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ANTI-FEDERALIST FEARS OF THE STRONG CENTRAL GOVERNMENT PROPOSED
BY THE FEDERAL CONSTITUTION OF THE UNITED STATES

By

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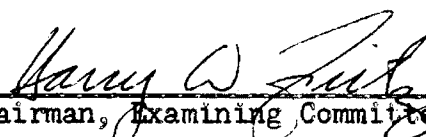
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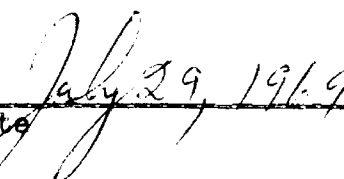
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TABLE OF CONTENTS

CHAPTER	PAGE
INTRODUCTION	1
I. THE ANTI-FEDERALIST THEORY OF REPUBLICAN GOVERNMENT . . .	8
II. THE NEW ENGLAND STATES	16
III. THE MIDDLE ATLANTIC STATES	37
IV. THE SOUTHERN STATES	76
CONCLUSION	120
BIBLIOGRAPHY	126

INTRODUCTION

The United States of America formally secured its independence from Great Britain on January 14, 1784. On that date, the Congress of the United States ratified the Treaty of Paris; America gained its independence from Great Britain, which also granted important though in some instances dangerously ill-defined territorial concessions. The Congress of the new nation which approved of that Treaty of Paris had been operating under the Articles of Confederation since March of 1781, replacing the "extra legal" Second Continental Congress as the overall directing body for the Revolution.

The Articles of Confederation reflected the unity of purpose characteristic of the thirteen united states during the Revolution; but it reflected the desire on the part of those states to maintain their separate and individual sovereignties. The Articles gave the new government considerable powers. Congress was entitled to make war or peace and to fix state quotas for men and monies for the national armies, to make treaties and alliances, decide interstate disputes, limit state boundaries and admit new states, borrow money and regulate the coinage of the United States, and establish post offices for the country. The real sense of the Articles, however, lay in the provision that "Each state retains the sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled."¹ Thus,

¹Jonathan Elliot (ed.), The Debates in the Several State Conventions on the Ratification of the Federal Constitution (5 vols. 1876-1891; Philadelphia, 1876), I, 79.

the Articles of Confederation acknowledged that the powers of war and foreign affairs were national in scope, kept alive the idea of union during the post-Revolution period when that idea was at its lowest ebb,² and ultimately provided the means for the orderly transition from rule by Parliament to self-government under the Constitution. Nonetheless, its basic weakness remained unresolved.

The essential defect of the Articles was that they operated upon the states in their corporate capacity; Congress under the Articles was not, in fact, a central government as such, but rather the central agency of an alliance of sovereign states. Consequently, even the powers theoretically belonging to Congress were practically unenforceable, while the theoretical scope of its authority was unduly narrow. Because taxes were to be collected from the individual states, Congress could not levy them; inasmuch as commerce was an affair of the individual states, Congress could not regulate it; treaties could not have the force of law since as treaties they would have operated directly on individual states by-passing the state legislatures. In short, a common policy in these fields, where such a policy was necessary--the source and collection of revenues, regulation of commerce, foreign relations--was virtually impossible, for the power of the Articles remained with the states.³ These weaknesses played directly into the hands of the chief defect of the government of the states: a too great concentration of power in the hands of legislative departments of those

²Edwin S. Corwin, "The Progress of Political Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," American Historical Review, XXX (1925), 527.

³Ibid.

governments.⁴ Despite its defects, and despite those American political leaders who, refusing to minimize those defects, saw the Articles only as a means to a better plan of central government, the significance of the Articles must not be discounted.

The situation in 1787-1788 was very favorable for the creation and adoption of a new plan of government. For, first, the experience gained from the Revolutionary state constitutions and from the Articles of Confederation had accustomed the people of the United States to the idea of framing government by choice and deliberation⁵: blending old ingredients from the colonial period with new republican elements, and finding that the results worked quite well in practice. Secondly, the experience of about a decade of operation of the Articles had revealed their defects, and induced among many Americans an inclination toward change. And thirdly, though the doctrinaire thinking so responsible for the Articles was still widely prevalent in the United States, among many Americans there existed a flexibility and receptivity to new political ideas and institutions, a sober but confident will toward political experimentation along republican lines.⁶ Eventually the desire of many Americans for a strengthened central government culminated in the Annapolis Convention of September, 1786. Called ostensibly to achieve a more satisfactory regulation of interstate commerce on the Chesapeake,

⁴Ibid., pp. 528-529.

⁵The history of the framing of the Massachusetts Constitution of 1780 is an excellent example of public deliberation on the formation of state governments and constitutions. See Robert J. Taylor (ed.), Massachusetts, Colony to Commonwealth: Documents on the Formation of its Constitution, 1775-1780 (Chapel Hill, 1961).

⁶Cecelia M. Kenyon (ed.), The Antifederalists (New York, 1966), pp. xxxiii-xxxiv.

the Convention ended with a call for a new convention to secure amendments for the Articles, to meet at Philadelphia the following May. This latter convention, the Constitutional or Federal or Philadelphia Convention as it has been variously called, convened for work on May 25, 1787. Thereafter, for the next four months, the delegates to that Convention were in continual session, struggling over a plan of government which one delegate, a future Anti-Federalist, considered

. . . would end either in monarchy, or a tyrannical aristocracy, which, he was in doubt, but one or other he was sure. This Constitution had been formed without the knowledge or idea of the people. . . .

With the signing of the Constitution by all but three of the delegates of the Convention, the work of that body was closed. In the future, however, lay an even more formidable task--to secure the acceptance by the people of the new article of government. This task would occupy the attention of those supporting the Constitution, the Nationalists, or Federalists as they preferred to call themselves,⁸ until August of 1788.

The struggle for the ratification of the Constitution, from the winter of 1787-1788 to late summer of 1788, was, in essence, the first political campaign waged on a national scale in the United States. From the level of dozens of local arenas, with battles fought over local and even petty issues, the struggle for some manner of political supremacy in the country moved into the national coliseum,⁹ where all could take

⁷James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America, Gaillard Hunt and James Brown Scott (eds.) (New York, 1920), p. 576.

⁸See footnote number one of Forrest MacDonald, "The Anti-Federalists," The Wisconsin Magazine of History, XLVI (1963), 209.

⁹Kenyon, op. cit., p. xxiii.

an active part. The principal issue at stake appeared simple enough on the surface--shall the Constitution, as drafted by the Federal Convention of 1787, be adopted or rejected? But beneath the surface of this issue, and not a very great depth at that, lay a much larger, almost theoretical political question. Accompanying that political question was a consuming political struggle between two great, opposing, though by no means clearly drawn, political factions.

On the one hand were the supporters of the Constitution, men of a small, dedicated, and rather closely though informally associated, nationalist-minded organization. Typically rather younger than their opponents, the men of this position and mentality were mostly the products of the Revolution, and of the political, economic, and social reshufflings consequent of that great event. A clearly overwhelming majority in the Federal Convention, the Constitution reflected their strongly centralist political ideology to no surprising degree.

Opposing the Nationalists were the men of the "establishment," often men of the state and local governments. These men, generally of pre-Revolutionary War vintage, were acting to maintain the position of the state governments within the framework of the Articles and thereby also maintain their own entrenched political position. These men realized the threat posed by the Constitution to the Articles, the supremacy of the state governments, and their own entrenched political machines.¹⁰

Roughly in the middle of these two opposing extremes were a relatively few men, in terms of numbers though certainly not in terms of ability, intellect, or national renown. Typically, these men were

¹⁰MacDonald, op. cit., pp. 209-211.

the moderates in the controversy, tending toward a position of classical, doctrinaire republicanism. It was easy, and indeed not unexpected, for these few men to oppose the Constitution on the grounds that it contained too many imperfections from the point of view of republican principles of political theory. These men, Elbridge Gerry of Massachusetts, Mel-ancton Smith of New York, John Francis Mercer of Maryland, and George Mason and Edward Randolph of Virginia, were men of the eighteenth century nationalist tradition, reasoning from principles to particulars. For these men no national government was better than an imperfect one which might subsequently degenerate into tyranny.¹¹

The men who opposed the Constitution, those of the last two described positions, have come to be known as the Anti-Federalists. That designation signifies only, as Forrest MacDonald has argued, that their position was opposed to that of the Federalists, not that they were truly anti-federal in their political ideology.¹² It was a name given to them by their opponents, and though they repeatedly stressed that they, and not their opponents, were truly federalists, the Anti-Federalists never were quite able to live the designation down. Anti-Federalism was, thus, as varied as the men representing that position.

It is the purpose of this thesis to explore and document the Anti-Federalist fear of the strong central government proposed by the Constitution. The problem in a thesis of this nature is the multiplicity and internal contradictions of the Anti-Federalist arguments and objections, and the lack of treatment of certain major topics, notably judicial review. Thus, while their overall theoretical constitutional

¹¹Ibid., p. 209.

¹²Ibid.

and political position is quite easy to arrive at, it is more difficult to demonstrate and evidence the Anti-Federalists' somewhat unconscious fears of strong central government. Only by a careful examination of Anti-Federalist literature and speeches in the ratification controversy, together with some understanding of the men who made the objections, can an accurate picture of the Anti-Federalist fear be determined.

This thesis will examine the Anti-Federalists' fears of a strong central government in the following fashion. Chapter one will be concerned with the basis for that fear--the Anti-Federalist theory of republican government. A summary of this theory is very necessary for the understanding of the Anti-Federalist position on the Constitution and the proposed federal government; it is also important if one is to comprehend the true significance of the Anti-Federalists in the constitutional development of the United States. Chapter two will deal with expressions of Anti-Federalist fears of New England origin, that is, from those New England states which displayed any significant Anti-Federalist support (Connecticut and, particularly, Massachusetts). Chapters three and four will cover, respectively, the Anti-Federalism of the Middle Atlantic states (Pennsylvania, New York, New Jersey, and Delaware), and the Southern States (Virginia, North and South Carolina, Maryland, and Georgia). This sectional approach to the study of Anti-Federalism provides the most continuity in demonstrating the sectional differences in the Anti-Federalists' objections to the Constitution. The concluding chapter will summarize briefly the position of Anti-Federalism in American constitutional and political development.

CHAPTER I

THE ANTI-FEDERALIST THEORY OF REPUBLICAN GOVERNMENT

The Anti-Federalist's position on republican government was closely tied to the widespread belief that republican government was possible only in small, relatively homogeneous areas. As republicans in the classical understanding of the word, the Anti-Federalists read widely in the works of such well-known and widely respected political and legal theorists as John Locke and Sir William Blackstone. They were, however, particularly impressed by the works of Baron Montesquieu whose name carried great weight in America. Montesquieu's opinion was cited frequently, particularly that on the nature of republican government:

The natural properties of small states is to be governed as a republic; of middling ones, to be subject to a monarchy; and of large empires to be swayed by a despot prince . . . The consequence is that, in order to preserve the principle of the established government, the state must be supported in the extent; and that the spirit of the state will alter in proportion as it extends or contracts its limit.¹

The history of America reinforced this belief, and in turn led to further generalizations. Before the Revolution, the Americans enjoyed self-government only as individual colonies. The Articles of Confederation maintained that tradition of local self-government by severely restricting the extent of power exercised by the central authority. A large republic was impossible, the Anti-Federalist argued,

¹Jonathan Elliot (ed.), The Debates in the Several State Conventions on the Ratification of the Federal Constitution (5 vols. 1876-1891; Philadelphia, 1876), II, 421.

because the center of government would unavoidably be distant from the people. The interest of the people would then naturally decrease, setting the stage for a change in republican government to aristocracy or monarchy.² Any self-governing people must be relatively homogeneous in interests, opinions, habits, and mores. The Anti-Federalists were highly conscious of and emphasized the cultural diversities of the American people, and argued that no one set of laws could operate over such diversity equally.³

The Anti-Federalists' fear of the strong central government proposed by the Constitution stemmed also from their conception of human nature. The 'Antis' shared with their opponents many of the assumptions of human nature characteristic of the late eighteenth century. Man's dominant motive in life, they believed, was self-interest. The most extreme form of this self-interest manifested itself in the lust for political power. References to this lust for power were repeatedly made by men on both sides of the ratification struggle.⁴

James Madison, a leading Federalist, wrote in Federalist Number 51:

Ambition [for power in government] must be made to counteract ambitions. The interest of the man must be connected with the constitutional rights of the place. It may be reflected on human nature that such devices should be unnecessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither external or internal control on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty is this:

²Cecelia M. Kenyon (ed.), The Antifederalists (New York, 1966), p. xl.

³Ibid.

⁴Ibid., pp. lxii-lxiii.

you must first enable the government to control the governed; and in the next place oblige it to control itself.⁵

In a passage strikingly similar to Madison's, the New York Anti-Federalist leader, John Lansing, Jr., said:

Samples would be impertinent, arguments would be in vain, checks would be useless, if we were certain our rulers would be good men; but for the virtuous, government is not instituted; its object is to restrain and punish vice, and all free constitutions are formed with the views--to deter the governed from crime, and the governors from tyranny.⁶

Because of their skepticism of man's motivation, the Anti-Federalists viewed representative government only as a substitute for direct democracy. They desired the restriction of that government's operation to such functions so natural in scope as to make the legislature the personification of the people themselves.⁷ The Anti-Federalists doubted the people's judgment of the issues in ratification, indeed of the necessities and requirements of republican government itself. They were skeptical of the people's capacity as electors. The 'Antis' did not feel the people, as electors, were capable of preventing corruption in choosing the legislative and executive branches of the proposed federal government. Indeed, corruption was bound to creep in and affect even the state and local governments, so deep did the Anti-Federalists' skepticism reach. Finally, and perhaps most important, was the belief that the people, voting in the large constituencies provided by the Constitution, would either lose electors to

⁵Alexander Hamilton, James Madison, John Jay, The Federalist, Clinton Rossiter (ed.) (New York, 1961), p. 322.

⁶Elliot, Debates, II, 295-296.

⁷Cecelia M. Kenyon, "Men of Little Faith: The Antifederalists on the Nature of Political Man," The William and Mary Quarterly, XII (1955) 10.

the aristocrats of the country because of the latter's superior organizational capacity, or would find themselves choosing representatives solely from among a number of proffered aristocrats.⁸

For these reasons, the Anti-Federalists were essentially localists on the matter of representative government. They lacked the faith needed to extend the principles of republican government beyond the state level. Their democracy was small, simple, and homogeneous.

The central question, then, that troubled the Anti-Federalists, was the extent of power to be given to the general government. The course of the Revolution and the trials which it presented were still very distinct in the minds of those Americans who lived through and took an active part in it. Political power over the thirteen colonies had been transferred from England to the thirteen states operating as separate, self-governing political entities. Having suffered under what often seemed an overly centralized, and thereby unrestrictive government, the Anti-Federalists were loathe to assign any more power to a new centralized government than was necessary for the benefit, safety, and continued liberty of all. The Articles of Confederation had been in effect for some years--certainly long enough to show that its powers for dealing with all the problems facing the young nation were generally insufficient. The post-Revolution years under that article of government were years of petty, local rivalries and scrambles for political power. The Articles did little to alleviate the

⁸ Kenyon, The Antifederalists, pp. xcii-xciii.

power struggles; indeed, as the years passed, those struggles only intensified, to the detriment of all.⁹

The framers of the Constitution considered it as the solution to the internal political problems facing the United States. The Constitutional Convention evidenced the idea that for greatest effectiveness constitutional reform must be national in scope and must embrace the entire national American political system in a single coherent program.¹⁰ The later phase of the Convention's task was significant because it drew attention to the most persistent constitutional problem of the United States--the existence of a multiplicity of local legislatures with indefinite powers.¹¹ The Constitution was designed and couched with sufficient working room for construction to supply the shortcomings of that article of government.¹² The Constitution placed undisputed highest authority in the national government. It was stated, and understood by the signers at least, to be the supreme law of the land.

But was the United States, a nation little more than a decade old, ready to receive such a government as proposed by the Constitution? Could its people, their institutions, and their degree of political awareness maintain such centralization without the accompanying loss of political freedoms and individual liberties historically consequent

⁹Robert Allen Rutland, The Ordeal of the Constitution: The Anti-federalists and the Ratification Struggle of 1787-1788 (Norman, 1966), p. 49.

¹⁰Edward S. Corwin, "The Progress of Political Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," American Historical Review, XXX (1925), 520.

¹¹Ibid., p. 513.

¹²Ibid., p. 521.

of such centralization? Power to handle their own affairs had been wrested from the Mother Country only with great sacrifice and effort. That power was not considered a commodity to be tossed about lightly. Thus, the Anti-Federalists charged, the basis for conflict was that a strong central government, given sufficient time, would weaken and ultimately destroy local government and its accompanying political freedoms and individual personal liberties.¹³ Others believed that national government must become an aggrandizing aristocracy to the detriment of those hard-won freedoms.¹⁴

The Anti-Federalists in the Federal Convention were from the start an exceedingly small number. Indeed, at the end only George Mason and Governor Edmund Randolph of Virginia,¹⁵ and Elbridge Gerry of Massachusetts remained. Gone were John Lansing, Jr., and Robert Yates of New York, and Maryland's Luther Martin, disappointed at the Convention's continued insistence on centralized government. They need not have been surprised, however, nor felt so badly, about the outcome of the Convention, for arrayed against them was the greatest collection of Nationalists ever collected together in one place in American history. Richard Henry Lee, subsequently one of the foremost of the Anti-Federalist essayists, declined attendance at the Convention, saying that "he smelt a rat."

¹³Morton Borden (ed.), The Antifederalist Papers (Ann Arbor, 1961), pp. 40-41.

¹⁴James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America, Gaillard Hunt and James Brown Scott (eds.) (New York, 1920), p. 576.

¹⁵Edmund Randolph apparently had second thoughts on the matter of continued opposition to the Constitution between the closing of the Philadelphia Convention and the opening of the Virginia Ratifying Convention. At least he said he did. Elliot, Debates, III, 23-28.

In view of their small number at the Convention, and in view also of the strong Nationalist contingent, the Anti-Federalists gained few successes in their efforts to thwart the centralizing tendency of the nationalist-minded delegates. Of their many proposals, only the exclusive right of the House of Representatives to originate appropriation bills was accepted; their other proposals found little support among the delegates. As if to vent their disappointment over the outcome of the Convention, the three remaining 'Antis' refused to give their signed assent to the Constitution as it emerged from the secret debates, nor did they hesitate to review the outcome of the proceedings in the final days of the Convention. Each of this famous "dissenting trio" expressed in his own way grave concern over the dangerous tendency toward centralization of authority adopted in part of the Constitution.¹⁶

Though the Anti-Federalists transferred their opposition to the Confederation Congress, their effort to prevent the passage of the Constitution on to the people failed. But the Constitution still faced its most difficult test: ratification in special state conventions by the required nine of the thirteen states remained. This presented the Anti-Federalists with their final opportunity and their strength, abilities, and perseverance were put to the test.

The Anti-Federalists gathered all their determination and facts at their disposal for the final contest. But their nationalist opponents were no less active. The Federalists' strategy was to secure the

¹⁶For the objections of Edmund Randolph to the Constitution, see Madison, op. cit., pp. 575-576. For George Mason's objections to the Constitution, see ibid., p. 576. And for the criticisms by Elbridge Gerry of the Constitution, see ibid., pp. 576-577.

early calling of the state ratifying conventions and consequent speedy ratification. Thus, they hoped to build up a momentum of ratification which would be difficult to stop.¹⁷ The strategy was action. The Anti-Federalists on the other hand pressed for delay, counselling slow and careful consideration of the new plan of government.¹⁸ The Federalists' strategy paid off, with several quick and relatively easy successes. But these early successes by no means deterred the Anti-Federalists, for these successes were chiefly in the small New England states; these, with the exception of Massachusetts, had been acknowledged as give-aways from the first. The 'Antis' looked forward to the larger states--New York, Virginia, North Carolina--for their hopes. And they came very close to success in their campaign.

¹⁷Rutland, op. cit., p. 49.

¹⁸Ibid., p. 36.

CHAPTER II

THE NEW ENGLAND STATES

The Federal Convention held its last session of debates on September 17, 1787. The Constitution was then presented to the Confederation Congress, which quickly gave the new article of government its approval,¹ and recommended that the state legislatures plan elections for delegates to the special state ratifying conventions. While these proceedings were in progress, Federalists throughout America were active. Their strategy, as outlined in Chapter I, had previously been decided upon, and they moved swiftly to implement that strategy. The Federalists of the four New England states were especially active, for they realized the great advantage presented to them by the internal situation in those states.² The prospect of early and relatively easy ratification was indeed the case in New England, and the Federalists planned to get the ball of quick ratification moving early in that region.³

¹Despite the efforts of Richard Henry Lee and other Anti-Federalists in the Confederation Congress to convince that body not to approve the Constitution, the Congress unanimously decided on September 28, 1787, to approve the new article of government. The Congress sent a resolution to the legislatures of the several states instructing them to call elections for delegates to the ratifying conventions. James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America, Gaillard Hunt and James Brown Scott (eds.) (New York, 1920), p. 641.

²Robert Allen Rutland, The Ordeal of the Constitution: The Ratification Struggle of 1787-1788 (Norman, 1966).

³Robert Morris is reported to have considered that all the states above New York, Rhode Island excepting, lay in the Federalist Camp. His estimation was very accurate; indeed, only Massachusetts and New Hampshire (unexpectedly) and Rhode Island (expectedly) demonstrated any Anti-Federalist strength. Rutland, ibid., p. 50.

