



Signet Classics

The Anti- Federalist Papers and the Constitutional Convention Debates

THE CLASHES AND
COMPROMISES THAT GAVE
BIRTH TO OUR GOVERNMENT

Edited and with an Introduction by
RALPH KETCHAM

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ANTI-FEDERALIST PAPERS
AND
THE CONSTITUTIONAL
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THE RIGHTS OF THE INDIVIDUAL VERSUS THE POWER OF THE GOVERNMENT

Should the members of the government be elected by direct vote of the people? Should the central government of the United States be stronger than the individual state governments? Does slavery have any place in a nation dedicated to liberty? Should the government be headed by a single executive, and how powerful should that executive be? Should immigrants be allowed into the United States? Which citizens should have the vote? How should judges be appointed, and what should their role in government be? What human rights should be safe from government infringement? In 1787, these important questions and others were raised as the states debated the merits of the proposed Constitution. Along with *The Federalist Papers*, this invaluable book documents the political context in which the Constitution was born.

Ralph Ketcham is Professor of History and Political Science at the Maxwell School of Citizenship and Public Affairs of Syracuse University. He is the author of many books on American History, including *Presidents Above Party: The First American Presidency*; *From Colony to Country: The Revolution in American Thought, 1750–1820*; and *James Madison: A Biography*.

Introduction

The Revolutionary Background of American Constitutional Thought

For anyone interested in political thought in action, the United States during the 1770s and 1780s is perhaps the most exciting period in the country's history. The discussion of political ideas that accompanied the American Revolution was seminal to the effort in 1787–1788 to draft and ratify a new constitution for the United States. In the years before 1776, as tension increased between Great Britain and her North American dominions, the rapidly maturing colonies were a laboratory of proposals and revised forms of union and confederated government. Each colony was more or less self-governing under its own “constitution,” but officials on both sides of the Atlantic probed for a more satisfactory relationship between the colonies and the mother country. The eleven years between the Stamp Act Crisis (1765) and the Declaration of Independence (1776) were years of vigorous, creative political thinking which produced hundreds of pamphlets, newspaper articles, and other writings on questions of representative government and confederation. Writers in Great Britain, too, debated basic political principles and regarded the many proposals for governing the empire as part of the quest for freer, eventually more democratic government.

Political independence, moreover, required new modes of thinking not only about the government but also about national identity. Initially, Britons in America often felt a sharp sense of loss in their repudiation of loyalty to the mother country. Gone or discredited were important parts of the body politic and their undergirding ideas. Revolutionists challenged the House of Lords, military institutions and traditions, and even the monarch

himself—symbol and embodiment of the nation. Colonials who still thought of England as “home” regretted, too, the distancing from a cherished land and culture; Salisbury Plain and London, Shakespeare and Milton, the ale house and the parish church remained deep in the consciousness—or subconsciousness—of many transatlantic Britons. Americans were uneasy about giving up this national identity and hence moved slowly and reluctantly toward independence. Many remained “loyalists” because they could not countenance such traumatic loss. Yet, by 1776, the “radical change in the principles, opinions, sentiments, and affections [that] was the real American Revolution,” as John Adams put it, had taken place: Americans no longer thought of themselves as members of the British body politic; they were no longer part of what they, and most enlightened European opinion, often regarded as the freest, best-governed nation in the world.

New institutions and new ideas of government were needed, then, to replace the rejected British models. Yet, as the revolutionary tracts showed, and as the debate over the new constitution would demonstrate anew, Americans had very little beyond British ideology and experience with which to fashion a new nationhood. All the best-known writers—Harrington, Locke, Hutcheson, Algernon Sidney, Swift, Trenchard and Gordon, Price, Burgh, and even the works of Voltaire and Montesquieu idealizing British government—focused American attention on English history and thought. Within this thoroughly British pattern, however, American political thinkers began to express vital differences in emphasis. Traditional, Tory ideas had much less weight in America than they had in Britain. Ancient institutions such as the Church, the nobility, and the common law weakened in the New World. The palaces and fortresses of authority could not cross the Atlantic Ocean. On the other hand, “radical Whig” thought, emphasizing openness and freedom, loomed proportionately larger in America. A century and one half of physical separation and relatively isolated development had nurtured what in many ways were distinctive societies. As political leaders sought after 1776 to move from colony to country, they used British concepts and precedents, but they also fashioned anew

for a new nation in a New World. To an initial revolution in loyalty which repudiated a nationality, Americans had to add a second revolution in purpose that would form ideas and institutions for a new polity.

