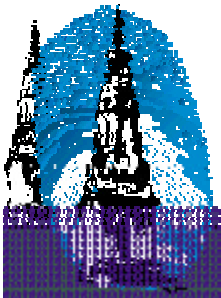


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LEFIC WORKING PAPER 2003-09

A Federal Constitution for the European Union: Some Lessons from United States Constitutional History

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**A Federal Constitution for the European Union:
Some Lessons from United States Constitutional History**

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Abstract: A constitution is more likely to be *accepted* if it federalizes those issues that are widely seen as needing complete harmonization. A constitution is more likely to *endure* if the federal government does not have powers that are not vital to it but which may alienate some member states to the point that the federal government loses legitimacy. It appears vital to have trade policy at the European Union level; for euro countries, monetary policy is already federalized. It is not clear that common foreign and defense policies are needed; insisting on common foreign and defense policies may lead to conflicts within and across member states that severely weaken the Union, conceivably contributing to eventual collapse. Insisting on harmonization of commercial codes does not have the destructive potential of attempting completely to harmonize defense and foreign policies; it may, however, lead to needless conflict that helps drain the reservoir of goodwill that the European Union will need for dealing with other conflicts amongst member states.

* For helpful comments, thanks are due to Clas Wihlborg and Subashis Gangopadhyay, and participants in a joint workshop of LEFIC and the Law School at the Copenhagen Business School. Parts of this paper were presented at the Mölle Conference; the author is grateful for comments to Evald Nalin and other participants in a plenary session. Parts of this paper were written at the Copenhagen Business School, and at the Gothenburg School of Economics.

Essay 1

A Federal Constitution for the European Union: Some Lessons from United States Constitutional History

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A Federal Constitution for the European Union: Some Lessons from United States Constitutional History

1. Introduction

United States constitutional history offers some lessons regarding which issues should be handled at the federal level and which should be left largely to member states. The discussion below uses the criteria of legitimacy of the federal government in the shorter- and longer-runs. Put another way, it focuses on the acceptability of the constitution at its inception, and on the constitution's durability, or its survival value. The analysis uses the concepts of Type I errors and Type II errors: In designing a constitution, it is crucial to raise to the federal level those issues that "should" be there in terms of legitimacy, but to leave at the member-state level those issues that need not be raised to the federal level. Leaving at the member-state level issues that should go to the federal level can have high costs in terms of the shorter- and longer-term legitimacy of the constitution. Conversely, taking to the federal level issues that should remain at the state level can similarly have high costs in terms of legitimacy. The difficulty is to know for a particular federation which issues are which: This paper pays particular attention to operational ways to identify issues that, in terms of legitimacy, should be raised to the federal level.

The choice of issues to raise to the federal level cannot be made a priori, but only in light of the circumstances facing a particular federation. U.S. constitutional history suggests a number of general operational lessons, however. First, if the federation is to survive, the allocation of issues should be done from a longer-term perspective. Concretely, the U.S. constitutional convention papered over many of the issues of slavery, and these returned to threaten the survival of the Union. Politicians' "short-term-ism" can have high long-term costs.

Second, issues should be raised to the federal level if a sufficiently large number of people of the member states believe these issues are vital parts of the *raison d'être* of the federation. At the U.S. constitutional convention, the delegates knew that issues of common defense and foreign policies, and common trade policy, were important federal issues in the minds of the people of the 13 individual sovereign states that were potential members of the federation. If the proposed constitution did not deal with defense, foreign policy and trade policy, there would be little reason for states to abandon their current situation to adopt a new constitution.

Third, issues should be left at the member-state level if people feel these issues are deeply connected with local culture. There are qualifications to this generalization, however. People in some states may feel unable to acquiesce in some decisions by other states: Slavery is the prime example for the U.S. The Constitution's Framers essentially ducked the issue of slavery. Decades later, positions on slavery hardened across the states. Many in the North could not acquiesce in the spread of slavery beyond where it already was, and many in the South could accept nothing less. The Framers had missed their best chance.

Fourth, if the federation is to deal successfully with its core federal issues, federal authority over other, related issues is often required. For the U.S., successful common defense and foreign policies required that the federal government have the ability to decide on and raise taxes on its own, and also required that federal law be supreme over state law on those issues that were constitutionally at the federal level.

Fifth, issues that do not have to be raised to the federal level should be left to the states. State delegations at the constitutional convention knew that on federal issues, the federal government would make decisions that differentially affected the interests of the states. The

constitution contains a number of mechanisms to protect states' interests. One is the equal representation of each state in the Senate, to protect small states, though the representation of each state in the House is proportional to population. More generally, the checks and balances among the three independent branches of government were intended to offer protection. A major source of protection was to limit the number of issues that were raised to the federal level; the powers that were not given to the federal government were reserved to the people and the states. Enumeration of federal powers was intended to limit the scope for federal decisions that states might view as harming their interests.

To be sure, some issues that should be left at the state level may not generate excessive costs by themselves if taken to the federal level; nevertheless, misallocating such issues depletes the reservoir of good will that a federation needs in order to function well, and in the limit even to survive. For example, forcing harmonization of European Union members' commercial codes appears to be a mistake—not a mistake that has severe consequence by itself, but a mistake that contributes to undermining the legitimacy and stability of the European Union.

General economic considerations suggest that for the efficient operation of a federation, there is likely to be an optimal allocation of issues between the federal level and the level of member states.¹ Some observers argue that many issues should be raised to the federal level on economic grounds, because federalization solves various types of market-failure problems, for examples, solves externality and public-goods problems. The discussion below shows that in many cases the economic benefits of federalization do not arise because it solves market failures. Instead, federalization's economic benefits often come from increasing market efficiency. These

¹ There is a substantial literature in political science and economics on the criteria for deciding the optimal degree of federalism. (Wildavsky, 1997). Wildavsky contrasts the unitary system, which he labels the coordination-coercion system, with the federal system, which he labels the competition-consensus system.

gains in efficiency may be highly valuable, but should not be confused with gains from solving market-failure problems.

2. The U.S. Constitutional Convention of 1787 ²

Those Americans who wanted a constitutional convention and a new constitution saw a number of clear problems that they thought should be settled at the federal level, not by each state on its own (Madison 1787). The individual states were sovereign, though bound together under the Articles of Confederation, adopted in 1781, in the midst of the Revolutionary War. The Confederation did not have supreme power over the states on any issue, however. Instead, the sovereign states adopted a hodge-podge of differing policies that, many believed, threatened the well being of all. On the one hand, those who favored a constitutional convention believed that these problems were important enough, and the need for a federal solution clear enough, that the states would be willing to adopt a well-designed federal constitution. On the other hand, if a new constitution did not address some of these important issues, it was not clear that it would be an improvement over the Articles of Confederation and could be ratified. Madison and many of his colleagues at the Constitutional Convention talked of designing “a government for posterity” (Bailey 1992, p. 353).

² The primary source is Madison’s (1920) notes from the Convention. Other notes from the Convention are by King (Mass.), Hamilton (NY), Lansing (NY), McHenry (MD), Paterson (NJ), Pierce (GA) and Yates (NY). Lansing and Yates were opposed to the Constitution and left the Convention after July 5 (New York is last recorded as voting on July 10). Hamilton supported a strong Constitution, but missed much of the middle of the Convention, so his notes are thin (for June 1, 6-8, 16, 19, 20, 26). McHenry gives interesting comments on the internal workings of the Maryland delegation; he supported the Constitution, and served as Secretary of War under Washington and Adams. Pierce provides character sketches of most delegates to the Convention. Notes by Hamilton, King and Patterson are cryptic and must be read with Madison’s notes. Farrand (rev. ed. 1937, Vols. 1-4) gives a massive day-by-day account in Vols. 1 and 2, based on all documents then available; Vol. 3 contains later papers related to issues that arose in the Convention. Bowen (1966) gives a narrative of the Convention. Berkin (2002) gives a less detailed narrative, but with brief biographies of the convention participants. For biographies of the fifty-five Framers, see the National Archives and Records Administration (NARA) website, Constitution page. See also Sanderson (1831, 5 vols.) and Bradford (1982). For Washington, see Brookhiser (1996) and, for an exhaustive account, Freeman (1948-1957). Interpretations of the plan that Hamilton presented to the Convention vary greatly (McDonald 1982, Miller 1992, Brookhiser 1999).

Trade policy. Each state was free to make its own trade policy, and to impose export and import restrictions regarding the other states. Under the Articles of Confederation, the states were not members of a free trade area, because they had protectionist policies against each other (thought mostly they exempted each other from tariffs), and they were not members of a common market, because they did not have a common external tariff, or more generally a common external-trade policy. Some states had strong shipping interests, other strong agricultural-export interests. Conflicts over trade policies created hostile feelings among states; some states engaged in a substantial amount of protectionism, and some engaged in retaliation against trade policies of other states. In addition, many observers believed that individual states were too small to offer adequate-size markets.