Connecticut, the first New England state to call its ratifying convention, demonstrated some meager Anti-Federalist opposition. The Connecticut ratifying convention required only one week to give its approval to the Constitution.⁴ It must not be thought from this rapid vote, however, that Anti-Federalist opposition was lacking in either existence or spirit; the small Anti-Federalist contingent present in the Federalist-dominated convention strongly maintained its position. The determination shown by the 'Antis' present in Hartford is a credit to their belief in their position and to the leadership shown by General James Wadsworth and his compatriot, Judge Eliphalet Dyer. General Wadsworth was a capable debater, and his staunch opposition to his Federalist opponents undoubtedly caused them some disparagement, though he realized the issue of ratification was never seriously in doubt.

General Wadsworth's opposition to the Constitution centered especially on the broad taxing powers granted to the proposed Congress. In giving Congress both the power of the purse (Article I, sections 7 and 8, of the Federal Constitution)⁵ and the power of the sword (Article I, section 8),⁶ a near-despotic authority was granted to the national legislature. Not only was power of such extensive nature but one short

⁴Pennsylvania was the first state to call its ratifying convention (November 21, 1787), Delaware followed with a call for December 3, 1787. The votes on ratification for these two states came on December 12 (46 for, 23 against), and December 7 (unanimous approval of the Constitution), respectively. New Jersey and Georgia became the third and fourth states to ratify the Constitution on December 18, 1787, and January 2, 1788, respectively, and followed the example of Delaware in ratifying unanimously. Connecticut called its ratifying convention for January 1, 1788; its ratification came on January 19, with a vote of 128 for ratification and 40 against.

⁵Madison, op. cit., pp. 629-630.

⁶Ibid., p. 630.

step from enforceable coercion by the federal government, Wadsworth charged, but the delegates to the Federal Convention had no right to delegate to Congress the right to usurp state prerogatives of taxing the citizens of the several states. Finally, he bitterly concluded that such extensive authority would serve in the last resort to benefit the South at the expense of the North.⁷

Wadsworth's position on this matter of federal taxation parallels closely that of the anonymous author of an essay reproduced in Morton Borden's The Antifederalist Papers.⁸ The new government, the author contended, would prove much more expensive than the Confederation. Though Alexander Hamilton, in Federalist Number 13, reasoned that the government as proposed by the Constitution would be far cheaper to operate than the old Confederation government, by virtue of its single civil list assuming more powers,⁹ --not so contended the Anti-Federalist essayist. For the history of Great Britain, with its scheme of representation in the House of Commons bore out the position that a large civil list is not necessarily cheaper in operation than thirteen separate and less powerful governments. Moreover, the writer asked, is it proper to grant both power and property to any group of men, before the public debt, including the present and future expenses of the federal

⁷Wadsworth's prediction was only the first of many such predictions that particular sections of the Constitution would benefit the Southern states at the expense of the North (or vice versa depending upon whether the source of the prediction was from the North or the South). Predictions of a similar nature will be pointed out in subsequent chapters. Rutland, op. cit., pp. 70-75.

⁸Morton Borden (ed.), The Antifederalist Papers (Ann Arbor, 1961), pp. 35-36.

⁹Alexander Hamilton, James Madison, John Jay, The Federalist, Clinton Rossiter (ed.) (New York, 1961), pp. 97-99.

government, is fully explained to the public? Even under the Confederation, no one, contended the writer, was quite sure of the extent of the public debt, nor what the expense of the central government was. Prudence demands, he concluded, that these matters, of the gravest economic importance, be known by the public before the powers of taxation of the proposed federal government, and its right to extend its uncontested authority over the immense area of the country, be granted.

Despite all of Wadsworth's efforts, the ratification of the Constitution by the Connecticut convention was assured as a matter of course. By the end of January, 1788, five states had given their approval to the Constitution. With the exception of Pennsylvania, all these states which ratified the Constitution by January were realized and accepted by the Anti-Federalists elsewhere as give-aways. The real show of strength was shortly to begin, however, for among the remaining conventions to be called were the states that could make or break either side in the contest--Massachusetts, New York, and Virginia. The contests in these three 'large' states, not to mention the smaller states of New Hampshire, Maryland, and North Carolina, were recognized as extremely close. A setback in any one of the three major states could very well be the undoing of all the effort and planning spent in securing ratification up to that time.

The first of the three 'large' states to open its convention proceedings was Massachusetts.¹⁰ Though the issue of ratification in the state was in doubt, there was another factor of equal importance in the final outcome: The action taken by the Massachusetts convention

¹⁰The Massachusetts ratifying convention opened on January 9, 1788.

would very likely determine, and was certain to influence, the outcome of the New York, Virginia, and Maryland conventions.

The Federalist ranks in the Boston convention suffered from no dearth of widely known, well respected, and undoubtedly talented men, for men like Nathaniel Gorham, Fisher Ames, Rufus King, Theodore Sedgwick, and Francis Dana rose and spoke in support of the Constitution. Though in terms of pure numbers the Federalists were at a disadvantage, the convention was held in strongly Federalist Boston, and that single fact was certainly of no small moral value.

The Anti-Federalists' ranks likewise included numerous well-known and respected men, though the most capable 'Anti', Elbridge Gerry, failed in his bid for election as a delegate. Then too, many of the Anti-Federalists present were moderates, tending towards vacillating, and a sudden shift in Federalist strategy aimed at capturing the support of these men caught the Anti-Federalist leaders off their guard.¹¹ The result, as will be seen, was disaster to the Anti-Federalists' aspirations.

The Massachusetts Anti-Federalists were extremely strong, vocal, and prolific in their position, presenting a sizable quantity of literature in the form of essays, letters, broadsides, and pamphlets to the

¹¹During the later course of the debates, the Federalist leadership in the convention convinced Governor John Hancock, whose support was vital to the Federalist cause, to present certain amendments to the Constitution in return for which the Federalists promised their support in securing Hancock an appointive position in the administration of George Washington as President. Forrest MacDonald, "The Anti-Federalists," The Wisconsin Magazine of History, XLVI (1963), f.n. Though the amendments were only recommendatory, the move was successful in changing the minds of a sufficient number of 'Antis' to give the Federalists the votes they needed for ratification. See Jackson Turner Main, The Anti-Federalists: Critics of the Constitution, 1781-1788 (Chapel Hill, 1961), p. 205.

public. Both the supporters and the opponents of the Constitution had more than sufficient time to prepare their respective arguments for dissemination to the public before the convention began, and both sides were extremely busy in doing so. The majority of the state's newspapers were located in Federalist-dominated Boston, and consequently reflected the Nationalist position. The bulk of the Anti-Federalists' writings were found in a single paper, Edward Power's American Herald,¹² but again, they were numerous.

The ablest Anti-Federalist pamphleteers were Elbridge Gerry and Agrippa, and both were extremely active in their efforts. Gerry, the northern member of the "dissenting trio" at the Federal Convention, repeatedly evidenced his fear of the possible consequences of adopting a Constitution which was both ambiguous and, to his mind, incomplete. As he explained in his letter to the Massachusetts' Legislature, his refusal to affix his signature to the Constitution, "his only motive for dissenting from the Constitution was a firm persuasion that it would endanger the liberties of America. . . . He was not," he continued, "authorized to an act, which appeared to him was a surrender of liberties."¹³ Close examination of Gerry's pamphlet to the presiding officer of the Massachusetts Legislature, entitled "Observations on the New Constitution and on the Federal and State Convention," makes for highly illuminating reading. More important, however, is the key that it provides for the understanding of the man himself.

¹²Rutland, op. cit., pp. 66-75.

¹³Paul Leicester Ford (ed.), Essays on the Constitution of the United States (Brooklyn 1892), pp. 127-127.

Independently wealthy, with a prosperous mercantile business in Boston, and with no apparent political aspirations,¹⁴ Gerry's refusal to sign an article of government which appeared so improper afforded him little benefit but much personal risk. Unlike many of his opponents, and many of his colleagues in all fairness, who served to profit from a political or economic standpoint from their respective positions, Gerry's opposition was quite convincingly derived from a genuine fear of the effects the Constitution would have upon the people and their freedoms. His position, then, ranks him as one of the very few true statesmen in the country on either side.

Gerry's "Observations" detail a number of objections which the author believes require immediate correction. A great many of his objections were repeated again and again during the month-and-a-half long convention, and this thesis will attempt to correlate his "Observations" with similar ones presented in the convention.

By no means the least of his and other Anti-Federalists' objections to the Constitution concerned the proposed House of Representatives. So important do these objections become in Anti-Federalist speeches and writings, in Massachusetts and elsewhere, that some recapitulation of Anti-Federalist theory of representative government is valuable here.

Both the Federalists and the Anti-Federalists were in agreement that whatever government operated in the United States, its basic form must be republican. For men of both positions, also, the lower house of the legislative branch, on both the state and national levels, the

¹⁴Forrest MacDonald, We the People (Chicago, 1958), p. 59.

houses broadly representative of the people, was understood to be the dominant house. This was a carry-over from colonial times and it was unthinkable, to the Anti-Federalists at least, that the power of the lower houses be significantly reduced.¹⁵ A part of this aspect of Anti-Federalism was the principle that the government should rest on the consent of at least a substantial proportion of the governed, though just what segments of the free adult male population might be excluded from the franchise was not agreed upon.¹⁶

As classical republicans, the Anti-Federalists were naturally very concerned with the extent to which the common people would be represented in the proposed federal government, and the degree to which they would exist as the authority behind that government. The framers of the Constitution designed the House of Representatives as the house of the people; indeed, it was the sole house over whose members the people had a direct selection. The House, accordingly, greatly concerned the Anti-Federalists of Massachusetts.

The prospect of biennial election of representatives was the first of Gerry's many criticisms of the Constitution.

[W]hen society has deputed a certain number of their equals to take care of their personal rights, and the interests of the whole community, it must be considered that responsibility is the great security of integrity and honor, and that annual election is the basis of responsibility.¹⁷

¹⁵Cecelia M. Kenyon, The Antifederalists (New York, 1966), pp. xxv-xxvi.

¹⁶Ibid., p. xxviii.

¹⁷Paul Leicester Ford (ed.), Pamphlets on the Constitution of the United States (Brooklyn, 1891), p. 8.

The problem of the frequency of national elections was hotly disputed throughout the Federal Convention, and continued to form the subject of extensive debates and exhaustive coverage in written form in most of the states during the ratification struggle. It was, moreover, a problem which was never answered to many Anti-Federalists' satisfaction during the course of the ratification movement. Montesquieu's epigram, "The greatness of power must be compensated for by the brevity of the duration,"¹⁸ was repeated again and again as the maxim for the guarantee of continued political liberty and personal freedom.¹⁹

It was not uncommon throughout the thirteen states to find public officials whose terms of office required reelection every six months; annual election to national and especially state offices was the rule.²⁰ The Anti-Federalists of Massachusetts, however, appeared to be particularly concerned with the problem of elections to national offices, and were extremely vexed with the provision of Article I, section 2, of the Constitution. Curiously enough, relatively little was made of the provision for biennial elections outside the Bay state. It may be, as Cecelia Kenyon suggests in her introduction to The Antifederalists,²¹

¹⁸Jonathan Elliot (ed.), The Debates in the Several State Conventions on the Ratification of the Federal Constitution (5 vols., 1876-1891; Philadelphia, 1876), II, 5, 13, 15-16.

¹⁹Ford, Essays, p. 59.

²⁰The Massachusetts Constitution of 1780, for example, provided that the members of both the Senate (Chapter I, section II, article I) and the House of Representatives (Chapter I, section III, article I) were to be elected to their offices annually. Robert J. Taylor (ed.), Massachusetts, Colony to Commonwealth: Documents on the Formation of its Constitution, 1775-1780 (Chapel Hill, 1961), pp. 133 and 135, respectively.

²¹Kenyon, op. cit., p. lvi.

that there seemed to be a greater willingness on the part of the Anti-Federalists to concede the legitimacy of the Federalist argument that the different circumstances of a central government and the length of time required for representatives to travel from their home districts to the seat of government justified the longer terms of office. Certainly, on the other hand, it seems just as expected that in the thirteen states of America, only Massachusetts Anti-Federalists would protest the Constitution's ignoring of the safety and security provided for in annual elections. The explanation for this conduct may lie in Robert Brown's theory that the Bay state demonstrated more middle-class democracy than did her sister states.²² More likely, however, the conduct of the Massachusetts Anti-Federalists arose from the constitutional history of the state, which had historically displayed a relatively wider suffrage than the other states of America. Indeed, the restrictions on suffrage were one of the main reasons for the rejection by the people of the Massachusetts Constitution of 1778.²³ The Anti-Federalists of the Bay state were theoretical inheritors of this tradition, and as such their objections to Article I, section 2, of the Constitution are entirely predictable.

As a corollary to this criticism of the proposed representative nature of the government, it was widely agreed that only one representative per thirty thousand inhabitants of a state's population was

²²Robert Brown, Middle Class Democracy and the Revolution in Massachusetts, 1681-1780 (Ithaca, 1955).

²³The inhabitants of the town of Mendoy, Worcester County, said, for example, that "it appears to us that it is very unreasonable that no person shall be allowed to give his vote for Governor, Lt. Governor or Senators . . . unless he make oath that he is qualified viz that he is worth £60." Taylor, op. cit., p. 62.

entirely too small. Agrippa complained that given that ratio of representatives to population, it was unlikely that the representatives would maintain any affection for their constituents.²⁴ As General Heath explained, during the early days of the debates:

It is a novel idea that representatives so chosen for a considerable time, in order that they may learn their duty. The representative is one who appears in behalf of, and acts for, others; he ought, therefore, to be fully acquainted with the feelings, circumstances, and interests of the persons he represents; and this is learnt among them, not at the distant court.²⁵

Precisely because few men would represent many, they should return often to the people from whence they came and consequently be more responsible to them. Annual elections, therefore, were widely favored among Anti-Federalists in Massachusetts.

Then too, given the power granted Congress by Article I, section 4²⁶ -- "The Time, Place, and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulation, . . ." was it not likely that Congress could virtually perpetuate itself in power indefinitely, or at best so regulate the time, place, and mode of election so as to ensure the election of such officials as it desired? It was a point often repeated in the debates,²⁷ and in the public essays.²⁸ Most often, the suggestion was to withhold

²⁴Ford, Essays, p. 54.

²⁵Elliot, Debates, II, 13.

²⁶Madison, op. cit., p. 628.

²⁷Elliot, Debates, II, 22, 23, 25, 30-31.

²⁸Ford, Essays, p. 105.

such power which if chosen could be so great and dangerous, and that the people had best to hold such powers.²⁹

The greatest fear of the Massachusetts Anti-Federalists was their belief that the proposed federal government would ultimately result in a consolidation of the state governments. The state governments, Agrippa so ably explained, were historically the greatest single source of protection of their citizens' rights and freedoms, and had proven themselves vigorous in handling problems of all kinds.³⁰ Moreover, no extensive republican-governed empire had preserved its political freedoms unless made up of confederations of small states. Only by local laws made by local representatives could the people's happiness be maintained.³¹

In his series of Letters, Agrippa presented a rather comprehensive examination of the Constitution in his endeavor to demonstrate its consolidating nature. Though similar objections were voiced during the debates,³² Agrippa's arguments were far superior in terms of breadth and analytical reasoning. For this reason, this thesis will examine that aspect of Anti-Federalist fear of the Constitution primarily from his Letters.

Agrippa was especially concerned with the extent of judicial power granted by the Constitution to the federal judiciary. Indeed, in the eyes of the notable Anti-Federalist writer, the provisions for

²⁹Elliot, Debates, II, 37.

³⁰Ford, Essays, p. 63.

³¹Ibid., p. 64.

³²Elliot, Debates, II, 63, 69, 73, 77, 80-81.

this federal judicial system were the most dangerous of all powers of the central government enumerated by the Constitution. Article III of the Constitution³³ proposed the establishment of a federal judiciary with a single Supreme Court on top and an unspecified system of inferior federal courts beneath. The Congress of the federal government possessed the right to make laws which would in no uncertain terms be the supreme law of the land, state constitutions and state laws to the contrary notwithstanding. The federal judiciary was bound by the Constitution to support these laws, again no state constitutions or laws to the contrary notwithstanding.³⁴ On these provisions, Agrippa was vocal in his criticisms:

Questions of every kind respecting property are determinable in a continental court, and so are all kinds of criminal cases. The continental legislature has, therefore, a right to make rules in all cases by which their judicial courts shall proceed and decide cases. No rights are reserved to the citizen. The laws of Congress are in all cases to be the supreme law of the land, and paramount to the constitutions of the individual states. The Congress may institute what modes of trial they please, and no plea drawn from the constitution of any state can avail.³⁵

Agrippa did not, by any means, stop with these few objections, however.

In Letter Number V, he begins a carefully constructed examination of the federal judiciary's powers under the Constitution:

Causes of all kinds, between citizens of different states, are to be tried before a continental court. This court is not bound to try it according to the local laws where the controversies happen; for in that case it may as well be tried in a state court. The rule which is to govern the new courts, must, therefore, be made by the court itself, or by its employers, the Congress. If by the former, the legislative and judicial

³³Madison, op. cit., p. 635.

³⁴Ibid., p. 631.

³⁵Ford, Essays, pp. 64-65.

departments will be blended; and if by the Congress, though these departments will be kept separate, still the power of legislation departs from the states in all cases.³⁶

The Congress of the proposed federal government, Agrippa continued, has the power to make rules for trying questions of any nature respecting property of any kind of citizens of two different states. Because Article VI of the Constitution³⁷ specifically provides that the Constitution, any law, and any treaty made under the Constitution are the supreme law of the land, state judges are bound to support them.

The jurisdiction of the federal courts thus supercedes that of the state courts.³⁸ Agrippa concluded:

As no authority remains to the state, indeed, but to decide questions between citizens of the same state, and those judges are to be bound by the laws of Congress, it clearly follows, that all questions between citizens of the same state are to be decided by the general laws and not by the local ones.³⁹

The same rule of procedure would apply in cases between a state and its own citizens, namely, the superior position of the federal courts to the state courts. This contrasts, Agrippa concluded, with the usual procedure of handling such cases--the petitioning of the supreme authority of the states.⁴⁰

In cases of criminal prosecutions with the state as plaintiff and the accused the defendant, the procedure would be for the attorney-general of the state to commence his suit before the nearest federal court. To that court the defendant must transport himself and his witnesses. Because the trial would take place among strangers, who in no way know whether the defendant is a good or bad man, the effect of the

³⁶Ibid., p. 66.

³⁷Ibid., pp. 66-67.

³⁸Ibid., p. 67.

³⁹Ibid.

⁴⁰Ibid., pp. 67-68.

procedure, Agrippa argued, would be the derangement of liberty; for the defendant must ruin himself to prove his innocence before the federal court.⁴¹

Agrippa, as were so many of the Anti-Federalists, was firmly convinced that the intention of those who framed the Constitution, certainly one ultimate effect of that article of government, was the consolidation of the states. For one thing, the new plan is to be considered as an entire system without any other sources of explanation; only by comparing the several parts of the system together can the whole of it be understood.⁴² With this introduction, the Massachusetts 'Antis' launched into a new series of observations on the Constitution.

The Congress of the federal government is empowered to establish such federal courts as it feels are necessary. This power to establish courts, Agrippa argued, implies the power to define the jurisdiction of these courts and to determine the rules by which their judgment will be regulated. It is an accepted practice, in common law, for the legislature to alter that law. For this reason, and this gets to the heart of the fears of such men as George Mason and Elbridge Gerry, a declaration of rights is so badly needed for the Constitution; it establishes those principles which the central government may never invade without also violating the fundamental compact between the people and their government.⁴³ But the real evidence of the intent of consolidation lay, Agrippa vehemently argued, in the right of Congress to regulate commerce.

Massachusetts was a state well-known throughout the United States for its hardy seafarers. Boston was one of the leading ports of America

⁴¹Ibid., p. 69.

⁴²Ibid., pp. 69-70.

⁴³Ibid., p. 71.

and enjoyed a considerable foreign trade. Agrippa, as a good son of Massachusetts, was proud of his state's reputation as a commercial leader, not only of New England but of the entire country as well. Article I, section 8, of the Constitution vested in Congress the virtually unlimited right to regulate external and internal commerce.⁴⁴ It is quite understandable that Agrippa should express fears on this matter, for the power reserved to Congress was very close to those regulatory powers claimed by the Parliament of Great Britain before the Revolution:

Though this power [to regulate trade] under certain limitations would be a proper one for the department of Congress; it is in this section carried too far, and much farther than is necessary . . . The new constitution not only prohibits vessels, bound from one state to another, from paying any duties, but even from entering and clearing. The only use of such a regulation is to keep each state in complete ignorance of its own resources.⁴⁵

Freedom of action in the field of commerce, Agrippa maintained, has a two-fold effect: business will find the means for its greatest gain, and individuals in commerce would all have a fair share of the available opportunities. He continued:

It is vain to tell us that we ought to overlook local interests. It is only by protecting local concerns that the interest of the whole is preserved. No man when he enters society does it from a view to promote the good of others, but he does it for his own good. All men having the same view are bound equally to promote the welfare of the whole. To secure them to such a principle as that local interests must be disregarded, is requiring of one man to do more than another, and is subverting the foundation of free government.⁴⁶

The significance of the last phrase of the last sentence is particularly interesting, for it seems also to disclose the character of the writer

⁴⁴Madison, op. cit., p. 630.

