American Constitutional Law Power and Politics

Volume One Constitutional Structure and Political Power

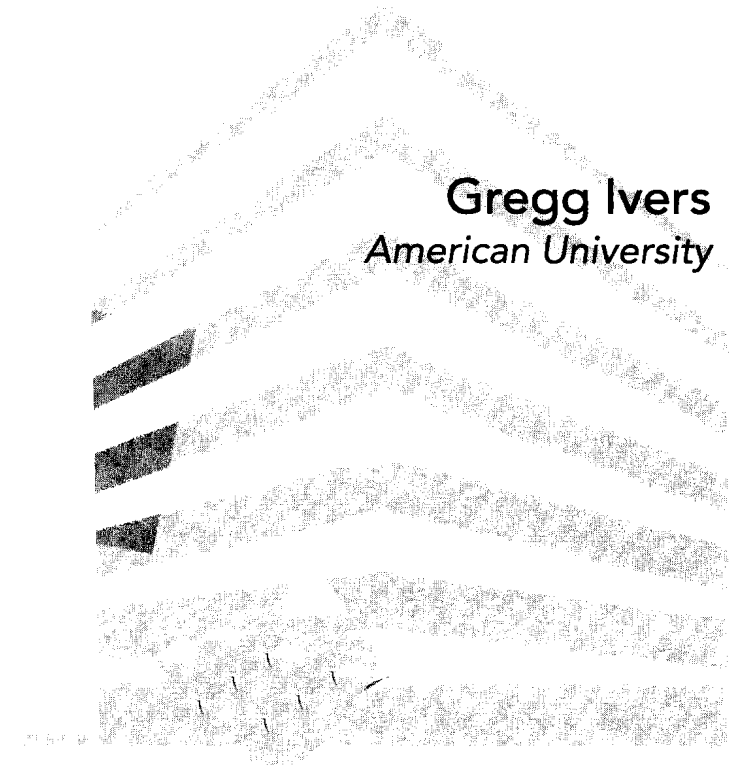
Gregg Ivers

AMERICAN CONSTITUTIONAL LAW: POWER AND POLITICS

Volume I

Constitutional Structure and Political Power

Gregg Ivers
American University



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AMERICAN CONSTITUTIONAL LAW:
POWER AND POLITICS

Volume I

Constitutional Structure and Political Power

For my family,
past, present, and future

Preface

Each semester when I teach Constitutional Law and Civil Liberties, I always tell my undergraduates that no one is going to learn anything, including myself, if we cannot make the subject come alive. And what makes the study of the Constitution fun is the human drama behind the cases that have resulted in many of the landmark decisions by the United States Supreme Court. In *American Constitutional Law,* I have emphasized the relationship between law and society, with a special focus on the people and organized interests that turned their personal disputes with the law into cases of monumental importance that resulted in constitutional change.

How the Book Is Organized

Like most professors, I have a certain point of view about the subjects I teach and write about. One point I want my students to understand is that the Constitution was not handed to the American people as God is said to have handed Moses the Ten Commandments on Mount Sinai. The Constitution was the result of an intense political battle between bitterly divided foes over how to organize the nation's social and economic life, how to distribute political power to govern a new nation, and how to secure individual rights while maintaining an orderly society. In the introductory chapter, I explain the theoretical and political roots of the Framers' decisions on these issues. I also introduce in Chapter 1 the concept of law as an instrument of social and political change, and describe the important role that organized interests play in the litigation process.

In Chapter 2, I offer an in-depth discussion of constitutional theory and why it matters. Here, I do not follow the path of some of my colleagues in emphasizing the attitudinal model of judicial behavior, or focus solely on modes of judicial review or emphasize the Court's decision-making process independent of concurrent social and political forces. Instead, I take the student through various theories of constitutional interpretation and explain the choices that the justices and the parties involved in litigation face in trying to articulate and defend what they believe the Constitution means. While I offer a balanced discussion of the strengths and weaknesses of different approaches to interpreting the Constitution, I also want the student to understand that constitutional theory has its roots in what Justice Oliver Wendell Holmes, Jr. called the "felt necessities" of our time. In other words, the societal arrangements that law protects do not just exist; they are the product of political choices. I emphasize this theme beyond this one chapter on constitutional interpretation to give it prominent weight throughout the casebook.

