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RECONSTITUTING THE AMERICAN STATES

Steven Alan Samson

A. TRIAL RUN OF THE CONFEDERATION

1. **Western Land Disputes** Virginia finally ceded her claims to Kentucky and the Ohio Valley.

a. But in 1784 the Pennsylvania militia forcibly removed Connecticut settlers from the **Wyoming Valley** with the approval of the state assembly. But the Council of Censors intervened late in the summer and compelled the assembly to pass laws restoring these lands.

2. **Border Disputes** In addition to western lands, the boundaries between states sometimes bred bitter wrangling. The eastern shore of Virginia on the Delmarva peninsula, which was annexed in 1663, was disputed until 1894. Fisher's Island off the coast of Connecticut belongs to New York. Just recently, New Jersey was awarded Liberty Island in New York harbor.

3. **Intrigues** In addition, various intrigues threatened to disrupt the new union from the beginning. **Ethan and Levi Allen** sought a treaty with England that would brought Vermont into association with Canada. Spain sought to split the country by offering lucrative trade concessions to American shipping interests if Congress would renounce its right to navigate the Mississippi for the next 25 years. This would have cut western farmers off from their markets. The southern states probably would have seceded as a result.

4. **Commerce** Indeed, the weakness of the central government made it difficult to negotiate favorable trade concessions from other countries. Americans were excluded from many British imperial markets. Moreover, attempts by Congress to gain power to regulate commerce were stymied because constitutional amendments required ratification by all thirteen states.

5. **Land Ordinances**

a. The greatest achievement of the period was the development of a new land policy. Three land ordinances set the precedents for the following century of westward expansion. The first was **Thomas Jefferson's** territorial ordinance of 1784. It provided for common ownership over all territories, their division into prospective states and the assignment of names, the organization of territorial governments, and full statehood once a territory achieved the population of the smallest existing state and upon the approval of two-thirds of the existing states. New states would be admitted on an equal footing with the original states. But the most remarkable passage, which was deleted due to the absence of a member from New Jersey, dealt with slavery: "That after the year 1800 of the Christian Era, there shall be neither slavery nor involuntary servitude in any of the said States."¹

¹Eugen Rosenstock-Huessy, Out of Revolution: Autobiography of Western Man. New

b. Before the Jeffersonian ordinance could be put into operation, however, it was superseded by the other two. The **Basic Land Ordinance of 1785** provided for rectangular surveys dividing the Ohio Valley into **townships** of six miles square composed of 36 square mile lots. This was the original of the grid system that has become fixed into the landscape. The system as a rule, however, favored large speculators rather than small farmers. One lot in each township was set aside for the purpose of providing support for a public school. A similar proposal to set aside another lot for the support of the majority religion in each township narrowly missed passage.

c. The **Northwest Ordinance of 1787** provided for a territorial government, freedom of worship and public support of education, abolition of slavery, eventual division of the Northwest into 3-5 states, and the admission of new states on an equal footing with the old.

6. The postwar economic **depression** reached its low point in the summer of 1786.

a. **Trevett v. Weeden**: Several states issued new paper money but the supreme court of Rhode Island ruled in September that the state's new legal tender law -- forcing creditors to accept paper money -- was unconstitutional and thus set another precedent for **judicial review**.²

7. During that summer, Congress also debated several proposals to amend the Articles of Confederation, but these were never submitted to the states. In order to get action on problems relating to commerce, the State of Virginia had called for a convention which met for four days at Annapolis in September. Delegates from five states attended. Alexander Hamilton of New York succeeded in getting delegates to the **Annapolis Convention** to agree to another convention to revise the Articles. They agreed to a meeting in Philadelphia the following May for "the sole and express purpose of revising the Articles of Confederation."

8. **Shays' Rebellion**

a. **Demand for Paper Money** Even as Hamilton was appealing for constitutional revisions, debt-ridden farmers in Massachusetts were clamoring for paper money and laws to stem the foreclosures that had been dogging them.

b. Mob violence began to break out in August and soon 500 insurgents rallied around **Daniel Shays**, a captain during the Revolutionary War. The rebellion finally collapsed in February following several skirmishes and some bloodshed. Shays was tried, sentenced to hang, but afterwards pardoned. Nevertheless, the incident left leaders throughout the country worried about what might lie ahead unless the country's economic and political troubles could be resolved. George Washington now threw his support behind the call for a new convention.

B. THE PHILADELPHIA CONVENTION

York: William Morrow, 1938, pp. 649-50.

²Richard B. Morris, ed. Encyclopedia of American History. New York: Harper & Brothers, 1953, p. 115.

1. **Leadership** George Washington was unanimously appointed as president and his presence had a restraining effect. William Jackson was elected secretary. James Madison kept a detailed personal diary of the proceeding.

a. **Leaders** in the floor debates included **James Madison** and **George Mason** of Virginia, **Gouverneur Morris** and **James Wilson** of Pennsylvania, **Roger Sherman** of Connecticut, and **Elbridge Gerry** of Massachusetts. Many of the delegates were members of a new generation of leaders who began to emerge alongside the still young radicals of an older generation who had begun the struggle only two decades earlier.

b. **Absentees** John Adams and Thomas Jefferson were out of the country on diplomatic assignments. Patrick Henry, who said he "smelt a rat," and a few other leaders who were suspicious of the proceedings stayed away. Rhode Island, which was out of step as always, did not even send a delegation.

c. **The Delegates** It was a distinguished assembly. Over half the fifty-five delegates were lawyers. The rest were planters, merchants, physicians, and college professors. They were generally young, representing the new generation of leaders that had emerged during the War for Independence. Two-thirds of them had sat in the Continental Congress. Nine of them, including James Madison, had studied with John Witherspoon at Princeton. Thomas Jefferson, who was then in France, referred to the Convention as "an assembly of demi-gods."

d. The delegates were pledged to secrecy, which permitted free debate, but **Robert Yates** and **John Lansing** of New York left on July 10 and publicly denounced the Convention for exceeding its authority.

