THE CASE AGAINST THE CONSTITUTION

From the Antifederalists to the Present

Edited by
John F. Manley
and Kenneth M. Dolbeare

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with a Foreword by Jackson Turner Main

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To the memory of Charles A. Beard

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THE CASE AGAINST THE CONSTITUTION

Foreword

The Framers of the Constitution would be astonished as well as delighted by the present adoration of their work. In their own day they had to contend with sharp differences among themselves, which led to the familiar constitutional "compromises," and with even greater disagreements within the population generally, which had somehow to be satisfied. The Framers had to seek an accommodation between the kind of government that most of them preferred, and what they thought they could actually achieve. The best they could hope for was not perfection, but improvement: a more perfect union.

For many years before 1787, American voters and their representatives had tended to divide into two major groups or blocs, or (as the word was then used) "parties." The polar nuclei can be characterized as localist vs. cosmopolitan, rural vs. urban, noncommercial vs. commercial, small property vs. large property, and farm vs. nonfarm. The first of each of these pairs valued local control and government dominated by democratic majorities, meaning themselves. The second had ideas and interests best served by a strong central government that could act vigorously in economic and political matters—and that they could control. In concrete terms, the antagonists were the somewhat isolated, rather provincial middle class and small farmers versus the educated, urban, well-to-do business and professional men and large-scale farmers. Their conflict foreshadowed that of the Populists and their opponents in the nineteenth century, and contained all the same prejudices and hostilities.

These two blocs took shape rapidly in 1774–1776 when most of the states, writing their own constitutions, had to confront a complicated series of political, military, economic, social, and religious issues. The questions that were important include the following: Should the states rely on their militias or on a permanent, national army? Should they finance the war for independence by deficit spending or by heavy taxes, and, if the latter, who should pay? Should Congress

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exercise extensive or limited powers? Should governments at all levels be run by "the better sort" or by ordinary people?

The debate became quite bitter in the 1780s. Many of the delegates to the Constitutional convention, such as Alexander Hamilton, had already felt the sting of popular disapproval. The reader might try to imagine what would happen today if a new constitutional convention were to meet under the domination of one of the two political parties. It would surely convene under suspicion, and it would have to reconcile not only the opposing elements within the party itself but the objectives and prejudices of the other party and of our disparate society. The new constitution would consist, surely, of some common core enveloped by expedient compromises.

The Framers of the Constitution were limited by history and by the practical circumstances of the times. Mostly lawyers, businessmen, and large landholders—educated, cosmopolitan, and well-to-do—they sought to create a strong central government through which they could implement their political and economic program, presumably for the best interest of all. The document that they produced granted the central government less in the way of powers than they would have preferred, but more than many other Americans liked. There was a bitter struggle, ending in a narrow victory.

Because the result fully satisfied neither side, the combatants continued the struggle far into the next century and even beyond. Indeed, many of the key questions that divided the country then still divide it today. The Constitution embodied one set of answers, the Antifederalists gave another. Posterity—we, the people—must judge.

Most books about the Constitution present it as a classic to be expounded rather than evaluated. This book challenges us to think about the Constitution, to consider its flaws as well as its excellences, and perhaps even to wonder how we today might create an even more perfect union.

JACKSON TURNER MAIN
Boulder, Colorado

Introduction

The Bicentennial of the American Constitution will be celebrated from 1987 to 1991, the 200th anniversary of the ratification of the Bill of Rights. This long-planned event is, of course, only the latest in an almost unbroken series of celebrations of that document and the political genius of its Framers. Ironically, perhaps tragically, it seems likely that an uncritical, one-dimensional approach to the Constitution will prevail, and that Americans will miss an opportunity to confront the very questions about the premises and purposes of government that so vitally engaged the Framers.

Conventional wisdom holds that in the Constitution the Founding Fathers designed a system of government that would function neutrally and objectively—as if by the laws of mechanics—to produce policy in the public interest. This system is said to be so acutely attuned to human nature that it has been able to adapt to every need generated by the changing circumstances of 200 years. As such, it has more than earned the adulation of all Americans and others around the world who are truly devoted to democratic government.

However, there has always been an important body of American political thought that challenges or rejects this portrayal of the Constitution. It is a tradition that puts *democracy* first. It rejects the notion that there can be "neutral" structures of government. Values, purposes, and goals are inevitable parts of the design of any government; they should be openly debated and ultimately decided by popular majorities. It challenges the Constitution with the basic questions: who, or what interests, should be served by government, and how can control by the people be assured?