Volume I is subtitled *Constitutional Structure and Political Power,* and the themes I explore include the separation of powers, federalism, congressional and state commerce power, and the protection of private property and ownership rights. Although the emphasis in Volume I is on the social organization of American political power, I go beyond just a dry recitation of the traditional cases that define the authority of the different branches of government and the distribution of power between the national government and the states. I also infuse constitutional development with commentary on the social and political dynamics of the era. Supreme Court justices, like everybody else, are products of their time. How a justice in the late 1800s, for example, understood private property rights had a great deal to do with the nation's rapid move toward an industrialized society, the influence that such titans of American industry as the Rockefeller and Carnegie families had on attitudes toward government regulation, and the legal and economic theories being advanced by leading intellectuals in support of property rights. Likewise, in the late 1930s, the Great Depression and the panic that gripped the nation during this time inevitably shaped what a growing number of justices believed about the power of Congress to regulate the economy.

Features of the Book

Each chapter begins with an opening story that is designed to illustrate the complexities involved in that particular area of constitutional law and how the law affects the lives of ordinary American citizens. I then

offer an essay that leads students into the cases and, from that point forward, interweave commentary and narrative with excerpts from Supreme Court opinions. In almost every case, I include concurring and dissenting opinions so that students can see the range of views among the justices on important constitutional questions. Each case excerpt is preceded by a headnote that emphasizes the social and political dimension of the litigation and, when appropriate, the role of organized interests. Starting with Chapter 2, each chapter includes several SIDEBARs, short pieces that highlight the human origins and real-world consequences of particularly critical cases. I also include suggested readings at the end of each chapter to assist students writing research papers or who simply want to know more about the subject.

Houghton Mifflin will provide instructors and students comprehensive support for *American Constitutional Law.* The award-winning CD-ROM *The Supreme Court's Greatest Hits* is available with new copies of the text. This CD contains more than seventy hours of Supreme Court oral arguments and opinion pronouncements from fifty of the most important cases decided in the last forty years. Cases on the CD that are excerpted in the text are marked with a CD icon; this cross-referencing will help students easily locate the multimedia resources that correspond to their assigned readings.

There is also a Web site (accessible via the College Division homepage at http://www.college.hmco.com) that will provide hypothetical problems to use in conjunction with each chapter; ACE self-tests that students can use to test their comprehension of the readings; a Guide to Legal Reports and Periodicals to help students with their research; and links to organizations that frequently participate in Supreme Court litigation. Each year, Houghton Mifflin will publish an annual supplement to *American Constitutional Law* to keep instructors and students abreast of the Court's most recent decisions and other related developments.

Acknowledgments

I never had the slightest illusion I could undertake this book without research support and assistance from my students, who remain a teacher's greatest resource. I would like to thank the following students for all their hard work: Dan Weiss, Kristen Eastlick, Chris Donovan, Erika Schlachter, Eric Eikenberg, Mari Strydom, Meredith Mecca, Scott Shoreman, Kyle Cruley, Kim Horn, Meg Streff, Kristen Murray, Nicole Goodrich, Kara Ruzicka, Carey Ng, Jennie Tucker, Jarrett Alexander, Erin Ackerman, Reuben Ackerman, Gina Connell, Jay Liotta, Stephanie Lenner, Michelle Moyer, Dominique Fanizza, Shannon Thornton, and Jeremy Gauld. Several other students helped make my life easier in many other ways, and they, too, deserve thanks: Lisa Loftin, Amy Hannah, Eva Rallis, Allison Viscardi, Michael Wilkosz, Ethan Rosenzweig, Sarah Simmons, Bridget McGuire, Fred Turner, Chris Canavan, Tim Titus, Jon Liebman, Damon Manetta, Shawn Bates, Kim Nelson, Meg Scully, Carla Cerino, and Melanie Auerbach. These are all special people who are destined for great things. It was a privilege to work with all of you.

Scott Diener, Bruce Field, John Reteneller, Scott Stephenson, and Jim Verhoff are not political scientists, but they are great friends and always a necessary source of laughter, error-correction, and support. Jon Kaplan and Scott Aronson, two great friends and talented musicians, were my partners in Available Jones, one of Washington's great bar and party bands. Thanks for helping me not think about the Constitution while we were cranking out the hits! And you're welcome for learning that drummer's rule.

