A Reminder: The Constitutional Values of Sympathy and Independence

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ABSTRACT

Nearly all participants in the American Founding shared constitutional values of "sympathy" and "independence." According to the ideal of sympathy, government actors should mirror the full range of popular attitudes. According to the ideal of independence, voters should remain independent of other citizens and of governmental entities, and those entities should remain independent of, and competitive with, each other. Sympathy and independence were central, not peripheral, to the Founders' Constitution, so the document cannot be interpreted properly without keeping them in view. The author provides examples of how constitutional practice might be altered had these central values not been overlooked.[1]

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[1] *Repeatedly Referenced Works:* The sources listed in this note are cited repeatedly in this Article. Several may be unfamiliar to most legally-trained readers. The editions used for these works are as follows:

JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (1787) (Only the first volume of this three volume set had been published by the time of the Constitutional Convention, but the other two followed quickly.).

> [The Constitution's] handful of general purposes will inform judicial interpretation of many individual provisions that do not refer directly to the general objective in question.[2]

INTRODUCTION

The language of the United States Constitution is not always clear,[3] so the principles and values underlying the document, to the extent they are

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THE ANTIFEDERALIST PAPERS (Morton Bordon ed., 1965) [hereinafter THE ANTIFEDERALIST PAPERS].

HENRY ST. JOHN BOLINGBROKE, THE WORKS OF LORD BOLINGBROKE (1967).

GILBERT CHINARD, HONEST JOHN ADAMS (1964).

JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1941).

ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (Paul Leicester Ford ed., 1892).

THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961) [hereinafter THE FEDERALIST].

JOHN FERLING, JOHN ADAMS: A LIFE (1992).

JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA (J.G.A. Pocock ed., 1992).

DAVID HUME'S POLITICAL ESSAYS (Charles W. Hendel ed., 1953).

SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755).

FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION (1985).

BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Thomas Nugent trans., *rev'd by* J.V. Pritchard, 1900).

Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807 (2002).

THE OXFORD CLASSICAL DICTIONARY (N.G.L. Hammond & H.H. Scullard eds., 2d ed. 1970).

PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES (Paul Leicester Ford ed., 1888).

JACK N. RAKOVE, ORIGINAL MEANINGS (1997).

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937).

CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994).

COLLEEN A. SHEEHAN & GARY L. MCDOWELL, FRIENDS OF THE CONSTITUTION: WRITINGS OF THE "OTHER" FEDERALISTS: 1787-1788 (1998).

HERBERT J. STORING, THE ANTI-FEDERALIST: AN ABRIDGEMENT (Murray Dry ed., 1981).

[2] Stephen Breyer, *Madison Lecture: Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 247-48 (2002).

[3] A concise discussion of the interpretative challenges appears in ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 15-16 (1997).

discoverable,[4] can be useful aids to interpretation. That originalists would find them so should be obvious.[5] But even many nonoriginalists may find them useful. For example, advocates of the "living Constitution" seek to apply the principles and values of the Constitution—perhaps even more than the wording itself—to guide the evolution of constitutional law over time.[6]

Those principles and values transcend the "intent of the drafters." The relevant evidence of original understanding includes the views of all or most participants in the great Constitutional debate of 1787-1789. The Constitution was a political deal, and, as in other deals, there was more than one side. Essentially, the process was one of public negotiation: Congress authorized the convention, the members of the convention argued among themselves and most finally agreed on the content of an offer: the proposed Constitution. In each state, the public debated on whether to ratify (i.e., whether to accept the offer). Although we cannot recapture much of what was said privately, a great deal was said publicly—in newspapers, pamphlets, broadsides, and the state ratifying conventions—and much or most of that has been preserved.

As the debate came to a head in 1788, it became clear that the Anti-Federalists might be able to block ratification in pivotal states such as New York, Massachusetts, and Virginia, whose assent was necessary to the scheme. The Anti-Federalists had drawn blood by pointing out purported defects in the document such as the vague nature of the General Welfare Clause[7] and the lack of a bill of rights. In the face of Anti-Federalist gains, the Federalists naturally sought to reassure the faithful, win undecided

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[4] Justice Jackson stated, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). This is no doubt true as to some principles and values but not, as shown in this Article, of the values of sympathy and independence discussed here. *Cf.* RAKOVE, *supra* note 1, at 7 (asserting that Jackson overstated his point).

[5] For a discussion of the differences between originalists and nonoriginalists, see CHEMERINSKY, *supra* note 3, at 17-20.

[6] A critical but useful summary of the arguments of the "living Constitution" theorists appears in Andrew P. Morriss & Richard L. Stroup, *Quartering Species: The "Living Constitution," The Third Amendment, and The Endangered Species Act*, 30 ENVTL. L. 769 (2000). *See also id.* at 773 ("The Constitution must be interpreted to give effect to the principles expressed in the text in the context of contemporary social and political problems.").

[7] U.S. CONST. art I, § 8, cl. 1.

voters, and persuade or neutralize moderate Anti-Federalists. Accordingly, proponents issued reassuring representations about the meaning of the document[8] and, ultimately, acceded to the demand for a bill of rights. They also showed how the document furthered the values and principles shared by Federalists and Anti-Federalists. These dynamics in the ratification debate underscore why the stated views of participants on both sides in the Founding Generation are relevant sources of common principles.[9]

On some basic constitutional values there was little variation of thought. Federalists thought that, on balance, the Constitution would promote certain values while the Anti-Federalist thought that it would not. However, they agreed on the fundamental political principles that the eventual frame of government should promote. Among the principles upon which almost everyone agreed was republicanism—consisting at a minimum of a non-monarchical government that institutionalized the rule of law, and as to most matters rule by a majority of voting citizens.[10] Other principles almost universally held were a wide citizen franchise (i.e., avoidance of aristocracy),[11] political liberty, some sort of federalism,[12] and the two values discussed in this Article: sympathy and independence.

Some of these principles have received a great deal of scholarly and judicial attention, but, at least in recent scholarship, the values of sympathy

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[8] *E.g.*, THE FEDERALIST NO. 41, *supra* note 1, at 263-64 (James Madison) (reassuring the public of the narrow scope of the General Welfare Clause).

[9] Professor Rakove has characterized the process as one of "determining which forms of republican government were best suited to securing the general principles all accepted." RAKOVE, *supra* note 1, at 19.

I do not dispute that some views are more relevant than others. For example, the views of Alexander Hamilton, which were near the edge of the political spectrum, compare CHINARD, *supra* note 1, at 238 (Hamilton expressing his preference for the British form of government), are probably less representative than those of an elected official such as Governor Edmund Randolph of Virginia. Relevance also can be divined by the centrality of the role the specific actor played. However, such issues of relative importance are not weighed in this Article, since practically all participants shared the two values discussed here.

[10] On the minimal agreed content of the Founding Generation's republicanism, see Natelson, *supra* note 1, at 822-23 (stating that "republicanism" included majority rule, the rule of law, and absence of a monarch).

[11] *Id.* at 827 (noting that the Founders were divided on whether aristocracy was inconsistent with republicanism, but that titles of nobility were prohibited by U.S. CONST. art. I, § 10).

[12] George Read of Delaware was almost the only Founder to propose abolishing the states. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 136.

and independence have been comparatively neglected. Sympathy has hardly been discussed at all. Independence appears mostly in articles about judicial independence,[13] although judicial independence was only one phrase in a complex melody.[14]

Without understanding the roles of sympathy and independence, our interpretation of the Constitution is distorted. Sympathy and independence are not peripheral to the document, but central to it. The goals of this Article are to remind the legal community of what the values of sympathy and independence are, to show that these values affected the drafting and ratification of the Constitution, and to offer some examples of how proper

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[13] Thus, Illinois Supreme Court Justice Heiple has observed:

> As every American schoolchild learns, governments in this country are composed of three separate branches. In spite of this, one rarely hears talk of "legislative independence" or "executive independence." Yet the need for judicial independence is a common subject of legal, political, and academic discourse . . . .

James D. Heiple, *Introduction*, 28 LOY. U. CHI. L.J. 661, 661-62 (1997).

The same observation was made earlier in James Zagel & Adam Winkler, *Federal Judicial Independence Symposium: The Independence of Judges*, 46 MERCER L. REV. 795, 814 (1995).

For recent treatments of judicial independence, see John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353 (1999); Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31 (1998); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673 (1999); Burkeley N. Riggs & Tamera D. Westerberg, *Judicial Independence: An Historical Perspective*, 74 DENV. U. L. REV. 337 (1997).

[14] There have been a few recent writings on *specific aspects* of executive and legislative independence. *See, e.g.*, Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. PITT. L. REV. 389 (1994) (arguing that the Speech or Debate Clause promotes legislative independence); Steven N. Sherr, *Freedom and Federalism: The First Amendment's Protection of Legislative Voting*, 101 YALE. L.J. 233 (1991) (noting that congressional conditions on grants to states may trigger First Amendment issues because they interfere with the independence of state legislatures); Douglas S. Onley, Note, *Treading on Sacred Ground: Congress's Power to Subject White House Advisers to Senate Confirmation*, 37 WM. & MARY. L. REV. 1183 (1996) (discussing executive independence); J. Robert Robertson, Comment, *The Effects of Consent Decrees on Local Legislative Immunity*, 56 U. CHI. L. REV. 1121 (1989) (arguing that legislative immunity promotes legislative independence); Michael R. Seghetti, Note, *Speech or Debate Immunity: Preserving Legislative Independence While Cutting Costs of Congressional Immunity*, 60 NOTRE DAME L. REV. 589 (1985).

consideration of these values might alter current Constitutional interpretation and practice.

I. SYMPATHY

A. The Founding Generation's Passion for Sympathy

1. *The Meaning and Importance of Sympathy*

In modern American usage, or at least in my interpretative community, "sympathy" lies somewhere between empathy and pity—more condescending than the former, less so than the latter. Among the Founding Generation the meaning was closer to empathy. In the political context, sympathy meant a kind of similarity between officials and the people they governed—specifically, an identity of feelings, views, interests, opinions, senses, habits, and sentiments.[15] James Madison used the term "fellow-feeling" as a synonym for sympathy.[16] John Adams's ideal was a government "in Miniature, an exact Portrait of the people at large."[17]

Although we do not hear much about the subject today, the Founding Generation placed sympathy between people and government among their highest political values. As we shall see, much of the debate surrounding the Constitution involved the question of whether the document would ensure adequate sympathy between government and governed.

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[15] *See, e.g.*, THE FEDERALIST NO. 57, *supra* note 1, at 352 (James Madison) (referring to "that communion of interests and sympathy of sentiments"); Federal Farmer, Letter No. 3, *in* STORING, *supra* note 1, at 51 ("feelings, views, and interests"); Federal Farmer, Letter No. 7, *id.* at 77 ("interests, . . . opinions, and views"); Brutus, No. 3, *id.* at 125 (sentiments, feelings, interests); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *id.* at 214; Federal Farmer, No. 76-77, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 217 ("habits, feelings, and opinions"); *cf.* Agrippa, Letter No. 1, *in* STORING, *supra* note 1, at 230 ("affection for the welfare of the people." Arguably, however, this last may be slightly different from sympathy. One can be concerned with another's welfare without sharing that person's sentiments and views.).

On the value the Founding Generation placed on sympathy, see also RAKOVE, *supra* note 1, at 203-04.

[16] 3 ELLIOT, *supra* note 1, at 395. Samuel Johnson's dictionary agreed, defining "sympathy" as "fellow feeling; mutual sensibility; the quality of being affected by the affection of another." There is no entry in the dictionary for "empathy." JOHNSON, *supra* note 1.

[17] FERLING, *supra* note 1, at 214.

2. *Reasons For Sympathetic Government*

The Founding Generation had several reasons for believing that to be good, government must be sympathetic. One reason is that they were all republicans, and they believed that popular control of government was of the essence for republicanism. *Res publica res est populi,* John Adams said,[18] quoting Cicero: a republic is the property of the people. James Harrington, the influential English political writer of Cromwell's time, compared government decisions in a commonwealth (republic) to decisions on allocating portions of cake: one participant must divide, the other chooses. It was best if the Senate divided (discussed), but the people made the final choice,[19] for, after all, the commonwealth was their property.[20] It follows from this view that public affairs should be administered as a trust for the people.[21] Trustees (government actors) are more likely to honor their obligations if bound to their beneficiaries (the people) by ties of sympathy.

A related reason the Founding Generation insisted on sympathetic government is that they were zealous for the liberties they had won, and they believed that continuation of those liberties depended on creating a government in which "the interest of the members is the same as yours [i.e., the people's]."[22] In monarchies and aristocracies, by contrast, those in

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[18] 1 ADAMS, *supra* note 1, at xxi.

[19] HARRINGTON, *supra* note 1, at 24 ("Dividing and choosing, in the language of a commonwealth, is debating and resolving; and whatsoever upon debate of the senate, is proposed unto the people, and resolved by them, is enacted *auctoritate patrum et jussu populi,* by the authority of the fathers [i.e., the senators] and the power of the people, which concurring make a law.").

[20] *Id.* at 12 ("And if the whole people be landlords, or hold the lands so divided among them, that no one man, or number of men, within the compass of the few or aristocracy, overbalance them, the empire . . . is a commonwealth.").

[21] *The Federalist Papers*, for example, include many references to the "public trust." *See, e.g.*, THE FEDERALIST NO. 49, *supra* note 1, at 316 (James Madison); *id.* NO. 55, at 345; *id.* NO. 57, at 350; *id.* NO. 63, at 383.

[22] ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 225 (Roger Sherman writing as "A Countryman"). The connection between the trust duties of governors and the preservation of liberty is illustrated in THE FEDERALIST NO. 49:

> The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people.

power governed for their own interest, with adverse effects on liberty for the citizenry as a whole.[23]

Another reason for sympathetic government was that, in general, decisions by officials remote from popular feeling—even if well-intentioned—would not be of as high a quality as decisions by officials in touch with the broad mass of citizens. Contact with the citizenry would provide more information and many points of view. In other words, with some qualifications, the Founders seem to have agreed with Aristotle[24] and the Bible[25] that more decision makers were better than fewer. Federalist John Jay made the point:

> It is said that "in a multitude of counsellors there is safety," because in the first place, there is greater security for probity; and in the next, if every member cast in only his mite of information and argument, their joint stock of both will thereby become greater than the stock possessed by any one single man out of doors [i.e., in public life].[26]

Anti-Federalists expressed similar opinions. For example, Melancton Smith, Hamilton's great antagonist in the New York ratifying convention,

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THE FEDERALIST NO. 49, *supra* note 1, at 316 (James Madison).

[23] *Infra* note 34.

[24] ARISTOTLE, THE POLITICS 202-03 & 222 (Thomas Alan Sinclair trans., *rev'd* 1992). For Aristotle's influence on the Founding Generation, see, for example, RICHARD, *supra* note 1, at 125 & 133 (mixed government), 169-70 (natural law). I have discussed Aristotle's influence on James Madison's use of the term "pure democracy" in Natelson, *supra* note 1.

[25] *Proverbs* 11:14 ("in the multitude of counselors there is safety").

[26] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 75. *Cf.* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 134 (Madison stating that direct election of representatives by the people will lead to better quality representatives); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 40 (Noah Webster, defending the small size of the Senate on the grounds that they will be under the direction of the state legislatures); *id.* at 329 (George Mason claiming that the Constitution's House of Representatives was only the "shadow of representation," and would possess inadequate information).

The phrase "out of doors" as meaning "in public life" is one of those many eighteenth century expressions hard to understand for those without the Founding Generation's knowledge of Latin. (The word *forensic* derives from the Latin *foras,* which means outdoors, related in turn to *forum.*) On the close connection between Latin and the political discourse of the Founding Generation, see Natelson, *supra* note 1, and the sources cited therein.

argued that a larger, more sympathetic legislature would be more fiscally responsible than a legislature drawing its members from only one part of society.[27]

The idea that more decision makers leads to better decisions was not inconsistent with the Founder's preference for representative over direct democracy—the latter in their time necessarily signifying mass meetings in the town square. John Dickinson argued that representation "collects the will of millions upon points concerning their welfare, with more advantage, than the will of hundreds could be collected under the ancient form."[28]

Yet another reason for sympathetic government was that it would be more durable than its opposite. A tree with roots planted firmly among the people could withstand strong blasts indeed.[29] Early in the federal convention, Pennsylvania Delegate James Wilson, contending that representatives should be elected directly by the people, supported his position with another metaphor:

> Mr. Wilson contended strenuously for drawing the most numerous branch of the Legislature immediately from the people. He was for raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible. No government could long subsist

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[27] 2 ELLIOT, *supra* note 1, at 244. *See also* Smith's comments:

> We ought to guard against the government being placed in the hands of this [upper] class. They cannot have that sympathy with their constituents which is necessary to connect them closely to their interests. Being in the habit of profuse living, they will be profuse in the public expenses. They find no difficulty in paying their taxes, and therefore do not feel public burdens. Besides, if they govern, they will enjoy the emoluments of the government. The middling class, from their frugal habits, and feeling themselves the public burdens, will be careful how they increase them.

Id. at 248.

[28] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 206.

[29] *Cf.* THE FEDERALIST NO. 45, *supra* note 1, at 290 (James Madison) (stating if local sovereigns under feudalism had been in sympathy with the people, Europe would have become a continent of petty sovereignties); *id.*, NO. 63, at 390 (James Madison) (writing, "Against the force of the immediate representatives of the people nothing will be able to maintain even the constitutional authority of the Senate, but such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature the affections and support of the entire body of the people themselves."); 4 ELLIOT, *supra* note 1, at 129 (James Iredell, at the North Carolina ratifying convention, speaking of the power of the popular branch).

without the confidence of the people. In a republican Government this confidence was peculiarly essential.[30]

3. *All Parts of Government Should Be Sympathetic*

Discussions of sympathy arose most often in debates over the proposed federal House of Representatives. But sympathy was also a virtue for the other branches of government, both state and federal.[31] Patrick Henry justified state jurisdiction over its own inhabitants because states were more sympathetic to those inhabitants than federal government would be.[32] Madison argued that the President would "be considered as a national officer, acting for and equally sympathising with every part of the U. States [sic]."[33] The Upper House in Britain was composed of aristocrats, independent of the people,[34] but the Federalists argued that under the new Constitution the Upper House would be composed of ordinary citizens, sympathetic with, and ultimately dependent upon the people.[35] Even the courts, the most remote of all the branches, were ultimately responsible to the people,[36] and the jury

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[30] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 49.

[31] For a discussion of sympathy in the House and how it differed from sympathy in the other branches of government, see *infra* Parts I.C and II.D.

[32] 3 ELLIOT, *supra* note 1, at 590. *See also* THE FEDERALIST NO. 31, *supra* note 1, at 196 (Alexander Hamilton) (discussing the closely-allied concept of dependence at the state level); 2 ELLIOT, *supra* note 1, at 47 (Fisher Ames speaking at the Massachusetts ratifying convention).

[33] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 81. *Cf.* 3 ELLIOT, *supra* note 1, at 388 (James Monroe at the Virginia ratifying convention stated: "He ought to depend on the people of America for his appointment and continuance in office; he ought also to be responsible, in an equal degree, to all the states . . . .").