This line of thinking has its roots in seventeenth-century England. Its principal American expression is the Declaration of Independence of 1776—not the Constitution of 1787. Those who opposed ratification of the Constitution, the Antifederalists, clearly saw the property defensiveness, centralization potential, and

prospective loss of local democratic control that were implicit in the new system. They extracted grudging acquiescence to a Bill of Rights from the Constitution's advocates. Although they were defeated in their efforts to prevent adoption and implementation of the Constitution, the Antifederalists' challenge to status and property on behalf of equality and democracy has been an inspiration since first articulated in 1787.

In the face of the long survival—and indeed, the popular enshrinement—of the Constitution, the Antifederalist critique has often been misunderstood or simply dismissed. One of the major contributions of the Progressive historians, J. Allen Smith and Charles A. Beard prominent among them, was to show that their own industrial-era challenge to the system was fully anticipated by the Antifederalists. Since then, in part through the careful work of modern historians, the arguments of the Antifederalists have been examined more thoroughly.

No reputable modern historian or political theorist would argue that the Framers of the Constitution intended a democracy. Nevertheless, many assert that, as a practical political fact, democracy was accomplished in the United States sometime in the early nineteenth century and that it reigns in full flower today, warm and comfortable in the protective embrace of the Constitution. The equation of the Constitution, the government of the United States, and the treasured political principle of democracy is complete for most Americans, scholars included, and has been so for so many generations that it sometimes seems beyond dispute.

Decades of study of American politics have convinced us that, like much conventional wisdom, this conclusion simply will not stand up in the face of the facts. The Constitution was originally designed, and functions effectively today, to *permit political participation* but *prevent democracy* in the United States. Moreover, it is the Constitution that is primarily responsible for many of the failures of governance in the United States today. Americans badly need a dose of realism about the Constitution if we are to solve the serious political-economic problems heralding our third century.

Our vast bicentennial celebration is not simply a harmless patriotic extravaganza. It promises to be little more than an utterly unrealistic, and potentially tragic, exercise in self-delusion and systematic avoidance of hard political truths—and, for those very reasons, profoundly unworthy of the Framers it seeks to honor. Men like Madison and Hamilton understood their dangerous world very well. They acted in a timely fashion to create a new political-economic structure, one that met compelling needs they openly acknowledged.

We have developed this collection of classic and contemporary writings to give voice to American democracy's continuing challenge to the Constitution. We hope that it will spark serious discussion of the premises and purposes of American government as well as a realistic appraisal of the adaptation of its structures to the ends it is to serve. Readers may judge the merits of the arguments for themselves.

The plan of the collection is straightforward. Part 1 features the Progressive critique of the Constitution, the first modern, twentieth-century statement of the democratic challenge. J. Allen Smith (1907) and Charles Beard (1913) saw the issue as an industrial-era problem of corporate capitalism against democracy. The Constitution, the supposed embodiment of democracy, was the authority that was being invoked (chiefly by the courts, but by many others as well) to *legitimate* whatever economic power—in this case the corporations—wanted to do. In other words, the Constitution was being used as an instrument of economic exploitation—and the result celebrated as "democracy." In their work they sought to remove the veil of reverence that covered the Constitution, and with it the justification for allowing corporate activity to evade public control.

The Progressive historians showed that the Framers had been members of a propertied upper class determined to preserve and enhance the opportunities of their class. They showed the Constitution itself to be biased in favor of that class, and full of limitations on democratic control. Finally, they showed that many people, perhaps even a majority of all Americans at the time of ratification, were well aware of these purposes of the Constitution and the intentions of its Framers.

For this the Progressive historians were vigorously attacked. The issue was joined on two fronts: (a) the historical question of the Constitution's original biases; and (b) the contemporary question of whether the Constitution should provide corporations immunity from popular control.

In this context, the history of the Framers' actions and the Antifederalists' reactions took on new meaning. What did the Framers really intend? Which individuals, and which documents, actually championed democracy? This debate was something more than a scholarly exercise. In the United States, then as now, to argue about democracy in the present, one must be ready to take on the events, arguments, and actions of that golden age when the Constitution was fashioned. The Progressive critique is thus the hinge on which this collection turns. It is both the first statement of a continuing industrial-era challenge and a call on Americans to more clearly and realistically understand the Constitution itself.