2. **Edmund Randolph** and his fellow Virginians arrived early and stole a march on the other delegations by preparing the **Virginia Plan**, which was introduced on May 29, four days after the convention opened.

a. **Provisions** The plan called for scrapping the old Articles in favor of a new Constitution. Its purpose was to strengthen the national government, which under the Articles had the power to borrow money but not to tax or to otherwise secure the cooperation of the states. It proposed a bicameral national legislature that would represent the states proportionally. The lower house would be elected by the people. The upper house would be elected by the lower house from nominees proposed by the state legislatures. A chief executive with the power to veto legislation was to be chosen -- along with a supreme court -- by the legislature.

3. **Proposed Amendments** The Virginia Plan set the agenda and became the focus of the debates.

a. **Popular Elections Issue** Recent experience with Shays' Rebellion caused Roger Sherman and Elbridge Gerry to oppose popular elections at the national level. But George Mason argued for popular election of the larger branch of Congress, which was adopted.

b. **Single Executive** James Wilson argued for a single executive but Edmund Randolph opposed it as "the foetus of Monarchy," calling to mind the man on horseback. Wilson's view finally prevailed.

c. **Upper House** James Madison saw the upper house, now named the Senate, as the more deliberative of the two branches of Congress and wanted it to be popularly elected. But Gerry and Mason wished to have it reflect the will of the state legislatures,

making the states, according to Mason, a "constituent part of the national establishment." The vote was unanimous.

4. The Virginia Plan aroused some opposition because it was perceived as favoring the interests of the large states and because it favored a centralized government. **William Paterson** introduced a counterproposal known as the **New Jersey Plan** on June 15.

a. **Provisions** It proposed a revision of the existing Articles by keeping equal representation of the states in Congress, but giving Congress the powers to levy direct taxes and regulate commerce. The plan was simplicity itself: one state, one vote. Congress would also name a plural executive without a veto power, and a supreme court. Treaties and acts of Congress were to be the supreme law of the land. But an alliance of the larger states and the Carolinas defeated the plan four days later and returned to the national plan.

5. Late in June, the Convention began to meet as a **Committee of the Whole** to consider the Virginia Plan.

a. The debate centered on the issue of **proportional vs. equal representation**.

b. **Franklin's Proposal** It was on the 28th that Franklin made his famous speech recommending that sessions be opened with a prayer, declaring to chairman Washington: "I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth, that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid?" But Franklin's motion was lost due to a lack of funds with which to pay a chaplain.

6. **Compromises**

a. Earlier, **Roger Sherman** had introduced a plan that was initially rejected but was revived in July. Sherman proposed a bicameral Congress with proportional representation in the lower house and equal representation in the upper house. The **Connecticut Compromise** or Great Compromise as it has come to be known was accepted on July 16.

b. It joined the earlier **three-fifths compromise** which counted 3/5 of the Negro population in figuring representation.

c. A third was the **commerce compromise** which permitted import duties (tariffs) but outlawed export taxes and prohibited interference with the slave trade for twenty years.

d. The **electoral college** was created as another compromise between state power and popular rule.

7. With these obstacles removed, Congress proceeded to draw up a series of 23 **fundamental resolutions** late in July. After they were put into proper legal form, the 23 articles were submitted to the Convention on August 6.

8. The **Great Debate** lasted over a month. Specific provisions regarding terms of office, the commerce clause, and the prohibition of bills of attainder and ex post facto laws were worked out.

a. Attempts to abolish **slavery** were thwarted when the Carolinas and Georgia threatened to secede.

b. Efforts to set **property qualifications** for federal office holders were **rejected**. George Washington himself, who had given so much of his fortune, might have been

excluded under the proposals.

c. Franklin favored a liberal **immigration** policy. Pierce Butler of Georgia and Gouverneur Morris opposed. The controversy has persisted to the present day.

d. Without success, Elbridge Gerry and Luther Martin of Maryland sought strict limits on the **army** in peacetime.

e. The Constitution also gave Congress the power to assume the **national debt** but did not require it to do so as Gerry wanted. Nevertheless, it did so later despite Gerry's truculent opposition to the final document.

9. The results of the debates were then handed over to the **Committee on Style and Arrangement** composed of William Johnson, Hamilton, Madison, Rufus King, and Gouverneur Morris, who hammered out the last details from the 8th to the 17th of September.

10. **Final Approval** also took place on September 17. Three of the 42 delegates who still remained refused to sign: **Elbridge Gerry, Edmund Randolph, and George Mason**. On the 28th, Congress resolved to transmit the Constitution to the state legislatures for ratification despite attempts to have it censure the Convention for violating its original instructions.

11. **Analysis** On the last day of the Convention, Benjamin Franklin called for unanimous consent: "In these sentiments, Sir, I agree to this Constitution with all its faults, if they are such; because I think a general government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered, and believe further that this is likely to be well administered for a period of years, and can only end in Despotism, as other forms have done before it, when the people shall have become so corrupted as to need despotic Government, being incapable of any other."