[34] Generally, aristocrats were seen as independent of, rather than dependent, on the people. 2 ELLIOT, *supra* note 1, at 256 (Hamilton at the New York ratifying convention); SHEEHAN & MCDOWELL, *supra* note 1, at 347 (a Federalist "Cato").

[35] THE FEDERALIST NO. 63, *supra* note 1, at 389 (James Madison); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 35 & 38 (Noah Webster stating that the Senate was not to represent a higher order, but to be dependent on the people); SHEEHAN & MCDOWELL, *supra* note 1, at 351-52 ("A Democratic Federalist" opining that the Senate, unlike the British House of Lords, will not be a different class, but will have no "interest different from and separate from the people").

[36] *See, e.g.*, Brutus, Nos. 15 & 16, *in* STORING, *supra* note 1, at 103-91 (criticizing the proposed Constitution for making the judges too independent of the people); 3 ADAMS, *supra* note 1, at 420 ("So the people are represented in courts of justice by the judges and the juries. . .").

system would inject into their deliberations the ideas and attitudes of the common man.[37]

B. Threats to Sympathetic Government

The Founders identified the principal threat to a sympathetic republic as capture by special interests—or, to use the economic term, rent-seekers:[38] individuals and groups who seek to use government power to profit in ways deleterious to the public.[39] The most common contemporary terms for special interests were *factions*, *combinations*, and *juntos*.[40] Even an unscrupulous majority could comprise a faction.[41] Usually, however, factions were minorities. The risk was that they might form a coalition to create a majority and adopt measures that benefited that majority but damaged the whole.[42]

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[37] The Federal Farmer, No. 4, *in* STORING, *supra* note 1, at 58-59. *See also* THE FEDERALIST NO. 83, *supra* note 1, at 500-01 (Alexander Hamilton, citing the jury as a protection against "corruption").

[38] Economic rent is "income in excess of opportunity cost." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 178 n.4 (3d ed. 1986). Rent-seeking is a competitive activity in which expected gains ultimately are translated into wider costs. *Id.* at 35 n.3.

[39] *Cf.* 3 ADAMS, *supra* note 1, at 273 (apparently adopting Nedham's definition of faction: "an adherence to an interest distinct from the true interest of the state").

[40] The frequency of the use of these terms is captured somewhat by the following: In THE FEDERALIST, *supra* note 1, the term "faction" is used in this sense fifty-four times, "combination" thirty-one times, and "junto"—more of an anti-federalist term—once. In THE ANTIFEDERALIST PAPERS, *supra* note 1, an edited compilation of some of the best anti-federalist productions (but about twenty-nine percent shorter than THE FEDERALIST), "combination" appears eleven times, "faction" twelve, and "junto" six times. These figures are approximate, because sometimes they (especially "combination") may be used in a different or overlapping sense.

My personal observation is that publications less high-toned employed these terms of opprobrium more frequently.

[41] 3 ADAMS, *supra* note 1, at 287 ("It may sound oddly [sic] to say that the majority is a faction; but it is, nevertheless, literally just. If the majority are partial in their own favour, if they refuse or deny [sic: should be "grant"] a perfect equality to every member of the minority, they are a faction . . . .").

[42] THE FEDERALIST NO. 10, *supra* note 1, at 80 (James Madison).

The following illustrates how a measure might benefit the majority but damage the whole: A society with an aggregate wealth of $1000 contains ten special interests, each worth $100. Six special interests form a majority to pass legislation that raises the wealth of each of the six to $120, or an aggregate of $720, while

Corruption, *oppression*, and *undue influence* were contemporary terms used to describe the result of government officials disregarding the public good by serving factions, combinations, or juntos.[43] Corruption did not necessarily signify personal dishonesty. It was more akin to the breach of trust that occurs when a private trustee favors one beneficiary over another—that is, a breach of the duty of impartiality.[44] The factions thus benefited might not be domestic. An unsympathetic legislature[45] or executive branch[46] was good feeding ground for foreign interests. Corruption was a disease to which monarchy and aristocracy were particularly susceptible because, by definition, in monarchies and aristocracies governmental decision makers were relatively few and were independent

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reducing the wealth of the other four from an aggregate of $400 to $200. The six factions have benefitted, but not only has each of the four groups outside the combination suffered, but *total societal wealth* has dropped from $1000 to $920.

[43] For examples of the use of the term "corruption," see THE ANTIFEDERALIST NO. 3, *supra* note 1; THE FEDERALIST NO. 10, *supra* note 1, at 82. For an example of the term "oppression," see *id.* at 83. For an example of the term "undue influence," see THE FEDERALIST NO. 3, *supra* note 1, at 40.

[44] The *Restatement (Second) of Trusts* states, "Duty to Deal Impartially with Beneficiaries. When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." RESTATEMENT (SECOND) OF TRUSTS § 183 (1959).

The Anti-Federalist writer "Agrippa" (probably James Winthop) captured the attitude: "On the contrary I believe that it is universally true, that acts made to favour a part of the community are wrong in principle." Agrippa, No. 3, *in* STORING, *supra* note 1, at 232-33. *Cf.* 2 ELLIOT, *supra* note 1, at 491 (James Wilson, at the Pennsylvania ratifying convention, stating, "Impartiality is the leading feature in this Constitution; it pervades the whole."). *See also* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 275-76 (George Clinton writing as "Cato," stating that Senate must be independent of the President to assure impartiality); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 36 (Noah Webster praising impartiality in the executive and judiciary); *id.* at 41 (impartiality in the Senate); *id.* at 77 (John Jay stating that public officials "are to receive that [public] business to manage, not for themselves and as their own, but as agents and overseers for the people to whom they are constantly responsible.").

[45] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 451-52 (James Madison).

[46] 2 *id.* at 389 (Charles Pinkney speaking at the federal convention); 3 ELLIOT, *supra* note 1, at 490 (James Monroe speaking at the Virginia ratifying convention).

of the people at large,[47] most of whom, indeed, depended on the few who dominated the government.[48] However, a broad-based, sympathetic government would mirror all the major interests and attitudes of the general population. Since all would have a voice, such a government would be less subject to corruption.[49]

C. *Securing Sympathetic Government*

1. *The Problem*

A principal problem for the Founders was how best to ensure that government remained sympathetic. They devoted much energy to learning and applying lessons from the history of previous republics, a task in which their classical educations aided them greatly. By the time of the federal convention, John Adams had collected much republican history in the first volume of his *Defence of the Constitutions of the United States*. (The "constitutions" thereby referenced were the existing state constitutions.). Participants in the debate of 1787-1789 repeatedly cited and relied upon this work.[50]

Educated people in the Founding Generation knew how sympathy, to the extent desired by ancient constitution-makers, had been assured in ancient republics: by choosing magistrates through direct election or by lot,

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[47] 3 ADAMS, *supra* note 1, at 374 (writing that free states are generally less subject to oppression and tyranny than are aristocracies or monarchies, although free states without checks are also subject to oppression and tyranny); 2 ELLIOT, *supra* note 1, at 105 (Fisher Ames stating that dependence on the people is a protection against aristocracy); 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 451 (Madison stating, "In Monarchies and Aristocracies oppression proceeds from a want of sympathy & responsibility in the Govt. towards the people."); 2 *id.* at 30 (James Wilson stating that Polish nobles' dependence threatens their "republic").

[48] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 212 (John Dickinson writing as "Fabius"); SHEEHAN & MCDOWELL, *supra* note 1, at 48-49 (Nicholas Collins writing as "A Foreign Spectator").

[49] Some saw the proposed federal legislature as not sympathetic enough, and therefore prone to corruption. *See, e.g.*, THE ANTIFEDERALIST PAPERS NO. 21, *supra* note 1, at 53 ("Centinel") ("In short, by putting it in the power of the future government to levy money at pleasure, and placing this government so independent of the people as to enable the administration to gratify every corrupt passion of the mind, to riot on your spoils, without check or control?").

[50] For a discussion of the influence of this text, see Natelson, *supra* note 1.

by indirectly electing senators,[51] and by instituting popular assemblies in which the citizenry gathered to discuss, approve, or reject proposals.[52]

The drafters of the American state and federal constitutions replicated ancient republics' direct and indirect election of magistrates and senators, but not their popular assemblies. They concluded that the popular assemblies suffered from serious flaws[53] and that the sheer size of America rendered it impractical to collect all citizens of a state or nation in one place.[54] Hence, each state had a legislature based on a "scheme of representation as a substitute for a meeting of the citizens in person."[55] At the

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[51] In the Roman Republic, for example, all elected magistrates of the rank of *quaestor* secured life tenure in the senate, and "[t]hus the senate was recruited indirectly by popular election." THE OXFORD CLASSICAL DICTIONARY, *supra* note 1, at 973.

This Article uses the term "magistrate" in its traditional republican sense of any public officeholder other than a legislator.

[52] For some ancient popular assemblies, see *id.* at 208 (Carthage); *id.* at 272 (Rome); *id.* at 376-77 (Athens). All of these republics, as well as that of Sparta, were discussed prominently in the founding debates. *See* Natelson, *supra* note 1.

[53] *E.g.*, 2 ELLIOT, *supra* note 1, at 8 (Fisher Ames, at the Massachusetts ratifying convention); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 30 (Noah Webster). *But see* A Farmer, No. 5, *in* STORING, *supra* note 1, at 267-70 (an Anti-Federalist, probably John Francis Mercer of Maryland, who favored retention of popular assemblies as they existed in Switzerland).

[54] 2 ELLIOT, *supra* note 1, at 8 (Fisher Ames speaking at the Massachusetts ratifying convention); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 151 (Oliver Ellsworth writing as "A Landholder"); *id.* at 269 (George Clinton writing as "Cato"); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 30 (Noah Webster); SHEEHAN & MCDOWELL, *supra* note 1, at 346 (a Federalist "Cato").

At the local level, matters were different, and the popular assembly was replicated in the New England town meeting.

[55] THE FEDERALIST NO. 52, *supra* note 1, at 327 (James Madison). *See also* 3 ADAMS, *supra* note 1, at 214; The Federal Farmer, No. 7, *in* STORING, *supra* note 1, at 74; PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 30 (Noah Webster). *Cf.* HARRINGTON, *supra* note 1, at 24 ("[A]nd whereas this, in case the commonwealth consist of an [*sic*] whole nation, is too unwieldy a body to be assembled, this council is to consist of such a representative as may be equal, and so constituted as can never contract any other interest than that of the whole people . . . .").

federal level, the proposed Constitution would replace the republican popular assembly with a House of Representatives.[56]

However, operating through representatives rather than directly entails "agency costs."[57] One of these costs is the risk that the representative will act at cross-purposes to, or at least not in full sympathy with, the principal.[58] Thus, drafters of the new constitution had to structure the House of Representatives in a manner that would reduce the risk that it might betray the people; they then had to defend their proposal against Anti-Federalist charges that they had done an inadequate job.

2. *One Solution: A Sympathetic Congress as Guardian*

In discussions of how to render government sympathetic, most of the focus was on the new national legislature—partly the Senate,[59] but particularly the House of Representatives, the replacement for the popular

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[56] THE FEDERALIST NO. 52, *supra* note 1, at 327 (James Madison) (stating, "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people."); The Federal Farmer, THE ANTIFEDERALIST PAPERS NO. 76-77, *supra* note 1, at 217 ("A legislature, in a free country, must be numerous; it is in some degree a periodical assemblage of the people, frequently formed.").

Cf. SHEEHAN & MCDOWELL, *supra* note 1, at 171 (Noah Webster writing, "The Legislators thus chosen to represent the people, should have all the power that the people would have, were they assembled in one body to deliberate upon public measures.").

[57] Agency costs are "the costs to the principal of obtaining faithful and effective performance by his agents." POSNER, *supra* note 38, at 368.

[58] At the Massachusetts ratifying convention, Fisher Ames characterized the "agency cost" objection as follows:

> Much has been said about the people divesting themselves of power, when they delegate it to representatives; and that all representation is to their disadvantage, because it is but an image, a copy, fainter and more imperfect than the original, the people, in whom the light of power is primary and unborrowed, which is only reflected by their delegates. I cannot agree to either of these opinions.

2 ELLIOT, *supra* note 1, at 8.

[59] *E.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 40 (Noah Webster, defending the Senate as sufficiently representative despite its small size because of its direction by state legislatures); *id.* at 42 ("But the senate of the United States can have no separate interests from the body of the people. . . ."). *See also id.* at 140 (Tench Coxe); *infra* note 99 and accompanying text.

assemblies of old. Nearly everyone on both sides of the debate agreed with the paramount importance of sympathy in the House. Thus, Federalist James Madison commented:

> It was politic as well as just that the interests & rights of every class should be duly represented & understood in the public Councils. It was a provision every where established that the Country should be divided into districts & representatives taken from each, in order that the Legislative Assembly might equally understand & sympathise, with the rights of the people in every part of the Community. It was not less proper that every class of Citizens should have an opportunity of making their rights be felt & understood in the public Councils.[60]

Anti-Federalist Melancton Smith stated:

> The idea that naturally suggests itself to our minds, when we speak of representatives, is, that they resemble those they represent. They should be a true picture of the people, possess a knowledge of their circumstances and their wants, sympathize in all their distresses, and be disposed to seek their true interests.[61]

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[60] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 123-24.

This view of Madison tends to get lost in discussions of his theories of "refinement" and "filtration" of popular views. At the federal convention, Madison himself put matters in perspective:

> Mr. Madison considered the popular election of one branch of the national Legislature as essential to every plan of free Government. He observed that in some of the States one branch of the Legislature was composed of men already removed from the people by an intervening body of electors. That if the first branch of the general legislature should be elected by the State Legislatures, the second branch elected by the first—the Executive by the second together with the first; and other appointments again made for subordinate purposes by the Executive, the people would be lost sight of altogether; and the necessary sympathy between them and their rulers and officers, too little felt. He was an advocate for the policy of refining the popular appointments by successive filtrations, but thought it might be pushed too far.

1 *id.* at 49-50. *See also* 1 *id.* at 57 (Pierce, quoting Madison: "Mr. Maddison [sic] was of the opinion that the appointment of the Members to the first branch of the national Legislature ought to be made by the people for two reasons,—one was that it would inspire confidence, and the other that it would induce the Government to sympathize with the people.").

[61] 2 ELLIOT, *supra* note 1, at 245 (speaking at the New York ratifying convention).

There are similar words preserved for us from throughout the debates. They were uttered by Federalists[62] and Anti-Federalists[63] alike. Dissenters were few,[64] although Alexander Hamilton, the great outlier in the debate who labored mightily but unsuccessfully to conceal his monarchical views,[65] doubted whether the ideal was capable of realization.[66]

To keep the House sympathetic, most people thought that representative districts should be relatively small and representatives relatively numerous.[67] This would promote sympathy in two ways. Smaller districts

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[62] *E.g.*, 3 ELLIOT, *supra* note 1, at 279 (William Grayson at the Virginia ratifying convention stating that the purpose of the House is to provide full and fair representation); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 152 (Oliver Ellsworth, writing as "The Landholder," stating that the Congress "will always know the sense of the people at large" by reason of Congressmen's "acquaintance with their own state legislatures."); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 170 (John Dickinson writing as "Fabius").

[63] For example, in speaking of the House of Representatives, George Mason said (as reported by Madison), "It was, so to speak, to be our House of Commons—It ought to know & sympathise with every part of the community." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 48. And again: "The requisites in actual representation are that the Reps. should sympathize with their constituents; shd. think as they think, & feel as they feel. . . ." 1 *id.* at 133-34. *See also* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 288 (Richard Henry Lee writing as "The Federal Farmer").

[64] One was "Cato," a Federalist who objected to proportional representation for "fools and knaves." SHEEHAN & MCDOWELL, *supra* note 1, at 347.

[65] CHINARD, *supra* note 1, at 238 (Hamilton expressing his preference for the British system).

[66] *See* THE FEDERALIST NO. 35, *supra* note 1, at 215-16 (Alexander Hamilton) (questioning the extent to which the House could mirror all interests and argued that virtual representation, whereby some classes represented the interests of other classes, was sufficient). One can argue that Fisher Ames took a similar view. 2 ELLIOT, *supra* note 1, at 11.

[67] *E.g.*, 3 ELLIOT, *supra* note 1, at 12 (Wilson Nicholas at the Virginia ratifying convention: "[F]or the more the representatives increase in number, the greater the influence of the people in the government. . . ." Nicholas did, however, defend the relatively small size of the House. 3 *Id.*).

This was an area in which the Federalists were on the defensive. They did the best they could. Hamilton argued that small districts could be less representative because they could be dominated by a few great men and their dependents. 2 *id.* at 256-57 (at the New York ratifying convention), but he was almost the only person to do so. *See also* 3 *id.* at 111 (Francis Corbin at the Virginia ratifying convention); 3 *id.* at 256-57 (Madison at the Virginia ratifying convention).

assured that all important pockets of society had a voice and that none would be disregarded simply because they were unrepresented.[68] When Federalists raised the rather lame counter that a small House would be cheaper to maintain, New York's Anti-Federalist Melancton Smith took them head on by arguing:

> The difference of expense, between supporting a House of Representatives sufficiently numerous, and the present proposed one, would be twenty or thirty thousand dollars per annum. The man who would seriously object to this expense, to secure his liberties, does not deserve to enjoy them. Besides, by increasing the number of representatives, we open a door for the admission of the substantial yeomanry of our country, who, being possessed of the habits of economy, will be cautious of imprudent expenditures, by which means a greater saving will be made of public money than is sufficient to support them.[69]

Larger legislatures were also seen as more sympathetic because numerosity raised the costs of "combination." Larger chambers were less subject to "corruption"—including corruption by foreign interests[70] or by the Senate[71]—because majorities were more difficult to purchase. Anti-Federalists such as Richard Henry Lee hammered home the risks of small chambers:

> I mean the constant liability of a small number of representatives to private combinations. The tyranny of the one, or the licentiousness of the

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Federalist John Dickinson was at first uncertain about the advantages of numerosity, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 169, but shortly thereafter seemed to concede its desirability. *Id.* at 170.

[68] *E.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 295 (small size of House would keep out men of humbler classes). *Cf.* Noah Webster's defense of the small size of the Senate on the basis that it would be subject to "direction" by numerous state legislators. *Id.* at 40.

[69] 2 ELLIOT, *supra* note 1, at 244. Smith claimed that the insufficient size of the House was a point of union among all Anti-Federalists. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 102.

[70] 2 ELLIOT, *supra* note 1, at 249 (Melancton Smith speaking at the New York ratifying convention); 2 *id.* at 261 (John Lansing speaking at the same convention); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 268 (Edmund Randolph claiming the small number of states in the confederation congress increased the opportunities for foreign influence).

[71] ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 273 (George Clinton writing as "Cato").