Part 2 of our collection reaches back from the Progressive Era to the earliest challenges to the Constitution. We begin with an excerpt from the work of the leading historian of the Antifederalists, Jackson Turner Main. *The Antifederalists: Critics of the Constitution, 1781–1788* is Main's lively account of the ratification process and the class divisions that underlay the debate over adoption of the Constitution.

To give a full hearing to the Antifederalists' arguments, some immersion in their own writings is essential. We have chosen a document from the Pennsylvania dissenters, because that state had the most democratic of all the state constitutions and one of the most vigorous opposition movements to the new Constitution. Although defeated at every turn, the arguments of the Pennsylvanians were typical of the Antifederalists throughout the ratification debate.

The other document is from Richard Henry Lee, a leading Virginian whose

support for the Antifederalist cause gave it significant respectability. In particular, Lee articulates the class basis of the ratification conflict that divided the country from September 1787 through June 1788.

The two principal issues raised in these documents were fundamental to the eighteenth-century concept of democracy: (a) individual liberties and (b) control by local majorities. There was no bill of rights in the Framers' Constitution. And the centralized government it proposed, far removed from voters, seemed to offer little chance for informed control. The first claim was won, at least in formal legal terms, with the adoption of the first ten amendments to the Constitution. But the second could not be allowed to succeed, if the Framers were to gain the ends that had led them to the Convention in the first place. It remains at the heart of the problem of democratic governance today.

In part 3, we come forward from the Progressives to the present. In every case, the authors of these essays first acknowledge the necessity of a clear and realistic understanding of the intents and events of the founding era. Only with such a base is it possible to see through the clouds of celebratory rhetoric and critically analyze today's Constitution in the light of present and future problems.

Our message is offered in three parts. First, John F. Manley shows that James Madison had as his primary purpose the defense of the property interests of the dominant class of his day. Rather than holding an image of many interest groups, each seeking its separate and disparate goals and following fair procedures (as the conventional wisdom would have it), Madison saw an enduring conflict between classes. These classes were based on property—the many "have-nots" against the few "haves"—and Madison was determined to provide a system that would protect the few.

The implication is that class was then, and remains today, the best analytic concept with which to understand the provisions and purposes of the Constitution. By extension, today's Constitution is biased toward control by the heirs of the ruling class of 1787—those who hold the greatest assets of power: long-established family status, institutional position, great wealth, an elite education, control of the mass media, and so forth.

Second, Kenneth Dolbeare and Linda Medcalf show that the Framers succeeded too well in their efforts to design a government in which popular majorities were prevented from becoming effective. Indeed, the authors argue, the Framers must share the responsibility for some of our present political problems. Frequent institutional "gridlock," presidential adventurism in foreign policy, and steadily declining voter turnout for national elections are only some of the contemporary problems that Dolbeare and Medcalf trace to the Framers' purposefully crafted provisions.

They show further that Alexander Hamilton's role at the Convention, during ratification, and then as Secretary of the Treasury was a crucial factor in the implementation of this design. Hamilton effectively removed two key decision-making arenas—the legal system and the financial system—from popular reach. These two systems finally crystallized in the late nineteenth century and were

effectively defended in the election of 1896.

Since that time, there has been increasing popular inability to translate goals and preferences into government action. Growing frustration with the failure of elections as a way to accomplish goals has led to a widespread withdrawal from politics. The United States, celebrating the bicentennial of its Constitution, now ranks *nineteenth* among industrial democracies in the proportion of eligible voters who actually vote in national elections.

The analysis implies that substantial changes will have to be made in some basic Constitutional provisions if the United States is to resolve two pressing needs. The first need is to restore some sort of linkage between the people and their government. Popular confidence in government must be rebuilt primarily on the basis of a new capacity for popular majorities to achieve what they want from government. The second need is to become more effective in coping with economic problems. The authors sketch some illustrative changes that would, taken together, offer a chance to accomplish this end.

Third, Jeanne Hahn describes a group of modern-day Hamiltonians who share the view that the Constitution poses many problems for Americans today, but do not see democratization as a solution. Rather, they have proposed changes that would make decision making even *more* centralized and distant from voters and the possibility of democratic control. The members of this group, the Committee on the Constitutional System, are "insiders" who have found it frustratingly difficult to make the institutions of the national government work quickly and smoothly. The Committee has produced two volumes in which twelve recommended Constitutional amendments and statutory changes are presented, explained, and defended.