⁴⁵Ford, Essays, p. 70.

⁴⁶Ibid., pp. 72-73.

--a man who though concerned with probable restrictions on the economic gain to be had by his state, acknowledges at the same time the importance and worth of the individual in government. It is a theme that would be repeated again and again by Anti-Federalists in other states, as George Mason and Richard Henry Lee of Virginia stressed the necessity of a bill of rights.⁴⁷

The perfection of a government depends on the equality of its operation, as far as human affairs will admit, upon all parts of the empire and upon all citizens . . . small enqualeties [sic] may be easily compensated. There ought, however, to be no inequality in the law itself, and the government ought to have the same authority in one place, as in another. . . . The most plausible argument in favour of the new plan is drawn from the inequality of its operation in different states.⁴⁸

Agrippa continued by laying out in concise form the sources of federal collection of revenues in several states to prove his contention:

"Connecticut have been told that the bulk of the revenue will be raised by imposed and excise, and, therefore, they need not be afraid to trust Congress with the power of levying a dry tax at pleasure."⁴⁹ But New York and Massachusetts are commercial states; Connecticut naturally hopes that those two states will pay the bulk of the continental expense. But if the trade is not overtaxed, the consumer pays the tax. If, on the other hand, the trade is over-taxed, trade languishes, and the farmer, too, loses his market. In short, the proposed plan of taxation, and there also the power of Congress to regulate both internal

⁴⁷See George Mason's "The Objections of the Hon. George Mason to the Proposed Federal Constitution; Addressed to the Citizens of Virginia," in Ford, Pamphlets, p. 329. Also, Richard Henry Lee, "Letters of a Federal Farmer," in Ford, Essays, p. 280.

⁴⁸Ford, Essays, p. 74.

⁴⁹Ibid.

and external taxes is delusive, unequal, and ultimately detrimental to the country as a whole.⁵⁰

All states have certain internal, local advantages, Agrippa continued in a later Letter, and can to a considerable degree supply each other's wants. Friendly intercourse between the individual states, therefore, can be very easily established. The United States, under the Articles, exists as a true federal republic: each state within its own limits maintains sovereignty over its own citizens, while some general concerns are granted to Congress.⁵¹ It is true, Agrippa readily admitted, that Congress has particular deficiencies, but:

If the new system should be adopted, the whole impost, with an unlimited claim to exercise and dry tax, will be given to Congress. There will remain no adequate fund for the state debt, and the state will be subject to be sued on their notes . . . if we surrender the impost, we shall still, by this new constitution, be held to pay our full proportion of the remaining debt, as if nothing had been paid. The impost will not be considered as being paid by this state, but by the continent. The federalists, indeed, tell us that the state debts will all be incorporated with the continental debts and all paid out of one fund . . . Not one word is said in the book in favor of such a scheme, and there is no reason to think it true. Assurances of that sort are easily given and as easily forgotten.⁵²

A consolidated government, such as proposed by the Constitution, argued Agrippa,

is inapplicable to a great extent of country; is unfriendly to the rights of both persons and property, which rights always adhere together; and that being contrary to the interest of the extreme of an empire, such a government can be supported only by power, and . . . commerce is the true bond of union for a free state.⁵³

The Constitution is clearly a consolidated government, Agrippa continued:

⁵⁰Ibid., pp. 74-75.

⁵¹Ibid., pp. 76-77.

⁵²Ibid., pp. 77-78.

⁵³Ibid., pp. 82-83.

By Article 3, section 2, Congress are empowered to appoint courts with authority to try civil causes of every kind, and even offences against particular states. By the last clause of Article 1, section 8, which defines their legislative powers, they are authorized to make laws carrying into execution all the "powers vested by this constitution in the government of the United States, or in any department or officer thereof;" and by Article 6, the judges in every state are to be bound by the laws of Congress.⁵⁴

Agrippa employed a total of twelve Letters in his analysis of the Constitution; he concluded his series of Letters with an analysis of man as a political being in relation to the new article of government, including within those last Letters a number of charges which, for his support of the Constitution, would have to be adopted, preferably by a second convention. The object of every just government, he wrote is

to render the people happy by securing their persons and possessions from wrong. To this end, it is necessary that there should be local laws and institutions; for a people inhabiting various climates will unavoidably have local habits and different modes of life, and these must be consulted in making the laws. . . . It is plain, therefore, that we require for our regulation laws which will not suit the circumstances of our southern brethern, and that laws made for them would not apply to us. Unhappiness would be the uniform produce of such laws.⁵⁵

Agrippa continued, "We may go further, and say that it is impossible for any single legislature so fully to comprehend the circumstances of the different parts of a very extensive dominion as to make laws adapted to these circumstances."⁵⁶

Of the choices of government offered to the people of the United States, including the Constitution, a "Federal Republic" is best adapted to the object and purpose of securing their persons and possessions.

⁵⁴Ibid., p. 83.

⁵⁵Ibid., pp. 91-92.

⁵⁶Ibid., p. 92.

"By this kind of government each state retains to itself the right of making and altering its laws for internal regulation, and the right of executing these laws without any external restraint."⁵⁷ This is the form of the Confederation; the advantages, securities, and freedoms offered by it to the people of the United States, Agrippa urged, ought not be surrendered readily without close reasoning of and adequate safeguards over that system of government which it is proposed be accepted now.⁵⁸

The powers of government, Agrippa concluded, reside in the people; and when they appoint some of their number to administer the government for them, they delegate all the powers of government not expressly reserved.

A constitution does not in itself imply any more than a declaration of the relation which the different parts of the government bear to each other, but does not in any degree imply security to the rights of individuals In doubtful cases the decision is in favor of the government.⁵⁹

The bill of rights to the Constitution of Massachusetts incorporates thirty articles; yet it is proposed and advocated strongly that the people of the State of Massachusetts consent to give far greater powers than those of their state's constitution to a new article of government upon which is exercised far fewer controls.

The complaints against the separate governments, even by the friends of the new plan, are not that they have not power enough, but that they are disposed to make a bad use of what power they have. Surely [the advocates of the Constitution] reason badly, when they propose to set up a government possessed [sic] of much more extensive powers than the present, and subject to much smaller checks.⁶⁰

⁵⁷Ibid., p. 93.

⁵⁹Ibid., p. 112.

⁵⁸Ibid., pp. 121-122.

⁶⁰Ibid., p. 113.

New Hampshire and Rhode Island, too, evidenced strong Anti-Federalist support. Unfortunately for American history, Anti-Federalist literature from the former state is scarce, while the records of the debates are only very fragmentary. Rhode Island, historically a go-it-alone colony and state, presented no Anti-Federalist literature for examination; indeed, the state legislature did not even call a convention, but rather, submitted the Constitution directly to the people for their consideration. Neither state, consequently, will be discussed in this thesis. The scene shifts, therefore, in the next chapter to the Middle Atlantic States.

CHAPTER III

THE MIDDLE ATLANTIC STATES

This chapter will examine Anti-Federalism of the Middle Atlantic states, i.e., Delaware, New Jersey, New York, and Pennsylvania. As with all states in the late eighteenth century America, these states were largely rural. A few large urban areas, New York and Philadelphia, were present of course, and their growth was quite rapid, but they contained only a relatively small segment of the population in their respective states. These urban areas, and in general terms the eastern areas of the state in which they were located, were the principal sources of support for the Constitution in the states, and certainly in New York and Pennsylvania. The struggle over ratification in these two states, then, was waged between the eastern commercial, banking and market interests in support of the Constitution and the western agriculturists in opposition.¹

Delaware and New Jersey were, respectively, the first and third states to ratify the Constitution. Neither of the states showed any

¹Since Charles A. Beard published his influential work, An Economic Interpretation of the Constitution of the United States (New York, 1913), and within the last two decades especially, there has been an increasingly concentrated study in the history of the events and conditions of the late Confederation and early Constitutional periods of American history. As part of this concentrated study, there has been much historiographical dispute of the sources of Federalist and Anti-Federalist support in the several states of the Union. See: Jackson Turner Main, The Anti-Federalists: Critics of the Constitution, 1781-1788 (Chapel Hill, 1961); Forrest MacDonald, We the People (Chicago, 1959); and Robert Allen Rutland, The Ordeal of the Constitution: The Ratification Struggle of 1787-1788 (Norman, 1966), for some indication of the nature of this dispute.

Anti-Federalist opposition at all, for the conventions of both states ratified unanimously.²

Pennsylvania was the first state of the Confederation to call its ratifying convention. The circumstances surrounding the calling of that convention cannot in any way be called honorable.³ The events leading to the convention, and the speed with which it deliberated, accounts in great part for the scarcity of Anti-Federalist literature from Pennsylvania. It explains also, in part, the lack of Anti-Federalist opposition in the convention. The early date, November 20, 1787, allowed sufficient time for the canvass of only the pro-Constitution eastern area of the state, but not of the central and western areas which were dominated by anti-Constitution agriculturists.⁴

Because of this lack of Anti-Federalist opposition in the ratifying convention, and the scarcity of Anti-Federalist literature which appeared in the state, any investigation of Pennsylvania Anti-Federalism is necessarily handicapped from the outset. Indeed, the nature of the Anti-Federalist opposition in the convention can only be arrived at from an extrapolation of the counter-arguments of the Federalists in the convention. That is, only from what James Wilson and his colleagues

²The Delaware ratifying convention first met on December 3, 1787. Its final vote came on December 7, 1787. The debates of the New Jersey ratifying convention were December 11 to December 18. The conventions of both states gave unanimous approval to the Constitution.

³Those members of the Pennsylvania Assembly who opposed the Constitution walked out of the Assembly, thereby preventing the quorum necessary for the vote on the state's ratifying convention. That night a mob stormed the residences of two of the Anti-Federalist delegates, carried them to the Assembly's meeting place, and convinced one to stand for the role call, thereby constituting the necessary quorum for the vote on the ratifying convention to be taken. Main, op. cit., p. 178.

⁴Rutland, op. cit., p. 51.

said in refutation of their opponents' objections can the nature of those objections expressed in the convention, especially the fear of the central government proposed in the Constitution, be deduced. The notes of the debates of the ratifying convention include only the Federalists' speeches. Furthermore, such Pennsylvania Anti-Federalist literature as did appear was largely published out of the state, so completely Federalist-dominated were the state's newspapers. The real nature of Pennsylvania Anti-Federalist objections can be drawn, consequently, only very imperfectly, and only in quite sketchy form.

The form is federal, the effect clearly national, contended A Farmer, who, to prove his contention, presented quite a sophisticated argument. The Federalists argued that the state legislatures chose their respective senators, and could never, therefore, be annihilated. To A Farmer, however, that power of selection was merely a ministerial one. For those same state legislatures had no power to direct or even instruct their senators, or the power to censure or replace them for misconduct. The exercise of the power of selection is not, therefore, indicative of the state's sovereignty; only in the power of choosing and directing those to whom authority is delegated is that sovereignty preserved. In fact, A Farmer continued, the senators do not even vote as states, but as individuals, nor do the states pay their salaries. The effect is, then indisputably national.⁵ Furthermore, the power of the states in officering and training the militia, and in handling state affairs, does not in any way constitute sovereign powers; like

⁵Morton Borden, The Antifederalist Papers (Ann Arbor, 1961), pp. 105-106.

the power of appointing the state's senators, they are merely ministerial powers, whether they be taken together or separately. Further, the state governments are destitute of all sovereign command of and control over the sources of revenue, and of protecting their citizens and their property from the national law. The powers of making laws of treason are left solely in the hands of the central government. In all these respects, the effect contemplated by the Constitution is, argued A Farmer, the consolidation of the several states under a national government.⁶

What will be the effect of that national, consolidated government? An Old Whig insisted:

It is beyond a doubt that the new Constitution, if adopted, will in a great measure destroy, if it does not totally annihilate, the separate governments of the several states. We shall in effect become one great republic. Every measure of any importance will be continental. What will be the consequence of this? One thing is evident--that no republic of so great magnitude ever did or can ever exist . . . A confederacy of republics must be the establishment in America, or we must cease altogether to retain the republican form of government. From the moment we became one great republic, either in form or in substance, the period is very shortly removed when we shall sink first into monarchy, and then into despotism.⁷

After some historical study of ancient and contemporary republics, An Old Whig concluded:

Before we establish a government, whose acts will be the supreme law of the land, and whose power will extend to almost every case without exception, we ought carefully to guard ourselves by a bill of rights, against the invasion of those liberties which it is essential for us to retain, which it is of no real use for government to deprive us; but which, in the course of human events, have been too often insulted with all the wantonness of an idle barbarity.⁸

⁶Ibid., p. 106.

⁷Ibid., pp. 46-47.

⁸Ibid.

James Wilson repeatedly contended during the debates that in view of the nature of man as a social being, and the nature of human society, government must be so designed as to bind the interest and authority of the whole community upon every part of that community. In forming the system, it is important to give minute attention to the interests of all parts. But a duty of still higher importance is to feel and demonstrate predominant regard to the interests of the whole.⁹

But John deWitt had other thoughts on the matter, and argued them with equally cogent skill. Under section 8 of Article I of the Constitution,¹⁰ Congress was given the power of organizing, arming, and disciplining the militia of the several states, and of governing them when in the service of the United States. The states themselves reserved the right to appoint the militia officers, but the authority of training the militia was according to the discipline prescribed by Congress.¹¹ The total effect, regardless of what Wilson argued in the convention, deWitt insisted, was certainly not to give respectability to the proposed central government, nor to establish military fortifications on the frontier in view of the presence of foreign governments elsewhere in the North American continent. Rather, the upshot of the provision could only be a further insurance for the subtle intention of consolidation; the framers of the Constitution recognized the historical value

⁹Jonathan Elliot, The Debates in the Several State Conventions on the Ratification of the Federal Constitution (5 vols., 1876-1891; Philadelphia, 1876), II, 424-425.

¹⁰James Madison, The Debates in the Federal Convention Which Framed the Constitution of the United States of America, Gaillard Hunt and James Brown Scott (eds.) (New York, 1920), pp. 630-631.

¹¹Borden, op. cit., pp. 75-77.

of a militia of free men in preserving the freedom of a free people. Certainly the framers could not afford, deWitt contended, to allow such potentially "dangerous" power and authority to remain solely in the hands of the states. But the real significance of deWitt's essay comes in the final paragraph:

If the people are not in general disposed to execute the powers of government, it is time to suspect there is something wrong in that government; and . . . they had better have another. For, in my humble opinion, it is much too early to set it down for a fact, that mankind cannot be governed but by force.¹²

The implication of deWitt's single paragraph might well summarize the essence of Anti-Federalist opposition to the powers of the proposed federal government: should the people of the United States fail or refuse to acknowledge the supremacy of the federal government, as they might well do, there may be some drastic misunderstanding of the people's desires or needs in the federal government; the people of the United States are quite capable of governing themselves, as the history of the country showed, and they neither need nor want the coercive powers of a central government in which their role is limited.

Another point of strong Anti-Federalist opposition, to which their opponents were forced again and again to return, was the proper distinction of power to be drawn between the federal and state governments. Although a restatement of the 'Antis'' argument against the consolidating nature of the Constitution, it was an argument repeatedly asserted. Certainly, judging from the number of times Wilson was forced to return to the subject, it was an argument stressed again and again by the 'Antis' in the Pennsylvania convention.

¹²Ibid.

In the course of his counter arguments, Wilson repeatedly covered the same ground. Whereas, the Articles of Confederation moved to arrive at some proper limit of authority between the national and state governments, the relationship it established was far too lopsided in favor of the latter:

Whatever object of government is confined, in its operation, and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States. But though this principle be sound and satisfactory, its application to particular cases would be accompanied with much difficulty, because, in its application, room must be allowed for great discretionary latitude of construction of the principle.¹³

Later in the same speech before the convention, Wilson arrived at the fundamental Federalist position on government:

[T]he powers of the federal government and those of the state governments are drawn from sources equally pure. If a difference can be discovered between them, it is in favor of the federal government, because that government is founded on the representation of the whole Union, whereas the government of any particular state is founded only on the representation of a part; inconsiderable when compared with the whole. Is it not more reasonable to suppose that the counsels of the whole will embrace the interest of every part, than that the counsels of any part will embrace the interests of the whole?¹⁴

The essence of Wilson's argument, and the basis of the Constitution, was that a central government required genuine national powers. It was the question of the extent and nature of those powers in the Constitution that separated the Federalists and the Anti-Federalists.

Criticism and fear of the federal government expressed by Pennsylvania Anti-Federalists was by no means limited to the powers of

¹³Elliot, Debates, II, 424.

¹⁴Ibid.

Congress alone. William Penn, for example, reflected at some length on the proposed executive's veto power, one of the very few men to consider that aspect of the executive branch of the federal government. It is essential, Penn argued, always to divide the powers of a free government:

The first and most natural division of the powers of government are into the legislative and executive branches. These two should never be suffered to have the least share of each other's jurisdiction, or to intermeddle with it in any manner. For whichever of the two divides its powers with the other, will certainly be subordinate to it; and if they both have a share of each other's authority, they will be in fact but one body. Their interest, as well as their powers will be same, and they will combine against the people.

It is, therefore, a political error of the greatest magnitude, to allow the executive power a negative, or in fact any kind of control over the proceedings of the legislature.¹⁵

This absolute separation of legislative and executive has been the rule, continued Penn, in England since William III, and in almost every state of America.

Cincinnatus chose the proposed Senate as the object of bitter remarks. The six-year terms of the Senate's members, its powers of impeachment, the necessity for its approval of all presidential appointees, the union that would likely be established between that body and the executive via the vice-president's position as the presiding officer, all constituted serious breaches of accepted principles of republican government. The result, he insisted, would undoubtedly be the establishment of an aristocratic club "by which the democratic rights of the people will be overwhelmed."¹⁶

¹⁵Borden, op. cit., p. 210.

¹⁶Ibid., pp. 210-211.

Despite all the efforts of the Pennsylvania Anti-Federalists, their cause was a losing one, and their efforts came to nothing but delay in the debates.¹⁷

If the Federalists in Pennsylvania achieved ratification with little real opposition, their counterparts in neighboring New York faced a much darker prospect. For in New York, the Federalists were opposed by a well developed and well disciplined Anti-Federalist organization. The organization, coordination, and discipline of the Anti-Federalist forces of the Empire state were equalled only by the Anti-Federalists of Virginia, where ratification came only after a most bitter struggle inside and outside the convention, and of North Carolina, which rejected the Constitution in the first ratifying convention, and did not ratify until 1789.

The New York Anti-Federalist delegation to the ratifying convention was a very distinguished and very capable one. It included Governor George Clinton, around whose state-wide political party the Anti-Federalist organization was largely based, his lieutenants Robert Yates and John Lansing, Jr., and Melancton Smith, without a doubt the most capable Anti-Federalist debater and one of the very few men on both sides of the Constitution struggle really disinterested in the struggle. The New York 'Antis' were greatly aided by what was perhaps the best functioning committee of correspondents in the United States. Newspaper support was a determining factor in their extensive support throughout the rural, agricultural areas. Most significant of all,

¹⁷The final vote on ratification, taken on December 12, 1787, gave approval to the Constitution by a vote of 46 for, 23 against ratification. Rutland, op. cit., pp. 135-159.

however, was the efficient nature of the state government.

The contest for control of the state's political and governmental machinery had been fought out, for many years, between the Clintonians and the Anti-Clintonians. The former group, constituting the bulk of the Anti-Federalists in the convention, had controlled New York almost completely since independence. The state's government, under Clinton, was an enormously popular¹⁸ and highly successful one, at least to those in the rural areas who constituted its major support. The opposition, led at the time of the ratification struggle by General Philip Schuyler and his son-in-law, Alexander Hamilton, gleaned both its leaders and its chief support from the large urban areas of the state, particularly New York City and the surrounding counties.¹⁹ These lines of political division, popular support, and leadership within the state were carried down to the ratifying convention, with little real significant alteration.

Spectators at the convention, which began its sessions on June 17, 1788, came in the expectation that they would see the greatest display of oratorical talent, and the most important and widely-respected group of leaders of both sides, ever assembled in the state's history. The promise of much excitement was fulfilled early.

The display of intellectual talent was not limited to the actual debates. Essays and pamphlets from both sides were more widely read and distributed than in any other state. The Federalist Papers of

¹⁸MacDonald, op. cit., gives one explanation for Clinton's popularity and success in controlling the state's government.

¹⁹Main, op. cit., pp. 41-71.

Alexander Hamilton, John Jay, and James Madison on the Federalist side had no peers; the Letters of Brutus and the pamphlets and essays of Melancton Smith from Anti-Federalist pens vied only with Richard Henry Lee's "The Letters of a Federal Farmer," as the most analytical of Anti-Federalist literature to appear.

In the most general of terms, the essence of Anti-Federalist opposition to the Constitution in New York was that the new central government would ultimately prove destructive of the political freedom and individual liberties enjoyed by Americans everywhere. This was the argument most often advanced for the rejection of the Constitution. But it is not at all surprising, considering the privileged political position enjoyed by the Clintonians within the state, to find a great deal of what must be called states-rights politics creeping into both debates and essays of particular New York 'Antis'. This duality of purpose is quite apparent, for example, in the Letters of Sidney.²⁰ More often, however, one can only surmise the purpose for opposition to the Constitution, this being especially the case with the Letters of Cato,²¹ the pen-name of George Clinton, and the speeches during the debates of Clinton²² and John Lansing, Jr.²³ Indeed, the opening Anti-Federalist speech in the ratifying convention, by Lansing, included this rather indicative paragraph:

²⁰Paul Leicester Ford, Essays on the Constitution (Brooklyn, 1892), pp. 297-313.