> multitude, are, in my mind, but small evils, compared with the factions of the few. It is a consideration well worth pursuing, how far this house of representatives will be liable to be formed into private juntos . . . .[72]

Madison agreed that a certain level of numerosity was needed to deter "corruption."[73] Even the arch-Federalist, Hamilton, conceded the point, stating explicitly that numerosity would "make it as difficult as possible for [legislators] to combine in any interest opposite to that of the public good."[74] The value, incidentally, of numerosity in combating special interest influence has been confirmed by modern academic research.[75]

The problem this widespread belief presented for the Federalists is that the federal convention had made the tactical blunder of providing for a relatively small initial house—one representative for every 30,000 people. Indeed, it almost was one for every 40,000, but on the last day of the convention George Washington spoke up—his only recorded contribution to the debate—and convinced the delegates to enlarge the lower

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[72] THE ANTIFEDERALIST PAPERS NO. 55 part 1, *supra* note 1, at 162.

See also id. No. 76-77, at 217 (also as "The Federal Farmer," Richard Henry Lee, stating, "A legislature, in a free country, must be numerous."); *id.* No. 63, part 2, at 186 (The Federal Farmer stating, "But in a government consisting of but a few members, elected for long periods, and far removed from the observation of the people, but few changes in the ordinary course of elections take place among the members. They become in some measure a fixed body, and often inattentive to the public good, callous, selfish, and the fountain of corruption."); 2 ELLIOT, *supra* note 1, at 248 (Melancton Smith stating, "In so small a number of representatives, there is great danger from corruption and combination.").

See also ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 54 ("Agrippa"); *id.* at 268-69 (George Clinton writing as "Cato"); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *in* STORING, *supra* note 1, at 214.

[73] *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 536. *Compare* 1 *id.* at 136 *with* THE FEDERALIST NO. 10, *supra* note 1, at 83 (in each case, James Madison stating that a remedy for faction is to increase the number of players). David Hume had pointed out that personal factions arise more easily in smaller than in larger republics. HUME, *supra* note 1, at 78.

[74] THE FEDERALIST NO. 66, *supra* note 1, at 406 (Alexander Hamilton). *Cf.* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 143 (Tench Coxe noting that widespread suffrage among thousands of independent freemen would prevent electoral bribery).

[75] ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION, AND THE ECONOMY 29-60 (1981) (finding inverse correlations between state special interest legislation and size of state legislatures).

house.[76] Still, even in districts with 30,000 population, each representative would be chosen by five or six thousand electors,[77] and those were large numbers in that era. So it was on this issue that the Anti-Federalists made some of their most telling arguments.[78]

In general, the Federalist responses to Anti-Federalist charges of insufficient numerosity were as weak as the cost argument answered so effectively by Melancton Smith.[79] Among the Federalist defenses were pleas that the Constitution's drafters had done the best they could,[80] that numerosity would increase corruption,[81] that with the rise in population the House would get larger,[82] and that "fools and knaves" should not get proportional representation in any event.[83] Ultimately, the Constitution may have been saved because everyone agreed that the question of how many legislators were "enough" was not subject to mathematical determination.[84]

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[76] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 644 (Washington called the small House "insufficient security for the rights & interests of the people."). By this stand the "American Cincinnatus" may have saved the Constitution from popular rejection.

[77] THE FEDERALIST NO. 57, *supra* note 1, at 354 (James Madison).

[78] *E.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 289, 303 (Richard Henry Lee, writing as "A Federal Farmer," claims Congress should contain at least 200 members); Centinel, Letter No. 1, *in* STORING, *supra* note 1, at 19; The Federal Farmer, Letter No. 3, *id.* at 44, 47, 51; The Federal Farmer, Letter No. 7, *id.* at 77-78; Brutus, No. 3, *id.* at 125; Brutus, No. 4, *id.* at 127-29; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *id.* at 214; Agrippa, Letter No. 1, *id.* at 230.

[79] *Supra* note 69 and accompanying text.

[80] *E.g.*, SHEEHAN & MCDOWELL, *supra* note 1, at 337 ("Atticus" writing that "[a]s to the representation, it seems to be as large, as the state of our country will well admit of; and as well defined, as numbers can make it.").

[81] THE FEDERALIST NO. 58, *supra* note 1, at 360 (James Madison) (arguing that a House of too large a number could be counterproductive); SHEEHAN & MCDOWELL, *supra* note 1, at 42 ("A Federalist" arguing the same).

[82] *E.g.*, 3 ELLIOT, *supra* note 1, at 11 (Wilson Nicholas, at the Virginia ratifying convention, stating, "I take it for granted that the number of representatives will be increased, according to the progressive increase of population, at every respective enumeration; and one for every thirty thousand will amount to one hundred representatives . . . .").

[83] SHEEHAN & MCDOWELL, *supra* note 1, at 347 ("Cato," a Federalist arguing against equal representation for "fools and knaves").

[84] *See* 2 ELLIOT, *supra* note 1, at 245 (Melancton Smith stating, "We may be sure that ten is too small, and a thousand too large a number. Every one will allow that the first number is too small to possess the sentiments, be influenced by the interests of the people, or secure against corruption; a thousand would be too numerous to be capable of deliberating."); 2 *id.* at 259 (Melancton Smith); 2 *id.* at

3. *Legal and Psychological Solutions*

Numerosity was a principal tool for keeping the House sympathetic. For other branches of government, the Founders utilized different tools. For example, sympathy would be promoted because officials of the federal government would be subject to the same laws they imposed on everyone else.[85] In other words, government officials would have few of the legal privileges, immunities, and prerogatives that distinguished officials from the citizenry in Europe. But how could one be certain that federal officials simply wouldn't exempt themselves from laws they found inconvenient? The people, Madison said, would prevent this, and a people who could stand for any other state of affairs "will be prepared to tolerate anything but liberty."[86]

Further support for sympathy would come from psychological factors, such as the natural tendency of the elected to be well-disposed toward those who elected them. As Madison remarked, office holders "will enter into the public service under circumstances which cannot fail to produce a temporary affection at least to their constituents."[87] Federalist Pelatiah Webster cited the needs of reputation and public approbation, and the dread of censure, shame, and divine judgment as incitements to duty.[88] However,

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260 (John Lansing speaking at the New York ratifying convention); The Federal Farmer, Letter No. 7, *in* STORING, *supra* note 1, at 74.

James Iredell dismissed the Anti-Federalist concern by stating that the precise number was "a mere matter of calculation"—meaning that it could not be calculated. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 337. *See also* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 151 (Oliver Ellsworth writing as "The Landholder").

[85] THE FEDERALIST NO. 57, *supra* note 1, at 352 (James Madison); 3 ELLIOT, *supra* note 1, at 647 (Zachariah Johnson at the Virginia ratifying convention stating that members of Congress "will bear an equal share of the burdens imposed on the people"); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 42 (Noah Webster stating that Senators will be "subject to the same laws" that bind everyone else); *id.* at 124 (Pelatiah Webster citing equal application of laws on Congressmen).

[86] THE FEDERALIST NO. 57, *supra* note 1, at 353 (James Madison). For some time in the twentieth century the fear that federal officials would exempt themselves from their own laws became a reality. There were some corrections made in 1995 as a result of a shift in Congressional control. *See, e.g.*, Kenneth J. Cooper & Helen Dewar, *Passing the Torch on Capitol Hill; GOP Takes Over; House Sets Off at Quick Pace; Gingrich Gets Gavel*, WASH. POST, Jan. 5, 1995, at A1.

[87] THE FEDERALIST NO. 57, *supra* note 1, at 351 (James Madison).

[88] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 124.

Anti-Federalists such as Joseph M'Dowall of North Carolina, cited psychological factors cutting the other way. Representatives, he argued, would likely win re-election and end up spending eight or ten years in Congress. He noted that "[a]t such a distance from their homes, and for so long a time, they will have no feeling for, nor any knowledge of, the situation of the people."[89]

4. *Dependence as a Solution*

A more substantial guarantee of sympathy was dependence—that is, dependence of elected officials on the people.[90] Later, this Article shall explore more fully the contemporary connotations of the word *dependence.*[91] For now, it is enough to say that eighteenth century political expositors saw dependence of government on the citizenry as so necessary to sympathy and so allied with it that they often joined the terms in the same sentence. Moreover, they sometimes credited dependence with the benefits that, more precisely, came from the sympathy that dependence created. David Hume's influential *Idea of a Perfect Commonwealth* argued

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[89] 4 ELLIOT, *supra* note 1, at 88 (speaking at the North Carolina ratifying convention).

[90] "This dependence, and the necessity of being bound, himself and his posterity, by the laws to which he gives his assent are the true and they are the strong chords of sympathy between the representative and the constituent." THE FEDERALIST NO. 35, *supra* note 1, at 216 (Alexander Hamilton). *See also id.* NO. 52 at 327 (James Madison) (stating, "As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people."); *id.* NO. 51, at 322 (James Madison) (stating, "A dependence on the people is, no doubt, the primary control on the government . . . .").

See also 2 ELLIOT, *supra* note 1, at 252 (Hamilton speaking at the New York ratifying convention); 2 *id.* at 298 (Richard Harrison speaking at the same convention: "If the senator is conscious that his reelection depends only on the will of the people, and is not fettered by any law, he will feel an ambition to deserve well of the public."); 3 *id.* at 647 (Zachariah Johnson at the Virginia ratifying convention stating, "When the members of the government depend on ourselves for their appointment, and will bear an equal share of the burdens imposed on the people,—when their duty is inseparably connected with their interests,—I conceive there can be no danger.").

See also Orrin G. Hatch, *"A Dependence on the People,"* 77 CORNELL L. REV. 959 (1992).

[91] *See infra* Part II.A.

that dependence was a guard against faction.[92] Americans similarly contended that it was a guard against aristocracy,[93] monarchy,[94] and oppression.[95] "Publius" set forth the new federalist ideal as one in which

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[92] HUME, *supra* note 1, at 153-54:

> There are two things to be guarded against in every senate: its combination and its division. Its combination is most dangerous; and against this inconvenience we have provided the following remedies: (1) The great dependence of the senators on the people by annual elections, and that not by an undistinguished rabble, like the English electors, but by men of fortune and education. . . .
>
> The division of the Senate is prevented: . . . (2) As faction supposes a combination in a separate interest, it is prevented by their dependence on the people. . . .
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> . . .
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>
> It is necessary, likewise, to prevent both combination and division in the thousand magistrates. This is done sufficiently by the separation of places and interests.
>
> But, lest that should not be sufficient, their dependence on the ten thousand for their elections serves to the same purpose.

Id. For a summary of the influence of Hume's thought, transmitted through Founders such as Franklin, John Adams, Hamilton, and Madison, see *id.* at *l-lx* (summarized by Charles W. Hendel).

See also 2 ELLIOT, *supra* note 1, at 289 (John Lansing, at the New York ratifying convention, arguing that dependence obviates faction); 3 *id.* at 17 (Wilson Nicholas at the Virginia ratifying convention stating that the dependence arising from frequent elections prevents combination).

[93] THE FEDERALIST NO. 63, *supra* note 1, at 389-90 (Madison). *See also* 2 ELLIOT, *supra* note 1, at 105 (Fisher Ames, speaking at the Massachusetts ratifying convention); 4 *id.* at 132 (James Iredell, speaking at the North Carolina ratifying convention: "In this government there is not the least symptom of an aristocracy, which is, where the government is in a select body of men entirely independent of the people . . . . Will not all authority flow, in every instance, directly or indirectly from the people?").

[94] THE FEDERALIST NO. 70, *supra* note 1, at 424 (Alexander Hamilton) (stating, "The ingredients which constitute energy in the executive are; [first,] unity; [secondly,] duration; [thirdly,] an adequate provision for its support; [fourthly,] competent powers. The ingredients which constitute safety in the republican sense are [first,] a due dependence on the people, and [secondly,] a due responsibility.").

[95] 3 ELLIOT, *supra* note 1, at 420 (John Marshall speaking at the Virginia ratifying convention). *See also* SHEEHAN & MCDOWELL, *supra* note 1, at 165 ("Socius").

both the central government and the states were to be "substantially dependent on the great body of the citizens of the United States . . . in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes."[96] John Adams made much the same point with respect to the legislative, executive, and judicial branches of government.[97]

Federalists and Anti-Federalists heartily agreed, therefore, that government must be ultimately dependent on the citizenry. They disagreed about how best to assure this and on whether the proposed Constitution did a good enough job. In words that suggest just how central to the ratification debate the concept of sympathy was, Noah Webster, the great lexicographer, summarized what he saw as the basic Anti-Federalist argument:

> Your whole reasoning, and that of all the opposers of the Federal Government, is built on this *false principle,* that the *Federal Legislature* will be a body *distinct from* and *independent* of the people. . . .
>
> But the principle is false. The Congress, under the proposed Constitution, will have the *same interest* as the people—they are a *part* of the people—their interest is *inseparable* from that of the people . . . . The only requisite to secure liberty, is to connect the *interest* of the *Governors* with that of the *governed.*[98]

To meet Anti-Federalist concern, the friends of the Constitution, following the lead of Lord Bolingbroke,[99] emphasized the value of relatively short

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[96] THE FEDERALIST NO. 46, *supra* note 1, at 294 (James Madison). *See also id.* NO. 39, at 245 (James Madison) (stating, "In the latter [states], the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.").

[97] 3 ADAMS, *supra* note 1, at 419:

> The executive power is not naturally, nor necessarily, and ought never to be, in fact, derived from the legislative. The body of the people . . . is the fountain and original [sic] of all power and authority, executive and judicial, as well as legislative; and the executive ought to be appointed by the people, in the formation of their constitution, as much as the legislative. . . . The executive represents the people for one purpose, as much as the legislative does for another; and the executive ought to be as distinct and independent of the legislative, as the legislative is of that.

Id.

[98] SHEEHAN & MCDOWELL, *supra* note 1, at 170-71.

[99] 2 BOLINGBROKE, *supra* note 1, at 99:

> . . . [T]he design of the revolution [of 1688] was not accomplished, the benefit of it was not secured to us, the just expectations of the nation could

terms and frequent elections to maintaining dependence. For Noah Webster, in fact, frequent elections were the panacea: "The only barrier against tyranny, that is necessary in any State, is *the election of Legislators* by the yeomanry of that State. Preserve *that,* and every privilege is safe."[100] If other Federalists did not think elections would solve everything, they certainly saw them as the chief tool for maintaining dependence and, therefore, sympathy.[101]

As for such elections, just how frequent was frequent enough? The Federalists admitted that, like the optimal size of a legislature, the

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not be answered, unless the freedom of elections, and the frequency, integrity and independency of parliaments were sufficiently provided for.

Id. An example of Bolingbroke's influence: He was John Adams's favorite philosopher. CHINARD, *supra* note 1, at 209. *See also id.* at 21, 28, 231-32.

[100] SHEEHAN & MCDOWELL, *supra* note 1, at 171.

[101] *See, e.g.*, THE FEDERALIST NO. 37, *supra* note 1, at 227 (James Madison) (stating that, "The genius of republican liberty seems to demand on one side not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people by a short duration of their appointments . . . ."); *id.*, NO. 52, at 327 (James Madison) (writing that, "Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured. . . . biennial elections, under the federal system, cannot possibly be dangerous to the requisite dependence of the House of Representatives on their constituents."); *id.*, NO. 57, at 352 (James Madison) (writing that, "All these securities, however, would be found very insufficient without the restraint of frequent elections. Hence, in the fourth place, the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people."); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 42 (Noah Webster referring to election of Senators every six years as furthering sympathy); *id.* at 364 (James Iredell writing, "every two years a new body of representatives with all the energy of popular feelings will come."); SHEEHAN & MCDOWELL, *supra* note 1, at 166 ("Socius").

See also THE FEDERALIST NO. 77, *supra* note 1, at 463-64 (Alexander Hamilton) (defending the term of the President). *See also* 2 ELLIOT, *supra* note 1, at 199 (Governor Huntington, at the Connecticut ratifying convention, arguing that terms are sufficiently short to assure dependence); 2 *id.* at 166 (Rev. Samuel Stillman speaking at the Massachusetts ratifying convention); 3 *id.* at 14 (Wilson Nicholas speaking at the Virginia ratifying convention); 3 *id.* at 97 (Madison at the same convention arguing that biennial rotation of Senators would inhibit combinations and intrigues).

In the federal convention, Hamilton argued that frequent elections could actually decrease dependency by reducing popular interest, but he seems to have abandoned this argument. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 362.

frequency could not be determined exactly.[102] But, they argued that the Constitution struck a good balance.[103] Anti-Federalists, however, contended that the proposed terms were too long. Thus, "Brutus," one of the best Anti-Federalist writers, averred that a six-year term would destroy sympathy between the Senate and the people; he preferred four years.[104] Anti-Federalists also attacked the two-year tenure for representatives—arguing for one year.[105] For example, the transcript of the Massachusetts ratifying convention records these comments of General Thompson:

> Gen. THOMPSON accordingly said, that, however just, however good, and however upright the administration may be, there was still a great necessity for annual elections.
>
> He thought a change of election was for the best, even if the administration pleased the people. Do the members of Congress, says he, displease us, we call them home, and they obey. Now, where is the difference of their having been elected for one or two years? It is said that the members cannot learn sufficiently in that time. Sir, I hope we shall never send men who are *not learned*. Let these members know their dependence upon the people, and I say it will be a check on them, even if they were not good men. Here the general broke out in the following pathetic apostrophe: "O my country, never give up your annual elections!

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[102] THE FEDERALIST NO. 52, *supra* note 1, at 327 (James Madison) (writing, "But what particular degree of frequency may be absolutely necessary for the purpose does not appear to be susceptible of any precise calculation, and must depend on a variety of circumstances with which it may be connected.").

[103] *E.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 38 (Noah Webster arguing that the Senators' six year terms "rendered [them] sufficiently dependent on their constituents").

[104] *See* The Federal Farmer No. 63, part 2, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 185:

> Men six years in office absolutely contract callous habits, and cease, in too great a degree, to feel their dependence, and for the condition of their constituents. Senators continued in offices three or four years, will be in them longer than any popular erroneous opinions will probably continue to actuate their electors.

Id. Compare his criticism of the Constitution's judiciary article in Brutus, Nos. 15 & 16, *in* STORING, *supra* note 1. *See also* 2 ELLIOT, *supra* note 1, at 315 (Melancton Smith at the New York ratifying convention arguing that the terms of federal Senators, unlike those of the New York State legislature, are too long to assure dependence).

[105] *E.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 8-9 (Elbridge Gerry writing as "Columbian Patriot"); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 267 (George Clinton writing as "Cato").

> young men, never give up your jewel!" He apologized for his zeal.... He concluded by hoping that the representatives would be annually elected, and thereby feel a greater dependence on the people.[106]

Moreover, Anti-Federalists argued that frequent elections were simply not enough and that the proposed Constitution contained provisions that would impair dependence and sympathy and neglected provisions to promote them. Anti-Federalists claimed that the government would be rendered too independent by its powers to raise revenue,[107] maintain standing armies,[108] and control elections to federal office.[109] At least one prominent Anti-Federalist, James Monroe, thought the President's dependence on the people would be impaired by over-dependence on the states and on the Senate.[110] Anti-Federalists generally were very concerned about the "Ten Miles Square"—the proposed seat of the federal government to be located outside the boundary of any state. The transcripts of the New York ratifying convention capture a memorable moment. Gilbert Livingston, an Anti-Federalist, held the floor and commented:

> What will be their situation in a federal town? Hallowed ground! Nothing so unclean as state laws to enter there, surrounded, as they will be, by an impenetrable wall of adamant and gold, the wealth of the whole country flowing into it. [Here a member, who did not fully understand, called out to know what WALL the gentleman meant; on which he turned, and replied, "A wall of gold—of adamant, which will flow in from all parts

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[106] 2 ELLIOT, *supra* note 1, at 16. For another example of Anti-Federalist concern about the length of terms, see 2 *id.* at 45, reporting the following at the Massachusetts ratifying convention, "Col. JONES, (of Bristol,) objected to the length of time. If men continue in office four or six years, they would forget their dependence on the people, and be loath to leave their places. Men elevated so high in power, they would fall heavy when they came down."