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Former Sponsoring Editor Melissa Mashburn is many things—witty, charming, endlessly optimistic, persistent, and a first-rate connoisseur of barbeque and donuts—but most of all endlessly supportive and marvelously inspirational. Melissa gave me the confidence to move forward with this casebook. After I reached the initial wall, Melissa told me, "Don't worry! I'm going to get you a great development editor! Just wait! You'll love her!" And, lo and behold, Katherine Meisenheimer came along, and sure enough, whipped this project into shape and kept me going, offering just the perfect blend of support, encouragement, and "that's great, Gregg, but when am I going to see Chapter 5" reminders that every author needs. Faced with Katherine's powerful intelligence and acute sense of purpose, I was left with little choice but to listen to this amazing woman. Nancy Benjamin managed the production process with ease and skill. June Waldman turned frequently unintelligible prose bearing only a remote kinship to the English language into coherent sentences. Martha Friedman took my less-than-specific ideas for photographs and illustrations and managed to find exactly what I wanted. Jean Woy, Editor-in-Chief, is legendary in political science publishing circles, and after working with her on *American Constitutional Law,* I understand why. Finally, thanks to Jay Hu, Marketing Manager, and the Houghton Mifflin sales representatives for believing in and selling my book.

For Janet, still sweet and lovely after all these years, and Max, who makes every day a fun day, and Claire, the wonderwaif of Maplewood Park, you make me feel all right, and that is better than I can say.

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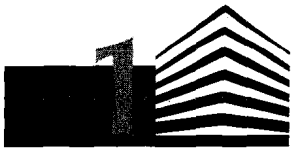


Law and Constitutional Structure

A student preparing to study American constitutional law for the first time usually experiences a mix of emotions. First, the big, fat casebook—like this one—that goes with the course immediately suggests to the student that a lot of reading will be involved, inviting fear. Professors think that reading is a good thing. In fact, some even take pride in believing that their constitutional law course will require students to read more than any other course the student ever takes. Second, after flipping through this clean, unhighlighted, new casebook, the student notices that phrases such as *ipso facto, ex post facto, subpoena duces tecum, in toto,* and *stare decisis* appear—repeatedly—throughout the opinions, leaving him or her to wonder in just what language constitutional law is taught. Third, as if this newly discovered need to brush up on Latin is not enough to cause anguish, the student then discovers that familiar topics such as congressional committees, majority leaders, cabinet secretaries, and political parties have been replaced by obscure subjects: appellants filing writs of *certiorari, amici curiae* briefs, jurisdictional claims, and equitable remedies. The result? Bewilderment, confusion or maybe a little of each!

So, is it possible for the uninitiated student to learn about constitutional law and, as only a professor could dare ask, love it at the same time?

Indeed it is, for constitutional law is about far more than dry legal rules and their application to what seem like distant abstract disputes. Constitutional law is about how the most critical and important questions involving government power, social and political organization, and individual rights evolved from disputes between citizens and their government—or between and among the different branches and levels of government—into legal rules. Concurrent with this theme is the other critical component in understanding American constitutional law: how the Supreme Court has interpreted the United States Constitution and what the Court's interpretations mean for the relationship between law and society. This casebook has two purposes: (1) to help you understand the social and political context of modern American constitutional law and (2) to encourage you to think about the Court not only as an institution that creates constitutional doctrine based on iron-clad rules of legal jurisprudence but also as one whose decisions are intertwined with social and political forces.

Students of the Court and the Constitution need to know more than just the chronological development of constitutional law. This casebook includes materials that tell you who the clients were in these cases and how they were selected; the role organized interests play in the dynamics of the litigation process; the historical and social context in which particularly controversial cases were decided; and how the Court's decisions affect the real world. The Court most often has the last word on what the Constitution means. But after the Court hands down an opinion, responsibility shifts to government agencies, large corporations, small businesses, college admissions directors, farmers, police departments, and public schools, to name just a few of the people and institutions that must apply judicial decisions to everyday life.

Law as Constitutional Foundation

Constitutional law is more than just a body of rules that organize our social and political institutions, protect individual rights, and establish government power. Law serves as the "connective tissue" that binds the structure, substance, and culture of American constitutionalism together.[1] Law is the foundation upon which government and social organization rests. Think for a moment about the use of the adjective *constitutional* to describe the rule of law. The Constitution created our current government structure and established, in principle, the balance between liberty and authority. But the decision of the Framers to create a written constitution also represented the decision to create, or *constitute,* a government. Although the American model of government is often described as representative and democratic, it is above all a constitutional government because it depends on the consent of the governed for its legitimacy. A government that derives its authority from sources other than the people is not, under this definition, properly constituted.

