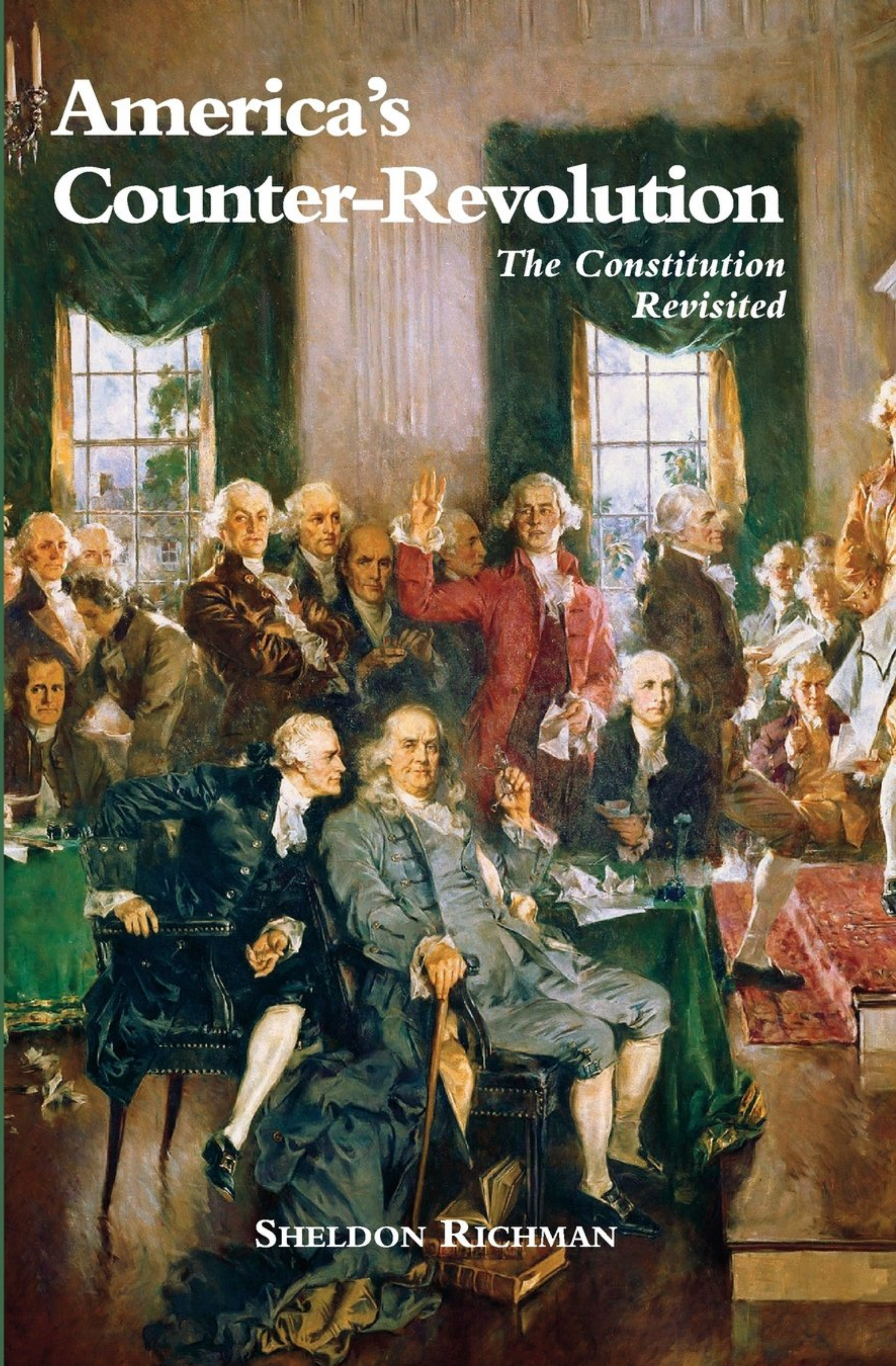
America's Counter-Revolution

The Constitution Revisited



SHELDON RICHMAN

America's Counter-Revolution

AMERICA'S COUNTER-REVOLUTION

The Constitution Revisited

SHELDON RICHMAN

Griffin & Lash
Ann Arbor, Michigan

Published by
Griffin & Lash
Ann Arbor, Michigan

This book was printed in the United States of America
on acid-free paper.

This is the third, corrected, printing of this book.

ISBN 978-0692687918

Sheldon Richman.
America's Counter-Revolution: The Constitution Revisited
1. Constitutional history—United States 2. Constitutional law—
United States 3. Anarchism I. Title

To the constitutionalists of all parties

"A nation which makes greatness its polestar can never be free; beneath national greatness sink individual greatness, honor, wealth and freedom. But though history, experience and reasoning confirm these ideas; yet all-powerful delusion has been able to make the people of every nation lend a helping hand in putting on their own fetters and rivetting their own chains, and in this service delusion always employs men too great to speak the truth, and yet too powerful to be doubted. Their statements are believed—their projects adopted—their ends answered and the deluded subjects of all this artifice are left to passive obedience through life, and to entail a condition of unqualified non-resistance to a ruined posterity."

—Abraham Bishop (1800)

Contents

Foreword

This much I can assure the reader: after reading this book, you will never think about the U.S. Constitution and America's founding the same way again. Sheldon Richman's revealing and remarkably well-argued narrative will permanently change your outlook.

Richman, one of this country's most treasured thinkers and writers, digs through a period of American history that manages to be almost invisible to most people. He brings the whole period to life in ways that upset core tenets of the American civic religion.

If you ask the average American to summarize the founding in a few minutes, you will hear a story about a bad foreign king, a tea party, a defiant declaration, a war, and then the immaculate conception of the glorious U.S. Constitution that has guarded our liberty ever since. The entire period called "the founding" is smashed together into one short span, from conception to birth to the greatest document in the history of humankind. At best, the short period between the war and the Constitution is dismissed as merely transitional.

As it turns out, there's a missing 12 years in this conventional account: the time between when the Articles of Confederation were sent to the states for ratification and its replacement in 1789 by the new Constitution. What were the Articles? Why were they replaced? Who replaced them? Was there a debate, and did opponents make valuable points? These are the questions that Richman addresses here. In doing so, he draws on the most contemporary and important scholarly research, while putting the evidence in prose that is accessible and compelling.

His argument at first appears shocking. The small elite who won the day didn't actually share the values and ideals that drove the war for independence from Britain. These "founders" plotted and schemed to impose a new government that dramatically enhanced and centralized

government power. Their stroke of genius in pulling off this coup d'etat was selling the Constitution as a means of guaranteeing freedom and limiting government. In fact, it was the opposite: the imposition of a new statist yoke to replace the one just cast off; the complete reversal of a hard-won freedom.

Provocative, isn't it? Yet it's all true. Also striking is Richman's thorough documentation of the arguments of the Constitution's opponents, the Anti-Federalists. (These terms can become very confusing. The so-called Federalists were actually the centralists, while the anti-federalists were dedicated to the decentralist ideals of the federalist tradition.) As it turns out, the Anti-Federalists warned about the provisions of the Constitution that they believed would eventually erode rights and liberties. They went further to explain that the structure of the Constitution itself was designed to achieve this very result, benefitting a ruling class at the expense of the people.

While today's conservatives are routinely shocked at how government violates the Constitution, Richman has a different take: the intrusive and parasitical government we have today was baked into the original design, which is precisely why Richman argues that the Anti-Federalists were right all along. As for the protection of rights and liberties that comes from the most famous section of the Constitution, the Bill of Rights, it wasn't even part of the original draft sent to the states for ratification.

To reduce the argument here to its essence: the Constitution, far from limiting government, was actually designed to bring about a new one that betrayed the ideals of the Declaration of Independence itself. The ratification of the Constitution was a counter-revolution. There is a reason it has done a poor job in protecting freedom: it was never intended to do so.

Finishing his detailed and exciting argument, Richman turns to the alternative. Must we reject constitutions completely? Not at all. We just need to dispense with the myth that a state can be restrained by a document. What actually restrains power in society is freedom itself, and that includes freedom over the choice of rules we adopt in regulating our lives. Under freedom, these rules are emergent and evolutionary, subject to a market test of trial and error and unending exploration of better ways of living and getting along.

The careful reader will detect in Richman's conclusion the emergence of a highly sophisticated and distinctly 21st century form of libertarianism. For him liberty is not an alternative set of central plans, pre-packaged laws, and visions of justice and truth that are imposed from above by wise intellectuals who know what's what. Richman's libertarian anarchism defers to the wisdom of social processes themselves.

In all my years of thinking about these topics, I've wondered if there was a way forward that could blend the best of the insights of Albert Jay Nock, F.A. Hayek, Ayn Rand, Murray Rothbard, and contemporary polycentric legal theorists. Must we follow some one thinker to the end or can we extract their best insights to improve our conception of what freedom looks like? In so many ways Richman has provided that answer. He has done it, and it's a breath of fresh air.

On a personal note, Richman has been a mentor to me since I first started really thinking, and I know this because he is the person who taught me how. For longer than a year I was privileged to spend time with him talking about ideas. In this period he taught me to avoid dismissive slogans and preset dogmas. He taught me how to be at once open to new ideas and committed to permanent principles. Time and again I saw him as a model of how to think through issues carefully, drawing on logic, experience, and evidence. As the years have gone by I've seen how he has maintained this intellectual discipline, never becoming lazy about his thinking but rather finding delight in the process of coming to ever greater understanding. He never ceases to challenge us to new heights of intellectual integrity and rigor.

It was sometime in the last year or two that I had dinner with him and a few friends. Around the table he dazzled us all with his insight and erudition. As usual he was as interested in what we were thinking as he was eager to express his own thoughts. His powerful mind was on display as I had never seen it. Everyone felt enlightened and delighted. We paid the bill and left.

Outside the restaurant we said goodbye, and I walked one way while he went the other. I stopped and watched him walk away and briefly teared up with the full realization of the treasure we have in our midst. He seemed at the moment to be a living representative of a great tradition. In my imagination I saw Nock, Thomas Paine, Frank Chodorov, Murray Rothbard. I blinked and saw something even more wonderful:

my own friend, as unique and brilliant an exemplar of the ideas of liberty as we could ever hope to have among us.

I can't fully express just how honored I am to have been invited to write the foreword to this powerful book. I am deeply in Sheldon's debt. After you read this book, you too will join the ranks of his many intellectual proteges.

—Jeffrey A. Tucker
Liberty.me and Foundation for Economic Education

Introduction

> But whether the Constitution really be one thing, or another, this much is certain—that it has either authorized such a government as we have had, or has been powerless to prevent it.
>
> —Lysander Spooner, "The Constitution of No Authority"

This is not a history of the U.S. Constitution or the founding of the American republic. Rather, it is a brief against the proposition that the Constitution was a landmark in the long and continuing struggle for liberty. Sadly, it was not. Instead, it was a counter-revolution, in many ways a reversal of the radical achievement represented by America's break with the British empire. The constitutional counter-revolution was the work not of radicals, but of *conservatives* who sought, in the words of Robert Morris, the ambitious nationalist Superintendent of Finance under the Articles of Confederation, a nation of "power, consequence, and grandeur." These men understood that the government of such a nation-state must have the unlimited power to tax, to maintain a permanent debt through a central bank, to regulate and promote trade, and to keep a standing army—all of which was secured, extra-legally and duplicitously, through the process that delivered the U.S. Constitution. Of course, the power to tax, which the Confederation government lacked, was the key, for without it, none of the rest could be accomplished. As historian E. James Ferguson put it, "Proceeding rigidly by the axiom that related sovereignty with revenue power, the founding fathers crowned the new government with unlimited powers of taxation" (*The Power of the Purse*, 1961).

That the nationalists were motivated in part by an exaggerated fear of democracy in the states should be no excuse in the eyes of libertarians for their maneuvering to create a new central government, far from the people's watchful eyes, with vast and broad powers. The nationalists would have sought those same powers regardless of how the state legis-

latures had conducted their business, because a loose federation of states under the Articles of Confederation could never have given the nationalists what a unified, essentially de-federalized state could provide.

How can libertarians look on this conservative, even reactionary achievement with fondness? This book will attempt to show that they should not.

Like most Americans and libertarians, I started out with a favorable attitude toward the Constitution, believing that it indeed was a landmark in the struggle for liberty and that it served well as a protector of our rights until, intentionally or not, it was misinterpreted and twisted into a weapon against liberty. My embrace of the libertarian philosophy in the late 1960s did not change this attitude. For quite a while after that moment, I maintained my respect for what the framers had done in Philadelphia from May to September 1787 and for what the state ratifiers did thereafter.

But slowly, over time, my view changed, and I began to see the Constitution as the product of a counter-revolution. My revisionism was fueled by my exposure to political theory, much of it anarchist, including that of Murray Rothbard and Lysander Spooner, but also by my reading of history, as the following pages will show.

I hasten to note that one's view of the Constitution need not depend on whether one rejects all government, as an anarchist does. After all, the opponents of the Constitution were not, to our knowledge, anarchists. They opposed vague and concentrated government power far from the people over a large territory, but not, alas, power per se. They accepted the states' exercise of power—that is, the initiation of force—including the power of taxation, perhaps believing with Thomas Paine that government is "a necessary evil." Contrary to James Madison's famous and then-novel view that liberty could be best safeguarded in a large republic, many Anti-Federalists, the dubious term given to all critics of the centralist scheme embodied in the Constitution, stood with Montesquieu, in believing that a free republic had to be a small republic, in which a homogeneous people could know their governors personally and keep a close watch on them. (They would have rejected as a false alternative the Tory clergyman Mather Byles's question: "Which is better—to be ruled by one tyrant three thousand miles away or by three thousand tyrants one mile away?"—a question made famous by Mel Gibson in *The Patriot*.)

The critics were not even consistent limited-government advocates of laissez faire, according to which the state did nothing more than keep the peace so the marketplace could operate for the benefit of all. Revealingly, Anti-Federalist Patrick Henry complained that the new Constitution would leave the states little to do but "take care of the poor—repair and make high-ways—erect bridges, and so on, and so on." This reveals that taking care of the poor, as well as administering the infrastructure, was a normal function of state and local government. So much for the proposition that welfare-state measures were something new in 1933. They may have been new at the national level, but not at the state level. (For more on this, see Jonathan Hughes's *The Governmental Habit Redux: Economic Controls from Colonial Times to the Present* [1991].)

Nevertheless, in my view, the men called Anti-Federalists were closer to libertarianism than their nationalist adversaries, who called themselves (with some disingenuousness) Federalists. (Elbridge Gerry, who wanted the Constitution amended before it was adopted, thought that better terms for the opposing sides were *ratificationists* and *anti-ratificationists*, or, for short, *rats* and *anti-rats*.) The Anti-Federalists would have endorsed what Jeffersonian Republican Abraham Bishop of Connecticut would say a dozen years later: "A nation which makes greatness its polestar can never be free." As Max M. Edling wrote in *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (2003): "It makes sense to see Antifederalism as an anti-statist argument against the formation of a 'fiscal-military state' in America." In general, these were men who distrusted men with power, especially elites at a distance. As proto-Public Choice theorists, they understood that under-determinate constitutional language would tend to be interpreted and wielded by those with the greatest interest in enlarging government power, while the rest of the population was busy making a living and raising families. This was less of a problem (though still a problem) when government was simple and close, but they thought it was intolerable with a complicated governmental system far away, in which "representatives" from large districts would most likely be drawn from society's aristocracy.

Yet we must be careful. As Pauline Maier shows in *Ratification: The People Debate the Constitution, 1787-1788* (2010), this was no simple contest pitting two distinct teams against each other. Each side consisted of men holding a range of views; the range was clearly larger on the Anti-Fed-

eralist side. The advocates of ratification had their differences, but they all wanted the special state ratifying conventions to approve the plan for the new government, even if some hoped for amendments. But the Anti-Federalists held diverse views. Some wanted an outright rejection of the Constitution, favoring instead modest amendments to the Articles of Confederation to strengthen the national government with a limited power to tax and to regulate and promote trade. Others called for amendments to the Constitution before ratification. Still others favored ratification with amendments to follow in the first Congress. Some believed that blocking ratification was hopeless—the convention and the Constitution had the blessing of the most popular man in the country and the presumptive first president, George Washington—so they worked for second-best solutions.

Despite the differences, everyone in the critical camp favored the union (contrary to Federalist charges that the Anti-Federalists were foreign agents seeking to divide the United States into several confederations) and supported strengthening the central government to some extent. In other words, they conceded that there were problems with the existing system that needed addressing at the national level, a major concession that probably guaranteed their defeat.

Yet they had something even more important in common: their suspicion of concentrated power and their consequent view that the confederation of states should not be scrapped for a "consolidated" system in which, as Federalist Papers coauthor John Jay put it, the states would be equivalent to counties in the states, subordinate to the national government.

This was no melodrama, with Dudley Do-Right on one side and Snidely Whiplash on the other. History is rarely so black and white. Federalists had valid concerns about the future of liberty, including property rights, at the hands of state legislatures, which exercised the power to grant debt relief, emit paper money, and enact other forms of wealth transfers. But these concerns were likely exaggerated. (Also see chapter 1 for how a successful grassroots tax rebellion spurred the nationalists.) It's hard to know how frequently the states tampered with loan contracts or violated property rights, although it occurred to some extent. But it's reasonable to expect that a state known for interfering with property and contracts would lose vital and entrepreneurial individuals to those states that abstained from or minimized interfering. Who would con-

tinue to lend money in a state where the legislature would without warning grant relief to borrowers or stay court judgments on behalf of creditors? In other words, such problems would tend to work themselves out as long as states respected freedom of exit and people could vote with their feet. Creating a central government with virtually unlimited powers (despite what its backers said) seems a strange way to prevent abuses by state legislatures.

If outright confiscations of property were routinely perpetrated, we can ask the same question we asked about debt relief. Competition among states for investment, in time, should have discouraged flagrant violations of property rights. But we cannot rule out that the confiscations that occurred had something to do with the acquisition of property that did not meet Lockean standards. "Much loyalist property," Arthur A. Ekirch Jr. wrote in *The Decline of American Liberalism* (1955), "found its way into the hands of a new group of wealthy landed proprietors." Government-based land speculation was common. War, Randolph Bourne counseled, is the health of the state. It's also the health of war profiteers. That goes for revolutionary wars too.

As for paper money, which at the time few people objected to, the story is more complicated. Several states used moderately depreciating fiat currency to keep tax rates low or in lieu of taxation altogether. In other words, the transfer of purchasing power from the people to the state via paper money substituted for the armed taxman, who could show up at the door and confiscate property for nonpayment. This is no endorsement of government fiat money or taxation, but since those were the only feasible options, paper money worked reasonably well in many, but not all, places. After all, times were different then: most working people were farmers who could avoid the money economy without much inconvenience. This aspect of the story does teach one lesson: fiat money and war are a dangerous combination.

(Before the Revolution, Americans at all socioeconomic levels got angry when the Parliament passed prohibitions on legal-tender laws in regard to state-issued paper money in the colonies. Contrary to libertarian assumption, Americans liked their paper money. The Constitution later barred the states from issuing it because of the bad experience with the wartime Continental currency, but it did not stop the states from chartering banks that could print notes, which they commonly did. As a result, growing America was awash in paper money after the Consti-

tution took effect: "By 1819," Gordon S. Wood wrote in *The Radicalism of the American Revolution* (1991), "Alexander Baring, the head of the great British financial family, could tell a committee of the British House of Commons that 'the system of a paper currency has been carried to a greater extent in America than in any other part of the world.'")

Just as some Federalists had (in part) good motives for favoring the Constitution, so some Anti-Federalists no doubt had bad motives for opposing it. For example, Southern patrician opponents might have feared that a strong national government would limit or abolish slavery. And Anti-Federalists who were prominent in their state governments might not have liked their positions downgraded as the states became less important in a consolidated political system. (Federalists unjustly made this charge against particular Anti-Federalists.)

The upshot is that there could have been honorable and dishonorable reasons to take either side. Similar people—such as creditors and debtors, planters, and merchants—could be found in both camps. The Federalist side may well have been an example of Bruce Yandle's "Baptists and bootleggers" phenomenon harkening back to Prohibition, that is, an alliance of those who believed (or publicly emphasized) a moral case for the Constitution and those who expected to benefit materially from it. We should not rule out that a given individual was both a "Baptist" and a "bootlegger."

As usual, this history is complicated. But that should not overshadow the fact that leading Federalists, those most responsible for the Constitution as written, were looking for more in a fortified central government than mere protection of life and property from hyperactive state legislators. The leading Federalists wanted a strong central government and a consolidated system because they understood those things were necessary for a continental and even hemispheric market-empire (Indians, Britons, Spaniards, French, and Russians had to be removed one way or another) and a commercial world power reaching to Asia. They sought national greatness, a new empire (to be sure, with elements of liberal republicanism) to replace the exhausted empires of the Old World.

And the leading Anti-Federalists were no mere radical democratic defenders of provincialism trying to thwart the inevitable flow toward cosmopolitanism. Contrary to common impression, they embraced commerce and world trade—albeit as mercantilists, like their Federalist

counterparts. (Adam Smith's *The Wealth of Nations* was just a decade old and not widely read.) They distrusted political power per se, which they associated with aristocracy, even if they could not imagine a society without it at all. If there had to be power, they thought, let it be limited and exercised over a small area through many representatives watched closely by the people—for large districts and small legislatures would mean ersatz representation, that is, rule by an elite wielding vague and effectively unlimited power. Contrary to what some historians (Charles Beard and Jackson Turner Main, for example) have believed, Herbert J. Storing wrote in *What the Anti-Federalists Were For* (1981),

> There were very few "democrats" among the Anti-Federalist writers (or probably among Americans of any kind), if by that is meant those who believe simply that the will of the majority of the people is law and that will ought to be exercised as directly and with as little restraint as possible. However, the Anti-Federalists *were* typically more democratic than the Federalists in the specific sense that they were less likely to see majority faction as the most dangerous and likely evil of popular government. They were inclined to think, with Patrick Henry, that harm is more often done by the tyranny of the rulers than by the licentiousness of the people. Moreover, so far as there may be a threat of licentiousness, it is to be met in the same way, fundamentally as the threat to [sic] tyranny: by the alert public-spiritedness of the small, homogeneous, self-governing community.

Likewise, historian Cecelia Kenyon earlier wrote ("Men of Little Faith: The Anti-Federalists on the Nature of Representative Government," *William and Mary Quarterly*, January 1955),

> The Anti-Federalists were not latter-day democrats.... They were not confident that the people would always make wise and correct choices in either their constituent or electoral capacity, and many of them feared the oppression of one section in the community by a majority reflecting the interests of another. Above all, they consistently refused to accept legislative majorities as expressive either of justice or of the people's will. In short, they distrusted majority rule, at its source and through the only possible means of expression in governmental action over a large and populous nation, that is to say, through representation.... Their philosophy was primarily one of limitations on power....

Indeed, the Anti-Federalist using the name Agrippa (James Winthrop) spoke for many when he said that a bill of rights, which the Constitution as written lacked, would "serve to secure the minority against the usurpation and tyranny of the majority." These were no majoritarians.

But were they nevertheless "men of little faith," as Kenyon dubbed them? If vast, virtually unlimited power on a national scale was what they were being asked to have faith in, then yes, and proudly so. The Federalists repeatedly argued that since the needs of the new nation were unlimited, power too must be so. "The means, the Federalists argued again and again, must be proportioned to the end, and the end in the case of the general government is not capable of being limited in advance," Storing wrote. "As bounds cannot be set to a nation's wants, so bounds ought not to be set to its resources." As Alexander Hamilton, the staunchest of nationalists, wrote in Federalist 23:

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

This was one of the Federalists' favorite arguments in favor of a standing army. (See chapter 3.) These men were not for limited government except in the most abstract way. To be sure, they favored due process in a constrained republican system ("the rule of law") over arbitrariness, but that is not the same as strict limits on power and scope. When Madison wrote in Federalist 51, "You must first enable the government to control the governed; and in the next place oblige it to control itself," it was as if he were saying the genie had to be let out of the bottle in order to restrain it.

The Anti-Federalists were skeptical, as they should have been. One would expect any libertarian to be sympathetic to those who had little faith in such an argument. Unfortunately, the Anti-Federalists shared too many Federalist premises to adequately meet the argument, although they tried valiantly to expose what the nationalists were up to: "They charged that the Federalists were more or less deliberately using an argument about means to enlarge the ends of government," Storing wrote, "shifting their gaze from individual liberty to visions of national empire and glory." Indeed, they were. They essentially said that the time had come to end the preoccupation with liberty, which was useful in the striving for independence, and turn to more important things now: nation-building.

At the New York ratifying convention, Hamilton said:

> In the commencement of a revolution which received its birth from the usurpations of tyranny, nothing was more natural than that the public mind should be influenced by an extreme spirit of jealousy. To resist these encroachments, and to nourish this spirit, was the great object of all our public and private institutions. The zeal for liberty became predominant and *excessive*. In forming our Confederation, this passion alone seemed to actuate us, and we appear to have had no other view than to secure ourselves from despotism. The object certainly was a valuable one, and deserved our utmost attention; but, sir, there is another object, equally important, and which our enthusiasm rendered us little capable of regarding: I mean a principle of *strength* and *stability* in the organization of our government, and *vigor* in its operations. [Emphasis added.]

Benjamin Rush, a signer of the Declaration of Independence, member of the Pennsylvania ratifying convention, and the father of American psychiatry, took this a step further: he diagnosed "the excess of the passion for liberty" as a mental illness. "The extensive influence which these opinions [excited by the excess passion for liberty] had upon the understandings, passions and morals of many of the citizens of the United States," Rush said, "constituted a species of insanity, which I shall take the liberty of distinguishing by the name of Anarchia." To tamp down the potential for this disease, Rush advised that pupils be taught that they were "public property."

Storing emphasized the Federalists' subtleness in changing the agenda:

> Indeed, the stress placed by Federalists on national defense and a vigorous commercial policy often seemed to mask a radical shift in the direction from the protection of individual liberty to the pursuit of national riches and glory. When the Anti-Federalists saw the new Constitution defended as having the "noble purposes" to make us "respectable as a nation abroad, and rich as individuals at home' and as calculated to promote "the grandeur and importance of America, until time shall be no more," they feared for the principles of the American governments. "You are not to inquire how your trade may be increased," Patrick Henry warned, "nor how you are to become a great and powerful people, but how your liberties can be secured; for liberty ought to be the direct end of your Government.'"

Henry, who worked overtime to keep things on track, went on:

> Shall we imitate the example of those nations who have gone from a simple to a splendid Government? Are those nations more worthy of our imitation? What can make an adequate satisfaction to them for the loss they have suffered in attaining such a Government—for the loss of their liberty? If we admit this Consolidated Government, it will be because we like a great splendid one. Some way or other we must be a great and mighty empire; we must

> have an army, a navy, a number of things: When the American spirit was in its youth [This was in 1788!], the language of America was different: Liberty, Sir, was the primary object. [These words would be more inspiring had Henry, like other southern Anti-Federalists, not owned slaves.]

When Federalists admonished Anti-Federalists about lacking confidence in the virtuous men who would govern, the Anti-Federalists scoffed. Anticipating Thomas Jefferson's language in the Kentucky Resolution protesting the Federalists' Alien and Sedition Acts 10 years later, they responded that confidence was not the appropriate disposition for free people toward the government. What is? Jealousy. "They ought to be so [jealous]," an Anti-Federalist said. "It was just they should be so; for jealousy was one of the greatest securities of the people in a republic." Moreover, Agrippa added for good measure, "let us not flatter ourselves that we shall always have good men to govern us."

The Anti-Federalists could not discuss power without expressing their distaste for aristocracy. If they seem like radical democrats, it may be because they opposed rule by aristocrats. The Revolution (as we'll see) was as much an internal struggle against a conservative elite as an external struggle against the British. Aristocracy in the new nation was no imaginary nemesis. The Federalists complained that with the breakdown in social distinctions achieved through the Revolution (apparel no longer indicated who was well-born and who was not), the wrong sort of people were populating the state legislatures, people who actually worked for a living. The remedy was a national government, which for various reasons would favor prominent wealthier men. In Wood's words, the new system would "act as a kind of sieve" to exclude those who were "unfit" to govern wisely and dispassionately with an eye to the general welfare. To be sure, America's aristocracy was seen as a "natural aristocracy," one based not on heredity, but on education, virtue, and merit, which was all the more reason to have a proper vetting process. The Anti-Federalists were unimpressed.

In retrospect, the Anti-Federalists seemed destined to lose because they conceded too much. (They were also handicapped, as Maier and Wood documented, by newspaper bias toward the Federalists, who were concentrated in the cities and towns.) Anti-Federalists objected to power, but only up to a point. They were willing to accept a stronger national government, and they accepted taxation, regulation, and other government activism at the state and local level. This reduced the force

of their case against the Federalists. They were arguing not about power per se, but about which level of government should have the upper hand. That made the difference a matter of degree not kind, which gave the advantage to the nationalists. "In any conflict between two men (or two groups) who hold the same basic principles," Ayn Rand wrote in "The Anatomy of Compromise, "it is the more consistent one who wins." Unfortunately, the Federalists were the more consistent.