[107] Centinel No. 21, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 53 ("In short, by putting it in the power of the future government to levy money at pleasure, and placing this government so independent of the people as to enable the administration to gratify every corrupt passion of the mind, to riot on your spoils, without check or control?").

[108] *E.g.*, A Democratic Federalist No. 29, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 78; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *in* STORING, *supra* note 1, at 220.

[109] *E.g.*, *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *in* STORING, *supra* note 1, at 211-12.

[110] 3 ELLIOT, *supra* note 1, at 488-89 (speaking at the Virginia ratifying convention).

> of the continent." At which flowing metaphor, a great laugh in the house.] The gentleman continued: Their attention to their various business will probably require their constant attendance. In this Eden will they reside with their families, distant from the observation of the people. In such a situation, men are apt to forget their dependence, lose their sympathy, and contract selfish habits. Factions are apt to be formed, if the body becomes permanent. The senators will associate only with men of their own class, and thus become strangers to the condition of the common people. They should not only return, and be obliged to live with the people, but return to their former rank of citizenship, both to revive their sense of dependence, and to gain a knowledge of the country.[111]

Jokes about Livingston's flowing wall of adamant continued in the New York convention,[112] but there was no doubt that the "Ten Mile Square" was a sensitive point for many Americans.[113] Part of Madison's defense was that the new federal district would *increase* sympathy, or at least make it more uniform,[114] and would prevent the central government from becoming too dependent on any local district.[115]

Anti-Federalists also argued for the addition of recall and term limits (then called "rotation in office"). Both of these were in the Articles of Confederation but were absent from the Constitution. The Anti-Federa-

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[111] 2 *id.* at 287-88. For another attack on the proposed federal city, see PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 18 (Elbridge Gerry writing as "A Columbian Patriot"). A related objection to the "Ten Miles Square" was that its inhabitants would be largely government dependents. ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 265 (George Clinton writing as "Cato:" "the asylum of the base, idle, avaricious and ambitious"). *Cf.* 3 ELLIOT, *supra* note 1, at 558 (John Marshall at the Virginia ratifying convention refuting Anti-Federalist objections).

[112] *E.g.*, 2 ELLIOT, *supra* note 1, at 292 & 323.

[113] *E.g.*, Brutus, No. 16, *in* STORING, *supra* note 1, at 189 (predicting that Senators present in the federal city, whose inhabitants "will be the great and mighty of the earth" will tend to be "weaned" from their constituents).

[114] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 261 ("As the powers & objects of the new Govt would be far greater <yn. heretofore>, more private individuals wd. have business calling them to the seat of it, and it was more necessary that the Govt should be in that position from which it could contemplate with the most equal eye, and sympathize most equally with, every part of the nation. These considerations he supposed would extort a removal even if a law were made necessary.").

[115] 3 ELLIOT, *supra* note 1, at 438 (Madison at the Virginia ratifying convention).

lists said they promoted dependence and sympathy.[116] The Federalists

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[116] *See, e.g.*, The Federal Farmer No. 63 part 2, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 187-88:

> It will generally be expedient for a man who has served four years in congress to return home, mix with the people, and reside some time with them. This will tend to reinstate him in the interests, feelings, and views similar to theirs, and thereby confirm in him the essential qualifications of a legislator. Even in point of information, it may be observed, the useful information of legislators is not acquired merely in studies in offices, and in meeting to make laws from day to day. They must learn the actual situation of the people by being among them, and when they have made laws, return home and observe how they operate. Thus occasionally to be among the people, is not only necessary to prevent or banish the callous habits and self-interested views of office in legislators, but to afford them necessary information, and to render them useful. Another valuable end is answered by it, sympathy, and the means of communication between them and their constituents, is substantially promoted.

Id. See also Montezuma No. 9, *id.* at 19 (arguing that absence of term limits would make elected representatives too independent of the people); 2 ELLIOT, *supra* note 1, at 289-90, 293, 300 (John Lansing speaking at the New York ratifying convention); 2 *id.* at 309-10 (Melancton Smith speaking at the same convention); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 11-12 (Elbridge Gerry as "A Columbian Patriot" stating that rotation in office "teaches [the representative] the feelings of the governed."); and The Federal Farmer Nos. 76-77, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 217.

> In considering the principle of rotation I had occasion to distinguish the condition of a legislator from that of a mere official man. We acquire certain habits, feelings, and opinions, as men and citizens—others, and very different ones, from a long continuance in office. It is, therefore, a valuable observation in many bills of rights, that rulers ought frequently to return and mix with the people. A legislature, in a free country, must be numerous; it is in some degree a periodical assemblage of the people, frequently formed. The principal officers in the executive and judicial departments must have more permanency in office. Hence it may be inferred, that the legislature will remain longer uncorrupted and virtuous; longer congenial to the people, than the officers of those departments. If it is not, therefore in our power to preserve republican principles for a series of ages, in all the departments of government, we may a long while preserve them in a well formed legislature. To this end we ought to take every precaution to prevent legislators becoming mere office-men; choose them frequently, make them recallable, establish rotation among them, make them ineligible to offices, and give them as small a share as possible in the disposal of them.

Id. But see A Farmer No. 5, *in* STORING, *supra* note 1, at 263 (An Anti-Federalist author, probably John Francis Mercer of Maryland, who believed rotation made officials more rapacious).

disagreed.[117]

D. *The Founding Generation's Passion for Sympathy Redux*

Disagreements among the Founding Generation as to how best to assure sympathy should not obscure for us the central points of agreement: Republican government must share the attitudes and interests of the people. To achieve this end, legislatures must be numerous, districts small, prerogatives limited, terms short, and all branches of government ultimately dependent on the people. As we shall see, independent of each other.

II. INDEPENDENCE

A. *Nature of and Reasons for Independence*

Independence is, of course, the negative of dependence and of dependency. As is true of "sympathy," these words also had different connotations in the eighteenth century. The educated member of the Founding Generation knew of their connection to the Latin verb *dependeo* (infinitive form, *dependere*), meaning, originally, "to hang down;"[118] and quite aside from that, even in common speech the meaning of English derivatives from Latin tended to be closer to the originals than they are today.[119] Thus, when people were described as "dependents," there was something of the image of people who hung down from their patron—analogous to the modern expression, "hangers-on."[120]

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[117] THE FEDERALIST NO. 71, *supra* note 1, at 431 (Alexander Hamilton) (stating, "The inference from it is that a man acting in the capacity of chief magistrate, under a consciousness that in a very short time he *must* lay down his office, will be apt to feel himself too little interested in it to hazard any material censure or perplexity from the independent exertion of his powers, or from encountering the ill-humors, however transient, which may happen to prevail, either in a considerable part of the society itself, or even in a predominant faction in the legislative body."). *See also* 2 ELLIOT, *supra* note 1, at 298 (Richard Harrison speaking at the New York ratifying convention).

[118] D.P. SIMPSON, CASSELL'S LATIN DICTIONARY 179 (1968). The "e" in the penult is long; the word should not be confused with the verb *dependere*, where the "e" in the penult is short. The latter word means to pay or expend.

[119] For information on the Latinate English of the Framers, see MCDONALD, *supra* note 1; GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 93 (1979). For information on their classical educations, see RICHARD, *supra* note 1.

[120] Thus, Samuel Johnson's dictionary offered the following as the first two definitions of "to depend:"

> "1. To hang from . . . 2. To be in a state of servitude or expectation; to live subject to the will of other; to retain to others."

A person was a dependent when he or she relied on another for protection, preference, or financial sustenance. As in ancient Rome, with which the Founders so often identified,[121] slaves, children, and married women all received protection and civic definition from the *pater familias* and, accordingly, were his dependents.[122] Courtiers were the dependents of the monarchs and aristocrats from whom they received political preference. "Placemen" in the British Parliament and others who received salaries from the Crown were dependents of the monarch, and therefore threatened to render the legislative branch dependent on the executive.[123] Paupers were dependents of whatever person or entity provided their bread.[124] Anti-Federalists feared that the population of the "Ten Miles Square"—the future District of Columbia—would be dominated by government dependents.[125] A person or entity was *independent* only if that person or entity did not depend on another for protection, political preferment, or financial support.[126]

The following was the first definition of "dependency:" "The state of hanging down from a supporter." JOHNSON, *supra* note 1.

[121] *See generally* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 25-26 (1967); RICHARD, *supra* note 1.

[122] MCDONALD, *supra* note 1.

[123] *See* 3 ELLIOT, *supra* note 1, at 375-76 (William Grayson speaking at the Virginia ratifying convention); 2 *id.* at 52-53 (D. Taylor speaking in the Massachusetts ratifying convention); 4 *id.* at 289 (Rawlins Lowndes speaking in the South Carolina ratifying convention).

[124] Thus, John Adams remarked that the poor were "too dependent upon other Men to have a Will of their own." FERLING, *supra* note 1, at 156.

[125] *See* 3 ELLIOT, *supra* note 1, at 558 (John Marshall at the Virginia ratifying convention answering Anti-Federalist objections).

[126] *Cf.* Bolingbroke's discussion of the need for the independence of the branches of government from each other:

> Should angels and archangels come down from heaven to govern us, the same danger would exist until the springs, from whence it arises, were cut off. . . because . . . public liberty must be in danger whenever a free constitution, the proper and sole security of it, is dependent on will; and a free constitution, like ours, is dependent on will, whenever the will of one estate can direct the conduct of all three.

2 BOLINGBROKE, *supra* note 1, at 154.

One reason the Senate rather than a group of Presidential appointees was deemed to be the fit council for the executive was the Senate's independence of the executive. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 229-31 (Alexander Contee Hanson writing as "Aristides"); *cf. id.* at 330 (George Mason claiming that without a proper council of presidential appointees, the executive will be one "directed by minions and favorites.").

The participants in the Constitutional debate, apparently unanimously, believed that for liberty to survive republican decision makers must be independent. (As we shall see, government officials' dependence on the people both limited and further justified this rule). There were three reasons why the independence of decision makers was important. First, only independent people could use their intelligence fully and impartially to solve problems.[127] Dependents were not really free agents—they were exponents of the attitudes and ideas of their patrons. If one jiggled the sustainer, one jostled the dependents. On this point, Hamilton's views were typical: "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"[128] Gouverneur Morris, whose pen polished the Constitution to its ultimate sheen, observed that while "[i]n Religion the Creature is apt to forget its Creator. . . . [I]t is otherwise in political affairs."[129] Even if a dependent happened to

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[127] 2 ELLIOT, *supra* note 1, at 491, 517 (James Wilson, at the Pennsylvania ratifying convention, tying judicial impartiality to independence); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 36 (Noah Webster tying executive and judicial impartiality to independence); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 275-76 (George Clinton, writing as "Cato," citing need for independence of President and Senate to better assure impartiality.).

Cf. 4 ELLIOT, *supra* note 1, at 204 (William Lenoir, at the North Carolina ratifying convention stating, "We are to exercise our own judgments, and act independently."). *See also infra* notes 156-57 and accompanying text.

[128] THE FEDERALIST NO. 79, *supra* note 1, at 472 (Alexander Hamilton). *See also* FERLING, *supra* note 1, at 156 (John Adams stating that paupers are dependent on others and thus have no will of their own.); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 373 (Hamilton stating that "Those who pay are the masters of those who are paid."); 2 *id.* at 202-03 (Gouverneur Morris stating that dependents have no will of their own); 4 ELLIOT, *supra* note 1, at 304 (Charles Cotesworth Pinckney stating at the South Carolina ratifying convention that when South Carolina senators were chosen by the state house, "being their mere creatures, they could not be supposed to have that freedom of will as to form a proper check."); 3 *id.* at 17 (Wilson Nicholas at the Virginia ratifying convention stating, "Any branch of government that depends on the will of another for supplies of money, must be in a state of subordinate dependence . . . .").

Cf. 3 ELLIOT, *supra* note 1, at 258-59 (Madison at the Virginia ratifying convention predicting that the states will have more employed dependents than the central government).

[129] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 512. *Cf.* THE FEDERALIST NO. 79, *supra* note 1, at 472 (Alexander Hamilton) (stating, "In the general course of human nature, *a power over a man's subsistence*

disagree with his patron, he usually had to weigh whether expressing that disagreement might threaten his livelihood, his safety, or his political position. This muddied, at the least, one's ability to make judgments on affairs of state.[130]

Another reason republican decision makers had to be independent was this: Because the votes and other decisions of dependents really were attributable to their patrons, for practical purposes dependency resulted in fewer real decision makers, and therefore, less varied input into public decisions. Moreover, if the real decision makers were relatively few, they would operate the state for their benefit rather than for the public good: the condition the Founding Generation called "corruption."[131] Having fewer real decision makers lowers the contracting costs for factions and juntos

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amounts to a power over his will."). According to one commentator, John Adams wrote in 1776 that "[c]hildren, servants and the propertyless were excluded [from civic life] because they were 'too little acquainted with public affairs to form a right judgment, and too dependent upon other men to have a will of their own.'" *Quoted in* MCDONALD, *supra* note 1, at 161. *Cf.* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 124 (Madison opining on the "biassed directions of a dependent judge.").

[130] I sometimes bring this home to fellow academics by the following challenge: From the entire nation, name *any two* law professors out of the hundreds at state universities who, after serious, impartial consideration, have recommended cuts in state funding for their own institutions. I have never met anyone who has been able to meet that challenge. The source of the paycheck renders vaunted professorial independence in this situation almost non-existent, even in times of state budgetary stress, even if the money could be more compassionately used to aid the poor or to reduce unfair taxes, and even with the knowledge that public funding of law schools is a regressive transfer from the general taxpayers to the presently and prospectively well-to-do.

I know of only a single law professor who has ever done so publicly. I can testify from personal experience that even if one has tenure it is very risky business, and that if one does survive at the job there are other, very unpleasant, personal and professional consequences.

The corrosive effects on academic integrity resulting from direct university dependence on state government are, perhaps, too rarely acknowledged.

[131] *See generally* 2 ELLIOT, *supra* note 1, at 509 (James Wilson at the Pennsylvania ratification convention: "Is there not also greater danger that the majority of such a body [the then-U.S. Congress] might be more easily bribed than the majority of one not only more numerous, but checked by a division of two or three distinct and independent parts?"); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 512 (Gouverneur Morris on the effects of a dependence of one legislative chamber on the other).

seeking to "concert and execute their plans of oppression"[132]—thereby increasing further the risk of corruption.

B. Independence of the Citizenry

In the view of the Founders, independence of individual citizen-voters was a prerequisite for liberty and for republican government. Only independent citizens—citizens who were self-supporting economically, were independent legally and socially, and who could defend themselves militarily, would have the fortitude to evict office holders who abused their trust.[133] In England, the franchise had long been limited to those who were self-sufficient.[134] In America, too, " 'the public' included only independent adult males,"[135] and "no member of the public could be dependent upon any other and still be reckoned a member of the public."[136] The prevailing political literary canon reinforced the point.[137] Niccolo Machiavelli, a luminary in that niche, distinguished clearly between "free men or . . . those who depend on others."[138] Bolingbroke had written of "private independ-

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[132] THE FEDERALIST NO. 10, *supra* note 1, at 83 (James Madison). *See also* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 12 (Elbridge Gerry decrying the relatively low number of Presidential electors, leading to "aristocratic junto, who may easily combine in each State"); *id.* at 268 (Edmund Randolph claiming the small number of states in the confederation congress increased the opportunities for foreign influence).

[133] 3 ELLIOT, *supra* note 1, at 10 (Wilson Nicholas speaking at the Virginia ratifying convention). *See also* 3 *id.* at 14 ("[F]or those who have sold themselves to their representatives will have no right to complain, if they, in their turn, barter away their rights and liberties; but those who have not themselves been bought, will never consent to be sold."). *See also* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 270-71 (George Clinton, writing as "Cato," defending participation in free government only by those who are *sui juris*.); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 56 (Noah Webster stating that armed citizenry will defend itself against unjust laws).

[134] MCDONALD, *supra* note 1, at 25-26.

[135] *Id.* at 70.

[136] *Id.* at 71.

[137] *See id.* at 74.

[138] Niccolo Machiavelli, *Discourses on the First Decade of Titius Livius*, *in* 1 MACHIAVELLI: THE CHIEF WORKS AND OTHERS 193 (Allan Gilbert trans., 1965). *Cf.* 4 ELLIOT, *supra* note 1, at 97 (James Iredell, at the North Carolina ratifying convention: "This personal independence is the surest safeguard of the public freedom.").

ency, which can alone support public liberty under such a government as ours."[139] Hume noted that "property when united causes much greater dependence than the same property when dispersed,"[140] and Harrington prescribed dependence through receipt of large landholdings as a path to monarchy.[141] The widespread ownership of property was necessary to the independence that was crucial to a free state.[142]

It was critical also that decision makers not be dependent on the state. John Adams advised his son Thomas that one involved in politics:

> [M]ust make it a rule never to become dependent on public employments for subsistence. Let him have a trade, a profession, a farm, a shop,

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[139] 2 BOLINGBROKE, *supra* note 1, at 64.

[140] HUME, *supra* note 1, at 72-73:

> Those who assert that the balance of our government inclines towards absolute monarchy may support their opinion by the following reasons .... It is evident that much less property in a single hand will be able to counterbalance a greater property in several, not only because it is difficult to make many persons combine in the same views and measures, but because property when united causes much greater dependence than the same property when dispersed.... But a man possessed of £100,000 a year, if he has either any generosity or any cunning, may create a great dependence by obligations and still a greater by expectations.

[141] HARRINGTON, *supra* note 1, at 15 (quoting Machiavelli to the following effect):

> "[A]nd he who goes about to introduce monarchy where the condition of the people is equal shall never bring it to pass, unless he cull out such of them as are the most turbulent and ambitious, and make them gentlemen or noblemen, not in name but in effect, that is by enriching them with lands, castles, and treasures, that may gain them power amongst the rest and bring in the rest unto dependence upon themselves, to the end that, they maintaining their ambition by the prince, the prince may maintain his power by them."
>
> Wherefore, as in this place I agree with Machiavel that a nobility or gentry, overbalancing a popular government, is the utter bane and destruction of it....

[142] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 59 (Noah Webster). *See also* SHEEHAN & MCDOWELL, *supra* note 1, at 51 (Nicholas Collins, writing as "A Foreign Spectator," praising the fact that in America "no necessity renders great numbers indigent, consequently dependent, poor in spirit, and in many respects less valuable as men and citizens."); *id.* at 340 ("Atticus" writing that widespread holding of small estates is a democratic influence, large estates an aristocratic influence, and dependence a monarchical influence).