The states were faced with the issue of whether to form a customs union, and which partners to choose. The only plausible partners were combinations of the states themselves; European nations were not plausible partners, and neither was Canada, then controlled by Britain. The choices were no customs union, a customs union amongst all thirteen states, or customs unions amongst subsets of the thirteen. Some subsets made only marginal sense—Georgia and South Carolina were both small, Southern agricultural states.³ Other subsets could easily get along without all thirteen—inclusion of Georgia and South Carolina in a customs union could not be crucial to the remaining eleven. At one point, the small states threatened to abandon the convention if they did not get their way on their key issue of equal representation for each state. Some large-state representatives threatened that they could easily form a viable

³ Both were heavily agricultural and produced much the same products in the early 1780s; their staple was rice. Thus, they offered the possibility of trade creation rather than trade diversion, favorable under standard customs-union criteria. It seems highly unlikely, however, that manufacturing in either state would have shown much response to forming a two-state customs union. In the 1780s, Georgia began to grow rapidly, turning to tobacco in the tidewater region, and with much immigration to the piedmont for farming. Georgia had charter claims to the territory that became the states of Alabama and Mississippi. The limitation perceived on Georgia's growth was conflicts with the numerous Indians on the land claimed.

federation without the small states—for example, the large states of Virginia, Massachusetts, Pennsylvania and New York—but in the end compromise was reached.⁴

One reason to form a customs union is because of economies of scale and scope. Such economies are conventionally attributed to externalities. In this sense, externalities can be a motivation for forming a customs union, and they can influence which states enter coalitions. Still, trade policy as a constitutional issue is perhaps best viewed as a customs union problem, not a problem of market failure.

Trade policy is not in general a public good. Nor, in general, do variations in trade policy across separate states create externalities that require a free trade area or a common market to internalize them. To be sure, trade policies by the individual American states could inflict pecuniary externalities on each other, but these were not real externalities. Rather, protection and retaliation led to economic inefficiency that reduced overall welfare.

Monetary policy. Policy Towards Bankruptcy. Each state was free to have its own currency and many did. Often the states ran very different monetary policies, and in some cases ran policies that created high and variable inflation. Rhode Island's government, for example, issued paper money that soon depreciated to eight to twelve cents on the dollar. In such cases, the real value of state debt was highly uncertain, as of course was the real value of any nominal debt. There was no common legal tender across the states, though gold coins from various European powers were widely used across the states. Many argued the wisdom of having one currency, a federal currency, with states forbidden to issue their own monies.

A state could reduce the real value of its debt by inflation, and similarly reduce the real value of the debts of private debtors. In a number of states, debtors agitated for paper money, in

⁴ Virginia and Pennsylvania had substantial western territories; New York, Massachusetts and Connecticut all had claims on western New York territory. A federation among the large states thus had much potential for economic

part for this purpose. Related, states could specify legal tender. By exercising its legal-tender power, a state might allow loans made in specie to be discharged with paper that traded at a discount to specie, often a great discount.⁵ Further, states could adopt bankruptcy laws that favored debtors in a number of ways; in some cases, the laws explicitly put creditors from other states at a disadvantage relative to same-state creditors. States that were net creditors on balance to other states could thus be hurt by inflation, by legal-tender ploys in other states, and by discriminatory bankruptcy laws. Adopting a common currency, and imposing uniform or at least non-discriminatory bankruptcy practices, is analogous, though not perfectly, to the case for forming a customs union for trade in goods.⁶

The monetary policy of one state is not in general a public good for other states.⁷ To the extent each state ran a monetary policy that was optimal for it, the spillover effects on other states were pecuniary rather than real externalities. Rhode Island offered an example of a state that ran a policy of high and variable inflation that injured many of its own citizens as well as causing negative spillover effects for neighboring states. On the one hand, there was no evidence that the thirteen states formed an optimum currency area (in the sense of the modern, technical literature on optimum currency areas), and it seems clear that in the decades after the Union was

and population growth. But note that North Carolina and Georgia also had extensive claims on western territories.

⁵ The North Carolina representatives to the Constitutional Convention wrote to the state's governor requesting more funds, in part because North Carolina money traded at such a heavy discount in Pennsylvania (Bowen 1966).

⁶ The Constitution allows the federal government to write a bankruptcy code, which would be binding on the states and supersede state codes (Section 1). Today, "Bankruptcy law is federal statutory law, contained in Title 11 of the United States Code.... States may not regulate bankruptcy though they may pass laws that govern other aspects of the debtor-creditor relationship. A number of sections of Title 11 incorporate the debtor-creditor law of the individual states." Legal Information Institute (n.d., a). "Debtor-creditor law governs situations where one party is unable to pay a monetary debt to another.... Non-bankruptcy debtor-creditor law arises mainly from state statutory and common law." Legal Information Institute (n.d., b). In many places in the Federal code, the code follows state definitions of creditors, debtors and creditor-debtor relations, however; thus, in practice the code varies across states.

Congress passed a bankruptcy statute in 1800; until then, debtors were subject to the common-law punishment of imprisonment. The Democratic Republicans repealed the federal bankruptcy law in 1803, as favoring speculators at the expense of farmers. Congress did not enact a new code until 1841. In the meantime, individual states enacted their own codes (Smith 1996, pp. 257-258, 348, 438-440, 498-499).

formed, U.S. monetary policy was far from optimal.⁸ On the other hand, under the Union there were not, could not be, the wide disparities in state monetary policies and inflation experiences as under the Articles of Confederation.

Defense policy.⁹ Under the Articles, Congress could not effectively mount defensive or offensive military operations under its own authority. Congress could not levy troops, or impose and collect taxes to support such operations; further, it could not force coordination on the state militias. It could only adopt policies that the individual states could choose to support or not, and to the extent each state desired in a given case. Even during the Revolutionary War, Congress found it very difficult to cajole resources from the states, or to coordinate state militias. Congress could “requisition” funds for defense, but had no authority to collect funds from states that that did not meet their requisitions.¹⁰

The states faced actual or potential hostilities from Indians on the western frontier, from the British in Canada, from the Spanish in the Floridas and in New Orleans and the Mississippi Valley, and possibly from the French, who had not given up their aspirations in the Mississippi Valley, Canada and the West Indies. War was a frequent and costly occurrence in the decades leading up to 1787, both in Europe and North America, and had to be viewed as high probability.

Related, the Confederation did not have the military power to back up diplomatic demands. For example, high seas freedom was important to many of the states, both those with shipping interests such as Massachusetts and those with agricultural, and hence export, interests

⁷ To be sure, all the residents of a given state receive the monetary policy of that state, and in this sense for them it is a public good. This state’s monetary policy need not be a public good for residents of other states, however.

⁸ The controversies and battles over the Bank of the United States, and the fluctuations in Treasury policies on where to hold its cash balances, imply that, at some times at least, policy was sub-optimal.

⁹ In the *Federalist Papers*, John Jay discusses problems of foreign alliances and defense (Numbers 2-5), and Alexander Hamilton discusses the likelihood of conflicts between the states if they are independent or form three or four confederations (6-9).

such as the Southern states, but the Confederation could not effectively threaten the British over their high-handed unilateralism regarding the high seas.

The individual states faced different perceived threats in 1787. Many had Indian threats, for example, Pennsylvania and Virginia, which had extensive western frontiers, but long-settled Delaware or Rhode Island, with no western lands, did not. The British in Canada were potential threats for New York (which then included Vermont), Massachusetts (which then included Maine) and New Hampshire.¹¹ Beyond a possible threat from Canada, a recurring theme among some Americans was the desirability of seizing Canada and her resources; a number of attempts were made during the Revolutionary War (1775-1783) and the War of 1812 (1812-1815).

Farmers and other land owners along the western frontier were greatly interested in preserving free use of the Mississippi River to ship their products, including farmers in the Northwest Territory (from which five states arose, including Ohio, Indiana and Illinois) and farmers in some Southern states—Kentucky was then a part of Virginia, Tennessee of North Carolina, and Georgia had claims on the territories that became Alabama and Mississippi. On the one hand, these western interests feared that they would be “sold out” by the other states agreeing to allow Spain or France to close the Mississippi. In 1785, John Jay, the equivalent of the Confederation’s foreign minister, asked Congress to give him the power to negotiate with Spain to close the Mississippi for 25 or 30 years in exchange for commercial concessions; Congress did not grant him this power, but westerners were greatly upset by the attempt. On the other hand, if Spain or France¹² decided unilaterally to close the Mississippi, the likelihood of

¹⁰ Opponents of the Constitution argued that the system of requisitions had worked satisfactorily during the revolution (Miller 1992). George Washington, American commander during the war, found lack of reliable funding one of the major difficulties in prosecuting the war, and said so both in and outside the Convention.

¹¹ The British violated the Treaty of Paris of 1783 by maintaining troops and forts in the states’ western territories, and were thought to be stirring up the Indians.

¹² At the end of the French and Indian War (1756-1763), the French ceded Canada to Britain and the Louisiana Territory, including New Orleans, to Spain. Thereafter, France had plans to re-take its lost possessions in North

successfully forcing open the river would be low in the absence of a united front among the states. In 1787, Spain controlled New Orleans and thus could relatively easily close the Mississippi; Jefferson later claimed that whichever country ruled New Orleans was the natural enemy of America (he said this before he bought New Orleans for the U.S.).

An individual state could thus envisage possible cases where a federal government could entangle it in wars that offered little except a chance to build a record of solidarity with the other states. There were, however, obvious threats for many states where they would need support from the others, support that by no means could be depended upon to be forthcoming under the Articles of Confederation.