The Anti-Federalists also were plagued by (at least apparent) contradictions. Some complained that the proposed new government would be too complicated to be monitored by average people, enabling the rulers to escape responsibility; others said it was not complicated enough—that it lacked sufficient checks and balances. This conflict could perhaps be reconciled by the belief (Storing suggests) that if simple government was out of the question, the second-best position was a government of effective checks and balances—which this new government would not be. Moreover, many Anti-Federalists made the dubious argument that small republics were better protectors of liberty because their populations were homogeneous: that is, a wide harmony of interests would avert battles for political advantage. But as the Federalists point out, small territories don't necessarily have homogenous interests; farmers, merchants, and manufacturers, for example, have different interests that clash in a political arena that permits wealth transfers. The existing states already demonstrated this truth.

The dispute about levels of government, however, introduces a topic worth considering briefly. James Madison, an author of the Federalist Papers, said the states and other local authorities should be tolerated "so far as they can be subordinately useful." He and other leading nationalists wanted the Constitution to include a congressional power to veto state laws; and they did not like that states were to be equally represented in the Senate, the members of which were to be elected by the state legislatures. In other words, they did indeed favor a consolidated system with a centralized government, and not a federation of states. This is confirmed by the absence in the Constitution of anything like Article II of the Articles of Confederation, which affirmed that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." Only the need to compromise at the Philadelphia convention kept Madison and his

colleagues from getting all they wanted in these matters. But they were under no illusions: they knew that the boundary between the states and national government, like the boundaries between the three branches of the national government, had not been clearly drawn and would be determined politically in the years to come. Libertarian and conservative constitutional sentimentalists, or "fetishists," as Jeffrey Rogers Hummel calls them, display a naïveté on this score when they demand that the Constitution be interpreted either as the framers intended or as people understood it at the time.

For their part, Anti-Federalists were shocked, on seeing the preamble's first words, "We the People," that the Constitution was written not as though the union were a federation of sovereign states, but rather a single population to be ruled directly by a central government in an extended republic. "The question turns, sir on that poor little thing—the expression, We, the *people*, instead of the *states*, of America," Patrick Henry said. "States are the characteristics and soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all states."

Samuel Adams made the same point more colorfully: "I confess, as I enter the Building I stumble at the threshold. I meet with a National Government instead of a Federal Union of Sovereign States."

This was not knee-jerk parochialism, for as Jacob T. Levy showed in *Rationalism, Pluralism, and Freedom* (2015), liberalism (broadly defined) has always had two conflicting approaches to protecting individual liberty and autonomy. One, the rationalist approach, stands for the proposition that liberty could best be protected by a central government applying a single liberal legal code directly to individuals over a large territory. Such a system would check potentially oppressive associations, both private and political. This is the approach of Voltaire, Thomas Paine, and John Stuart Mill, among others.

The other, pluralist, approach insists that liberty is best protected by a layered system in which a variety of associations stand between the individual and the central government to check its power. State and local governments were counted in this buffer of intermediate entities. We find this view espoused by Montesquieu, Tocqueville, and Lord Acton.

As Levy pointed out, on paper both approaches have virtues with respect to protecting the individual. But in reality (leaving aside obvious

problems for libertarians like taxation), things work out differently, and each side has generally ignored the risks its own position presented. States are never disinterested justice-dispensing machines, for reasons, among others, captured by terms like *public choice*, *regulatory capture*, and *knowledge problem*. And private associations, including families, fraternal entities, and religious groups, can be oppressive and costly to escape, even when not outright aggressive. Unlike private groups, state and local governments, of course, can legally use aggressive force and hence were an even bigger danger.

So neither rationalism nor pluralism can guarantee the individual his or her liberty.

It's easy to see that the Federalists tended toward the rationalist camp and the Anti-Federalists toward the pluralist camp, though few individuals have ever been pure rationalists or pure pluralists. Some Federalists praised the move from the Articles of Confederation to the Constitution on the explicit grounds that the new national government would relate directly to the individual citizen. (This enthusiasm, however, was not necessarily out of a love of liberty; an independent power to tax people directly was understood to be the key to national greatness.) A direct central-state-to-citizen relationship is precisely what the Anti-Federalists feared; they saw the states, among other associations, as buffers between the individual and a distant ruling aristocracy. (Madison is a complicated case; as we've seen, he was not fond of the states, but he famously thought an extended republic would, in Levy's words, "multiply factions to make it difficult to assemble a majority coalition in favor of any particular partial interest." Charitably put, his was a horizontal rather than vertical pluralism. The reader may judge for himself or herself how that's worked out.)

Levy argued that these two approaches cannot be reconciled or transcended and that the risk to liberty comes from all directions. As long as governments exist, pluralism seems the better of the two approaches, primarily because the smaller the jurisdiction the cheaper the exit. The potential to vote with one's feet at least has some chance to exert pressure on state and local governments to minimize their burdens. The resulting competition ought somewhat to serve the cause of liberty. (Of course we today are in a different position from the Americans of 1787-88. Our political system has both rationalist and pluralist elements with

no radical change in the offing. So our best hope, for now, is for each component to block the usurpations of the other.)

What was missing from the debate in the late 18th century was the anarchist perspective. By this I mean that neither side could imagine how order and prosperity could be achieved and sustained without government, state or national, without the initiation of force. Lacking this perspective, the Anti-Federalists handicapped themselves because, as noted, it meant they shared many premises about the necessity of government with the Federalists. When they were accused of favoring anarchy, they could only react defensively. No one could respond in effect: "Anarchy, yes. Chaos, no." The Anti-Federalists needed to assimilate fully the truth that Paine (who failed to assimilate it fully himself) would formulate a few years later *Rights of Man* (1792):

> Great part of that order which reigns among mankind is not the effect of government. It has its origin in the principles of society and the natural constitution of man. It existed prior to government, and would exist if the formality of government was abolished. The mutual dependence and reciprocal interest which man has upon man, and all the parts of civilised community upon each other, create that great chain of connection which holds it together. The landholder, the farmer, the manufacturer, the merchant, the tradesman, and every occupation, prospers by the aid which each receives from the other, and from the whole. Common interest regulates their concerns, and forms their law; and the laws which common usage ordains, have a greater influence than the laws of government. In fine, society performs for itself almost everything which is ascribed to government."

Government, Paine went on to say, "purloins from the general character of man, the merits that appertain to him as a social being."

Being a political document and hence the product of compromise, the Constitution contains enough ambiguity that at times it has furnished grounds for limiting government power. The subsequently appended Bill of Rights has helped in this regard, although it has not been an unmixed blessing, since it has also shifted the burden from justifying a claimed power to justifying an asserted right. (The Ninth Amendment's acknowledgement of unenumerated rights has not done the work some hoped it would do.) Nevertheless, we can be thankful that occasionally government-limiting interpretations have prevailed. Let's hope that becomes more common. But we should not overlook all the outrages that have been defended—and upheld by the Supreme Court—on the basis of one constitutional provision or another. There's

simply no gainsaying Lysander Spooner's observation, quoted above: "But whether the Constitution really be one thing, or another, this much is certain—that it has either authorized such a government as we have had, or has been powerless to prevent it."

★★★

Most of the chapters of this book originated as TGIF (The Goal Is Freedom) columns I wrote over nearly 10 years for the websites of the Foundation for Economic Education and the Future of Freedom Foundation. Others were first published on my blog, *Free Association* (sheldonrichman.com), after the TGIF column moved there. In preparing the book I have added material, amplified points, and, I hope, removed unnecessary repetition. I hope the reader will forgive whatever overlap remains.

While I was turning out these articles, I was urged to be cautious because "people need their fairy tales." I took this to mean that most Americans grow up learning American history with a fairly libertarian slant, and we libertarians ought not undercut that narrative. If people believe that the Constitution is an extension of the Declaration of Independence, then all well and good. Keep your revisionism to private meetings.

That has long struck me as short-sighted and self-defeating. We do no one, especially young libertarians, any favors by leaving historical misconceptions intact. Nothing sets up budding libertarians for disillusionment more effectively than to send them into intellectual battle on campus armed with false history. It's like sending sheep to the slaughter, because sooner or later they will encounter professors and students who know better. The results won't be pretty. I speak from experience.

My interest in constitutional revisionism was sparked most directly by my friend and mentor Walter E. Grinder, after I wrote an article about the unconstitutionality of trade protectionism. He's been a source of encouragement and reading suggestions for a long time. I could not have written this book without the inspiring example set by one of my oldest friends, Jeffrey Rogers Hummel, a first-rate historian and economist. It was he who clued me in to the importance of the public-finance aspects of early American history, something I was inclined to underestimate. For many years I've benefited from conversations and email exchanges with him. In many respects this book would have never been produced without the help and concern of my friend Gary Chartier. Not only

did he take on the task of laying out the book, designing the cover, and arranging for its publication, he contributed to the content through our near-daily discussions, his probing questions, and his gentle but constant imploring that I get the book done. Thanks, I needed that. And thanks, also, to Less Antman, whose friendship and generosity are beyond words. I'm especially grateful for the pleasant environment in which I was able to complete this book.

Over the years I had able copy-editing assistance and helpful suggestions from Michael Nolan, Mike Reid, and Chad Nelson. This printing, in particular, reflects the careful scrutiny of Beth Cody.

Finally, thanks to all who have supported my work through Patreon and PayPal.

Of course, any errors herein are my responsibility.

Writers get themselves into trouble when they set out to write the last word on a subject. I have no doubt that there's much more to be said on this subject, so let the conversation proceed!

1
Conceived in Tyranny

If the American Revolution was in some large measure a tax rebellion, we should appreciate the bitter irony that the U.S. Constitution was in some large measure a *reaction to* a tax rebellion. It's another reason we can reasonably view the move toward the Constitution—toward, that is, the concentration of power in a national government—as a counter-revolution and something for libertarians to abhor.

Shays's Rebellion was the mass tax resistance that lit a fire under conservative nationalists who were already looking for ways to concentrate power in the central government. They had long been frustrated with the weak quasi-government of the Articles of Confederation (1781–89), which amounted to a one-house congress with no power to tax or regulate trade, and no executive or judicial branches. (This is not to say it had no powers worth objecting to.) To be sure, Americans of the day had various economic and social problems—many caused or aggravated by active state governments—but collapse and chaos were not at hand, whatever the nationalists said. They assumed that only a strong central government could promote trade and cure the fiscal and monetary woes, but that's because they saw the European states as their only model. They also wanted a standing army ready to advance, if necessary, what they saw as America's commercial and geopolitical interests. They knew they would not get that from the states.

The nationalists started making progress toward their objectives in the early 1780s, when the war wasn't going well and foreign loans were needed. But as the war wound down to a successful conclusion, the nationalists, who hoped the conflict would go on long enough for them to achieve their centralist goals, lost their primary case for government expansion—especially the power to tax—and by 1783 they were in retreat. The wealthy merchant Robert Morris, whom Congress had named Superintendent of Finance, could not manage even to persuade all the

states to allow the confederation government a 5 percent tariff. He had hoped for a general federal power to tax, and was willing to go to great lengths to secure it—even to solicit pressure from the government's creditors and, to nationalist George Washington's mind at least, disgruntled, unpaid military officers and troops at their Newburgh, New York, encampment. "He was convinced," E. James Ferguson wrote, "that the outburst at camp was hatched in Philadelphia and gave credence to rumors that Robert and Gouverneur Morris were at the bottom of it.... [Nationalist Alexander Hamilton] did not contradict the allegations against Robert and Gouverneur Morris, except to say that he himself might be accused of playing a deep game. It was no secret that he had tried to align the army with the public creditors." (See Ferguson's *The Power of the Purse* [1961].)

But the nationalists did not give up their dream of creating a European-style fiscal-military state—complete with aristocratic and monarchical elements—albeit one tailored to the American suspicion of centralized government power. As John Jay, coauthor of the Federalist Papers and America's first chief justice, put it, "Men will not adopt & carry into execution, measures the best calculated for their own good without the intervention of a coercive power. I do not conceive we can exist long as a nation, without having lodged somewhere a power which will pervade the whole Union in as energetic a manner, as the authority of the different state governments extends over the several States." (Quoted in Pauline Maier's *Ratification: The People Debate the Constitution, 1787-1788* [2010].)

Then along came Capt. Daniel Shays. In 1786 a controlling faction of the Massachusetts legislature got the bright idea to retire its Revolutionary War debt in a mere 10 years. The legislators thought that they could copy their quick payoff program that followed the Seven Years' War, but they failed to take into account that the new per capita debt was far larger and that therefore the consequences of paying it off quickly would be devastating for the taxpayers. The policymakers "were rigid, unrealistic, and uncompromising in their effort to retire the public debt too rapidly given the magnitude of the state's obligations," Edwin J. Perkins wrote in *American Public Finance and Financial Services: 1700-1815* (1994).

While other states showed mercy to the taxpayers by spreading out debt retirement, thereby keeping tax rates in check, or by implicitly tax-

ing the people by issuing paper money instead of imposing direct taxes, Massachusetts was tone deaf to the people's circumstances. Its burdensome poll and property assessments drove western Massachusetts farmers, many of whom got foreclosure notices when they couldn't pay their mortgages after paying their taxes, to revolt. Shays's Rebellion used to be described as a class revolt of debtors against mortgage lenders, a leveler movement, but the case that it was essentially a tax revolt has been solidly made by eminent historians of the period, as well as by contemporary observers.

Perkins wrote: "Despite the resolve of the urgency faction to coerce citizens into meeting the state's financial obligations in short order, signals of impending difficulties emerged in the mid-1780s. Tax arrearages grew year after year. Of the $930,000 assessed against persons and property between 1780 and 1782, nearly half was past due as late as December 1785. Between 1782 and 1786 additional taxes of $3.3 million were scheduled for collection, yet by October 1787 more than $1.4 million, or 40 percent, were past due. Under the state's internal revenue system, the locally elected tax collector in each town was held personally liable for the quota assigned by the state treasurer; and after July 1786 county sheriffs became liable for arrearages as well. To escape governmental claims against their own assets, collectors and sheriffs were forced to file suit against tax delinquents and to seize farms, crops, livestock, and other property when payments were not forthcoming."

As a result, "bands of rioters closed the courthouses in several inland towns during the second half of 1786 in a sustained effort to prevent evictions and forced sales of properties," Perkins wrote. "Under the leadership of Daniel Shays, a disgruntled and embittered farmer, armed civilians numbering perhaps two thousand, marched on the federal arsenal at Springfield in January 1787. In the brief battle, cannon fire killed three rebels and drove off the rest, but they soon regrouped."

When similar trouble had brewed in other states, the governments made conciliatory offers and the trouble subsided. Not in Massachusetts. Governor James Bowdoin called up over 4,000 troops and quashed the uprising within two months.

But that wasn't the end of it. "The elections of 1787 sent new blood to the legislature and a new governor, John Hancock.... Shaken by the threat to popular government, Hancock and legislative leaders belatedly abandoned the program of accelerated debt retirement and suspended

the tax collections associated with that program. They sponsored tax reductions and private debt relief laws that gave middling citizens some breathing room. Tax assessments on persons and property dropped significantly from 1787 through 1790." (Massachusetts would later benefit from Treasury Secretary Alexander Hamilton's 1790 federal debt-assumption program.)

Thus the rebels won.

Shays's Rebellion might not look so earth-shaking in retrospect, but it scared the hell out of the nationalists—or at least they pretended it did—and they saw in the popular uprising an opportunity to press their centralist agenda. "The adherence to an irresponsible, impractical, and ultimately unnecessary program of fiscal policy in this solitary, critical state," Perkins wrote, "contributed to the renewed movement for a more permanent and more centralized national government with enhanced taxing power." According to Gordon S. Wood, "Shays's uprising in 1786 was only the climactic episode in one long insurrection, where the dissolution of government and the state of nature became an everyday fact of life. Indeed, it was as if all the imaginings of political philosophers for centuries were being lived out in a matter of years in the hills of New England" (*The Creation of the American Republic, 1776-1787* [1998]).

Wood also reported that "So relieved by the rebellion were many social conservatives that some observers believed the Shaysites were fomented by those who wanted to demonstrate the absurdity of republicanism. Nothing so insidious has been proved, but many social conservatives did see the rebellion as encouraging the move for constitutional reform," i.e., centralization.

Since the conservative nationalists favored aristocratic republican rule over the liberal democracy favored by the radicals, the conservatives would have been understandably alarmed at what had happened in Massachusetts. "Not only the fact of the rebellion itself," Wood wrote, "but the eventual victory of the rebels at the polls brought the contradiction of American politics to a head, dramatically clarifying what was taking place in all the states."

Sincere or not, this alarm was communicated to George Washington at his home in Mount Vernon. By this time Washington had been named by the Virginia assembly as a delegate to the coming federal convention in Philadelphia, but he was unsure whether he would go. Those reporting to him about Shays's Rebellion would have had reason to hope that

by exaggerating the turmoil, they could motivate Washington, a nationalist who favored a strong central government, to go to Philadelphia, giving the convention and resulting constitution a prestige no one else could have bestowed.

"Everything [is] in a state of confusion," David Humphreys wrote Washington. "Discontent was 'not confined to one state or to one part of a state' in the northeast, Henry Lee told Washington in September 1786 but pervaded 'the whole,'" Maier wrote. "...Washington's correspondents—above all Humphreys, [Henry] Knox, and General Benjamin Lincoln [who put down the rebellion], all old army officers—sent Washington detailed reports slanted against the insurgents in Massachusetts." But, Maier added, "the problem was hardly as serious or as intractable as Knox had claimed. Washington, however, believed the frenzied reports he received." (By contrast, Rufus King calmly advised John Adams that the rebellion was a response to onerous taxes: "You will see this business greatly magnified and tories may rejoice, but all will be well.")

Wood noted, citing an observer, that "these rioters were not rabble.... They were country farmers under strong economic pressures, prompted by 'a certain jealousy of government, first imbibed in the beginning of our controversy with Britain, fed by our publications against the British government, and now by length of time became in a manner habitual and ready to rise whenever burthens press, at once concluding, that *burthens* must be *grievances*.'"

In other words, since the revolution had been in large part a tax rebellion, Americans were in no mood to substitute a Yankee taxman for a British taxman. In several states before 1789, controlled emissions of paper money functioned as a satisfactory alternative to direct taxation; that is, the currency depreciation was moderate and undisruptive. The resulting implicit transfer of purchasing power from the people to state governments had advantages (assuming government exists)—for example, no taxman visited people's homes or seized property from delinquent taxpayers.

Much of the Anti-Federalist case against the proposed Constitution focused on the new national government's virtually unlimited power to tax. For a host of reasons, however, Americans' abhorrence of taxation was not enough to thwart ratification. Thus the United States that emerged in 1789 was born in reaction to a tax rebellion, which is not exactly a libertarian pedigree.

2

The Constitution Revisited

Why do so many people, including many libertarians, see the U.S. Constitution as a landmark achievement in the struggle for liberty? On principle alone, consistent advocates of liberty should have become wary in time. A document that is adored at virtually every position in the political firmament should arouse suspicion among libertarians.

Moreover a smattering of historical knowledge should have been enough to turn suspicion into outright skepticism. The Constitution was not the first constitution of the United States. Under the Articles of Confederation (for all its faults) the central quasi-government had *no power to tax* (hence my calling it a quasi-government), *regulate trade, or raise an army*. Money and soldiers had to be requisitioned from the states, which were often reluctant to comply. Under the second constitution the new government assumed those powers and more, including the express power to grant patents and copyrights (which necessarily interfere with rights in physical property) and unspecified or implied powers, such as the power of eminent domain. You'll not find this power to appropriate private property enumerated in the document proper, but thanks to the takings clause of the subsequently added Fifth Amendment (part of the "Bill of Rights"), which feebly limits the implied power with requirements regarding "public use" (now, under *Kelo* interpreted to include private use) and "just compensation," we know it is there (perhaps tucked into the necessary-and-proper clause). Considering this historical context alone, how could a libertarian adore such a document?

In practice the U.S. Constitution was a *tax, trade-regulation/promotion, and military project*. In furtherance of that objective, the machinery of government had to be constructed so that the right sort of people, virtuous and nationally minded, would get into power, unobstructed by

the radical plebeians emboldened and liberated by the American Revolution. Hence the Federal Convention in Philadelphia in 1787.

The push for a new constitution came from conservative men who openly complained that America's problem lay in too little, not too much, central government. "The evils suffered and feared from weakness in Government have turned the attention more toward the means of strengthening the [government] than of narrowing [it]," James Madison, father of the second constitution, wrote to Thomas Jefferson. "It has never been a complaint agst. Congs. that they governed overmuch. The complaint has been that they have governed too little," James Wilson, an important but largely ignored nationalist, added. Earlier, John Jay, who along with Madison and Alexander Hamilton wrote, under the name "Publius," the series of pro-Constitution newspaper articles that came to be known as the Federalist Papers, said about central government power: "the more the better." Hamilton himself said, "The fundamental principle of the old Confederation [viz., sovereignty of the member states] is defective; we must totally eradicate and discard this principle before we can expect an efficient government." And Fisher Ames, an influential nationalist and participant at the Philadelphia convention, added, "Everyman of sense must be convinced that our disturbances have arisen more from the want of power than the abuse of it."

Further historical investigation reveals that the Constitution was put over on the American people by dubious means. After nationalists in some state legislatures began choosing delegates for a meeting in Philadelphia to address problems of government finance and trade, the Confederation Congress resolved that a convention should be held for the express purpose of amending the Articles. Under the Articles of Confederation, any amendment would have to be approved by the Congress and *all* 13 state legislatures. But once assembled, the convention, after locking the doors to the public, dispensed with an official record (though Madison and others kept notes), tossed out the Articles, and started from scratch, working from Madison's centralist Virginia Plan. Moreover new rules for ratification were included in the proposed Constitution: only nine states would need to ratify for it to take effect (for those states), and, crucially, the proposed constitution would be submitted not to the state legislatures but rather to specially elected conventions—driving home the point, later argued by the Anti-Federalists, that the new country was no longer a confederation of sovereign states but

a "consolidated government." This prompted Patrick Henry to ask, "Who authorised them to speak the language of, *We, the People,* instead of *We, the States?*"

Little wonder Albert Jay Nock, in *Our Enemy the State* (1935), called the Philadelphia convention a coup d'etat.

If changing the rules was not bad enough, the misnamed Federalists handicapped the equally misnamed Anti-Federalists during the ratification debates with their control of the mail and influence over the newspapers. As Pauline Maier notes in *Ratification: The People Debate the Constitution, 1787-1788* (2010), most newspapers were in the cities, where merchants, who tended to favor the Constitution for its trade-promotion power, were concentrated. They did not look kindly on editors who published anti-Constitution articles. Editors who prided themselves on presenting a range of opinion "suffered verbal attacks, canceled subscriptions, and threats of mob violence." Anti-Federalist authors, who also risked reprisal, wanted to write under pennames, but some editors would not allow it, although Federalists were able to do this. Maier reports that "only twelve out of over ninety newspapers and magazines published substantial numbers of essays critical of the Constitution during the ratification controversy."

Speaking of the ratification debate, isn't it strange that libertarian constitutionalists ignore the most libertarian activists and commentators of the day—the Anti-Federalists—to keep their narrative intact? "The Antifederalists' opposition to the Constitution was an opposition to the creation of a central government, which they feared would become as heavy and as powerful as the governments of contemporary European states," Max M. Edling wrote in *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Marking of the American State* (2003). "…The Antifederalist fear was that the Constitution would create a state that would bring about a growth of armies, taxes, and [permanent] public debt, as well as the concomitant strengthening of centralized power." And why did the Anti-Federalists fear these things? Because they would rob the people of their liberty, their individual rights.

This opposition sheds light on an important controversy. While it would be naïve to suggest that particular influential nationalists were oblivious to how a strong central government with unlimited taxing powers would serve their personal financial interests (say, by maximizing the value of their wartime government securities or western land

claims), the presence of this incentive, however important, was hardly decisive or necessary. Even without an existing personal financial stake, the nationalists would have pushed for the Constitution and the centralization of power. They wanted a different nation from the one they had. (We should not overlook the self-regarding motive, however. "To eliminate entirely the role of economic motive in the political affairs of the time is as doctrinaire and as unnecessary as [Charles] Beard's overstatement of it," E. James Ferguson wrote. (See *The Power of the Purse* [1961]. On the controversy of financial motivation, see along with Ferguson, Charles Beard's *An Economic Interpretation of the Constitution of the United States*; Forrest McDonald's *We the People* [1992]; Robert A. McGuire's *To Form a More Perfect Union*; Edling's *A Revolution in Favor of Government*; and *Our Enemy the State*. Let us note that Federalists like James Wilson accused Anti-Federalists of having financial motives for opposing the Constitution.)

The nationalists sought a strong state with the power to tax, regulate and promote trade, and raise and maintain a standing army because in their eyes that is what "a great and respectable nation" (as one nationalist put it) required to deal with other world-class countries in pursuit of security and commerce. (This point is easily overlooked if Federalism is identified exclusively with Madison's aspiration to rein in the states.) "The Federalists … argued that it was crucial that Congress was granted powers similar to those of European governments," Edling wrote. "The Antifederalists claimed that such a development would mean the end to popular liberty in America." Moreover, as Anti-Federalist Arthur Lee wrote to Samuel Adams, "Every engine is at work here to obtain permanent taxes."

This Anti-Federalist opposition alone, which was a well-articulated critique both of concentrated power and aristocracy, should make any champion of liberty suspicious of the Constitution. (The Bill of Rights came nowhere near addressing the Anti-Federalists' objections; see chapter four.)

The historian Gordon S. Wood shed even more unflattering light on the Constitution in his in his Pulitzer Prize-winning book, *The Radicalism of the American Revolution* (1993). Wood showed that as the 1780s wore on, the revolutionary leaders, Hamiltonian and Jeffersonian alike, were unhappy with how things were turning out in the new country. Both sides had hoped that the people would embody classical republican

values and put the general welfare over their particular financial interests. To their dismay, people were more interested in improving their economic well-being than in contributing to the new nation's good. The Hamiltonians were especially upset that the public was taking its egalitarian, anti-aristocratic attitudes to such great lengths. They had not expected the common people to govern themselves directly. Rather, they (that is, propertied white males) were supposed to elect as their representatives detached wise, virtuous, and educated men who were immune to the vicissitudes of the marketplace. Democratic participation by common people was more acceptable to the Jeffersonians, but like the Hamiltonians, they lamented the preoccupation with commercial self-interest and the use of state legislatures to secure it. "By the 1780s," Wood wrote, quoting Yale College President Ezra Stiles, "it was obvious that 'a spirit of *locality*' was destroying 'the aggregate interests of the community.'" Government had been envisioned as an above-the-fray enlightened referee that balanced competing particular interests and served the general welfare. Instead it had become, to some extent, an auction house.

What to do? Convene a federal convention and try again. And that's what they did.

Those who wanted a new constitution reconciled themselves to the fact that people would inevitably put their own "narrow" interests first. According to Wood,

> Madison and others were now willing to allow these diverse competing interests free play in the continent-sized national republic created by the new Constitution of 1787. But Madison and the Federalists ... were not modern-day pluralists. They still clung to the republican ideal of an autonomous public authority that was different from the many private interests of the society.... They now knew that [quoting Madison's Federalist 10] "the regulation of these various interfering interests forms the principal task of modern Legislation," but they also hoped that by shifting this regulation to the national level these private local interests would not be able to dominate legislation as they had in the states and become judges in their own causes.

The advocates of the new constitution believed that a central government could play the umpire's role, Wood added, "because the men holding office ... would by their fewness of numbers be more apt to be disinterested gentry who were supported by proprietary wealth and not involved in the interest-mongering of the marketplace."

This point was critical. Common people were preoccupied with making a living. But those who were suited to govern did not have to

work and therefore only they could be counted on, first, to ascertain the general interest and, second, to work unfailingly to achieve it. Hamilton made this argument even though he had to earn his living as a lawyer. When this was pointed out, he replied that lawyers were different from self-interested merchants, mechanics, and farmers. According to Hamilton, Wood wrote, "being a lawyer was not an occupation and was different from other profit-making activities." Lawyers and other professionals, Hamilton said, "truly form no distinct interest in society" and thus can be "an impartial arbiter" of everyone else's claims. Anti-Federalists scoffed at this, understanding that no ruling class could be expected to be disinterested.

The Federalists painted lurid pictures of legislative majorities representing the common people in the states running roughshod over the propertied minority. But wouldn't a national legislature be subject to the same problem? The Federalists thought that in an extended republic, particular interests would offset one another, mitigating the problem. But as Wood wrote in another book (*The Creation of the American Republic, 1776-1787* [1998]), "The Federalists were not as much opposed to governmental power in the states as to the character of the people who were wielding it."