12. Critiques

a. **Rejection of Super-Majority** Thomas Jefferson later recalled that George Washington was pessimistic about the result because of the rejection of a proposed rule to require a two-thirds majority in matters that affected the economic interests of the different sections. In a later essay, "The Civil War in America," the British historian Lord Acton noted: "This provision, which would have given protection to minorities, was repealed in consequence of a coalition between Southern and Eastern States, for the benefit of the slave-owners in the South, and of the commercial and manufacturing interests in the East. But this coalition proved to be short-lived and both sections would later regret the omission. Washington also "did not like throwing too much into democratic hands; that if they would not do what the Constitution called on them to do, the government would be at an end, and must then assume another form."³

b. **Excessive Weakness** Among those advocating a strong central government, Alexander Hamilton believed the compromises so weakened the document that it would not last. Daniel Carroll pointed out its continuity with the Articles. But Madison saw it as a factor in its favor.

c. **Excessive Strength** The Antifederalists feared that the new constitution would become an instrument of tyranny. Luther Martin called it a stab in the back to the

³John Emerich Edward Dalberg-Action. Selected Writings of Lord Acton. Vol. I: Essays in the History of Liberty, ed. J. Rufus Fears. Indianapolis: Liberty Classics, 1986, pp. 267-68.

goddess of Liberty.

d. **Corruption vs. Virtue** Recent historians, like Gordon Wood and Robert Bellah, believe the founders attempted to reconcile liberal constitutionalism with a system of civic-minded republican virtue. Forrest McDonald contends that the framers of the Constitution made personal ambition the system's "activating principle" rather than virtue.⁴ Indeed, its opponents complained that the new system would encourage vice and speculation. America would then go the way of imperial Rome.

e. **Tenuousness** Today we take its longevity for granted. But even the most optimistic delegates like James Madison did not expect the Constitution to last more than a generation.

C. THE RATIFICATION DEBATES

1. Hamilton, who was unhappy with the new Constitution, which he later called a "frail and worthless fabric," now faced the problem of selling it to the hostile New York Assembly. In collaboration with James Madison and John Jay, he wrote the bulk of a series of eighty-five newspaper articles signed under the pseudonym Publius and published in New York newspapers between October 27, 1787 and April 2, 1788. These **Federalist Papers** have come to be regarded as the classic interpretation of the intent of the Framers of the Constitution.

2. But if there were prestigious men like Washington and Franklin to uphold the Federalist position, there were also prominent **Antifederalists**, including George Mason, Elbridge Gerry, Richard Henry Lee, and Patrick Henry.

a. Among them were some of the wealthiest men in the country, such as **George Mason**. Unlike the Federalists, most Antifederalists used the term "democracy" approvingly and feared the growth of a centralized tyranny.

b. **Robert Yates**, who wrote under the pseudonym "Brutus," argued that the judiciary was left unchecked by the new Constitution.

c. **Hesitant Supporters** It was the younger men, the natural democrats, who rallied to the Constitution. Although Edmund Randolph and John Hancock hesitated, they finally threw their support behind the new Constitution. Samuel Adams was also won over.

3. **Early Ratifications** Delaware, Pennsylvania, and New Jersey ratified in December, all except Pennsylvania unanimously.

a. The **Anti-Federalist dissent** presented at the Pennsylvania convention criticized the lack of a bill of rights and the notion of "two co-ordinate sovereignties," which would necessarily result in the destruction of state governments. It warned against direct taxation of the people and the tendency of the new constitution to mix the powers of government: for example, in tying the presidency too closely to the Senate in the appointment power. Its recommendations are typical of the amendments that several conventions proposed.

⁴Forrest McDonald, E Pluribus Unum: The Formation of the American Republic, 1776-1790 (Indianapolis: Liberty Press, 1979 [1965]), pp. 315-16.

b. **Middle Ratifications** Georgia and Connecticut ratified in January. In February, Massachusetts ratified by a close vote and only with the addition of some recommended amendments. Rhode Island rejected it in March. Then came another string of ratifications: Maryland in April, South Carolina in May, and New Hampshire brought the vote to the necessary 2/3 majority in June of 1788.

4. **Late Ratifications**

a. **Virginia** finally ratified on June 25 despite Patrick Henry's opposition. Henry supported a strong national defense, but he was also suspicious that Northern politicians were more interested in perpetuating "the influence of their region at the expense of settlers who hoped to build for themselves and their children a new life along the frontier."⁵ Still, the Assembly stipulated that amendments be made and a bill of rights included. It also declared "that Powers granted under the Constitution, being derived from the people of the United States, may be resumed by them whensoever the same shall be perverted to their injury or oppression."⁶ New York and Rhode Island later followed this precedent.

b. Hamilton delayed a final vote in **New York** until it was clear that the new Constitution had been ratified by New Hampshire and Virginia. Even then, it just barely passed late in July.

c. **North Carolina** did not ratify until late in 1789, months after the new government had taken office, and **Rhode Island**, which was controlled by a debtor faction, waited until May, 1790.

d. **Opponents** The leaders of the opposition reconciled themselves to the inevitable and made no attempt to sabotage the new government. In Virginia, Patrick Henry remarked: "I will be a peaceable citizen. My head, and my heart, shall be at liberty to retrieve the loss of liberty, and remove the defects of the system in a constitutional way."⁷

5. **Dissolution of the Continental Congress** In October of 1788 with all but two states having ratified, the Continental Congress dissolved itself in New York. Afterwards elections for the new Congress were held.

D. CONSTITUTIONALISM

Men are qualified for civil liberty in exact proportion to their disposition to put moral chains on their own appetites; in proportion as their love of justice is above their rapacity; in proportion as their soundness and sobriety of understanding is above their vanity and presumption; in proportion as they are more disposed to listen to the counsels of the wise and good, in preference to the flattery of

⁵M. E. Bradford, The Trumpet Voice of Freedom: Patrick Henry of Virginia (Marlborough, NH: Plymouth Rock Foundation, 1991), p. 14.

⁶*Op. cit.*, pp. 274-75.

⁷Oxford History, I, p. 406.

knaves. Society cannot exist unless a controlling power upon will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters.⁸

-- Edmund Burke

1. **Purpose** The great accomplishment of the Philadelphia Convention was producing a **design for a free government**. Let us examine the development of the Constitution of 1787 in some detail.

a. Consider the following, which is a standard textbook **definition**: "A constitution is a set of rules about rule making. Its principal purposes are (1) to describe the basic structure and decision making processes of government and (2) to allocate political power." As with our earlier discussion of politics, we are presented with a non-definition. It is simply a description. No consideration is given to its origins, its scope, or the nature of its authority, possibly in part because of what may be learned of its purpose and character.

