the most comprehensive mind cannot foresee the full operation of material changes on civil polity; it is the genius of the common law to resist innovation.<sup>114</sup>

Later in the same series of articles, "Centinel" pronounced "this reluctance to change" as "the greatest security of free governments, and the principal bulwark of liberty."<sup>115</sup> This attitude provides an interesting comparison with the unquestioning assumption in the Federal Convention that the proposed Constitution would be submitted to the people for their verdict,

<sup>113</sup> Elliot, II, p. 225.

<sup>114</sup> McMaster and Stone, *Pennsylvania and the Constitution*, pp. 566-567.

<sup>115</sup> *Ibid.*, p. 655. It may be noted that this Burkeian friend of Tom Paine had not undertaken to submit the radical revolutionary Constitution of Pennsylvania to the people of that state for full, free, and deliberate debate, but had rushed its ratification through the legislature with most unseemly haste.

and with the level of popular understanding of political affairs to which the essays of the *Federalist Papers* were addressed.

Serious reservations about the capacity of the people as electors were implicit in several of the arguments noted above. The advocacy of religious qualifications for office-holding indicated a desire to restrict the choice of the electorate to certified Protestants, and the demand for compulsory rotation of senators and President rested on the fear that corruption of both state and national legislatures by the incumbents of those offices could not be prevented by the feeble check of popular election. Perhaps most important was the belief that the people, voting in the large constituencies provided for by the Constitution, would either lose elections to their presumed aristocratic opponents because of the latter's superior capacity for organization, or would themselves let their choice fall on such aristocrats, or be deceived by ambitious and unscrupulous demagogues.

There was no more confidence in the inherent justice of the will of the majority than there was in its electoral capacity. Since the Anti-Federalists were skeptical that constituent opinion would be adequately reflected in the national legislature, they were less inclined than the Federalists to regard the government as the instrument of the people or of the majority. When they did so, there was not the slightest tendency to consider its decisions "right" *because* they were majority decisions. Rather was there always some standard of right and justice, independent of the majority's will, to which that will ought to conform. The Anti-Federalists were perfectly consistent in their conception of political behavior and did not regard a majority as superior to the sum of its parts, that is to say, of individual men motivated by self-interest and subject to a natural lust for power. There was very little discussion of majority rule and minority rights as fundamental principles of representative government, but the general attitude of the Anti-Federalists is, I think, reasonably clear.

They assumed, of course, that in a republican form of government, the majority must rule. But they also assumed that the will of the majority ought to be limited, especially when the "majority" was a legislative one. They demanded a bill of rights, with special emphasis on procedural protections in criminal cases, and vehemently repudiated the somewhat spurious Federalist argument that a bill of rights was not necessary in a government ruled by the people themselves. To this, James Winthrop replied:

that the sober and industrious part of the community should be defended from the rapacity and violence of the vicious and idle. A bill of rights, therefore, ought to set forth the purposes for which the compact is made, and serves to secure the minority against the usurpation and tyranny of the majority. . . . The experience of all mankind has proved the prevalence of a disposition to use power wantonly. It is therefore as necessary to defend an individual against the majority in a republick as against the king in a monarchy.<sup>116</sup>

The reaction of the Anti-Federalists to the restrictions imposed on state legislative majorities by Article I, Section 10 of the Constitution is also relevant at this point. These provisions were certainly intended to protect the rights of property against legislative invasion by majorities. If there had been any spirit of doctrinaire majoritarianism among the opponents of the Constitution, this would surely have been the occasion to express it, and in quite unequivocal terms. There was very little open criticism of these provisions, none on the grounds that they violated the principle of majority rule or that they were designed to protect the interests of the upper classes.<sup>117</sup> What criticism there was, was expressed largely in terms of practical considerations.

Distrust of majority factions in much the same sense as Madison's was emphatically expressed by the one sector of Anti-Federalism which constituted the most self-conscious minority. Southerners felt keenly the conflict of interest between North and South and were vehemently opposed to surrendering themselves to the majority of the seven Eastern states. One of the reasons for George Mason's refusal to sign the Constitution had been his failure to get adopted a two-thirds majority vote for all laws affecting commerce and navigation. His fears for the South's interests were shared by his fellow Southerners and were frequently expressed in the Convention debates. "It will be a government of a faction," said William Grayson, "and this observation will apply to every part of it; for, having a majority, they may do what they please."<sup>118</sup> Other colleagues in Virginia joined in this distrust of the anticipated Northern majority uniting to oppress the South.<sup>119</sup> In North and South Carolina it was much

<sup>116</sup> *Agrippa* Letters, Ford, *Essays*, p. 117. See also Elliot, III, p. 499, for a similar statement from William Grayson.

<sup>117</sup> See above, footnote 111, for discussion of the possibility of more criticism expressed outside of the conventions.

<sup>118</sup> Elliot, III, p. 492.