This too should be enough to make libertarians wary about the second constitution. But there's more. Madison and other centralizers, Wood wrote in *The Radicalism of the American Revolution*, believed that what was missing in American government was a *monarchical* element. The revolutionary leaders were happy to be rid of the British monarchy, but they came to believe, in light of what I've described above, that perhaps they had thrown the baby out with the bathwater.

> Madison expected the new national government to play the same suprapolitical neutral role that the British king had been supposed to play in the empire. In fact, Madison hoped that the new federal government might restore some aspect of monarchy that had been lost in the Revolution.... That someone as moderate and as committed to republicanism as Madison should speak even privately of the benefits of monarchy adhering in the Constitution of 1787 is a measure of how disillusioned many of the revolutionary gentry had become with the democratic consequences of the Revolution.

The Madisonians later saw the judiciary as playing this neutral role, but the radicals feared that this meant rule by an unelected elite.

"In place of the impotent confederation of separate states that had existed in the 1780s," Wood wrote, the Federalists aimed to build a

strong, consolidated, and prosperous 'fiscal-military' state in emulation of eighteenth-century England, united 'for the accomplishment of great purposes' by an energetic government composed of the best men in the society."

Thus the prime movers of the second constitution sought to reintroduce *hierarchy, aristocracy, and even elements of monarchy* in order to rein in the radical social and political egalitarianism that had made the American Revolution unique in world history. Why? We've already dealt with the question of personal interest, which is relevant but misleadingly narrow and determinist. However, the Revolutionary War debt played another role in motivating the move to centralization. Both the nationalists and decentralists understood that if the central government, rather than the state governments, assumed responsibility for the debt, loyalty and hence power would necessarily shift away from the states. This shift was indispensable to creating a new and enduring nation, indeed, an empire throughout North America if not the entire the Western Hemisphere. This was the goal of men such as Robert Morris, a member of the confederation Congress, a wealthy Philadelphia merchant, and a staunch nationalist, who as Superintendent of Finance worked under the Articles of Confederation to put in place a program that included a separate executive, congressional taxing power, a central bank, and a permanent debt. He mostly failed, but much of his scheme was enacted in the Constitution and subsequent measures. Treasury Secretary Alexander Hamilton carried out a federal debt-assumption program in 1790.

In "The Constitution as Counter-Revolution: A Tribute to the Anti-Federalists" (Libertarian Alliance, online at http://www.la-articles.org.uk/FL-5-4-3.pdf), Jeffrey Hummel summed up the situation:

> The nationalists … vigorously opposed state assumption [of the war debt]; it was a method of paying off the debt that would diminish the prestige of the central government relative to the states and thereby threatened the nationalists' overriding objective. Morris effectively forestalled repudiation and, for the most part, state assumption. Lingering on, the national debt provided both a continuing rationale for national taxation and another special interest supporting such taxation.

It is revealing that the nationalists had tried to use the war to beef up the confederation government, for example with the power to tax. However, the war ended too soon for Morris's purposes: a "continuance of the war," he said, "is necessary until we shall acquire the habit of paying taxes." War is indeed the health of the state.

Libertarians of course would have rejected the nationalists without *fully* embracing the decentralist democrats, if indeed that's what they were. As noted, Cecelia M. Kenyon and other historians document that the leading Anti-Federalists were not majoritarians, but advocates of individual liberty. (This does not mean that people did not seek to use their state legislators for economic gain at the expense of others, of course.) At any rate, aristocracy versus economic democracy is a false alternative. The missing option is Adam Smith's "simple system of natural liberty": individual freedom rooted in natural rights and natural law. Both the nationalists and democrats would have claimed the ideal of self-government. However, neither construed this as literally *self*-government. The self is an attribute of individual human beings not of groups. In the political realm groups do not govern themselves. Some govern others.

The nationalists prevailed in that they secured their Constitution (albeit with compromises). However, Wood emphasized that things could have turned out worse.

> The Anti-Federalists lost the battle over the Constitution. But they did not lose the war over the kind of national government the United States would have for a good part, at least, of the next century. Their popular understanding of American society and politics in the early Republic was too accurate and too powerful to be put down—as the Federalists themselves soon came to appreciate. Even the elections for the First Congress in 1788 revealed the practical realities of American democratic life that contradicted the Federalists' classical republican dreams of establishing a government led by disinterested educated gentlemen.

But in time, despite setbacks here and there, the Federalists and their successors prevailed as the 19th century wore on. In many respects the second constitution fulfilled its unlibertarian purpose. It even delivered a standing army, despite Americans' distrust of the military. We turn to that matter next.

3
The Constitution and the Standing Army

The U.S. Constitution can reasonably be seen as a massive tax and mercantilist trade-promotion program. However, there's a third leg to this stool. It was a national-security program as well—almost a proto-PATRIOT Act. As historian Walter Millis wrote, "Though the point has not often been noticed, the Constitution was as much a military as a political and economic charter" (*Arms and Men: A Study in American Military History* [1956]). Indeed, these three elements formed an integrated project: it gave the new central government independent power to raise revenue by taxing individuals directly and to establish an army and navy in order to advance, by force if necessary, American trade. This, I submit, was not exactly a libertarian project.

While the nationalists saw military power as essential to the development of American commerce, the ability to raise an army and navy was intended to accomplish more than that; it was aimed at continental hegemony and national security in what was regarded as a hostile world. As Madison told the Virginia ratifying convention, America was surrounded by countries "whose interest is incompatible with an extension of our power and who are jealous of our resources to become powerful and wealthy. [They] must naturally be inclined to exert every means to prevent our becoming formidable." Thus the nationalists sought a permanent military establishment—albeit initially small—powerful enough that no nation would challenge the nation's interests (as interpreted by its rulers).

Whom did the Federalists fear? "The hostile nations the Federalists were talking about [Spain and England]," Max M. Edling wrote in *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (2003), "had dominions to the north and south of the union, while in the west they fuelled the animosity of the Indian nations."

It's odd, then, that many libertarians think an obsession with national security dates back only to the end of World War II and Harry Truman's National Security Act of 1947. In fact it goes back to the very beginning of the republic, when Americans who sought to expand the power of the central state warned that because America was exceptional, it faced constant danger from the old colonial powers and the Indian nations, whose lands Americans coveted. Security, the nationalists explained, required consolidation (rather than the loose "league of friendship" under the Articles of Confederation) and a ready peacetime military. Yes, a standing army was potentially dangerous, they said, and so need not be large; but America, as a unified extended republic secure between two oceans, would not have to fear a permanent military establishment.

Some libertarians believe that since Americans opposed a standing army, as the vocal Anti-Federalists did, the Constitution forbade it. That is not the case. No prohibition is to be found. On the contrary, the Third Amendment, which prohibits the quartering of troops in private homes without consent in peacetime, assumes the existence of a peacetime standing army. (Thanks to Gary Chartier for pointing out this connection.)

But that's the least that can be said. Congress was empowered virtually without qualification to raise an army and navy, the only restriction being that the military budget can be for no more than two years at a time: "Congress shall have the power to ... To raise and support Armies [and] To provide and maintain a Navy." Moreover, control of the state militias was taken from the states and nationalized. (See Article I, Section 8. In 1783 the Confederation Congress created a committee, chaired by Alexander Hamilton, to plan for a peacetime army and navy. Committee member Madison was unconvinced that Congress had the power under the Articles of Confederation to carry out such a plan.)

These powers in the proposed Constitution outraged the Anti-Federalists. They pointed out that this shift in responsibility for defense to the national government would reduce the states to mere administrative districts. They also warned that a professional military could enforce federal tax and other laws, suppressing the liberty of Americans, who would be unable to resist because the militias would be gutted through federal neglect. Herbert Storing cautioned against reading the Anti-Federalists too literally on this point, suggesting that we "subsitut[e] 'bureaucracy' for 'standing army' [in their statements]. The Anti-Federalists were not so much worried about military coups or about 'militarism' in the pop-

ular sense, as about rigid rule of a large and varied republic by the force of government, of which the standing army is the ultimate expression" (*What the Anti-Federalists Were For* [1981]). Oddly, the Federalists responded that the Constitution would preclude federal coercion of the states because the new central government would "act directly upon citizens as individuals," as Arthur A. Ekirch Jr. explained in *The Civilian and the Military: A History of the American Antimilitarist Tradition* (1972). Small comfort for those citizens, of course.

The Federalists understood that most Americans were suspicious of a professional military, so the Federalists gave assurances that the armed forces would be small and stationed at the frontiers, where few people would see them. But the Anti-Federalists were not pacified. "My great objection to this Government is, that it does not leave us the means of defending our rights; or, of waging war against tyrants," Patrick Henry said. "Have we the means of resisting disciplined armies, when our only defence, the militia, is put into the hands of Congress?" Edling commented that "the argument that the Constitution would allow the national government to create a standing army in order to expropriate the people's property [through arbitrary taxation] shows that the Antifederalist objections to the Constitution were grounded in traditional Anglo-American individuals rights."

Another concern of the Anti-Federalists was that the Constitution could authorize conscription. Anti-Federalist writer "Brutus" (Robert Yates) warned of a coming "Prussian militia": If "the general legislature deem it for the general welfare to raise a body of troops, and they cannot be procured by voluntary enlistments, it seems evident, that it will be proper and necessary to effect it, that men be impressed from the militia to make up the deficiency." The Anti-Federalists saw the necessary-and-proper clause as a blank check for the central government.

And that wasn't all that worried the Anti-Federalists. As Edling explained: "By law the American militia consisted of all men between the age of sixteen and sixty. Congress's unlimited power over the militia therefore gave it power over the vast majority of adult men, which meant that the entire political nation was within reach of the government's command." The especially radical Anti-Federalist Luther Martin pointed out that members of the nationalized militia "from the *lowest* to the *greatest* [could] be *subjected* to *military* law, and *tied up* and *whipped* at the *halbert* like the *meanest* of *slaves*."

Anti-Federalists, perhaps seeing the writing on the wall but also realizing that many Americans did not like being called away from their homes for militia duty, were willing to concede power to the national government to raise an army in wartime—but not in peacetime. However, the Federalists, as one of them, James Wilson, put it, wanted "the appearance of strength in a season of the most profound tranquility," that is, a peacetime standing army.

That the proposed Constitution put the military under civilian control pleased the critics, who were also relieved that although the president would be commander-in-chief, the Congress controlled the purse and held power to declare war. (We know what became of that power.) However, with the ominous rise of the Society of the Cincinnati and with retired Gen. George Washington as the likely first president of the United States under the Constitution, how comforted should they have been about all this? ("Almost at once," Ekirch wrote, "the Society was criticized as an attempt to establish the former Revolutionary officers as a hereditary aristocracy, and the volume of protest soon reached impressive proportions.")

The Anti-Federalist case against unlimited central control of the military obviously did not prevent ratification of the Constitution, but it did yield proposed amendments to limit Congress's power, such as requiring a two-thirds majority of voting House members to approve the raising or keeping of troops in peacetime. That proposal was ignored, however, when Madison assembled what would become the Bill of Rights. Earlier, Luther Martin and Elbridge Gerry's amendment at the federal Convention to cap the number of troops failed, prompting Gerry, Edmund Randolph (an ambivalent Federalist), and George Mason to refuse to sign the Constitution.

The Federalist Papers, newspaper columns written to sell the Constitution to the public, were stunningly frank in their defense of the vast military powers enumerated in the Constitution. In Federalist 41 Madison wrote:

> Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American Union. The powers requisite for attaining it must be effectually confided to the federal councils....
>
> Is the power of declaring war necessary? No man will answer this question in the negative. It would be superfluous, therefore, to enter into a proof

> of the affirmative. The existing Confederation establishes this power in the most ample form.
>
> Is the power of raising armies and equipping fleets necessary? This is involved in the foregoing power. It is involved in the power of self-defense.
>
> But was it necessary to give an INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in WAR?
>
> ...The answer indeed seems to be so obvious and conclusive as scarcely to justify such a discussion in any place. With what color of propriety could the force necessary for defense be limited by those who cannot limit the force of offense?...
>
> How could a readiness for war in time of peace be safely prohibited, unless we could prohibit, in like manner, the preparations and establishments of every hostile nation?

Answer these questions as you may, but don't think for a minute that the Constitution did or was intended to limit the national government's power to raise and keep a peacetime standing army, or what Madison and his allies euphemistically called a "peace establishment." At the Federal Convention Madison had acknowledged that "according to the views of every member, the Gen[era]l. Govt will have powers far beyond those exercised by the British Parliament."

As indicated, Madison tried to allay fears of a standing army by arguing that a unified country would preclude the dangers experienced in Europe. "The Union itself, which it [the Constitution] cements and secures, destroys every pretext for a military establishment which could be dangerous," he wrote. "America united, with a handful of troops, or without a single soldier, exhibits a more forbidding posture to foreign ambition than America disunited, with a hundred thousand veterans ready for combat.... A dangerous establishment can never be necessary or plausible, so long as they continue a united people." (But note: he did not favor only a handful of troops or none at all.)

Indeed, he wrote, investigation into the matter

> must terminate in a thorough and universal conviction, not only that the constitution has provided the most effectual guards against danger from that quarter [i.e., standing armies], but that nothing short of a Constitution fully adequate to the national defense and the preservation of the Union, can save America from as many standing armies as it may be split into States or Confederacies, and from such a progressive augmentation, of these establishments in each, as will render them as burdensome to the properties and ominous to the liberties of the people, as any establishment that can become necessary, un-

> der a united and efficient government, must be tolerable to the former and safe to the latter.

In other words, it's not the central government's peacetime standing army that would be dangerous. It's the standing armies of small sovereign states that were to be feared. Of course the states had citizens militias, not standing armies.

In Federalist 23 Alexander Hamilton declared:

> The principal purposes to be answered by union [and hence the powers to raise taxes and military forces] are these—the common defense of the members; the preservation of the public peace as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.
>
> The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. *These powers ought to exist without limitation* [italics added], BECAUSE IT IS IMPOSSIBLE TO FORESEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM.

What was that about powers "few and defined," as Madison promised?

In case anyone missed it the first time, Hamilton repeated:

> Whether there ought to be a federal government intrusted with the care of the common defense, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defense and protection of the community, in any matter essential to its efficacy that is, in any matter essential to the FORMATION, DIRECTION, or SUPPORT of the NATIONAL FORCES.

This is reminiscent of young William F. Buckley's declaration that "we have got to accept Big Government for the duration [of the Cold War]—for neither an offensive nor a defensive war can be waged … except through the instrumentality of a totalitarian bureaucracy within our shores."

In Federalist 25 Hamilton wrote that defense cannot remain the province of the states because "the territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common."

In other words, the new central state was first and foremost to be a national-security state, or a "fiscal-military state," European-like but superficially tailored to Americans' distrust of centralized power and elites. Like Madison, Hamilton tried to turn this distrust on its head. "As far as an army may be considered as a dangerous weapon of power," he wrote, "it had better be in those hands of which the people are most likely to be jealous than in those of which they are least likely to be jealous. For it is a truth, which the experience of ages has attested, that the people are always most in danger when the means of injuring their rights are in the possession of those of whom they entertain the least suspicion." Or: better to give the power to distant strangers than to nearby acquaintances.

The Anti-Federalist argument was that the nearby government of a small republic was one the people could more easily watch. The Federalists' government, they said, would be dominated by an elite, which would have an advantage over working- and middle-class people in gaining seats from the proposed large congressional districts in which one man would represent up to 30,000 people. The Anti-Federalists also invoked a version of the dispersed costs/concentrated benefits argument in claiming that the unorganized masses, unlike the well-organized special interests, would find it impractical to keep an eye on the new government.

Admittedly, the Anti-Federalists' worst fears did not come to pass, but that happy outcome had much to do with the resistance mounted by their successors, the congressional Republicans, to the Federalists' proposed military buildup. (Later, the Republicans became militarists. See chapter 19 on the War of 1812.) While in the early decades, the professional army was occasionally used domestically by both Federalists and Republicans (legislation permitting this was passed in the Jefferson administration), federal laws by and large did not require such heavy-handed enforcement, though it became more common later. As Edling wrote, "According to one estimate, the army was employed in more than three hundred labor disputes in this period [1867–1957]." The domestic

use of the army to enforce law domestically was banned under the Posse Comitatus Act of 1878 "except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

The military establishment was of course essential in building the bloody and costly American empire, starting with the conquest of much of North America. The people may not have wanted a standing army, but they wanted things that could only be acquired with it. (See chapter 15.)

4
The Bill of Rights Revisited

In *Empire of Liberty: A History of the Early Republic: 1789-1815* (2009), Gordon S. Wood wrote, "Benjamin Rush [a signer of the Declaration of Independence who voted to ratify the Constitution in Pennsylvania] described the new government in 1790 as one 'which unites with the vigor of monarchy and the stability of aristocracy all the freedom of a simple republic.'" But is that union coherent?

Was Rush's invocation of "the freedom of a simple republic" mere lip service to satisfy ordinary Americans? In his case, perhaps so. As noted, the physician diagnosed the "excessive" passion for liberty a mental illness, which he named "anarchia." But at the risk of being too charitable, we can say that the new country's patricians valued personal liberty, at least to an extent. They did not want the arbitrary rule of an absolute monarchy, and they realized that the new government had to be popularly accepted or the people might rebel. But it is important to understand that the framers of the second U.S. constitution did not intend for the complex governmental structure devised at the Federal Convention to protect Americans' liberty directly. Rather, the ultimate protector was to be the wise and virtuous ruling elite, the gentlemen of leisure (along with working lawyers and other professionals) who, free of the daily cares of laboring in the marketplace, could referee clashing particular interests and thereby effect the *general* welfare. The purpose of the political process established in 1789 was to assure that the right sort of people would be selected to govern and the wrong sort would be weeded out, as alas they had not been in the several states since the Revolution.

"What actually bothered the Federalists," Wood wrote in *The Creation of the American Republic, 1776-1787* (1998), "was the sort of people who had been able to gain positions of authority in the state governments, particularly in the state legislatures." Wood quoted Anti-Federalist

Patrick Henry: "The Constitution reflects in the most degrading and mortifying manner on the virtue, integrity, and wisdom of the state legislatures; it presupposes that the chosen few who go to Congress will have more upright hearts, and more enlightened minds, than those who are members of the individual legislatures." Thus, "The federal government would act as a kind of sieve," Wood added, quoting James Madison, "extracting 'from the mass of the society the purest and noblest characters which it contains.'" As one critic of the Constitution noted, the plan was "dangerously adapted to the purposes of an immediate *aristocratic tyranny*." And, Wood noted, "even young John Quincy Adams" saw the Constitution as (in Adams's words) "calculated to increase the influence, power and wealth of those who have it already."

In light of this insight into constitutional history, we may now inquire into the nature and purpose of the Bill of Rights, the 10 amendments adopted immediately after the new government went into operation.

As Wood noted in *Empire of Liberty*, Americans were surprised that the proposed Constitution had no bill of rights. Furthermore, most of those who had participated in the convention were apparently surprised that everyone else was surprised. In fact, no one even mentioned a bill of rights during the convention until the closing days, when George Mason raised the matter. "It was voted down by every state delegation," Wood wrote. Bear in mind that some state constitutions had bills of rights, so including one would have blazed no new ground. (The lack of interest in a bill of rights reminds me that when Alexander Hamilton was asked why God was not mentioned in the Constitution, he reportedly said, "We forgot.")

Anti-Federalists like Mason made the lack of a bill of rights the top talking point against the Constitution (a fatal strategic error, as we'll see), and the issue came up repeatedly in state ratifying conventions. While no state convention conditioned ratification on the addition of a bill of rights (states had to vote up or down), Wood wrote, "many of the states had ratified the Constitution on the understanding that some changes would be made in order to protect people's rights, and popular expectation was high that amendments would be added as soon as possible."

This made the Federalists unhappy. The last thing they wanted was to tamper with their handiwork before it had a chance to go into effect. Besides, they said, no bill was needed. In the Federalists' eyes, "the Con-

stitution had been drafted in part to protect the rights of Americans," Wood wrote. "But the Constitution was designed to protect the Americans' rights from the abusive power of the state legislatures." Hamilton and others argued further that if the national government, unlike state governments, could exercise only enumerated powers, then the document *itself* was a bill of rights. Why declare a right to freedom of the press, they asked, if government had no express power to regulate the press?

Because of the Constitution's necessary-and-proper clause, the Anti-Federalists did not believe this talking point about enumerated powers, nor should they have believed it. As noted, the power of eminent domain was not enumerated, but we know from the Fifth Amendment's "takings clause" that the framers viewed the power either as an inherent possession of government or as necessary and proper for the exercise of other powers. The Anti-Federalists also pointed out that the government should be limited in *how* it exercised enumerated powers.

After enough states ratified the Constitution, all but one Federalist was willing to ignore their promise to add a bill of rights: James Madison. At first he was also willing to let the matter go, but his sense of honor (and pressure from Thomas Jefferson) prevailed, and he strove to keep his promise when he was elected to the first Congress as a member of the House of Representatives. (He had lost out on the Senate when the Virginia state legislature selected two Anti-Federalists.), "As he [Madison] told a friend," Wood wrote, "a bill of rights would 'kill the opposition everywhere, and by putting an end to the disaffection to the Govt. itself, enable the administration to venture on measures not otherwise safe.'"

Thus did Madison make a virtue of expediency.

Nearly 200 amendments had been recommended by the state ratifying conventions, and so Madison sorted through them. "Yet Madison was determined that his bill of rights would be mainly limited to the protection of personal rights," Wood wrote, "and would not harm 'the structure & stamina of the Government.'" In other words, most of the proposed amendments and the Anti-Federalists' most serious objections—among them, Congress's unrestricted power to maintain a peacetime standing army—would be ignored. Revealingly, Madison favored an amendment, in Wood's words, "to protect certain rights from the states," which shows that the Federalists were truly nationalists. It failed,

just as Madison's proposal at the Federal Convention to empower Congress to veto state legislation failed.

By the time Madison got through all the amendments, Wood added, "many Federalists had come to see that a bill of rights might be a good thing after all. Not only was it the best way of undercutting the strength of Anti-Federalism in the country, but the Bill of Rights that emerged, as Hamilton pointed out, left 'the structure of the government and the mass and distribution of its powers where they were.'"

In the end, Americans got a government with nearly a comprehensive power to tax and regulate/promote trade, as well as potential blank checks in the form of the general-welfare, necessary-and-proper, supremacy clauses, the lack of a prohibition on a standing army, and more. (They had other concerns: the powerful executive, the Senate, and the judiciary.)

But what of the Bill of Rights?

"Madison's amendments, as opponents of the Constitution angrily came to realize, were 'good for nothing' and were 'calculated merely to amuse, or rather to deceive,'" Wood wrote, quoting critics. "They affected 'personal liberty alone, leaving the great points of the Judiciary & direct taxation & c. to stand as they are.'"

Aedanus Burke, a Representative from South Carolina, said Madison's amendments "are little better than whip-syllabub, frothy and full of wind, formed only to please the palate.... I think it will be found that we have done nothing but lose our time, and that it will be better to drop the subject now and proceed to the organization of the government."

But since some Anti-Federalists had put a great deal of emphasis on the lack of a bill of rights, once the amendments were ratified, the critics appeared to be unwilling to take yes for an answer. They had far deeper grievances, but further complaints now looked obstructionist. "Anti-Federalists in the Congress," Wood wrote, "began to realize that Madison's rights-based amendments weakened the desire for a second convention and thus actually worked against their cause of fundamentally altering the Constitution." They had been bested in this historic game of chess.

Actually, the Bill of Rights largely embodied uncontroversial traditional rights of Englishmen. Indeed, in sorting through the amendments, Wood wrote, "Madison ... extracted mainly those concerned with per-

sonal rights that he thought no one could argue with."

Wood continued: "Unlike the French Declaration of Rights of Man and Citizen issued by the National Assembly in 1789, the American Bill of Rights of 1791 was less a creative document than a defensive one. It made no universal claims but was rooted solely in the Americans' particular history. It did not invent human rights that had not existed before, but mainly reiterated long-standing English common law rights."

To see this point clearly, recall that in 1798 the Federalist Congress passed the Sedition Act, which prohibited one to "write, print, utter or publish ... any false, scandalous, and malicious writing or writings against the Government of the United States, or either House of the Congress of the United States, with intent to defame the said government, or either house of the said Congress, or the President, or to bring them ... into contempt or disrepute, or to excite against them, or either or any of them, the hatred of the good people of the United States." Little good the First Amendment did to stop it. Wood explained:

> Americans believed in freedom of the press and had written that freedom into their Bill of Rights. *But they believed in it as Englishmen did*. Indeed, the English had celebrated freedom of the press since the seventeenth century, but they meant by it, in contrast with the French, no prior restraint or censorship of what was published. Under English law, people were nevertheless held responsible for what they published. If a person's publications were slanderous and calumnious enough to bring public officials into disrespect, then under the common law the publisher could be prosecuted for seditious libel. The truth of what was published was no defense; indeed, it even aggravated the offense. [Emphasis added.]

Bad as it was, the Sedition Act was more liberal than the common law because it permitted truth as a defense.

Wood summed up the story of the Bill of Rights thus: "Under the circumstances the states ratified the first ten amendments slowly and without much enthusiasm between 1789 and 1791; several of the original states—Massachusetts, Connecticut, and Georgia—did not even bother. After ratification, most Americans promptly forgot about the first ten amendments to the Constitution. The Bill of Rights remained judicially dormant until the twentieth century."

This does not mean the Bill of Rights has been worthless. To the extent it has worked to restrain government power, we should be grateful. (That also goes for the 14th Amendment, which applied the Bill of Rights to the states.) But its presence eventually shifted attention from

asking where in the Constitution a claimed power was enumerated to asking where in the Bill of Rights a claimed right was enumerated. And the effort to procure the Bill of Rights distracted from weightier matters, leaving the national government with its frighteningly broad powers intact.

5
Lost Articles

The Constitution says that to be elected to the U.S. Senate, a person has to be 30 or older, a citizen for at least nine years, and a resident of the state from which the candidate is elected.

Alas, it says nothing about knowing American history.

Good thing for Sen. Lindsey Graham, the South Carolina Republican. He'd have to find honest work.

Interviewed after the State of the Union address in 2007, Graham was asked about the continuing violence in Iraq, nearly three years after the U.S. invasion. Trying to put the difficulties in perspective, he said the United States did not get its constitution until 1789, years after achieving independence from Great Britain.

Buzz! Wrong answer, Sen. Graham. But as a consolation prize you get to take home a copy of Merrill Jensen's book *The New Nation: A History of the United States During the Confederation, 1781-1789* (1950). And we'll also throw in a copy of Herbert Storing's *What the Anti-Federalists Were For* (1981). And thanks for playing our game.

Seriously, I realize that children learn virtually nothing about the eight years before 1789 during which the United States existed under the Articles of Confederation. But shouldn't someone who holds himself qualified to be a U.S. senator know that what we call the Constitution was really America's *second* constitution?

The Articles were adopted by the Second Continental Congress on November 15, 1777, and took effect after ratification on March 1, 1781. That was seven months before Cornwallis surrendered at Yorktown on October 19, 1781, and two and a half years before the Treaty of Paris was signed on September 3, 1783.

Under the Articles the government of the United States, which was essentially confined to external affairs, consisted of a one-chamber Congress, with legislature, executive, and limited judicial functions. As noted,

the new quasi-government had no power to tax, regulate trade (except with the Indians), or raise an army directly. If it needed money or soldiers, it had to requisition them from the states.

The states were represented in Congress by delegations of two to seven members, selected by a method chosen by each state legislature, but each state had only one vote. No person could be a member of Congress for more than three years in any six-year period.

The government had no separate executive branch or judiciary. The Congress selected a member to preside while it was in session; this person, who could hold the office no more than one out of three years, was known as the president of the United States. Why no independent executive? Because the recent unpleasant experience with the king of England made many members of the Continental Congress wary of untrammeled executive power. Ten men held the position of president, including John Hancock and Richard Henry Lee. John Hanson of Maryland, the third person to hold the office but the first person to hold it for a full one-year term after the Articles were ratified, was strictly speaking the first president of the United States.

The Articles remained in effect until the Constitution displaced them in 1789. The process by which the Articles were scrapped—rather than amended—in favor of an entirely new blueprint was dubious. As the pseudonymous Anti-Federalist "Federal Farmer" (most likely Melancton Smith of New York) wrote on October 8, 1787,

> A general convention for mere commercial purposes was moved for—the authors of this measure saw that the people's attention was turned solely to the amendment of the federal system; and that, had the idea of a total change been started [sic], probably *no state would have appointed members to the convention*. The idea of destroying, ultimately, the state government, and forming one consolidated system, could not have been admitted—a convention, therefore, merely for vesting in congress power to regulate trade was proposed. [Emphasis added.]