2. The Constitution may be properly described as the second part of an **American covenant** that includes the Declaration of Independence. The first founded the American nation and the second established its polity. This polity is federal in structure with a system of checks and balances built into it to keep power divided, limited, and accountable to the people.

3. As the United States began to expand westward, the constitutions of the new states reflected an increasingly equalitarian outlook. Many state constitutions are largely composed of pickings from earlier examples. For example, the **preamble**, which normally invokes God and states a few abstract principles, has become an expected part of any such document.

4. Each state constitution contains a **bill of rights**. In this particular case, the early states set the example which our national constitution followed.

5. Each state constitution also provides for the **separation of powers** between the three branches of government and for a system of **checks and balances**. Questions of constitutional interpretation are usually left for the courts to decide.

6. Numerous distinct **powers** have been subsequently abstracted from or interpolated into the Constitution by various jurists and scholars.

a. Some powers are granted or delegated to the government (**expressed, delegated, or enumerated powers**);

b. other powers, called civil rights, are withheld from it (**denied powers**);

c. some are **concurrent powers** shared by the various levels of government, such as taxing and spending (**fiscal powers**), eminent domain (**takings**), and police powers for regulating public health and welfare;

d. others are **exclusive powers** exercised only by the national government, such as diplomacy and war;

⁸Quoted in Wilhelm Roepke, A Humane Economy: The Social Framework of the Free Market (Chicago: Henry Regnery Company, 1960), p. xiii.

- e. still others are reserved to the states or to the people (**reserved powers**).
- f. The Supreme Court has added **implied powers** -- those deemed "necessary and proper" to the exercise of the enumerated powers. This is the so-called elastic clause (Art. I, sec. 8).
- g. The Court has also identified **inherent powers** relating to foreign policy which are not derived from the Constitution but from the fact of national sovereignty;
- h. and **resulting powers**, which are extrapolated from a combination of enumerated powers.

7. **Amendment** Several major ways of changing a constitution are provided by the Constitution itself or generally accepted political custom.

a. **Constitutional Methods** The Constitution itself provides two methods of proposing a change and two methods of ratifying it.

1) First, a **constitutional convention** may be convened upon the vote of two-thirds of the members of both houses of congress or two-thirds of the state legislatures. This method has not yet been used, although nearly two-thirds of the states have called for a balanced-budget amendment.

2) Alternatively, an **individual amendment** may be proposed by following the same procedure without the necessity of calling for a convention.

3) **Ratification** of a new constitution or an amendment may be achieved either by a vote of three-quarters of the state legislatures or by three-quarters of ratifying conventions held by the states. This last method was used in ratifying the Constitution and again in 1933 to repeal the Prohibition Amendment.

b. Second, the Constitution may be effectively changed either through custom or by executive, legislative, or judicial **interpretation**. The Supreme Court is now generally recognized as the authority of last resort through judicial review, although the president, Congress, and the states historically have claimed this power.

c. Third, at the state level, the **popular initiative** may be used in those states which permit the circulation of petitions in order to have a proposed law or amendment placed on the election ballot.

d. Fourth, also at the state level, an amendment may be proposed by a state legislature and ratified through a **popular referendum**.

8. In addition to the generally accepted methods, more **drastic measures** have been taken from time to time.

a. **Interposition** occurs when a duly appointed or elected official resists what he considers unlawful orders by a superior or by another official or agency of the government. He thus interposes his authority to protect against tyranny or injustice.

b. Several states once claimed the right of **nullification**, insisting that they could in effect veto unlawful laws passed by Congress.

c. Their ultimate recourse was to **secession**, in which they voted to withdraw from the union.

d. In the case of the War Between the States, the president responded by assuming **emergency powers** and declaring **martial law**, which effectively -- although only temporarily -- suspended certain constitutional protections. Emergency powers have been exercised subsequently, as during the First World War.

E. ORGANIZING PRINCIPLES: DIVISIONS OF POWERS

Our constitution provides for a division of powers through four organizing principles.

1. The primary division is the vertical system of **federalism** in which
 - a. power is divided into **two main levels** between a central (or national) government and individual states, each being limited by the other and by the Constitution.
 - b. Modern federalism, which provides for unity as well as diversity, originated in the political covenants developed by Puritan communities in New England to preserve local self-government while entrusting certain functions, like defense, to larger units. Its apex of development was reached with the American Constitution of 1787 and is the chief American contribution to political theory. The **prevailing norm before 1787** was either
 - 1) a unitary system with a strong central government, as with a **monarchy**, or
 - 2) a confederated system of many small regions that were only loosely united, as with **feudalism**.
2. The second major division is the horizontal **separation of powers**, which **Baron Montesquieu** of France earlier attributed to the unwritten British constitution.
 - a. Here the functions of government are divided between several units, which include **three separate branches** at the national level and three at the state level, as well. The three branches are
 - 1) First, the two-chambered **legislative** or law-enacting branch, which in many respects is the central unit of government;
 - 2) Second, the **executive** or law-implementing branch; and
 - 3) Finally, the **judicial** or law-interpreting branch.
 - b. Each branch (as well as each of the two chambers of Congress) is characterized by different methods or **modes of selecting their officers** and by different **terms of office**.
 - 1) **Representatives**, who are members of the lower house of Congress, are elected to a two-year term by registered voters who reside within specific congressional districts within the states.
 - 2) **Senators**, who are members of the upper house of Congress, are elected to a six-year term by the electorate of the entire state.
 - 3) The **President** and **Vice-President** are elected to four-year terms through the **electoral college**.
 - 4) **Justices** of the Supreme Court and other courts of the federal judiciary are appointed for life or good behavior by the president and confirmed by the senate.
3. The third division is the **bicameralism** of the legislative branch in which
 - a. Congress and the state legislatures are divided into **two chambers**, a Senate and a House of Representatives,
 - 1) with the exception of Nebraska, which has a **unicameral legislature**.
 - b. In Congress, the **Senate** or upper house was originally
 - 1) **designed to represent the states** themselves. Before 1913, Senators were elected by the state legislators. Today, they are directly elected by the people.