Defense is a pre-eminent textbook example of a public good. An application of public-goods theory to defense in a federation is not straightforward, however, when member states face different circumstances and have differing views regarding the good. Take the hypothetical example of an attack on the Spanish Floridas, as advocated by a number of Americans. The marginal utility for the thirteen states of one more dollar spent on this is the sum of marginal utilities across the thirteen, but one state's view of the net benefits to it of the activity might differ greatly from another state's. Most sharply, one state might have substantial marginal *dis*utility from any dollar thus spent, but another might have substantial positive marginal utility. A state might well worry that the federal government would lead it into a series of wars that offered that state no benefits but only costs. Further, to the extent that a state had moral qualms about a particular war, there might exist no pattern of side payments, from the states in favor to those against, that could lead all thirteen to agree to go to war. In principle, then, the public-good nature of defense could be a deterrent to forming a Union rather than an incentive. In practice,

America, including Canada and Louisiana. Indeed, Spain ceded Louisiana to France in 1800 under Napoleon, who sold the Louisiana Purchase to the U.S. in 1803.

for example, the New England states were much less enthusiastic than the Western and Southern states in declaring war on Britain in 1812, and numerous merchants in New England traded with the British in Canada during the War of 1812. Similarly, during the undeclared war with France in the late 1790s, under President John Adams, U.S. sympathies were deeply split between Britain and France.

Foreign policy. Under the Articles of Confederation, Congress was entrusted with negotiating foreign treaties. Some foreign governments were reluctant to conclude treaties with Congress, however, because Congress could not bind each state to carry out the terms of treaties. Indeed, many states refused to carry out provisions of the Treaty of Paris (1783) that ended the Revolutionary War; for example, property of those loyal to Britain was often seized and not returned, in violation of the treaty. Each sovereign state could in principle enter into treaties with foreign countries; if any did this might lead to the dissolution of the Confederation, but the Confederation had no power to stop a state from doing so.

In 1787, the thirteen states had fewer than 4 million residents,¹³ and perhaps one sixth of these were slaves. The largest state, Virginia, had approximately 700,000 residents, and the smallest, Delaware, had approximately 70,000.¹⁴ Some observers believed that, in the absence of a strong federal government, most of the individual states could not get by over the longer term without forming an alliance with one of the great powers. In essence, at least some states would have no choice but to pick one among the great powers, though perhaps changing alliances on occasion. (When the small states threatened to leave the Constitutional Convention in 1787 over the issue of equal representation for states, some of their representatives explicitly threatened to

¹³ Many writers conjectured, however, that the population of the American states would double every 25 years and that America would one day thus become a powerful empire (Draper 1996). Britain's population was approximately twice as large, though its population growth was much slower than America's. For rough comparison, perhaps 30

turn to the great powers for protection.) Of course an individual American state was likely to be dominated by the much more powerful great power. A domino effect was envisaged: As some states began to form alliances with great powers, the other states would feel pushed to form their own alliances, perhaps with competing great powers. The potential for the states to become involved with wars among the European powers seemed real and threatening, and Europe had spent a good part of the 1700s at war.

Already the states had experience with the great powers fighting their wars in part in North America, for example, the French and Indian War (the Seven Years War in Europe). During this war, the French and their Indian allies fought the British in Canada, in the American colonies, and on the western frontier, as well as in Europe.¹⁵ The danger seemed to be that individual states would end up inviting in the great powers, and North America would then unavoidably become involved in European wars.

The alternative seemed to be to form a federation that had supreme foreign and defense power over the states. In essence, the states would *permanently* ally with each other rather than foreign powers, and thus united among themselves, could pursue a policy of non-alignment with the European powers¹⁶. In the 1780s, the European great powers clearly included Britain, France and Spain, and The Netherlands were an important financial and trading country, with a still-important navy; at some remove, Prussia, Russia, Austria-Hungary, Sweden and Portugal were

years later the Austro-Hungarian Empire had approximately 30 million residents (Okey 2001), while the U.S. had 9.68 million residents in 1820.

¹⁴ The free residents in the two were approximately 450,000 and 45,000.

¹⁵ Other great-powers wars in America were King William's War (the Nine Years War), Queen Anne's War (the War of the Spanish Succession) and King George's war (the War of the Austrian Succession; see Draper 1996).

¹⁶ Under the Articles of Confederation, Congress could not compel states to honor treaties it negotiated, and could not stop states from doing their own negotiating. The alliance of the states was thus inherently unstable and temporary, however much the Articles of talked of a perpetual treaty.

capable of playing important roles.¹⁷ The Americans thought of themselves as a growing maritime power, and *ceteris paribus* preferred neutrality and more-or-less free trade with all. Alliance with Britain would force the Americans to blockade where and when the British decided. Alliance with France would make U.S. shipping the target of the British navy, the dominant navy in the world. Better to be non-aligned and powerful enough to make non-alignment work.

The foreign policy and defense difficulties that faced the states do not seem to be public-good or externality problems. Rather, the issue was one of forming optimal coalitions for foreign policy and for defense. The argument presented by supporters of the new constitution seemed to be that the optimal coalition was for the thirteen states to form a permanent non-aggressive alliance,¹⁸ one that ruled out state membership in other alliances.

Federal taxation, expenditure and debt. The Confederation inherited a large debt from the Revolutionary War. It could not pay the debt, and had little credit; the debt traded at a discount, often huge, and foreign states were reluctant to make loans to the Confederation. The Confederation could not raise taxes from tariffs or levies on the states, save to the extent each state voluntarily responded to requisitions from Congress; and some states were notoriously unresponsive (Connecticut, for example), and none was up-to-date on paying requisitions. Of course, the pinch on the revenue side severely limited the expenditure side. To the extent there

¹⁷ In the War of Spanish Succession (King William's War in North America), Britain and Prussia were allied against France, Austria-Hungary and Russia (Draper 1996), but these alliances tended to be unstable.

¹⁸ There is little evidence to suggest the Framers intended an aggressive policy against the European powers. The Constitution does not restrict the U.S. to non-aggression, but a declaration of war requires majority votes in both the House and Senate, and the president must be in favor if he is wholeheartedly to carry out his role as commander in chief. To be sure, many in the U.S. thought that in some long-distant future, the U.S. would stretch to the Pacific. Others had designs on Canada and the Floridas, and even land west of the Mississippi, but aside from unsuccessfully invading Canada in the War of 1812 (1812-1815), as in the Revolutionary War, the Floridas and the Louisiana Territory were acquired by negotiations.

were important common purposes, for example, defense, the severe limitations on revenues hindered the common purposes.

The Constitution gives the federal government the power to impose and collect tariffs directly from individuals involved in international trade. The states do not collect tariffs as agents and then turn the funds over to the federal government. These funds, then, are not like requisitions under the Articles of Confederation, which the states could ignore.

The federal government was not granted the power to impose or collect income taxes. The income tax is the main source of central-government income in modern industrial economies. The revenues from tariffs have a maximum that is not sufficient to finance the great amount of federal spending in the period after the First World War. The Sixteenth Amendment (1913) gave the income tax power to the federal government, and starting modestly, both federal taxation and expenditure have blossomed.

Police Powers. “Police power” is a technical term in Anglo-American law. It refers to government powers to regulate the economic and social interactions of individuals, public health, public safety, religion and public morals. Thus, wages and hours legislation, drug safety, restrictions on or guarantees of religion, laws concerning prostitution or homosexuality, traffic regulations, taxes or subsidies designed to influence individuals’ behavior are all comprehended by police powers. The U.S. Constitution grants no police powers to the federal government, and thus reserves them all for the individual states. At the time the Constitution was written, the individual states claimed all of these police powers, and most of the states exercised police powers extensively. Further, states were jealous of maintaining their control of police powers, and consciously chose different patterns of exercising them from other states. For most police powers, it did not occur to the founding fathers to consider raising them to the federal level.

Further, the Constitution would not have been ratified if it had given the federal government supremacy over any significant set of police powers. Beginning in the 1900s, however, but particularly in the 1930s, the federal government began to accumulate a great deal of police powers, essentially through Supreme Court decisions. Congress has sole power to regulate interstate and international trade. Because, in a general equilibrium system, every economic action within a state has some effect on interstate or international trade, direct or indirect, a generous interpretation of how small the effect must be to justify federal intervention serves to allow almost any federal intervention Congress or the president desires. Thus, Congress came to have the power to regulate drugs within states for their safety and effectiveness. Congress gained the power to set wage and hour standards within states. The federal government gained control over enforcement of anti-prostitution laws and of bank robbery laws. In this accumulation of power, two other important instruments were Supreme Court interpretations of the Necessary and Proper clause in the Constitution, and the Fourteenth Amendment to the Constitution. Under the Necessary and Proper clause, if the federal government has the power to regulate drugs for safety and effectiveness, then it has the power to make all regulations that are necessary and proper for this regulation, save those that are themselves unconstitutional. The Supreme Court came eventually to interpret the Fourteenth Amendment as allowing the federal government to intervene in states to protect rights that are guaranteed to individuals under the Bill of Rights. In particular, federal law trumps state laws that relate to any rights guaranteed under the Bill of Rights.