Eight years is a significant period for a nascent country to endure after breaking away from an empire. Graham's remarks were meant to suggest that what took place in the United States during that time was similar to what was taking place in Iraq in 2007. (Not much had changed in 2016.) But that is ridiculous. The 13 states did not embroil themselves in civil war or sectarian violence—neither internally nor with one another. Quite the contrary.

How was life under the Articles of Confederation? As Merrill Jensen wrote,

> Americans fought against and freed themselves from … coercive and increasingly centralized power…. They did not create such a government when the Articles of Confederation were written, although there were Americans who wished to do so…. Thus the American Revolution made possible the democratization of American society by the destruction of the coercive authority of Great Britain and the establishment of actual local self-government within the separate states under the Articles of Confederation.

People in the new states, Jensen wrote, were full of optimism about the possibilities ahead. Criminal codes were made more humane, with the death penalty removed for all crimes but murder and, in some cases, treason. Property qualifications for voting were abolished over time. Charities and mutual-aid societies were formed, along with library, scientific, and medical associations. Schools were founded. The union of church and state was increasingly opposed. The steps in the direction of religious freedom and the complete separation of church and state were thus halting, but the direction was sure and the purpose was clear, Jensen wrote.

Of course, there was slavery, which contradicted the philosophy espoused in the Declaration of Independence. But some states moved against it. Within a few years after 1775, either in constitutions or in legislation, many of the new states acted against slavery. Within a decade all states except Georgia and South Carolina had passed some form of legislation to stop the slave trade, Jensen wrote. The New England states and Pennsylvania took steps toward abolition, and antislavery societies flourished.

What about the economies of the states? We can infer much from the fact that those who wanted to overthrow the Articles for a new constitution warned of *coming* economic turmoil if the central government were not fortified. Hence turmoil was a prediction *not* a description. The states were certainly no models of laissez faire, although some individuals—namely, white males—were free economically to a perhaps hitherto unknown extent. But then neither was the consolidated national system a practitioner of laissez faire after 1789. The first economic action of the first Congress under the Constitution was imposition of a broad protective tariff, which one newspaper described as "the second Declaration of Independence."

Rent-seeking (political entrepreneurship in pursuit of profits beyond what could be earned in the market) was seen in the states, as it has been in every real-world system. Subsidies, loans, monopoly charters, and land giveaways were common. In this largely agrarian society, Jensen wrote,

> the dominant note was sounded by American merchants and business men who lived mostly in the seaport towns.... Their power was born of place, position, and fortune. They were located at or near the seats of government and they were in direct contact with legislatures and government officers. They influenced and often dominated the local newspapers which voiced the ideas and interests of commerce and identified them with the good of the whole people, the state, and the nation. [Hence, the bad name *capitalism* has had for many people since.]

Merchants and manufacturers disagreed on *what kind* of government intervention should exist, but not on *whether* it should exist. That's because they had different competitors. Merchants liked imports but wanted barriers to foreign (especially British) shipping, while manufacturers wanted barriers to foreign goods and didn't care about shipping. Part of the impetus toward a strong central government was businessmen's desire for a uniform national economic policy, since individual states, acting alone, could hurt themselves by having more stringent restrictions than their neighbors and one state could capture the lion's share of trade by competitively lowering its barriers. In other words, the constitutional consolidation of 1789 was part regulatory cartel.

There were also regional differences. Most manufacturing was in the North, so protectionist sentiment was concentrated there. The South had little manufacturing and wanted access to cheap foreign goods. Thus high protective tariffs found little support. Northerners who coveted the Southern market realized that only a nationwide trade policy would serve their interests. On the other hand, Southern farmers wanted as many shipping options as possible and had little interest in restrictions on foreign carriers.

Some state economies, but not all, suffered booms and busts—a depression in 1784-85—due to badly managed paper money (which nevertheless remained popular) and other government ineptitude. But the crises were not extraordinary. As Jensen summarized, "There is nothing in the knowable facts to support the ancient myth of idle ships, stagnant commerce, and bankrupt merchants in the new nation. As long as ago as 1912, Edward Channing demonstrated with adequate evidence that despite the commercial depression, American commerce expanded rap-

idly after 1783, and that by 1790 the United States had far outstripped the colonies of a few short years before."

Despite intervention, white men still had a virtually unprecedented degree of economic freedom. A man could easily get a plot of land and take care of his family by farming. (Some states operated land banks to extend mortgages to individuals through the emission of paper money.) There was no distant overbearing central bureaucracy to worry about. Contact with government was minimal.

Thus contrary to Sen. Graham, pre-1789 America had a constitution, almost no central government, relative prosperity, and peace. (Of course it also had slavery, wars on Indians, and the oppression of women, but that continued for a long time under the Constitution, fortified by a broad power to tax.)

As Jensen said, the men who wrote the Constitution of 1787 were quite a different set of men from those who signed the Declaration of Independence in 1776. Let's further explore those early years of the republic.

6
History Lesson Lost

Call me nostalgic, but I still have a thing for the Articles of Confederation. Admittedly, it's a tempered nostalgia, for as Murray Rothbard reminded us, even the Articles represented an intolerable centralization of power, a triumph of conservatism over radicalism. (See volume four of Rothbard's *Conceived in Liberty* [1979/2011].)

Maybe it's the enticement of forbidden fruit. In the government schools I attended, little if anything was said about the eight years during which the United States of America were governed under the Articles. The curriculum writers must have had a good reason for not devoting class time to that period. What didn't they want us to know?

If we heard anything about those eight years, it would have been that the period was a mess: provincialism, mobocracy, depression, trade barriers at state borders, and an impotent national government that had to beg the states for money and militiamen. Thank goodness—the teacher probably said—that wiser heads prevailed and the impractical decentralization of the Articles was replaced by the Constitution, which gave the national government badly needed potency while simultaneously restraining it from violating our liberties. Remember James Madison, Federalist 51: "You must first enable the government to control the governed; and in the next place oblige it to control itself."

Maybe what the schools didn't want us to know was that life under the Articles, as pointed out in the last chapter, wasn't so bad after all—at least for white males with property. America got along without a central taxing authority and distant impersonal bureaucracy; obviously it wasn't so good for African Americans, Indians, and white women, but their fate did not change in 1789. Under the Articles, that narrow slice of the population enjoyed economic growth, and the transition from a collection of colonies to a confederation of sovereign states was reasonably smooth. As already noted, it certainly wasn't a period of laissez faire,

and many of the problems experienced, such as periodic inflation and depression, were attributable to grants of privilege and government mismanagement of paper money. Contrary to common libertarian assumption, fiat paper money was popular in the colonies and states. Thus British Parliament's 1764 attempt to restrict colonies' enactment of legal-tender laws was resented across the socioeconomic spectrum. According to historian E. James Ferguson, Benjamin Franklin said such outside monetary restrictions helped drive a wedge between the colonies and the British Empire. "In North America [unlike in England] pragmatism won out over theoretical abstractions and moralistic pronouncements," historian Edwin J. Perkins wrote. (See Ferguson's *The Power of the Purse: A History of American Public Finance, 1776-1790* [1961] and Perkins's *American Public Finance and Financial Services: 1700-1815* [1994].)

Even interstate protectionism is more legend than fact. Economic historian Jeffrey Rogers Hummel handily disposes of that myth in "The Constitution as Counter-Revolution: A Tribute to the Anti-Federalists (online at http://www.la-articles.org.uk/FL-5-4-3.pdf)":

> Indeed, subsequent accounts have blown this rationale [for strengthening the central government] up into an utterly fanciful picture of competing trade barriers between the various states disrupting the American economy. The two factual instances on which this overblown picture is largely based involve New York and Connecticut, which taxed foreign goods entering from neighboring states—an economically insignificant restriction. *The prevailing rule prior to the Constitution was complete free trade among the states*. [Emphasis added.]

In fact, in the Federalist Papers Alexander Hamilton said he favored the Constitution in part because it would enable American to triple its tariff against Europe. Competition among the states tended to lower barriers to foreign products. The Constitution can be seen as constructing a protectionist cartel. (More on this in chapter 12.)

If life under the Articles was reasonably good (again, for white males, especially those with property), why was the first constitution scrapped in favor of a plan for a more powerful central government? Merrill Jensen, the respected historian of the period, offered an explanation in his book *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* (1940). Jensen explained that the negative impression of the confederation period was fostered at the time by those who favored nationalism (over true federalism) and centralized power. Those forces prevailed, and as we know,

the victors largely write the history. "Posterity has seldom questioned their partisan interpretation," Jensen wrote.

> The Articles of Confederation have been assigned one of the most inglorious roles in American history. They have been treated as the product of ignorance and inexperience and the parent of chaos; hence the necessity for a new constitution in 1787 to save the country from ruin. In so interpreting the first constitution of the United States and the history of the country during its existence, historians have accepted a tradition established by the Federalist Party. They have not stopped to consider that the Federalist Party was organized to destroy a constitution embodying ideals of self-government and economic practice that were naturally abhorrent to those elements in American society of which that party was the political expression.

This bias toward the Federalist narrative is discussed at length by Pauline Maier in *Ratification: The People Debate the Constitution* (2011). "We tend to believe everything [the Federalists] said…," Maier wrote. "But the Federalists … controlled the documents on which historians depend. They owned most of the newspapers. They sometimes paid those who took notes on the convention debates or subsidized the publication of their transcripts. In some places, above all Connecticut, Federalists forcibly blocked the circulation of literature critical of the Constitution."

Jensen went on to describe the deep division that existed in the British North American colonies and, after the Revolution, in the states. Groups of people are rarely of one mind, and the colonies and states were no exception. As to be expected, a privileged elite came to dominate the government of each colony; power and land were handed out as royal favors, and the recipients became entrenched. In the Northern and Middle colonies, merchants constituted the most powerful group. In the South that rank was held by the large planters. These people came to think of themselves as the wise and disinterested aristocracy destined to govern, and they were not eager to give up power to the radical democrats who were the first to push for independence from Britain. When possible, merchants and planters secured their positions by denying the vote to men who held no or too little property or by denying farmers in outlying areas full representation in the legislatures or sometimes any representation at all. Taxation without representation was thus practiced by one group of colonists against another. The victims of this policy were not happy about it and were determined to change the system.

Holding political power was the key to retaining wealth and economic influence against upstart rivals. Jensen noted that in Pennsylvania, for example, "the merchants had tried by various means to overthrow the system of markets and auctions in order to get a monopoly of the retail trade. . . . The merchants likewise tried to check the activity of wandering peddlers." Then as now, businessmen preferred cartels and monopoly privileges (the exclusive corporate charters of old) to free and unpredictable competition. When one recognizes the politically powered land speculation that was rampant, one can see how economic interest could have had a hand in shaping political visions. The holders of political power were not invincible, however, and in some colonies democratic and agrarian challengers succeeded in winning control.

The upshot is that the contending groups—the "radicals" and the "conservatives"—had different economic and political interests and thus different views about independence from Great Britain. When British usurpations made independence an imperative even for many conservatives, these groups disagreed about how the new nation should be governed. The mercantile interests tended to favor nationalist centralization, which was seen as the best way to maintain power and to hold back the radical democrats. The mass of people who felt themselves imposed on by those interests tended to favor decentralization because they believed they had a better chance for justice with local self-government. Thus what Jensen called the "internal revolution" was at least as important as the external one against the British. Indeed, the revolution against Britain was seen by the radicals as a means to success in the revolution against domestic aristocracy. The conservatives understood this too. Jensen wrote,

> The interpretation of the Revolution is often confused by the insistence that all revolutionists were radicals. Probably most radicals were revolutionists, but a large number of revolutionists were not radicals. The conservatives were those who—whether they desired independence or not—wanted to maintain the aristocratic order in the American colonies and states. The radicals were those who wanted changes in the existing order, changes which can be best described as democratic, though the term is necessarily relative.

The Articles of Confederation, Jensen noted, were the radicals' triumph over the conservatives in the Second Continental Congress, "a constitutional expression of the philosophy of the Declaration of Independence." But the conservatives did not give up their nationalist aspirations. After years of denigrating the confederation and attempting to

amend the Articles, they finally got their way in 1787 and used the Federal Convention to scrap them in favor of a strong central government. The Antifederalists warned about its dangers, but to no avail.

The framers' anti-democratic tenor is often taken as a sign of their liberalism. However, Jensen's approach sheds a different light on the matter. Whether democratization is good or bad depends on the context. When it is an assault on individual sovereignty, it is bad. But when it is a move against aristocracy and mercantilism, it is good. According to Jensen, the proponents of democracy and local self-government were disfranchised, overtaxed small farmers trying to resist the entrenched mercantilist elite. They may not have been consistent libertarians, but they were more libertarian than their adversaries. Thus the attack on democracy can be seen as a defense of aristocracy. It doesn't look so good in that light.

Dispersed power is a pillar of liberalism. (Although it must be acknowledged that liberalism also contains a strain in favor of centralization. See Jacob T. Levy's *Rationalism, Pluralism, and Freedom* [2015] and my discussion of his book in the introduction to this volume.) Decentralization entails smaller jurisdictions, competition, and relative ease of exit. The Articles of Confederation, though hardly perfect, embraced those principles. The plan that took its place exchanged those principles for the promise of horizontal checks and balances within a strong central government over a large geographical area. It's fascinating to ponder how things would have turned out had that exchange not taken place.

7
The Decline of American Liberalism

A good description of the early years of America is to be found in Arthur A. Ekirch Jr.'s classic, *The Decline of American Liberalism* (1955/1967). By *liberalism*, Ekirch meant classical liberalism, or something closely resembling libertarianism. In his foreword, Ekirch wrote: "Since the time of the American Revolution the major trend in our history has been in the direction of ever-greater centralization and concentration of control—politically, economically, and socially. As part of this drift toward 'state capitalism' or 'socialism,' the liberal values associated with the eighteenth-century Enlightenment—and especially that of individual freedom—have slowly lost their primary importance in American life and thought."

But he added, "Despite the pessimism implied in such a stand, I wish to disclaim any intent to essay the role of a Jeremiah or a Cassandra. My purpose is rather that of an historian and social scientist. I desire to examine the history of liberalism because I think that evidence of a decline would tell of an important facet of our history, deserving more consideration than it has hitherto received.... I believe the weakening of the liberal tradition should be of sufficient concern to cause us to reassess that easy assumption of continual progress which has so frequently characterized American historical writing."

In chapter 2, "The Hope of America," Ekirch wrote,

> It is not far from correct to say that liberalism and colonial America grew up together.... Probably the majority of the settlers who came to America did so because of their longing to break away from the rigid class society and restraints of Europe. In one way or another the average settler was fleeing absolutism.... An abundance of free land ensured the widespread diffusion of property, higher wages, and greater social equality. Feudal customs of restricted land tenure proved impossible of general application in the New World. No hereditary aristocracy of lords and ladies owned exclusive title to the land, and the Old World customs of primogeniture and entailed estates were never

> popular in the colonies. Prosperity bred economic individualism and, in a land of seemingly boundless wealth, mercantilist notions of political economy began to yield the economic stage to a rising laissez-faire capitalism….

In large part therefore the American colonial economy fulfilled liberal expectations, approximating closely the agrarian dream of a society in which property was widely diffused and divided on fairly equal terms. Only the presence of the lower class of Negro slaves and indentured white servants intervened to mar the picture of a free and liberal social system.… Almost as unfortunate as the Negro slave was the American Indian, who, though not enslaved, was often warred upon and divested of his lands and hunting grounds.

While Ekirch wrote glowingly of the rise of liberalism in colonial America (without ignoring the contradictions of chattel slavery and the oppression and extermination of Indians) he, like historian Vernon L. Parrington, underscored a shift in emphasis that occurred during the Revolution with its "encroachment of a new spirit of nationalism and Americanism upon the older, local frontiers of colonial days." He quoted Parrington, who wrote that the Revolution "marked the turning point in American development; the checking of the long movement of decentralization and the beginning of a counter movement of centralization….The history of the rise of the coercive state in America, with the ultimate arrest of all centrifugal tendencies, was implicit in that momentous counter movement."

Ekirch himself went on to note that "in the process of fighting the Revolution, economic advantage and social privilege were by no means eliminated. Much loyalist property, for example, found its way into the hands of a new group of wealthy landed proprietors. Such transfers sometimes did more to advance speculation in land prices than to further the achievement of an agrarian diffusion of property. Army contracting also resulted in the creation of new wartime fortunes.… [M]ost governmental regulation of the period was favorable to business."

Ekirch described the illiberal movement that occurred after the Revolution in a chapter he titled "Federalist Centralization and Consolidation." He and Parrington differed with other historians not in their seeing a conservative counterrevolution, but rather in seeing it as something permanent. The Jeffersonian and Jacksonian periods revived the declining liberalism to some extent, "but the shift in American thought in the period between the Declaration of Independence and the adop-

tion of the Constitution represented more than a temporary reaction. It was rather, as Parrington insisted, a turning point of American history and a direct challenge to the liberal tradition." Specifically, in part the shift was characterized by business's "look[ing] to government for economic support." He pointed out, "In a variety of ways therefore the war had an educational effect upon American business thinking and practice, especially teaching businessmen to identify themselves with the policies and operations of government. After the return of peace, it was only natural that the new generation of businessmen should strive to enlist the aid of the government in preserving and increasing their wartime gains."

This attitude and other things, such as the government-debt speculators' wish to protect their investments, intensified the conservatives' discontent with the Articles of Confederation, which (as we've seen) set up a weak central government without authority to levy taxes or regulate trade. This discontent was increased by rebellious farmers and mechanics who "were beginning to unite in their opposition to strong government and higher taxes." (Shays's Rebellion in 1786 is the best-known example.) Even greater centralization of power was the conservatives' answer. Ekirch quoted James Madison, a nationalist, who explained the move to centralization as a way "to protect the minority of the opulent against the majority."

The conservative reaction resulted in the 1787 Federal Convention at Philadelphia. "[A]ll fifty-five of the delegates were men of considerable and varied property holdings, ranging from the possession of slaves and lands to investments in government securities and far-flung business enterprises," Ekirch wrote. His discussion of this period sheds valuable light on constitutional matters still relevant today, for example, the allegedly clear distinction between strict constructionism and living-constitutionalism. Here's what he said:

> Fundamental to an understanding of the Constitution adopted at Philadelphia is the realization that it represented a compromise made possible by the large areas of essential agreement among the delegates. Between the two poles of a colonial and Revolutionary radicalism—which favored democratic individualism and state rights—and a lingering British conservatism—which frankly preferred a constitutional monarchy and the rule of a propertied aristocracy—compromise was relatively easy to achieve. The delegates to the Philadelphia Convention were overwhelmingly agreed upon the necessity of a government that was national, yet republican, and there was little sentiment

> in behalf of either a monarchy or the kind of decentralized government illustrated by the Articles of Confederation. In accord therefore on the basic theory of the new government, the delegates fashioned *a document whose meaning depended to a considerable extent upon how it was interpreted. The very vagueness and silences of the Constitution left much to be inferred and decided in the future.* [Emphasis added.]

This undercuts the claim of constitutional sentimentalists that the framers intended to create a government that was limited to "few and defined" powers by a constitution that was not open to interpretation.

In the document Ekirch perceived homage to liberalism in the tacit acknowledgement of natural rights (later made explicit in the Bill of Rights), the (appearance of) limited powers, and the separation of branches. Yet he also saw an illiberal delegation of economic powers to the central government: "The men at Philadelphia were convinced that the economic powers hitherto wielded by the states would be safer in the hands of a centralized national government. To this end, Congress was given exclusive authority to coin money and to regulate both foreign and interstate commerce. Thus the stage was set for the abandonment of laissez-faire liberalism and the substitution of economic nationalism or government paternalism."

The so-called Federalists, epitomized by Alexander Hamilton, were the first to rule under the Constitution and thus were able to establish important precedents under which we still labor. For example, Ekirch noted, when Hamilton asked Congress to charter a national bank—"a significant example of government paternalism," in Ekirch's words—and Jefferson protested on constitutional grounds, "Hamilton answered with his famous doctrine of implied or resulting powers—that certain powers are implied, or are the result of other powers specifically enumerated in the Constitution." (The Anti-Federalists had warned of the danger of implied powers.) That doctrine has stood the advocates of robust central government in good stead ever since. (Madison appears to have been the author of the implied-powers doctrine, as shown in this volume.)

Ekirch summed up the period thus:

> The Federalists were correct in pointing out the necessity of the rule of law, rather than of revolution, for the preservation of liberalism, but they erred in the way they interpreted the laws at home. Using the checks and balances of the Constitution to thwart popular control, they went on to violate their own concept of a balanced government, adopting *a broad and elastic interpretation of*

> *the Constitution* and using expanded power of government and *the vague concept of the general welfare* for the benefit of a particular class—the commercial, propertied aristocracy. But, though overthrown in 1800, the remnants of the defeated Federalists later had the grim satisfaction of seeing their Jeffersonian opponents embrace many of the same consolidating principles that they had earlier so bitterly denied. [Emphasis added.]

In other words, the conservatives gave birth to the living constitution.

8
Where Is the Constitution?

The title question is not like "Who's buried in Grant's tomb?" And the answer isn't "the National Archives." I mean the *real* constitution—the set of dispositions that influence what most Americans will accept as legitimate actions by the politicians and bureaucrats who make up the government—not a mere piece of parchment behind glass or a booklet in someone's pocket. This real constitution more or less makes the written Constitution what it is at any given time. When Peter Finley Dunne's Mr. Dooley said that "th' Supreme Court follows th' illiction returns," he was exaggerating only a bit.

The U.S. Constitution has changed over the years, without being formally amended, in response to changes in the real constitution. *Plessy v. Ferguson* became *Brown v. Board of Education*, for example. The commerce clause came to be interpreted in ways that would have astounded some (but not all) earlier Americans. Same with the general-welfare clause. This presents a problem for constitutionalists: constitutions (rules) can neither interpret nor apply themselves. *People* interpret and apply them. As legal scholar John Hasnas points out, the rule of law under a monopoly government legal system inevitably is a rule of men and women. (See his "The Myth of the Rule of Law," *Wisconsin Law Review,* 1995, online at http://faculty.msb.edu/hasnasj/GTWebSite/MythWeb.htm). So how can a constitution do the work that the constitutionalists expect it to do?

Conservatives scoff at the idea of a living Constitution, the proposition that its meaning should change with the times. The economist Thomas Sowell, like the late Justice Antonin Scalia, quips that a living Constitution is really a dead Constitution. By that he means that unless the Constitution's content is fixed and timeless, it no longer qualifies as a constitution.

This argument has a plausible ring. But it runs up against the problem I've cited. No set of rules interprets or applies itself, and no guide

to interpretation can interpret itself. In that sense all constitutions are living. It is too glibly asserted that we know what the Constitution "really means: means to whom? The framers? The ratifiers? The people of 1788? Us? The Constitution is a historical and political document, and people divine its meaning from their changing views of the epoch that produced it, which is in turn influenced by their moral and political values. As the historian Merrill Jensen wrote in *The New Nation: A History of the United States During the Confederation, 1781-1789* (1950),

> Since the founding fathers themselves disagreed as to the nature of the history of the period and as to the best kind of government for a new nation, it is possible to find arguments to support almost any interpretation one chooses. It is not surprising therefore that conflicting interpretations have filled thousands of pages and that all this effort has never produced any final answers and probably never will, for men have ever interpreted the two constitutions of the United States in terms of their hopes, interests, and beliefs rather than in terms of knowable facts.... When the Constitution was submitted to the public in October 1787 the controversy rose to new heights. Men talked in public meetings and wrote private letters and public essays in an effort to explain, justify, or denounce what the Convention had done.... Some said there would be chaos without the new Constitution; others said that there would be chaos if it were adopted.

And the framers were alive during this debate! What chance do we have?

Jensen went on:

> Once it was adopted Thomas Jefferson and Alexander Hamilton, with two opposed ideas of what the United States should be, laid down two classic and contradictory opinions of the nature of the Constitution. The two basic interpretations may be simply stated. Jefferson held that the central government was sharply limited by the letter of the Constitution; that in effect the states retained their sovereign powers except where they were specifically delegated. Hamilton argued in effect that the central government was a national government which could not be restrained by a strict interpretation of the Constitution or by ideas of state sovereignty.

Who was right? Jefferson or Hamilton? What does *right* signify here?

The Auburn University philosopher Roderick T. Long has touched on this subject in "Rule-following, Praxeology, and Anarchy" (*New Perspectives on Political Economy*, 2006, online at http://pcpe.libinst.cz/nppe/2_1/nppe2_1_3.pdf). Long's purpose was to explore the political and other implications of what the philosopher Ludwig Wittgenstein called the "rule-following paradox." We know rule-following when we see it and engage in it, Wittgenstein observed, but what *is* it? It is neither words

in one's mind or on paper (or parchment) that *compel* certain behavior, nor a sequence of physical motions, which could be consistent with many different rules. Rather, it's a kind of *purposeful human action* (à la Ludwig von Mises) in a particular context that cannot be reduced to either a mental state nor a series of bodily motions. Long quoted Wittgenstein: "[A] move in chess doesn't consist simply in moving a piece in such-and-such a way on the board—nor yet in one's thoughts and feelings as one makes the move: but in the circumstances that we call 'playing a game of chess', 'solving a chess problem', and so on."

Thus, Long continued, "One moral of the paradox is that action is an indivisible whole, of which thoughts and movements are aspects but not separable ingredients; *action* is more than the sum of its parts. The identity of my thoughts depends on how I translate them into action—not bodily movement, but action."

This may not seem to shed light on the problem at hand: seeing to it that a particular interpretation of the Constitution is followed. But Long continued:

> If I think that following a rule *must* somehow be anchored by the rule's having its application already built into it, then a close look at rule-following is bound to turn vertiginous, because there's no such thing to be found. As Wittgenstein puts it, "any interpretation still hangs in the air along with what it interprets, and cannot give it any support." But what he infers from this is not that grasping a rule is impossible, but rather that "there is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call 'obeying the rule'."

This isn't just esoteric abstract philosophizing. As Long writes,

> Just as it's tempting to think that my grasp of a rule is something independent of my actions, something that *makes* me behave in a certain way, so it's equally tempting to think that a society's legal system is something external to that society that *makes* it orderly. But as the rule-following paradox shows, there couldn't be any such self-applying entity….

To return to the Constitution, it's not as if the proper interpretation (whatever that may be) can be hardwired and somehow imposed to guarantee that legislators, presidents, and judges will act in certain ways, or that the public will demand such. At every point *people* will be making decisions, including decisions over which interpretation of the rules is right. "Government is not some sort of automatic robot standing outside the social order it serves," Long wrote. "Its existence … depends on on-

going cooperation, both from the members of the government and from the populace it governs."

In other words, a particular interpretation of the Constitution in reality means that people act in particular ways to achieve particular values in particular situations, and they expect others to act in particular ways. There's no automatic pilot, no impersonal mechanism, and no mere declaration or constitution that can get society to where you want it to go.

Long added:

> Presumably a mere written document is not sufficient to limit the government's power; what's needed are actual institutional structures. But these sorts of constitutional restraints, such as checks and balances and divided powers, do not exist in their own right, as external limitations on society as a whole; on the contrary, they exist only insofar as they are maintained in existence by human beings acting in systematic ways….
>
> Just as it's tempting to think that my grasp of a rule is something independent of my actions, something that makes me behave in a certain way, so it's equally tempting to think that a society's legal system is something external to that society that makes it orderly. But as the rule-following paradox shows, there couldn't be any such self-applying entity; and since individuals do manage to follow rules pretty well most of the time—and since societies do likewise manage to maintain order pretty well most of the time—the absence of such a self-applying entity is no problem at all.

This is something like what Thomas Paine had in mind (without fully appreciating it), as noted previously, when he wrote in *Rights of Man* (1792), "Great part of that order which reigns among mankind is not the effect of government. It has its origin in the principles of society and the natural constitution of man. It existed prior to government, and would exist if the formality of government was abolished. In fine, society performs for itself almost everything which is ascribed to government."

Long concludes from this that the challenges of bringing about a free society under the principle of market anarchism, or statelessness, are similar to those faced by advocates of limited government: the latter gain no advantage from their written constitution or court of final jurisdiction. Those things provide no greater guarantee of freedom than a competitive, polycentric legal order because rules are not the external constraints they think they are.

As Jeffrey Rogers Hummel explained in the "The Constitution as Counter-Revolution" (online at http://www.la-articles.org.uk/FL-5-4-3.pdf), the Federal Convention of 1787 was dominated by nationalist Hamiltonians rather than (anti-)federalist Jeffersonians. In drafting the

document the centralists largely got their way (despite some compromises), and that Constitution was ratified by state conventions. Then at Anti-Federalist insistence the Bill of Rights (which, as we saw in chapter 4, did not change the structure of the government) was added. Yet, Hummel writes, "The Anti-Federalists … won on the question of how the Constitution would operate in practice…. To oversimplify only slightly, the Federalists got their Constitution, but the Anti-Federalists determined how it would be interpreted." The Federalists' words didn't deliver what they hoped—at least for a while.