- 2) At the national level, each state is represented by **two Senators** in Congress who are free to vote their conscience and who
 - 3) may act as a **restraint on the presidency and Supreme Court.**
- c. The lower house or **House of Representatives** was originally
 - 1) **designed to represent the people.**
 - 2) The number of representatives in Congress is loosely based on **population** with each congressman representing approximately 600,000 people.
 - 3) **Money Bills** All taxing and spending bills must originate in the lower house on the principle that the House is most directly accountable to the people and is supposed to reflect public opinion.
 - 4. A final division of power may be found in the operation of the **republican principle** itself, which divides power between the people and their elected representatives.
 - a. The indirect rule of the people through their representatives **enhances stability** by buffering elective officials from the momentary passions of the people, who may be unduly swayed by shifting political winds.
 - b. The system was designed to favor the election of **wise and capable leaders** rather than popular leaders whose only qualification is the ability to win votes.
 - c. The electoral college is best understood in the context of the republican principle. slates of electors are fielded by the political parties throughout the state. One set of electors is chosen during the general election, usually on a winner-take-all basis except in Maine. The number of electors for each state is determined by the total number of its congressional and senatorial districts, which gives more of an advantage to less populous states than strict proportional representation. About a month after the general election the winning slate of electors meets at the state capital and casts its votes, which are then forwarded to the Senate to be counted when Congress begins its next session in January. Election of the president requires a majority of electoral votes throughout the country. Otherwise the House of Representatives must decide on a one state, one vote basis. Although there are efforts from time to time to abolish the electoral college system, they have failed in part because it effectively gives the less populous states and regions a veto over the election. This complicated system designed to assure the election of people who are acceptable throughout the country.

F. CONSTITUTIONAL THEORY

- 1. This brings us to our next topic: a look at the theoretical foundations of our political system. The first point to be made is that the **locus of sovereignty** -- the true source of power -- under the Constitution has been disputed almost from the beginning.⁹
 - a. According to Forrest McDonald, Massachusetts and New Hampshire located the ultimate source of political power in the **towns**. This was reflected in the way those

⁹The ratification debates in Massachusetts and the two Carolinas are compared and contrasted in M. E. Bradford, Original Intentions: On the Making and Ratification of the United States Constitution (Athens: University of Georgia Press, 1993).

states ratified the Constitution.

b. Rhode Island and Connecticut kept their colonial charters for decades after independence and held that the **state** itself was the source of power.

c. But in any case, the prevailing belief is, as one delegate expressed it, that "power reverted to the **people of the several states**, severally."¹⁰ In other words, the federal Constitution of 1787 created a stronger confederation with extensive general powers, a limited federal government rather than a consolidated national state. Some critics have maintained that the framers of the Constitution sought to impose a consolidated state and deliberately undercut the state constitutions.¹¹ This, in fact, was true of several of the delegates, notably James Madison and James Wilson. But Madison, who drafted the Virginia Plan, was forced to back down and acknowledge that the states must continue to play a strong and independent role in the federal system. The result was the Great Compromise, which gave the states representation in the Senate.

2. Division of Powers

a. A number of **checks and balances** have resulted from a combination of four organizing principles: federalism, separation of powers, bicameralism, and the republican principle.

b. One of the results is a **mixed government**: one that combines the forms of a monarchy, aristocracy, and democracy. John Adams and other framers regarded the mixed constitution as an obstacle to tyranny by any single branch or faction. A faction, by the way, is a political party or interest group.

3. If we took each division of powers by itself, the government would be rigidly compartmentalized. This would prevent outside supervision and restraint. Each branch or level would be answerable only to itself and its constituents. Instead, a fluid **system of overlapping powers** -- the checks and balances -- was designed to give each branch some say in the affairs of the others.

a. The idea is to keep **sovereignty**, ultimate authority, from being vested in any person, agency, or faction. Early American jurists, following the lead of William Blackstone, believed that "no human laws are of any validity" if they contradict the Law of God or the Law of Nature. To avoid tyranny, human frailties must be restrained by the rule of law.

b. The Constitution itself is a covenant with the people of the united *states* rather than a body of statutory law. It is the **supreme law of the land** in the restricted sense that it takes precedence over all other political structures, statutes, and obligations. It is designed to govern a people rather than to transform a society in the name of some higher ideological purpose.

4. The divisions of power restrain concentrations of power by representing **separate constituencies**, different publics that hold them accountable.

5. Thus all power is limited by some **countervailing power** and placed under the rule of law. This means that substantive changes must be introduced gradually and deliberately.

6. Together, these divisions act as a **restraint on power**. All power is to

¹⁰McDonald, p. 311.

¹¹Gary North, Political Polytheism: The Myth of Pluralism. Tyler, TX: Institute for Christian Economics, 1989), p. 456ff.

be limited and placed under law. In order to see how this system of restraints works, we must look at

- a. First, the **theory** behind it;
- b. then the distinctive **constitutional powers** and characteristics of each branch of government,
- c. along with the **specific areas of overlap** which created the checks and balances. The theory is best stated in the Federalist Papers by James Madison as a means of controlling factions.

7. The **Federalist Papers** are a series of 85 newspaper articles originally written by Alexander Hamilton, James Madison, and John Jay to explain the new Constitution and persuade the voters of New York to ratify it.

- a. In Federalist, no. 10, Madison maintained that the **purpose** of dividing the powers of government was in order to **break and control the violence of factions** (interest groups or political parties).