Our Constitution, then, creates the legal structure for our political institutions. The decision of the Framers to create a political system in which the legislature, the executive branch, and the courts served independent purposes and were accountable to different societal interests reflected a *political theory* about the possibilities and limits of popular government. That government should represent the wishes and aspirations of the people held out the more optimistic side of the Framers. That the sources of political power and the motives that drove its exercise were, in the view of James Madison, a pernicious threat to the operation of representative democracy represented their own experience with popular government. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands," wrote Madison in *Federalist* 47, "whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[2]

Here, well before Alexander Hamilton's more explicit description of judicial power in *Federalist* 78, Madison also hints of the important functional role the courts will have in the American form of constitutional government. To defend his model of popular government based on the separation of powers, Madison drew heavily from the French philosopher Baron de Montesquieu's classic 1784 work of political theory, *The Spirit of the Laws.* Noting Montesquieu's argument on behalf of an independent judicial branch in an otherwise elected popular government, Madison wrote that "he did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. [W]here the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."[3]

Madison, and the Framers in general, believed that a proper constitutional structure was necessary to limit government power and protect individual rights. In a perfect world no constitution would be needed because no government would be necessary to organize and channel social and political currents. But, as Madison wrote in *Federalist* 51, his most famous defense of the new constitutional order: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[4] What were—and remain—those "auxiliary precautions" of which Madison spoke? A constitutional government that called for separation of powers, checks and balances, federalism, and protections for individual rights against reckless majority rule.

In 1789 the nation ratified its new Constitution and with it "A New Order for the Ages," or *Novus Ordo Seclorum,* the Latin phrase embossed on the great seal of the United States. These core principles of American constitutionalism remain vibrant and timeless. But, as you will see over the course of this book, the transformation of those principles into constitutional law has created new issues and questions that continue to confront the participants in our constitutional system. The next section examines the basic structure of the Constitution, the government it created, and the political theory underlying American popular government.

Constitutional Structure

In *Federalist* 1, Alexander Hamilton made clear that nothing less than the survival of the United States as a

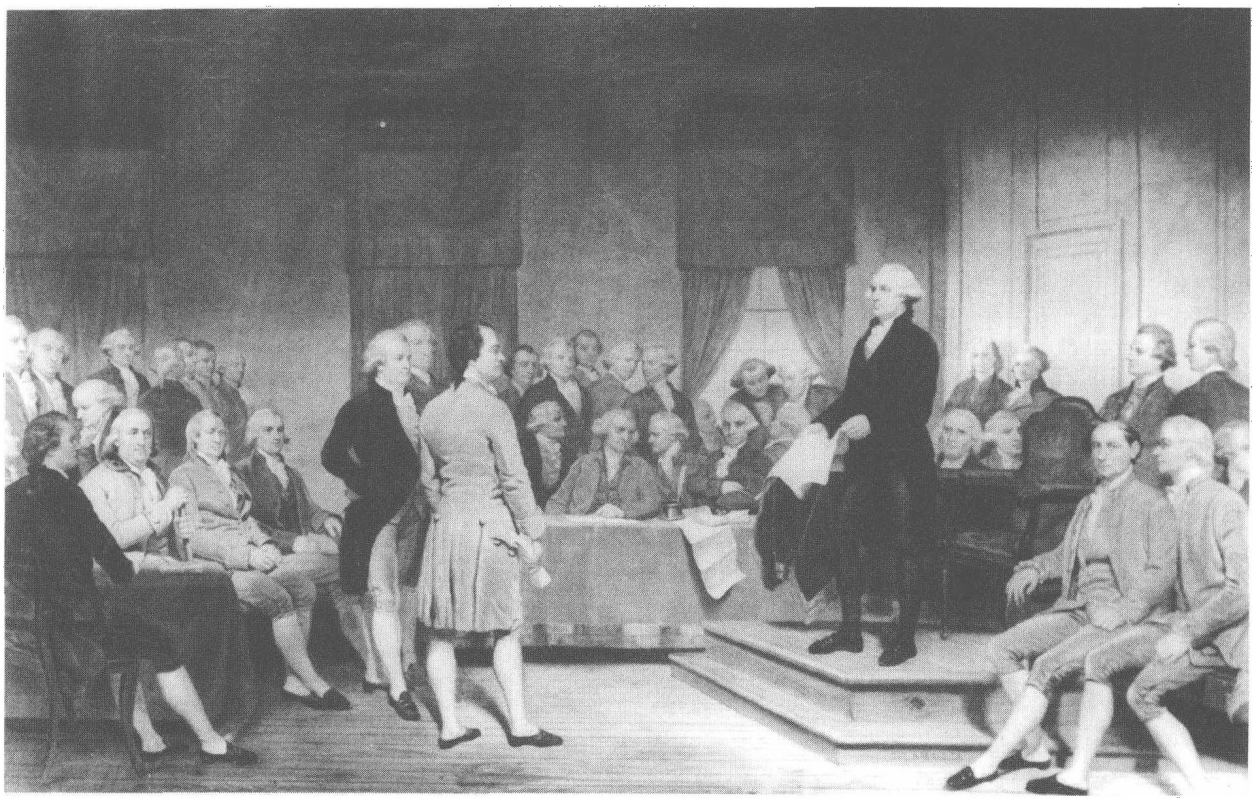
democratic republic was at stake in the ratification process over the new Constitution. Indeed, in the first paragraph of the first of eighty-five papers that he, Madison, and John Jay, writing under the pseudonym of *Publius*, Latin for "Public Man," Hamilton implored the nation to consider the historical significance of the Constitution's ratification. "The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION," Hamilton wrote, "[f]or it has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, *whether societies of men are really capable of good government through reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.*"[5]