Thus words faithfully recited or carefully inscribed on parchment will never assure liberty. If you doubt this, look around. If liberty is to be made full, government power must be rolled back (on the way eventually to being abolished). And if government power is to be rolled back, the real constitution—the one embedded in people's own actions and expectations about the actions of others—must be pro-liberty. That's why there's no substitute for education and an intellectual-moral revolution.

9
James Madison: Father of the Implied-Powers Doctrine

A free society depends ultimately on people having a disposition favoring justice, which includes respect for other people's rights. As I discussed in the last chapter, this requires more than the words they recite or put on paper. Most crucial is how they *act* and expect others to act—the rules they follow. For this reason it is futile to put undue emphasis on written constitutions as the key to liberty. The real constitution is within each of us. If the freedom philosophy is not inscribed in the actions of people, no constitution will help.

The 1977 Soviet Constitution proclaimed, "In accordance with the interests of the people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations.... Citizens of the USSR are guaranteed freedom of conscience, that is, the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda." The 1936 Constitution contained some of the same guarantees.

How much were those words worth?

I am reminded of the weak protection afforded liberty through mere words by Richard Labunski's book *James Madison and the Struggle for the Bill of Rights* (2006). Labunski provides a well-written account of how James Madison kept his promise to have the first U.S. Congress amend the new Constitution in order to add a bill of rights. As I've already pointed out, the resulting Bill of Rights did not address the deepest concerns of the most libertarian activists at the time, the Anti-Federalists. But the behind-the-scenes story sheds light on the thinking of the man regarded at the father of the Constitution.

Before we get to that story, however, we should take a closer look at Madison's pre-Constitution record. Madison was a member of Congress under the Articles of Confederation. As already described, the relatively bare-bones Articles left little for ambitious nationalist politicians seeking to expand the power of the central government to work with. But that did not stop them from trying. For example, the Congress's Superintendent of Finance, Robert Morris, argued that Congress, which could not impose taxes, had an *implied* power to force the states to finance the federal war debt. Less than two weeks after the Articles took effect, Congressman Madison thought he found a way to increase the national government's power. He introduced an amendment that stated: "A general and implied power is vested in the United States in Congress assembled to enforce and carry into effect all the articles of the said Confederation against any of the States which shall refuse or neglect to abide by such determinations."

Note the phrase "general and implied power." Constitutionalists, including libertarian constitutionalists, despise the implied-powers doctrine because it contains the potential for unlimited power. Yet here was Madison seeking to incorporate the doctrine into the Articles.

As Ralph Ketcham wrote in *James Madison: A Biography* (1971), "Madison sought as well to make the mode of enforcement explicit: Congress was authorized 'to employ the force of the United States as well by sea as by land' to compel obedience to its resolves." Once again we see Madison's nationalism and centralism.

The amendment, along with others that would have bulked up the central government, failed. Ketcham noted that Madison then became "more devious" in his attempts to enlarge its powers. In the end he gave up; hence, the move toward a convention, the scrapping of the Articles, and the formulation of a new constitution in order to create a government with far more sweeping powers.

Ketcham also noted that Madison again revealed his constitutional philosophy when, before the Federal Convention, he "opposed a strict definition of 'the extent of Legislative power'" in advising Kentuckians who were contemplating a state constitution.

As described in chapter 4, Madison entered the first Congress under the new Constitution determined to add a modest bill of rights, one that would leave the government's structure and powers intact while invoking traditional, uncontroversial rights of Englishmen. (The one

amendment Madison apparently really wanted—a prohibition on *state* violations of freedom of speech, press, and religion and the right to a jury trial—was removed by the Senate, whose members were chosen by state legislatures.)

Madison revealed an important element of his constitutional philosophy during the debate on what would become the 10th Amendment to the Constitution. As introduced, it read: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Congressman Thomas Tudor Tucker of South Carolina proposed the addition of a single word: *expressly*. It thus would read: "The powers not *expressly* delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Here Tucker was making a last-ditch attempt to salvage language from the Articles of Confederation, Article II of which declared, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." (More on this in the next chapter.)

Madison opposed Tucker's amendment, however, arguing that "it was impossible to confine a government to the exercise of express powers; there must necessarily be admitted *powers by implication*, unless the constitution descended to recount every minutiae." (Emphasis added.) Here, again, Madison invoked the need for implied powers, the Anti-Federalists' nightmare.

Tucker's amendment failed twice, first in the committee of the whole and then in the full House, by a 32-17 vote.

As Labunski noted, the change would have had dramatic consequences: "The Tucker amendment would have greatly diminished congressional authority under the 'necessary and proper' clause, which had granted Congress substantial discretion to carry out responsibilities assigned by the Constitution." At least it would have created tension within the document, undercutting those who sought to interpret the government's powers in the broadest possible way. The necessary-and-proper clause was a source of great concern to the Anti-Federalists. "Brutus" had warned that "no terms can be more indefinite than these, and it is obvious, that the legislature alone must be the judge what laws are proper and necessary for the purpose." And in Federalist 44 Madison

had responded that "no axiom is more clearly established in law or in reason than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included." That is exactly worried the Anti-Federalists.

This episode raises interesting questions. In light of Madison's plea that there must necessarily be admitted powers by implication, what are we to make of his famous line in Federalist 45 that "the powers delegated by the proposed Constitution to the Federal Government, are few and defined"? When constitutionalists, libertarian or otherwise, appeal to original meaning, intent, or understanding, which one have they in mind? And which counts more: what was said during deliberations over the text (according to Madison's notes); what was said in the Federalist Papers, which were polemical newspaper columns written to win public support for the Constitution; or what was said by Madison in the debate over the Bill of Rights? Is Madison a reliable ally to be cited with confidence?

Moreover, when the Constitution says, "Congress has the power To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof," where is the bright line that limits the scope of the national government?

Most important, how is something as malleable as the language of a political document borne of compromise to protect our freedom from those who would read its phrases broadly?

Madison was right, of course. No constitution could expressly enumerate all powers without appending an endless list of minutiae. There must be implied powers. But that's the danger of a constitution and a monopoly constitutional government. Implied powers must be inferred, and inference requires interpretation. Who is likely to have the inside track in that process: those who seek to restrict government power or those who seek to expand it? We know the answer to that question.

10

The Constitution or Liberty

> "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."

We might think those words—or words to the same effect—are in the U.S. Constitution. But they are not. They are from Article II of the Articles of Confederation, America's first constitution. They could have been placed in the U.S. Constitution but were deliberately left out in 1787 and again in 1789.

As we saw in the last chapter, after the Constitution was ratified, something vaguely like Article II was added to the Constitution as the 10th Amendment. Unfortunately it is like Article II in the same sense that a whale is like a fish—superficially.

As noted in the last chapter, the 10th Amendment says: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

One significant difference, as we've already seen, is that Article II qualifies the word *delegated* with *expressly*. The 10th Amendment does not, due to James Madison's opposition. The difference was no oversight. Thus while the Articles of Confederation really was a document of explicitly enumerated congressional powers, or an honest attempt at such, the Constitution, contrary to widespread belief, was not.

The two clauses had another significant difference, as William Crosskey noted in *Politics and the Constitution in the History of the United States* (1953). Article II says expressly undelegated powers are *retained* by the states. But in the 10th Amendment, such powers are *reserved*. To *retain* is to keep what one already possesses. To *reserve* something to someone does not imply it was previously possessed. Thus the 10th Amendment diminishes the states compared to Article II. Crosskey also offers persuasive evidence that virtually no one—neither the Federalists nor Anti-

Federalists—thought the 10th Amendment changed the nature of the Constitution. On the contrary, it was taken as a reaffirmation.

In a 2005 research paper titled "The Dubious Enumerated Power Doctrine" (online at https://law.utexas.edu/faculty/calvinjohnson/DubiousEnum.pdf) Professor Calvin H. Johnson of the University of Texas Law School presented formidable evidence that the framers had no intention of limiting the national government's powers to the 16 items listed in Article I, Section 8, of the Constitution.

"In carrying over the Articles' wording and structure, they removed old Article II's limitation that Congress would have only powers 'expressly delegated' to it," Johnson wrote. "When challenged about the removal, the Framers explained that the expressly delegated limitation had proved 'destructive to the Union'.... Proponents of the Constitution defended the deletion of 'expressly' through to the passage of the Tenth Amendment. That history implies that not everything about federal power needs to be written down."

The Federal Convention of course operated on the assumption that more, not fewer, powers were needed for the national government than were allowed under the Articles. Johnson quotes some of the framers to indicate this attitude. As already noted, Madison wrote to Jefferson that "the evils suffered and feared from weakness in Government have turned the attention more toward the means of strengthening the [government] than of narrowing [it]."

When the convention began its work the delegates passed resolutions to guide the committees that were drafting particular sections of the document. Johnson explained that one such binding resolution specified that the new government would have every power enumerated in the Articles and an additional power (quoting the resolution) "to legislate in all Cases for the general Interests of the Union."

This conflicts with the common view that Article I, Section 8, of the Constitution exhausts the national government's powers. That view is undermined by several inconvenient facts. For example, the first clause of Article I, Section 8, states, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States...." That's a hefty grant of power that does not appear to be further restricted by any subsequent language. (Jefferson and Madison disagreed. See Madison's Federalist 41, keeping in mind, again, that the Federalist Papers

were essentially ad copy for the Constitution and against the Anti-Federalist opposition.) The 16 specific powers that follow don't appear to limit the taxation clause but rather coequal provisions. (See chapter 11, "Was the Constitution Really Meant to Constrain the Government?")

But then why include a list of powers if it was not meant to be exhaustive? Johnson responded: "Reading the Constitution as giving a general power to provide for the general welfare means that the enumerated powers of clauses 2 through 17 are *illustrative* of what Congress may do within an appropriately national sphere, but are not exhaustive." (Emphasis added.)

In other words, Congress can't do whatever it wants: it can only act for the common defense and general welfare. But that's a lot and it's not all spelled out, especially since words don't interpret themselves. Thus in the eyes of the framers, the government would be limited, but not in the way that today's constitutionalists believe. The view among the framers was that Congress's jurisdiction covered all matters national in scope, leaving local matters to the states. But importantly, as Johnson wrote, "both Madison and Hamilton argued that the division between the federal and state governments was a legislative or political question that would be set in the future by competition between those governments for the loyalty of the people."

We know that the Constitution must have contained implied powers from the beginning. Article I, Section 9, expressly prohibits Congress from doing certain things, such as passing ex post facto laws and bills of attainder and granting titles of nobility. Why would such prohibitions have been thought necessary if Congress could exercise only enumerated powers? (We've already noted another example: the implied power of eminent domain, later limited, for a while, by the Fifth Amendment.)

Johnson's argument would not be news to the Anti-Federalists. (It should be noted that Southern Anti-Federalists like Patrick Henry objected to an expanded national government in part because they feared the taxing power might be used to free their slaves. Thus was a good cause, decentralization of power, perhaps permanently stained by a link to the abomination of slavery. Samuel Johnson had it right: "How is it that we hear the loudest yelps for liberty among the drivers of negroes?")

Moreover, when advocates of the proposed Constitution advertised the document as containing express, enumerated powers, the Anti-Federalists and fellow travelers such as Thomas Jefferson scoffed. For exam-

ple, Federalist James Wilson said: "The congressional authority is to be collected, not from tacit implication but from the positive grant expressed in the [Constitution].... [E]verything which is not given [to the national government], is reserved [to the states]."

To which Jefferson replied: "To say, as Mr. Wilson does that … all is reserved in the case of the general government which is not given … might do for the Audience to whom it was addressed, but is surely gratis dictim, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation [Article II], which declared that in express terms."

Calvin Johnson is happy the Constitution has expansive and implied powers. No libertarian would be. But we must separate what the Constitution appears to say and how we evaluate it, and resist the temptation to let our political-moral views warp our reading.

11

Was the Constitution Really Meant to Constrain the Government?

There's no shortcut to a free society. But that hasn't prevented some libertarians from looking for one. A shortcut favored by many advocates of limited government is the imagined restoration of the "lost" Constitution. If only we could get back to the Constitution as it was written and understood in its time, they say. It's a sincere wish, but as a path to a free society, it's riddled with potholes. Not that I don't want the Constitution interpreted in the most restrictive way in order to prevent violations of liberty. The problem is how we can get there from here. Many advocates of liberty think they just have to appeal to the "original meaning or understanding" and things would more or less take care of themselves. But if that were so, why are we in the mess we're in now? I presume that earlier generations interpreted the Constitution in a way more to the liking of today's constitutionalists. What happened? Since that time, the Constitution has never been suspended; the government wasn't replaced by a nonconstitutional regime. The formal Constitution has been in force continuously since 1789. Everything that happened was justified constitutionally.

So Lysander Spooner, the 19th natural-law individualist anarchist and constitutional scholar, was right. To quote him again: "the Constitution has either authorized such a government as we have had, or has been powerless to prevent it," he wrote in "The Constitution of No Authority" (online at http://praxeology.net/LS-NT-6.htm.). The "parchment barrier" against power (James Madison's term for the Bill of Rights) wasn't much of a barrier. (Where it appears to have worked, it's because the liberty in question is deeply rooted in people's values independent of any document. Why is the First Amendment more honored than the Fourth?)

This suggests that understanding the Constitution—and constitutional government itself—is not the straightforward project it's made out to be. The reason is not hard to discern. Controversies over the meaning of rules—especially rules about justice, freedom, and force, which must be applied in unforeseeable circumstances—are inevitable. As already discussed, constitutions do not speak for or interpret themselves. People interpret them. There is no way to avoid moral and political discourse. And there's always the chance that someone else's interpretation will prevail. What then?

The Constitution, let us not forget, was the product of compromise, crafted so as to be acceptable both to Federalists, who wanted a strong central government, and people who distrusted concentrated power. The proof is that Alexander Hamilton and Thomas Jefferson, whose political philosophies could hardly have been more different, both looked on the Constitution with favor (less so in Jefferson's case).

Can't we resolve the differences over meaning by appealing to the writings of the framers, such as the Federalist Papers or James Madison's letters and notes on the Federal Convention? We can try. But where does that get us? Anything the framers said or wrote about the Constitution was necessarily expressed in language—which inevitably will be subject to the same controversies regarding its application as the Constitution itself. The problem is merely moved back a step. Instead of arguing about the Constitution, we'd be arguing about what Madison, Hamilton, and John Jay *wrote* about the Constitution. But if a given interpretation of a constitutional clause is controversial, wouldn't the framers' statements about the clause be controversial also? How do we resolve any controversy? By resort to other statements? The process would have no end.

We've already seen Ludwig Wittgenstein's insight in this regard, "Any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning."

Take the pesky general-welfare Clause. The term *general welfare* appears in the preamble to the Constitution as well as in Clause 1 of Article I, Section 8, which sets out the powers of Congress. Contrary to what many constitutionalists believe, the clause looks like a general grant of power: "Congress shall have the Power *To* lay and collect Taxes, Duties, Imposts and Excises, to . . . provide for the common Defense and general

Welfare of the United States. . . ." (Emphasis added.) Following Clause 1 are 17 more clauses, each beginning with the capitalized word *To* like the one above. This suggests that all 18 clauses are coequal, independent items in a list. Clause 1, then, does not look like a preamble introducing an exhaustive list of 17 powers.

Madison rejected this interpretation, which had been voiced by the Antifederalists. In Federalist 41 he wrote:

> It has been urged and echoed, that the power to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States, amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.
>
> Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases….
>
> But what color can the objection have, when a specification of the objects alluded to by these general terms immediately follows, and is not even separated by a longer pause than a semicolon?

Does this dispose of the matter? Hardly. First, the Constitution does not direct us to consult Madison for definitive interpretations of possibly vague clauses. (Must we also find out what Hamilton thought? Who else?) In the Federalist Madison was *selling* the Constitution to a partly skeptical population. It is plausible that the Federalists who dominated the state ratifying conventions were aware of this and didn't take Madison's pitch seriously. At any rate, we can't know what was in their minds when they voted yea. We only know what language they assented to.

Second, the construction of Article I, Section 8, is, alas, patently inconsistent with Madison's description. (I'm reminded of Chico Marx's line, "Who are you going to believe, me or your own eyes?") Madison's point about the semicolon is ironic, since it supports my view not his. Madison's case would have been stronger if the punctuation mark were a colon, since that's how we introduce lists. Semicolons suggest elements at the same level.

Some might say that we must judge Article I, Section 8, by the entire Constitution and specifically the purposes enumerated in the Preamble. Fine. Here's the Preamble:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Conspicuously missing from this list is: *to constrain the powers of government*. How did we overlook this? One comeback is that restraining government is implicit in the references to justice and liberty. In my view, justice and liberty certainly impose limits on anyone's power to use force, namely, limitation to defensive and restitutive purposes. But there are other notions of justice and liberty (which I would regard as mistaken). Advocates of expansive government power also see themselves as champions of justice and liberty—just ask them. How do we know that the language in the Constitution doesn't mirror those other notions? There was a good deal of government intervention in the states back then, including poor relief and regulation of commerce.

We could answer that question by pointing to the Declaration of Independence, which embraces the rights to life, liberty, and the pursuit of happiness. But does that really get us out of the woods? Someone who believes the Preamble authorizes the welfare state will similarly believe the rights to life, liberty, and the pursuit of happiness *entail* the welfare state. But even if the Declaration resists that interpretation, we must note, as historian Merrill Jensen did, that the authors of the Constitution of 1787 were quite a different set of men from those who signed the Declaration of Independence in 1776.

My message is not one of despair. But we will not promote the freedom philosophy merely by invoking a political document written by men who thought the main problem with America was too little, not too much, national government. Rather, we must cut to the chase and convince people directly that our concepts of freedom and justice best accord with their own deepest moral sense.

12

That Mercantilist Commerce Clause

The commerce clause in Article I, Section 8, of the Constitution has been used to justify a wide expansion of government power, from antidiscrimination laws to drug prohibition to a ban on guns near schools. In objecting to use of the commerce clause for such seemingly remote purposes, some constitutionalists, including many libertarians, rely on a particular historical interpretation of both the clause and the Constitution as a whole. Roger Pilon of the Cato Institute, for instance, writes,

> The Commerce Clause, through which so much modern drug law has been enacted, was written to enable Congress to regulate, or 'make regular,' commerce among the states—and, in particular, to enable Congress to override or address the state and foreign protectionism that was frustrating free trade when the clause was written.... It is all but a commonplace, however, that that was the principal rationale for the clause—indeed, for the new Constitution—in the first place. It was out of a pressing need to regularize the domestic and foreign commerce of the nation that was breaking down under government measures the Articles of Confederation permitted.

There certainly seems to be support for that position. As Pilon notes, Justice William Johnson wrote in *Gibbons v. Ogden*, the first major commerce-clause case: "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."

But there is to be more to the story, and it goes against Pilon's argument. In 2004 a revealing paper appeared in the *William & Mary Bill of Rights Journal* with the curious title, "The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause," by Calvin Johnson, whom we encountered in chapter 10 (online at https://tinyurl.com/htgezb4). I came across this paper for the first time while reading Richard Epstein's book *How the Progressives Rewrote the Constitution* (2007).

Let's start with the text. Article I, Section 8, Clause 3, of the Constitution delegates to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

What does "regulate commerce" mean? Does it mean only to "make regular"? Johnson took a promising route to finding out. He wrote, "To determine what was meant by 'regulation of commerce,' this review collects and categorizes 161 uses of the phrase 'regulation of commerce' or the word 'commerce' in the debates over the adoption of the Constitution. One hundred thirty-nine of those uses are associated with a specific goal or program. . . . The samples come from both sides of the debate and the sampling was intended to be omnivorous."

Here is Johnson's summary of his findings:

> In the original debates over adoption of the Constitution, regulation of commerce was used, *almost exclusively*, as a cover of words for specific *mercantilist* proposals related to deep-water shipping and foreign trade. The Constitution was written *before* Adam Smith, laissez faire and free trade came to dominate economic thinking and the Commerce Clause draws its original meaning from the preceding *mercantilist* tradition. All of the concrete programs intended to be forwarded by giving Congress the power to regulate commerce were *restrictions on international trade giving subsidy or protection to favored domestic merchants or punishing imports or foreign producers*. [Emphasis added.]

He added, "Neither trade with the Indians nor interstate commerce shows up as a significant issue in the original debates." And to drive the point home, he wrote, "It is often now stated that the major purpose of the Constitution was to prevent protectionist economic policies among the states and to establish a common market with free trade across state borders. *Barriers on interstate commerce, however, were not a notable issue in the original debates*." (Emphasis added.)

This is consistent with the fact that the first economic bill passed by the first Congress under the Constitution—on July 4, 1789—was a comprehensive protectionist tariff. Moreover, as we've seen, the mercantilist Alexander Hamilton believed a strong national government was necessary precisely to keep the tariff against European goods higher than the states could have kept it. States competing for trade would drive it down to low levels, Hamilton feared. As he wrote in Federalist 12:

> It is therefore, evident, that one national government would be able, at much less expence, to extend the duties on imports, beyond comparison further, than would be practicable to the States separately, or to any partial confederacies: Hitherto I believe it may safely be asserted, that these duties have not

> upon an average exceeded in any State three per cent. . . . There seems to be nothing to hinder their being increased in this country, to at least treble their present amount.

Treble what the states had imposed! But only if trade policy was cartelized under a central government. This was an important reason for replacing the Articles of Confederation with the Constitution. One can look at it as a document intended to stifle competition among the states.

Johnson reinforces this point: "Hamilton argued that imposts by the individual states would be difficult to enforce because the bays, rivers and long borders between the states made smuggling too easy. On the federal level, however, there was only one side to guard—the Atlantic. The general government would regulate commerce with a uniform impost and so make commerce productive of general revenue."

Revenue was one of the big attractions for the advocates of a strong central government. James Madison asked, "Was it not an acknowledged object of the Convention, and the universal expectation of the people, that the regulation of trade should be submitted to the general government in such a form as would render it an immediate source of general revenue?"

Unfortunately, Johnson adds, the Anti-Federalists did not oppose giving the national government the power to tax imports. They too were mercantilists. (*The Wealth of Nations* was barely a decade old.) However, as he points out, the national government didn't need the commerce clause to tax imports or to stop the states from doing so. Those things are handled elsewhere in Article I.

Johnson continued:

> Commerce in the constitutional debates primarily referred, at 83% of the program-associated quotes, to Atlantic Ocean shipping. The most important issues within regulation of commerce were tax issues: *to regulate commerce meant to tax it* (27% of program-associated quotes). The remainder of the actively-proposed programs under regulation of commerce … were restrictions on foreign trade. Proponents of the Constitution advocated retaliatory tariffs against the British as punishment for excluding American ships from the British West Indies (28%) and they advocated giving American ships a monopoly on the export of American commodities (22%). [Emphasis added.]

As this shows, revenue was not the only concern. Johnson documents that Federalists and Anti-Federalists alike feared trade imbalances, the loss of gold and silver, and the importation of luxury goods. They were, at bottom, mercantilists. So too did they favor subsidies under the

rubric "regulation of commerce." Johnson writes, "Hamilton had argued as early as 1781 that the Congress needed the 'power of regulating trade, comprehending a right of granting bounties and premiums by way of encouragement.'" He was joined in this mercantilist effort by George Washington and Madison, who, lamenting what he called "the present anarchy of our commerce," "joined [Johnson writes] in the enthusiasm, denouncing those who were 'decoying the people into a belief that trade ought in all cases to be left to regulate itself.'" It's unclear who thought that trade should regulate itself.

Johnson commented: "Indeed, given that Madison had condemned those who advocated free trade and had traced most of our political and moral errors to the imports that drained us of our precious metals, the insincere part of Madison's 1789 address to the House was the opening claim that he was 'the friend to a very free system of commerce.'"

The upshot of Johnson's thesis is that the commerce clause, contrary to common belief, was mercantilist in intent, although most of the protectionist program was never adopted because of popular resistance. As a result, Johnson doesn't believe the clause was the main impetus for the Constitution: "Clause 1, the first power listed, gives the federal government the power to tax to provide for the common defense and general welfare. The tax power gave effect and consequence to the federal government. The explanation for the constitutional revolution thus plausibly resides in Clause 1 … rather than in Clause 3, the Commerce Clause."

But what about Justice Johnson's quote above, claiming that the chief purpose of the Constitution was to keep interstate trade open? Professor Johnson responded: "Justice Johnson's comments are not a fair description of the effect of the Constitution, but they are a fair description of a movement for nationalization and against balkanization of the states, which includes the adoption of the Articles [of Confederation]. He continued:

> Reducing barriers on interstate trade, however, was not an important part of the constitutional debates. The major reason for this was that the goal had already been mostly achieved and was not challenged. The Articles of Confederation had already prohibited any state from imposing a duty, imposition or restriction on any out-of-state citizens that it did not impose on its own inhabitants. The states seem to have followed the norm well enough that the issue did not make it among the issues the debaters were most concerned about.

Nevertheless, many people believe that interstate trade barriers were *the* concern of the framers and ratifiers. How can that be? It might have something to do with the fact, Johnson writes, that "The Federalists

did use the specter of trade barriers to scare voters toward ratification of the Constitution…. [But] Hamilton's example of interstate barriers came from the German empire, not from the United States."

Two more brief points: First, the commerce clause is usually regarded as pertaining only to interstate commerce, but this is not self-evident. William Crosskey in *Politics and the Constitution in the History of the United States* (1953) argued plausibly that at the time, "among the several states" meant "among *the people* of the several states" and that an exclusively *interstate* meaning was almost certainly not intended. For example, he provided quotations from literate people at the time who referred to the duty of government to promote peace or tranquility or happiness "among the several states." The contexts of these quotations indicate that these could not have been meant to exclude *intrastate* peace or tranquility or happiness. In fact, in one example a delegate to the Federal Convention lamented that although Congress in the Confederation period "was intended to be a body to preserve peace among the states," it was not authorized to suppress Shays's Rebellion, an entirely intrastate affair.

Moreover, Crosskey provides many quotations showing that the word *state* itself more often than not meant *the people* of a state. This was apparently the default meaning; other senses of the word seemed to require specification. Had the framers meant "trade between people of different states," they were perfectly capable of saying that, as they did in Article III: "The judicial Power shall extend to all Cases … between Citizens of different States."

Second, self-described strict constructionists insist that *commerce* means only trade, not manufacturing and other economic activities. But some historians who have examined how the word was used in 1787 say the word was more general. The upshot is that the commerce clause may not have been intended as a limit on the power of Congress to regulate trade, but more of a general grant of power. At the very least, this "original meaning" cannot be dismissed out of hand.

This brings us to Johnson's title, "The Panda's Thumb." Fans of Stephen Jay Gould will recognize that phrase. It's the title essay of one of his books and refers to the evolution of a panda's "thumb" from a wrist bone. Johnson's point is that from mercantilist beginnings, the commerce clause evolved into something very different: "That the power to regulate commerce was once a mercantilist clause, regulating

commerce by restricting it, should not bother us very much. We are no longer mercantilists."

Considering the daily panic of pundits and politicians about the "trade deficit," one has to wonder what Johnson is talking about here.

13

The All-Embracing Power to Tax

Despite warnings from the Anti-Federalists, some people today refuse to believe that the Constitution gave Congress a virtually limitless power to tax. The vastness of this power can be seen in America's experience with the income tax. For many opponents of the income tax the name *Brushaber* is magical. It comes from *Frank R. Brushaber v. Union Pacific Railroad Co.,* the 1916 U.S. Supreme Court case that upheld the 1913 income-tax law passed under the 16th Amendment to the U.S. Constitution. That income-tax opponents would look with favor on a Supreme Court opinion that affirmed, in the most sweeping language, Congress's power to tax incomes "from whatever source derived" seems incomprehensible. But according to their reading of the case, *Brushaber* is salvation.

That reading, I'm sorry to say, is wrong—in the extreme. After close study of the case, its context, predecessors, and successors, I am compelled to conclude that *Brushaber* offers neither aid nor comfort to those looking for a legal escape from the hated income tax. If we are ever to get this monster off our backs, it will not be through casuistry and pettifoggery. We will have to pull off a far tougher feat: convincing a critical mass of the American people that taxation is theft.

A cautionary note: do not conclude from what I will demonstrate in this series of articles that I approve of the income tax. My book on that subject, *Your Money or Your Life: Why We Must Abolish the Income Tax,* makes my position clear. The tax (like all taxes) entails the threat of physical force against nonaggressors and is thus indistinguishable from robbery or extortion. In the most fundamental terms, the income tax is objectionable not because it's an *income* tax, but because it is an income *tax*. In other words, Frank Chodorov, one of my heroes, was wrong. It's not the income tax that is "the root of all evil." It's taxation per se—the

transfer of purchasing power from the people to the state—that is the ultimate power without which government could not operate.