Anarchy and Threats to Republican Government. Those who wanted a new constitution were explicitly in favor of a stronger federal government; they viewed a number of grave problems as arising from the weakness of the Confederation. Many thought the Confederation

was so weak that it was in danger of falling apart under either foreign or internal pressures. Internal pressures had two forms. On the one hand, some state governments adopted policies that seemed likely to undermine their republican governments. Some state governments were corrupt. Some issued paper money in great volume, undermining the real value of nominal debt. Some manipulated bankruptcy laws ex post to the disadvantage of all creditors or of particular creditors who were non-residents of the state. On the other hand, many observers saw the danger of rebellion within a state. Shays' Rebellion in Massachusetts, just before the Convention, was unsuccessful, but impressed many with the potential that armed factions had to overthrow the elected, legitimate republican state government, perhaps replacing it with a dictatorship or oligarchy. Many supporters of the Constitution wanted a federal government strong enough to crush a rebellion in any state, and thereby ensure the continuance of republican government in all states.

Some anti-federalists, opposed to ratification of the constitution, argued that any uprising could and should be put down by the individual states' militias, and argued that relying on a standing federal army was dangerous to liberty.¹⁹ Further, many argued that the major source of unrest would be state and particularly federal attempts to restrict citizens' rights. From this viewpoint, perhaps the best way to promote internal stability was to place strong restrictions on possible abuses of government power, particularly on the power of the federal government, which was farther removed from the individual citizen's control than was state government.

Other issues that might be federal. Some states seemed to be out of control and wholly corrupt. Rhode Island was an example. It ran highly inflationary monetary policy, and was also a by-word for corruption and legislative instability. By and large, the states were willing to let

another state run corrupt and inefficient internal policies, as long as these policies did not spill over into other states. The major exception was monetary policy; many people and states wanted to get monetary policy out of the hands of the individual states. The constitution ruled out the individual states issuing their own currencies, and made federal the question of what could be declared legal tender.

States differed greatly in their legal, religious, legislative and military institutions. Two states had only one house in the legislature (Pennsylvania and in effect Georgia), though the rest had two.²⁰ Some had an established church, or faced great pressure to establish one.^{21, 22} The states had different qualifications for voters.²³ By and large, the constitution left these issues to the states—these are police powers. The main action was that the constitution ruled out any religious test for holding *federal* office; the Bill of Rights, added to the constitution in 1791, prohibited any *federal* established church in the United States.²⁴

¹⁹ Fear of a standing army had been an important opposition view in England for over a hundred years among those concerned with liberty. The standing army had been used to support the power of the king and his ministers against their opponents.

²⁰ During the colonial period almost every colony had a governor, council and general Assembly, modeled on the system of King, House of Lords and House of Commons in Britain. Of course, the governors in no way had powers comparable to the King, and the councils were typically elective—there were no Lords in America, hereditary or otherwise. Over time, the colonists began to view their General Assembly as playing a role comparable to Parliament; indeed, starting with taxation but going on to other issues, many began to view Parliament's laws as having no force in the American colonies unless ratified by their local General Assemblies (Draper 1996).

²¹ Connecticut did not disestablish the Congregational Church until 1818, Massachusetts until 1831.

²² In the eighteenth century, Catholics suffered political disabilities in five states, Jews in four (Keyssar 2000, p.6). At various times, free blacks could vote in several states, including North Carolina, and similarly for Indians or tax-paying Indians.

²³ On the one hand, a much larger percentage of adult, white males could vote in America than in England. Further, the English problem of rotten boroughs did not exist to nearly the same extent in the colonies, and the gross under-representation of cities was much less. On the other hand, historians are split on the percentage of white, male adult suffrage in the colonies; the evidence, mostly from the mid-eighteenth century, is incomplete and of uneven quality (Chandler, 1901, Williamson 1960, Pole 1966, Brown 1976, Dinkin 1977). Suffrage for white, male adults was restricted mainly through property or income requirements for voters. Some argue suffrage was 80% to 90%, others that it was only 40% to 50%. The extent of the suffrage very likely fluctuated with location and over time. One view is that white, male suffrage had fallen in America to below 60% by the start of the Revolutionary War (Keyssar 2000 p. 7). Brown (1956), however, after detailed research on Massachusetts, argues that likely 90 to 95 percent of white males had the franchise at the time of the Constitutional Convention.

²⁴ Commentators are divided on the importance of the Bill of Rights in American history, and on the intellectual merits of the Federalist and Anti-federalist arguments regarding the need for a Bill of Rights (Levy 1992; McDonald 1997).

3. Threats to the Durability of the U.S. Constitution: The Survival of the Republic

Until perhaps 1830, conflicts over war and trade policy were the greatest dangers to the survival of the Union. During the Napoleonic Wars, for a number of years the Federal government essentially forbade any trade, in an attempt to avoid being drawn into war with Britain or France and their allies. This led to a good deal of economic pain among the New England states, which were heavily involved with trade in general and shipping in particular. New England states opposed the War of 1812 (1812-1815)²⁵ against Britain, and during the war, New England suffered substantial economic pain. There was talk of the New England states seceding from the Union to form their own country, perhaps with some other northern states, and delegates from a number of New England states met at the unsuccessful Hartford (Connecticut) convention of 1815 (Adams 1905, Banner 1970).

The Southern states were highly agricultural, with slavery important in each of them, more important in some than in others. The South as a whole had strong incentives to favor free trade, because it was an exporter of agricultural products, and an importer of shipping services and manufactured goods. Northern states were more favorable to industrial protectionism—arguing for protectionism on grounds of infant industries and self-sufficiency, among others. These differing interests led to grave inter-sectional conflicts over trade policy. Many southern leaders labeled the tariff bill of 1828 the “Tariff of Abominations.”²⁶ In reaction to tariffs, but also to some other uses of federal power, a number of important Southern leaders proposed the

²⁵ Peace was agreed to at Ghent in 1814, but news did not reach the U.S. until after the U.S. victory at the Battle of New Orleans in January, 1815. This victory took some of the sting out of the British successes in raiding New England and in capturing and burning Washington, DC (1814).

²⁶ This bill raised protective tariffs to higher levels than before; the tariffs of 1816 and 1818 are described as moderate; the tariff of 1824 was opposed by Georgia, South Carolina and Virginia, but not by other southern states. Previously, southerners were content to have moderate protective tariffs, because it appeared that southern states using slave labor could be competitive with northern states in manufacturing; even Jefferson could support the moderate protective tariff of 1816. As manufacturing outgrew home and small-factory production, it became clear

doctrine of “Nullification,” whereby any state could nullify on its own territories those laws of the Federal government that violated the sovereign rights of the individual states.²⁷ In principle, the Supreme Court could overturn a particular act of nullification, and the Federal executive could use force to see to it that the Federal law in question was carried out. The Supreme Court did in fact overturn a number of acts of nullification, but the Court’s decisions were never imposed on the states because no president was willing to use federal troops; indeed, on some occasions, a president disagreed with the Supreme Court’s decisions and purposely did not enforce them. Nevertheless, these conflicts over trade and other federal issues stirred hostility, weakened respect for the Union, and drained away goodwill at the national level.

Slavery was the rock on which the Union crashed and almost foundered, 73 years after the Constitutional Convention (South Carolina was the first state to secede, in December, 1860). Many delegates at the Constitutional Convention viewed slavery as a moral evil; none defended it there as a moral good, though such defenses later arose, especially after 1820. Nevertheless, slavery was seldom explicitly addressed at the Constitutional Convention. Delegations from at least two deep-South states, Georgia and South Carolina, made it clear that they would not sign a draft constitution that endangered slavery, and argued that their states would surely not ratify such a constitution. The South was not solid on slavery, however. Among the Virginia delegates, James Madison spoke against slavery at the convention, and George Mason was known to favor abolition, as was George Washington, who freed his slaves in his

that slave labor had difficulty competing with northern production, and southerners came to see only costs to them from protectionism.

²⁷ Nullification was the extreme version of “interposition” of the state between the Federal government and the people. John Calhoun of South Carolina was the great theorist of nullification (in his “South Carolina Exposition and Protest”). The idea of interposition can be traced back to the Virginia and Kentucky Resolutions of 1798 and 1799, which were directed against the Alien and Sedition Acts; Jefferson and Madison supported these Resolutions (McDonald 2000).

will.²⁸ George Wythe, Chancellor of Virginia, left the Constitutional Convention early when his wife fell sick (he strongly supported the Constitution at the Virginia ratifying convention). He manumitted his slaves in his will. Alexander Hamilton of New York was outspoken against slavery (New York at the time had 30,000 slaves), as was Benjamin Franklin of Pennsylvania, who had opposed slavery since the 1730s. It appeared to some that the convention would fail if restrictions on slavery were addressed in a serious fashion—and restrictions were not seriously addressed. This omission left slavery as an on-going source of tension among the states; over time, it became a growing divide between the Northern and Southern states.²⁹ At the time the Revolution began, slavery was legal in every state; at one point, New York had more slaves than some southern colonies. Slavery was still legal in most states at the time of the constitutional convention. No European country had outlawed slavery. Britain outlawed the slave trade in 1807, but would not outlaw slavery in its Empire until 1838, and France did not outlaw slavery until the 1840s.