²¹Ibid., pp. 245-278.

²²Elliot, Debates, II, 359.

²³Ibid., p. 217.

It has been observed, that, as the people must, of necessity, delegate essential powers either to the individual or general sovereignties, it is perfectly immaterial where they are lodged; but, as the state governments will always possess a better representation of the feelings and interests of the people at large, it is obvious that those powers can be deposited with much greater security with the state than with the general government.²⁴

This attitude must be contrasted with that expressed by Melancton Smith in his first speech on the convention floor:

[Smith] was as strongly impressed with the necessity of a union as any one could be. He would seek it with as much ardor. In the discussion of this question [the necessity of a union requiring a strong central government], he was disposed to make every concession, and indeed, to sacrifice everything for a union, except the liberties of his country, than which he could not contemplate a greater misfortune. But he hoped we were not reduced to the necessity of sacrificing, or even endangering our liberties, to preserve the Union. If that was the case, the alternative was dreadful. But, he would not now say that the adoption of the Constitution would endanger our liberties, because that was the point to be debated. . . .²⁵

Characteristic of his later speeches in attitude was Smith's lack of concern for the state governments per se. He dwelt primarily upon the need to preserve those liberties and freedoms enjoyed by Americans.

This examination of New York Anti-Federalism will draw from Anti-Federalists of both positions, and will correlate the arguments of both into a coherent picture of New York Anti-Federalists' fears of the proposed federal government.

John Lansing, in the speech previously quoted, precisely summed up the argument of states-rights Anti-Federalists: "If the operation of the general government will subvert those of the individual states, the interest of the state officers [will] be affected in some measure."²⁶ The two greatest spokesmen for this position, and the two who had the

²⁴Ibid.

²⁵Ibid., p. 223.

²⁶Ibid., p. 220.

most to fear from the operation of a strong central government, were Governor George Clinton and Robert Yates, member of the New York State Supreme Court. Both were extremely vocal in their attacks on the Constitution, though Clinton took little real part in the debates and Yates none at all. Both men were, however, active essayists on the Constitution, and Yates, under the pseudonym of Sidney,²⁷ made little effort to hide the extent of his feelings.

In his Letters, Sidney compared the federal Constitution with the constitution of the state of New York. He demonstrated how the powers of the state government would be either totally or partially absorbed, and asked whether the remaining powers would be sufficient to support the state governments. Though his Letters lacked the literary and intellectual quality of those of Smith or Brutus, Sidney achieved his desired end quite well.

Sidney contended that:

The powers vested in the legislature of this state [by the New York state constitution] will be weakened, for the proposed government declares that "all legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a Senate and a house of representatives," and it further prescribes, that "this constitution and the laws of the United States, which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. . . ."28

This objection was a familiar one, though Federalists everywhere contended that the powers of the national legislature were quite restricted in the scope of their operations. But, is this reasonable, Sidney asked, and concluded:

²⁷Ford, Essays, p. 295.

²⁸Ibid., p. 304.

It appears to me as impossible that these powers in the state constitution and those in the general government can exist and operate together . . . Can there at the same time and place be and operate two supreme legislatures, executives, and judicials? Will a "guarantee of a republican form of government to every state in the union" be of any avail, or secure the establishment and retention of state rights?²⁹

In a later Letter, Sidney answered his own question:

It appears that the general government, when completely organized, will absorb all those powers of the states which the framers of the constitution had declared should be only exercised by the representatives of the people of the state . . . but [the state's] operations to ensure or contribute to any essential measures promotive of the happiness of the people may be totally prostrated, the general government arrogating to itself the right of interfering in the most minute objects of internal policy, and the most trifling domestic concerns of every state. . . .³⁰

Cato went further into this matter, though his initial premise of the consolidating nature of the Constitution was the same. Was it possible, he asked, to expect a republican form of government to exist in the United States, given its diverse interests, cultures, and needs? Reflecting on Montesquieu's famous aphorism relating the size of a country to its form of government, Cato continued:

Will this consolidated republic, if established, in its exercise beget such confidence and compliance, among the citizens of these states, as to do without the aid of a standing army? . . . The malcontents in each state, who will not be a few, nor the least important, will be exciting factions against it--the fear of a dismemberment of some of its parts, and the necessity to enforce the execution of revenue laws [a continual source of apprehension] on the extremes and in the other districts of the government, will incidentally and necessarily require a permanent force to be kept foot. . . .³¹

The effect of that standing army would be detrimental to the freedoms of the people:

²⁹Ibid., pp. 304-305.

³⁰Ibid., pp. 313-314.

³¹Ibid., p. 258.

Will not political security, and even the opinion of it, be extinguished? Can mildness and moderation exist in a government where the primary incident in its exercise must be force? Will not violence destroy confidence, and can equality subsist where the extent, policy, and practice of it will naturally lead to make odious distinctions among citizens?³²

Cato further suggested that the southern states, whose citizens were unfamiliar with frugality and individual effort and achievement, and whose economy was based on slavery, would be less tenacious in defense of their freedoms and independence than the northern states.³³ Cato's appeal in the latter argument was to the emotions, to one's pride in being a "freedom-loving, hard-working, energetic Yankee." Certainly, the argument had little basis in history, for the South had shown itself as dedicated to the cause of independence as had the North.

But this was certainly not the only means by which the existence of the states was threatened. To Sidney, the duality of provisions in the state's constitution and the federal Constitution for the regulation of the mode, time, and place of national elections, and the fact that the latter article of government was considered in all cases as the supreme law of the land, virtually made the state's constitutional provisions on the matter ineffective, if not indeed nullified. The federal Constitution could, in addition, void the state's constitutional provision that no citizen could be deprived of his vote, or the privileges and rights confirmed to that individual by his state citizenship.³⁴

Article IV, section 4, of the federal Constitution³⁵ guaranteed to every state a republican form of government. This, Sidney charged, was a guarantee in name only, for:

³²Ibid.

³³Ibid., pp. 258-259.

³⁴Ibid., pp. 208, 311.

³⁵Madison, op. cit., p. 636.

If the United States guaranteed "to every state in the union a republican form of government," we may be allowed the form and not the substance, and that it was so intended will appear from the changing of the word constitution to the word form and the omission of the words, and its existing laws.³⁶

Moreover, Sidney continued:

And I do not even think it uncharitable to suppose that it was designedly done; but whether it was so or not, by leaving out these words the jurisprudence of each state is left to the mercy of the new government . . . [by] 1st art., 8th sec., 1st clause . . . by the 9th clause of the same section . . . by the 18th clause . . . [by] the 3rd art., 1st sec. . . . by sec. 2nd, . . . by the 3d art., 3d sec.³⁷

The implication of Sidney's contention is obvious--the Constitution could not either guarantee the states a republican government or maintain the force of their existing laws, for by doing so the federal government could not assume the position of supremacy within the country its framers so obviously intended. Omissions of this nature were subtle indeed, but they were more than sufficient and more than apparent for Sidney to catch their probable consequences.

Sidney also pointed out that under the Constitution the states would lose command of their own militia when drawn into the use of the federal government. The state governor's power of pardon, his execution of state laws, his control of appointment, and the lieutenant governor's authority to assume the power of his superior, would all be "either all enervated or annihilated."³⁸

Finally, the state constitution, unlike its federal counterpart, flatly insured the sanctity of any and all religious practices, except as they were inconsistent with the peace and safety of the state. The

³⁶Ford, Essays, p. 309.

³⁷Ibid.

³⁸Ibid., p. 310.

federal Constitution made no such guarantees, nor did it prohibit those in the ministry from simultaneously occupying civil or military positions.³⁹ Separation of church and state was a provision incorporated into virtually every state constitution, and the lack of insistence upon this in the Constitution made Federalists and Anti-Federalists alike uneasy.

Cato and John Lansing were more specific and less inflammatory in their observations on the Constitution than Sidney. The former's Letters, which largely covered the same ground as did the Letters of Sidney, and which were only marginally superior in quality to those of Sidney, did not so greatly reflect preoccupation with state interests as did the Letters of Sidney. Lansing's speeches likewise are only very seldom concerned with any states-rights. On reading the speeches or Letters of these men, however, one suspects their position was not entirely disinterested. Yet Lansing very ably summarizes the problem of assessing these men's position:

If the operation of the general government will subvert those of the individual states, the interests of the state officers may be affected in some measure, otherwise their emoluments will remain undiminished--their consequences not so much impaired as not to compensate men of interested pursuits by the prospect of sharing the offices of the general government. Does this imputation only apply to the officers of this state? Are they more discerning in distinguishing their interests, or are they only capable of being warped by apprehensions of loss?⁴⁰

The problem is a difficult one for a modern historian to deal with objectively. Indeed, any completely objective analysis of Cato and Lansing could be only concerned with their objections. Only by

³⁹Ibid., p. 313.

⁴⁰Elliot, Debates, II, 220-221.

injecting one's subjective feelings into the analysis can one arrive at any conclusions of the underlying motives of two such men.

This thesis is concerned more with the observations on the Constitution of those who saw in it genuine threats to the liberties, freedoms, and privileges enjoyed by Americans. Anti-Federalists like Melancton Smith and Brutus devotedly believed in a decentralized government. Though they realized that the Confederation was too weak to accomplish the needs of and meet the problems faced by the young nation, they feared the Constitution to be too far in the other extreme. Their position in the controversy was a moderate one--with certain amendments to the Constitution insuring the freedoms of the Americans, the Constitution would be acceptable to them. But they added a great deal of respectability and intellectual quality to the New York Anti-Federalist organization, which otherwise would have been quite drab. Smith, however, and other moderates like him, proved to be the weak link in the otherwise quite solid New York Anti-Federalist organization.⁴¹

⁴¹Until very late in the debates, Smith remained firm to the Anti-Federalist position of no ratification without prior amendments. At the same time, however, he expressed private thoughts that he would vote for recommendatory amendments if substantial enough. As the convention continued, and as the split between the two sides in the controversy widened, Smith came to realize that should New York refuse ratification without prior amendment, the state would likely be isolated in the Union. Then too, Smith was the only Anti-Federalist delegate from Duchess County, and he knew from New York's rebellious state of mind that the possibility of secession of the city and the surrounding counties was real. though perhaps unlikely. Smith decided after much consideration that it was better to vote for ratification with recommendatory amendments than risk a division of the state by voting against ratification. He did exactly that, though he must have realized that his action would virtually amount to his political death in the state. Robin Brooks, "Alexander Hamilton, Melancton Smith, and the Ratification of the Constitution in New York," William and Mary Quarterly, XXIV (1962). Also, Linda Grant DePauw, The Eleventh Pillar: New York and the Federal Constitution (Ithaca, 1966).

The proposed House of Representatives particularly concerned Smith. The House alone was the source of the people's direct representation in the federal government, and as such was considered the source of much of the people's security in government. The proposed House was objectionable on three particular counts.

Smith's first objection to the House was that its rule of apportionment was unjust. Section 2, Article II of the Constitution⁴² provided that all whites and three-fifths of the slaves in each state were the basis for representation. This provision was the result of a North-South compromise between the delegates in the Federal Convention, and Smith clearly understood that, as such, it was a compromise which nonetheless displeased him.

He could not see any rule by which slaves were to be included in the rate of representation. The principle of representation being that every free agent should be concerned in governing himself, it was absurd in giving that power to a man who could not exercise it. Slaves have no will of their own. The very operation of it was to give certain privileges to those people who were so wicked as to keep slaves.⁴³

Secondly, the Constitution, by Article I, section 2, fixed the representation at one representative per thirty thousand inhabitants.⁴⁴ This was unsatisfactory to Smith, for while the maximum number of representatives was fixed, the Constitution did not fix a minimum number below which the House might be reduced. The House might conceivably reduce the number of representatives below the sixty-five provided for by the Constitution until the census of 1790. The only

⁴²Madison, op. cit., p. 627.

⁴³Elliot, Debates, II, 226-227.

⁴⁴Madison, op. cit., p. 627.

security in the provision for the number of representatives was the integrity of the rulers, a very slender thread of protection indeed. The power to determine the number of representatives in a republican government being left to the discretion of the legislators was a potential threat to the people.⁴⁵

The third error in the proposed House, and the objection most often reverted to by Anti-Federalists throughout the country, was that the representation of the House was inadequate for the size and population of the country.

It was, [Smith] said, the fundamental principle of free government, that the people should make the laws by which they were to be governed. He who is controlled by another is a slave; and that government which is directed by the will of any one, or a few, or any number less than is the will of the community, is a government for slaves. . . . The viewpoint was, how was the will of the community to be expressed? It was not possible for them to come together; the multitude would be too great; in order, therefore, to provide against this inconvenience, the scheme of representation had been adopted, by which the people denoted others to represent them. Individuals entering into society became one body, and that body ought to be animated by one mind . . . we may approach a great way toward perfection by increasing the representation.⁴⁶

Given the natural urge of men once in power to retain as much power as possible, it was not wise to expect the House to enlarge its numbers, thereby decreasing the power each representative possessed. The same motives would also operate upon the Senate and the executive, to whose advantage it would be to maintain a small body of representatives. It was very important, therefore, to establish from the outset a suitable number of representatives, enforced by a constitutionally-established minimum number of representatives.⁴⁷

⁴⁵Elliot, Debates, II, 227.

⁴⁶Ibid., pp. 227-228.

⁴⁷Ibid., pp. 228, 242-243.

Smith continued to hammer at section 2, Article I:

There was another objection to the clause: if great affairs of government were trusted to few men, they would be more liable to corruption. Corruption, he knew, was unfashionable amongst us; but he supposed that Americans were like other men; and though they had hitherto displayed great virtue, still they were men; and therefore such steps should be taken as to prevent the possibility of corruption.⁴⁸

With this observation and demand, Cato staunchly agreed:

It is a very important objection to this government, that the representation consists of so few; too few to resist the influence of corruption, and the temptation of treachery, against which all governments ought to take precautions.⁴⁹

As a corollary to his third observation, Smith asserted that a republican government must depend, for its faithful execution, upon the people's good opinion and confidence. The Confederation had been somewhat inefficient, precisely because it lacked this confidence. Representatives should resemble those whom they represent, and should possess a knowledge of their circumstances and wants. Such knowledge should comprehend politics and commerce, as that held by men of refined education. But men of the 'middling class' were more competent to comprehend the concerns and preoccupation of the common people.⁵⁰ The government proposed by the Constitution, Smith charged, would be composed of men of the higher class, since it was constructed to admit but a few to the exercise of its powers. The well-born, with superior respect from the common people, and with their talent for easily formed political associations, would tend to be chosen for public office before those of the middling class. The result might very well be, Smith

⁴⁸Ibid., pp. 228-229.

⁴⁹Ford, Essays, p. 268.

⁵⁰Elliot, Debates, II, 245-246.

concluded, a government of limited public expression; indeed a government of oppression. The effect upon liberty would be disastrous.⁵¹

The duty of citizens at this crucial time, Smith vigorously argued, was to frame a government friendly to the liberty and rights of mankind.

We were now in that stage of society in which we could deliberate with freedom; how long it might continue, God only knew! Twenty years hence, perhaps, these motives [of honesty in government] might become unfashionable. We already have . . . in some parts of the country, gentlemen ridiculing that spirit of patriotism, and love of liberty, which carried us through all our difficulties in times of danger.⁵²

Government must also cultivate a love of liberty among its citizens. Should it become oppressive, it would do so by degrees and would proceed to the step by step deprivation of political freedoms and personal liberties.⁵³ Cato held similar beliefs:

[I]t may be remarked that a well-digested democracy has this advantage over all the others, to wit, that it affords to many the opportunity to be advanced to the supreme command, and the honors they thereby enjoy fill them with a desire of rendering themselves worthy of them; hence this desire becomes part of their education, is matured in manhood, and produces an ardent affection for their country . . . the more complete [the representative branch] is, the better your interests will be preserved, and the greater the opportunity you will have to participate in government, one of the principal securities of a free people.⁵⁴

The delegates to the New York ratifying convention spent a full week on the proposed House of Representatives. They also spent over a week on the proposed Senate, the repository of those whom Smith termed the natural aristocracy of the country.

⁵¹Ibid., pp. 246-247.

⁵²Ibid., p. 229.

⁵³Ibid., p. 246.

⁵⁴Ford, Essays, pp. 268-269.

Gilbert Livingston, an Anti-Federalist who seldom spoke on the convention floor, but who was nevertheless a capable orator, opened the debates on the upper house of the national legislature. His summary of Anti-Federalist objections to the Senate was very well developed:

First, [the Senate] would possess legislative powers coextensive with those of the House of Representatives except with respect to originating revenue laws; which, however, they would have power to reject or amend, as in the case of other bills. Secondly, they would have an importance, even exceeding that of the representative house, as they would be composed of a smaller number, and possess more firmness and system. Thirdly, their consequence and dignity would still further transcend those of the other branch, from their longer continuance in office. These powers . . . rendered the Senate a dangerous body.⁵⁵

As Brutus so accurately observed, the Senate was designed to represent the aristocracy of the country.⁵⁶ This was necessary if the Senate were to balance the House. But, the Senate was also designed as a kind of bulwark of the states, a check on encroachments by the general government.⁵⁷ Given the nature, and the responsibilities of the Senate, John Lansing thought its dignity and respect to be greater than that of the House.⁵⁸

Livingston continued his observations on the Senate:

He went on, in the second place, to enumerate and animadvert on the powers with which they were clothed in their judicial capacity, and in their capacity of counsel to the President, and in the forming of treaties. In the last place, if too much power could not be given to this body, they were made, he said, a council of appointment, by whom ambassadors and other officers of state were to be appointed. These are the powers . . . which are vested in this small body of twenty-six; in some cases, to be exercised by a bare quorum, which is fourteen; a majority of which number, again, is eight. What are the checks provided to balance this great mass of power?⁵⁹

⁵⁵Elliot, Debates, II, 286.

⁵⁶Borden, op. cit., p. 181.

⁵⁷Elliot, Debates, II, 289.

⁵⁸Ibid., p. 293.

⁵⁹Ibid., p. 287.

The Senate was, as Brutus observed, a mixed legislative-executive-judicial body:

1. They are one branch of the legislature, and in this respect will possess equal power, in all cases with the house of representatives; for I consider the clause which gives the house of representatives the right of originating bills for raising revenue as merely nominal, seeing the Senate [has the power] to propose or concur with amendments.

2. They are a branch of the executive in the appointment of ambassadors and public ministers, and in the appointment of all other officers, not otherwise provided for; whether the forming of treaties, in which they are joined with the President, appertains to the legislative or executive part of the government, or to neither, is not material.

3. They are a part of the judicial, for they form the court of impeachment.⁶⁰

This arrangement, to Brutus, was not satisfactory:

It has been a long established maxim, that the legislative, executive, and judicial departments in the government should be kept distinct . . . I admit that this distinction cannot be perfectly preserved. In a duly balanced government, it is perhaps absolutely necessary to give the executive qualified legislative powers, and the legislature or a branch of them judicial powers in the last resort. It may possibly, also, in some special cases be advisable to associate the legislature, or a branch of it, with the executive, in the exercise of acts of great national importance. But still the maxim is a good one, and a separation of these powers should be sought as far as is practicable. I can scarcely imagine that any of the advocates of the system will pretend that it was necessary to accumulate all these powers in the senate.⁶¹

Article I, section 3, of the federal Constitution⁶² provided that the senators, two from each state, be appointed by the state legislators for a term of six years. Of this Brutus said:

The apportionment of members of the Senate among the states is not according to numbers, or the importance of the states, but is equal. This, on the plan of a consolidated government is

⁶⁰Borden, op. cit., pp. 182-183.

⁶¹Ibid.

⁶²Madison, op. cit., p. 628.

unequal and improper; but is proper on the system of confederation . . . It is indeed the only feature of any importance in the constitution of a confederated government.

The term for which the senate are to be chosen is, in my judgment, too long, and no provision being made for a rotation will, I conceive, be of dangerous consequence.

It is difficult to fix the precise period for which the Senate should be chosen . . . Some of the duties which are to be performed by the Senate, seem evidently to point out the propriety of their term of service being extended beyond the period of that of the assembly . . . They are designed to represent the aristocracy of the country, it seems fit they should possess more stability, and so continue a longer period than [sic] that branch who represent the democracy. The business of making treaties and some others which it will be proper to commit to the Senate, requires that they should have experience, and therefore that they should remain some time in office to acquire it.⁶³

Those Anti-Federalists, like Brutus and Smith, who, while not entirely satisfied with the distribution of power in the federal government, acknowledged the necessity of a Senate of longer duration of office and of some power, nevertheless greatly feared the length of time for which the Senate would exercise these powers. Brutus continued:

But still it is of equal importance that they should not be so long in office as to be likely to forget the hand that formed them, or be insensible to their interests. Men long in office are very apt to feel themselves independent; to form and pursue interests separate from those who appointed them. And this is more likely to be the case with the senate, as they will for the most part of the time be absent from the state they represent, and associate with such company as will possess very little feelings of the middling class of people.⁶⁴

To these observations, Smith added a few of his own:

I concur . . . that there is a necessity for giving this branch a greater stability than the House of Representatives. But, sir, it does not follow from this position, that the senators ought to hold their places during life . . . As the clause now

⁶³Borden, op. cit., p. 181.