Hahn carefully analyzes these proposals, individually and as a package, showing that they are fully in the Hamiltonian tradition. They would enhance the capacity of the national government to act swiftly and decisively, but at the price of insulating it even more fully from any popular impact. She calls for revival of a modern version of the Antifederalist concern for democracy, with democratizing institutional changes rather than those proposed by the Committee on the Constitutional System.

Taken together, the last three essays argue the need for a realistic dialogue about the first principles of government and the manner of implementing them through a constitution. No worthy point is served by uncritical celebration; indeed, the shrewd and purposeful accomplishments of the Framers can only be dishonored by mindless rhetorical excess.

A new era of realism is needed in which some basic questions can be discussed in a serious way. What is achieved by specific constitutional provisions under today's circumstances? How does this compare with what the country wants and needs in the way of political process and governmental capability? We think that the selections in this volume lay some of the groundwork for addressing these vital questions.

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1. The Progressive Critique
Capitalism
vs. Democracy

J. Allen Smith

The Spirit of American Government

J. Allen Smith, late Professor of Political Science at the University of Washington, wrote a pathbreaking (1907) critique of the Constitution as a reactionary document. Smith describes the strong democratic tendencies in America that culminated in the Declaration of Independence and the Articles of Confederation. He argues that conservative elites prepared the Constitution in order to curb the power of the people and protect the property interests of the upper class. Smith's ultimate purpose was to demonstrate that the efforts of contemporary majorities to curb corporations were justified, notwithstanding the constitutional interpretations of the courts.

The American Government of the Revolutionary Period

The American colonists inherited the common law and the political institutions of the mother country. The British form of government, with its King, Lords and Commons and its checks upon the people, they accepted as a matter of course. In their political thinking they were not consciously more democratic than their kinsmen across the Atlantic. Many of them, it is true, had left England to escape what they regarded as tyranny and oppression. But to the *form* of the English government as such they had no objection. The evils which they experienced were attributed solely to the selfish spirit in which the government was administered.

The conditions, however, were more favorable for the development of a democratic spirit here than in the mother country. The immigrants to America represented the more active, enterprising and dissatisfied elements of the English people. Moreover, there was no hereditary aristocratic class in the colonies and less inequality in the distribution of wealth. This approach to industrial and social

Reprinted from J. Allen Smith, *The Spirit of American Government*, edited by Cushing Strout (Cambridge, MA: The Belknap Press of Harvard University Press, 1965), chapters 2, 3, 11, 12, and p. 331.

equality prepared the mind for the ideas of political equality which needed only the stimulus of a favorable opportunity to ensure their speedy development.

This opportunity came with the outbreak of the American Revolution which at the outset was merely an organized and armed protest against what the colonies regarded as an arbitrary and unconstitutional exercise of the taxing power. As there was no widespread or general dissatisfaction with the *form* of the English government, there is scarcely room for doubt that if England had shown a more prudent and conciliatory spirit toward the colonies, the American Revolution would have been averted. No sooner, however, had the controversy with the mother country reached the acute revolutionary stage, than the forces which had been silently and unconsciously working toward democracy, found an opportunity for political expression. The spirit of resistance to what was regarded as unconstitutional taxation rapidly assumed the form of avowed opposition to the English Constitution itself. The people were ready for a larger measure of political democracy than the English Constitution of the eighteenth century permitted. To this new and popular view of government the Declaration of Independence gave expression. It contained an emphatic, formal and solemn disavowal of the political theory embodied in the English Constitution; affirmed that "all men are created equal;" that governments derive "their just powers from the consent of the governed;" and declared the right of the people to alter or to abolish the form of the government "and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness." This was a complete and sweeping repudiation of the English political system, which recognized the right of monarchy and aristocracy to thwart the will of the people.

To what extent the Declaration of Independence voiced the general sentiment of the colonies is largely a matter of conjecture. It is probable, however, that its specification of grievances and its vigorous arraignment of the colonial policy of the English government appealed to many who had little sympathy with its express and implied advocacy of democracy. It is doubtless true that many were carried along with the revolutionary movement who by temperament and education were strongly attached to English political traditions. It is safe to conclude that a large proportion of those who desired to see American independence established did not believe in thorough-going political democracy.

Besides those who desired independence without being in sympathy with the political views expressed in the Declaration of Independence, there were many others who were opposed to the whole Revolutionary movement. The numerical strength of the Tories can not be accurately estimated; but it is certain that a large proportion, probably not less than one-third of the total population of the colonies, did not approve of the war.[1]

> In the first place, there was, prior to 1776, the official class; that is, the men holding various positions in the civil and military and naval services of the

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