> something where he can honestly live, and then he may engage in public affairs, if invited, upon independent principles. My advice to my children is to maintain an independent character.[143]

Most of the participants in the Constitutional debate had been immersed in the history of the Roman republic, which was eventually destroyed in part by citizen dependence on great men and on the state.[144] All participants were determined that the new government neither be ruled by dependents nor be likely to encourage dependency. Anti-Federalists opposed the new Constitution in part because they believed it would foster dependence. For example, Governor George Clinton of New York, writing as "Cato," attacked the constitutional powers of the President because "the deposit of vast trusts in the hands of a single magistrate, enables him in their exercise to create a numerous train of dependents."[145] Much of the debate over whether there should be a federal town apart from state territory revolved around the disputed point of whether such a capital would create a class of citizens dependent on a government too independent of the people.[146]

Gouverneur Morris's comments at the federal convention illustrate the trepidation participants felt when contemplating possible loss of citizen independence. He stated:

> The time is not distant when this Country will abound with mechanics & manufacturers who will receive their bread from their employers. Will such men be the secure & faithful Guardians of liberty? Will they be the impregnable barrier agst. aristocracy? . . . The man who does not give his vote freely is not represented. It is the man who dictates the vote. Children do not vote. Why? because they want prudence. because they have no will of their own.[147]

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[143] *Quoted in* DAVID MCCULLOUGH, JOHN ADAMS 415 (2001). Adams also praised George Washington because he " 'judges more independently than any man I ever saw.' " *Id.*

[144] On the pervasive impact of Roman history on the Founding, see Natelson, *supra* note 1, and sources cited therein. *See also* RICHARD, *supra* note 1. Note the extract from the writings of Samuel Adams, *id.* at 99 (contrasting the "independent spirit" of an early Roman with the contemptible spirit of those who submitted to Caesar).

[145] ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 261.

[146] *See supra* notes 111-13 and accompanying text.

[147] *See also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 202-03; CHINARD, *supra* note 1, at 92 (John Adams expressing similar views).

When the question arose as to whether the Constitution should require officials to meet a property qualification so as to assure their personal independence, Morris responded that, "If qualifications are proper, he wd. prefer them in the electors rather than the elected."[148] Madison agreed,[149] and most others would have, also.[150] Even so, there was strong support for property requirements for elected officials as well as voters.[151]

Independence also required that freemen be armed for their own protection, not merely against invaders or criminals, but against their own government. This, too, was universal sentiment. Federalists such as Noah Webster[152] and James Madison[153] saw an armed citizenry as a protection against unjust laws. Patrick Henry inveighed against the Constitution by claiming that under its rule, the people would be "transformed from respectable, independent citizens, to abject, dependent subjects or slaves"[154] and that, "If you have given up your militia, and Congress shall refuse to arm them, you have lost every thing. Your existence will be precarious, because you depend on others, whose interests are not affected by your infelicity."[155]

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[148] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 121.

[149] 2 *id.* at 124. *Cf.* 2 *id.* at 126 (Oliver Ellsworth opposes a clause disqualifying "public debtors" from the legislature because, unlike in England, in America they are not dependent on the Crown.).

[150] Following are some other samples of contemporary praise for the value of citizen independence: Cato No. 14, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 38 (praising "the liberties and interests of the more northern states, where freedom, independence, industry, equality and frugality are natural to the climate and soil . . . ."); 2 ELLIOT, *supra* note 1, at 38 (Francis Dana at the Massachusetts ratifying convention on advantages of independent freemen over slaves); 2 *id.* at 130 (James Bowdoin, at the same convention, stating, "the strength, the welfare, and happiness of a country [depends] upon the numbers, the ease, and independence of its yeomanry."); 4 *id.* at 87 (John Steele, at the North Carolina ratifying convention, comparing a "government without revenue" to "a poor, forlorn, dependent individual, and said that the one would be as helpless and contemptible as the other."); 4 *id.* at 97 (James Iredell speaking at the same convention).

[151] *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 248 (Charles Pinkney). One argument against the Constitution was that it would render the states insufficiently independent, a claim that Federalists denied. *See, e.g.*, 2 ELLIOT, *supra* note 1, at 337 (Melancton Smith at the New York ratifying convention).

[152] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 56.

[153] THE FEDERALIST NO. 46, *supra* note 1, at 299-300 (James Madison).

[154] 3 ELLIOT, *supra* note 1, at 148 (at the Virginia ratifying convention).

[155] 3 *id.* at 388 (at the Virginia ratifying convention).

The Founders believed that only when fortified by economic, legal, social, and military independence could men make choices in a reasoned, impartial way. Such men could say of their own decisions much as Delegate Zachariah Johnson said of his when, near the end of the Virginia ratifying convention, he announced that his support for the Constitution had "not arisen from a blind acquiescence or dependence on the assertions and opinions of others, but from a full persuasion of its rectitude."[156] As Tench Coxe remarked regarding the electorate of prospective House districts, "the suffrages of six thousand enlightened and independent freemen are above all price."[157]

C. *Independence Within Government*

Independence of governmental actors and entities is potentially of two sorts: independence from each other and independence from the people. The Founders crafted the Constitution so there was plenty of the first sort and very little of the second. To understand why this was the case, we must first examine the plan for independence of governmental entities from each other. This subpart is devoted to inter-governmental independence. I approach the subject by addressing a pair of questions: (1) To what extent were governmental entities to be independent of each other? and (2) Why?

1. *Independence of Governmental Entities from Each Other*

The governmental entities most discussed in the Constitutional debate of 1787-1789 were: (1) the proposed federal government as a unit; (2) the states as units; (3) the proposed federal Senate; (4) the proposed federal House of Representatives; (5) the proposed President; (6) the proposed Vice-President; and (7) the proposed federal courts. There were, of course, multiple branches in the state governments as well, but they were mentioned mostly as a source of lessons for the proposed federal government.[158]

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[156] 3 *id.* at 644.

[157] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 143.

[158] *But see* 3 ELLIOT, *supra* note 1, at 408-09 (Madison at the Virginia ratifying convention stating, "The sum of the powers given up by the people of Virginia is divided into two classes—one to the federal and the other to the state government. Each is subdivided into three branches. These may be kept independent of each other in the one as well as the other.").

Most of the Founding Generation clearly favored a high level of independence among all of these government entities—that is, between states and federal government and among the various branches of the federal government. Very early in the federal Constitutional Convention there was some sentiment for abolishing the states[159] or subordinating them to the central government.[160] By the time of the ratification debate, however, nearly everyone—including (in public at least) Hamilton—had become convinced that the states should have a major role to play in the new system, and that for the purpose of playing that role they should act fairly independently of the central government.[161] This state independence of action was to be protected by the Constitution's enumeration of federal powers,[162] by popular sentiment,[163] by the state legislatures' influence over the Senate,[164] by state participation in election of federal officials generally,[165] by the state

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[159] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 136 (George Read stating, "Too much attachment is betrayed to the State Govermts. We must look beyond their continuance. A national Govt. must soon of necessity swallow all of them up. They will soon be reduced to the mere office of electing the national Senate. He was agst. patching up the old federal System: he hoped the idea wd. be dismissed.").

At the time of the ratification debate, one of the very few writers to favor total consolidation was Pelatiah Webster. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 129-30.

[160] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 287 (Hamilton saying that he would continue the states but treat them only as governmental corporations for local purposes.).

[161] THE FEDERALIST NO. 32, *supra* note 1, at 197-98 (Alexander Hamilton) (writing, "[T]he individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants."); *id.* NO. 33, at 205 (Alexander Hamilton) (writing, "The inference from the whole is that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports."); 2 ELLIOT, *supra* note 1, at 355-56, 362 (Hamilton speaking at the New York ratifying convention); 3 *id.* at 244 (George Nicholas speaking at the Virginia ratifying convention); 3 *id.* at 367 (Madison speaking at the Virginia ratifying convention).

[162] *E.g.*, THE FEDERALIST NO. 45, *supra* note 1, at 292 (James Madison).

[163] *E.g.*, *id.* NO. 17, at 119 (Alexander Hamilton).

[164] *E.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 142 (Tench Coxe).

[165] *E.g.*, *id.* at 152 (Tench Coxe).

militias,[166] and by an independent judiciary that would enforce the limitations set forth in the Constitution.[167]

On the other hand, most people also believed that the central government had to be substantially independent of the states.[168] The proposed Constitution sought to secure this independence through such devices as

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[166] *E.g.*, THE FEDERALIST NO. 46, *supra* note 1, at 299-300 (James Madison).

[167] *E.g.*, *id.* NO. 16, at 117 (Alexander Hamilton) & NO. 44, at 285-86 (James Madison); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 43 & 46 (James Sullivan as "Cassius"). For other contemporary recognition of the principle of judicial review, see 4 ELLIOT, *supra* note 1, at 71 (John Steele speaking at the North Carolina ratifying convention); 2 *id.* at 446, 489 (James Wilson speaking at the Pennsylvania ratifying convention); 3 *id.* at 541 (Patrick Henry speaking at the Virginia ratifying convention); 3 *id.* at 548 (Edmund Pendleton speaking at the same convention).

[168] *See* Philanthropos No. 7, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 17; A Federal Republican No. 8, *id.*; 3 ELLIOT, *supra* note 1, at 244 (George Nicholas speaking at the Virginia ratifying convention); 3 ELLIOT, *supra* note 1, at 367 (Madison speaking at the Virginia ratifying convention); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 37 (Madison speaking on the independence of Congress from the states); 1 *id.* at 69 (James Wilson stating that both branches of the legislature ought to be independent of the states); 1 *id.* at 176 (Randolph averring need for federal executive to be chosen separately from states); 1 *id.* at 215-16 (Madison declaring that allowing states to fix salaries of federal officials would leave the latter too dependent); 1 *id.* at 228 (report of the committee of the whole stating that long terms for Senators were necessary to assure independence from states); 1 *id.* at 514 (Gouverneur Morris); THE FEDERALIST NO. 30, *supra* note 1, at 191-92 (Alexander Hamilton) (writing that federal government should not have to rely on states for revenue); *id.*, NO. 43, at 272 (James Madison) (defending the Ten Miles Square as assuring federal independence of states); *id.*, NO. 52, at 326 (James Madison) (stating, "To have submitted it to the legislative discretion of the States would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone."); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 141-42 (Tench Coxe arguing that Senators' independence from their states would be furthered by the system of individual voting in the Senate); SHEEHAN & MCDOWELL, *supra* note 1, at 121 (George Nicholas as "State Soldier" contending that there was an excessive dependence of Congress on the states under the Confederation).

To further secure federal independence from the states, James Wilson favored adding a disqualification from state office for Senators. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 428-29.

direct popular election of the members of the House of Representatives,[169] long terms for Senators,[170] governmental salaries set and paid at the federal level,[171] the flexibility of the Necessary and Proper Clause,[172] a seat of government separate from any state,[173] and federal revenue powers independent from state obstruction.[174] The federal government and states would form a system of parallel sovereignty that Hamilton said resembled the legislative structure in ancient Rome:

> It is well known that in the Roman republic the legislative authority in the last resort resided for ages in two different political bodies—not as branches of the same legislature, but as distinct and independent legislatures, in each of which an opposite interest prevailed: in one, the patrician; in the other, the plebeian. . . . And yet these two legislatures coexisted for ages, and the Roman republic attained to the pinnacle of human greatness.[175]

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[169] U.S. CONST. art. I, § 2, cl. 1.

[170] *See* 2 ELLIOT, *supra* note 1, at 296 (Chancellor Robert Livingston arguing at the New York ratifying convention that Senators would be rendered too dependent on the states if recallable); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 228 (Committee of the Whole recommending long terms for Senators to assure independence from states).

[171] *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 215-16; 2 *id.* at 291 (Madison arguing that states fixing federal officers' salaries would leave those officers too dependent on states). *See also* 3 ELLIOT, *supra* note 1, at 369-70 (Madison at the Virginia ratifying convention); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 372 (Edmund Randolph and Rufus King), 1 *id.* at 373 (Madison and Hamilton), 1 *id.* at 428 (Jonathan Dayton); 2 *id.* at 292 (Daniel Carroll, John Dickinson, and Oliver Ellsworth).

[172] U.S. CONST. art. I, § 8, cl. 18. *See also* 2 ELLIOT, *supra* note 1, at 460 (James Wilson at the Pennsylvania ratifying convention).

[173] *See* 3 ELLIOT, *supra* note 1, at 438 (Madison at the Virginia ratifying convention); 3 *id.* at 439-40 (Edmund Pendleton at the same convention).

[174] U.S. CONST. art. I, § 8, cl. 1. The participants often noted, favorably or unfavorably, that the new federal revenue power would be independent of the states. *See, e.g.*, 4 ELLIOT, *supra* note 1, at 83-84, 86 (Whitmill Hill at the North Carolina ratifying convention); 4 *id.* at 87 (the North Carolina ratifying convention, John Steele recorded as saying that, "A government without revenue he compared to a poor, forlorn, dependent individual, and said that the one would be as helpless and contemptible as the other."); 3 *id.* at 119-20 (Edmund Randolph at the Virginia ratifying convention); 3 *id.* at 128-29 (Madison at the same convention); 3 *id.* at 244 (George Nicholas at the same convention); THE FEDERALIST NO. 30, *supra* note 1, at 188-93 (Alexander Hamilton).

[175] THE FEDERALIST NO. 34, *supra* note 1, at 206 (Alexander Hamilton).

However, Oliver Ellsworth pointed out that there was a precedent closer to home: the concurrent jurisdiction under the Articles of Confederation of Congress and the states over military offenses.[176]

To be sure, the independence of states and federal government from each other was not complete—in eighteenth century usage, not "perfect."[177] Both governments would rely on each other in some respects,[178] with reliance of the nation on the states somewhat heavier than vice-versa.[179] But the dominant feature of the system was the large measure of independence each level of government was to enjoy.

Nearly all debate participants seem to have believed that there should be a high degree of independence among the various federal branches.[180] Each branch "should have a will of its own."[181] The participants shared Bolingbroke's ideal of a legislature free of the kind of executive branch corruption induced by dependence.[182] The new Constitution therefore

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[176] 2 ELLIOT, *supra* note 1, at 195-96 (speaking at the Connecticut ratifying convention).

[177] Samuel Johnson's *A Dictionary of the English Language*, gives as the first definition of "perfect" the following: "Complete; consummate; finished; neither defective nor redundant." (A "defect" in contemporary usage meant an insufficiency.) JOHNSON, *supra* note 1. The definition most closely approximating our current use of the word "perfect" was the third, reading "Pure; blameless; clear; immaculate. This is a sense chiefly theological." *Id.*

[178] 2 ELLIOT, *supra* note 1, at 352 (Hamilton at the New York ratifying convention, speaking of "that mutual dependence which forms the essence of union.").

[179] *See infra* notes 230-31 and accompanying text.

[180] *E.g.*, 2 ELLIOT, *supra* note 1, at 479 (James Wilson speaking at the Pennsylvania ratifying convention).

[181] THE FEDERALIST NO. 51, *supra* note 1, at 321 (James Madison) (stating,"[I]t is evident that each department should have a will of its own. . . . It is equally evident that the members of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices."); *id.* NO. 68, at 413 (Alexander Hamilton) (stating, "Another and no less important desideratum was that the executive should be independent for his continuance in office on all but the people themselves."); 2 ELLIOT, *supra* note 1, at 510-11 (James Wilson at the Pennsylvania ratifying convention arguing that neither the President nor the Senate will be nor should be "tools" of the other).

[182] 3 ELLIOT, *supra* note 1, at 375 (William Grayson speaking at the Virginia ratifying convention); 2 *id.* at 264 (Hamilton at the New York ratifying convention, although he might have been speaking disingenuously, as often); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 273-75 (George Clinton writing as "Cato"); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 139

prohibited members of Congress serving in the executive branch[183] and guaranteed them freedom of speech.[184] The Vice-President, because of his legislative duties, was to be independent of the President[185] (a point modern Americans seem to have forgotten).

Not only was Congress to be independent of the executive, but each chamber of Congress was to be independent of the other.[186] Further, the

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(Tench Coxe noting that the President would not have "placemen" in the legislature).

Cf. Bolingbroke:

> Time and trouble, indeed, may be sometimes required to lead independent men, who judge for themselves, and comply because they are convinced; whereas neither one nor the other are wanting to determine such as hold to a court by a corrupt dependency on it: for they are soon disciplined, and ready to perform the whole exercise of parliamentary mercenaries at the beat of a drum.

2 BOLINGBROKE, *supra* note 1, at 146.

See also 2 *id.* at 148:

> The democratical power is no longer kept under the same dependencies; and if a house of commons should now fail to assert that independent share in the supreme legislative power, which the constitution assigns to this assembly, it could not proceed, as it might and sometimes did formerly, from the nature of tenures, and many other unavoidable restraints; it could proceed alone from the corruption of particular men, who threw themselves into a voluntary dependency.

Id.

Cf. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 141 (Tench Coxe writing that the independence of the Senate from the executive would better ensure impartiality in cases of impeachment).

[183] U.S. CONST. art. I, § 6, cl. 2.

[184] *Id.* at cl. 1; PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 144 (Tench Coxe).

[185] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 138 (Tench Coxe); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 240 (Roger Sherman writing as "A Citizen of New Haven").

[186] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 20 (Virginia plan outlining independent upper and lower chambers); 1 *id.* at 52, 69, 254 (James Wilson mentioning need for independence of Senate from House); 1 *id.* at 120, 490 (Madison mentioning need for an independent Senate); 1 *id.* at 136 (Dickinson stating need for an independent Senate); 1 *id.* at 152 (Gerry on the need for the Senate to be independent of the House); 1 *id.* at 155 (Pinckney, same); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 31 ("[T]he expediency of dividing the powers of legislation between the two bodies of men, whose debates shall be separate and not dependent on each other. . . .").

executive was to be independent of the legislature, and this the new federal Constitution prescribed this even more thoroughly than most state constitutions.[187] For example, the President's election largely bypassed Congress,[188] so he was not "tempted to sacrifice his duty to his complai-

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THE FEDERALIST NO. 51, *supra* note 1, at 322 (James Madison) (stating, "In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."). *See also id.* NO. 65, at 398 (Alexander Hamilton) (writing, "Where else than in the Senate could have been found a tribunal [to try impeachments] sufficiently dignified, or sufficiently independent?").

See also 2 ELLIOT, *supra* note 1, at 26-27 (Theophilus Parsons speaking at the Massachusetts ratifying convention); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 227 (Roger Sherman, writing as "A Countryman," stating that "the two houses should be completely independent of each other."); *id.* at 273-74 (George Clinton writing as "Cato").

[187] James Wilson, for example, averred that while the Constitution did not maintain strict separation among legislative, executive, and judicial powers, such separation "is more strictly adhered to than in any other system of government in the world." 2 ELLIOT, *supra* note 1, at 504.