⁶⁴Ibid.

stands, there is no doubt that the senators will hold their office perpetually, and in this situation they must of necessity lose their dependence, and attachments to the people. It is certainly inconsistent with the established principles of republicanism that the senate should be a fixed and unchangeable body of men.⁶⁵

Gilbert Livingston also spoke on the matter. A senator, like all men, would have personal matters to attend to, and so might forego his official duties. Furthermore, given the aristocratic nature of the senators, the duration of office, and their distance from the people's observation, "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."⁶⁶

Alexander Hamilton, a Federalist of some note and consequence, thought that the federal government ought to be virtually independent. The states, he acknowledged, were necessary and fundamental parts of the political system of the country. But they should be so positioned within the governmental organization of the United States as to reduce their influence upon the central government. But, Lansing asked, were the Constitution to be adopted unamended, and were the federal government to be established virtually as Hamilton wished, where was the check upon it to be lodged? Certainly, checks could not be found within the states, for they lacked any effective constitutional powers of this nature against the central government. Hamilton contended that the states retained their sovereignty, and thereby constituted a de facto check. But, Lansing asked, did they in fact retain their sovereignty? They could not maintain armies; they did not have the unlimited

⁶⁵Elliot, Debates, II, 309-310.

⁶⁶Ibid., pp. 287-288.

powers of taxation which characterized the central government. In reality, the states would soon be found useless and unnecessary. Upon the gradual but inexorable erosion of state and local governments, the rights and liberties of the people would likewise erode, until they became not citizens but subjects of the federal government.⁶⁷

Forced rotation of the senators, Smith argued, would be a step in the right direction of an effective check against the central government. Rotation would insure the senators' continued understanding of the people's needs and feelings. It would prevent, or at least hinder, the beginning of plots against the liberties and authority of the state governments. Finally, rotation would be the best means of extinguishing factions, which had so often prevailed in republican governments. The history of legislative bodies in republican states, Smith pointed out, showed that perpetual bodies tended to either combine in schemes of usurpation or were torn apart by cabal.⁶⁸

Similar reasoning suggested the advantage of granting to the state legislatures the power of recall over their senators. Smith argued:

That the senators are the representatives of the state legislatures, it is reasonable and proper that they should be under their control. When a state sends an agent commissioned to transact any business, or perform any service, it certainly ought to have the power of recall. . . .⁶⁹

Smith continued by stressing that the recall should not be exercised by the people at large, for that would defeat the purpose for which the senate was established. He concluded:

⁶⁷Ibid., p. 308.

⁶⁸Ibid., p. 311.

⁶⁹Ibid.

Form this government as you please, you must, at all events, lodge in it very important powers. These powers must be in the hands of a few men, so situated as to procure a small degree of responsibility. These circumstances ought to put us on our guard, and the inconvenience of this necessary delegation of power should be corrected, by providing some suitable checks.⁷⁰

Both Smith⁷¹ and Lansing⁷² feared that the state governments, either through lack of jurisdiction or insufficient power to effect what areas of jurisdiction were left them, would dwindle in public respect. Eventually, they argued, the states would be considered only as a useless and expensive burden upon the people. Though the two men's arguments closely paralleled each other, one note of interest does appear in the former's reasoning: "I conceive that the true interest of every state is the interest of the whole; and that if we should have a well-regulated government, the idea will prevail."⁷³

The Federalist argument that as the well-regulated central government developed, so also would the interests and well-being of the states, was judged erroneous. The error lay, Smith contended, in the premise of the Federalist argument:

We shall, indeed, have a few local interests to pursue, under the new Constitution, because it limits the claims of the states by so close a line, that on their part there can be but little dispute, and little worth disputing about. But, sir, I conceive that partial interests will grow continually weaker, because there are not those fundamental differences between the real interests of the several states, which will long prevent their coming together and becoming uniform.⁷⁴

It was a widely repeated postulate of politics in the United States in the late eighteenth century, that the closer the people were to their government, the more secure their rights. It was an argument

⁷⁰Ibid.

⁷¹Ibid., p. 313.

⁷²Ibid., p. 311.

⁷³Ibid., p. 314.

⁷⁴Ibid.

with which Smith was in total agreement:

I have frequently observed a restraint upon the state government, which Congress never can be under, construct that body as you please. It is a truth capable of demonstration, that the nearer the representative is to his constituents, the more attached and dependent he will be. In the states, the elections are frequent, and the representatives numerous; they transact business in the midst of their constituents, and every man must be called upon to account for his conduct. . . . In this state, the council of appointment are elected for one year. The proposed Constitution establishes a council of appointment who will be perpetual.⁷⁵

Nor was it accurate to observe, as did Hamilton on occasion, that factions could not exist in the Senate without the knowledge of the state legislatures. Indeed, the history of the Confederation Congress proved the opposite.⁷⁶

The delegates to the ratifying convention spent over a week on the Senate. The executive and judicial branches of the proposed federal government received only passing reference. Indeed, Cato was the only New York 'Anti' to give the executive branch any attention at all. In his fourth Letter, Cato observed that the construction of Article II, section 1, of the Constitution⁷⁷ was vague and inexplicit as to the mode of election of the President and Vice-President following their first four-year term of office. Indeed, there was no indication that the two offices would become vacant upon the expiration of their terms.⁷⁸ Cato continued:

It is remarked by Montesquieu, in treating of republics, that "in all magistracies, the greatness of the power must be compensated for by the brevity of the duration, and that a longer time

⁷⁵Ibid., p. 315.

⁷⁶Ibid., p. 312.

⁷⁷Madison, op. cit., pp. 632-633.

⁷⁸Ford, Essays, pp. 260-261.

than a year would be dangerous." It is, therefore, obvious . . . to account why great power in the hands of a magistrate, and that power connected with considerable duration may be dangerous to the liberties of a republic. The deposit of vast trusts in the hands of a single magistrate, enables him in their exercises to create a numerous train of dependents; this tempts his ambition, . . . and the duration of his office for any considerable time favors his views, gives him the means and time to perfect and execute his designs, he therefore fancies that he may be great and glorious by oppressing his fellow-citizens and raising himself to permanent grandeur on the ruins of his country.⁷⁹

Furthermore, Cato observed, the President was without a constitutional council for advice during the recess of the Senate. He would most likely come under the influence of favorites.⁸⁰ Finally, the President might by no means be the choice of the plurality of the people, for he need have only the greatest number of votes of the top five candidates. Yet, the President was capable of exercising powers which likely might "tend either to the establishment of an arbitrary aristocracy or monarchy."⁸¹ Cato concluded with an observation on the nature of republican government:

The safety of the people in a republic depends on the share or proportion they have in the government; but experience ought to teach you that when a man is at the head of an elective government, invested with great powers, and interested in his re-election, in what circle appointments will be made; by which means an imperfect aristocracy bordering on monarchy may be established.⁸²

The judicial branch of the federal government would be virtually independent of all other branches of the government, and of the people. The Constitution, by Article III, section 1,⁸³ provided that one supreme court, and such inferior federal courts as thought necessary would be

⁷⁹Ibid., p. 261.

⁸⁰Ibid.

⁸¹Ibid., p. 264.

⁸²Ibid.

⁸³Madison, op. cit., p. 635.

established. Once established and staffed, Brutus noted, the justices could be removed only by the instance of treason, bribery, or high crimes and misdemeanors; otherwise, their tenure in office was for life. Nor could the Supreme Court's decisions be reviewed by any other judicial body; it was the supreme judicial organization of the country, and its word was final.⁸⁴

Article III, section 2,⁸⁵ of the Constitution provided that: "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ." The construction of this provision, Brutus argued in two consecutive Letters, was not easy to define. For, on the one hand, the federal courts were authorized to determine any and all questions that might arise upon the meaning of the Constitution in law, that is:

This article vests the courts with authority to give the Constitution a legal construction, or to explain it according to the rules laid down for construing a law. These rules give a certain degree of latitude of explanation . . . The courts are to give such meaning to the constitution as compares best with the common, and generally received acceptance of the words in which it is expressed . . . Where words are dubious, they will be explained by the context.⁸⁶

On the other hand, the courts are empowered to decide questions arising out of equity: "By this they are empowered, to explain the constitution according to the reasoning spirit of it, without being confined to the words or letters."⁸⁷

⁸⁴Borden, op. cit., p. 227.

⁸⁵Madison, op. cit., p. 635.

⁸⁶Borden, op. cit., p. 227.

⁸⁷Ibid.

Because there was no superior judicial body and because there could be no appeal from their decisions, these decisions will have virtually the force of law. Though Brutus nowhere explicitly said so, his implication was that the federal judiciary, unlike the legislative or executive branches, would in effect control the Constitution. Far worse, however, was his belief that the federal judiciary would operate to effect the subversion of the state governments. Every adjudication of the Supreme Court on questions arising from and affecting the nature and extent of the general government would likewise affect the limits of state jurisdiction. As the federal judiciary enlarged its powers, to that extent would the sphere of the latter's powers be restricted.⁸⁸

Brutus saw more than enough evidence in the Constitution to suggest that the powers of the federal judiciary would operate strongly in favor of the federal government. First, he charged, the Constitution itself countenanced such construction; not only did it justify the courts in inclining to this mode of explanation, but the courts themselves would be interested in extending their powers. Moreover, every extension of the powers of the general legislature would likewise act as an extension of the power of the courts. Finally, he concluded, the courts had a precedent to plead and justify the extension of their powers--the Court of Exchequer of Great Britain. With this precedent, would it not be likely, Brutus asked, for the federal courts likewise to attempt to extend their own powers?⁸⁹

The most potentially dangerous feature of the proposed federal judiciary, Brutus argued, was that the judiciary could virtually mold

⁸⁸Ibid., p. 228.

⁸⁹Ibid., pp. 228-230.

the general government into whatever shape it desired. In rendering its decisions, the court must, and would, assert certain principles which, from repetition, would become fixed. These principles, in turn, would be adopted by the Congress, and would become the rule by which it would fix the extent of its own powers. Though the legislature would not extend its authority beyond that established by the courts, it was most likely that it would approach those limits as often as the occasion permitted. The purpose of the federal government was stated in the Preamble to the Constitution. The court would understand its ends to be precisely the same and would give latitude to every department. Thus, for example, from the first object of government declared in the Preamble, "To form a more perfect Union," the courts would give such construction to that provision as would tend to disparage the local and state governments. Clearly, the Union intended and stated was to be a union not of the states, but of the people, and to establish it would require the disparagement of any inferior governments.⁹⁰

It was important, Brutus concluded in another essay, that a check be established upon any body given extraordinary powers, in order not to abuse those powers. He did not intend popular election of the justices of the courts, for that would eliminate the independence of those men. Yet, in order to avoid total and complete independence, a feature repugnant to the principles of free government, the justices should be in some manner controlled. This he proposed as "some supreme, over whom is no power to control but the people themselves. This supreme controlling power should be in the choice of the people. . . ."⁹¹

⁹⁰Ibid., pp. 230-233.

⁹¹Ibid., p. 225.

The parts of the Constitution which were of greatest concern to Anti-Federalists everywhere were those sections of the Constitution granting the federal government its fields of powers. The intent of the federal government was expressively provided for: ". . . in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general welfare. . . ." ⁹² To achieve these broad ends Congress was granted the extensive range of powers enumerated in Article I, section 8, ⁹³ culminating in the powers to ". . . make all laws which shall be necessary and proper for carrying into Execution . . . all . . . powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." In short, as Anti-Federalist John Williams argued, there was no limit to the possible number of objects to which the power of the federal government might extend. Nor were the means by which these ends were to be attained clearly set forth. ⁹⁴

It was a condition, acknowledged and earnestly held by Anti-Federalists everywhere, that the states were necessary for the purposes and matters of local concern. It was also contended that the general government was necessary for those matters and purposes national in scope. But even the more moderate 'Antis,' exemplified by Smith, also conceived that the state constitutions ought to be both the support and the check upon the national Constitution, the state governments likewise being the support and check upon the national government. But the

⁹²Madison, op. cit., p. 627.

⁹³Ibid., pp. 630-631.

⁹⁴Elliot, Debates, II, 331.

state governments and state constitutions, not their national counterparts, should be the guardians of the domestic rights and interests. Therefore, the general government ought to rest upon the state governments, not only in its form but also in its operation.⁹⁵

In view of this relationship, it is necessary to establish properly and immediately, Smith argued, the line of jurisdiction between the state and general governments. Only by such an arrangement could the harmony between these governments be maintained, and interference between the two, and consequently serious differences, be prevented.⁹⁶ The power granted to the federal government by Article I, section 8, the greatest source of most serious dispute was, to Smith, the most vital principle of the republican government.⁹⁷

Anti-Federalist objections to the provisions incorporated in section 8 were numerous. Most, however, were related in one way or another to the one chief provision--the right of the general government to " . . . lay and collect Taxes, Duties, Imposts, and Excises" John Williams argued that the provisions comprehended in the terms taxes, duties, impost, and excises were exceedingly vague.⁹⁸ Indeed, virtually every source of revenue could be incorporated into one or another of those terms.⁹⁹ 'Antis' like Smith conceded that the principal difficulty facing the Confederation was an inadequate means of raising revenue.¹⁰⁰ Yet, though this fact was undeniable, the Constitution went too far in the opposite extreme. For the power of taxation granted Congress was most comprehensive and, given the stated intent of

⁹⁵Ibid., pp. 323, 334.

⁹⁶Ibid., p. 332.

⁹⁷Ibid.

⁹⁸Ibid., p. 330.

⁹⁹Ibid., pp. 330, 372.

¹⁰⁰Ibid., p. 330.

the Constitution and the necessary and proper clause, the most efficient power delegated to the general government. It would probably extend, again, to virtually all possible sources of revenue, excepting export duties.¹⁰¹

Smith cogently argued, at one point early in the debates on the provisions of section 8, that it was a general maxim that governments find use for all money they could raise. Indeed, not infrequently, the demand is far more.¹⁰² The case would in all probability be the same for the federal government. Subsequently, it was argued by Hamilton that the general government ought to possess all the resources of the country.¹⁰³ Hamilton's argument rested on the principle that the power of the national government ought to be national and general, and its resources, therefore, likewise general. Lansing answered that the general government was but part of a system, the whole of which should possess the means of support.

But the states, too, would have financial requirements to meet which required the levying of taxes or duties of some kind. In view of the state and general governments levying taxes or duties on the same person, and/or the same articles, it was likely that the two would interfere and be hostile to one another. In this contest for jurisdiction, arising from claim and interests, what chance would the states have? Considering the superior position of the general government, and the fact that all judicial disputes between the two would be carried to the federal courts, relatively little was left to the states. The powers granted the general government by the Constitution are mostly expressed,

¹⁰¹Ibid., p. 332.

¹⁰²Ibid., p. 333.

¹⁰³Ibid., p. 372.

nothing of importance is left to construction.¹⁰⁴ For the states, quite the opposite is the case. Though the Federalists argued repeatedly that the states had concurrent jurisdiction with the general government in the matter of taxation, yet, as Williams pointed out, the Constitution nowhere stated such. The Constitution granted the power of taxation to Congress; it was silent with regard to the same power of the states. Such would only be at best a whim of construction, and it was a matter of too much uncertainty yet of too much importance to be left to mere construction.¹⁰⁵ The right of the states, argued Smith, to levy taxes for their own support, was a legislative, not a constitutional right. It was dependent and controllable. No such important matter, he said, should be left to the doubt of construction. The jurisdiction and power of the states and general government should be so formed as to render the business of legislation as simple and as plain as possible. It could not always be expected that members of the federal legislature would be disposed to make nice distinctions with respect to that jurisdiction.¹⁰⁶

John Williams, in carrying the attack to his opponents on the convention floor, argued that even supposing the states to have concurrent jurisdiction with Congress for taxing purposes, yet the laws of the latter are considered as the supreme law of the land. Consequently, when its taxes are disrupted by the taxes of the states, those of the Congress must and will claim priority for collection. Indeed, he charged, the Congress may constitutionally abolish the state taxes, and monopolize all revenue sources. The end result of such action if

¹⁰⁴Ibid., pp. 333-4, 374.

¹⁰⁵Ibid., p. 338.

¹⁰⁶Ibid., p. 337.

it should come to that, would be the overturning of the state governments. For how could the state governments exist when their revenue sources were at the will and pleasure of Congress?¹⁰⁷

Smith advanced another argument of danger to the state governments by the federal taxing powers. Hamilton contended that the security of the state governments would be derived from the relatively great number of state representatives.¹⁰⁸ This, Smith said, would only act, however, to further encourage the abolishment of the states. For the people, seeing their great expense of their support and comparing that with their small importance, would hence be discouraged with their upkeep and so would be likely to drop them.¹⁰⁹

A few other criticisms of the powers of the proposed federal government were offered previous to the convention. Both Smith and Cato asked how was it possible to expect the federal government to lower taxes as its proponents promised? Smith contended that the simple basis for the expensive debt felt in the country was the result of a wrong balance of trade, and that as long as that balance of trade remained, cash would continue to leave the country and debts would mount.¹¹⁰ Cato, taking a more alarmist approach, urged that the new government must be more expensive because it must be bigger. He went on to say that as most members of the Senate and probably of the House would be landholders, they would not tend to levy taxes on land. Rather, their aim would be duties and imposts on commerce. But, as prices on foreign

¹⁰⁷Ibid., p. 339.

¹⁰⁸Ibid., pp. 251-252.

¹⁰⁹Ibid., p. 378.

¹¹⁰Paul Leicester Ford, Pamphlets on the Constitution of the United States (Brooklyn, 1891), p. 107.

made goods went up, the volume consumed would go down until that source of revenue dried up. The next source of revenue would be much more odious--poll taxes and the like.¹¹¹

The Anti-Federalists of New York made a valiant try in their effort to secure recommendatory amendments to the Constitution. Had they been willing to take advantage of their superior numbers and press for an early vote, they undoubtedly would have scored an overwhelming victory. Mere victory by itself was not their chief desire, however; they sought to convince at least a few Federalists that their fear of the Constitution and its proposed system of government was based on a genuine belief that the political freedom and individual liberties of the people were in danger. And, had Melancton Smith not acted on the strength of his convictions and decided to reverse his position on recommendatory amendments, perhaps the New York convention would not have ratified the Constitution. In any case, the scene of this thesis' interest will shift to the southern states in the following chapter.

¹¹¹Ford, Essays, pp. 222-223.

CHAPTER IV

THE SOUTHERN STATES

The ratification of the Constitution by New York on July 26, 1788, placed the Anti-Federalists of the United States in a desperate situation. New York was the tenth state to ratify the new article of government, and was the second of the 'big three' states of the Union to give its approval. Though the Constitution had for all intents and purposes entered into operation with its acceptance by New Hampshire on June 21, 1788, without the approval of New York and Virginia, the new government would be hamstrung at the start. New York's approval of the Constitution, then, threw Anti-Federalists' hopes of securing amendments to the Constitution upon the conditional ratification by the conventions of Virginia and North Carolina.

Of the southern states, only Virginia and North Carolina remained undecided on the question of ratification by the summer of 1788. Georgia had given its unanimous approval to the Constitution early in the winter of 1787. The South Carolina ratifying convention voted 140 to 73 in favor of the Constitution in January of 1788, the Federalists acting quite as they wanted during the debates; though the Anti-Federalist leader of the state, Rawlins Lowndes, made a commendable effort, the outcome was never in doubt. Maryland likewise gave its approval to the Constitution in late April, 1788.¹ The hopes of the Anti-

¹The ratification vote in the Maryland convention came on April 26, 1788. The vote was 63 for and 11 against ratification.

Federalists, then, and the aspirations of those of the South particularly, rested upon the outcome of the conventions of Virginia and North Carolina.

Virginia scheduled its convention during the first week of June, 1788,² and those who planned to attend the debates as spectators came assured of a lively show of forensic talent. North Carolina, meanwhile, was choosing the delegates for its convention, which opened in July, 1788.³ The contest in Virginia promised to be close. But the 'Antis' of North Carolina had the convention in their pocket, so completely did Willie Jones, the Anti-Federalist leader of the state, control the politics of North Carolina. Jones' only need in the convention was to maintain the unity of his associates (apparently quite easily done), allow his Federalist opponents to talk themselves hoarse, and, when the time came for a vote, secure an overwhelming vote of no ratification without prior amendments. His strategy worked perfectly, and on August 1, Jones secured a vote of 84 ayes to 184 nays on the question.

But all this is getting ahead of the story. And what is worse, it omits a look at one of the most interesting of all the states of the Union, South Carolina. Though Anti-Federalism there was never as strong as in its two more northern neighbors, and though the Anti-Federalist objections were not as soundly based on reason and logic as elsewhere, yet a few, at least, of the Anti-Federalist objections are of considerable interest, particularly because in many ways they closely resemble later South Carolina states-rights arguments.

²The Virginia ratifying convention began on June 2, 1788.

³The North Carolina ratifying convention held its first session on July 21, 1788.

The acknowledged Anti-Federalist leader in South Carolina was Rawlins Lowndes. A professional politician, Lowndes had served during the late colonial and early statehood periods in legislative and judicial capacities. His strong states-rights position appeared quite clearly in his debates on the issues of the slave trade and paper money, and his arguments on these issues mark him as unique among all the well-known southern Anti-Federalists. His speeches endorsing the slave trade as a beneficial good to all involved are of particular interest, for he alone of the southern 'Antis' took this position. He stands in sharp contrast to the Anti-Federalists of Virginia in particular, though a similar position would subsequently arise as the chief defense of slavery among pre-Civil War South Carolina political figures. Lowndes felt especially concerned for the preservation of South Carolina's interests in the Union. It might be expected that he would consequently develop his objections to the proposed House of Representatives to great length. Surprisingly, though, little opposition to the House appeared from Lowndes and his colleagues.