<sup>119</sup> *Ibid.*, pp. 152, 221-222.

the same. Bloodworth lamented, "To the north of the Susquehanna there are thirty-six representatives, and to the south of it only twenty-nine. They will always outvote us."<sup>120</sup> In South Carolina, Rawlins Lowndes predicted that "when this new Constitution should be adopted, the sun of the Southern States would set, never to rise again." Why? Because the Eastern states would have a majority in the legislature and would not hesitate to use it—probably to interfere with the slave trade, "because they have none themselves, and therefore want to exclude us from this great advantage."<sup>121</sup>

There was, then, no doctrinaire devotion to majoritarianism. It was assumed that oppression of individuals or of groups might come from majorities of the people themselves as well as from kings or aristocrats.

## VI

For a generation the *Economic Interpretation of the Constitution* has exerted a deep and extensive influence over students of American history and government. The conception of the Constitution as the product of a conservative reaction against the ideals of the Revolution has been widely accepted, and Beard's analysis of the document itself commonly followed. According to this interpretation, the Founding Fathers secured their property rights by placing certain restrictions on state legislatures and by setting up a government in which the system of separation of powers, with checks and balances, indirect elections, staggered terms of office, and a national judiciary with the potential power of judicial review, would restrain the force of turbulent, democratic majorities. Surprisingly little attention has been devoted to the Anti-Federalists, but it is implied that they were the true heirs of the Revolutionary tradition—equally devoted to individual liberty and majority rule. The Federalists' desire for strong central government and the Anti-Federalists' fear of such are also considered, but the allegedly undemocratic structure of the national government itself is strongly emphasized. This aspect of the Beard thesis is open to question.

For the objections of the Anti-Federalists were not directed toward the barriers imposed on simple majority rule by the Constitution. Advocates and opponents of ratification may have belonged to different economic classes and been motivated by different economic interests. But they

<sup>120</sup> Elliot, IV, p. 185.

<sup>121</sup> *Ibid.*, p. 272.

shared a large body of political ideas and attitudes, together with a common heritage of political institutions. For one thing, they shared a profound distrust of man's capacity to use power wisely and well. They believed self-interest to be the dominant motive of political behavior, no matter whether the form of government be republican or monarchical, and they believed in the necessity of constructing political machinery that would restrict the operation of self-interest and prevent men entrusted with political power from abusing it. This was the fundamental assumption of the men who wrote the Constitution, and of those who opposed its adoption, as well.

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

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

They regarded representation primarily as an institutional substitute for direct democracy and endeavored to restrict its operation to the performance of that function; hence their plea that the legislature should be an exact miniature of the people, containing spokesmen for all classes, all groups, all interests, all opinions, in the community; hence, too, their

preference for short legislative terms of office and their inclination, especially in the sphere of state government, to regard representatives as delegates bound by the instructions of constituents rather than as men expected and trusted to exercise independent judgment. This was a natural stage in the development of representative government, but it contained several weaknesses and was, I think, already obsolete in late eighteenth-century America.

Its major weaknesses were closely akin to those of direct democracy itself, for representation of this kind makes difficult the process of genuine deliberation, as well as the reconciliation of diverse interests and opinions. Indeed, it is notable, and I think not accidental, that the body of Anti-Federalist thought as a whole showed little consideration of the necessity for compromise. The Founding Fathers were not democrats, but in their recognition of the role which compromise must play in the process of popular government, they were far more advanced than their opponents.

It is clear, too, that the same factors limiting the size and extent of direct democracies would also be operative in republics where representation is regarded only as a substitute for political participation by the whole people. Within their own frame of reference, the Anti-Federalists were quite right in insisting that republican government would work only in relatively small states, where the population was also small and relatively homogeneous. If there is great diversity among the people, with many interests and many opinions, then all cannot be represented without making the legislature as large and unwieldy as the citizen assemblies of ancient Athens. And if the system does not lend itself readily to compromise and conciliation, then the basis for a working consensus must be considerable homogeneity in the people themselves. In the opinion of the Anti-Federalists, the American people lacked that homogeneity.<sup>122</sup> This Rousseauistic vision of a small, simple, and homogeneous democracy may have been a fine ideal, but it *was* an ideal even then. It was not to be found even in the small states, and none of the Anti-Federalists produced a satisfactory answer to Madison's analysis of the weaknesses in-

<sup>122</sup> I do not mean to suggest that the Anti-Federalist attitude concerning homogeneity and what modern social scientists refer to as *consensus* was hopelessly wrong. A degree of both is necessary for the successful operation of democracy, and the concept itself is an extremely valuable one. I would merely contend that the Federalist estimate of the degree required was both more liberal and more realistic. On the subject of the extent to which the American people were united in tradition, institutions, and ideas in 1787-1788, see Ranney, "Bases of American Federalism."

herent in republicanism operating on the small scale preferred by his opponents.