On the desirability of executive independence, *see also* 3 ELLIOT, *supra* note 1, at 275 (William Grayson speaking at the Virginia ratifying convention); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 66, 176 (Edmund Randolph); 1 *id.* at 290 (Hamilton); 2 *id.* at 31, 52, 64-65, 527 (Gouverneur Morris); 2 *id.* at 32 (Hugh Williamson); 2 *id.* at 33, 36 (James McClurg); 2 *id.* at 66 (Charles Pinkney); 2 *id.* at 66-67 (Rufus King); 2 *id.* at 102 (Elbridge Gerry); 2 *id.* at 109 (Madison); 2 *id.* at 524 (Hugh Williamson); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 225-26 (Alexander Contee Hanson writing as "Aristides").

Perhaps the most independent state governor was that of Massachusetts, whose then-existing constitution was based on a draft by John Adams. FERLING, *supra* note 1, at 214-15.

At the Massachusetts ratifying convention James Bowdoin cited this independence as a virtue. 2 ELLIOT, *supra* note 1, at 128.

Roger Sherman was an extremely rare dissenter from this principle. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 68. However, he may have changed his views later. 2 *id.* at 499.

[188] 4 ELLIOT, *supra* note 1, at 304 (C.C. Pinckney speaking in the South Carolina ratifying convention); THE FEDERALIST NO. 68, *supra* note 1, at 413 (Alexander Hamilton) (writing, "Another and no less important desideratum was that the executive should be independent for his continuance in office on all but the

sance for those whose favor was necessary to the duration of his official consequence."[189] Finally, of course, everyone agreed that the judiciary needed to be independent of all other branches.[190]

Although the existing state constitutions and the Articles of Confederation featured less independence among branches than did the new Constitution, almost all the Anti-Federalist writers endorsed the principle of independence of co-ordinate branches.[191] In fact, one of their favorite

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people themselves."); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 134 ("Mr. Madison considered an election of one branch at least of the Legislature by the people immediately, as a clear principle of free Govt. and that this mode under proper regulations had the additional advantage of securing better representatives, as well as of avoiding too great an agency of the State Governments in the General one."); 2 *id.* at 500 (Gouverneur Morris); 2 *id.* at 501-02, 523 (James Wilson); 2 *id.* at 522 (Elbridge Gerry).

[189] THE FEDERALIST NO. 68, *supra* note 1, at 413 (Alexander Hamilton). *See also id.* NO. 71, at 433 (Alexander Hamilton) (writing, "[I]t is certainly desirable that the executive should be in a situation to dare to act his own opinion with vigor and decision."). Part of that "duty" was protection of the public liberties. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 67 (Rufus King).

[190] 2 ELLIOT, *supra* note 1, at 480-81, 491 (James Wilson speaking at the Pennsylvania ratifying convention); THE FEDERALIST NO. 78, *supra* note 1, at 465-66 (Alexander Hamilton); *id.*, NO. 79, at 472 (Alexander Hamilton); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 429 (James Wilson & Edmund Randolph).

See also 4 ELLIOT, *supra* note 1, at 71 (John Steele speaking at the North Carolina ratifying convention); 3 *id.* at 205, 468 (Edmund Randolph speaking at the Virginia ratifying convention); 3 *id.* at 303 (Edmund Pendleton speaking at the same convention); 3 *id.* at 539, 541 (Patrick Henry speaking at the same convention); 3 *id.* at 552 (John Marshall speaking at the same convention); 3 *id.* at 563-64 (William Grayson speaking at the same convention); 3 *id.* at 580-81 (George Nicholas speaking at the same convention); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 27 (Madison criticizing state judiciaries as too dependent on state legislatures); SHEEHAN & MCDOWELL, *supra* note 1, at 35 ("Philodemos" claiming independence of judges as a virtue of the Constitution).

[191] *See, e.g.*, Brutus No. 17, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 44 (supporting independence of judges); The Federal Farmer No. 3, *in* STORING, *supra* note 1, at 47. See also 4 ELLIOT, *supra* note 1, at 118 (Samuel Spencer at the North Carolina ratifying convention); The Federal Farmer Nos. 76-77, THE ANTIFEDERALIST PAPERS, *supra* note 1; ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 273-75 (George Clinton writing as "Cato"); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 298 (John Francis Mercer); 2 *id.* at 537 (George Mason). *See also* 2 ELLIOT, *supra* note 1, at 550-51 (proposed amendment in Maryland ratifying convention in part to further judicial independence).

arguments was that the proposed Constitution *did not guarantee enough* independence among co-ordinate branches. Illustrative is "The Federal Farmer's" fear that:

> [T]his sextennial senate . . . will not in practice be found to be a body to advise, but to order and dictate in fact; and the president will be a mere *primus inter pares*. . . . By giving the senate, directly or indirectly, an undue influence over the representatives, and the improper means of fettering, embarrassing, or controlling the president or executive, we give the government in the very outset a fatal and pernicious tendency to . . . aristocracy.[192]

Anti-Federalist concern about insufficient independence was one reason many of them advocated changes to ensure "rotation in office"—i.e.,

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But see Centinel, Letter No. 1, *in* STORING, *supra* note 1, at 15-16 (favoring a simple government rather than a complex one with mutually balancing branches).

[192] The Federal Farmer Nos. 76-77, THE ANTIFEDERALIST PAPERS, *supra* note 1. For other Anti-Federalist claims of insufficient independence, *see* Centinel, Letter No. 1, *in* STORING, *supra* note 1, at 19 (opposing inter-branch independence, but stating that even if it is a good idea, the Constitution violates the principle); The Federal Farmer No. 3, *in id.* at 46-47 (decrying improper blending of powers of Senate and President); Brutus No. 16, *in id.* at 190-91 (same); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *id.* at 218. *See also* 4 ELLIOT, *supra* note 1, at 118 (Samuel Spencer speaking at the North Carolina ratifying convention); 3 *id.* at 57 (Patrick Henry speaking at the Virginia ratifying convention); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 9 (Elbridge Gerry as "A Columbian Patriot" decrying the blending of the executive and the legislative functions.); *id.* at 103 (Melancton Smith objecting to blending of powers in Senate); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 537 (George Mason, same).

See also 2 ELLIOT, *supra* note 1, at 514 (James Wilson responding to unrecorded Anti-Federalist charge of insufficient judicial independence at the Pennsylvania ratifying convention.); 2 *id.* at 539 (Mr. M'Kean responding to the same); 3 *id.* at 539 (Patrick Henry at the Virginia ratifying convention on judicial independence); 3 *id.* at 563-64 (William Grayson at the same convention on the same topic).

Some might read Brutus Nos. 15-16, *supra*, as opposing judicial independence, but this is not quite accurate. Those papers show that his disagreements with the proposed system were (1) *excessive* independence of the judiciary from the people by the use of English-style devices useful for independence in that country but excessive in American conditions, (2) judicial superiority to the legislature and states, resulting in both becoming dependent on the judiciary.

term limits.[193] One way to get a sense of the closeness of the Anti-Federalists to the Federalists on this principle is to compare the Anti-Federalist advocacy of "rotation" with the similar discussion early in the federal Convention, when the delegates considered limiting the President to a single, long term to better ensure his independence from Congress.[194]

As evidence of insufficient independence among federal branches, the Anti-Federalists pointed to the proposed Constitution's frequent disregard for separation of powers.[195] There was no concealing the fact that Federalists blurred legislative, executive, and judicial functions, and the Federalists admitted it.[196] In doing so, however, they created a political problem for themselves. They departed from the dictum of the universally admired sage, the "celebrated Montesquieu,"[197] that separation was a necessary protection

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[193] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 112 (George Mason). *Cf.* THE FEDERALIST NO. 72, *supra* note 1, at 440 (Alexander Hamilton) (writing, "What are the advantages [of rotation] promised to counterbalance these disadvantages? They are represented to be: 1st, greater independence in the magistrate; 2d, greater security to the people.").

The Federalists disagreed on the merits. *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 113 (Gouverneur Morris).

[194] 4 ELLIOT, *supra* note 1, at 103 (William Davie reporting on the federal convention debate to the North Carolina ratifying convention and stating that his view at that time—that re-election would lead to excessive dependence—had been in the minority.); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 21 (Virginia Plan); 2 *id.* at 54 (Edmund Randolph speaking on ineligibility for re-election as a way to keep the executive independent); 2 *id.* at 57 (Elbridge Gerry and John Rutledge speaking on same).

[195] *E.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 298-99 (Richard Henry Lee writing as "Federal Farmer"); *id.* at 330 (George Mason criticizing the mixture of powers in the vice-president).

[196] Thus, Hamilton said at the New York ratifying convention, "The legislative authority is lodged in three distinct branches, properly balanced [i.e., House, Senate, and President]; the executive is divided between two branches [i.e., President and Senate]." 2 ELLIOT, *supra* note 1, at 348 (emphasis omitted).

[197] So coronated repeatedly in the public debate of 1787-1789. *See* THE FEDERALIST NO. 47, *supra* note 1, at 301 (James Madison); *id.* NO. 78, at 466 (Alexander Hamilton); Brutus No. 54, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 154. *See also* 2 ELLIOT, *supra* note 1, at 352 (Hamilton speaking at the New York ratifying convention); 3 *id.* at 84 (Edmund Randolph at Virginia ratifying convention); 3 *id.* at 247 (George Nicholas at the same convention); Centinel, *in* STORING, *supra* note 1, at 16; *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, *in id.* at 212, 217.

against tyranny.[198] The weight of Montesquieu's prestige lent gravity to the Anti-Federalist charge.

After some initial confusion,[199] James Madison decided to respond by taking on Montesquieu directly. Madison pointed out that the state constitutions frequently violated the maxim of separation.[200] "[A] mere demarcation on parchment of the constitutional limits of the several departments," he said, "is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[201] On the contrary, the system must give "to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[202] The "constitutional means" required that each branch exercise fragments of the others' functions. For example, the President would enjoy a qualified legislative veto.[203] The Senate would review executive appoint-

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[198] *See* 1 MONTESQUIEU, *supra* note 1, at 182-83.

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Id.

[199] *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 34.

[200] THE FEDERALIST NO. 47, *supra* note 1, at 303-04 (James Madison) (stating, "If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom [of separation] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.").

See also 4 ELLIOT, *supra* note 1, at 121 (William Davie speaking at the North Carolina ratifying convention).

[201] THE FEDERALIST NO. 48, *supra* note 1, at 313 (James Madison).

[202] *Id.* NO. 51, *supra* note 1, at 321-22 (James Madison).

[203] 2 ELLIOT, *supra* note 1, at 128 (James Bowdoin speaking at the Massachusetts ratifying convention); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 98 (James Wilson on the executive veto as a tool of self-defense);

ments.[204] The judiciary could invalidate unconstitutional laws.[205] This would not lead to tyranny, as Montesquieu feared, for no branch could fully exercise any power without the consent of at least one other branch. Thus, when James Wilson conceded that the Constitution mixed executive and legislative (and, he might have added, judicial) powers in the Senate, he noted that "[i]n its legislative character, [the Senate] can effect no purpose without the co-operation of the house of representatives: and in its executive character, it can accomplish no object, without the concurrence of the president."[206]

Indeed, the Founders proved more sophisticated than Montesquieu. Montesquieu touted the value of separation in preventing tyranny, while, for reasons discussed below,[207] the Founders recognized that the better tool was inter-branch independence. Where separation would further independence, the Founders adopted it. Where blurring and checking would better serve independence, the Founders chose to blur and check. The basic principle of American balance of powers was not separation of the functions of the branches, but their independence from each other.[208]

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2 *id.* at 79 (Gouverneur Morris, same). *But see* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 74-75 (Elbridge Gerry, opposing this approach).

[204] 4 ELLIOT, *supra* note 1, at 122 (William Davie speaking at the North Carolina ratifying convention).

[205] THE FEDERALIST NO. 16, *supra* note 1, at 117 (Alexander Hamilton) (writing, "If the judges were not embarked in a conspiracy with the legislature, they would pronounce the resolutions of such a majority to be contrary to the supreme law of the land, unconstitutional, and void."); 4 ELLIOT, *supra* note 1, at 71 (John Steele speaking at the North Carolina ratifying convention); 2 *id.* at 446, 489 (James Wilson speaking at the Pennsylvania ratifying convention); 3 *id.* at 540-41 (Patrick Henry speaking at the Virginia ratifying convention); 3 *id.* at 548 (Edmund Pendleton speaking at the same convention).

[206] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 158.

Cf. Wilson at the federal convention:

> The separation of the departments does not require that they should have separate objects but that they should act separately [i.e., independently—ed.] tho' on the same objects. It is necessary that the two branches of the Legislature should be separate and distinct, yet they are both to act precisely on the same object.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 78.

[207] *Supra* Part II.C.2.

[208] *Cf.* Brian C. Murchison, *The Concept of Independence in Public Law*, 41 EMORY L.J. 961, 963 (1992) (illustrating the notion of independence amongst the executive, legislative, and judicial branches as "a thread connecting separation of powers cases").

2. *Why? Reasons for Independence Among Governmental Entities*

One reason for the independence of governmental entities was to ensure that each "had a will of its own" so that it could make unbiased decisions using unimpaired judgment. Moreover, simply increasing the number of individual decision makers led to better quality decisions,[209] and separate, impartial deliberations by more than one branch would have the same effect.[210]

Perhaps the most important reason for the independence of governmental entities *inter se* was to render each of them more *dependent* on the people. In order for a governmental entity to be fully dependent on the people, it had to be free from other, perhaps conflicting, incentives.[211] When the people chose, mediately or immediately, several different entities, each dependent on themselves, those entities, like individual

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Recognizing the primacy of independence over separation resolves the perplexity expressed by some authors as to the nature of the federal separation of powers. *See, e.g.*, Samuel W. Cooper, Note, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 362 (1994) (alleging that "the Founders lacked a well-developed separation of powers theory").

[209] *Supra* notes 24-27 and accompanying text.

[210] *See, e.g.*, 3 ADAMS, *supra* note 1, at 239-40, 501 (averring that government with multiple branches is harder to corrupt than simple government); 3 ELLIOT, *supra* note 1, at 347 (James Madison at the Virginia ratifying convention discussing the Constitutional requirement that two branches, President and Senate, approve treaties); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 240 (Roger Sherman, writing as "A Citizen of New Haven," stating that a purpose of the Presidential veto was "to prevent laws from being passed without mature deliberation").

[211] *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 75 (Caleb Strong stating that involving judges in making the laws can impede their impartiality in expounding them).

See also Commentator Steven N. Sherr's observation that:

> In an ideal republican government, elected representatives express and implement the people's will through legislative speech and activities. However, an elected legislator's ability to perform these representative functions depends largely upon her ability to speak freely and to make independent choices. In short, republican government requires legislative independence. It follows that constraints on independent legislative speech or voting undermine the legislature's representative function.

Sherr, *supra* note 14, at 233.

politicians,[212] were encouraged to compete with each other for popular favor.

Publius trumpeted the prospective advantages of competition between the states and the federal government. This competition would help keep the federal government within constitutional bounds,[213] prevent adoption of measures "obnoxious to their constituents,"[214] and provide the American

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[212] *See* Reverend Samuel Stillman, at the Massachusetts ratifying convention:

> In all governments where offices are elective, there ever has been, and there ever will be, a competition of interests. They who are in office wish to keep in, and they who are out, to get in; the probable consequences of which will be, that they who are already in place will be attentive to the rights of the people, because they know that they are dependent on them for a future election, which can be secured by good behavior only. Besides, they who are out of office will watch them who are in, with a most critical eye, in order to discover and expose their malconduct, if guilty of any, that so they may step into their places. Every gentleman knows the influence that a desire to obtain a place, or the fear of losing it, hath on mankind. Mr. Borgh tells us, that, towards the close of the seven years for which the representatives are chosen in the British Parliament, they become exceedingly polite to the people. Why? Because they know there is an approaching election depending. This competition of interest, therefore, between those persons who are in and those who are out of office, will ever form one important check to the abuse of power in our representatives.

2 ELLIOT, *supra* note 1, at 167.

[213] THE FEDERALIST NO. 26, *supra* note 1, at 172 (Alexander Hamilton) (writing, "Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent."). *See also id.* NO. 28, at 181 (Alexander Hamilton); *id.* NO. 46, at 297-98 (James Madison); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 152 (Tench Coxe discussing the role of state checks on the federal government as protecting the public interest).

[214] THE FEDERALIST NO. 46, *supra* note 1, at 300 (James Madison) (writing, "Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people.").

people with mutual watchdogs.[215] The answer to the classic question, "*Quis custodiet ipsos custodes?*"[216] would be "*Custodes vero inter se ipsos.*"[217] Similar benefits could be expected from competition among branches of the federal government. Competition would prevent usurpation[218] and would secure publicity for information that the people need to know (i.e., information as to the quality of executive appointments).[219] Competition

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[215] *Id.* NO. 52, *supra* note 1, at 330 (James Madison) (writing, "In the second place, it has, on another occasion, been shown that the federal legislature will not only be restrained by its dependence on its people, as other legislative bodies are, but that it will be, moreover, watched and controlled by the several collateral legislatures, which other legislative bodies are not."). *See also id.* NO. 28, at 181 (Alexander Hamilton):

> Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men [i.e., the state legislatures], as of the people at large. The legislatures will have better means of information. They can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

Id.

[216] Who will guard the guardians themselves?

[217] Indeed, the guardians will among themselves.

[218] *See, e.g.*, THE FEDERALIST NO. 48, *supra* note 1, at 311 (James Madison).

[219] *See* Hamilton's observations in THE FEDERALIST NO. 76, *supra* note 1, at 458, on the need for Senatorial approval of executive appointments:

> The danger to his own reputation, and, in the case of an elective magistrate, to his political existence, from betraying a spirit of favoritism or an unbecoming pursuit of popularity to the observation of a body whose opinion would have great weight in forming that of the public could not fail to operate as a barrier to the one and to the other. He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or of being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.

Id. See also 4 ELLIOT, *supra* note 1, at 122 (William Davie at the North Carolina ratifying convention stating, "The gentleman from Anson has said that the Senate destroys the independence of the President, because they must confirm the nomination of officers. . . . [But,] [t]he interest of each state will be equally attended to in appointments, and the choice will be more judicious by the junction of the Senate to the President."); 2 THE RECORDS OF THE FEDERAL CONVENTION

would improve the general quality of federal decisions.[220] Of course, competition requires that each entity have the tools necessary to protect itself.[221]

Competition also requires that competitors remain independent from each other. Interdependence among putative competitors—cartelization—tends to direct competition, to the extent it survives at all, more toward the protection of turf than toward the pursuit of popular favor. Speaking of state-federal relations, Madison alluded to this point. He said that if the federal government was too dependent on the states, then the states would view an aggressive federal government as "encroaching, not on the people, but on themselves"[222]—in other words, a mere turf war.

The foregoing explains why participants in the Constitutional debates could claim simultaneously that the branches of the new federal government would be both independent and dependent.[223] Each branch's independence from the others promoted the dependence of each upon the citizenry.

OF 1787, *supra* note 1, at 42-43 (Madison stating that approval of nominations by at least a third of the Senate would provide security against "any incautious or corrupt nomination by the Executive.").

[220] 2 ELLIOT, *supra* note 1, at 348 (Hamilton at the New York ratifying convention: "This organization is so complex, so skilfully [sic] contrived, that it is next to impossible that an impolitic or wicked measure should pass the scrutiny with success."); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 225 (Alexander Contee Hanson, writing as "Aristides," stating that the need for several agencies to approve legislation will promote the public good).