The gulf between morality and the edicts of governments is vast. To say that something is legal (in the narrow sense) or constitutional is not to say it is moral or proper. When I say the income-tax laws satisfy the requirements of the U.S. Constitution, I hope I will not be taken to say that the income tax is legitimate in the moral sense.

I know libertarians and others who insist that *Brushaber* shows beyond doubt that the federal government has no constitutional power to tax the wages of ordinary Americans and that the income-tax laws passed over the years were never intended to tax that form of income. In this view, the only income targeted for taxation was that which is derived from federal privilege: government employment, government contracts, corporate income, trade across national boundaries, business done in the federal possessions, etc. One looks at *Brushaber* in vain for such a statement. (If "privilege" is broad enough to include trade with foreigners, the concept is very broad indeed—broad enough to cover almost all people under the jurisdiction of the U.S. government and hence all forms of income.)

But according to *Brushaber* fans, the link between taxable income and federal privilege is indirect. The emptiness of this claim will be clear by the end of this chapter.

To understand *Brushaber* we have to understand why the 16th Amendment was passed. And to do that, we have to reach back to 1894, when Congress passed the Wilson-Gorman Tariff, which included an income tax. (The first U.S. income tax was passed during the War Between the States.)

But first we must pause to consider the matter of direct and indirect taxes, an important distinction in the Constitution. Article I, Section 8, Clause 1 of the Constitution states, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . ; but all Duties, Imposts and Excises shall be uniform throughout the United States." Article I, Section 9, Clause 4, states, "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

This has been interpreted as a simple distinction: direct taxes must be apportioned among the states according to population; indirect taxes must be uniform throughout the states.

What seems simple on its face is not simple at all. It is far from clear what a direct tax is and what an indirect tax is. The Framers provided one example of a direct tax, the head tax, and used several terms for presumed indirect taxes: duties, imposts, and excises. But as we'll see, that doesn't tell us whether a given tax is, say, an excise tax or not.

In 1794, during George Washington's administration, Congress passed a tax on "carriages for the conveyance of persons," whether for hire or for personal use. This was not a sales tax, but a $16 assessment on every carriage owned, including those possessed at the time the tax was passed. Since the tax was not apportioned among the states, the courts were asked to declare it unconstitutional.

Was that a tax on the ownership of property, making it direct and in need of apportionment? Or was it on the *use* of property, presumably making it an excise and thus an indirect tax not in need of apportionment (but in need of uniformity)?

No less an authority on the Constitution than James Madison, a member of Congress, said it was a direct tax and hence unconstitutional as written. His friend Fisher Ames, a respected Federalist member of Congress, said it was an indirect tax and hence perfectly constitutional because "the duty falls not on the possession, but on the use." Arch-Federalist and Treasury Secretary Alexander Hamilton filed a brief in the case, in which he said, "If the meaning of the word 'excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered as an 'excise.'"

These men who attended the Federal Convention did not agree on whether this tax was direct or indirect.

Although each of the six Supreme Court justices had a different rationale, the Supreme Court, in *Hylton v. United States* (1796), sided with Hamilton and Ames. The tax was declared indirect and not in need of apportionment.

Here was an early clue that the distinction between direct and indirect was by no means straightforward. If Madison on one hand and Hamilton and Ames on the other couldn't agree on what seemed to be a simple matter, what lay ahead? In fact, efforts to decide what is direct and what is indirect have something of the feel of a coin toss. Earlier Hamilton had confessed confusion about the terms: "It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution." No less an authority on the Constitution

than Fisher Ames, who like Hamilton and Madison attended the Federal Convention, said, "It was difficult to define whether a tax is direct or not." Indeed, when someone at the Convention asked for a clarification of the term *direct taxation*, Madison recorded in his notes, "No one answered."

To add to the confusion, I will point out that while American legal authorities have regarded taxation of income generally as an indirect (excise) tax not requiring apportionment, the British have long regarded it as a direct tax.

The United States got its first income tax during the Civil war, again demonstrating that war harms ordinary people in more ways than one. In any war government becomes an especially voracious consumer of the people's resources, so it is no surprise that the first income tax came when it did.

Several successive wartime bills enacting progressive income taxes were passed by Congress, and when the war ended, the income tax did not. Changes to the law got rid of the progressive rate structure, but the tax continued. A flat rate of 5 percent was levied on incomes over $1,000. Out of a population of 39.5 million, no more than 250,000 people paid it. The tax, however, was set to expire in 1870, but it would not end. The pro-income-tax forces rallied, and Congress passed a 2.5 percent tax with a $2,000 exemption. Then, two years later, that tax was allowed to expire. For the first time since the war, (wealthy) Americans did not see their incomes taxed.

The big budget surplus was a major reason the tax was permitted to die. Meanwhile, the pro-tax lobby kept at work, prompting the introduction of 68 bills from 1874 to 1894. A big selling point for populists was that the income tax would permit large reductions in tariffs, which, they correctly argued, harmed working people for the benefit of wealthy manufacturers. Their wish to relieve workers of the burden of protectionism was admirable, but their strategy was flawed. Eventually, Americans would have an income tax and high tariffs. There's a lesson in that for all would-be tax reformers.

Congress next passed an income tax in 1894, during a depression that ate up the budget surplus. President Grover Cleveland, who said he opposed the tax, let it become law without his signature. The law imposed a 2 percent tax on "gains, profits and incomes" over $4,000 during a five-year period. Few people would have paid it—and it had a short

life, because it was successfully challenged by a bank stockholder, Charles Pollock, who objected that taxation of dividend income as written in the law was unconstitutional because it was not apportioned among the states. His landmark U.S. Supreme Court case, *Pollock v. Farmers' Loan & Trust Co.* (1895), paved the way for the 16th Amendment.

To cut to the chase, the Supreme Court struck down the unapportioned tax. This has led people to conclude that the Court held income taxation itself unconstitutional. But, as we have seen, the Court did not say that.

The case had to be argued twice. In the first instance, the Court declared most of the bill unconstitutional, but split 4-4 on the question of whether a tax on general income was also unconstitutional. (One justice was ill.) On rehearing, the Court voted 5-4 to affirm its earlier decision and to add that income taxation per se was not barred by the Constitution.

The majority opinion, written by Chief Justice Melville Fuller, who has a classical-liberal reputation, is instructive. Recall that the Constitution distinguishes between direct taxes, such as a head, or poll, tax, and "Duties, Imposts and Excises," presumably indirect taxes. Direct taxes must be apportioned among the states according to the census. Indirect taxes do not require apportionment, but must be uniform throughout the country. Recall also that from the beginning, there was no general agreement on precisely which taxes were direct and which were indirect.

The 1894 tax was comprehensive, which led the Court to consider the nature of the tax as it affected different sources of income. Taking its two *Pollock* rulings together, the Court concluded that a general tax on income, being indirect, was constitutional without apportionment, but that a tax on income from real and personal property, being indistinguishable from a tax on the property itself, was direct taxation and thus required apportionment. Regarding the second point, the Court held,

> [Can] it be properly held that the constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership, and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

> … Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom.

Thus the Court said that some taxes on income, depending on the source from which it derives, are direct taxes requiring apportionment. This did not mean that all income taxes were in that category. Determining whether a given tax is direct requires an examination of the income's source.

As to taxation of other income, the Court said it had "not commented on so much of it [the law] as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such."

In other words, a general income tax is an excise (indirect) tax and does not require apportionment. "[There] is no question as to the validity of this act," the Court ruled, "except [the sections on real and personal property]." Thus the tax on wages, salaries, and profits was held to be constitutional. But this created a problem. If the provisions that taxed income from real estate and securities were stricken, the Court said, "this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain, in substance, a tax on occupations and labor. We cannot believe that such was the intention of congress." The Court concluded, "[The] scheme must be considered as a whole." So the entire act was stricken. This is what leads people to believe that income taxation in general was voided, but as we've seen, that is not the case.

The Court stressed that it was not its job to say whether an income tax was desirable. Nevertheless, it reminded the county that "the instrument [Constitution] defines the way for its amendment."

Champions of income taxation suffered a big setback. But they had one hope: a constitutional amendment. In 1913 the 16th Amendment was added to the U.S. Constitution. I leave aside the claims that the amendment was ratified improperly by the states. No court accepts this argument, which is based on trivialities. Besides, as we've seen, the case against the procedural integrity of the original Constitution's ratification is far stronger.

The 16th Amendment states: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without

apportionment among the several States, and without regard to any census or enumeration."

In light of *Pollock* one can see the significance of the phrase "from whatever source derived." The amendment removed a restriction, one of the few, from Congress's power to tax, namely, by relieving it of the need to apportion a tax on income from property. As we shall see, it did not grant Congress the general power to tax incomes *because Congress needed no amendment to exercise a power the court said it already had.*

The same year that the 16th Amendment was ratified Congress passed a graduated income tax during a special session called by President Woodrow Wilson. As usual, the income tax began as a tax on the wealthy. (World War II turned it into a truly mass tax. That's war for you.) Shortly after passage, the tax law was challenged in federal court. The case culminated in a revealing Supreme Court decision, *Brushaber v. Union Pacific Railroad,* which was handed down in 1916. Frank Brushaber, a stockholder in the railroad, contended that the tax on the company violated due process. The Court rejected Brushaber's claims, arguing that it is "well settled" that the due-process provision is not a limit on the power to tax: "in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause."

For anyone looking for protection from taxation this is an ominous statement. The tax-protest movement attaches great weight to this opinion—for reasons that mystify me. The language of *Brushaber* should make any advocate of liberty cringe.

The Court laid the groundwork for its opinion by rehearsing the ruling in *Pollock*. It noted that the *Pollock* Court did not rule that income taxes in general were direct taxes requiring apportionment—only certain income taxes, namely, those on land and securities. The *Brushaber* Court commented,

> Nothing could serve to make this clearer than to recall that in the Pollock Case, in so far as the law taxed incomes from other classes of property than real estate and invested personal property, that is, income from "professions, trades, employments, or vocations," *its validity was recognized;* indeed, it was expressly declared that *no dispute was made upon that subject,* and attention was called to the fact that taxes on such income had been sustained as excise taxes in the past. [Emphasis added.]

In other words, Congress always had the constitutional power to tax incomes. (Tax-protest activists make much of the fact that the income tax is held to be an excise tax, but it's not clear what this gets them.)

The Court went on to say that the purpose of the 16th Amendment was to relieve the government of what the *Pollock* Court had to engage in, namely, an examination of the *sources* of income. In other words, future courts would no longer have to inquire whether a tax on a particular kind of income was in its effect a direct tax. Contrary to Frank Brushaber's argument, it said, no limitations on the power to tax incomes can be divined in the 16th Amendment. Indeed, all such contentions are "in irreconcilable conflict with the very purpose which the Amendment was adopted to accomplish."

If the opinion had stopped there, it would have been enough to depress opponents of income taxation. But the Court did not stop there. It went on to describe Congress's power to tax in the most sweeping terms possible, stressing that this power predated the 16th Amendment and was present from the beginning of the government. For example, the Court said that "the authority conferred upon Congress by § 8 of article 1 'to lay and collect taxes, duties, imposts and excises' is *exhaustive and embraces every conceivable power of taxation*" [emphasis added]. This is followed by: "[There] was authority given, as the part was included in the whole, to lay and collect income taxes," "the conceded complete and all-embracing taxing power," "the complete and perfect delegation of the power to tax," "the complete and all-embracing authority to tax"; and the "plenary power [to tax]."

In case someone missed the point, the Court also referred to "the all-embracing taxing authority possessed by Congress, including necessarily therein the power to impose income taxes."

Could that be any more clear?

No Court has contradicted the holding in *Brushaber*. One can quibble with the Court's opinion that the Amendment did not create a new class of taxation, namely, a direct tax that needed no apportionment. It seems to me that is what the Amendment did. But that is a side issue. The undeniable upshot of *Brushaber* is that *under the U.S. Constitution* Congress always had the power to tax anything, including incomes.

Thus the income tax is and has always been constitutional. The manufactured argument that the income tax was intended to, and constitutionally *could,* tax only incomes derived from some federal privilege is

entirely lacking in foundation. If you ask proponents of this position to prove their case, they become evasive, or they make ludicrous arguments, along the lines that the word *includes* is a term of limitation rather than "a term of enlargement," as a court put it. (One writer argues that only government employees are subject to withholding because the code says, "[The] term 'employee' *includes* an officer, employee, or elected official of the United States, a State, or any political subdivision thereof, or the District of Columbia…." (Emphasis added.)

Like it or not (*Not!)* the U.S. Constitution empowers the Congress to levy any tax it wants. You may read the Constitution otherwise, but the constitutionally empowered courts have spoken. Reading one's libertarian values into the Constitution in defiance of the text and court holdings is futile. It can land you in prison—for life.

As we've seen, the Constitution's clauses are often vague, purposely so; it is a political document and the product of compromise. For better or worse the Constitution means what the occupants of the relevant constitutional offices say it means.

The battle over the taxing power took place long ago—in 1787—between the Federalists and Anti-Federalists, before the Constitution was ratified. Under the Articles of Confederation, Congress had no power to tax; it could only ask the states to raise money. When the Federal Convention (after violating its mandate merely to revise the Articles) proposed to give the central government that fearsome virtually unlimited power, the Anti-Federalists objected, predicting terrible things would happen. One Anti-Federalist warned, "By virtue of their power of taxation, Congress may command the whole, or any part of the property of the people." They should have been listened to, but the Anti-Federalists lost. We can't pretend the battle never occurred.

If we want to be free of income taxation (and all the rest) we will have to effect an intellectual revolution that will convince people that no one, no government, has the right to deprive peaceful people of their lives, liberty, or property. There is no shortcut to freedom.

14
The Constitution and Congressional Generosity

Every now and then we get a glimpse into what government officials, acting under the Constitution, really think about our rights to life, liberty, and property.

The U.S. Justice Department a decade ago provided such a glimpse in a controversial tax case, *Murphy v. IRS* (2007). How revealing it is! For it teaches us that if the government abstains from taxing all your income, you should be grateful for this "congressional generosity." The Anti-Federalists warned us.

To recap the case, Marrita Murphy was awarded $70,000 in compensatory damages for the mental distress and loss of reputation she claimed to have suffered after she acted as a whistleblower against her employer, the New York Air National Guard. She paid about $20,000 in federal income taxes on that money, but later asked for a refund on grounds that the damage award should have been excluded from her gross income under §104(a)(2) of the Internal Revenue Code (Title 26 of the U.S. Code). That section states: "gross income does not include— … (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness …."

The IRS rejected the request because her injuries were nonphysical and the section specifies "physical injuries." She sued in federal district court and lost.

Murphy then appealed to the U.S. Court of Appeals for the District of Columbia Circuit. She argued that the compensation was covered by §104(a)(2), but if not, then the section is unconstitutional because it

would permit the taxation of money that is not included in the constitutional and statutory meaning of "income."

The Justice Department rebutted that Murphy's injuries were nonphysical—and hence not included in §104(a)(2)—and that IRS policy was consistent with the concept of "income" as used since the 16th Amendment was ratified in 1913.

A three-judge panel stunned the government by ruling in Murphy's favor that §104(a)(2) is unconstitutional: "The framers of the Sixteenth Amendment would not have understood compensation for a personal injury—including a nonphysical injury—to be income." (Point of historical fact: the Amendment did not delegate to the government the power to tax income. Under the Constitution, it always had that power.)

Next, the Justice Department petitioned to have the case heard by the entire circuit court (en banc). However, before the court could rule on the petition, the original three judges announced they would rehear the case themselves. After doing so, they reversed their earlier ruling. If Congress wants to exclude from income damage awards for physical injuries but not for nonphysical injuries, that was Congress's prerogative, the judges said. As the Supreme Court put it in 1996, "exclusions from gross income were matters *not of right but rather of congressional generosity.*" (Emphasis added.) Taxpayers apparently should be grateful for what they are allowed to keep and should not ask for more.

Murphy asked the Supreme Court to take the case, but the Court said no. The decision stands.

The Justice Department's petition for rehearing is revealing—and chilling. The Department's task in the petition was to convince the court that the judges had defined "income" too narrowly, allowing them to exclude compensation for nonphysical injury from gross income. They had ruled that compensatory damages for injuries are intended to make a victim whole—that is, to restore something that is not taxable. Since the damage award was not a replacement for something taxable, such as wages, the judges initially said, the award itself should not be taxable.

What is ominous about the petition is how broadly the Justice Department views the government's power to tax. Unfortunately, the Department has the Constitution and a long line of cases to back up its position.

Here's a sample of what the Justice Department argued (internal quotes are from previous court opinions, citations are excised, and all emphasis is added):

> Congress's power to tax income, like its power to levy non-direct taxes generally, is indeed "expansive." In Brushaber, the Supreme Court emphasized that Congress's taxing power is "exhaustive and embraces every conceivable power of taxation." It referred to the constitutional limitations as "not so much a limitation upon the complete and all-embracing authority to tax, but in their essence [ ] simply regulations concerning the mode in which the plenary power was to be exerted."…
>
> In [Commissioner v.] Glenshaw Glass [1955], the Court reviewed the "sweeping scope" of the predecessor to §61(a) [the beginning of the section of the law defining "gross income"] and observed that it had "given a liberal construction to this broad phraseology in recognition of the intent of Congress to tax all gains except those specifically exempted."The Court held that income includes "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."

The Department's petition proceeded to quote earlier court opinions on the broad range of the government's power to tax, for example, "We have repeatedly emphasized the 'sweeping scope' of [§61, the code section that defines gross income] and its statutory predecessors" and "[Income] extends broadly to all economic gain not otherwise exempted."

The government's petition also emphasized that the decision not to tax something belongs to Congress—and Congress alone:

> Any determination to exclude such damages from income is not required by the Constitution or driven by tax considerations, but is one of policy based upon value judgments…. Such determinations are the sole province of Congress, and … Congress established its clear intent to tax the type of award (for nonphysical damages) taxpayer here received.

In this connection, the petition quoted a 1996 Supreme Court case, *O'Gilvie v. U.S.*, which attributed the exclusion from gross income of compensatory damages for personal injury to—"congressional generosity"!

The petition closed with the claim that even if the damage award is not construed to be income "within the meaning of the Sixteenth Amendment," the government may still tax it:

> The constitutional restrictions on Congress's taxing power deal only with how to tax, not what to tax.To conclude that the tax here is unconstitutional, the panel had to determine that it is either a direct tax requiring apportionment, or an indirect excise that is not uniform….The panel wholly failed to perform this critical part of the analysis.

To boil the petition down to the fewest words: Congress has the constitutional power to tax whatever it darn well pleases, thank you. If it abstains from taxing a type of revenue (be it income or not), just be

thankful for its generosity. But don't go thinking you have a right not to have it taxed.

Political officials may talk a limited-government game, but let a judge suggest there's something they can't tax and they show their true colors.

To be sure, Murphy's attorney, David Colapinto, responded to the petition, and he too cited Supreme Court cases. As philosopher John Hasnas wrote, "Because the legal world is comprised of contradictory rules, there will be sound legal arguments available not only for the hypothesis one is investigating, but for other, competing hypotheses as well." As noted, the Supreme Court declined to hear the case. But it would be mistake to think there is an objectively "right" answer. In the Constitution game, "right" (in the sense of what gets enforced) is whatever the courts decide. Constitutions and laws don't interpret themselves. People interpret them, and only some people's opinions count.

We really have no reason to be shocked by the government's extravagant claims because we were warned over 200 years ago. In 1787 the Anti-Federalist Robert Yates ("Brutus"), objecting to Congress's unlimited power to tax under the proposed Constitution, wrote, "This power therefore is neither more nor less, than a power to lay and collect taxes, imposts, and excises at their pleasure; not only the power to lay taxes unlimited, as to the amount they may require, but it is perfect and absolute to raise them in any mode they please."

15
Empire on Their Minds

The U.S. government's unceasing effort to control events around the globe is a topic of much discussion these days. Unfortunately, even many critics of the American empire think it is relatively new. Some do understand that its origins preceded the 20th century and that the empire did not begin with the Cold War or U.S. entry into the world wars. They would likely see the Spanish-American War in 1898 as the beginning, when America acquired territory as far away at the Philippines. But I would look even further back than that. How far back? The second half of the 18th century. The earliest days of American empire-building shed light on how America's earliest rulers perceived their constitutional powers and hence on the Constitution itself. The next two chapters are presented for that purpose.

Even the government's schools teach, or at least taught during my 12-year sentence, that America's founders had—let us say—an expansive vision for the country they were establishing. The historian William Appleman Williams's extended essay, *Empire as a Way of Life* (1980), provides many details. Clearly, these men had empire on their minds.

Before he became an evangelical for independence from Great Britain, Benjamin Franklin proposed a partnership between Great Britain and the American colonists to help spread enlightened empire throughout the Americas. His proposal was rejected as impractical, so he embraced independence from Britain—without giving up the dream of empire in the New World. George Washington would have shared the vision; he spoke of the "rising American empire" and described himself as living in an "infant empire."

Thomas Jefferson—"the most expansion-minded president in American history," (writes Gordon S. Wood in *Empire of Liberty: A History of the Early Republic: 1789-1815* (2009)—set out a vision of an "Empire of Liberty," later revised as an "Empire *for* Liberty," and left the presidency

believing that "no constitution was ever before as well calculated as ours for extensive empire and self-government." Before leaving office, of course, he acquired the gigantic Louisiana territory from France (828,000 square miles) without constitutional authority, a violation he was fully aware of.

As Jefferson, who favored a U.S. shield showing a pillar of light shining down from heaven on the children of Israel, wrote James Monroe in 1801, after assuming the presidency, "However our present interests may restrain us within our own limits, it is impossible not to look forward to distant times, when our rapid multiplication will expand itself beyond those limits, & cover the whole northern, if not the southern continent, with a people speaking the same language, governed in similar forms, & by similar laws.

Indeed, in the eyes of the founders, the American Revolution was largely a war between a mature, exhausted empire and a nascent one. Many—but assuredly not all—Americans of the time would have cheerily agreed. The founders' goal was to bring civilization (which was still identified with England and many of its institutions) to the New World's benighted. As Jefferson indicated, this vision was more than continental, because South America was never regarded as permanently off limits. If expansion required conflict with the French and Spanish also, so be it, when the United States was prepared.

The Indian Wars were among the first steps in empire building. The unspeakable brutality and duplicity—the acts of ethnic cleansing and genocide, as we say today—were crimes, not merely against individuals, but also against whole societies and nations. "Imperialism" was not yet a word in use, but that's what this was, as were the designs and moves on Canada (one of the objects of James Madison's War of 1812), Mexico, Cuba, Florida, the Mississippi and New Orleans, Louisiana, the Northwest, and the Pacific coast (the gateway to Asia). The wishes of the inhabitants—who were "as yet incapable of self-government as children," as Jefferson said of Louisiana's residents—didn't count. (Lincoln's war is thus understood as an exercise in empire preservation.)

A good deal of this program was tied up with trade. For libertarians, trade far and wide is a good thing, but one must keep in mind that the expansion of trade in those days (as in these) depended on how strong the government, that is, its military, was. By hook and crook, a constitution—the Articles of Confederation—that denied the national gov-

ernment the powers to regulate and promote trade, to tax, and to raise an army and navy had been exchanged for one—the U.S. Constitution—that authorized those powers. Trade was a *policy*, not a recognition of individual freedom, and that meant government activism, which included selective embargoes, such as those imposed by Jefferson's program of "peaceful coercion," and even war if deemed necessary.

America's founders did not share of the view of a true liberal, Richard Cobden, who said several decade later, "They who propose to influence by force the traffic of the world, forget that affairs of trade, like matters of conscience, change their very nature if touched by the hand of violence; for as faith, if forced, would no longer be religion, but hypocrisy, so commerce becomes robbery if coerced by warlike armaments."

Obviously, the Articles of Confederation were a poor platform for empire building; not so the Constitution. "Both in the mind of Madison and in its nature," Williams wrote, "the Constitution was an instrument of imperial government at home and abroad."

I don't mean to say that the liberty of Americans was of no import to their rulers. In light of the Revolution, they understood that a government without broad acceptance would be doomed. I do mean, however, that liberty was to be subordinated (only to the extent necessary, of course) to national greatness, which was America's destiny. (I first heard the words "Manifest Destiny" in a government school. Do students hear it today?)

Americans sensed that something exceptional was happening. And indeed it was, as Wood explained in *The Radicalism of the American Revolution* (1991). To the dismay of the dominant Federalists, average Americans, exemplified by those whom Wood calls "plebeian Anti-Federalists," saw the revolution as having overturned hierarchical and aristocratic colonial society in favor of a democracy that facilitated personal and commercial self-interest. (This did not sit well with those who wanted America to be, per Wood, "either a hierarchy of ranks or a homogeneous republican whole.")

But even well-grounded exceptionalism can quickly turn dark by the belief in one's duty to enlighten—or , if necessary, exterminate—the benighted. And that's what happened. The Indian Wars were popular (the land was coveted), and so were the other imperial exploits. (This is not to say there were no dissenters.)

Williams notes that with exceptionalism came aloneness and thus danger. Thus the quest for security and tranquility for the new nation—invoked in precisely those words—fueled these imperial exploits. The national-security state is nothing new; only the technology and the wealth to make empire feasible have changed.

Some American figures glimpsed that empire and liberty might not so easily fit together. (The unabashed empire builders were convinced that freedom at home *required* empire.) The problem was that even many who opposed empire, sometimes quite eloquently, wanted ends that only an empire could procure. Williams puts John Quincy Adams in this small camp. Secretary of State Adams's July 4, 1821, speech, declaring that America "goes not abroad in search of monsters to destroy," was "thoughtful, powerful, and subversive," Williams writes. "But for the time Adams remained enfolded in the spirit of empire and was unable to control the urge to extend America's power and influence." (As secretary of state, he supported Maj. Gen. Andrew Jackson's seizure of Florida from the Spanish, although Congress had not declared war. In 1819, backed by a veiled military threat, Adams negotiated the Transcontinental Treaty under which Spain ceded the Florida territories over to the Mississippi River and defined a boundary between U.S. and Spanish territory that stretched to the west coast. This treaty along with the Treaty of 1818 with Britain, negotiated by Albert Gallatin, paved the way to America's status as a Pacific power. Adams's famous "monster" speech may be seen as a rationalization for not recognizing revolutionary governments in South America, when nonrecognition had other, less lofty reasons.)

Adams was the main author of the Monroe Doctrine, which announced not only that the United States would stand aloof from Europe's quarrels, but also that the Western Hemisphere was exclusively the U.S. government's sphere of influence: "The American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers," for any such extension would be taken as "dangerous to our peace and safety [i.e., our national security]."

So keep out of our backyard, Europe, and we'll keep out of yours. Nearly 100 years later, America would be at war in Europe.

16

The War of 1812 Was the Health of the State

In 1918, having watched in horror as his Progressive friends gleefully jumped onto Woodrow Wilson's war wagon, Randolph Bourne penned the immortal words: "War is the health of the state." As he saw things,

> The republican State has almost no trappings to appeal to the common man's emotions. What it has are of military origin, and in an unmilitary era such as we have passed through since the Civil War, even military trappings have been scarcely seen. In such an era the sense of the State almost fades out of the consciousness of men.
>
> With the shock of war, however, the State comes into its own again,…
>
> In general, the nation in wartime attains a uniformity of feeling, a hierarchy of values culminating at the undisputed apex of the State ideal, which could not possibly be produced through any other agency than war. Loyalty—or mystic devotion to the State—becomes the major imagined human value.

An earlier group of Americans would have agreed, although they would not have shared Bourne's horror. These are the men who sought war with England in 1812. As Wikipedia notes,

The United States declared war on June 18, 1812 [after close party votes in Congress] for several reasons, including trade restrictions brought about by the British war with France, the impressment of American merchant sailors into the Royal Navy, British support of Indian tribes against American expansion, outrage over insults to national honor after humiliations on the high seas, and possible American interest in annexing British territory in modern-day Canada.

Here I will explore neither the justifications for the war nor the terms of the Treaty of Ghent. Suffice it to say that Britain ceased its impressment policy before the war started and sought to reconcile with America after the war, opening up opportunities for westward U.S. expansion at the expense of Spain and the Indians. Instead I'll focus on

how the war eroded liberalism in the United States by concentrating power and interest in the national government. There's a lesson here: even a war that appears justifiable—Britain conscripted Americans into its navy and interfered with commerce—had enduring illiberal domestic consequences beyond the immediate transgressions of taxes, debt, and trade embargoes—dangerous precedents were set.

While I don't wish to overstate the liberalism of prewar America—slavery and the war on Indians were only the most egregious violations of the principles of liberty—it would be wrong to think that America did not become *less* liberal with the war, that Bourne's maxim was suspended in this case. It was not.