Could popular government, rooted in consent—a word mentioned no less than forty-eight times in the *Federalist Papers*—and dependent upon the power of reason rather than the power of force survive the factional disputes that would be inevitable among a people characterized by social, economic, religious, and political differences? For *Publius*, the answer was yes if the nation was willing to embrace a constitution that created a strong national government, separated and divided the sources of government power, gave each branch of government partial control over the other, allowed states to retain jurisdiction over matters of law and public policy closest to the people, and kept tyrannical majorities from usurping individual rights.

Here, let us remember that the Constitution is much more than a suggestion box for good government. It is the foundation for the rule of law. Even early opponents of the Constitution could agree with the assessment of one Boston newspaper, not long after the Constitution's ratification, that "that which is not regulated by law must depend on the arbitrary will of the rulers, which would put an end to civil society."[6] The Constitution is also *public* law in that it creates the rules that govern the relationship between our public institutions and the people. All laws made by our legal and political institutions must be consistent with its meaning. What the Constitution means or, better phrased, *should* mean, is open to debate. How and where to ascribe meaning to the Constitution, what it means from generation to generation, and who should have ultimate authority in constitutional interpretation are questions that have been at the center of constitutional litigation since the establishment of the Republic.

Creating the constitutional structure of public law was the problem that confronted the state representatives to the Constitutional Convention held in Philadelphia during the summer of 1787. Consensus existed among the delegates over the inadequacies of the Articles of Confederation, but opinion over the extent to which the Articles should be revised was far from settled. When the Constitution was completed and presented to the public later that September, its language reflected the textual ambiguities that are an essential feature in the art of political compromise. Convention delegates and numerous others involved in the drafting of the Constitution held widely divergent views on what it was supposed to mean. Several delegates left the convention confused over the meaning of key sections of the Constitution even after it was completed. Some of the more prominent Framers, including Madison and Hamilton, changed their original views on the Constitution's meaning during their lifetimes. Notable opponents of ratification, such as George Mason, who refused to sign the Constitution and actively campaigned against its ratification, later became more hopeful of its possibilities. If the Framers resolved their political differences through textual ambiguities and, in some cases, deliberate exclusion, should it come as any great surprise that subsequent generations continue to disagree over what the Constitution means?[7]

The Constitution that emerged from the convention in September 1787 created a legal and political structure radically different from the Articles of Confederation. No nation had ever devised a constitutional framework that centralized power in an elected national government to the extent the United States Constitution did. No nation had created an elaborate federal structure to protect the domain of state governments from national intrusion. No nation had ever developed such an imaginative and complex series of constitutional safeguards against the improper use of institutional power. No nation steeped in the culture and language of popular rule had ever created a judicial branch unaccountable to electoral will to declare acts and laws of political majorities unconstitutional. And, in the Bill of Rights, no nation had ever deemed civil and political liberties so fundamental that their protection was not dependent on the sentiments and prejudices of popular



George Washington presiding over the Constitutional Convention in 1787.
Bettman/CORBIS.

majorities. That women, African Americans, Native Americans, and poor whites were not, in different degrees, the beneficiaries of the Constitution's majestic promises raised troublesome questions then—and even now—about the democratic intentions of the constitutional Framers. We will deal with these important issues throughout this casebook. For now, let us consider the four major and interlocking components of our constitutional structure: national government, separation of powers, federalism, and civil and constitutional rights.