Early in the debates in the state legislature,⁴ Lowndes rose to speak:

He believed the gentlemen that went from this state, to represent us in the Convention, possessed as much integrity, and stood as high in point of character, as any gentlemen that could have been selected; and he also believed that they had done everything in their power to procure for us a proportionate share in this new

⁴Debates on the Constitution in South Carolina began first, curiously, in the South Carolina Legislature, in mid-January, 1788. Following the reading of the Constitution on the floor of the Legislature, that body resolved itself into a committee of the whole and debated the Constitution for some days. The South Carolina ratifying convention itself opened on May 12, 1788, with the final vote of 149 to 73 in favor of ratification coming on May 23.

government; but the very little they had gained proved what we may expect in the future--that the interest of the Northern States would be so predominant as to divest us of any pretensions to the title of a republic.⁵

What, then, will skill and character avail in a body where most of the men were of opposing and different interests, and where the representatives from the state were so few in number? Only six of the eastern states were required for a majority in the House, and these six could virtually enact any legislation they wished, which, he added, in all probability would be opposed to the interests of South Carolina. Where was any security for the interests of South Carolina in the proposed system?⁶

To what benefit, he continued later, would representatives of character be when the President could interfere or influence the elections of those men?⁷ He posed another question: How were the elections of the representatives to be carried out, since the Constitution was so vague on this matter? Would it not be possible for some districts of the state to have no representation in Congress?⁸

Nor was Lowndes satisfied with the proposed Senate. He did not consider the necessity of only two-thirds of the members for the passage of legislation as satisfactory a check as the approval of nine states of any legislation in the Confederation Congress. Article I, section 7 of the Constitution⁹ provided that only a quorum of the Senate need be

⁵Jonathan Elliot, The Debates in the Several State Conventions on the Ratification of the Federal Constitution (5 vols., 1876-1891; Philadelphia), IV, 272.

⁶Ibid.

⁷Ibid., IV, 287.

⁸Ibid., IV, 288.

⁹James Madison, The Debates in the Federal Convention of 1788 Which Framed the Constitution of the United States of America, Gaillard Hunt and James Brown Scott (eds.) (New York, 1920), p. 629.

present for the enactment of any legislative business. Of that quorum, he contended, only ten senators constituted a majority for the passage of any legislative business. What propriety was this, he asked, to vest so few men with such extensive powers?¹⁰

But Lowndes reserved his strongest objections for the powers of the central government. Opposed to independence, by his own admission, until the day of reckoning, he likewise remained opposed to the Constitution. Only when that new article of government was approved of by his constituents would he work in support of it. Until then, as he repeatedly stressed, he would remain in opposition.

Article VI, clause 2, of the Constitution¹¹ provided that the Constitution, the laws made in pursuance of it, and all treaties made under the authority of the United States were considered as the supreme law of the land, and to which all judges were bound by law to support. The extent of the powers granted to the central government by that clause alone, he charged, were thus greater than the powers granted to any of history's most arbitrary kings.

Lowndes was especially angered at Article V of the Constitution,¹² prohibiting of the importation of Negro slaves after 1808:

[W]hat cause was there for jealousy of our importing negroes? Why confine us to twenty years, or rather why limit us at all? For his part, he thought this trade could be justified on the principles of religion, humanity, and justice; for certainly to translate a human being from a bad country to a better, was fulfilling every part of those principles. But they don't like our slaves because they have none themselves and therefore want

¹⁰Elliot, Debates, IV, 310.

¹¹Madison, op. cit., p. 637.

¹²Ibid., p. 636.

to exclude us from this great advantage. Why should the Southern States allow of this, without the consent of nine states? . . . we had a law prohibiting the importation of negroes for three years, a law he greatly approved of; but there was no reason offered why the Southern States might not find it necessary to alter their conduct, and open their ports. Without negroes, this state would degenerate into one of the most contemptible in the Union; and he cited an expression that fell from General Pinckney on a former debate, that whilst there remained one acre of swamp-land in South Carolina, he should raise his voice in restricting the importation of negroes. Even in granting the importation for twenty years, care had been taken to make us pay for this indulgence, each negro being liable, on importation, to pay a duty not exceeding ten dollars; and in addition to this, they were liable to a capitation tax.

Negroes were our wealth, our only natural resource; yet behold how our kind friends in the north were determined soon to tie up our hands, and drain us of what we have.¹³

Where, he asked the members of the legislature, was the often-marvelled at North-South compromise in the Constitution? The South agreed that Negro slave trade might continue for twenty years, and then be abolished; the North, in turn, agreed that a five per cent impost would be paid on imported goods. Where was the compromise in this since:

The Eastern States drew their means of subsistence, in a great measure, from their shipping; and, on that head, they had been particularly careful not to allow any burdens: they were not to pay tonnage or duties; no, not even the form of clearing out: all ports were free and open to them! Why then, call this a reciprocal bargain, which took all from one party, to bestow it on the other?¹⁴

In reply to an interjection by Pierce Butler that the northern states agreed to a five per cent impost, Lowndes continued: "This . . . must fall on the consumer. They are to be the carriers; and, we being the consumers, therefore all expenses would fall on us."¹⁵

This was only one disadvantage placed upon the southern states by the commerce powers granted to Congress by the Constitution, Lowndes

¹³Elliot, Debates, IV. 272-273.

¹⁴Ibid., p. 273.

¹⁵Ibid.

stressed. By the Constitution, Congress "was to regulate commerce ad infinitum; and thus called upon us to pledge ourselves and posterity forever, in support of their measures."¹⁶ Furthermore, Lowndes continued in a later speech:

[The Constitution] threw into their [the eastern states] hands the carrying trade, and put it in their power to lay us under payment of whatever freightage they thought proper to impose. It was their interest to do so, and no person could doubt but they would promote it by every means in their power. [Lowndes] wished our delegates had been sufficiently attentive to this point in the Convention--had been more attentive to this object, and taken care to have it expressed in this Constitution, that all our ports were open to all nations; instead of putting us in the power of a set of men who may fritter away the value of our produce to a little or nothing, by compelling payment of exorbitant freightage.¹⁷

He stressed also that the eastern states were making little attempt to meet the needs of the southern states for ships: "It was, indeed, a general way of talking, that the Eastern States had a great number of seamen, a vast number of ships; but where were they? Why did they not come here now, when ships are greatly wanted?"¹⁸

Lowndes also strongly objected to the taxation powers of the federal government. The states, he contended, had given up the power of self-taxation, which even the British government had not taken from the colonies.¹⁹ And, to further add to the objectionable nature of the Constitution in this regard, it was likely that taxes would increase under the demand of the "pompous government"²⁰ established by the Constitution. Additionally, Lowndes charged, the Constitution proposed to take from the states their right to pay their own delegates. The same

¹⁶Ibid., pp. 273-274.

¹⁷Ibid., pp. 288-289.

¹⁸Ibid., p. 289.

¹⁹Ibid.

²⁰Ibid., p. 310.

issue, he pointed out to the other legislators, had been raised in colonial Massachusetts when it was proposed that the judges be paid out of impost revenues rather than by the legislature's appropriations. Everyone, he said, remembered the outcry throughout the colonies when that proposal was advanced. Thus, the Constitution, like the act of the British Parliament, struck directly at the independence of the states.²¹

Moreover, South Carolina had met its own local expenses from state imposed impost duties. But "now that this was given away, and thrown into a general fund, for the use of all states indiscriminately, we should be obliged to augment our taxes to carry on our local government, notwithstanding we were to pay a poll tax for our negroes."²²

Lowndes had strong objections also to the restriction placed upon state-issued paper monies by the Constitution:

Paper money, too, was another article of restraint, and a popular point with many; but what evils had we ever experienced by issuing a little paper money to relieve ourselves from any exigency that pressed us? We had now a circulating medium which everybody took. We used formerly to issue paper bills every year, and recall them every five with great convenience and advantage. Had not paper money carried us triumphantly through the war, extricated us from difficulties generally supposed to be insurmountable, and fully established us in our independence? and now everything is so changed that an entire stop must be put to any more paper emission, however great our distress may be.²³

Lowndes also contested the navy proposed by Article I, section 8 of the Constitution.²⁴ Because the navy would be staffed, built, supplied, and run by men of northern birth and heritage, it would be but

²¹Ibid., p. 289.

²²Ibid.

²³Ibid., pp. 289-290.

²⁴Madison, op. cit., p. 231.

one more opportunity for the North to assume a position of superiority over the southern states. It was obvious, he charged, why northern Federalists so very often expounded the need of a federal navy, since it would be in effect their navy. The effect the establishment of that navy would have upon the fiscal condition of the country should be obvious to all, he added.²⁵

Lowndes and those of his colleagues in the legislature and convention who spoke presented other objections to the Constitution. These other objections were repeatedly stressed elsewhere--fear of the President's extensive powers, the lack of sufficient checks upon the exercise of those powers, and the vagueness of the method of election of the President, among others. The repetitiveness of these objections does not make it worth our while to examine them here, and we shall not spend further time exploring them.

The real significance, then, of Lowndes' position lies in his early states-rights attitudes on government. His political position throughout the late colonial and early national periods was curious. For, as we have previously said, he opposed the movement towards independence until the break between the colonies and the Mother Country was irreparable, after which his support of the United States was solid and active. His support of the Confederation was likewise unequivocal and staunch until, again, the die was cast and the Constitution accepted by his state. In short, Lowndes' political philosophy contrasts curiously with that of George Clinton, who from the start was vocal in support of independence, and the Confederation, but who made the transition

²⁵Elliot, Debates, IV, 309-310.

to the Constitution smoothly, easily, and, in terms of political life, advantageously. Clinton was the professional politician who, as befits the pragmatic politician, used every turn of events of his country's political development to enhance his own political position within his area.²⁶ In this respect, Clinton resembled more closely certain other northern politicians, men like Robert Yates,²⁷ who made the transition of every change of government easily and successfully. But Lowndes, like Patrick Henry, of Virginia, more closely resembled later southern politicians of the stamp of John C. Calhoun and Jefferson Davis. For Lowndes, like Henry, stood in opposition to the Constitution not because of the threat it presented to his own political career within his state, but rather because of the threat it presented to his state's position within the framework of the central government. Lowndes' position was more genuinely states-rights, as that term has come to be understood in American political thinking, than that of Clinton, who assumed more of the position of the self-aggrandizing politician.

The ratifying convention for the State of Virginia opened its first business session on the morning of June 2, 1788. Thus, within a period of two weeks, June 2 to June 16, the two most influential states in the Union, Virginia and New York, convened their respective ratifying

²⁶George Clinton continued as Governor of New York until 1794, and, after spending five years in private life, was reelected Governor in 1800. In 1804 and again in 1808, he was elected Vice-President of the United States. See Ernest William Spaulding, His Excellency George Clinton, Critic of the Constitution (New York, 1938).

²⁷Robert Yates was appointed to the position of Chief Justice of the New York Supreme Court in 1789. Robert Allen Rutland, The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787-1788 (Norman, 1966), p. 83.

conventions. Rejection of the Constitution by either of the two states would place the new article of government, even if it should be ratified by the necessary nine states needed for its operation within the country, virtually without a leg to stand on. Both Federalists and Anti-Federalists alike in the two states realized the significance of their particular state's decision, and none spared any effort to succeed. The Federalists especially in the two states realized the need for all-out individual effort, for they were in a minority in both states.

But though the Virginia Anti-Federalists realized the likelihood of their superior number in the convention, they were by no means complacent. Indeed, Virginia Anti-Federalist essayists were among the earlier, most active, and most sophisticated in their reasoning, of any in the country. George Mason, for example, sent his objections to the Constitution to George Washington in the form of a terse essay on October 7, 1787. Likewise, Virginia Federalists of the caliber of James Madison and Edmund Pendleton found strong and extremely capable opposition during the debates from such 'Antis' as Mason and James Monroe. Virginia, then, had perhaps the finest Anti-Federalist personages of any state in the Union, and the essays of these, and the debates in the ratifying convention are extremely interesting.

It is not inaccurate to say that Virginia probably had more truly disinterested Anti-Federalists as citizens than did any other state in the Union. Men such as George Mason and Richard Henry Lee, as republicans in the eighteenth century sense, were naturally concerned with the extent to which the common people would be represented in the federal government, and the degree to which they would exist as the

authority behind the government. They were, consequently, greatly concerned with the strength of the proposed House of Representatives, as the House of Congress representing the people. The strongest arguments presented against the House came in the Letters of a Federal Farmer by Richard Henry Lee.

The great object of a free people in forming their government, Lee contended, was to create confidence in and establish respect for the laws of that government. That confidence and respect would result in popular support of the government without the need of military coercion. Coercion, if applied internally often enough, would only destroy the confidence of the people in their government, destroy the spirit of the people, and ultimately bring destruction upon that people's free government.²⁸

Only within the representative branch of the government, Lee continued, was it possible to collect the confidence of the people, and in it to find almost entirely the force of persuasion. In forming the branch, then, it was necessary to incorporate several distinct qualities in it:

It must possess the ability to discern the situation of the people and of public affairs, a disposition to sympathize with the people, and a capacity and inclination to make laws congenial to their circumstances and condition: it must afford security against interested combinations, corruption, and influence; it must possess the confidence and have the voluntary support of the people.²⁹

And what of the proposed House of Representatives? On it Lee was quite explicit. That body, as proposed, was to consist of sixty-five

²⁸Richard Henry Lee, An Additional Number of Letters from the Federal Farmer to the Republican (Chicago, 1962), pp. 56-57.

²⁹Ibid.

members, or about one representative for every fifty thousand inhabitants. This number might, and Lee stressed the provision "might", be increased to one representative for every thirty thousand inhabitants. It was not conceivable, he charged, to expect that sixty-five representatives could collect the interests, feelings, and opinions of the three or four millions of inhabitants of the country. This was especially true, he said, and Mason agreed most heartily,³⁰ in matters of internal taxation.³¹ Lee continued:

A small representation can never be well informed as to the circumstances of the people, the members of it must be too far removed from the people, in general, to sympathize with them, and too few to communicate with them: a representation must be extremely imperfect where the representatives are not circumstanced to make the proper communications to their constituents, and where the constituents in turn cannot, with tolerable convenience, make known their wants, circumstances, and opinions, to their representatives: where there is but one representative to 30,000 or 40,000 inhabitants, it appears to me, that he can mix with a few respectable characters among his constituents, even double the federal representation, and then there must be a very great distance between the representatives and the people in general represented.³²

The population of the United States, Lee went to great lengths to explain, consisted of several distinct classes of people. There are, first, the three kinds of aristocracy (a constitutional one, which he said did not exist in the United States; the aristocratic faction was the second, constituted of men of wealth who combined to make their object their own private interests or aggrandizement; and thirdly, the natural aristocracy, the class traditionally the leading class in

³⁰Elliot, Debates, III, 262-264.

³¹Paul Leicester Ford, Essays on the Constitution (Brooklyn, 1891), p. 295.

³²Lee. op. cit., pp. 62-63.

colonial government), the largest number of citizens who formed what Lee called the "natural democracy," and finally, those of the lower classes.³³ Each of the separate classes has its own particular interests, and each is naturally concerned with the greatest degree of advantage it can achieve. The need, then, of representative government is to "unite and balance their interests, feelings, views, in the legislature; we may not only so unite and balance these as to prevent a change in the government by the gradual exaltation of one part to the depression of others."³⁴ In view of the small number of representatives, however, and the great distances separating the representatives from their constituents, it is likely that a rather peculiar representative House will be the consequence. Lee explained:

I will consider the descriptions of men commonly presented to the people as candidates for the offices of representatives--we may rank them in three classes: 1. The men who form the natural aristocracy: . . . 2. Popular demagogues: these men also are often politically elevated, so as to be seen by the people through the extent of large districts; they often have some ability, without principle, and rise into notice by their noise and arts. 3. The substantial and respectable part of the democracy, they are a numerous and valuable set of men, who discern and judge well, but being generally silent in public assemblies are often overlooked: they are the most substantial and best informed men in the several towns, who occasionally fill the middle grades of office, &c. who hold not a splendid, but a respectable rank in private concerns: these men are extensively diffused through all the counties, towns, and small districts in the union; even they, and their immediate connections, are raised above the majority of the people, and as representatives are only brought to a level with the more numerous part of the community, the middle orders, and a degree nearer the mass of the people . . . The true idea is, so to open and enlarge the representation as to let in a due proportion of the third class with those of the first. Now, my opinion is, that the representation proposed is so small as that ordinarily very few or none of them can be elected; and, therefore, . . . the government must possess the soul of aristocracy, or something worse, the spirit of popular leaders.³⁵

³³Ibid., pp. 60-61.

³⁴Ibid., p. 62.

³⁵Ibid., pp. 72-73.

Lee was extremely skeptical of the nature of the proposed House:

On the whole, it appears to me to be almost self-evident position, that when we call on thirty or forty thousand inhabitants to unite in giving their votes for one man, it will be uniformly impracticable for them to unite in any man, except those few who have become eminent for their civil or military rank, or their popular legal abilities: it will be found totally impracticable for men in the private walks of life, except in the profession of law, to become conspicuous enough to attract the notice of so many electors and have their suffrages.³⁶

The representative House of Congress must guard against combinations of interests, accidental or otherwise. The chances for such combinations are increased as the number of representatives are decreased.³⁷ It is a consideration of much merit, Lee insisted, to explore the constant liability of a small representative body to fall prey to private combinations, to "factions of the few." The possibility of private juntas, the influence which accompanies the prospect of appointive offices, the control of the representatives by the President or the Senate were all very real and dangerous possibilities in the proposed House, and any and all were likely to adversely affect the confidence of the people in their government.³⁸

It had been said many times, Lee pointed out, that the people will elect good men. But the representatives will tend to be several degrees more aristocratic than their constituents. Nor was the contention that the Federal Convention in its wisdom had found the ideal medium number of representatives valid, Lee asserted, for "the Convention was divided on this point of numbers." Indeed, it was not until September 17, 1787, that the maximum ratio of one representative per

³⁶Ibid., p. 74.

³⁷Ibid., pp. 59-60.

³⁸Ibid., p. 63.

every thirty thousand inhabitants was settled upon, and then only after George Washington, making a rarely expressed private opinion before the Convention, agreed that the increased number of representatives would ~~eliminate one of the strongest objections to the Constitution.~~³⁹ The principal objections made against increasing the representation, Lee said, were the expense of the increased representation and the difficulty in getting members to attend. But the first ought not be considered, and the second, if founded at all, was against any federal form of government.⁴⁰

Lee strongly objected also to the lack of inducements upon the representatives to attend the sessions of Congress. Not only was an inadequate representative branch proposed, but what else but a sense of duty would encourage the representatives to attend? The lack of inducements of this nature had been made in the Articles, and he hoped the same mistake would not be repeated in the Constitution.⁴¹

Federalists throughout the country repeatedly stressed that the representatives must return home, that the burdens they might impose upon their constituents would likewise be imposed upon themselves at home, and that therefore they would naturally be inclined to make mild laws, to support liberty, and ease as well as possible the burdens of the people. But, Lee insisted, if a man will gain more by measures oppressive to others than he will lose by them, he will be inclined towards their adoption. Though that man increase the public burdens,

³⁹Madison, op. cit., pp. 581-582.

⁴⁰Lee, op. cit., p. 76.

⁴¹Ibid., p. 70.

he will in all probability also be increasing his own. Such a man would also tend to secure an increased salary and other benefits at the same time that he worked against the public. He would secure an advantage over the public, however much he might be affected by public laws.

Under the Constitution, the states would have the power to choose ninety-one members of Congress. Of this number, which was the same number of representatives in the Confederation Congress, only two-thirds would be brought into the spotlight of public examination by reelection in a ten-year period, as was the case with the Confederation Congress. But under the Constitution, there would be five and probably ten times the number of appointive offices open for ex-members of Congress as under the Articles. The effect of this larger number of such appointive offices would be to provide these ex-congressmen with enough lucrative offices so that they would never have to return to private life. Moreover, not only would such offices be available to ex-congressmen, they would also be opened for their friends and family. What security could exist in the government, then, where so many of the members of Congress would feel themselves candidates for the offices, corruption aside? This question posed by Lee was a challenging one, one that no Federalist ever attempted to answer.

The Constitution authorized the Congress of the United States to levy taxes at pleasure for the general welfare,⁴² Lee explained. Should that Congress

mis-judge of the general welfare, and lay unnecessary oppressive taxes, the constitution will provide . . . no remedy for the people or states--the people must bear them, or have recourse,

⁴²Madison, op. cit., p. 636.

not any constitutional checks or remedies, but to that resistance which is the last resort, and founded in self-defense.

It is well stipulated, that all duties, imposts, and excises shall be equal and that direct taxes shall be apportioned on the several states by a fixed rule, but nothing further. Here commences a dangerous power in matters of taxation, lodged without any regard to the balance of interests of the different orders of men, and without any regard to the internal policy of the states . . . there will be nothing to prevent a system of tax laws being made, unduly to ease some descriptions of men and burden others; though such a system may be unjust and injudicious, though we may complain, the answer will be, congress have the power delegated by the people, and probably, congress has done what it thought best.⁴³

In the following Letter, Lee continued his examination of Congress's power of taxation:

To palliate for the smallness of the representation, it is observed, that the state governments in which the people are fully represented, necessarily form a part of the system . . . the state governments, we are told will stand between the arbitrary exercise of power and the people: true they may, but armless and helpless, perhaps, with the privilege of making a noise when hurt--this is no more than individuals may do. Does the constitution provide a single check for a single measure, by which the state governments can constitutionally and regularly check the arbitrary measures of congress? Congress may raise immediately . . . twenty millions of dollars in taxes, build a navy, model the militia, &c. and all this constitutionally. Congress may arm on every point, and the state governments can do no more than an individual, by petition to Congress, suggest their measures are alarming and not right.⁴⁴

Elsewhere in his Letters, Lee made a number of interesting observations on the proposed House. The branches of the legislature were essential parts of the fundamental compact, presumably between the people and their government, and ought to be fixed by the people. But by Article I, section 4, of the Constitution,⁴⁵ the House might alter itself by

⁴³Lee, op. cit., p. 79.