Prewar, there were still eminent voices favoring small government and decentralized power. Postwar, this was hardly the case. Indeed, the idea of a "living constitution" seems to have been born in this era. The War of 1812 should bring to mind the French saying "The more it changes, the more it's the same thing."

In the final chapter of *The Radicalism of the American Revolution* (1991), the historian Gordon S. Wood noted that as the 19th century unfolded, the survivors of the founding generation were unhappy with what they saw in America. "It was increasingly clear," Wood wrote, "that no one was really in charge of this gigantic, enterprising, restless nation … the most thoroughly commercialized society in the world." He continued: "The founding fathers, of course, had thought that eminent men and imaginative minds were in control of events and caused things to happen. But the heroic conception of society was now relegated to a more primitive stage of development." Thus,

> This democratic society was not the society the revolutionary leaders had wanted or expected. No wonder, then, that those of them who lived on into the early decades of the nineteenth century expressed anxiety over what they had wrought….
>
> Indeed, a pervasive pessimism, a fear that their revolutionary experiment in republicanism was not working out as they had expected, runs through the later writings of the founding fathers. All the major revolutionary leaders died less than happy with the results of the Revolution. The numbers of old revolutionaries who lost faith in what the Revolution had done is startling.

To their dismay, people were more concerned with their personal economic affairs than with the new nation. "White males had taken only too seriously the belief that they were free and equal with the right to pursue their happiness," Wood wrote. Thus commercial success out-

weighed republican virtue, disappointing Hamiltonians and Jeffersonians alike. "A new generation of democratic Americans was no longer interested in the revolutionaries' dream of building a classical republic of elitist virtue out of the inherited materials of the Old World."

As a result, "the founding fathers were unsettled and fearful not because the American Revolution had failed but because it had succeeded, and succeeded only too well."

The retired founders were not the only ones who worried. They were joined by the men who still exercised power, especially Republicans James Madison and James Monroe, and such influential men of the next generation as John Quincy Adams, Henry Clay, and John C. Calhoun. As war with England approached, Republicans (as opposed to the Federalists) had no problem finding silver linings. War would not only inject government with a new dynamism—with important implications for trade policy, money and banking, and internal improvements—it would also give the people a shot of badly needed national spirit.

Thus the War of 1812 is an underrated turning point in American history, rivaling the Civil War, the Spanish-American War, and the two world wars. Indeed, the War of 1812 helped to launch the empire that manifested itself in those later conflicts. In its aftermath, America's rulers could believe that their continental and global ambitions, backed by the army and navy, were fully realizable. They just needed a government equal to the task.

It's not too much to say that modern America was born in 1812—1815. While it was a Republican war—Federalists in the northeast opposed and even threatened secession over it—the postwar Republican Party took on most of the fading Federalist Party's program with respect to the role of government in the American economy. Advocates of smaller, decentralized government (Andrew Jackson and Martin Van Buren, among others) rallied in the decades before the Civil War, but in the end the mercantilists and militarists—advocates of Henry Clay's Hamiltonian American System—triumphed to the point that Grover Cleveland, outraged by the rampant privileges for business insiders, railed against what he called the "communism of combined wealth and capital" that had given rise to communism in its ordinary sense.

Before open hostilities with England broke out, Wood wrote in another book, *Empire of Liberty: A History of the Early Republic, 1789-1815* (2009), "America had been engaged in a kind of warfare—commercial

warfare—with both Britain and France since 1806." As president (1801-1809), Thomas Jefferson had pushed Congress to impose a general trade embargo—a ban on *all* American exports—during the Napoleonic wars, when American merchant ships (and a warship) were interfered with, American neutrality violated, and merchant seamen impressed into the Royal Navy. Jefferson called this response, which was highly divisive because it disrupted so many Americans' means of earning a living, "peaceful coercion" and an alternative to war. Wood added, "The actual fighting of 1812 was only the inevitable consequence of the failure of 'peaceful coercion.'"

As the War of 1812 approached during the Republican administration of James Madison, the War Hawks saw silver linings everywhere. "Republicans even came to see the war as a necessary regenerative act—as a means of purging Americans of their pecuniary greed and their seemingly insatiable love of commerce and money-making," Wood wrote. "They hoped that war with England might refresh the national character, lessen the overweening selfishness of people, and revitalize republicanism." The money cost of war was dismissed as insignificant compared to national honor and sovereignty. Indeed, the war was called the "Second War of Independence." "Forget self and think of America," the *Richmond Enquirer* editorialized (quoted in Wood).

Republicans, of course, had previously warned of the dangers of war, including high taxes, debt, corruption, a big military, and centralized power. Madison himself famously said that war contained the "germ [of] all the enemies to public liberty." So now the party set out to prosecute a war while trying to avoid the evils they held were intrinsic to it. Republicans in Congress talked about cutting military spending even as war loomed. But it didn't quite work out that way. In early 1812 Congress built up the army, though it—initially—decided a navy was not needed against the greatest naval power on earth. (The strengthened U.S. navy later did very well against Britain.)

The Republican Congress also raised taxes, including dreaded internal taxes, conditioned on war actually breaking out. Madison, Wood wrote, "was relieved that at last the Republicans in Congress had 'got down the dose of taxes.'" Still, the government would have to borrow money to finance the war. The proliferation of government securities and new note-issuing banks followed, of course. (On the connections among the war, public debt, Madison's Second Bank of the United

States, inflation, government-sanctioned suspension of specie payments, government bankruptcy, and subsequent economic turmoil, see Murray Rothbard's *A History of Money and Banking in the United States* and his earlier *The Panic of 1819*.)

Wood noted that Americans hoped the war would deal a blow to the Indians in the Northwest, who had the support of Britain and whose land was much coveted. Indian removal (extermination) was a popular government program. Moreover, "with the development of Canada freeing the British Empire from its vulnerability to American economic restrictions, President Madison was bound to be concerned about Canada."

> Although Madison's government always denied that it intended to annex Canada, it had no doubt, as Secretary of State [James] Monroe told the British government in June 1812, that once the United States forces occupied the British provinces, it would be "difficult to relinquish territory which had been conquered."

Interest in Canada was not just material. A belief in "Manifest Destiny," though the term would not be coined until 1845, was a driving force. (Acquisition of Spain's Florida territories was also on the agenda.) America was the rising "Empire of Liberty," fated by providence to rule North America (at least) and displace the worn-out empires of the Old World.

Even though the war had no formal victor and produced no boundary adjustments (U.S. forces were repulsed in Canada after burning its capital, for which Britain retaliated by burning Washington, D.C.), Americans were generally delighted with the outcome, mistakenly thinking that Madison had dictated terms at Ghent. (Wood noted that a record 57 towns and counties bear Madison's name.) Wood wrote that a group calling itself the "republican citizens of Baltimore" expressed "a common refrain throughout much of the country" in April 1815 when it declared that the war

> has revived, with added luster the renown which brightened the morning of our independence: it has called forth and organized the dormant resources of the empire: it has tried and vindicated our republican institutions: it has given us that moral strength, which consists in the well earned respect of the world, and in a just respect for ourselves. It has raised up and consolidated a national character, dear to the hearts of the people, as an object of honest pride and a pledge of future union, tranquility, and greatness.

The anti-Hamiltonian Albert Gallatin, secretary of the Treasury from 1801 to 1814, said that because of the war, the people "are more American; they feel and act more as a nation." Arthur A. Ekirch Jr. reported in *The Decline of American Liberalism* (1955) that Gallatin admitted that (Gallatin's words) "the war has laid the foundation of permanent taxes and military establishments, which the Republicans had deemed unfavorable to the happiness and free institutions of the country."

Madison's restraint, however it is to be explained, ought to be acknowledged. As we have seen, he was an advocate of centralized government and implied powers, yet "he knew that a republican leader should not become a Napoleon or even a Hamilton," the sympathetic Wood wrote. He quoted an earlier admirer of Madison who said that the president conducted the war "without one trial for treason, or even one prosecution for libel." (Some Republicans viewed Federalists who were openly sympathetic to the British as traitors.) A more ambitious politician might have not have kept the "sword of war" "within its proper restraints." However, imperial chickens eventually come home to roost, and Madison indisputably reinforced the imperial course of his predecessors. Moreover, Jeffrey Rogers Hummel wrote in *War Is the Health of the State: The Impact of Military Defense on the History of the United States* (2012, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2151041), Madison asked Congress for conscription—only the war's end kept Congress from acting—and later a peacetime standing army.

How the war dramatically changed America, the people, and the government is discussed at length in *Dangerous Nation* (2007) by Robert Kagan—the historian and prominent neoconservative thinker—and *John Quincy Adams and American Global Empire* (1992) by William Earl Weeks. (Unlike Weeks, Kagan approves of the war's effects and the American empire in general.)

Kagan noted that the war boosted efforts to expand America westward. "Indian tribes north of the Ohio River, deprived of British support, gave up vast stretches of land in the years immediately following the war," Kagan writes, "permitting a huge westward migration of the American population.... Trying to contain American continental aspirations after the war with Great Britain, John Quincy Adams observed, would be like 'opposing a feather to a torrent.'"

Kagan noted that

> The requirements of fighting the war expanded the role of the federal government and exposed deficiencies in the operation of federal power under the old Jeffersonian Republican scheme—much as the Revolutionary War had pointed up the deficiencies of the Articles of Confederation. The end of the war in 1815 brought calls for augmented national powers even from Republicans.…
>
> Madison, Jefferson's staunch colleague in the struggle against Hamiltonian policies in the 1790s, now all but embraced the Hamiltonian system.

Attitudes toward the military also changed for reasons of national and economic security. When Monroe succeeded Madison as president, Weeks wrote, a

> guiding principle … in [his] effort to expand American foreign trade concerned the construction and maintenance of a formidable military force. Republicans traditionally had mistrusted large military establishments as subversive of republican institutions. Yet once again, the War of 1812 led to a reevaluation of a basic tenet of the Republican faith.

Indeed, future President John Quincy Adams, Monroe's secretary of state and a champion of Clay's American System, said, "The most painful, perhaps the most profitable, lesson of the war was the primary duty of the nation to place itself in *a state of permanent preparation for self-defense.*" (Emphasis added.)

"Along with support for a national bank," Weeks added, the Republicans' new imperial principles "stood as a dramatic break with the traditional philosophy of the Republican party. The vision of a decentralized inward looking agrarian republic had been replaced by an imperial vision which reflected many of the basic tenets of the disgraced Federalist party."

It's important to realize, Weeks wrote, that "after the Treaty of Ghent the search for new markets became the explicit aim of American foreign policy."

Kagan agreed: "the War of 1812 spurred the federal government to redouble efforts to open access to foreign markets." Previously, Republicans like Jefferson, while reconciled to the new commercial world, hoped that commerce would not dominate America or its politics since that preoccupation would inevitably draw the country into perpetual international turmoil. But with the war, many now saw things differently. "Active promotion of commerce required further expansion of American military strength, especially the navy," Kagan wrote.

In other words, America would not promote free trade by unilaterally setting a good example, as libertarians call for today. Instead, the government would aggressively open foreign markets, particularly the colonial possessions of the European powers, threatening retaliation against uncooperative regimes and displaying the military card rather prominently. But such "free trade" soon gave way to an explicit mercantilism, that is, special-interest economic protectionism. Weeks wrote that

> changing economic conditions had inspired a new vision of American empire based not on free trade but on protection of certain sectors of the economy. The shortages caused by embargo and war had led to the growth of an extensive manufacturing sector in the United States and a sizable constituency that wanted it protected from foreign competition, once peace was restored.

Revealingly, Weeks wrote, the postwar American Society of the Encouragement of American Manufactures, a pro-tariff group, boasted as members Thomas Jefferson and James Madison along with the old Federalist John Adams.

A remnant of small-government, decentralist, free-trading "Old Republicans" objected to this embrace of centralized power, mercantilism, and militarism, but their voices were fading. Against them, the rising generation of politicians saw the need for new principles. The Old Republicans' narrow interpretation of the Constitution, the new Republicans said, should not be treated as engraved in stone. "A new world has come into being since the Constitution was adopted," Henry Clay said. "Are the narrow, limited necessities of the old thirteen states … as they existed at the formation of the present Constitution, forever to remain a rule of its interpretation? Are we to forget the wants of our country?… I trust not, sir. I hope for better and nobler things."

Apparently the idea of a living constitution was born much earlier than the 1930s.

The new vision pervaded Monroe's administration, which the continental expansionist and militarist John Quincy Adams dominated as secretary of state, and then Adams's own term as president. (Opposition to the spread of slavery would check, temporarily, the drive for southwestern expansion, an ironic turn on Madison's principle that "ambition must be made to counteract ambition.") As for domestic policy, Kagan reported, in 1825, Adams's first year in power, he called for "a national university, government-sponsored scientific explorations, the creation of

new government departments, the fostering of internal improvements, and even the building of a national astronomical observatory."

The "great object of the institution of government is the improvement of the condition of those who are parties to the social compact," Adams said. The government should not only provide internal improvement, such as canals and roads, but should also see to the people's "moral, political, intellectual improvement."

Adams's program, however, proved too much too fast for most Americans. So he, like his father, became a one-term president. But eventually the American System, often propelled by foreign policy and war, would return—for good.

The lesson here is that even a superficially justifiable war can be counted on to produce bad consequences and precedents. The Republicans could not fight a war unaccompanied by what Gallatin called "the evils inseparable from it[:] debt, perpetual taxation, military establishments, and other corrupting or anti-republican habits or institutions." They would sooner have squared the circle.

Moreover, the War of 1812 reinforced the executive branch's de facto monopoly over foreign policy. Within a few years the Monroe administration—and no one more staunchly than John Quincy Adams—would defend Gen. Andrew Jackson's invasion of Spanish Florida and undeclared war on the Seminoles, after which dissenting members of Congress could do nothing but gripe.

Randolph Bourne was right: war is indeed the health of the state.

17

Of Bumblebees and Competitive Courts

Considering that what liberty we continue to enjoy in the West is a product in large part of competition hundreds of years ago among legal institutions operating within the same territory, it's curious that so many libertarians still believe such an order—an essential feature of free-market, or natural-law, anarchism—would be inimical to liberty. Why wouldn't that which produced liberty be up to preserving it?

When I say that competition produced liberty, I of course do not mean that liberty was necessarily anyone's objective. Yet liberty emerged all the same, as if by an "invisible hand." That's how things often work. Good (and bad) consequences can be the result of human action but not of human design (to use a favorite phrase of F. A. Hayek's, which he borrowed from the Scottish Enlightenment thinker Adam Ferguson).

We should be delighted to know that something so wonderful as liberty can emerge unintentionally. It ought to give us hope for the future; if the libertarian movement is deficient, we need not assume that liberty has no chance.

Many authors from the 18th century onward have written about the unintended good consequences of competition, that is, the absence of monopolistic central control. They emphasized that in the West the rivalries between church and state, between nobles or parliament and crown, and between nation-states yielded zones of liberty that endure to this day, however diminished in particular matters. Competition among legal institutions—courts and bodies of law—within overlapping jurisdictions played a large role in this centuries-long beneficent process. These of course are not examples of anarchism; on the contrary, states existed. But competitive overlapping legal regimes are an element of market anarchism. So where a state coexisted with a polycentric legal order, we may say, with Bryan Caplan, that there existed "less than the

minimum" state, that is, something that fell short of the night-watchman state favored by limited-government libertarians.

A good place to read about competition in law and dispute resolution is Todd J. Zywicki's highly accessible 2003 *Northwestern University Law Review* article "The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis." An important feature that "influenced the common law's evolution," Zywicki wrote, "was the competitive, or 'polycentric,' legal order in which the common law developed. During the era that the common law developed, there were multiple English courts with overlapping jurisdictions over most of the issues that made up the common law. As a result, parties potentially could bring a particular lawsuit in a variety of different courts. In turn this created competition among these various courts for business."

The idea of courts competing for "business" sounds strange to modern ears, but it was commonplace before the 20th century. (The extent of private arbitration in international commerce today is largely unappreciated.) Zywicki's paper shows that the common law, which featured this competition, was efficient in the eyes of those who used its services. Monopoly is inefficient even (especially?) in matters of security, dispute resolution, and justice. Moreover, it's a mistake, as F. A. Hayek explained in *Law, Legislation, and Liberty* (volume 1, *Rules and Order* [1978]) to assume that government is the source of law.

Moves away from competition and the common law, then, aren't adequately explained by shortcomings in services to its consumers. Political ambition provides a more satisfactory explanation.

Zywicki draws on the legal historian Harold Berman, who wrote in *Law and Revolution: The Formation of the Western Legal Tradition* (1983), "Perhaps the most distinctive characteristic of the Western legal tradition is the coexistence and competition within the same community of diverse jurisdictions and diverse legal systems."

The legal philosopher Lon L. Fuller, in *Anatomy of the Law* (1968), went further, Zywicki shows: "A possible … objection to the view [of law] taken here is that it permits the existence of more than one legal system governing the same population. The answer is, of course, that such multiple systems do exist and have in history been *more common* than unitary systems." (Emphasis added.)

The limited-government libertarian who insists that market anarchism cannot work because it lacks a monopoly court of final jurisdic-

tion is like the apocryphal aerodynamicist who calculated that a bumblebee couldn't possibly fly. One needed only to point out the window, saying, "Behold!" Likewise, the natural-law market anarchist need only point to history.

Berman also wrote (quoted by Zywicki), "The same person might be subject to the ecclesiastical courts in one type of case, the king's courts in another, his lord's courts in a third, the manorial court in a fourth, a town court in a fifth, [and] a merchants' court in a sixth." This sounds as though the courts were not really competitive, but rather that the variety of courts constituted specialization and a division of labor. That inference would be wrong. To see this we may turn to a keen contemporaneous observer, Adam Smith. In *The Wealth of Nations* Smith noted that despite a de jure division of labor, courts in fact competed with one another, even to the point of entrepreneurially finding ways—indeed, creatively manufacturing reasons—to justify luring cases from other courts. Why do this? Because the courts obtained their revenues from fees paid by parties to cases. The more cases a court heard, the more money it earned, a state of affairs that Smith, no anarchist of course, approved of: "Public services are never better performed than when their reward comes only in consequence of their being performed, and is proportioned to the diligence employed in performing them."

Smith described the legal environment of his day,

> The fees of court seem originally to have been the principal support of the different courts of justice in England. Each court endeavoured to draw to itself as much business as it could, and was, upon that account, willing to take cognisance of many suits which were not originally intended to fall under its jurisdiction. The court of king's bench, instituted for the trial of criminal causes only, took cognisance of civil suits; the plaintiff pretending that the defendant, in not doing him justice, had been guilty of some trespass or misdemeanour. The court of exchequer, instituted for the levying of the king's revenue, and for enforcing the payment of such debts only as were due to the king, took cognisance of all other contract debts; the plaintiff alleging that he could not pay the king because the defendant would not pay him. In consequence of such fictions it came, in many cases, to depend altogether upon the parties before what court they would choose to have their cause tried; and each court endeavoured, by superior dispatch and impartiality, to draw to itself as many causes as it could. The present admirable constitution of the courts of justice in England was, perhaps, originally in a great measure formed by this emulation which anciently took place between their respective judges; each judge endeavouring to give, in his own court, the speediest and most

> effectual remedy which the law would admit for every sort of injustice. [Emphasis added.]

Zywicki also quoted from Smith's *Lectures on Jurisprudence*: "Another thing which tended to support the liberty of the people and render the proceedings in the courts very exact, was the rivalship which arose betwixt them."

It may be argued that the state provided a backdrop to the competitive legal order, meaning that a forum of last resort was always available. This argument loses its force, however, when one realizes, as Edward P. Stringham shows in *Private Governance: Creating Order in Economic and Social Life* (2015), that private dispute-resolution procedures arose in matters where states abstained from involvement, such as the nascent stock markets.

"In short," Zywicki summed up, "a market for law prevailed, with numerous court systems competing for market share in order to increase their fees. This competitive process generated rules that satisfied the demand of consumers (here litigants) for fairness, consistency, and reasonableness."

Bumblebees fly and reasonably pro-freedom dispute resolution emerges without the state, no matter what a cloistered theoretician may think.

18
Looking Back at Magna Carta

June 15, 2015, was the 800th anniversary of the day in 1215 that rotten King John put his seal to the sheet of parchment called the Articles of the Barons—later to be known as Magna Carta—at Runnymede in England. It wasn't the first charter issued by an English monarch pledging to subordinate his power to the law (custom), yet it has had a staying power like no other in the imagination of people worldwide. Indeed, it is seen as a precursor to the U.S. Constitution. Magna Carta's endurance is especially ironic when you consider that at John's request, Pope Innocent III nullified the charter just 11 days later and excommunicated the rebellious barons who forced it on him. (Further ironies: the charter had been drafted by the learned archbishop of Canterbury, Stephen Langton, whom the Pope had selected over John's objection, and it affirmed the autonomy of the church.)

With the nullification, the civil war resumed between king and landholders who had grown tired of his taxes for wars in France (which he lost along with vast properties) and other impositions. In the end, however, they more or less triumphed, as John's successors, starting with his 9-year-old son, reissued the charter, albeit in revised editions. The principle that an English king was not a law unto himself would stand. While Magna Carta did not raise the curtain on a libertarian, or even classical-liberal, future, it may be said to have gotten the ball rolling, even if that was no part of anyone's intention.

The story of Magna Carta is instructive precisely because of its unintended consequences. This has long been noted, for example, by John Millar (1735-1801), a student of Adam Smith, a figure of the Scottish Enlightenment in his own right, and author of the multivolume *An Historical View of the English Government, From the Settlement of the Saxons in Britain to the Revolution in 1688* (1787). The judge and literary critic Francis Jeffrey wrote of Millar in 1804:

> To some of our readers, perhaps, it may afford a clearer conception of his intellectual character, to say that it corresponded pretty nearly with the abstract idea that the learned of England entertain of a *Scotish* [sic] *philosopher;* a personage, that is, with little or no deference to the authority of great names, and not very apt to be startled at conclusions that seem to run counter to received opinions or existing institutions; acute, sagacious, and systematical; irreverent towards classical literature; rather indefatigable in argument, than patient in investigation; vigilant in the observation of facts, but not so strong in their number, as skilful in their application.

Jeffrey wrote that Millar's "leading principle" was that institutions evolve "spontaneously from the situation of the society." "Instead of gazing, therefore, with stupid amazement, on the singular and diversified appearances of human manners and institutions," Jeffrey wrote, "Mr. Millar taught his pupils to refer them all to one simple principle, and to consider them as necessary links in the great chain which connects civilized with barbarous society."

(I found Jeffrey's quotes in Mark Salber Phillips's introduction to Liberty Fund's 2006 edition of Millar's book. Phillips notes that one of Millar's objectives was "a rebuttal of what Millar took to be the royalist and authoritarian politics of Hume's *History* [*of England*], though Millar salutes Hume as 'the great historian of England, to whom the reader is indebted for the complete union of history with philosophy.'")

Regarding Magna Carta, in book 2, chapter 1 of his *Historical View*, Millar wrote,

> The character of John … is universally known, as a compound of cowardice, tyranny, sloth, and imprudence. This infatuated king was involved in three great struggles, from which it would have required the abilities of his father [Henry II], or of his great grandfather [Henry I, son of William the Conqueror], to extricate himself with honour; but which, under his management, could hardly fail to terminate in ruin and disgrace.

The struggles were against the challengers to his land holdings in France, Pope Innocent III, and the rebellious barons. After his humiliating losses in France, John made peace with the pope—accepting Langton at Canterbury and, in Millar's words, "surrendering his kingdom to the pope, and submitting to hold it as a feudatory of the church of Rome."

But his troubles were only beginning. Millar wrote:

> The contempt which this abject submission of their sovereign could not fail to excite in the breast of his subjects, together with the indignation raised by various acts of tyranny and oppression of which he was guilty, produced at

> length a combination of his barons, who demanded a redress of grievances, and the restoration of their ancient laws. As this appeared the most favourable conjuncture which had occurred, since the Norman conquest, for limiting the encroachments of prerogative; the nobility and principal gentry were desirous of improving it to the utmost; and their measures were planned and conducted with equal moderation and firmness.

John would have none of it, and he moved to quash the rebellion of the barons. "He endeavoured by menaces to intimidate them; and, by delusive promises, to lull them asleep, in order to gain time for breaking their confederacy." When that failed, "he made application to the pope as his liege lord; and called upon his holiness to protect the rights of his vassal."

War broke out, and the king, "deserted by almost all his followers," saw the ranks of the rebels grow.

> All further opposition, therefore, became impracticable. At Runnemede, a large meadow between Windsor and Staines; a place which has been rendered immortal in the page of the historian and in the song of the poet; was held that famous conference, when the barons presented, in writing, the articles of agreement upon which they insisted; and the king gave an explicit consent to their demands. The articles were then reduced into the form of a charter; to which the king affixed his great seal; and which, though it was of the same nature with the charters obtained from the preceding monarchs, yet, as it was obtained with difficulties which created more attention, and as it is extended to a greater variety of particulars, has been called, by way of distinction, *the great charter of our liberties.*

Millar claims that "feudal superiority of the crown, over the nobles" had been the rule since William the Conqueror (1066), so "it would probably have been a vain project to attempt the abolition of it." Then what was the point of the gathering at Runnymede on June 15, 1215?

> The chief aim of the nobility, therefore, in the present charter, was to prevent the sovereign from harassing and oppressing them by the undue exercise of those powers, the effects of their feudal subordination, with which he was understood to be fully invested….
>
> The jurisdiction exercised by the king, as a feudal superior, was another source of oppression, for which a remedy was thought requisite; and several regulations were introduced, in order to facilitate the distribution of justice, to prevent the negligence, as well as to restrain the corruption, of judges: in particular, it was declared, that no count or baron should be fined unless by the *judgment of his peers,* and according to the quality of the offence.

Millar then made an intriguing point about Magna Carta's application beyond the barons.

> While the barons were thus labouring to secure themselves against the usurpations of the prerogative, they could not decently refuse a similar security to their own vassals; and it was no less the interest of the king to insist upon limiting the arbitrary power of the nobles, than it was their interest to insist upon limiting that of the crown. The privileges inserted in this great transaction were, upon this account, rendered more extensive, and communicated to persons of a lower rank, than might otherwise have been expected. Thus it was provided that justice should not be *sold,* nor unreasonably *delayed, to any person*. That no freeman should be imprisoned, nor his goods be distrained, unless by the *judgment of his peers,* or by the law of the land; and that even a villein should not, by any fine, be deprived of his carts and implements of husbandry.

King and barons were aware of the fact, articulated by Étienne de La Boétie, that since the few rule the many, the ruled have it in their power to overthrow their rulers. Therefore, "liberal" measures are sometimes necessary to pacify the many to keep them from having revolutionary thoughts or to keep particular groups (such as the rising merchant class) from shifting allegiance to another contender for power. More often than not, acts of political kindness are the result of such a motive.

Thus,

> It is worthy of notice, however, that though this great charter was procured by the power and influence of the nobility and dignified clergy, who, it is natural to suppose, would be chiefly attentive to their own privileges; the interest of another class of people, much inferior in rank, was not entirely overlooked: I mean the inhabitants of the trading towns. It was declared, that no aid [tribute] should be imposed upon the city of London, unless with consent of the national council; and that the liberties and immunities of this, and of all the other cities and boroughs of the kingdom, should be maintained.... The insertion of such clauses must be considered as a proof that the mercantile people were beginning to have some attention paid to them; while the shortness of these articles, and the vague manner in which they are conceived, afford an evidence equally satisfactory, that this order of men had not yet risen to great importance.

With the Great Seal of the king affixed, copies of Magna Carta were distributed throughout the country. But, Millar wrote, "nothing could be farther from [John's] intentions, than to fulfil the conditions of the charter."

> No sooner had he obtained a bull from the pope annulling that deed, and prohibiting both the king and his subjects from paying any regard to it, than, having secretly procured a powerful supply of foreign troops, he took the field, and began without mercy to kill and destroy, and to carry devastation throughout the estates of all those who had any share in the confederacy. The

> barons, trusting to the promises of the king, had rashly disbanded their followers; and being in no condition to oppose the royal army, were driven to the desperate measure of applying to Lewis, the son of the French monarch, and making him an offer of the crown. The death of John, in a short time after, happened opportunely to quiet these disorders, by transmitting the sovereignty to his son Henry the third, who was then only nine years of age.
>
> Under the prudent administration of the earl of Pembroke, the regent, the young king, in the first year of his reign, granted a new charter of liberties, at the same time that the confederated barons were promised a perpetual oblivion for the past, in case they should now return to their allegiance.

There is much more to this story, of course. Suffice it to say here that Millar draws three broad conclusions from his account.

First, he saw significance in the fact that Magna Carta was not the only charter issued by a king; as noted, others were issued before and afterward.