Between 1776 and 1787, then, Americans undertook to create a new republic. They had to articulate and establish, perhaps beginning with revised understandings of human nature itself, basic principles and institutions of free government. Following the lead of Tom Paine in *Common Sense* (1776), many dreamed that the overthrow of oppressive, irrational customs and authority might be followed by a paradisiacal age when only the mildest and simplest bonds of self-government would be necessary. A western Massachusetts town resolved in 1776 that "what is the fundamental Constitution of this province, what are the undeniable Rights of the people, the powers of the Rulers, how often to be elected by the people, etc." were matters to be determined explicitly and anew by the people. Though John Adams believed Paine's ideas a "Star of Disaster," and warned that it was "safest to proceed in all established modes to which the people have been familiarized by habit," he still saw in Independence "Rays of Ravishing Light and Glory." Americans would create, as they announced on their great seal, *novus ordo seclorum*, "a new order of the ages." The new government to be fashioned in the United States might become a model for the world.

Beginning with New Hampshire in January 1776, every state drafted at least one constitution before 1787 (Connecticut and Rhode Island, without royal governors before 1776, merely had to remove references to Great Britain from colonial charters). Thus the new states added to the theoretical debates of the Revolutionary era a considerable practical experience in drafting and inaugurating new, constitutional governments. They tried many often novel proposals for legislative, executive, and judicial departments. By 1787, in a famous calculation by Thomas Jefferson, the new states had had eleven times thirteen, or nearly 150, years of experience in republican government. On the whole Jefferson thought the experiments remarkably successful, proving that the people were capable of governing themselves.

Mindful of the oppressions of their last British governors,

most states established legislative supremacy based on the principle of consent in their new constitutions. Pennsylvania gave broad powers to an annually-elected single-house (unicameral) legislature. In Virginia and other states, the legislature elected the governor and often had the power to appoint judges and other officials. In some states, though, notably New York and Massachusetts, the executive had more power and was elected directly by the qualified voters. Maryland chose the upper house by means of an elector college similar to that eventually put into the federal constitution. Bills of rights were drafted and debated in every state. Writing and ratifying the Articles of Confederation led to further discussion of principles and forms of government. By 1787, not only had the theory of self-government been widely debated, but virtually every conceivable device for implementing it had been suggested, if not tried.

As had been true during the long debate over "representation" within the British Empire before 1776, much attention focused on giving voice to the undistorted and uncorrupted will of the people. Small districts, annual elections, rotation in office, versions of referendum and recall, and unicameral legislatures were among the devices tried to tie representatives to that will. Intense rivalries, clash of interests, and manipulation of voters and representatives, though, seemed often to lead legislative governments into biased and unwise measures. Many states with two-house (bicameral) legislatures, and some with frankly aristocratic upper houses, even found that prolonged deliberation and checks on popular will could result in more dispassionate and practical legislation. By 1787 Americans had tried many devices of representative government, and had discussed at length the more sophisticated dilemmas it posed.

The liabilities of executive weakness had by 1787 also become apparent. Jefferson and Madison considered the impotent governorship of Virginia "the worst part of a bad constitution." The governor, elected by the legislature and required to act only with the consent of a council also elected by the legislature, was simply unable to govern. The elections of the governor and council became occasions for intrigue and influence-swapping of the worst sort. As experience with elective rather than he-

editary or appointed executives accumulated, furthermore, a new and intriguing possibility emerged: the elective governor might himself become a legitimate part of government by consent when he vetoed laws, made appointments, or commanded the militia. Thus election of the governor by the people was a potentially effective *extension* of popular influence, rather than a checking of it as had normally been the case under a monarchical executive. As James Wilson would put it in 1790, with executives elected by the people and thus drawn from the same source as legislatures, "they who execute and they who administer the laws, are as much the servants, and therefore as much the friends of the people, as those who make them."

The judiciary also came under reconsideration. Experiments with legislative appointment of judges, or even election by the people, undertaken on democratic principles, seemed often to subject judges to political pressures that hindered impartiality and "equal justice." A few years' experience in Virginia with legislature-appointed judges had led, in Madison's opinion, to the sacrifice of "private rights" and the exposure of judges to "all the corruptions of the two other departments." Instead, foreshadowing provisions for the new federal judiciary, Madison favored executive appointment, fixed salaries, and life tenure to shield judges from legislative intrigue and popular sentiment.