During the first three decades of the 1800s, there grew a moral revulsion against slavery, in those American states and European countries where slavery was not quantitatively important and hence not economically important. In those countries and states where slavery was economically important, there was little such revulsion. Indeed, residents of these slave states came to see themselves as increasingly under unfair attack from other states and countries. The conflicts over slavery were complicated by social and “scientific” views of the time that stressed white superiority. Many whites, even those who opposed the extension of slavery or opposed

²⁸ He did not, and could not, order manumission for slaves at Mount Vernon who were owned by his wife, Martha. She had only a life interest in these slaves, however, whom she had inherited from her first husband, Daniel Parke Custis. On her death, her slaves went to descendants of her children with Custis, and these descendants did not free the slaves. (See Dalzell and Dalzell 1998, Chp. 10.)

²⁹ The New England states were heavily involved in the slave trade at the time of the convention and previously. On some matters regarding slavery, Connecticut formed alliances at the convention with Georgia and South Carolina (Miller 1992). See also the record in Farrand (1937).

slavery altogether, were unwilling to accept the idea of social equality with blacks, and were unwilling to have large numbers of free blacks near them. Many southerners viewed northern anti-slavery people as hypocritical. By the early 1830s, changes to the institution of slavery could not be discussed politically in the South, or indeed in open social settings there.

4. Some Lessons from United States Constitutional History

Some issues have to be addressed at the federal level. In part, they are the reason for the federation: For the U.S., trade, monetary policy, and foreign and defense policy were such issues. Finding a federal solution for these problems was a *raison d'être* for a federal union under the new constitution. Other issues should be addressed at the federal level; if they are not, they may lead to major problems that will fester and may destroy the federation. Slavery is the key example of such an issue. Ignoring it, leaving it to work itself out, bought temporary calm and agreement, but at the cost of great violence later.

It appears that trade, foreign and defense policies could not have been ignored in the U.S. constitution. If they had been ignored, it seems doubtful the constitution would have been approved. Further, supposing they had been ignored but the constitution approved, it is likely the Union would have fallen apart after a few decades; indeed, before the Constitutional Convention, many felt the government under the Articles of Confederation would fall apart because of lack of central power over trade, defense and foreign policy.

It is not clear that individual states had to be excluded from monetary policy. Indeed, in some ways they were not; each had its own state banking system. Nevertheless, no state had its own captive bank to buy the state's obligation with printed money. Each state could print up and try to sell its debt obligations, but it could not force banks in its territory to buy.

Pushing trade, defense and foreign policy to the federal level led to great stress on the Union; most states were gravely dissatisfied with some federal policies at some times. It was a chance that had to be taken, however. These policies had to be federalized if the Union was to have a chance, but the conflicts over them subjected the Union to grave danger.

It is a grave mistake to federalize issues if they do not have to be federalized. Power at the federal level holds the potential for weakening, perhaps even destroying the federation. Perhaps the test is this: Will the federation fall apart if the issue is not taken to the federal level? Of course, one can make severe mistakes on this question—slavery is the life-threatening example of an issue that was not addressed at the start and almost killed the Union. For the great part, though, the Constitutional Convention took care to leave at the state level issues that *could* go to the federal level but did not *have* to go to the federal level.

If the federation is likely to survive with a particular issue at the level of the member states, then there is a good case for keeping that issue there. Pushing it to the federal level may in time generate conflicts among the member states that are hard to manage. Even if the conflict can be managed on a particular issue, conflict is likely to drain goodwill away from the federation. The danger is that when issues arise that can be managed only by drawing on a reservoir of goodwill, the reservoir is empty.

There is likely to be a wide gray area of issues where it is hard to see whether an issue might be better handled at the federal level, or by member states, with many pros and cons, and the balance unclear. Successful federal policy depends on goodwill on the part of member-state citizens towards the federal government. The danger is that federal government will take decisions on marginal issues, where the federal decision is not noticeably better than what the member states would produce, but the member states are angered by the federal decision. These

federal decisions produce the externality of draining the goodwill that the federal government requires to make decisions that truly are better made at the federal level.

5. Some Implications for A Constitution for the European Union

The EU is the institutional product of a process with a single *raison d'être*: to stop wars among the countries of Western Europe. The method of achieving this goal was economic integration, starting with the European Coal and Steel Community. The EU long ago became a federation; sovereignty is shared between the EU and its member states. Now many politicians envisage a federation with goals beyond peace in Western Europe and methods beyond economic integration. For decades, EU treaties have stressed commitment to “an ever closer union.” This is an emotive slogan, but has little content. Few envisage a unitary state, the logical limit to “an ever closer union.” In a unitary state, educational policy for example would be set completely at the federal level. Instead, it makes sense to ask what limits to federalism the EU and its member states might prudently choose in light of the lessons of U.S. constitutional history. A minimalist but still quite expansive answer has the EU aiming for a union with two parts: first, a customs union with a single market for goods, services, labor and capital; and second, a monetary union, with a common currency and single central bank. Both parts are already achieved, though admittedly in imperfect form that leaves much scope for reform. A key possible addition is common defense and foreign policies. If the lesson of U.S. constitutional history were that the EU should be closely similar to the U.S., then federalizing EU defense and foreign policies would make sense. Rather, the lesson of U.S. constitutional history is to limit federal powers to those for which there is a strong consensus that they must be federalized. In 1787, there was a fairly strong consensus that a new constitution had to make defense and

foreign policies federal issues. There seems at best a weak consensus in the EU to federalize foreign and defense policies.

The ambience of federal constitution making is much different in the EU from in the U.S., especially at the time of the Constitutional Convention. The U.S. Constitution faces up to most of the hard issues of what is to be a federal power and what is reserved to individuals or the states. To be sure, the federal government has accumulated much more power than was envisaged in 1787. This occurred through expansive use of the Interstate Commerce Clause, which lets the federal government regulate activities that can be plausibly argued to have significant effects on interstate commerce, as well as the Necessary and Proper Clause. It also occurred through passage and interpretation of the Fourteenth Amendment (1868), which eventually was interpreted to extend rights guaranteed under the federal constitution to individuals in their dealings with member states, not just the federal government. And it occurred through the vast increase in federal resources made possible when the Sixteenth Amendment (1913) authorized a federal income tax.

The ambience of federalization in the EU is captured, perhaps, by some quotes. “A senior German diplomat [argues] that the big decisions in the European Union have always been made by elites, and have then gained popular acceptance later. ‘If we had had a referendum on the treaty of Rome, people might have rejected it on the grounds that it raised the price of bananas.’” (*Economist*, Oct. 5, 2002, p. 36.)

“Jean-Claude Juncker, Luxembourg’s prime minister, once described the E.U.’s ‘system.’ ‘We decide on something, leave it lying around and wait and see what happens,’ he explained. ‘If no one kicks up a fuss, because most people don’t understand what has been decided, we continue step by step until there is no turning back.’” (*Economist*, Sept. 14, 2002, p. 33.)

In contrast, “The [EU] constitution should start with just a few lines, setting out what the EU is—a union of sovereign states who have decided to pool some of that sovereignty, better to secure peace and prosperity in Europe and the wider world. It should confirm that the Union exercises only those powers which are explicitly and freely conferred on it by the member states, which remain the EU’s primary source of democratic legitimacy. (Jack Straw, “A constitution for Europe,” *Economist*, Oct. 12, 2002, pp. 41- 42.)

On the one hand, the evolution from the European Coal and Steel Community to the European Union is widely viewed as a success. On the other hand, the discussion in this paper suggests that if more and more issues are federalized without the clear, willing consent of the citizens of member states, federalization can easily go to far.

6. Some Conclusions: Self-Denial of Power at The Federal Level

The amount of government legislation and regulation has a strong empirical tendency to grow, and a number of theoretical arguments suggest that some growth is largely inevitable.³⁰ Bureaucracy at the federal level may well cause pressures to raise more and more issues to the federal level. From a constitutional viewpoint, these pressures should often be resisted. Raising issues to the federal level, when the issues do not have to go there, puts stresses on the federal system that could be avoided. These stresses have a tendency to be cumulative, draining the reservoir of good will among the member states. With decline in good will and growth of

³⁰ At the time of the Constitution, 1787, the individual states had extensive government intervention in the economy, and it was largely taken for granted that the state government had a large role to play in the economic development of the state. The question was rather the extent of the role of the federal government in such activity. Some argue that the constitution was far from being designed to facilitate capitalism (McDonald 1984). Instead, the role of the federal government in economic activity was set, first, by the evolution of policies under the first several administrations, in particular Hamilton’s federal system, and the opposition to it by Jefferson and Gallatin (Balinsky 1958, McDonald 1982, Brookhiser 1999). Second, the accumulation of police powers at the federal level was gradual and arose in major part through Supreme Court decisions that turn on the Interstate Commerce clause, the Necessary and Proper clause, and the Fourteenth Amendment.

bitterness, the effectiveness of the federal government may decline; in the limit the federation may collapse.