[221] Writing as "Aristides," Federalist Alexander Contee Hanson, remarked, "The perfection of political science consists chiefly in *providing mutual checks amongst the several departments of power, preserving at the same time, the dependance* [sic] *of the greatest upon the people.*" PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 222.

[222] 3 ELLIOT, *supra* note 1, at 372 (speaking at the Virginia ratifying convention).

[223] *See, e.g.*, Rev. Thomas Thacher at the Massachusetts ratifying convention:

> [The House and Senate] are a check on each other, and can never be made either dependent on one another, or independent of the people. The President is chosen by the electors, who are appointed by the people. The high courts of justice arise from the President and Senate; but yet the ministers of them can be removed only upon bad behavior. The independence of judges is one of the most favorable circumstances to public liberty . . . . Thus it appears that all parts of this system arise ultimately from the people, and are still independent of each other.

2 *id.* at 145. *Cf.* 2 *id.* at 200 (Richard Law, at the Connecticut ratifying convention, stating that all branches will be dependent on the people).

3. *Qualifications on Independence Among Government Entities*

The independence of governmental entities from each other was not perfect. To the extent that the Founding Generation tolerated dependencies, however, those dependencies followed a clear pattern: entities more remote from the people relied on entities chosen more directly by the people far more than vice-versa.[224] The spectrum from less remote to more remote ran from the states to the House of Representatives to the President and Senate (approximately tied) and finally to the federal courts. The Constitution clearly reflected this principle: The House and President were to depend on the states for election procedures,[225] the Senate on the House to originate revenue bills,[226] Senators on state legislatures for their appointment,[227] the courts on the President and the Senate for their staffing[228] and on the other two federal branches for their salaries.[229] In part, the dependence of greater upon lesser appears to have been established to make the government more democratic and, perhaps, to "even the playing field" for competition—that is, to provide the more homey entities such as the states with more capacity

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[224] *Cf.* 3 *id.* at 257 (Madison, at the Virginia ratifying convention, stating that the federal government will depend on the states more than the states depend on the federal government). *See also* THE FEDERALIST NO. 46, *supra* note 1, at 296 (James Madison) (stating, "the members of the federal will be more dependent on the members of the State governments than the latter will be on the former.").

[225] THE FEDERALIST NO. 44, *supra* note 1, at 287 (James Madison); *id.* NO. 45, at 291 (James Madison); *id.* NO. 46, at 296 (James Madison); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 404 (Charles Pinckney).

[226] U.S. CONST. art. I, § 7, cl. 1.

[227] *Id.* art. I, § 3, cl. 1.

[228] *Id.* art. II, § 2, cl. 2.

[229] *Id.* art. I, § 9, cl. 7 (appropriations).

For additional citations to Federalist resort to federal dependencies on the states, see *infra* note 234.

The fact that the judiciary was somewhat dependent on the less remote branches while they were not dependent on the judiciary helps to explain Hamilton's view that "the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks." THE FEDERALIST NO. 78, *supra* note 1, at 465-66 (Alexander Hamilton). Anti-Federalist William Grayson argued that the prospect of salary increases made the judiciary too dependent on the other branches. 3 ELLIOT, *supra* note 1, at 563-64 (speaking at the Virginia ratifying convention).

to defend themselves and the people against the high-toned, remote entities.[230] Certainly David Hume suggested a similar role for a limited amount of dependence in the British constitution.[231]

The Anti-Federalists subscribed to this approach. In fact, they quarreled with the proposed Constitution because they believed it did not fully carry the principle far enough. For example, when James Monroe, the future President and then an Anti-Federalist, demanded an explanation of the clause forbidding either chamber of Congress from adjourning more than three days without the consent of the other,[232] his potential objection was that this might render the House too dependent on the Senate; he expressed no concern about the Senate depending on the House.[233]

The pattern of relatively small levels of dependence of more remote entities on less remote ones became a material part of the final political bargain. During the ratification debates, Federalist speakers and writers repeatedly referenced these small dependencies to show that the more remote entities would not dominate those closer to the people.[234]

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[230] *See, e.g.*, PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 152 (Tench Coxe discussing the role of federal dependencies on states in enabling the states to better defend the people). *Cf.* THE FEDERALIST NO. 45, *supra* note 1, at 291 (James Madison) (writing on the protection given the states by these dependencies).

[231] HUME, *supra* note 1, at 70 (arguing that the dependence of some members of Parliament on the Crown was necessary for the Crown to protect itself against the inherently stronger House of Commons).

[232] U.S. CONST. art. I, § 5.

[233] 3 ELLIOT, *supra* note 1, at 367 (speaking at the Virginia ratifying convention).

[234] Richard Law speaking at the Connecticut ratifying convention:

> Some suppose that the general government, which extends over the whole, will annihilate the state governments. But consider that this general government rests upon the state governments for its support. It is like a vast and magnificent bridge, built upon thirteen strong and stately pillars. Now, the rulers, who occupy the bridge, cannot be so beside themselves as to knock away the pillars which support the whole fabric.

2 *id.* at 201. *See also* 2 *id.* at 202 (Oliver Wolcott stating at the same convention that the Senate is dependent on states, the House on the people); 2 *id.* at 46 (Fisher Ames speaking at the Massachusetts ratifying convention); 2 *id.* at 64 (Increase Sumner speaking at the same convention); 2 *id.* at 91-92 (Theophilus Parsons speaking at the same convention); 4 *id.* at 53 (James Iredell speaking at the North Carolina convention); 4 *id.* at 59 (William Davie speaking at the same convention); 4 *id.* at 180-81 (MacLaine speaking at the same convention; this may be Archibald or William MacLaine; the transcripts do not state with certainty.); 2 *id.* at 353 (Hamilton speaking at the New York ratifying convention); 3 *id.* at 40 (Edmund

D. *The Apparent Independence of Government from the People*

We have seen that the value of "independence," insofar as applicable among governmental entities, was not inconsistent with—and indeed existed to further—the values of sympathy and dependence on the people.[235] On the other hand, there is a good deal in the debates and in the final document to suggest that the framers also sought a certain amount of independence *from* the people. For example, participants in the debates occasionally referred to the need for the more remote branches of government to be independent from popular whims[236] and to serve as forces of "stability."[237] In the proposed Constitution itself, officials in each branch

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Pendleton speaking at the Virginia ratifying convention); 3 *id.* at 96 (James Madison speaking at the same convention); ESSAYS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, *supra* note 1, at 153-54 (Oliver Ellsworth writing as "The Landholder"); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 159 (James Wilson making the same point in a speech delivered Oct. 6, 1787); THE FEDERALIST NO. 44, *supra* note 1, at 287 (James Madison); *id.* NO. 45, at 291 (James Madison); *id.* NO. 46, at 296 (James Madison).

Anti-Federalist Melancton Smith commented on the irony of the Federalists simultaneously arguing that (1) the Senate would protect the states but (2) the Senate should not be dependent on the states. 2 ELLIOT, *supra* note 1, at 312 (speaking at the New York ratifying convention).

[235] *Supra* Part II.C.2.

[236] *See, e.g.*, 2 ELLIOT, *supra* note 1, at 302 (Hamilton speaking at the New York ratifying convention).

[237] *See, e.g.*, 3 *id.* at 279 (William Grayson discussing the Senate during the Virginia ratifying convention; Grayson favored lifetime terms.); 2 *id.* at 309 (Melancton Smith, an Anti-Federalist, favorably discussing stability of the Senate at the New York ratifying convention); 3 *id.* at 360 (William Nicholas at the Virginia ratifying convention opposing recall of Senators on the ground that this would "impair their independence and firmness."); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 141 (Tench Coxe stating that Senate is more independent of the people than the House).

Note, however, that most of the references to the "independence" of the more remote branches actually refer to independence from other branches, not to independence from the people. *See, e.g.*, 2 ELLIOT, *supra* note 1, at 196 (Oliver Ellsworth speaking on independence of the judicial branch from the legislature); THE FEDERALIST NO. 78, *supra* note 1, at 468-70 (Alexander Hamilton) (referring both to judicial "independence" from Congress but also from popular leaders—acknowledging, however, that the independence from the people is short-term only); 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 86 (John Dickinson speaking on the need for independent legislative, executive, and

were to be selected for fixed terms (or, in the case of the judiciary, during good behavior) and were not subject to recall. Election of Senators and the President was indirect rather than direct. Independence of this sort would seem to conflict with the principle of sympathy.

Arguably, some constitutional tension exists. However, upon examination, one finds that it is much less than might be supposed. The apparent independence of government actors served to restrict each of them to defined roles—or, as the Founders would have said, discrete "offices" (using "offices" in its common eighteenth century sense to mean functions and responsibilities).[238] Each constitutional "office" was designed to reflect a different aspect of popular sentiment. The various offices complemented each other in a way that rendered government as a whole sympathetic to and dependent on the full range of citizen preferences. It was as if each office comprised an instrument in an orchestra whose sound was the product of the whole.

It is a commonplace of modern polling that one often elicits alternative answers according to how one asks a question. This is sometimes cited as evidence of popular fatuity. In fairness, however, we must remember that varying forms of a question may elicit differing answers because they either incorporate different values or do not weigh common values uniformly.

Consider the question: Do you prefer to vote Democrat or Republican? During the second half of the twentieth century, some commentators marveled at an electorate that voted for Democratic Congresses but voted just as consistently for Republican Presidents.[239] Then it was suggested that this voting pattern was rational if one wanted a maximum share of available pork for one's own locality (Democrat) while keeping the lid on the overall size of the budget (Republican). The voters' answer (Republican or Democrat) was different in each case because the form of the question was different: *general* welfare or local *welfare*?[240]

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judicial branches).

[238] "Office" derives from the Latin term *officium*, which means a duty, as in "It is the office of the President to resist foreign influences."

[239] Thus, for most of the terms of Presidents Eisenhower, Nixon, Reagan, and the elder Bush, all Republicans, both houses of Congress were in Democratic hands. The split reversed during the Presidential term of Bill Clinton.

[240] *Cf.* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 52-53 (Gouverneur Morris speaking on the role of executive as guardian of the interest of the whole people).

There are many other examples. My first academic appointment was in Oklahoma, where at the time voters invariably installed a Democratic state legislature, sometimes balanced it with a Republican governor, voted for a political

In the British parliamentary system (at least before recent devolution), the answers to national issues were simpler because voters faced only one question: Do you want the Conservative Party, Liberal Democratic Party, or Labour Party to represent you for the next five years?[241] But the American Founding Generation constructed a system that regularly asked the American electorate multiple questions: "What are your preferences for state issues?" "What are your preferences for national issues?" "And as to national issues, please state your preferences for legislative, executive, and judicial approaches;" and "Specify your answers assuming time horizons of two years, four years, six years, and for the rest of this generation (i.e., the remaining lifespan of a middle-aged man)." Such varying questions often have varying answers. The selection of the distant and forbidding, yet internationally respected, George Washington as our first President was in perfect sympathy with American popular sentiment. One imagines that he might have lost a local election to an affable ward heeler.[242]

Consider again the roles—"offices"—each federal branch was expected to fill. The role of the House of Representatives was not merely to serve as a legislative entity, but also to oversee ("check") the executive and judicial branches through its powers to impeach and appropriate. In all of its functions the House was a close, although not exact,[243] substitute for the popular assemblies of earlier republics[244] because it injected into federal

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mix at the Congressional level, but supported Republican presidential nominees quite strongly.

Split-ticket voting also makes sense if the electorate believes it can benefit from inter-party competition.

[241] Or, in the eighteenth century: "Do you want Tories or Whigs to represent you for the next seven years?"

[242] Unless, perhaps, he applied his considerable wealth to win the post.

[243] At least some Federalists acknowledged that representation for a two-year term was not quite a perfect mirror of a popular assembly. At the Massachusetts ratifying convention, Fisher Ames argued:

> I consider biennial elections as a security that the sober, second thought of the people shall be law. There is a calm review of public transactions, which is made by the citizens who have families and children, the pledges of their fidelity. To provide for popular liberty, we must take care that measures shall not be adopted without due deliberation. The member chosen for two years will feel some independence in his seat. The factions of the day will expire before the end of his term.

2 ELLIOT, *supra* note 1, at 11.

[244] *See supra* notes 55-56 and accompanying text. The powers of those assemblies were not entirely legislative, either. The Roman assemblies, for example, had a number of executive and judicial duties. THE OXFORD CLASSICAL

decision making the electorate's local and short-term attitudes and interests.

The "office" of the President fits somewhere between Roman consul and British king:[245] both to administer the executive branch and to influence the legislative process (by proposals to Congress and the veto), and the judicial process (by appointments and approval of judicial appropriations). In each of these functions, the President, with his national responsibilities and four year term, would represent popular sentiments on wider, longer-range questions than would the average representative. It was not that the President was less sympathetic than the House of Representatives, but that he was sympathetic to popular sentiments of a wider, longer-term kind.[246]

Noah Webster, the lexicographer and Federalist, captured this point. In the course of a pamphlet supporting the proposed Constitution, he discussed the varying roles of popular assemblies, the House, and the Senate in reflecting, respectively, immediate-term, short-term, and medium-term preferences. Popular assemblies, he said, are subject to "passions, easily inflamed, which may bias their reason."[247] Chambers elected for short terms (from the context, he seems to mean three years or fewer) may suffer similar disabilities. However, the same men who adopt an ill-advised measure in the pressure of the moment think better of it after the fervor dies down and they can take a longer-term view.[248] Similarly, while the House would reflect "local attachments," the longer terms of Senators would induce them to "lose their partiality, generalize their views, and consider

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DICTIONARY, *supra* note 1, at 272.

[245] *Cf.* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 35-37 (Noah Webster).

[246] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 80 (Madison). As Nicholas Collins said in defense of longer terms of office: "A person who wants only a common dwelling house, does not change the master workman every week." SHEEHAN & MCDOWELL, *supra* note 1, at 50 (writing as "A Foreign Spectator").

[247] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 31.

[248] *Id.* at 32 (stating how under the Articles of Confederation Congress later became ashamed of a hastily-passed resolution and repealed it); *id.* at 33 (describing how, after the Connecticut senate blocked a foolish measure passed by the lower house, "within two months, every representative was ashamed of the conduct of the house"). *Cf. id.* at 340 (James Iredell writing that, without checks, "the government might be destroyed by a momentary impulse of passion, which the very members who indulged it might for ever afterwards in vain deplore").

themselves as acting for the whole confederacy."[249] To be sure, the Senate still would represent the people rather than some "superior and independent order of men."[250] However, the aspect of popular opinion it reflected would be the longer term, national part, and would bring to bear those views *before* measures were adopted.[251]

The "office" of the courts was to respond to the longest-term question of all: "Do you favor the rule of law?" The courts would implement the electorate's overwhelming affirmative answer, not merely by deciding private cases, but by correcting the other two branches when they violated the Constitution. Although as the Anti-Federalist writer Brutus observed, the jury system would provide the courts with an element of sympathy for popular short-term preferences,[252] the lifetime tenure of judges gave them the ability to fulfill long-term preferences by curbing short-term ones.[253] The classical shorthand for the process is "strapping oneself to the mast."[254]

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[249] *Id.* at 40 (Noah Webster).

[250] *Id.* at 35 (Noah Webster).

[251] *Id.* at 340 (James Iredell).

[252] Brutus No. 17, THE ANTIFEDERALIST PAPERS, *supra* note 1, at 44. *See also* Federal Farmer No. 4, *in* STORING, *supra* note 1, at 58.

[253] THE FEDERALIST NO. 78, *supra* note 1, at 469 (Alexander Hamilton), on the judicial obligation to guard the Constitution:

> Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions . . . .

Id. Cf. id. NO. 81, *supra* note 1, at 486 (Alexander Hamilton) (writing that "State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.").

[254] In the story of Homer's *Odyssey*, with which, of course, the Founding Generation was very familiar, the sirens lured sailors to their death by inducing them, through the beauty of their song, to drive their ships upon the rocks where the sirens perched. Odysseus arranged to hear the song and still remain safe by stuffing his crew's ears with wax, having them strap him to the mast, and telling them if he should implore them to release him, to bind him yet more. Odysseus thus achieved his longer-term preferences (hearing the song) by creating institutions that denied his short-term preferences (approaching the sirens' rocks). *See* HOMER, THE ODYSSEY 173-74 (T.E. Shaw trans., 1956).

Most complicated of all "offices" would be that of the Senate. In several respects its function was an intermediate one. Although the Constitution placed it in the legislative branch, the Senate was to exercise both executive[255] and judicial functions. It was to approve executive and judicial nominations, try impeachments, advise and consent on questions of foreign affairs, and represent the state legislatures in federal councils.[256] Its unique point of view flowed from its mode of election and its term of office. State legislatures selected Senators—but for fixed terms. Thus, the Senate was halfway dependent on the states[257] and halfway independent of them.[258] Its six year term and two year rotation would give it greater "stability"[259] than the House—that is, to cause it to sympathize with medium-term, relatively wide preferences rather than with shorter-term, local preferences.

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[255] Indeed, Hamilton said, "the executive is divided between two branches," i.e., the President and Senate. 2 ELLIOT, *supra* note 1, at 348 (speaking at the New York ratifying convention).

[256] At the federal convention, James Wilson expressed reservations over the Senate's sprawling jurisdiction. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 522-23. This formed a principal basis for opposition among Anti-Federalists.

[257] *See, e.g.*, 2 *id.* at 290 (Pierce Butler contending for payment of Senators by states). At one point James Madison said there would be "absolute dependence," but surely this was an overstatement. 3 ELLIOT, *supra* note 1, at 97 (speaking at the Virginia ratifying convention).

[258] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 291 (Madison); 2 *id.* at 292 (Daniel Carroll and John Dickinson).

John Lansing, arguing for a recall amendment at the New York ratifying convention captured some of the ambiguity of the Senate's position:

> It is observed, that one design of the Senate, as it is now organized, is to form a counterpoise to the local prejudices which are incompatible with a liberal view of national objects, and which commonly accompany the representatives of a state. On the other hand, it is said, the amendment will have a tendency to lessen the attachment of the senators to their constituents, and make them regardless of the public sentiments, by removing the motive to virtue; that is, a continuation of honors and employments. This reasoning seems to be calculated upon the idea of dependence on the state governments, and a close connection between the interest of the several states and that of their representatives. But this dependence, say the gentlemen, is the very source of all those local prejudices which are so unfavorable to good government . . . .

2 ELLIOT, *supra* note 1, at 300.

[259] Many, if not most, Anti-Federalists agreed with this goal as well. *See, e.g.*, 2 ELLIOT, *supra* note 1, at 309 (Melancton Smith speaking at the New York ratifying convention).

We have seen that governmental entities were to be independent of each other largely in order to render them more dependent upon the people.[260] Similarly, for an entity to respond faithfully to the popular sentiments to which it was designed to respond required that it be independent from other kinds of popular sentiment. The "office" of the House of Representatives, for example, was to respond to short-term popular feelings; monarchical, aristocratic, and long-term influences would distract it from fulfilling that office. Accordingly, the House of Representatives was to be elected frequently and kept mostly independent from the states and from the more "monarchical" and "aristocratical" branches of government.[261] The President's sympathy was to be of a longer-term, nationwide kind.[262] Hence, his tenure was longer, and he was freed from dependence on the popular branch.