In another effort to resist, as Madison put it, "the maxim . . . that the interest of the majority is the political standard of right and wrong," many leaders sought to establish written constitutions, with their bills of rights, clear definitions of procedure, and careful limitations of power, as fundamental law, above legislative or executive authority. Massachusetts and other states elected special conventions to draft constitutions and then held special elections to ratify them to underscore the supremacy and the republican character of constitutional provisions. These solemn, deliberate acts of the people established a "higher law" that a majority of the legislature or even of the people would be forbidden to violate.

American political thought and experience after 1776 in fact highlighted a tension built into the Declaration of Independence which proclaimed in one clause that certain rights were "un-

alienable," and in another that "Governments . . . derive their just powers from the consent of the governed." Rights to life, liberty, and the pursuit of happiness were not to be submitted to a vote or to depend on the outcome of elections; that is, not even the consent of the governed could legitimately abridge them. But it was nonetheless possible that the people, through their elected representatives, might sanction laws violating "unalienable" rights. Suppose legislatures, state or national, passed laws abridging freedom of the press, or violating liberty of conscience, or permitting default on contracts, as happened in the 1780s. Which principle had priority, that of "consent" or that of "unalienable rights"? Unless it could be assured that all, or at least a majority, of the people would always protect "unalienable rights," which few thought likely, the American Revolutionists seemed committed to propositions not always compatible. The Federal Constitution of 1787 was one effort to contain the tension, and the debate over its ratification often revolved around whether the framers had properly adjusted the balance of the two principles. Virtually all the members of the Federal Convention, and both sides in the ratification struggle, sought to fulfill the purposes of the Declaration of Independence to both protect rights and insure government by consent. The key differences arose over which purpose to emphasize and what mechanisms of government best assured some fulfillment of each. The separation from Great Britain and eleven years of independent state and national government had left Americans with an uncertain national identity, an intriguing republican idealism, and an intricate array of unresolved tensions and practical problems.

Republicanism in the 1780s

As the Federal Convention assembled in May 1787 its members did agree, though, on some basic principles and use of terms. All believed in government by consent, which in eighteenth-century understanding included (1) constitutional monarchy, where the monarch's powers were limited and where the government included an assembly elected by the people; (2) a

republic, meaning some form of representative government without a hereditary executive; and (3) democracy, which meant either town-meeting style democracy or simply the direct voice of the people within a government. The Revolutionary struggle against the government of George III left even constitutional monarchy in ill-repute in America. (Many leaders, however, including at times John Adams and Alexander Hamilton, continued to think it theoretically the form most likely to insure freedom and good government.) Equally discredited was "mere democracy" which still meant, as Aristotle had taught, rule by the passionate, ignorant, demagogue-dominated "voice of the people." This was sure to produce first injustice, then anarchy, and finally tyranny. Hence, virtually all shades of opinion reviled monarchy and democracy, and, publicly at least, affirmed republicanism. (This republicanism of the 1780s was not in principle different from what in Britain and America by mid-nineteenth century was generally called representative democracy. The founders would not have been opposed to the modern connotations of the word "democracy," nor would they have used the word "republic" to mark out a distinction from those connotations. In scorning "democracy," eighteenth-century theorists had in mind Aristotle's picture of a heedless, emotional, manipulated populace that would still be denigrated by most modern democratic theorists.)

By 1787, republicanism, then, was positioned between monarchy and "mere democracy." As it benefited from the experience of the years after 1776 and struggled to contain the tension between "unalienable rights" and majority rule, republicanism became both more moderate and more intricate. A broadly based lower house of a legislature continued to be basic to government by consent, but, increasingly, the election of other officials came to be regarded as good republican practice. Also, mindful of colonial experience and following the arguments of Montesquieu, the idea that the legislative, executive, and judicial powers had to be "separated," made to "check and balance" each other in order to prevent tyranny, gained wide acceptance. This often validated devices of government that would restrain or "refine" the will of the majority in order to protect rights, or "higher law."

Thus, while eighteenth-century American republicanism was committed to the sovereignty of the people, it was also a complicated approach to government. It opposed traditional, monarchical tyranny, but was equally hostile to mob rule. It also sought balancing and refining devices that would at once restrain the power of rulers, encourage the better judgment of the people, and enable the union to defend itself in a dangerous world. Edmund Burke stated the problem succinctly: "to make a government requires no great prudence; settle the seat of power, teach obedience, and the work is done. To give freedom is still more easy. It is not necessary to guide; it only requires to let go the rein. But to form a free government, that is, to temper together the opposite elements of liberty and restraint in one conscious work, requires much thought; deep reflection; a sagacious, powerful, and combining mind." Madison's formulation in *Federalist* No. 51 made the same point: "You must first enable the government to control the governed; and in the next place, oblige it to control itself"—as much a need in a republic as in any other form of government.