Goodwill on the part of member-state citizens towards the federal government is an asset, one that the federal government must manage wisely if federal policy is to be effective, or indeed the federal government is to survive. Federal bureaucracies have a strong tendency to view every issue as a federal issue. The individual federal bureaus are myopic, however, and do not consider how their decisions affect the overall reservoir of goodwill towards the federal government. One effective way of limiting unintentional damage to goodwill is to set constitutional limits on the issues that can be pushed to the federal level. This suggests two main areas for limitation in a EU constitution. First, much of EU regulation falls under the head of police powers, and EU control over police powers seems to have no formal limits and the extent of regulation to be growing. Police powers, however, are the government interventions that most closely and sensitively touch the individual, and are thus most likely to lead to hostility towards the federal government and system. A EU constitution should set limits on the federalization of police powers, and perhaps roll them back to the member-state level. Second, the EU has taken only modest steps to federalize defense and foreign policies. There seem no very compelling arguments for further federalization, and there are a number of significant dangers from federalizing them. This suggest a EU constitution should set very tight limits on their federalization.

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August 20, 2003

Appendix to:

Essay 1, "A Federal Constitution for the European Union:
Some Lessons from United States Constitutional History,"

Influences on The Founders and Framers

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Abstract: A huge literature deals with the interests and ideologies of the Revolutionary War Founders and the Constitution Framers. The Founders' and Framers' interests and ideologies have much in common, but there are some important differences. Both groups had complex economic interests that often over differed greatly across men and time. The Founders were familiar with the British political theorists and controversialists of the seventeenth century (Locke, Harrington, Sydney) and eighteenth centuries (Bolingbroke, Trenchard and Gordon, Pope, Swift, Defoe), and also with some continental writers such as Montesquieu. The Framers also knew Scottish Enlightenment writers, particularly Hume. The Founders and Framers were highly eclectic, taking ideas from authors on both sides of many disputes. No one slavishly followed a particular system. The Founders were familiar with older writers on British law, for example, Coke, and the Framers were also familiar with Blackstone, and both were familiar with older writers on international law (Grotius, Pufendorf and Vattel). The Framers knew works by mercantilist writers and by a number of economists, particularly Adam Smith, but also another Scot, James Steuart, and Quesnay and the French physiocrats.

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Some Lessons from United States Constitutional History,"

Influences on The Founders and Framers

Abstract: A huge literature deals with the interests and ideologies of the Revolutionary War Founders and the Constitution Framers. The Founders' and Framers' interests and ideologies have much in common, but there are some important differences. Both groups had complex economic interests that often over differed greatly across men and time. The Founders were familiar with the British political theorists and controversialists of the seventeenth century (Locke, Harrington, Sydney) and eighteenth centuries (Bolingbroke, Trenchard and Gordon, Pope, Swift, Defoe), and also with some continental writers such as Montesquieu. The Framers also knew Scottish Enlightenment writers, particularly Hume. The Founders and Framers were highly eclectic, taking ideas from authors on both sides of many disputes. No one slavishly followed a particular system. The Founders were familiar with older writers on British law, for example, Coke, and the Framers were also familiar with Blackstone, and both were familiar with older writers on international law (Grotius, Pufendorf and Vattel). The Framers knew works by mercantilist writers and by a number of economists, particularly Adam Smith, but also another Scot, James Steuart, and Quesnay and the French physiocrats.

Appendix to:

Essay 1, "A Federal Constitution for the European Union:
Some Lessons from United States Constitutional History,"

Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist It is ideas, not vested interests, which are dangerous for good or ill.

John Maynard Keynes
*The General Theory of Employment, Interest
and Money* [1936] end

Influences on The Founders and Framers

The Founders and Framers were eminently practical men who did not glory in supposed freedom from intellectual influences, but sought out works of the best thinkers they could find, argued about their thoughts, and tried to learn the best from each to help them build a country.

A huge literature deals with the motives and ideologies that the Founders brought to the American Revolution and that the Framers brought to the Constitutional Convention. The Founders' and Framers' motives and ideologies have a substantial amount in common. There are important differences, however. If nothing else, the Founders worked in the Revolutionary and pre-Revolutionary periods that together covered say 1763 to 1781, and the Framers in 1787 had this experience, plus the experience of living from 1781 to 1787 under the U.S.'s first try at a constitution, the Articles of Confederation. This appendix gives a brief discussion of the influences on the Founders and Framers, with some discussion of differences between the two groups.

Economic Interests. Start with the influence of the Founders' and Framers' economic interests. Most of the Founders and Framers were lawyers, farmers, planters, merchants or

shippers when they were active in enterprise. Some were educated in England, but not many, and the majority did not go to college (the lawyers almost all had read for the bar in a practicing lawyer's office)¹. Most were men of property—sometimes only small farms, sometimes hundreds of thousands of acres. A number were rich for their time and place, but none were near as rich as the European rich of their day. A few built large fortunes, but most faced periods of grave financial danger, and some lost everything. Few were rich enough to afford to focus solely on politics. Some were land rich and cash poor, were always in debt, and had to borrow money for living expenses to participate in politics.

John Hancock was born rich and got richer. His fellow Massachusetts revolutionary, Sam Adams, inherited a small business and did not do well. John Adams was a lawyer and small farmer. He went to Harvard, the first in his immediate family to go to college. Benjamin Franklin was born the tenth son of a soap- and candle-maker, was apprenticed to a printer, became a successful printer, made a good deal of money, thereafter devoted himself to science, philosophy and politics, and became the best known American thinker of the eighteenth century, famous both in America and Europe. His fellow Pennsylvania revolutionary, James Wilson, was born to a poor family in Scotland, studied at Glasgow and Edinburgh in the midst of the Scottish Enlightenment, came to the U.S. at age twenty-four, practiced law and became famous and modestly well off. Robert Morris came to the U.S. from Britain at age thirteen to join his father, a tobacco exporter, and started work at age sixteen. He went into commerce and especially finance in Philadelphia, made a large amount of money, was vital to financing the Revolution, helped write the Constitution and get it ratified, eventually went to debtor's prison (1798-1801) and died broke (1806). Alexander Hamilton was born in the West Indies; his father deserted his family and then his mother died,

¹ See below for the courses in law that George Wythe offered at The College of William and Mary after appointment as the first professor of law in America in 1779.

leaving Hamilton on his own. e went to King's College in New York, served in the army in the Revolution, including four years on Washington's staff, became a famous lawyer, and played an important role in the Constitution's ratification. He was the first U.S. Secretary of the Treasury, and was deeply in debt when he was shot to death in a duel. George Washington was born into Virginia gentry, had little schooling, worked as a surveyor, fought on the frontier against the Indians and the French, married a rich widow, built up his wealth, and died owning 500,000 acres of western land and leaving an estate of \$500,000, a huge amount for the time. He was sometimes short of cash; for example, he had to borrow £10,000 to finance his move to New York in 1789 to take up the presidency. Thomas Jefferson was born into a rich, very prominent family, was related to most of the best families in Virginia and most of the prominent men in Revolutionary Virginia². He attended The College of William and Mary, then read law, wrote extensively, worked seriously in architecture, and was famous in America and Europe for his wide-ranging knowledge. He was ambassador to France, the first secretary of state, and the third president. He worried about money, tried to improve his fortune, frequently made bad business deals, and died owing more than \$100,000.

The economic-determinism school of analyzing the Constitution, starting with Charles A. Beard (1913) and others, and others attempted to bring an increase in analytical rigor over previous work (see Beard's useful but too-harsh discussion of Banfield and others in his Chapter I). This school was dominant for fifty years, and was influential also in analyzing the Revolution. The school was attacked in at least two directions. Beard's division of economic interests into capitalist and agriculturalist, with these interests explaining the writing and ratification of the Constitution, was

² His cousins included Edmund Randolph (governor of Virginia, participant in the Constitutional Convention and supporter of the Constitution in the Virginia ratifying convention, Washington's first secretary of state), John Marshall (supporter of the Constitution in the Virginia ratifying Convention, Congressman, envoy to France, Secretary of State under John Adams, and fourth Chief Justice of the Supreme Court); Henry "Light-Horse Harry" Lee (supporter of the

shown to be simplistic and to have little explanatory power. Beard divided people by their economic interests into one of two groups. On the one hand, as agriculturists, he classed small farmers, who tended to be debtors, held little or no national or state debt, and were in favor of paper money schemes. On the other hand, capitalists were rich planters, manufacturers, shippers, merchants, holders of national and state debt, and opponents of paper money. McDonald (1958 and 1965), Brown (1956)³ and others showed that the economic interests of the Framers, and of the individual states that ratified the Constitution, were substantially more complicated than Beard's simple dichotomy suggests. Further, they found that these interests changed greatly for some states and some Framers, sometimes within a few years. Main (1965) found "a pattern of social mobility so fluid as to render meaningless any interpretation of the period resting on class conflict" (Morgan 1992, p. 191). McDonald argues that the Framers' economic interests had important influence on their behavior, but not in the naïve way that Beard envisioned. All of the Framers knew of examples where people used political power or connection in their home states to further their economic interests, and most of them had done (or tried to do) the same. Their political opponents were often of the same background and economic class, and often had similar interests in western lands and the national and state debts left from the Revolutionary War. Further, interests or passions in addition to their economic interests drove the Founders and Framers. In particular, following Adair (1967), scholars have paid attention to the Framers' psychological motivations, particularly, the desire for Fame, seen as secular immortality. Many see the Framers' desire for Fame as similar to the desires expressed by ancient authors through many important early moderns (from, for example, Cicero to Sir Francis Bacon).