As for the Senate, Alexander Hamilton, while speaking at the New York ratifying convention, described its level of dependency in this way:

> I admit that the aggregate of individuals constitute the government; yet every state is not the government; every petty district is not the government. Sir, in our state legislatures, a *compromise* is frequently necessary between the interests of counties: the same must happen, in the general government, between states. In this, the few must yield to the many; or, in other words, the particular must be sacrificed to the general interest.... to be dependent from day to day, and to have the idea perpetually present, would be the source of numerous evils. *Six years, sir, is a period short enough for a proper degree of dependence.*[263]

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[260] *See supra* Part II.C.2.

[261] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 512-13 (Gouverneur Morris).

[262] *See, e.g.*, 3 ELLIOT, *supra* note 1, at 488, which records the remarks of James Monroe at the Virginia ratifying convention:

> The President ought to act under the strongest impulses of rewards and punishments, which are the strongest incentives to human actions. There are two ways of securing this point. He ought to depend on the people of America for his appointment and continuance in office; he ought also to be responsible, in an equal degree, to all the states, and to be tried by dispassionate judges; his responsibility ought further to be direct and immediate. Let us consider, in the first place, then, how far he is dependent on the people of America.

Id.

See also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 80 (Madison arguing that the President would "be considered as a national officer, acting for and equally sympathising with every part of the U. States [sic].").

[263] 2 ELLIOT, *supra* note 1, at 318-19 (additional emphases added). *See also* Hamilton stating again:

It was not that the Senate was to be independent in the sense of ignoring or being out of sympathy with the people or the state legislatures. Its function was to represent popular sentiments when the questions asked called for compromise and for a longer time horizon than "from day to day."[264]

It was in foreign affairs that the Senate was expected to exercise the greatest independence. But this was fully consistent with sympathy because, as David Hume had written:

> In foreign politics the interest of the senate can scarcely ever be divided from that of the people, and therefore it is fit to make the senate absolute with regard to them; otherwise there could be no secrecy or refined policy. Besides, without money no alliance can be executed, and the senate is still sufficiently dependent.[265]

The point here is that on those relatively rare occasions when the Founding Generation spoke of officeholders being "independent" of the people, they meant independent of some popular attitudes so they could be dependent on others, allowing them to serve as separate parts of a sympathetic, dependent whole.

III. APPLICATION TO MODERN ISSUES

> ". . . this independency lost, our constitution is a dead letter, and we shall be only in a worse condition by preserving the forms of it."—Lord Bolingbroke[266]

In this Part, I discuss modern illustrations to show that, without sufficient application of the principles of sympathy and independence, the

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> There are few positions more demonstrable than that there should be, in every republic, some permanent body to correct the prejudices, check the intemperate passions, and regulate the fluctuations, of a popular assembly. It is evident that a body instituted for these purposes must be so formed as to exclude, as much as possible, from its own character, those infirmities, and that mutability, which it is designed to remedy. It is, therefore, necessary that it should be small, that it should hold its authority during a considerable period, and that it should have such an independence in the exercise of its powers, as will divest it, as much as possible, of local prejudices.

2 *id.* at 301-02.

[264] 2 *id.* at 318.

[265] HUME, *supra* note 1, at 154.

[266] 2 BOLINGBROKE, *supra* note 1, at 168.

system works rather differently than intended. These illustrations involve the size of the modern House of Representatives, modern inter-branch relations, and citizen and state dependency on the federal government. The last issue, insofar as it involves the current judicial interpretation of the Constitution's so-called Spending Clause, is treated in somewhat more depth than the others. As to all of these illustrations, however, I provide only a summary view; others may want to offer more detailed treatment of these and other examples.

A. Size of the House of Representatives

Given the size of the current U.S. population, the Founders probably would have viewed the small size of the present House of Representatives as "aristocratic" in nature. The value of sympathy dictates that the House can perform its functions as a truly representative assembly only if its numbers are large and its districts small. Federalists and Anti-Federalists disagreed about how large and how small, but districts with a population in the 30,000-40,000 range were considered "large."[267] In 1911, when the size of the House was fixed at its current level of 435,[268] the population of the United States was about 92 million;[269] there was approximately one representative for every 212,000 people. As I write, the population is about 289 million,[270] or about one representative for every 680,000 people. Variations, however, can be wide. I live in a congressional district with a population of *nearly a million.*[271] Application of the principle of sympathy suggests that an expansion is in order—if not as far as Melancton Smith's

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[267] The number of voters was much smaller than 30,000. *See* THE FEDERALIST NO. 57, *supra* note 1, at 354 (James Madison) (stating that, "The only difference discoverable between the two cases is that each representative of the United States will be elected by five or six thousand citizens; whilst in the individual States, the election of a [state] representative is left to about as many hundreds."). *See also* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 143 (Tench Coxe stating that each representative will be chosen by about 6000 electors).

[268] Act of Aug. 8, 1911, ch. 5, 37 Stat. 13 & 14.

[269] The 1910 Census counted a population of 92,228,496. The U.S. Census Bureau, *Table 16: Population 1790-1990*, *at* http://www.census.gov/population/censusdata/table-16.pdf. (Aug. 23, 1993).

[270] See The U.S. Census Bureau, *at* http://www.census.gov (last visited Dec. 3, 2002).

[271] Montana is a single Congressional district, and in 2001 her population was estimated at 904,433. U.S. Census Bureau, *QuickFacts*, *at* http://quickfacts.census.gov/qfd/states/30000.html (last visited Dec. 3, 2002).

example of excess—1000 members[272]—then to somewhat larger than the present number.[273]

B. Cooperative Inter-Branch Relations

Modern politicians regularly talk about different branches (e.g., states and federal government, Congress and President) "working together," as if that were a political virtue. The U.S. Supreme Court has commented favorably on this approach.[274] But the Founders likely would have condemned much of this cooperation as *cabal* and *intrigue*,[275] and

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[272] 2 ELLIOT, *supra* note 1, at 245 (at the New York ratifying convention).

[273] Discussions with two former Montana members of Congress, Rick Hill, a Republican, and Pat Williams, a Democrat, revealed disagreements about optimal size. These disagreements resulted from a tension of values, but not values particularly identifiable as Republican or Democrat. Mr. Hill suggested a reduction to about 250 in order to improve deliberation. Interview with Rick Hill, Former Member of the U.S. House of Representatives (R.-Mont.), Helena, Montana (Oct. 16, 2001). Mr. Williams suggested an expansion to one representative for every 200,000 to 300,000 (to a House of around 1000), citing "sympathy" concerns. Telephone Interview with Pat Williams, Former Member of the U.S. House of Representatives (D.-Mont.) (Dec. 19, 2001).

Each former Congressman, however, acknowledged the competing values. Mr. Williams said one effect of a larger House might be to institutionalize a leadership committee of committee chairs (in effect, a nascent Parliamentary cabinet). He also suggested that one could achieve additional sympathy by coupling a smaller expansion with proportional representation (of the House only). Another option we discussed was the addition of a third chamber, much larger than the other two but only with powers to accept or reject legislation—analogous to some of the ancient popular assemblies. Then the size of the House of Representatives could be reduced to facilitate deliberation. The addition of a third chamber, of course, would necessitate a constitutional amendment. *Id.*

[274] Steward Mach. Co. v. Davis, 301 U.S. 548, 588 (1937).

[275] There are many uses of this "intriguing" word to describe what happens if the branches are insufficiently independent. *See, e.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 175 (Elbridge Gerry); 1 *id.* at 263 (Edmund Randolph); 1 *id.* at 339 (George Mason); 1 *id.* at 376 (Pierce Butler); 1 *id.* at 380; 2 *id.* at 103 (James Wilson); 2 *id.* at 56 & 109 (Madison); 2 *id.* at 500 (Gouverneur Morris); PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 1, at 225-26 (Alexander Contee Hanson writing as "Aristides").

See also 2 ELLIOT, *supra* note 1, at 512 (James Wilson speaking at the Pennsylvania ratifying convention); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 30 (James Wilson noting that the executive must be independent so as to be able to stand between "intrigues & sinister views of the

subversive of the Constitutional system. In the arena of domestic policy at least, the Founders saw inter-branch cooperation and interdependency as fonts of secrecy and faction.[276] They believed that cabal and intrigue encouraged governmental cartels—anti-competitive agreements—that inhibited free and open competition among branches for popular favor.[277]

C. *Citizen Financial Dependency on Government*

Virtually all the participants in the Constitutional debates of 1787-1789 would have been repelled by the citizen dependency created by the modern

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Representatives and the general liberties & interests of the people."). *Cf.* SHEEHAN & MCDOWELL, *supra* note 1, at 50 (Nicholas Collins as "A Foreign Spectator" writing on the need to avoid "aristocratic collusion" between President and Senate).

If reports of the late Justice William O. Douglas' relations with other officials are right, then he might have been wise to heed the admonition of Gouverneur Morris. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 42 (judicial intrigues with other officials can impair impartiality).

[276] *See, e.g.*, Madison's comments dealing with the election of the President:

> If it be a fundamental principle of free Govt. that the Legislative, Executive & Judiciary powers should be *separately* exercised; it is equally so that they be *independently* exercised. There is the same & perhaps greater reason why the Executive shd. [sic] be independent of the Legislature, than why the Judiciary should: A coalition of the two former powers would be more immediately & certainly dangerous to public liberty. It is essential then that the appointment of the Executive should either be drawn from some source, or held by some tenure, that will give him a free agency with regard to the Legislature. . . . Certain it was that the appointment would be attended with intrigues and contentions that ought not to be unnecessarily admitted.

2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 56. *Cf.* RAKOVE, *supra* note 1, at 268 (citing Founders' ideal of a President "free from the habits of intrigue" that characterized legislative manipulations by British kings).

[277] *See supra* note 222 and accompanying text. *See also* THE FEDERALIST NO. 51, *supra* note 1, at 323 (James Madison) (writing, "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

You cannot control each other if you are too busy bolstering each other up. On the other hand, the Founders probably would have been more comfortable with another modern trend, the so-called "Reinventing Government" movement, which seeks to improve public sector productivity by injecting entrepreneurial incentives, particularly consumer-oriented competition, into the public sector. *See generally* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT (1993).

welfare state. A very large portion of the voting population currently consists of governmental dependents—not just welfare recipients, but millions of others who receive regular sustenance from government. The participants in the Constitutional debates would have maintained that many (if not most) recipients of government largess are not really independent voters, and that their judgment is clouded by their fear of losing their benefits and by their hopes of increasing them.[278] Indeed, the level of dependence among the modern American electorate is so high, the Founders might have questioned whether our government is an effectively-functioning republic at all. They probably would have advocated either restricting the franchise only to people who did not receive government checks or, preferably, finding ways to reduce the level of dependency.

D. Massive Federal Land Ownership

Another reason for dependence on the central government—both of citizens and of states—is the widespread federal ownership of land in the western United States. The Founding Generation envisioned the federal government owning, "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings" and having jurisdiction over the seat of government.[279] Moreover, by treaty, Congress had acquired undeveloped lands pending the settlement of those lands and their admission as states.[280] But it is unlikely that the Founding Generation envisioned federal ownership of huge tracts within functioning states: for example, eighty-nine percent of Nevada, sixty-two percent of Idaho, and nearly half of Wyoming.[281] The resultant

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[278] *Supra* Parts II.A and II.B.

[279] U.S. CONST. art. I, § 8, cl. 17.

[280] Congress was given the power to regulate these territories as well. *Id.* art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

[281] Federal land makes up the following percentages of the areas of the Rocky Mountain States:

Arizona	44.7%
Colorado	36.3%
Idaho	62.2%
Montana	27.8%
New Mexico	34.1%
Nevada	89.5%
Utah	64.2%
Wyoming	49.8%

dependencies are due in part to the large number of federal employees and contractors among the electorates of the Rocky Mountain states. In addition, those states' political and economic life is heavily dependent on the details of federal land management: mining, forestry, grazing, recreational use, introduction of wolves and grizzly bears, and the like.[282] Policy made within the executive branch unquestionably influences the nature of an affected state's Congressional representation.

On its face, the Constitution is unclear as to whether land ownership on such a scale is within federal enumerated powers. This would seem to be an instance in which courts should apply underlying constitutional values such as citizen and inter-entity independence to assist in resolving the question. Although a few courts have addressed the constitutionality of massive federal land ownership, they have not addressed the underlying constitutional value of independence in reaching their decision.[283]

E. Federal Grants in Aid to the States Under the Spending Clause

To the Founders, the growing pattern of state dependency on the federal government would have been subversive of the Constitutional order. As we have seen, independence was a guiding principle for inter-govern-

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U.S. Gen. Serv. Admin., *Table No. 369. Total and Federally Owned Land, 1960 to 1994, and by State, 1994*, *in* STATISTICAL ABSTRACT OF THE UNITED STATES (1997), *available at* www. census.gov/prod/www/statistical-abstract-us/html.

[282] Those living outside the affected states may have trouble understanding the overwhelming federal presence in much of the West. To illustrate, I have before me an article in one of Montana's leading papers—featuring a screaming full-front page banner headline—reporting how a federal court room was jammed with a standing-room-only crowd, intensely interested on whether the government's latest salvage timber cut was going to proceed. The article, which consumes approximately forty-five column-inches, describes the battle pitting four environmental groups trying to stop logging against the U.S. Forest Service, logging companies and the workers whose jobs were at stake. Sherry Devlin, *Public Packs Salvage Timber Hearing*, MISSOULIAN, Jan. 4, 2002, at A1.

Such battles are routine in the West; that the paper should have treated it in such a conspicuous and lengthy fashion illustrates how dependent the citizens of Rocky Mountain states are on otherwise-routine federal land management decisions. The Founding Generation would have been horrified.

[283] *See* United States v. Armstrong, 186 F.3d 1055 (8th Cir. 1999) (upholding federal regulation after state cession); United States v. Vogler, 859 F.2d 638 (9th Cir. 1988). *Cf.* Russia v. Nat'l City Bank of N.Y., 69 F.2d 44 (2d Cir. 1934) (holding that the U.S. government is the nature of a corporation and may acquire property).

mental relations, but when dependency was inevitable, it was nearly always the dependence of more remote entities (such as the federal government) on less remote ones (such as the states)—not the reverse.[284] Federal grants-in-aid programs may be an even more important force for dependency than federal land ownership, if only because grants-in-aid directly affect more states than federal land ownership.[285]

Federal largess bestowed directly on state governments is now huge. In the Montana state government's budget, for example, the accounts funded from federal sources now exceed the total state general fund by nearly eighteen percent.[286] There is no question that this sort of financial flow creates state dependency. The conditioning of federal aid on a federal program virtually guarantees that the state will accept any program and accede to any mandate that has money attached to it. In many or most states, the announcement that federal aid comes attached to a particular program or mandate virtually ends discussion of the advisability of the program or mandate.

From the text of the Constitution, it is not at all clear that the federal government is authorized to make grants-in-aid unless the purpose for the grant (as in the case of roads) is specifically mentioned in Article I, Section 8. The proffered basis for other grants is the putative "Spending Clause:" "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 . . . ."[287]

Actually, however, this clause says nothing specific about spending other than "to pay the Debts."[288] Some commentators doubt that it really is a "spending" clause at all.[289] The Supreme Court has construed it to mean

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[284] *Supra* Part II.C.3.

[285] To the extent, of course, that federal land decisions affect the composition and attitudes of western state Congressional delegations, those decisions also affect all states, but indirectly.

[286] All locally-generated funds not otherwise earmarked are included in the general fund. In Montana, as in other states, the general fund historically has been considered the most important component of the budget. For the 2003 biennium (July 1, 2001 through June 30, 2003) the general fund amounts to $2.347 billion. However, federal aid amounts to $2.767 billion. Telephone Interview with James Standaert, Senior Fiscal Analyst, Legislative Fiscal Division, State of Montana (Oct. 31, 2001).

[287] U.S. CONST. art. I, § 8, cl. 1.

[288] *Id.*

[289] *See generally* Jeffrey T. Renz, *What Spending Clause? (or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81 (1999).

that its authorization of taxes, debt payment, and "providing" for the general welfare implicitly authorizes appropriations outside the Article I, Section 8 list of enumerated powers.[290] Yet that conclusion was reached without reference to the principles of sympathy and inter-branch independence undergirding the Constitution.[291]

The Court has "recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion,'"[292] thus suggesting, but not actually stating, that conditions on federal mandates might become unconstitutional at that point. A more basic Constitutional problem, however, is the compromise of inter-governmental independence, with or without compulsion. The fact that states almost never turn down such funding or refuse to comply with imposed conditions demonstrates the truth of Founding-era observations such as "Those who pay are the masters of those who are paid"[293] and "Any branch of government that depends on the will of another for supplies of money, must be in a state of subordinate dependence . . . ."[294] The fact that the receiving entity is the one closer to the people (the states) means that such programs violate not only the general rule of inter-entity independence, but also the limited qualification that permits some dependence when the dependent branch is the more remote from the people.

SOME CONCLUDING OBSERVATIONS

Those who spoke out publicly in the Founding Generation believed that government should be "sympathetic" to the people: It should reflect their opinions, attitudes, and sentiments. Each branch of government would reproduce some, but not necessarily the same, aspects of popular sentiment. They would be independent of each other and compete against each other for popular favor. Cooperation among the branches was to be subordinated to this competition. The Founders sought a government of competitive trustees rather than a government of brokers. The result was to be an image

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[290] *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987); United States v. Butler, 297 U.S. 1 (1936).

[291] *Butler*, 297 U.S. at 1; *Dole*, 483 U.S. at 203.

[292] *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[293] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 1, at 373 (Hamilton).

[294] 3 ELLIOT, *supra* note 1, at 17 (Wilson Nicholas speaking at the Virginia ratifying convention).

not merely of the sentiments of any particular group, but of the whole; and not merely of the short-, medium-, or long-term perspectives, but of a balance among them.

I already have suggested that the various entities in the new constitutional system were to perform analogously to the sections of an orchestra, and the whole to the resultant symphony.[295] To employ a more mechanical simile, the new system was to be rather like the mirror of a huge reflecting telescope, composed of smaller mirrors each with its own function, but producing a total image accurate and true.[296]

The drafters of the Constitution did their best to incorporate into the document these common principles, shared by Federalist and Anti-Federalist alike. They created a variety of devices for doing so: numerosity in the House of Representatives, legal identity of interest between governed and governors, frequent elections, division and separation of power, mutual checks, and independence of governmental entities from each other. To the extent that the drafters did create inter-governmental dependencies, those dependencies were chiefly of the more remote agencies relying on more popular ones. Both sides of the debate applauded this approach. The Anti-Federalists questioned only whether the drafters had gone far enough.

The values of sympathy and independence were not peripheral to the Founding; they were to govern how the new system would work. One reflection of the neglect of those values is that, in significant part, the system has not worked as intended. Readers may decide for themselves whether it is time to re-set the machinery anew.

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[295] *Supra* note 238 and accompanying text.

[296] Another analogy: parts of a compound eye.