In a way, to oblige government to "control itself" was more difficult in the new United States than it was in Europe. There, "balance of power" theorists made use of the essentially different orders of traditional society—king, lords, commons, or first, second, and third estates—to achieve equilibrium in government. Thus British government preserved balanced freedom by giving each of the distinct—separately derived—orders of society a means of self-defense. The monarch, the House of Lords, and the House of Commons each had effective legislative voice. The balance was enduring because the king and the nobility and the commoners were formally and permanently separate. But in the United States, without a hereditary monarch or nobility, and without politically powerful bishops or other privileged elements formally distinct from "the people," how could checks and balances work? What real balance could there be when ultimately, as republican theory required, all legitimate power came from one entity, the people? Could the separation of powers among levels and branches of governments all resting on consent provide checks like those arising

from the distinct orders of a hierarchical society? Were, then, the ideas of deriving all just power from the consent of the governed, and genuine balance of powers, mutually exclusive? Yet another complicated problem faced the framers and ratifiers of 1787–1788.

The response, drawn in part from the ideas of David Hume but best elaborated by James Madison, was to try to build into the mechanism of government itself enough variations on election, powers, term of office, and complication of function to *create* separate interests and perspectives. Thus, for example, even though an upper and a lower house of the legislature might each *eventually* derive from the people, different districts, different terms of office, different modes of election, and different definitions of authority would create balances of power. Complex arrangements for appointing and giving power to other officials, and “refinements” of popular will through devices like an electoral college, it was theorized, would become further effective substitutes for the balances inherent in the lasting divisions within traditional societies. Could mere complication of government, together with devices to “refine” the expression of majority will, without departing fundamentally from the principle of consent, protect basic rights both from potential tyrants within government and from popular passions? The intention was to temper idealism with realism, and to substitute complexity for balance of orders. The challenge offered wide scope for political theorists as well as practical strategists as the time approached to revise the Federal Constitution.

Political Currents of the 1780s

These difficult and important theoretical problems existed at the Federal Convention amid a welter of clashing interests, social distinctions, ethnic diversities, religious backgrounds, and disparities of wealth. Differences over geography, commerce, religion, customs, land speculation, slavery, and credit influenced proposals for structures of government and sometimes required compromise of principle as well as of interests. These

concerns, especially that of the New England states to regulate commerce by majority vote in Congress, and of Georgia and South Carolina to keep open the slave trade (settled by compromise; see pp. 153–58), had an impact on many decisions. The Constitution also gave implicit sanction to private property (including slaves) and otherwise sustained the planter-yeoman/farmer/mercantile society that had emerged in the thirteen newly independent states. Yet, the Constitution as drafted also reflects the ebb and flow of debate over principles of government. In fact, there are some signs that the various special interests represented at the Convention counteracted and often nullified each other and thus in a way gave scope to discussion of basic constitutional issues. There is little evidence, in any case, that determined factions—creditors, land speculators, merchants, slave owners, or any others—implanted in the draft constitution a self-interested mode of government inconsistent with republican principles.

The principle of consent, furthermore, since it was thought of largely as applying to those with a material stake in society (land, securities, slaves, mercantile property, tax payments, etc.), was less inclusive in the eighteenth century than it would become two hundred years later. Property qualifications for voting and office-holding were common, and women were barred from doing either. Most extreme, black slaves were not regarded as part of the political community and hence were entirely denied participation and protection of rights. Though some advanced thinkers saw the inconsistencies in these limitations (especially of slave owners and slave traders proclaiming the blessings of liberty) and cried out against them, sentiment in 1787 had not generally reached the point where universal suffrage would be on the agenda of constitution framers. Thus the Convention ignored those issues by accepting the guidelines already existing in state constitutions and in the Articles of Confederation. Though this did not advance the causes of enlarged suffrage and abolition of slavery, at the same time, deliberately, there were no explicit barriers in the Constitution to liberalization when sentiment within any state moved in that direction. States were able to abolish slavery, and voting for members of

the lower house in Congress was to carry the same limitations—or lack of limitation—as for the lower house of the state legislature. The Convention had to find mechanisms of government that would guarantee the power of the people to decide economic as well as other matters, and protect the “unalienable rights” gained by the Revolution.