Constitution in the Virginia ratifying convention, governor of Virginia, father of Robert E. Lee); and John Randolph of Roanoke (Congressman, prominent supporter of states rights). (See Smith, 1996, Table between pp. 368-369.)

³ Brown gives a spare, 200-page critique, though it must be read with Beard (1913) at hand, and raises grave doubts about Beard's historical methods. McDonald (1958) devotes more than 400 pages do detailed, often quantitative, refutation of Beard's analysis.

All of the Framers and virtually all of the Founders considered protection of property one of the fundamental duties of government, and included in property the right to try to accumulate property. In this, they were representative of the large majority of white, male Americans of their day; imputing to this period notions of class struggle, socialism and communism from the nineteenth to twenty-first centuries is gross anachronism. As discussed below, the authors available to the Founders and Framers virtually all viewed property rights as the foundation of liberty; it was not that the Founders and Framers chose these views among a range, but that these views were all that systematic thinkers presented. For example, the Levelers in seventeenth-century England, tarred as radicals, had no interest in property redistribution (and proposed male suffrage, but not for servants, criminals or paupers); the small, contemporary group of Diggers proposed radical redistribution, but left hardly a mark in print. The authors the Founders and Framers knew virtually all thought property ownership helped a man to be independent, and many doubted a man with no property could really form and, in particular, exercise an independent opinion. They were deeply dismayed by the electoral fraud and vote buying in England in the 1700s. For these reasons among others, most Founders and Framers were willing to allow the states to impose property requirements on voters. For many of them, for example, both Adams and Jefferson, the ideal was a state composed mainly of small landowners, with few landless men and few large landowners, and no great landowners.

The term capitalist was just coming in to use, and was used often in a derogatory sense. The term capitalism was not in use for decades. A few of the Founders, and a few more of the Framers were engaged in large-scale commerce, and even fewer in finance and banking. Many were engaged in buying and selling land, particularly western land, in hopes of profit. To the extent the Constitution was designed to facilitate the Framers' economic interests, these interests were not viewed in terms of manufacturing and finance of the type that was soon to become common in the

Industrial Revolution in America. Further, the Framers left most economic and social regulatory power to the states with virtually no restrictions on the states save those in state constitutions, and the states were deeply involved in the economy.

The Framers knew that they would have to get the Constitution ratified to go into effect. They specified that each state should hold a special ratifying convention to debate and vote on the Constitution, with the Constitution going into effect when nine states had ratified it. Thus, they recognized they were under great pressure to design a Constitution that appealed to the interests of people in each state—and they did. As they went about this, they sometimes tried to help their particular interests as well, but they were limited by the need to “sell” a constitution to a wide range of voters in thirteen very different states. Most of the Framers had experience in politics and in its compromises, and worked to get an acceptable, if imperfect, document.

Ideological Influences. For interesting surveys of ideological influences on the Founders and the Framers, see Bailyn (1967, expanded edition 1992), Maier (1991, Chps. 1 and 2), McDonald (1982, Chps. I-IV; 1985, Chps. 1-4; 2000, Prologue, Chp. 1) and Miller (1992, Chps. 1-4). For a survey of seventeenth century English political thought, especially republican thought, see Fink (1945); for a survey of English Opposition writers of the late seventeenth century through mid-eighteenth century, see Kramnick (1968). Morgan (1989) surveys notions of popular sovereignty, and their influences, in England and America in the seventeenth and eighteenth centuries.

While some authors focussed on economic or psychological influences on the Founders and Framers in the wake of Beard and his school, other scholars turned to the ideological foundations of the Revolution and also the Constitution (for example, Mansfield 1965, Pocock 1965, and

Bailyn 1965, 1967 and expanded edition 1992, Maier 1991)⁴. These ideological influences can be traced back in the first place to the history and constitutional conflicts in England in the sixteenth and the early- to mid-eighteenth centuries. Scholars have identified a large range of authors with whose ideas the Founders and Framers were familiar.

The key is that a given Framers or Founder might take some ideas from one author, but not all his ideas, and take other ideas from other authors. A different Framers would have a different selection of ideas, though likely from a partially overlapping set of authors. Many of the influential authors whom the Founders and Framers knew disagreed sharply with each other. There is no one author that everyone followed in detail, and in their picking and choosing, the ideas a Framers might select need not be entirely consistent with each other, let alone consistent with the ideas of other Framers.

In particular, no one of the Founders or Framers ever put forth a more or less complete, well-articulated model of how a republic should be designed. Rather, they had ideas on many government topics, but tended to take the issues one at a time or at best address subsets of issues—until suddenly the Framers had to construct an entire federal government in 1787 at the Constitutional Convention.⁵ Related, the authors whom the Framers read did not for the most part offer complete systems, and this facilitated their American readers in picking and choosing among ideas. To be sure, some such as Plato with his *Republic* offered a more or less complete system, as did Hobbes with his *Leviathan* (published 1651), Harrington with his *Oceana* (published 1656) and Hume in some of his discussions (see “Idea of a Perfect Commonwealth,” first published in

⁴ Bailyn (expanded edition 1992, Postscript) argues that the Framers turned to much the same literature the Founders knew. In particular, he argues, the anti-Federalists used much the same literature as the Founders, with the same charges, fears and rhetoric, as in the run up to the Revolution in 1776.

⁵ The Founders and Framers had a first try at designing a federal constitution when they wrote the Articles of Confederation (submitted in 1777, ratified in 1781). Many thought the Articles ill-designed precisely because the drafters did not think them through as an integrated, balanced system with separation of powers and adequate checks and balances.

1752)⁶. Nevertheless, even those deeply influenced by some of Hume's thought, for example, on the constitution of a commonwealth did not adopt other parts of his system⁷.

Many of the Framers (for example, Hamilton, Madison and Gouverneur Morris) were familiar with, and some were deeply read in, ancient Greek and Roman history and political thought, as well as medieval and early-modern European history. Among the ancients were Plato (*The Republic*, *The Laws*), Polybius, Cicero and Plutarch (*Lives*). The Founders had access to Machiavelli's (1469-1527) works; later authors whom the Founders knew referred to his works frequently and favorably, particularly his *Discourses on Livy* (for example, Harrington, 1611-1677, in his *Oceana*, published 1656), though many deprecated Machiavelli's *Prince*. Many authors referred not only to ancient republics, but also the Republic of Venice, which they saw as an enduring republic, with mixed government and such perfect balance that it had survived 1000 years in liberty (Fink 1945, Chp. 2). Most influential, however, was British history, British law, and British political thinking. American leaders were knowledgeable about the English Civil War (1640-1660), the Commonwealth that followed the monarchy (1649-1660), the Restoration of the monarchy (1660), the Glorious Revolution of 1688, and the crisis of the Protestant Succession,

⁶ John Locke drafted for the government of the Carolinas a set of "Fundamental Constitutions" modeled on Harrington's *Oceana*, including an aristocratic, large-landholders upper house that initiated legislation, and a lower house that could vote only yes or no on legislation the upper house drafted (Morgan 1989, p. 129). This did not work at all well.

Hume (1985, p. 514) offered some praise to Harrington and *Oceana*. He dismissed Plato's *Republic* and More's *Utopia*: "All plans of government, which suppose great reformation in the manners of mankind, are plainly imaginary. Of this nature are the *Republic* of Plato, and the *Utopia* of Sir Thomas More. The *Oceana* is the only valuable model of a commonwealth, that has yet been offered to the public." Hume then discusses the flaws he finds in *Oceana*, and puts forward his own plans that avoid these flaws. Another well-known utopia was *The New Atlantis*, by Francis Bacon (1561-1626), who was greatly admired by many of the Founders and Framers.

⁷ Adair (1957) makes the case that Madison's notions of an "extended" republic, presented both at the Constitutional Convention and in the Federalist Papers, are based on a few final paragraphs in Hume's "Idea of a Perfect Commonwealth." Bailyn (expanded edition 1992, p. 329) finds Madison's notions of an "extended" republic, as opposed to Montesquieu's famous views that only a small republic could survive, were anticipated in print by two authors supporting the Constitution. Further, Bailyn (p. 368) argues that Madison "was doing what ... James Wilson and Alexander Hamilton were doing, too ... and what many other lesser figures ... were also doing, namely, showing the inapplicability in America of the inherited notion that republics can survive only on a small scale.... The difference between Madison and the other federalist writers who tackled the problem of size lay not in the point of the

and the political and historical literature around these seventeenth and early- to mid-eighteenth-century upheavals. They were knowledgeable about the Whig governments from 1721 to 1756, particularly under Walpole 1721 to 1742; about the Opposition to these Whig governments; and about the evolution of British law over this period.