G. FEDERALIST, NO. 10

1. There are two methods that may be used to accomplish this. The first method is to **remove the cause of factions**.

- a. This may be done either by **abolishing liberty**, which is essential to political life or
- b. by **creating uniformity of opinions and interests**, which work against diversity and division of labor in economy. Madison considered this to be as unworkable as the first was unwise.

c. **Conditions for Liberty** Yet is such enforced conformity unworkable? A comment is in order here. Looked at in one way, the twentieth century may be understood as the most systematic attempt ever made to prove Madison wrong. What is modern totalitarianism if not a vast series of political experiments to standardize and homogenize humanity? Consider the role of genocide in Turkey, Kampuchea, Eastern Europe and elsewhere? What was the purpose of the eugenics experiments in Germany, Japan, and even the United States? Why do so many countries still have single-party dictatorships, centrally-controlled public education systems and communications media, and so forth? Does political liberty mean anything if people are not free to express their differences or if they are kept ignorant of their history? The assumption behind our Constitution is that it will be secured by an alert, active, intelligent, and informed electorate. But we should consider the many ways people have been disconnected from their roles as citizens and family members by emphasizing consumption over production, substituting entertainment for creative leisure, standardizing and downgrading education, restricting access to information, and otherwise narrowing their horizons and impoverishing their lives. Political liberty requires a high level of public intelligence, which in turn represents the interplay of information and memory. Liberty and intelligence must be exercised or they will slacken. History represents the collective memory of a people. If this

memory is not preserved and handed down from generation to generation, or if it is rewritten to order to suit the powers that be, people will never reach beyond political infancy to a mature capacity for self-government. And they will never be free. Only the truth can make us free.

2. The second method is to **control the effects of factions**.

a. Here the **republican principle** is the key safeguard. If a faction is in the minority, a majority can defeat it through the regular electoral process. If a faction is in the majority, the danger is greater. So the new Constitution provided for a division and overlapping of powers to control this.

1) If this sounds undemocratic, that is because it is. It is designed to prevent a **tyranny of the majority**, as well as a tyranny of small groups or dictators.

b. In addition, Madison contended that a large republic is better than a small republic because it has a **built-in diversity** of interests: regional, religious, economic, even ethnic. Consequently, all groups must pull together or be torn apart.

c. Even with all these safeguards, Madison thought it wise to include **auxiliary precautions**, which we call the checks and balances system.

3. **Evaluation** It is a brilliant theory and has accomplished Madison's purpose better than he could have foreseen.

a. It favors slow **deliberation** in preference to energetic reform, provoking later Progressives like Theodore Roosevelt and Woodrow Wilson to consolidate power in the presidential office.

b. More characteristically, it emphasizes consensus or **unity** -- specifically national unity -- over diversity and favors a divisive individualism over voluntary cooperation and group loyalty.

H. CHECKS AND BALANCES IN PRACTICE

Let us examine the constitutional -- and extra-constitutional -- powers and characteristics of each of the three branches, as well as the relationship between the central and state governments. We will also examine the areas of overlap which require them to cooperate with each other and restrain each other. With some exceptions, most of these practices have their counterparts at the state level, too. It should quickly become evident that our practice today has gone far beyond the language of the Constitution itself.

1. **Laws** We begin with what has become the central business of government: law-making.

a. Legislative proposals -- called **bills** -- may not become laws [Art. I, sec. 7] until they pass both Houses of Congress.

b. But at least since 1916, **executive orders** of the president have enjoyed the full authority of law, an example of the delegation of powers by Congress.

c. Congress has also delegated a discretionary power to administrative

agencies whose rule-making has created a large body of **administrative law**, not dissimilar to the kind of law protested by the colonists.

d. The Senate has a custom of unlimited debate that permits **filibusters** that can tie up the floor and prevent other business from being conducted. Debate may be cut short through a **cloture** vote, which requires the support of sixty Senators.

2. Constitutional **Amendments** [Art. V] are usually proposed by a 2/3 vote of both houses of Congress and ratified by 3/4 of the State legislatures, although conventions may be used for either or both purposes.

a. But Constitutional change is not restricted to the formal amendment process. **Treaties** [Art. VI] are part of the "supreme law of land" and may thus effectively supersede or overrule earlier provisions of the Constitution. An effort to change this provision, the Bricker Amendment, fell one vote short in the Senate in 1954. Even so, the 1957 Supreme Court ruling in *Reid v. Covert* accomplished some of the Amendment's purpose by holding that the Bill of Rights may not be abrogated by such agreements.

b. The Constitution may also be effectively -- although informally -- amended through **custom and interpretation**, such as the power of judicial review.

3. The president negotiates **treaties** [Art. II, sec. 2]; the Senate ratifies them as part of its function to "advise and consent." Treaties then become part of the supreme law of the land.

a. But the President may conclude **executive agreements** with foreign heads of state that will be accorded the weight of law in the courts.

b. If individual states wish to form **compacts** [Art. I, sec. 10] with one another, the consent of Congress is also required.

4. **States**

a. **Reserved Powers** [Tenth Amendment] Even so, the states enjoy certain powers reserved to them by the Constitution, such as police powers -- protecting public health, welfare, peace, safety, and morals -- and a guarantee of equal representation in the national government [Art. V]. But in cases where these reserved powers are in conflict with federal regulatory controls, the State is usually required by the courts to yield.

b. **Denied Powers** [Art. I, sec. 10] States may not enter into treaties or alliances, coin money, issue bank notes or make anything legal tender except gold or silver, impair the obligation of contracts, grant any title of nobility, or lay taxes on imports or exports. States must give full faith and credit to the official records of other states; and respect the privileges and immunities of citizens of other states.

c. **Electoral College** [Art. II, sec. 1] The president is normally elected by a vote of the electoral college, which is made up of elected state delegates that equal in number the state's congressional delegation.

d. The constitutional guarantee of a **republican form of government** [Art. IV, sec. 4] prevents any fundamental change of government by the states.

e. **Territorial Integrity** [Art. IV, sec. 3] On the other hand, states are also protected against the loss of territory -- or dissolution [Art. V] -- without their

consent. This provision was violated during the Civil War by the creation of West Virginia out of the loyalist northwestern counties of Virginia. The refusal of the Senate to accept delegates from the defeated southern states immediately after the Civil War is more easily justified [Art. I, sec. 5].