> Taking those charters, therefore, in connexion with one another, they seem to declare, in a clear and unequivocal manner, the general and permanent sense of the nation, with respect to the rights of the crown; and they ascertain, by express and positive agreement between the king and his subjects, those terms of submission to the chief magistrate, which, in most other governments, are [not] otherwise explained than by long usage, and which have therefore remained in a state of uncertainty and fluctuation.

Second, contrary to "common opinion," Millar wrote, "from the Norman conquest to the time of Edward the first [reign, 1272–1307]; while the barons were exerting themselves with so much vigour, and with so much apparent success, in restraining the powers of the crown, those powers were, notwithstanding, continually advancing."

> The repeated concessions made by the sovereign, had no farther effect than to prevent his authority from increasing so rapidly as it might otherwise have done. For a proof of this we can appeal to no better authority than that of the charters themselves; from which, if examined according to their dates, it will appear, that the nobility were daily becoming more moderate in their claims; and that they submitted, in reality, to a gradual extension of the prerogative; though, by more numerous regulations, they endeavoured to avoid the wanton abuses of it. Thus, by the great charter of Henry the third, the powers of the crown are less limited than by the charter of king John; and by this last the crown vassals abandoned some important privileges with which they were invested by the charter of Henry the first.

If Magna Carta was a key moment in the West's advancement toward liberalism, the trajectory was neither straight nor smooth.

Finally, we come to the law of unintended consequences. Millar said students of history "will easily see that the parties concerned in [the procurement of "these great charters"] were not actuated by the most liberal principles; and that it was not so much their intention to secure the liberties of the people at large, as to establish the privileges of a few individuals."

He summed up:

> A great tyrant on the one side, and a set of petty tyrants on the other, seem to have divided the kingdom; and the great body of the people, disregarded and oppressed on all hands, were beholden for any privileges bestowed upon them, to the jealousy of their masters; who, by limiting the authority of each other over their dependants, produced a reciprocal diminution of their power. But though the freedom of the common people was not intended in those charters, it was eventually secured to them; for when the peasantry, and other persons of low rank, were afterwards enabled, by their industry, and by the progress of arts, to emerge from their inferior and servile condition, and to acquire opulence, they were gradually admitted to the exercise of the same privileges which had been claimed by men of independent fortunes; and found themselves entitled, of course, to the benefit of that free government which was already established. The limitations of arbitrary power, which had been calculated chiefly to promote the interest of the nobles, were thus, by a change of circumstances, rendered equally advantageous to the whole community as if they had originally proceeded from the most exalted spirit of patriotism.
>
> The power of apparent precedent worked in the common people's favor; a small measure of liberty was parlayed into a larger measure, despite the efforts of the privileged classes.
>
> When the commons, in a later period, were disposed to make farther exertions, for securing their natural rights, and for extending the blessings of civil liberty, they found it a singular advantage to have an ancient written record, which had received the sanction of past ages, and to which they could appeal for ascertaining the boundaries of the prerogative. This gave weight and authority to their measures; afforded a clue to direct them in the mazes of political speculation; and encouraged them to proceed with boldness in completing a plan, the utility of which had already been put to the test of experience. The regulations, indeed, of this old canon, agreeable to the simplicity of the times, were often too vague and general to answer the purposes of regular government; but, as their aim and tendency were sufficiently apparent, it was not difficult, by a proper commentary, to bestow upon them such expansion and accommodation as might render them applicable to the circumstances of an opulent and polished nation.

Can we libertarians do something similar today?

19
Magna Carta and Libertarian Strategy

Magna Carta is one of those things that virtually everyone across the political spectrum (however defined) has invoked in support of his or her cause. It's been enlisted in a variety of missions. Dissidents of all stripes have held it up as a shield against tyrants, while kings have used it to defend the legitimacy of their rule. Advocates of slavery took refuge in Magna Carta, but so did the proto-libertarian Levellers.

It's tempting to think of Magna Carta as a declaration of the limits of state power and therefore as an early charter of liberty. But the arguments against this perspective are persuasive. It contains little if any political philosophy. As the historian Nicholas Vincent said in an interview, the barons would be appalled by modern conceptions of liberty. It's also important to note that the barons, who appealed to English tradition, were not interested in *everyone's* liberty but only the liberty of a small minority of free men. The language imposing limits on the king's power was vague at best. Bringing the king under the rule of law sounds promising, but it leaves open the question of what the law should be. That was the king's province. The much-lauded clause 39 in the 1215 Magna Carta (there were several versions) stated:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the *lawful judgment of his equals or by the law of the land*. [Emphasis added.]

The italicized words are hardly crystal clear. Trial by jury in criminal matters did not exist at that time, according to the historian Richard Helmholz.

Those words are followed by: "To no one will we sell, to no one deny or delay right or justice."

Again, this sounds promising, but what is right or justice when the king owns his realm?

The principle "no taxation without baronial consent" also appears, though not in those exact words, of course. Nevertheless, the barons were not proto-libertarians. Defending the liberties of "free men" left a lot of people out of the class of beneficiaries. What the barons sought to minimize were John's arbitrary diktats over them. They didn't want it to be so "good to be the king."

Regardless, as we've seen, neither side abided by the agreement, and war between king and barons ensued. King John appealed for help from Pope Innocent III, who excommunicated the barons and declared Magna Carta null and void because the king had signed under duress. However, it was reissued by subsequent kings, albeit with important changes from the original, such as elimination of clause 61, which called for the creation of a council of barons that could sanction the king for wrongdoing. Why would any king reissue a charter that appeared to limit his power? Because having power doesn't mean never having to bargain with those who would oppose you—bargaining may be the least costly way to maintain *some* power. (This point is made clear in the excellent British television series *Monarchy*.)

As Magna Carta scholars point out, the interpretation (mythology) and impact of the charter over the last eight centuries are as important as—maybe more important than—the document and the authors' intentions themselves. Even if it wasn't actually a charter of liberty, it is regarded as such—by people, as I've already noted, who have widely differing views on liberty.

This has implications for libertarian strategy today.

That genuine liberty—in the sense of what Roderick T. Long calls "equality of authority"—can grow out of efforts intended to achieve something less is worth keeping in mind. (Lord Acton and John Millar had important things to say on this score.) I claim no profound insights in the matter of strategy, but I do know that social processes, like the people who actuate them, are complex, and therefore unintended consequences—good and bad—are ubiquitous and to be expected. This makes devising *a* strategy for social change complicated and more likely impossible. There's no algorithm for changing a society from unlibertarian to libertarian. We have no script. That's an argument for the "let a thousand flowers bloom" strategy.

If troublesome barons in the 13th century helped to promote future general liberty without its being part of their intention, the case for lib-

ertarian optimism may be buoyed. Things may look bleak on a variety of fronts, but we can never know what might turn the tide. Magna Carta is not the only example of such unintended consequences. In *Lust for Liberty: The Politics of Social Revolt in Medieval Europe, 1200-1425* (2006), Samuel K. Cohn Jr. described many peaceful and violent acts of resistance against local tyranny, some of which won significant concessions from rulers. It is unlikely the rebels carried a treatise on political philosophy under their arms or a theory of rights in their heads. They didn't gather in the village square to hear a political philosopher read from his latest treatise. The rebels simply reacted against particular burdens that had become intolerable; they did not set out to make a libertarian society. Yet they created facts on the ground, not always permanent, and set precedents for their descendents.

It's more than likely that theorists developed their ideas after studying local revolts. In those days, theory and history weren't compartmentalized. So it's a mistake to think that libertarian theory must precede libertarian social action or that inchoate resistance unguided by "pure" libertarianism can't make real progress toward liberty. Couldn't a thinker spin out a theory of individual rights without prompting from history? It's possible, but it seems more likely that historical episodes jump-started the intellectual process and that theory and action (history) will mutually determine each other. This certainly seems to have been the case with John Locke, Adam Smith, and many other thinkers.

If you want more a modern example to go with Cohn's, I recommend Thaddeus Russell's *A Renegade History of the United States* (2010), which chronicles how liberty was won in the streets through the misbehavior of riffraff who probably never read Locke or Paine or even Jefferson.

There is no *one right strategy*. If anything proves successful, it will be a loose web of complementary strategies (perhaps too loose to call a "web"), with a good measure of improvisation. Theories will prompt action; and action will prompt theories. Some approaches will consist in what will be labeled "compromise." (Oh horror!) That is, individuals and organizations will advance liberty through partial measures to reduce state power. Savvy libertarians will capitalize on such measures to push for more progress toward liberty. ("If you liked Measure X, you'll love Measure Y.") They won't let the perfect be the enemy of the good.

In truth, no compromise is involved if an incremental step is regarded *as such* and not as an end in itself.

I need not point out—or need I?—that merely because one incremental measure meets the libertarian standard as a genuine short-run step toward liberty, not all measures represented as such must do so. Each proposal is to be judged on its own merits, and good-faith disagreements are to be expected. That's the nature of the endeavor. I see no reason for libertarians, in the name of purity, to withhold support for steps that make real progress toward liberty and pave the way for more.

The libertarian movement needs individuals and organizations that devote their efforts to sound incrementalism, just as it needs those that do nothing more than teach pure libertarian philosophy. These approaches need not be at odds. In fact, they are complementary. One without the other is unlikely to succeed because society is unlikely to turn libertarian or dismantle the state all at once. Incrementalism without a guiding philosophy probably won't get us all the way to where we want to go, while merely issuing declarations about libertarianism is unlikely to bring about change. How do we get from here to there if it won't happen in a single bound?

It's important not to conflate philosophy and strategy. An uncompromising market anarchist can coherently embrace incrementalism, understanding that because of most people's conservatism, the state will not be abolished overnight. Murray Rothbard used to say that libertarians should take any rollback of state power they can get. In today's environment, we won't be setting the priorities.

What strikes me as futile is a "strategy" that consists in little more than boldly announcing that—if one could—one would push a button to make the government (or most of it) go away. That approach tells the uninitiated something about the speaker, but it says little about why a free society is worth achieving and why the state is our enemy. *That* requires something more than moralizing shock therapy.

20

The Constitution of Anarchy

This book has been a sustained attack on the idea that the U.S. Constitution is essentially a pro-freedom document. I have contended that, contrary to most people's—and many libertarians'—belief, the framers were not motivated by a love for individual liberty (though it had a place in their political vision) and that the Constitution has done a poor job of preserving individual liberty since it contains language suitable for justifying broad government power. But, admittedly, we in the United States have a good deal of personal freedom, despite the erosion of civil liberty, especially since 9/11, and substantial violations of freedom through taxation, regulation, monetary manipulation, subsidies, and other forms of privilege. If the Constitution is so bad, why do we have any freedom at all? That's what this chapter seeks to answer.

Let's start with with something that will surprise many readers: rejecting the U.S. Constitution does not require one to reject the very idea of a constitution. A free society needs a constitution; in fact, a free society would necessarily have a constitution. There is no choice in the matter. Every society has a constitution. The only question is whether it promotes liberty or violates it.

Here's the real shocker: this is true even of an anarchist society. How can that be?

Let's start by understanding (as I suggested in chapter 8) that a constitution need not be written. In "Market Anarchism as Constitutionalism," Roderick T. Long reminded us that England has an unwritten constitution. (*Anarchism/Minarchism: Is a Government Part of a Free Country?*, edited by Long and Tibor R. Machan, 2008.) Furthermore, a written one may or may not accord with how things are actually done. The Soviet constitution appeared to guarantee freedoms that in fact were routinely denied. Many other examples could be cited, including from the United States. James C. Scott, in *Seeing Like a State: How Certain*

Schemes to Improve the Human Condition Have Failed (1999), has much to say about how the real rules of a society, the ones displayed in common behavior, can differ vastly from the written rules, which are irrelevant to the life of the people. (This phenomenon often leads researchers to misunderstand the cultures they study.)

Clearly, Long wrote, "what matters is a nation's 'constitution' in the original sense of the actual institutions, practices, and incentive structures that are in place."

Since this is the case, we need to explore this matter more closely. What is a constitution typically thought to be? Aside from a blueprint of the government, it is thought to be a set of *restraints* on the conduct of government officials. Remember, Alexander Hamilton and other Federalists said the proposed Constitution was *by nature* a bill of rights, or a set of restraints on the government. Officials, they argued, may not do what they were not authorized to do by the Constitution. (Why that argument was illegitimate is a big part of this book.)

Think about that word *restraint*. Can a document restrain a government official? Obviously not. James Madison understood this when he called the Bill of Rights a "parchment barrier." So if government officials *are* restrained, something other than the written constitution must be doing the restraining. What could that be?

When a government official gives an order to another government official—say, a president orders generals to fight a war, a majority of Supreme Court justices strike down a law (ordering the executive branch not to enforce it), or a judge orders a sheriff to take a convicted defendant to prison—what gives rise to the broad social expectation that the order will be obeyed? One might think that those who carry out the order understand that they will be forced to do it—or fired—if they disobey. But this answer is of no help because we can just as easily ask why another official would follow an order to force the first one to carry out the order, or to fire that person. More likely, however, the first official carries out the order because he believes it's the right thing to do or that it is not his job to determine whether the order is right or wrong as long as it's deemed "lawful." This doesn't mean that no official would ever refuse an order, as the Kentucky county clerk Kim Davis did when she refused to issue marriage licenses to same-sex couples. And Long reminded us that "when the U.S. Supreme Court declared President Andrew Jackson's "Trail of Tears" policy unconstitutional, Jack-

son proceeded with the policy anyway, quipping '[Chief Justice] Marshall has made his decision; now let him enforce it!'"

So there's no guarantee that government officials will always act as they are "supposed" to act; as I said, no constitution, legal system, or statute forces them to do so. Yet they do so almost all the time. Why? Because routine conduct of a particular kind in such circumstances is part of what we mean by society's "actual institutions, practices, and incentive structures that are in place." What restrains government officials—and individuals in general—is something internal rather than external, contrary to what constitutionalists of all parties seem to believe. And, Long added, "those structures exist only insofar as they are continually maintained in existence by human agents acting in certain systematic ways. A constitution is not some impersonal, miraculously self-enforcing robot. It's an ongoing pattern of behavior, and it persists only so long as human agents continue to conform to that pattern in their actions." (On the role of ideology in restraining government, see Jeffrey Rogers Hummel's "The Will to Be Free: The Role of Ideology in National Defense," *The Independent Review*, Spring 2001, online at tinyurl.com/jxm6j38.)

Here's the key point: this feature is no less present in a stateless society than it is in a society with a government. How people, including people who run private defense and dispute-resolution firms, generally conduct themselves *constitutes* the society's incentive structures, that is, its institutions and expectations. Anarchy has a constitution fully as much as a society with a state.

Just as a society with government can have a better or worse constitution (in this real sense), so can an anarchist society. Any limited-government libertarian can point to governments he or she would not want to live under. Yet this does not lead such a libertarian to reject government per se. Similarly, any natural-law market anarchist could identify undesirable stateless circumstances without rejecting statelessness altogether. The difference lies in the (internal) constitution.

The natural question to ask is how we can assure that a stateless society has a good incentive structure, that is, one that promotes justice and liberty. It's an important question, but it's not a question for anarchists alone. It must also be directed to the advocates of government because they face the same challenge. They may not merely assume a proper constitution, for that would beg the question. Once this is un-

derstood, the limited-government criticism of market anarchism loses its force.

It is sheer myth that *government* creates the incentive structure it then operates within, and libertarians don't believe this is the case in areas other than law and security. (That is, they acknowledge the incentives inherent in the market process.) Imagine a government that would pass limited-government-libertarian (minarchist) muster. Where did it come from? If it was the product of a social agreement (which is not how governments arose historically), wouldn't the right incentive structure—that is, people's general expectations of themselves and others—have had to predate the government? The term *government* indicates a set of relationships among people, both rulers and ruled (who would likely outnumber their rulers). Ultimately, all those people have to cooperate generally, that is, assume their expected roles voluntarily, with a minimum of coercion. (This is baked into the terms *government* and *society*.) Again, a constitution and government are not outside society imposing rules of conduct. Thomas Paine showed that he understood this in the quotation given earlier: "Great part of that order which reigns among mankind is not the effect of government. It has its origin in the principles of society and the *natural constitution* of man. It existed prior to government, and would exist if the formality of government was abolished." (Emphasis added.)

The interesting problem is: which alternative—anarchy or minarchy—is most likely to respect and preserve liberty,?

The limited-government response is that only a state can have the checks and balances and the separation of powers required to safeguard liberty. This was Madison's response. But this answer implies that those things cannot exist in an anarchy. Why not? The assumption that they cannot is another instance of the myth that the constitution and legal system are outside society. Just as a state can be imagined without checks and balances, so an anarchy can be imagined *with* them. "Far from eschewing checks and balances," Long wrote, "market anarchists take market competition, with its associated incentives, to instantiate a checks-and-balances system, and to do so far more reliably than could a governmental system.... Separation of powers, like federalism and elective democracy, merely simulates market competition, within a fundamentally monopolistic context."

Of course, libertarians would be the first to point out that the U.S. Constitution's system of checks and balances hasn't exactly been effective. "There has been sufficient convergence of interests among the three branches that, occasional squabbles over details notwithstanding, each branch has been complicit with the others in expanding the power of the central government," Long wrote.

Would anarchy fare better? All signs say yes. Market anarchy would feature a competitive legal system, which means individuals could freely enter the market for security and dispute resolution. No monopolist could exclude rivals. Competition is the ultimate check and balance. Just as competition in the market for goods is a unique "discovery procedure," as F.A. Hayek called it, so would competition in the market for dispute-resolution, security, and remediation be a unique source of discovery. Hayek wrote: "I propose to consider competition as a procedure for the discovery of such facts as, without resort to it, would not be known to anyone, or at least would not be utilized." This inestimable epistemological function cannot be simulated by a monopoly, something libertarians should already understand. (See Hayek's "Competition as a Discovery Procedure," in *New Studies in Philosophy, Politics, Economics, and the History of Ideas*, 1978, and Gregory B. Christainsen's "Law as a Discovery Procedure," *Cato Journal*, Winter 1990, online at tinyurl.com/hkl9h9g. Also see Gustav de Molinari's "The Production of Security," online at praxeology.net/GM-PS.htm.)

But how do we know that we'd discover the right things, namely, how to protect liberty and do justice, rather than the wrong things, namely, ways to aggress and exploit? Again, we have no guarantees (nor with a monopoly either, need I say?) because people have volition, but we can judge our chances as favorable compared to our chances under monopoly. Conflict is expensive, not to mention off-putting to customers, and unlike with government, people in a competitive market who perpetrate violence would have to bear the expenses themselves because they could not tax or conscript the population—a pretty strong disincentive.

Thus Long summed up:

> Anarchy thus represents the extension, not the negation, of constitutionalism. Instead of thinking of anarchy as a situation in which government has been squeezed down to nothingness, it might be more helpful—at least for minarchists—to think of anarchy as a situation in which government has been ex-

> tended to include everybody. This is what Gustave de Molinari, the founder of market anarchism, meant when he wrote, in 1884: "The future thus belongs neither to the absorption of society by the State, as the communists and collectivists suppose, nor to the suppression of the State, as the [non-market] anarchists and nihilists dream, but to the diffusion of the State within society."...
>
> Anarchy is the completion, not the negation, of the rule of law.

Every problem that the advocate of monopoly government hurls at anarchy comes back like a boomerang. For example, in anarchy competing concepts of proper law may arise, but that's also true with a state, particularly under federalism (states of the union do not have identical laws) and a system of checks and balances. If an aggressor organization were to set up a protection agency or court system, people would be free to resist it. The gang would have no monopoly on the legal use of force and no mystique of the state with which to assert supremacy. But what happens when a state turns into an aggressor (beyond its minimum inherent aggressiveness)? We know what happens. For the most part, people suffer under it, if for no other reason than that they are bound to be outgunned. (While revolutions happen now and then, the potential is limited by collective-action problems. Individuals are reluctant to be the first to rebel, even though they'd be willing if they knew many others would join in.)

Another example: Anarchy cannot offer absolute finality to dispute resolution, but neither can a state. Yet anarchy is likely to provide reasonable finality because customers of dispute-resolution firms would value that feature. The spontaneous private transnational mercantile dispute-resolution process that arose after the fall of the Roman Empire (the Law Merchant) featured practical finality because a perpetual appeals process would have been prohibitively expensive for the courts' customers, who needed to get on with their business. This is also true with private arbitration. A process that went on forever would lose customers to competitors who offered better service.

The claimed superiority of minarchism, Long concluded, is merely the belief that government, unlike anarchy, can "magically" deliver what it merely *declares* it will deliver. The real world is messier both in states and anarchies. But at least in anarchy, the emergent, evolving rules and incentives are aligned constructively. Entrepreneurs make profits by solving problems. Government agencies get larger appropriations when they are problem-plagued. (See David Friedman's "Do We Need Government?" online at tinyurl.com/hu4zk.)

To recap, the American counter-revolution represented by the U.S. Constitution need not sour us on the idea of a constitution, checks and balances, and separation of powers because natural-law market anarchy delivers these, and does so better and more justly than a monopoly government. We can have a constitution and our freedom too!

But how do we get there? The insight into the true nature of a constitution holds a clue. It was grasped by the German anarchist Gustav Landauer (1870–1919), whom Long quoted: "The state is a relationship between human beings, a way by which people relate to one another; and one destroys it by entering into other relationships, by behaving differently to one another."

Credits

Quotations from historical figures were drawn from the Federalist Papers, various collections of Anti-Federalist writings, and the following books:

Max M. Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (2003).

Arthur A. Ekirch Jr., *The Civilian and the Military: A History of the American Antimilitarist Tradition* (1972).

Arthur A. Ekirch Jr., *The Decline of American Liberalism* (1955/1967).

E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (1961).

Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* (1940).

Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (1950).

Ralph Ketcham, *James Madison: A Biography* (1971).

Richard Labunski, *James Madison and the Struggle for the Bill of Rights* (2006).

Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (2010).

Edwin J. Perkins, *American Public Finance and Financial Services: 1700-1815* (1994).

Herbert J. Storing, *What the Anti-Federalists Were For* (1981).

William Earl Weeks, *John Quincy Adams and American Global Empire* (1992).

William Appleman Williams, *Empire as a Way of Life* (1980).

Gordon S. Wood *The Creation of the American Republic*, 1776–1787 (1998).

Gordon S. Wood, *Empire of Liberty: A History of the Early Republic: 1789-1815* (2009).

Gordon S. Wood, *The Radicalism of the American Revolution* (1991).

Many chapters of this book originated as columns in my TGIF (The Goal Is Freedom) series, which ran on the website of the Foundation for Economic Education (fee.org), 2006–2012, and then continued on the website of the Future of Freedom Foundation (fff.org), 2012–2015, specifically:

Foundation for Economic Education/The Freeman

"Lost Articles," January 26, 2007, http://fee.org/freeman/detail/lost-articles

"History Lesson Lost," October 6, 2006, http://fee.org/library/detail/history-lesson-lost

"The Decline of American Liberalism," March 23, 2007, http://fee.org/articles/arthur-ekirchs-the-decline-of-american-liberalism/

"Where Is the Constitution?," July 28, 2006, http://fee.org/library/detail/where-is-the-constitution

"The Constitution Within," August 18, 2006 http://fee.org/freeman/detail/the-constitution-within

"The Constitution or Liberty," December 7, 2007 http://fee.org/freeman/detail/the-constitution-or-liberty

"Was the Constitution Really Meant to Constrain the Government?," August 8, 2008, http://fee.org/freeman/detail/was-the-constitution-really-meant-to-constrain-the-government/

"That Mercantilist Commerce Clause," May 11, 2007, http://fee.org/freeman/detail/that-mercantilist-commerce-clause

"Is the Income Tax Unconstitutional?," September 1, 2006, http://fee.org/articles/is-the-income-tax-unconstitutional/

"Don't Repeal the 16th Amendment," May 23, 2008, http://fee.org/freeman/donapost-repeal-the-sixteenth-amendment/

"Congressional Generosity," April 1, 2007, http://fee.org/articles/congressional-generosity/

Future of Freedom Foundation/The Future of Freedom

"James Madison: Father of the Implied-Powers Doctrine," July 26, 2013, http://fff.org/explore-freedom/article/tgif-james-madison-father-of-the-implied-powers-doctrine/

"Beware Income-Tax Casuistry, Part 1," August 1, 2006, http://fff.org/explore-freedom/article/beware-incometax-casuistry-part-1/;

"Beware Income-Tax Casuistry, Part 2," September 1, 2006, http://fff.org/explore-freedom/article/beware-incometax-casuistry-part-2/

"Beware Income-Tax Casuistry, Part 3," October 1, 2006, http://fff.org/explore-freedom/article/beware-incometax-casuistry-part-3/

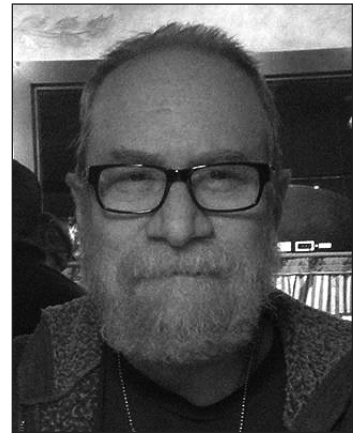
"Empire on Their Minds," March 14, 2014, http://fff.org/explore-freedom/article/tgif-empire-on-their-minds/

"The War of 1812 Was the Health of the State, Part 1," February 27, 2015, http://fff.org/explore-freedom/article/tgif-the-war-of-1812-was-the-health-of-the-state1/

"The War of 1812 Was the Health of the State, Part 2," March 6, 2015, http://fff.org/explore-freedom/article/tgif-war-1812-health-state-part-2/

About the Author

Sheldon Richman is a senior fellow of the Center for a Stateless Society (c4ss.org), chair of the Center's trustees, and a contributing editor at Antiwar.com. He is the author of three other books: *Separating School and State: How to Liberate America's Families* (1994); *Your Money or Your Life: Why We Must Abolish the Income Tax* (1999); and *Tethered Citizens: Time to Repeal the Welfare State* (2001), published by the Future of Freedom Foundation (fff.org). From 1997 to 2012 he was the editor of *The Freeman*, published by the Foundation for Economic Education (fee.org), following which he edited *Future of Freedom* for the Future of Freedom Foundation. Previously he was an editor at the Cato Institute, the Institute for Humane Studies, and *Inquiry* magazine. Richman's articles on foreign and economic policy, civil liberties, and American and Middle East history have appeared in *Newsweek*, *The Washington Post*, *The Wall Street Journal*, the *Chicago Tribune*, the *Chicago Sun-Times*, *USA Today*, *Reason*, *Forbes*, *The Independent Review*, *The American Scholar*, *The American Conservative*, *Cato Policy Report*, *Journal of Economic Development*, *Journal of Palestine Studies*, *Washington Report on Middle East Affairs, Middle East Policy, Liberty*, and other publications. He is a contributor to the *The Concise Encyclopedia of Economics*. Richman is a graduate of Temple University in Philadelphia. He blogs at *Free Association* (sheldonrichman.com).



"This book is a milestone in real liberal history. Never to my knowledge has the liberal critique of constitutionalism been so acutely and concisely put. All those defending the heavy hand of statism will henceforth have to answer Richman's assessment point by point. This book is the best extant overview of the matter." —**Walter E. Grinder**, *Institute for Civil Society*

"Richman delivers an accessible, incisive, and well-grounded argument that the Constitution centralized power and undid some of the Revolution's liberating gains. He rebuts patriotic platitudes but avoids the crude contrarianism so common in libertarian revisionism written for popular consumption. He does not romanticize America's past or overstate his case. Radical and nuanced, deferential to freedom and historical truth, Richman rises above hagiography or demonization of either the Federalists or anti-Federalists to produce an unsurpassed libertarian exploration of the subject."

—**Anthony Gregory**, *Independent Institute*

"[A]fter reading this book, you will never think about the U.S. Constitution and America's founding the same way again. Sheldon Richman's revealing and remarkably well-argued narrative will permanently change your outlook. . . . Richman . . . [is] one of this country's most treasured thinkers and writers."

—**Jeffrey A. Tucker**, *Liberty.me and Foundation for Economic Education*

"No state or government can limit itself through a written constitution, no matter how fine the words or how noble the sentiments they express. It is one of the many virtues of Sheldon Richman's book that it shows how this is true even of the American Constitution, which despite the promises of its designers and the insistence of its defenders down the years, made limited government less and not more likely."

—**Chandran Kukathas**, *London School of Economics*

This book challenges the assumption that the Constitution was a landmark in the struggle for liberty. Instead, Sheldon Richman argues, it was the product of a counter-revolution, a setback for the radicalism represented by America's break with the British empire. Drawing on careful, credible historical scholarship and contemporary political analysis, Richman suggests that this counter-revolution was the work of conservatives who sought a nation of "power, consequence, and grandeur." *America's Counter-Revolution* makes a persuasive case that the Constitution was a victory not for liberty but for the agendas and interests of a militaristic, aristocratic, privilege-seeking ruling class.

Griffin & Lash
Ann Arbor, Michigan