These theoretical and practical concerns persisted as the new nation struggled to survive, first in war and then in peace. As the states drafted and revised their constitutions, they also worked to form a confederal constitution. The *ad hoc* actions of the Continental Congresses, setting aside British authority and fighting the Revolutionary War, had to be formalized and a permanent form of government established. Congress approved “Articles of Confederation” in 1777 that were finally ratified (by all the states) and became the basis for national government in 1781. They were the first American constitution. Almost at once, though, complaints arose about their weakness and inefficiency. “Nationalists” such as Robert Morris, Alexander Hamilton, James Madison, James Wilson, and George Washington agreed that the Articles were inadequate and made various proposals for strengthening them. They sought especially to give Congress wider taxing power, more control over interstate and foreign commerce, and power to compel state compliance with acts of Congress. Since the Articles required unanimous consent of the states for amendment, proposals for change were easily blocked. A conference at Mount Vernon in 1785, though, which settled navigation, boundary, and other disputes between Maryland and Virginia, encouraged the idea of a larger meeting to cope with problems apparently stymied in Congress under the Articles. A convention at Annapolis in September 1786, asking all the states to discuss interstate commerce regulation, failed because most states did not send delegates. It did, however, call for another convention to meet in May 1787 in Philadelphia. A heightened sense of futility in Congress and disarray in the nation (Shays’ rebellion flared that winter) led Congress and all states except Rhode Island to endorse that call. Hence, the fifty-five delegates who came to the Federal Convention of 1787 (others appointed did not come at all) had in mind generally to strengthen the Articles,

but beyond that there was little agreement on how extensively and in what way to do that.

The Federal Convention of 1787

The debates of the Convention, known to us largely through notes taken by James Madison during its deliberations, flowed through readily discernible stages. The largely favorable reception by the Convention of the "Virginia Plan" (see pp. 7-12), conceived by Madison and agreed to by the Virginia delegation, implied that the Convention intended to frame a new government rather than merely amend the Articles of Confederation, as most delegates had been instructed to do. For two weeks the delegates debated representation, executive powers, state-national relations, and other basic matters. Though the Convention voted down the clause in the Virginia Plan giving Congress the power to "negative" "improper" state laws, in general there was surprising support for provisions to strengthen the national government. On June 13 the Convention accepted nineteen resolves largely following the Virginia Plan. The "small state" forces, however, still opposed bitterly the tentative switch from an equal vote for each state in the national legislature (as under the Articles of Confederation) to representation according to the population.

The Convention entered a new phase on June 15 when William Paterson introduced what became known as the "New Jersey Plan" (see pp. 39-48), retaining the equality of the states and other provisions closer to the Articles. The challenge had been made, and for a month the delegates debated state equality with increased passion and rancor, sought compromises, and struggled to prevent disruption of the Convention. Madison, James Wilson, Rufus King, and other proponents of proportional representation stood firm. Paterson, Luther Martin of Maryland, and other small-state delegates insisted just as strongly on state equality, while the Convention conciliators, mainly Benjamin Franklin and William Samuel Johnson of Connecticut, suggested compromise. A grand committee, appointed to settle the

deadlocked issue, reported on July 5 recommending the so-called "Great Compromise." The lower house would have representation according to population, and the states would be equal in the upper house. Though Madison and Wilson opposed the compromise because to them it violated the vital republican principle of majority rule, most of the delegates were ready to accept an accommodation. On July 16, the Convention approved the "Great Compromise."

Having settled this major point, the Convention considered, in ten days of important debate, the powers and election of the executive, the judiciary, the method of ratification, and the powers of Congress. After making some tentative decisions and deferring others, on July 26 the Convention appointed a committee of detail to arrange and systemize what had been done so far and to make proposals on unsettled matters. Its report (see pp. 122–134), made on August 6, was the first document before the Convention to resemble the final constitution. Perhaps most notable, instead of the broad power in the Virginia Plan for Congress "to legislate in all cases to which the separate States are incompetent," the draft enumerated the powers of Congress. Madison and other advocates of broad national power came to favor a more careful definition of congressional power after the adoption of what they regarded as the flawed "Great Compromise." They were unwilling to so generally empower a body where a few states containing a small minority of the population could have a deciding voice. Small-state delegates, on the other hand, assured of an equal voice in the Senate, became increasingly willing to put power in the hands of the central government, a circumstance that led in time to the quick ratification of the Constitution by most of the small states.

For more than a month, August 7–September 10, the Convention debated, clause-by-clause, the articles of the draft constitution. As the delegates thus settled matters of detail and accepted the practical compromise between New England and the deep South states on slavery and commercial regulation (see pp. 153–58), they continued to dispute the powers of the executive department and its relation to the Senate. How to elect the executive, how he might exercise his veto, and how he might be