⁴⁴Ibid., p. 82.

⁴⁵Madison, op. cit., p. 629.

modifying the elections of its own members, by regulating the elections so as to secure the choice of any particular description of men. It might make an entire state one district; the result might very well be that the people who lived in the more concentrated urban areas could unite and place in the House the entire number of representatives apportioned to the state. Why, Lee asked, leave the door open to improper regulations? Why not incorporate directly into the Constitution provisions for the division of each state into proper districts and for the confining of the electors in each district to the choice of some men with a permanent interest and residence in it?⁴⁶

Relatively little time was spent on the House by the 'Antis' during the course of the debates in the Virginia ratifying convention. For the most part, those objections that were voiced were the same that we have seen repeatedly stressed, i.e., that the representatives were too few to secure adequate knowledge of the people's needs, abilities, and conditions, that because of the small representation corruption was likely, and that the House would soon become an aristocratic club. But there were a few interesting observations made on the House, and it would be worthwhile to examine these.

The proponents of the new plan of government contend, William Grayson said, that the democratic branch of the Congress, because it is elected by the people, is a panacea for many of the defects of the Constitution. But what security is there in a representation that is too small, he asked? History showed that the less the representation, the greater the opening of corruption. Consider, he asked, some fifteen

⁴⁶Ford, Essays, pp. 295-296.

hundred representatives are considered only adequate to handle the
 amount of business responsible for in the state legislatures. And yet
 much more extensive powers, over the entire country as a consolidated
 union, are to be handled by a total of ninety-one representatives and
senators. Whether it was likely that these ninety-one men in the United
 States Congress were equal in their knowledge and abilities of the facts
 of the country to the fifteen hundred, he made no speculation. His
 greatest objection, he said, was that the Congress as proposed would
 be unequal and oppressive. Such efficacy as it would demonstrate, and
 this gets to the heart of Grayson's opposition to the House, would come
 from the presence of factions of one part of the Union against another.
For the powers and jurisdiction of the government might be called into
action by a combination of only seven states. There are, he stressed,
 great differences of circumstances among the states, and it is only
 reasonable that those states of similar interests would combine against
 others. The effect upon the country would be ruinous.

At a later date in the debates, Patrick Henry rose to make a few
 remarks on the House. During the course of his speech, he brought up
 the argument made by a Federalist opponent that the House would act to
 curb any treaties that might adversely affect the American right of
 navigation on the Mississippi. But where, Henry asked, was this power
 of the House to be found in the Constitution? It could not, for the
 House had no such power. A most unfortunate omission of power, indeed,
 Henry complained.⁴⁷

At a still later point in the debates, James Monroe brought up

⁴⁷Elliot, Debates, III, 354-355.

a unique and thoughtful observation on the House. What, he asked, was the purpose of the clause in the Constitution, clause 4, section 5, Article I, which prohibits either House from rising for more than three days without the consent of the other? Was it proper, he asked, that the House should thus be dependent upon the Senate, and as such might unduly increase the influence of the Upper House on the Lower?⁴⁸

In view of its importance, and the extent of its powers within the framework of the proposed federal government, the Senate received surprisingly little attention from Anti-Federalist writers of Virginia. Richard Henry Lee, for example, devoted only a very few pages in his Letters From a Federal Farmer to the Senate, far less than he did to the House of Representatives. His analysis of the Senate is of such excellent quality it is worthwhile to quote extensively from him:

The senate is an assembly of 26 members, two from each state, though the senators are apportioned on the federal plan, they will vote individually; they represent the states, as bodies politic, sovereign to certain purposes; the states, being sovereign and independent, all are considered equal, each other with the other in the senate. In this we are governed solely by the ideal equalities of sovereignties; the federal and state governments forming one whole, and the state governments an essential part . . . I feel more disposed . . . to acquiesce in making them the basis of the senate, and thereby to make it the interest and duty of the senators to preserve distinct, and to perpetuate the respective sovereignties they represent. . . . The senate, as a legislative branch, is not large, but as an executive branch quite too numerous. It is not to be presumed that we can form a genuine senatorial branch in the United States, a real representation of the aristocracy and balance in the legislature, any more than we can form a genuine representation of the people. Could we separate the aristocratical and democratical interests; compose the senate of the former, and the house of assembly of the latter, they are too unequal . . . to form a balance. Form them on pure principles, and leave each to be supported by its real weight and connections, the senate would be feeble, and the house powerful:— I say, on pure

⁴⁸Ibid., p. 367.

principles; because I make a distinction between a senate that derives its weight and influence from a pure source, its numbers and wisdom, its extensive property, its extensive and permanent connections; and a senate composed of unstable connections, that derives its weight and influence from a corrupt and pernicious source . . . I wish the proposed senate may not partake too much of the latter description.⁴⁹

By its very nature as the representative body of the aristocratic elements of the population the Senate had an inherent defect for the proper nature of representative government in the United States.

To produce a balance and checks, the constitution proposes two branches in the legislature; but they are so formed, that the members of both must generally be the same kind of men--men with similar interests and views--men of the same grade in society. Senators and representatives thus circumstanced . . . must be governed generally by the same motives and views, and therefore pursue the same system of politics; . . . there will not be found in them any of those genuine balances and checks, among the real interests, and efforts of the same classes of men in the community we aim at.⁵⁰

Lee had other objections to the Senate as it was organized. The senators, he contended, sat for far too long; history showed that men with long terms of office tended to develop callous habits, and cease to feel their dependence upon and knowledge of their constituents. This, he predicted, would be especially true in a body over which there existed no recall. The power of recall was, he said, considered an essential aspect of the Congress under the Articles of Confederation, and there was no reason, and certainly no security, in not incorporating similar provisions in the Constitution. The senators represented sovereignties which ought necessarily retain the power of recall over their agents, for it was the nature of all delegated power that constituents should retain the right to judge of the conduct of their

⁴⁹Lee, op. cit., pp. 89-90.

⁵⁰Ibid., p. 90.

representatives. The constituents' approval or disapproval of their representative's conduct implied the right to continue or control the representative's position. Indeed, he insisted, the necessity of recall is greater for the Senate than for the House, for the latter would be more frequently elected and, therefore, more likely to be scrutinized carefully by the public. The power of recall over the senators would have the effect of preventing the formation of any possible interested factions, as well as serving to keep up the watchfulness of the senators and their attention to their position's responsibilities.⁵¹

With the power of recall should also come the principle of rotation in office, Lee insisted. It was a principle found in the Articles, and most often in the state legislatures. In a government consisting of but a few members, elected for long periods, and far removed from the observations of the people, as proposed by the Constitution, members are seldom changed, and government becomes filled with men who constitute a relatively fixed body, who are often inattentive to the public good, are callous, selfish, and prone to corruption. The principle of rotation would reverse all such characteristics, and would have the additional effect of distributing more widely throughout the community knowledge of that community's government. Rotation would serve to return a representative to his constituents, and to reinstate him in the interests, feelings, and views of his constituents, and thereby confirm him in the essential qualifications of a legislator.⁵²

By Article II, section 2, the Constitution⁵³ required that two-

⁵¹Ibid., pp. 92-94.

⁵²Ibid.

⁵³Madison, op. cit., p. 634.

thirds of the Senate confirm presidential appointments for federal offices. In Lee's estimation this was an improper power to lodge in the Senate. The honor and emoluments of public offices are the objects in all communities of which ambitious men never lose sight. Honest men, those who are industrious and modest, are more than content to look after their own private affairs; it is the men of intrigue who seek after the offices of public concern. The offices necessary for a national system of government as proposed by the Constitution will be many, and those men with the power of disposal of those offices will have a very large influence in the government. The senators and representatives will naturally consider themselves possible recipients of appointive offices which become vacant every year. But every precaution must be taken to ensure that the legislators do not become mere office men. This would be effected, among other changes, by giving them as small a share in the disposal of those offices as possible.⁵⁴

Furthermore, Lee continued, in discussing Article II, section 2, the Senate has a major part in trying federal officers for misconduct. In creating offices, it is too numerous for a council of appointment, or to feel any great responsibility. Added to this must be the fact that the Senate has a necessary share in the concluding of treaties. The effect of all these powers might very likely be that the Senate will not only dictate to the President, but will manage the House as well, thereby upsetting what balance of government the Constitution establishes. Additionally, the Senate is the body to try impeachments of federal officers, and must therefore be as disinterested as possible.

⁵⁴Lee, op. cit., pp. 98, 111-114.

For all these reasons, Lee concluded, the Senate is a potentially dangerous body in which to lodge even a share in the power of appointment of federal officers.⁵⁵

Elsewhere in his Letters, Lee made other, rather random observations on the Senate that are worth examining for a moment. Article I, section 4, of the Constitution,⁵⁶ regarding the elections of federal legislators, empowered the general legislature to regulate the elections of senators, "except as to the places of choosing senators." There is, therefore, Lee argued, but little more security in the election of the senators than there is for the representatives.

The Senate also came under Anti-Federalist attack during the course of the debates, though the criticisms made were similar to Lee's in his Letters. A few other observations were made here and there, however, that are worth some time examining.

A great deal of discussion during the early days of the debates was given to the American right of navigation of the Mississippi River. As expected, Virginians felt very strongly about the continuation of that right. But William Grayson pointed out that the senators of only five states and the President were necessary for that right to be given up. For, with two-thirds of the Senate present a quorum would be fourteen senators, of which ten would constitute a majority. What, then, he asked, is the security in such a system, where senators of only five states and the President may conclude a treaty which affects virtually one-half of the states of the Union?⁵⁷

⁵⁵Ibid., pp. 115-116.

⁵⁶Madison, op. cit., p. 629.

⁵⁷Ford, Essays, p. 297.

Later in the debates, Grayson rose to object to the Senate's power of concurrence and approval of amendments to money bills: "He looked upon the power of proposing amendments to be equal, in principle, to that of originating, and that they were, in fact the same . . . this was, in his opinion, a departure from that great principle which required that the immediate representatives of the people only should interfere with money bills."⁵⁸

Like Grayson, Patrick Henry feared the possibility, and effects upon Virginia, of a collusion between the Senate and the President. The Constitution greatly diminished the security against collusion which was part of the Articles.⁵⁹ Nor did Henry, like Lee, approve of the lack of recall over the senators, and he feared the worst effect of that lack.⁶⁰

The Virginia Anti-Federalists made few criticisms or expressed little fear of the proposed Executive. Richard Henry Lee, for example, devoted parts of only two Letters to the Presidency and Vice-Presidency.⁶¹ George Mason devoted some time to his observations on the Chief Executive, but as his entire 'objections' occupied only four pages, those observations, too, were necessarily summarized. Likewise, little time was spent during the debates on the office of the President, and that which was said was done so for the most part only in passing. Still, it would be worthwhile to take some notice of the observations made.

The lack of a constitutional council for the President, was, for George Mason, most objectionable:

⁵⁸Elliot, Debates, III, 351.

⁵⁹Ibid., pp. 375-376. ⁶⁰Ibid., pp. 353-355.

⁶¹Lee, op. cit., pp. 118-119; also, Ford, Essays, p. 310.

The President of the United States has no constitutional council (a thing unknown in any safe and regular government) he will therefore be unsupported by proper information and advice; and will generally be directed by minions and favorites--or he will become a tool of the Senate--or a council of state will grow out of the principal officers of the great departments--the worst and most dangerous ingredients for such a council, in a free country; for they may be induced to join in any dangerous or oppressive measures, to shelter themselves, and prevent an inquiry into their own misconduct in office . . . From this fatal defect of a constitutional council, has arisen the improper power of the Senate, in the appointment of the public officers, and the alarming dependence and connexion between that branch of the legislature and the supreme executive. Hence, also, sprung that unnecessary officer, the Vice-President, who, for want of other employment, is made President of the Senate; thereby dangerously blending the executive and legislative powers; besides also giving to some one of the states an unjust and unnecessary pre-eminence over the other.⁶²

Mason objected also to the power of pardon granted to the President. The power of pardon might "sometimes be exercised to screen from punishment those whom he may have secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt."⁶³

Lee, as we have said, devoted space in only two Letters to the office and powers of the President. Like Mason, he objected to, and feared, the connection between the Senate and the President as an unnecessary mixing of legislative and executive powers.⁶⁴

Though he approved on the whole of the method of selection of the President, he did fear that the smallness of the number of electors would increase the possibility of corruption of those electors between the date of their selection and the date of vote for the President. He disapproved, further, of the idea of the re-eligibility of the President.

⁶²Paul Leicester Ford, Pamphlets on the Constitution (Brooklyn, 1891), p. 330.

⁶³Ibid., pp. 330-331.

⁶⁴Ford, Essays, p. 298.

The object in republican government, he argued, was to guard against perpetuating any position of power. The executive must remain in office long enough to give his office stability, but not long enough to establish himself. The possibility of reelection, he argued, might lead to intrigue for reelection. The ambitious man would spare nothing to secure reelection. By reelection, the man in office would lose his interest in his office and the government beyond aggrandizement.⁶⁵

Observations on the President's office made during the course of the debates were mostly repetitious of those we have examined before. George Mason, for example, expressed his fears the Presidency might become a perpetually-occupied position, that the Senate and President might act to support one another against the people, and that the President's power of pardon and control over the militia were undesirable and potentially dangerous powers.⁶⁶

James Monroe⁶⁷ and William Grayson⁶⁸ both covered old ground in their criticisms of the President's and Vice-President's offices. Neither man was at all satisfied with the broad extent of the President's powers and the lack of security placed on these powers, and they feared the worst should an ambitious man come to occupy the office.

Surprisingly enough, in view of the rather limited attention given the executive branch of the government, the proposed judicial branch drew considerable criticism from the Virginia Anti-Federalists. Lee, in particular, devoted much attention to the proposed judiciary, and his examination is certainly worth the space required to review it.

⁶⁵Lee, op. cit., pp. 123-126.

⁶⁶Elliot, Debates, III, 483.

⁶⁷Ibid., pp. 488-496.

⁶⁸Ibid., pp. 490-492.

Lee had no objection to the basic arrangement of the federal judiciary--one supreme court and a series of inferior courts.⁶⁹ Indeed, it was necessary for the functions of the judiciary to be carried out smoothly. But he did not approve of the judicial department's powers to handle questions arising from the internal laws of the several states, though he conceded the necessity of the department's power of deciding finally on the law of the Union. Article III, section 2, of the Constitution, actions between citizens of a particular state and foreigners, between citizens of different states, by state governments against foreigners, and by state governments against citizens of other states were to be handled concurrently by both state and federal courts. The effect of that provision, in Lee's estimation, would be to open new jurisdictions and new scenes of legal actions, to which citizens and foreigners alike must be drawn, perhaps hundreds of miles. Such processes would involve the states, and many defendants, to actions not in contemplation when the contract was made.⁷⁰ Furthermore, though the federal courts might be so organized as to ease the obtaining of legal action, the Constitution did not secure that benefit.⁷¹ In addition, he questioned the wisdom of making a state answerable to the suits of a foreigner or citizen of some other state. By any or all of these actions, state governments might be humbled to a degree to which they were not subject under the Articles.

Though Lee admitted the necessity of securing the independence of the federal judiciary, he questioned the wisdom of maintaining the

⁶⁹Madison, op. cit., p. 635.

⁷⁰Ford, Essays, p. 309.

⁷¹Ibid., pp. 306-307.

judge's salaries under permanent and standing laws. For to establish the salaries of the judges as permanent would be to ignore the possibility of change in the country's economic condition. Furthermore, he considered it likely that the judges and their friends would conspire to increase the salaries of the judges, as the Constitution provided that their salaries could be raised but not lowered except by consent of all the branches of the legislature.⁷²

Article III, section 2, of the federal Constitution providing that "the judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States," confused Lee. He asked:

What is here meant by equity? what is equity in a case arising under the constitution? possibly the clause might have the same meaning, were the words "in law and equity" omitted. Cases in law must differ widely from cases in law and equity. At first view, by thus joining the word equity with the word law, if we mean anything, we seem to mean to give the judge a discretionary power. . . . Perhaps the clause would have the same meaning were the words "this constitution" omitted; there is in it either a careless complex misuse of words, in themselves of extensive signification, or there is some meaning not easily to be comprehended. Suppose a case arising under this constitution--suppose the question judicially moved, whether, by the constitution, congress can suppress a state tax laid on polls, lands, or as an excise duty, which may be supposed to interfere with a federal tax. By the letter of the constitution, congress will appear to have no power to do it; but then the judges may decide the question on principles of equity as well as law. Now, omitting the words "in law and equity," they may decide according to the spirit and true meaning of the constitution, as collected from what must have been the intentions of the people when they made it.⁷³

Reflecting on this provision in an earlier Letter, Lee contended, "It is a very dangerous thing to vest in the same judge power to decide on

⁷²Lee, op. cit., pp. 135-136.

⁷³Ibid., p. 141.

the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate."⁷⁴ Furthermore, Lee continued, this provision ignores the principle of the separation of powers of law and equity established in the British judicial system. The importance of this precedent cannot be too strongly stressed, for the Americans, being of principally English heritage, considered the English system of government the finest in the world, barring, of course, their own governmental organization. A reading of the debates in the several state conventions will demonstrate the affection the Americans had for, and the respect of the British political and governmental system.⁷⁵

Lee doubted whether the Constitution established in unequivocal terms, jury trial in civil cases. Jury trial in common law cases, Lee contended, was well established, and was in fact the fundamental law of the United States. The juries were empowered to give a general verdict and to decide as to law and to fact, in common law procedures. Trial by jury was, politically considered, the most important feature in the judicial department of a free country, and ought to be given up only in the very last resort. Where, in civil law processes, the jury trial was unknown, the consequence was that a few judges and dependent officers possessed all the power in the judicial department. Furthermore, by the common law of England and the United States, there was no appeal from the verdict of the jury as to the facts. The Constitution, however, Lee contended, proposed to establish the very opposite principle

⁷⁴Ford, Essays, p. 308.

⁷⁵Elliot, Debates, III, 262 ff; also Debates II, 228.

of this; an appeal will lie in all appellate cases from the verdict of the jury, even as to facts, to the justices of the Supreme Court. The effect would be to establish civil law procedures by this provision, for if the jurisdiction of the jury is not final, as to fact especially, that body is of little or no importance.⁷⁶

George Mason had much different criticisms to make of the federal judiciary. It was, he complained to George Washington, so constructed and extended as to absorb and destroy the judiciaries of the several states. It would, as a consequence, render the laws as tedious, intricate, expensive, and as unattainable as it was for a great part of the population of England.⁷⁷ The inferior courts of the federal government were, he complained to the delegates at the convention, as numerous as Congress might think proper. There is no limitation whatsoever with respect to the nature or jurisdiction of those courts contained in Article III, section 2, Mason charged during the debates. Rather, it was there declared that "the judicial power shall extend to all cases in law and equity arising under this Constitution." What objects, he asked, will this provision not extend to? They will judge how far their laws may operate, they will modify their own courts, and there will be no state law that can counteract them. Thus, the discrimination between the judicial power of the federal court system and that of the states' court systems existed in name only.⁷⁸ Continuing on this theme, Mason said:

⁷⁶Lee, op. cit., pp. 137-141.

⁷⁷Ford, Pamphlets, p. 330.

⁷⁸Elliot, Debates, III, 521-522.

To what disgraceful and dangerous lengths does the principle of this go! For if your state judiciaries are not to be trusted with the administration of common justice, and decision of disputes respecting property between man and man, much less ought the state governments to be trusted with the power of legislation. The principle itself goes to the destruction of the legislation of the states, whether or not it was intended.⁷⁹

Concluding this matter, Mason made a candid and rather indicative statement: "As to my own opinion, I most religiously and conscientiously believe that it was intended, though I am not absolutely certain."⁸⁰

George Mason was, from all indications, a well educated, and widely read man, especially on matters of political theory. From the start of the Federal Convention, he noticed the widely prevalent desire among those supporting the need for a strong central government for a reduction in the importance and political position within the framework of the central government, whatever it was to be, of the several states. In a letter to his son, George Mason, Jr., he said:

The most prevalent idea in the principal States [present in Philadelphia at that time, May 20, 1787] seems to be total alteration of the present federal system, and substituting a great national council or parliament . . . with full legislative powers upon all the subjects of the Union, and an executive, and to make the several State legislatures subordinate to the national . . . It is easy to foresee that there will be much difficulty in organizing a government upon this great scale, and at the same time reserving to the State legislatures a sufficient portion of power for promoting and securing the prosperity and happiness of their respective citizens.⁸¹

The reasoning behind Mason's fear of the effects of the proposed federal government was, of course, that the state governments, being closer to the people, were therefore more sensitive to the people's needs and

⁷⁹Ibid., p. 522.

⁸⁰Ibid.