National Government

Complaints directed at the Constitution's decided emphasis on national power by the Anti-Federalists, as the various opponents of ratification were better known, were quite legitimate if we consider how the new constitutional structure altered the sources and distribution of government power established by the Articles of Confederation. In place of the loose, lateral framework that characterized the Articles, one in which the states retained their primacy, the Constitution delegated supreme legislative, executive, and judicial authority to the national government. Moreover, the Constitution provided comprehensive and specific powers to each branch that the Articles did not. Among the most dramatic changes that illustrated the Constitution's emphasis on national power were the following:

- Congress, in Article I, now had the exclusive power to regulate interstate commerce; to authorize and collect taxes; to create federal courts and establish their jurisdiction; and the general authority to make all laws necessary and proper to exercise its legislative

responsibilities. Throughout this volume you will see how, since the early nineteenth century, the Court's interpretation of the Necessary and Proper Clause, the Commerce Clause, and the power of Congress to tax and spend has been instrumental in the expansion of legislative power at the national level.

- The executive branch, created by Article II, now consisted of a single, elected president, and not, as some Anti-Federalists had wanted, a plural council. Article II also delegated to the president the power to make judicial and cabinet appointments. In language that first appeared to be an afterthought but has proven to be critical in the constitutional expansion of executive power, Article II reserved to the president the power to faithfully execute the laws of the United States. This book also explores how the growth of presidential power based on the "implied powers" of the executive has been enormous and extraordinarily consequential for the balance of constitutional power.
- Concurrent with the exercise of the judicial power by the Supreme Court, the sole court created by Article III of the Constitution, was the implied power of judicial review. Judicial review remains controversial for this reason alone. However, the Court's use of judicial review to advance dramatic new concepts of government power and individual rights, often in the face of popular opposition, has generated additional controversy.
- Article VI made all laws and treaties enacted under the "Authority of the United States . . . the supreme Law of the Land," and bound the state governments to the laws created under national power. Disagreement continues, however, over the scope of power retained by the states in areas such as commercial and police power regulation.

Criticism of the Constitution, which came in a series of written responses to the *Federalist Papers,* was swift and severe. *Brutus,* the pseudonym of one of most vociferous and articulate Anti-Federalists, charged:

> This government is to possess absolute and uncontroulable power, legislative, executive and judicial, with respect to every object to which it extends, for by the last clause of section 8th, article 1st, it is declared 'that the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States; or in any department or office thereof.' And by the 6th article, it is declared 'that this constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution, or law of any state to the contrary notwithstanding.'
>
> This government then, so far as it extends, is a complete one, and not a confederation. It [has] . . . absolute and perfect powers to make and execute all laws, to appoint all officers, institute courts, declare offences, and annex penalties, with respect to every object to which it extends, as any other in the world. So far therefore as its powers reach, all ideas of confederation are given up and lost. It is true this government is limited to certain objects, or to speak more properly, some small degree of power is still left to the states, but a little attention to the powers vested in the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual states must very soon be annihilated, except so far as they are barely necessary to the organization of the general government.[8]

Although several influential opponents of the Constitution acknowledged the need for a more efficient and cohesive national government, they never anticipated the wholesale transfer of legal and political power from the states to the national level.[9] But the inherent contradiction of the Anti-Federalists' desires to retain the advantages of a small, state-centered republic while granting to the national government the necessary power to forge and maintain the bonds of union left the Constitution's opponents vulnerable to the scornful criticism of *Publius:*

> For the absurdity must continually stare us in the face of confiding to a government the direction of the most essential national interests, without daring to trust it to the authorities which are indispensable to their proper and efficient management. Let us not attempt to reconcile contradictions, but firmly embrace a rational alternative.[10]

Publius had a powerful point here, "given the Anti-Federalists' own desire for a Union government powerful enough to secure common interests, especially defense."[11] By itself *Publius*'s argument that the proposed