f. **Extraterritoriality** [Art. I, sec. 8; Art. IV, sec. 3] Even so, foreign embassies and federal lands, which include the District of Columbia, Indian reservations, military bases, national parks, and national forests, are not subject to control or taxation by the states. They are immune because they belong to other jurisdictions.

g. **Sovereign Immunity** [Art. III, sec. 2; Eleventh Amendment] State, national, and foreign governments are immune to lawsuits except with their permission. Cases involving foreign diplomats are the exclusive jurisdiction of the United State Supreme Court. Diplomats are also immune to compulsory process in criminal proceedings. Members of Congress also enjoy a degree of immunity while Congress is in session. The irony of the term “sovereign immunity” is that the Constitution nowhere uses the term “sovereign.”

h. The **extradition** [Art. IV, sec. 2] of fugitives from one state to another is normally observed as a courtesy but may be refused if the governor considers the fugitive to be a legitimate refugee.

i. The passage in 1913 of the Seventeenth Amendment, which requires the **direct election of senators**, has meant that the loss of a direct voice in national lawmaking by the states.

5. **The People** The people play a role in the system at regular as well as irregular intervals.

a. Free and frequent **elections** [Art. I, sec. 2] regularly give the people and the states, although indirectly, a check on the power of the central, state, and local governments.

b. Many state constitutions still recognize that **juries**, which are deputized under oath to defend the Constitution, have the right to decide questions of law as well as fact. This power **may** be used to declare a law unconstitutional. But, in general practice, judges have been unwilling to inform juries of the full scope of their prerogatives.

6. The Constitution recognizes a number of civil immunities that under the Tenth Amendment may be considered among the powers reserved to the people. **Civil liberties**, many of which are set forth in the first eight amendments, are powers that have not been delegated to the government.

7. **The Judiciary**

a. **Original Jurisdiction** [Art. III, sec. 2] The Supreme Court, which has original and exclusive jurisdiction over interstate and international cases, has appellate jurisdiction in other cases.

b. **Restricted Appellate Jurisdiction** But Congress, which created the lower federal courts, may establish their rules of procedure and restrict the appellate jurisdiction even of the Supreme Court, preventing it from deciding certain cases.

c. **Judicial Review** The Supreme Court may rule that laws passed by Congress or actions taken by the president are unconstitutional.

d. **Judicial Legislation** But in practice, judicial review, an interpretive function, has in recent years increasingly become a law-making or constitution-amending function. (For example, the reapportionment order that overruled a provision of the Massachusetts Constitution that dated back to 1780).

e. **Reversals** [Art. V] Supreme Court decisions may be overturned by Constitutional Amendments and sometimes merely by passage of a new law by Congress. At times in the past, judicial decisions were sometimes simply ignored and the Court had no means of enforcing its rulings.

8. **Appointments** [Art. II, sec. 2] The president appoints federal judges, cabinet officers, and diplomats; the Senate confirms or rejects them.

a. **Patronage and Partisanship** The joint nature of this power has been used in various ways by the Senate and by presidents to reward friends, punish enemies, or attack each other politically.

b. **Senatorial Courtesy** is normally extended to the ranking senator from the president's party in making the selection.

c. The **Civil Service**, which was instituted in 1883, has also considerably narrowed the scope of presidential patronage and sheltered the bureaucracy from permanent partisan control.

d. The appointment of **independent counsels** to investigate and even prosecute high-ranking executive officials has been undertaken by both Congress and the courts.

9. **Bureaucracy** [Art. I, sec. 8; Art. II, sec. 2; Art. III, sec. 1] Congress may create or eliminate federal courts and executive agencies, expand or reduce their size or scope, and investigate their activities.

a. **Congressional oversight**, usually by standing committees created by Congress, is the price that executive agencies must pay for the privilege of operating.

b. **Quasi-Legislative and Quasi-Judicial Powers** But in practice agencies that have been given legislative or judicial authority may be fairly independent of outside control and may even subject members of Congress to scrutiny.

10. **Commerce**

a. **Regulation** The Commerce Clause [Art. I, sec. 8] gives Congress the exclusive power to regulate interstate and foreign commerce. The elastic clause (also known as the implied powers or necessary and proper clause) has also helped expand this power almost indefinitely.

b. **Subsidies and privileges** created by Congress have effectively converted state and local agencies as well as private institutions into agents of the federal government by means of subsidies, such as grants-in-aid, and other privileges.

11. **Fiscal and Monetary Policy** [Art. I, sec. 7-8] Congress controls the purse strings of the government, including the salary of all federal officials. All bills involving revenue, appropriations, and credit are introduced into the House of Representatives. Fiscal policy involves the taxing and spending power of Congress.

a. **Limits** [Art. I, sec. 9] The power of Congress to raise revenue,

however, is constitutionally limited by a restriction on direct taxes.

b. **Income Taxation** [Sixteenth Amendment] This limit has been largely preempted by the institution of an undefined power to tax incomes.

c. **Currency** This power has been enhanced by an undefined ability of Congress to create and regulate money through legal tender laws and the federal reserve banking system, resulting in economic regulation in the form of monetary policy. Monetary policy is determined by the Federal Reserve System, a quasi-public bank.

d. Members of Congress may set their own **salaries** [Art. I, sec. 6], but during the time for which they are elected, they may not be appointed to any office either created or be given a salary increase by Congress. Sen. Hugo Black of Alabama was appointed to the Supreme Court in violation of this rule. Congress also may not lower the salaries of other federal officials while those officials still hold office [Art. II, sec. 1; Art. III, sec. 1].

e. **Impoundment** The president may also exercise executive privilege in refusing to spend funds appropriated by Congress, but this was cited as an impeachable offense against Richard Nixon.