Associated with this theory of representation and its necessary limitation to small-scale republics was the Anti-Federalists' profound distrust of the electoral and representative processes provided for and implied in the proposed Constitution. Their ideal of the legislature as an "exact miniature" of the people envisaged something not unlike the result hoped for by modern proponents of proportional representation. This was impossible to achieve in the national Congress.<sup>123</sup> There would not and could not be enough seats to go around. The constituencies were to be large—the ratio of representatives to population was not to exceed one per thirty thousand—and each representative must therefore represent not one, but many groups among his electors. And whereas Madison saw in this process of "filtering" or consolidating public opinion a virtue, the Anti-Federalists saw in it only danger. They did not think that a Congress thus elected could truly represent the will of the people, and they particularly feared that they themselves, the "middling class," to use Melancton Smith's term, would be left out.

They feared this because they saw clearly that enlarged constituencies would require more pre-election political organization than they believed to be either wise or safe. Much has been written recently about the Founding Fathers' hostility to political parties. It is said that they designed the Constitution, especially separation of powers, in order to counteract the effectiveness of parties.<sup>124</sup> This is partly true, but I think it worth noting that the contemporary opponents of the Constitution feared parties or factions in the Madisonian sense just as much as, and that they feared parties in the modern sense even more than, did Madison himself. They feared and distrusted concerted group action for the purpose of "centering votes" in order to obtain a plurality, because they believed this would distort the automatic or natural expression of the people's will. The necessity of such action in large electoral districts would work to the advantage of the upper classes, who, because of their superior capacity and opportunity for organization of this kind, would elect a disproportionate share of representatives to the Congress. In other words, the Anti-Federalists were acutely aware of the role that organization played in the winning of elec-

<sup>123</sup> Nor for that matter, has it been the pattern of representation in state legislatures.

<sup>124</sup> See, e.g., E. E. Schattschneider, *Party Government* (New York, 1942), pp. 4 ff.

tions, and they were not willing to accept the "organized" for the "real" majority. Instead they wanted to retain the existing system, where the electoral constituencies were small, and where organization of this kind was relatively unnecessary. Only then could a man vote as he saw fit, confident that the result of the election would reflect the real will of the people as exactly as possible.

Distrust of the electoral process thus combined with the localist feelings of the Anti-Federalists to produce an attitude of profound fear and suspicion toward Congress. That body, it was felt, would be composed of aristocrats and of men elected from far-away places by the unknown peoples of distant states. It would meet at a yet undesignated site hundreds of miles from the homes of most of its constituents, outside the jurisdiction of any particular state, and protected by an army of its own making. When one sees Congress in this light, it is not surprising that the Anti-Federalists were afraid, or that they had little faith in elections as a means of securing responsibility and preventing Congressional tyranny.<sup>125</sup>

Their demand for more limitations on Congressional power was perfectly natural. These were believed to be necessary in any government because of the lust for power and the selfishness in its use which were inherent in the nature of man. They were doubly necessary in a government on a national scale. And so the Anti-Federalists criticized the latitude of power given to Congress under Article I and called for more detailed provisions to limit the scope of Congressional discretion. We are certainly indebted to them for the movement that led to the adoption of the Bill of Rights, though they were more concerned with the traditional common-law rights of procedure in criminal cases than with the provisions of the First Amendment. They were at the same time forerunners of the unfortunate trend in the nineteenth century toward lengthy and cumbersome constitutions filled with minute restrictions upon the various agencies of government, especially the legislative branch. The generality and brevity which made the national Constitution a model of draftsmanship and a viable fundamental law inspired in the Anti-Federalists only fear.

<sup>125</sup> It is worth noting again that the abuses of power dwelt upon by the Anti-Federalists were usually extreme ones, almost amounting to a complete subversion of republican government. They did not regard as of any value the Federalists' argument that a desire to be re-elected would serve to keep the representatives in line. The Federalists had no clear idea of politics as a profession, but they were close to such a notion.

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

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

The Anti-Federalists were not latter-day democrats. Least of all were they majoritarians with respect to the national government. They were not confident that the people would always make wise and correct choices in either their constituent or electoral capacity, and many of them feared the oppression of one section in the community by a majority reflecting the interests of another. Above all, they consistently refused to accept legislative majorities as expressive either of justice or of the people's will. In short, they distrusted majority rule, at its source and through the only possible means of expression in governmental action over a large and

populous nation, that is to say, through representation. The last thing in the world they wanted was a national democracy which would permit Congressional majorities to operate freely and without restraint. Proponents of this kind of majority rule have almost without exception been advocates of strong, positive action by the national government. The Anti-Federalists were not. Their philosophy was primarily one of limitations on power, and if they had had their way, the Constitution would have contained more checks and balances, not fewer. Indeed it seems safe to say that the Constitution could not have been ratified at all had it conformed to the standards of democracy which are implicit in the interpretation of Beard and his followers. A national government without separation of powers and checks and balances was not politically feasible. In this respect, then, I would suggest that his interpretation of the Constitution was unrealistic and unhistorical.

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