⁸¹Kate Mason Rowland, The Life and Correspondence of George Mason (New York, 1964), p. 101.

conditions, and could be more closely watched than could the federal government located in some distant city.

Later, Mason observed that the appellate jurisdiction of the Supreme Court would embrace every object of maritime, chancery, and common law controversy. Mason did not question the jurisdiction over the first two fields, but why not, he asked, discriminate as to matters of fact with respect to common-law controversies? James Madison, he said, previously agreed that it was dangerous, but expressed hope that regulations would be made to suit the convenience of the people. But he was not satisfied with the prospect of mere hope, for hope was not sufficient security.⁸²

Nor did Mason consider the provisions of the Constitution regarding common-law trials and trials in courts of equity and admiralty sufficiently explanatory.⁸³ In appeals on the latter two, the depositions are committed to record, and therefore on appeal the whole facts go to the appellate court. The equity of the whole case is considered, and no new evidence is requisite. But in common-law cases, evidence is given viva voce, and upon appeal new witnesses may be introduced. This in itself would certainly be an inconvenience. Moreover, certain Federalists had said that there would be no occasion to carry up the evidence by viva voce testimony, because Congress may order it committed to writing and transmitted in that manner. Yet on the other hand, it must be as equally true that Congress might not so act. Furthermore, Congress might establish its own regulations as to how appeals in

⁸²Elliot, Debates, III, 524.

⁸³Madison, op. cit., p. 635.

matters of revenue and excise controversies be brought to superior courts, and there would be nothing to say what their regulations might be.⁸⁴

Like Lee, Mason questioned whether state courts could not be trusted to handle cases between citizens of different states. And, again like Lee, he questioned the wisdom of humbling the state governments by bringing them as parties in cases concerning citizens of different states before federal courts. The latter power was entirely unnecessary, he argued, and, moreover, what was to be done if a judgment were obtained against a state government?⁸⁵

George Mason,⁸⁶ Patrick Henry,⁸⁷ and James Monroe,⁸⁸ all contended that the coexistent jurisdiction between the federal and state courts would ultimately lead to conflict between the two court systems. The result of such a conflict would be, they contended, the final destruction of one system or the other, though as Mason insisted, the likelihood was that Congress would come to the aid of the former against the latter.⁸⁹ Moreover, and far worse to consider, such a situation would tend to oppress and greatly inconvenience the people. On this latter point, again, all three men were in agreement.

William Grayson's great objection to the federal judiciary was that it would interfere with the state judiciaries. There was not superintending power to maintain order between the two contending jurisdictions, so that recurrence, he feared, could only be had to the

⁸⁴Elliot, Debates, III, 525-526.

⁸⁵Ibid., pp. 526-527.

⁸⁶Ibid., p. 584.

⁸⁷Ibid., p. 539.

⁸⁸Ibid., p. 582.

⁸⁹Ibid., p. 584.

sword. Those state courts were, Grayson argued, the best check the people of the states and the state governments themselves had. They secured the latter against encroachments on their privileges; they were, in short, the principal defense of the states. How improper it would be to deprive the states of their only source of political defense.⁹⁰

With Mason, Grayson considered the powers of the Supreme Court over chancery, admiralty, common pleas, exchequer, and criminal jurisdiction cases too extensive for a single body. The extent of its jurisdiction was not expressed in a definite manner. It was so vaguely and indefinitely expressed that the latitudes of power could not be ascertained. Grayson objected also to the lack of reciprocity in cases between states and foreign governments. In his unique argument he contended that though a state government might be sued by a foreign government without its consent, the reverse would not be possible. The effect, he implied, would be to give greater favoritism to foreign governments than to the state governments, and to him the idea was monstrous.⁹¹

John Marshall, Grayson argued, said that trial by jury is preserved in the Constitution by implication. The jurisdiction of the Supreme Court, and by implication the inferior federal courts, is to be regulated by Congress, which it was said would be ample security. It is true, argued Grayson, that Congress may indeed make these regulations, but on the other hand, it is just as true that they might not. This applied also to the trial by jury, which is given up to the discretion of Congress. It will not be a violation of the Constitution should

⁹⁰Ibid., p. 563.

⁹¹Ibid., pp. 566-567.

that body decide to take the right away, for it is the regulating body. It was possible for Congress to regulate it properly, but it is nonetheless at their mere discretion to do so or not.⁹²

The Constitution proposed the establishment, contended Lee, of a new species of Executive, a small Senate, and a very small House of Representatives. The seat of that government would be up to several hundred miles from a great many of its subjects, requiring a great many officers if it is to operate upon these. Though it provided for the concurrent jurisdiction and coextensive operation of the state governments, yet the general government would possess all the essential powers; the states would be mere shadows.⁹³ Lee was not, in short, pleased at the extensive nature of the powers of the general government, and several of his Letters he devoted exclusively to an examination of those powers.

Lee was particularly upset over the prospect of empowering the federal government to lay and collect internal and external taxes, to form the militia, to make bankruptcy laws, and to decide on appeal questions arising on the internal laws of the several states. These, he said, in effect comprehend all the essential powers in the country, and those left to the states would be of little real importance.

He conceded that many of the essential powers given the national government were not exclusive, and reasoned that the general government might have sufficient prudence to forebear the exercise of those powers which might also be exercised by the states. But at the same time,

⁹²Ibid., p. 568.

⁹³Ford, Essays, p. 292.

these powers were open for imprudent men in the national government to exercise if they would. And if so exercised, they must adversely affect the internal affairs of the state.⁹⁴ In view of prospects of this nature, his fears are therefore quite understandable.

The power to lay and collect taxes, he argued, was in itself of great importance:

By means of taxes, the government may command the whole or any part of the subject's property. Taxes may be of various kinds; but there is a strong distinction between external and internal taxes. External taxes are import duties, which are laid on imported goods; . . . though ultimately paid by the consumer; a few officers can collect them, and they can be carried no higher than the trade will bear . . . that in the very nature of commerce, bounds are set to them. But internal taxes, as poll and land taxes, excises, duties on all written instruments, &c. may fix themselves on every person and species of property in the community; they may be carried to any lengths, and in proportion as they are extended, numerous officers must be employed to assess them, and to enforce the collection of them. . . . Internal taxation in this country is more important, as the country is so very extensive . . . to lay and collect taxes in this extensive country, must require a great number of congressional ordinances, immediately operating upon the body of the people; these must continually interfere with the state laws, thereby produce disorder and general dissatisfaction, till the one system of laws or the other, operating on the same subjects, shall be abolished.⁹⁵

As the state governments have concurrent powers with the general government, and given the same objects to be taxed, the objection that the general government might suspend a state tax as a necessary measure for the collection of the federal tax was not without foundation, Lee continued. Was it, he asked, "wise, prudent, or safe, to vest the powers of laying and collecting internal taxes in the general government, while imperfectly organized and inadequate; and to trust to amending the Constitution after ratification, and making it adequate to this purpose."⁹⁶

⁹⁴Ibid., pp. 292-293.

⁹⁵Ibid., pp. 301-302.

⁹⁶Ibid., p. 304.

This power to lay and collect taxes was further objectionable, in Lee's estimation, because of other associated general powers.

By the constitution it is proposed that the congress shall have the power "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy, to provide for calling forth the militia to execute the laws of the union . . . reserving to the states the right to appoint the officers, and to train the militia according to the discipline prescribed by congress . . ." When an army shall be once raised for a number of years, it is not probable that we will find much difficulty in getting congress to pass laws for applying monies to its support.⁹⁷

Lee did not, he made clear, object to the power of raising and maintaining armies. His objection was centered on the fact that such power would be given to a very few men with so very few checks on its exercise.

The people must, he insisted, have a check upon the powers to lay and collect taxes, and the power to raise armies. For laws to carry these powers into effect must be made often, and unless the people have a check upon these powers, either through the state legislatures or by the few national representatives in Congress, they may very gradually but inexorably lose their proper negative upon these matters until they are lost forever.⁹⁸

The state governments, by the Constitution, have actual influence over the militia only in the appointment of officers. Otherwise, the states must train the militia according to such forms and by such rules and resolutions as prescribed by Congress, which body has, also, the power to call out the militias to execute the laws of the federal government. This latter power, Lee complained, was in effect to give few

⁹⁷Ibid., pp. 304-305.

⁹⁸Ibid., p. 305.

men in the community great advantage over others, and to commit the many to the mercy or prudence of the very few.⁹⁹

Fears of the discretionary powers granted Congress in the matters of internal taxation and standing armies and control of the militia were the most often expressed fears during the debates. Patrick Henry, George Mason, and William Grayson all expressed apprehensions on those matters. Henry, for example, contended that Congress' powers on internal taxes and the armed forces of the country were delegated without adequate, and certainly not satisfactory checks. It is said by certain Federalists, he added, that the means must be commensurate to the ends. This would apparently mean that an infinitude in the government must require an infinitude of means to carry it on. But consider the propriety, the safety of such a government. In such a government, the servants, the governing, become greater than those for whom they exist at all. That same argument, he continued, has been the means by which despotisms have been established elsewhere in the world. Furthermore, the control of the militia by the Congress might very well become the instrument of oppression. The states retained control of their militias only by implication, a most unsatisfactory provision.¹⁰⁰

George Mason likewise contested Congress' power over the militia. His objection was that too much power was given to Congress, and that if the states were competent to use the militia to suppress insurrections, Congress ought not have a coextensive power. There was the fear in his mind, moreover, that the Congress might inflict severe punishments

⁹⁹Ibid., p. 306.

¹⁰⁰Elliot, Debates, III, 395-396, 410-412, 416-417.

on the militia as a necessary incubus to the power of organizing and disciplining them, thereby inducing that body to wish its abolition, and which would afford a pretense for the establishment of a standing army. An additional change sometime in the future might be made in the organization of the militia, he said in a later speech, namely that the militia then be constituted only of the lower and middle classes of men, all classes of men at present, he said, being found in it. If that should happen, given the inadequate and more aristocratic representation of the Congress, he foresaw the loss of all feeling for the lower classes by that body. It might, then, discriminate in favor of people in its own class, and exempt from duty all the officers and lowest creatures of the national government.¹⁰¹

William Grayson agreed substantially with these observations of Henry and Mason, adding that Congress might maintain a well armed militia in one area of the country while neglecting that of another. Moreover, he commented, there was no assurance, given their numerical advantage in the Congress, that the northern states might not push through bills for the establishment and maintaining of a navy, the effect of which would be to further its own economy at the expense of that of the southern states.¹⁰²

Article VI of the Constitution provided that the Constitution, the laws of the United States, and all treaties made under the authority of the United States were to be considered the supreme law of the land.¹⁰³

¹⁰¹Ibid., pp. 402, 415-416, 425-426.

¹⁰²Ibid., pp. 417-419, 429-430.

¹⁰³Madison, op. cit., p. 630.

All judges, state and federal, were bound by the Constitution to support that Constitution, those laws, and those treaties, state laws to the contrary notwithstanding. The effect of this article would be, Lee insisted, to sweep away all those customs, rights, laws, and constitutions heretofore established, where these latter were incompatible with the Constitution, laws or treaties.¹⁰⁴

Though Lee did not contend that the national laws should be superior to state and district laws, he did insist that those laws ought to yield to unalienable or fundamental rights. These national laws should extend to only a few national concerns. But as the Constitution stood, these laws would extend to internal and external objects, and to those objects to which all others are subordinate. It is impossible, he stressed, to have much conception of the extent of those powers, or the extent and number of those laws which should be considered necessary and proper to carry these powers into execution. In short, whether Congress will respect those principles of the people of the United States by which they have so long lived will be merely up to the prudence of that body.¹⁰⁵

Like so many of the Anti-Federalists elsewhere in the country, Lee deplored the lack of a bill of rights in the Constitution. "There are," he said, "certain rights which we have always held sacred in the United States, and recognized in all our constitutions, and which, by the adoption of the new constitution in its present form, will be left unsecured."¹⁰⁶ Among these, he insisted, were the trial by jury in the

¹⁰⁴Ford, Essays, pp. 311-312.

¹⁰⁵Ibid., pp. 312-313.

¹⁰⁶Ibid., p. 310.

judicial department and the collection of the people by the representatives in the legislative branch. But by the Constitution there is nothing said in these matters, nor is there anything to prevent Congress from making a law to suppress the freedom of the press by laying a tax on printing.¹⁰⁷ He did not understand the reasoning between his opponents' position that a bill of rights was unnecessary because all powers not granted to the federal government were reserved. Rather, the Constitution is full of many undefined powers. To make declaratory articles in a governmental instrument unnecessary, the nature of the reserved rights and the extent of the powers delegated must be defined. Omission of those rights held dear by Americans everywhere implies that they were not considered important. And, furthermore, general powers granted carry with them incidental powers.¹⁰⁸

Why the Anti-Federalist forces in the Virginia convention lost the struggle for no ratification without amendments, given their numerical majority throughout the course of the debates, must be the consequence of the few undecided delegates in the convention. Both sides realized their hopes rested with these few men, and both made long and vigorous plays for their support. Eventually, however, Governor Edmund Randolph's decision to join the pro-Constitution forces in the convention, and the news of South Carolina's ratification made the difference, and gave a psychological urge to join the trend of support of the Constitution.¹⁰⁹ The ratification of the Constitution by Virginia on June

¹⁰⁷Ibid., p. 311.

¹⁰⁸Lee, op. cit., pp. 142-153.

¹⁰⁹Rutland, op. cit., pp. 231-232.

25, 1788, followed by the ratification by New York the following day doomed Anti-Federalists' hopes of amending the Constitution or submitting it to a second convention. With these two states in support of the Constitution, the Union was formed; only Rhode Island and North Carolina¹¹⁰ remained outside, and the latter was soon to join its sister states.¹¹¹

The Anti-Federalist forces of North Carolina had no contest in their debates with the Federalists. Despite the efforts of James Iredell and William R. Pevie, two very capable orators and debaters, and their Federalist colleagues, the 'Antis' of the convention, under the leadership of Willie Jones, had no problem in securing a vote of no ratification without prior amendments. So completely did the 'Antis' control the convention they did not feel it necessary to go to any great lengths to attempt to convince any of the delegates of the value of their position; indeed, beyond the repetition of fears of the future of the American right of navigation on the Mississippi River should the right of concluding foreign treaties be given to the Senate and the President alone,¹¹² the Anti-Federalists arguments from North Carolina are of no particular interest.

¹¹⁰The North Carolina ratifying convention was called July 21, 1788. The Anti-Federalists of the state were in complete control of the convention, having 193 delegates to the Federalists' 75 delegates. After listening to their opponents' speeches for two weeks, the North Carolina 'Antis' called for and secured a vote of no ratification, by the same margin as that of their number of delegates, that is, 193 voted against ratification to 75 votes for ratification.

¹¹¹North Carolina ratified the Constitution late in 1789.

¹¹²Elliot, Debates, IV, 168.

CONCLUSION

This thesis has been concerned with an examination and the documentation of the Anti-Federalists' fears of the strong central government proposed by the federal Constitution of the United States. From a reading of the debates on the Constitution in the several states' ratifying conventions, or of the Anti-Federalists' arguments expressed in newspapers and broadsides, it is quite easy to call the Anti-Federalist position contrived and its arguments unrealistic. To do so, however, is to miss a great deal of the significance of the Anti-Federalists in the development of American constitutional and political theory¹; to ignore the fact that the Anti-Federalists and the Federalists were far closer to each other than they were apart. Finally, to call their arguments and position unrealistic is to misrepresent an important characteristic of American political thinkers in the early National Period.

The Anti-Federalists, like virtually all Americans of their age, were great constitutionalists. A reading of the Massachusetts Constitution of 1780,² for example, presents an excellent indication of the great lengths to which American political thinkers went in their construction of constitutions. The Americans typically wanted all delegated powers in written form, and stated in such a way as to leave

¹Cecelia M. Kenyon, The Antifederalists (New York, 1966), p. lxxvi.

²Robert J. Taylor, Massachusetts, Colony to Commonwealth: Documents on the Formation of its Constitution, 1775-1780 (Chapel Hill, 1961).

very little to the discretion or interpretation of their representatives. Moreover, the 'Antis' characteristically had little faith in a republican government that could not be closely watched by the constituents, and which was not so arranged as to maintain a separation of powers and branches of the government. Their criticisms and their fears of the Constitution resulted, in part at least, precisely from the 'elasticity' of the Constitution. The Constitution, as Morton Borden points out,³ institutionalized the fundamental uncertainties and ambiguities inherent in the American form of democracy. Its solutions were not to have any solutions except a basic agreement to live by republican principles of government and associated mechanics, and to solve problems in a spirit of moderation and compromise. In short, the Constitution did not attempt to settle permanently the external issues of government, but instead provided the basis whereby each generation of Americans might apply its own definitions and interpretations to the problems.

It must not be thought that the picture of the Constitution developed in the above paragraph is an attempt to apologize for the Anti-Federalists. Nothing could be further from the truth. The Anti-Federalists do not need, and certainly do not deserve any attempt at apology. Rather, what is needed is an understanding of the Anti-Federalist mentality, their conception of man as a human being and as a political being, and the consequent description of their framework of government.

Basic to the understanding of the Anti-Federalist mind is their conception of the nature of man as a human being and political organism.

³Morton Borden, The Antifederalist Papers (Ann Arbor, 1961), p. xiii.

In this regard, the 'Antis' closely resembled the Federalists. Both saw any political theory as necessarily based on certain presuppositions of human nature, man's character, and his behavior. Much of this insight was to be gained from the study of human history, and men of both sides made frequent references to the development of man's governmental and political institutions, especially American history in this regard. Neither the Federalists nor the Anti-Federalists were deceived into thinking that Americans were other than human beings with all the defects and characteristics of human beings. Alexander Hamilton, for example, in Federalist Number 6 said, "Has it not . . . been found that momentary passions, and immediate interests have a more active and imperious control over human conduct than general or remote considerations of policy, utility, or justice?"⁴ In Federalist Number 37, James Madison examined human nature and saw that ". . . the history of almost all great councils of mankind held among mankind for reconciling their discordant opinions . . . is a history of factions, contentions, and disappointments . . . classed among the most dark and degraded pictures which display the infirmities and depravities of the human character."⁵ Interesting, too, is that fact that throughout the rather depressing picture of human history and nature, the authors of The Federalist never attempted to flatter their readers by picturing them as different from other men. For example, the remark made in Federalist Number 57 that ". . . the vigilant and manly spirit which nourishes freedom, and in return is nourished by it" comes immediately after the statement

⁴Alexander Hamilton, James Madison, John Jay, The Federalist, Clinton Rossiter (ed.) (New York, 1961), p. 57.

⁵Ibid., p. 231.

that ". . . the caprices and wickedness of mankind" are ". . . failings from which Americans are not expected to be exempt."⁶ In short, the Federalists, like the Anti-Federalists, had no expectation that Americans were other than human beings, and that government must be designed around and must take into consideration the fact that man is inherently corruptible and self-interested. The difference, then, between the men of the two positions is the willingness and the degree to which the men controlling the government were to be trusted to use their discretion in exercising the powers of that government, and in abiding by the degree of trust placed in them by the people of the country. As Madison said in Federalist Number 51,⁷ ". . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the government; and in the next place oblige it to control itself." The Anti-Federalists agreed in both principle and substance with Madison on this point. The issue of ratification arose because the 'Antis' believed the framers of the Constitution, and therefore also the Federalists, were too lax in the checks and balances, and the degree of separation of powers they proposed in the Constitution.

Because the Anti-Federalists were presented with a finished document with the demand for immediate and unconditional acceptance or total rejection, they tended to demonstrate a certain degree of inflexibility and doctrinaire thinking.⁸ This is not suggesting that they were incapable of abstract political theorizing, though neither side

⁶Ibid., p. 353.

⁷Ibid., p. 322.

⁸Kenyon, op. cit., p. xcii.

indulged in such theorizing to any appreciable degree. It is, rather, to suggest that in the face of the Constitution, truly a new political and governmental form, the 'Antis' could and did resort to traditional and, as has been stressed repeatedly throughout this thesis, classical proofs of their own political beliefs.

Thus, the concern of the Anti-Federalists in the ratification struggle of 1787-1788 was to prevent the acceptance of a form of government which they believed probably destructive of all that Americans had fought for and achieved by the Revolution and independence--the personal and political rights and freedoms of all men. For them, the preference was for a limited government, a heritage which, as Cecelia Kenyon⁹ says, was directly attributable to their English background and ancestry, accompanied by written constitutions creating the structure of and closely defining the powers and limitations of that government. It was to be a government on which the people could exercise as much direct control as possible, and from which they could derive as much benefit in the form of protection of their rights and freedoms as possible.

The Anti-Federalists, like the Federalists, were self-conscious men in their respective positions. They were working and acting and thinking not only in terms of the present, but just as important, for what might be the conditions of the future.¹⁰ Their beliefs of human nature made them carefully consider governmental changes that might affect them and their posterity alike. Though the Anti-Federalists nowhere laid down a framework of their position on government as did

⁹Ibid., p. xxviii.

¹⁰Ibid., p. xlv.

the Federalists in The Federalist, their basic ideas of government can be derived from their speeches and essays. And, though they were wrong in their major premise--that the Constitution would fail and so bring an aristocracy or monarchy upon America--it does not follow that the Anti-Federalists were wrong either in their political philosophy or their vision of the American future. Indeed, it seems likely that their own solutions to the problems of American government in the Early National Period could have operated and resulted in as much progress, prosperity and democracy as has been achieved under the Constitution.¹¹

¹¹Borden, op. cit., p. xviii.

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