12. Congress and the President

a. The President exercises a number of formal and informal **legislative powers**, sometimes jointly with the Senate and sometimes in interaction with Congress as a whole. One holdover from the British parliamentary system is the custom that the president may not enter Congress without permission. A presidential visit becomes an occasion marked with pomp and circumstance.

b. **Special Sessions** [Art. II, sec. 3] The president may call Congress into special session, or act on his own after Congress has adjourned. President Wilson made preparations for our entry into the First World War while Congress was in recess. President Lincoln had actually called up and dispatched troops, paid them out of treasury revenues, placed parts of Maryland under martial law, and suspended the right of habeas corpus at the outset of the Civil War before calling Congress into special session.

c. **Tie-Breaking** [Art. I, sec. 3] The vice president, a member of the executive branch, sits as the **president of the Senate** and in this capacity may break tie votes on proposed legislation. In his absence, the president pro tem serves as presiding officer but cannot cast the deciding vote.

d. The president may **veto** [Art. I, sec. 7] any legislation passed by Congress.

e. It takes a 2/3 vote of both Houses to **override** a veto [Art. I, sec. 7].

f. **Pocket Veto** [Art. I, sec. 7] Bills become law without the President's signature automatically after ten days unless Congress adjourns at an earlier date, in which case they will not go into effect.

g. **Setting the Agenda** The president may recommend individual laws or even a legislative package and thereby set the agenda of Congress.

h. **Elections** After the disputed election of 1800, the Twelfth Amendment revised electoral procedures in order to accommodate the new two-party system. Under the original system, Thomas Jefferson and Aaron Burr, who had run together on the Republican ticket, won the same number of electoral votes. Burr,

who did not wish to play second fiddle, afterwards challenged the results, hoping to throw the decision to the House of Representatives where he expected to win Federalist support. But the leading Federalist, Alexander Hamilton, who was no friend to either man, helped stave off a political crisis by opposing Burr. The Electoral College remained unchanged otherwise. Then as now, in the absence of a clear majority vote in the Electoral College,

1) the **president** is elected by a majority of the state delegations in the House of Representatives [see also Art. II, sec. 1];

2) the **vice president** is elected by a majority of the members of the Senate, over which he then presides [Twelfth Amendment].

13. **Crime and Punishment**

a. The House may bring **impeachment** [Art. I, sec. 2] charges for high crimes and misdemeanors against any federal official, involving both removal from office and disqualification to hold any other.

b. The **trial** [Art. I, sec. 3], if any, is held in the Senate. Conviction requires a 2/3 majority.

c. The president may be placed on trial for treason, bribery, or other high crimes and misdemeanors; the Chief Justice of the Supreme Court is to serve as the **presiding officer** [Art. I, sec. 3; Art. II, sec. 4].

d. Congress may also judge the **qualifications** [Art. I, sec. 5] of its own members and refuse to seat someone elected to Congress; or it may punish its members through **censure** or **expulsion**.

e. **Treason** [Art. III, sec. 3] charges may be brought only for levying war against the United States or giving aid and comfort to its enemies.

f. As commander-in-chief, the president may grant **pardons** or **reprieves** [Art. II, sec. 2] to civilian as well as military personnel, except in cases of impeachment.

g. Congress may also exercise the power of pardon in granting **amnesty** or **immunity from prosecution**.

h. Congress acts as a court during investigations and may cite uncooperative witnesses for **contempt of Congress**.

14. Separately as well as jointly, the president and Congress have been delegated certain **war powers** by the Constitution. The President is commander-in-chief of the armed forces and the national militia when called into service [Art. II, sec. 2].

a. **Conscription** [Art. I, sec. 8] Congress may call forth the militia and press it into national service to execute the laws of the Union, suppress insurrections, and repel invasions.

b. Congress alone may **declare war** [Art. I, sec. 8].

c. But the President has assumed the power to conduct **police actions** overseas without formal approval by Congress.

d. Apart from calling up the militia, the president may also exercise certain unspecified **emergency powers** or declare **martial law**, although not clearly authorized to do so under the Constitution.

15. **Conclusion** A concluding comment is in order here. Many of the examples cited above are nowhere mentioned in the Constitution. Over the years, constitutional

innovations during the Federalist period, the Civil War and Reconstruction (1861-1877), the Progressive Era (1900-1920), the New Deal, and more recent times have superseded earlier limitations and effectively extended the scope and power of the national government. This result was long ago anticipated by Lord Acton who wrote over a century ago that "There is no appeal from the people to itself. After having been taught for years that its will ought to be law, it cannot learn the lesson of self-denial and renounce the exercise of the power it has enjoyed."¹² The security of our constitutional limitations ultimately depends on preserving the republican system of restraints designed to protect the rights of all the people. What Edward Corwin called a Constitution of Powers is the consequence of the periodic expansion of powers to meet this or that emergency.¹³ This helps explain why the national government continues to grow in power and why, once a program or agency is started, it is so difficult to keep it from growing or to cut it back.

Review

western land disputes	Northwest Ordinance of 1787	Annapolis Convention
Shays' Rebellion	Edmund Randolph	Virginia Plan
William Paterson	New Jersey Plan	proportional representation
equal representation	Roger Sherman	Connecticut compromise
other compromises	critiques of the Constitution	Robert Yates
ratification	preamble	separation of powers
checks and balances	expressed powers	denied powers
concurrent powers	exclusive powers	reserved powers
implied powers	inherent powers	resulting powers
methods of amendment	interposition	nullification
secession	martial law	federalism
modes of selection	terms of office	bicameralism
republican principle	supreme law of the land	Federalist, no. 10
tyranny of the majority	executive orders	filibuster
cloture	treaties	executive agreements
compacts	extraterritoriality	sovereign immunity
extradition	juries	original jurisdiction
appellate jurisdiction	senatorial courtesy	bureaucracy
quasi-legislative powers	quasi-judicial powers	veto and override
president of the Senate	Electoral College	disputed elections
impeachment	censure	war powers
conscription	police actions	

¹²*Op. cit.*, p. 272.

¹³See Edward S. Corwin, Total War and the Constitution (New York: Alfred A. Knopf, 1947), pp. 170-72.