The 1600s were a turbulent, traumatic period in English history. James Stuart succeeded the childless Elizabeth I in 1603 as James I, the first Stuart king. His son Charles I called a parliament in 1640, but eventually he and the Parliament fell out, civil war resulted, a Rump of the Parliament executed Charles in 1649, the Parliamentary general Oliver Cromwell dismissed the Rump in 1652, and became Lord Protector in 1653. Cromwell died in 1658, and in 1660 Parliament invited Charles II, son of Charles I, to return as king. From 1640 to 1660, so-called Commonwealthmen wrote extensively, discussing issues from the rights of the people, especially regarding religion, under a limited monarchy, to justifications and plans for a republic with no monarch (Milton, Harrington). Charles II had no legitimate children, though fourteen acknowledged illegitimate children. His heir appeared to be his brother James, but James was a Catholic, and unacceptable to many Protestants in England. His daughters, Mary and Anne had been raised Protestant, however, and each was married to a Protestant, Mary to Prince William of Orange in The Netherlands, Anne to a Danish prince. Attempts to pass Exclusionary acts to bar James or any Catholic from the throne failed, and James II peacefully succeeded his brother in 1685. Eventually, civil war broke out once again, and in the so-called Glorious Revolution of 1688, Parliament deposed James II and in 1689 invited William of Orange and Mary to be king and queen of England. In the settlement of 1688-1689 between William and Parliament, a great deal of power was explicitly lodged in the House of Commons. Included in the settlement was the

arguments but in the style and quality of argumentation.” Bailyn (1992, pp. 371-375) discusses other attacks by Americans on the authority of Montesquieu’s views.

English Bill of Rights (1689), which was substantially weaker than the later U.S. Bill of Rights (1791). The English Bill of Rights stipulated that no one could be king who was Catholic or married to a Catholic. The conflict around the Glorious Revolution occasioned much writing, ranging from defenses of the absolute, divine right of kings (Sir Robert Filmer, written c. 1630, publ. 1680), to Whig defenses of the Whig Settlement (Locke, written c. 1680, publ. 1690), to republican objections to monarchy and excessive Parliamentary power (Algernon Sidney, written c. 1680, publ. 1698). William and Mary died childless, and Mary's sister Anne became queen in 1702. She also died childless, and the succession passed to a protestant—George, the Elector of Hanover, who was a grandson of Elizabeth Stuart, a sister to Charles II (and daughter of James I). George succeeded Anne Stuart as George I, the first of the Hanoverians. His son was George II, and a great-grandson was George III.

Under William and Mary, and then Anne and George I, the system continued of monarchs governing through ministers who were much strengthened as compared to the early Stuarts. William shifted between Whig and Tory ministers on the basis of who could most effectively push his programs at a given time.⁸ There were ten parliamentary elections between 1695 and 1715, with Whig and Tory majorities coming and going. At the end of her reign, Anne fired the Tory, Viscount Bolingbroke, who was (in effect) first minister; Bolingbroke fled to France and George I turned to Whig ministers. In 1721, the Whig Robert Walpole became first minister, and held great power until his fall in 1742. Walpole expanded and regularized royal patronage—and outright bribery—to exert control over the House of Commons, or as some put it, to avoid domination of the king and his ministers by the Commons' power. Opponents objected to the power the ministers wielded and to the blatant, acknowledged corruption on which this power rested. Groups of

⁸ Some authors think that parties were not well enough organized until say after the American Revolution to label governments as Tory or Whig. Nevertheless, whether a given politician was Whig or Tory was clear.

Tories, for example, around Viscount Bolingbroke (Swift, Pope and many others), as well as opposition Whigs, for example, Trenchard and Gordon, as well as religious dissidents, wrote extensively criticizing Parliament, the ministerial system and corruption. American colonists were familiar with this history, the great constitutional controversies that arose in the seventeenth and eighteenth centuries, and the literature they inspired.

Political Theory and Commentary. All the Framers were deeply familiar with Locke (1690) and his compact, consent and natural-rights theories, and with his views on the benefits of a “mixed government” or a “mixed monarchy.” They were also familiar with other literature associated with the Whiggish Glorious Revolution of 1688, for example, Filmer’s *Patriarca*, a defense of absolute monarchy (publ. 1680, written c. 1630). In turn, Locke and other writers from the time of the Glorious Revolution and its aftermath were familiar with writers who during the Commonwealth wrote on republican principles or theory, for example, James Harrington,⁹ the poet and controversialist John Milton, and Algernon Sidney. They were also familiar with Thomas Hobbes (*Leviathan* 1651), who assigned much more power to the state and king than these others. These writers viewed property rights as the foundation of liberty. Similarly, the Levelers in seventeenth-century England did not propose radical redistribution of property (though the contemporaneous Diggers did); indeed, in the Levelers view (Morgan 1989, pp. 72-73), Parliament should be excluded from power to “levell mens Estates, destroy Property, or make all things Common.” They did, however, discuss at length the notion of the sovereignty of the

⁹ Morgan (1989) writes:

Harrington ... offered in his *Commonwealth of Oceana* a model of government so bewildering in its detail that it could scarcely have had a wide reading. But its analysis of England’s society and politics was carried to the public in simpler form in a variety of briefer tracts, including many by Harrington himself. (p. 89) ... Harrington expounded, or rather buried, these ideas in his tiresome Utopian fantasy. But the fact that *Oceana* is virtually unreadable did not prevent the ideas in it from finding their way into popular tracts and gaining wide acceptance in both England and America in the seventeenth and eighteenth centuries. (p. 157)

people.¹⁰ To be sure, Harrington in *Oceana* stressed the need for periodic redistribution of land to prevent some owners from growing too powerful by accumulating great holdings. He argued, however, that an Agrarian law that ruled out primogeniture and required more or less equal distribution among heirs would be sufficient (Fink 1945, Chp. 3).

The Framers thus had access to these older writers of the seventeenth century and before, both directly and indirectly through later writers. Jefferson's draft of the *Declaration of Independence* has many conscious parallels with Locke's thought, perhaps as an effective way of communicating with the many American and British readers familiar with Locke. This apparent dominance of Locke in the Declaration may well overstate his influence, because the Founders were well aware of many other writers whose ideas they adopted in part.

A good part of the written work that the Founders and Framers knew arose out of conflicts between later Whig governments in Britain, particularly from 1721 to 1761, and their opponents. Bolingbroke (1678-1751) and his Tory circle (Kramnick 1968), and also the "Real Whigs" outside of the Whigish government, were prominent opponents of the Whig governments under Robert Walpole and his successors.¹¹ Many of the Framers were familiar with Bolingbroke's theories, and took some ideas from him. This is so, even though they also took ideas from Locke, and Bolingbroke disagreed with Locke on many issues, in particular, the compact theory of the origin of government; the influential David Hume disagreed with both.¹² Among Bolingbroke's circle were the satirist Jonathon Swift (1667-1745) and poet Alexander Pope (1688-1744), who both

¹⁰ As Morgan (1989) notes:

There is no evidence that they [the Americans] were familiar with the writings of the Levelers, where the would have found the most explicit discussion of it [the idea of popular sovereignty]; but they were familiar with Locke ...

¹¹ See Tuchman (1984), Mansfield (1965), Kramnick (1968) and Owen (1974) for discussions of the Whig Ascendancy and its opponents.

¹² Locke phrased his compact theory in terms of individuals. Bolingbroke spoke of a compact among men who were all-powerful fathers of family, patriarchs. Hume denied that governments arose from compacts, and instead stressed the necessity of government to avoid problems that would arise without it, particularly insecurity of life, liberty and property.

wrote extensively on political issues in the first four decades of the 1700s, for example, Swift's *Gulliver's Travels* (1726) and Pope's *Essay on Man* (1733-1734). (*Gulliver's Travels* is a thinly veiled satire and condemnation of the Walpole ministry. In contrast, Daniel Defoe's *Robinson Crusoe* (1719) is a thinly veiled apologia for the Whigs and for the new system of money, banking and finance that had grown up since the Glorious Revolution.) Both John Adams and Alexander Hamilton were deeply read in Pope.¹³ Some works by the "Real Whigs" were also well known to the Framers, particularly John Trenchard and Thomas Gordon's *Cato's Letters* (1720-1723), which were published in newspapers in Britain and America and collected in books, which later in books sold well in America for generations.¹⁴ Many of the Framers cited Montesquieu as a great authority; most of the reformist political thinkers in Europe and American held him in high regard. Montesquieu was closer in view to Bolingbroke than to Locke; Montesquieu and Bolingbroke knew each other well, and for his *Spirit of the Laws* (1748), Montesquieu took many of his ideas of how the British constitution actually worked from Bolingbroke. The Framers were particularly struck by Montesquieu's stress on the need for a separation of powers. The Framers also knew the authors of the Scottish Enlightenment (among the Framers, James Wilson had studied under Scottish Enlightenment figures in Scotland, and James Madison had studied them in some depth at

¹³ McDonald (1982, p. 365, n. 1) writes that Pope was the only poet Hamilton quoted in his papers. Adams was advised as a young man to study Swift and Pope to gain command of language; he sent a gift of several volumes of Pope to his son, John Quincy; on a tour of English gardens with Thomas Jefferson in 1786, they visited Pope's (d. 1744) garden; on the title page of his *A Defense of the Constitutions ...* (1787), Adams placed a line from Pope; and in his writings on human nature he drew heavily on Pope's *Essay on Man*, among other authors (McCullough 2001, pp. 51, 259, 357, 374, 421). John Marshall wrote in 1827, when he was seventy two, that, "At the age of twelve, I had transcribed Pope's *Essay on Man*, with some of his *Moral Essays*." (Smith 1996, p. 21.)

¹⁴ Bailyn (1967, p. 22) quotes well known lines from the will (1774) of American patriot Josiah Quincy, Jr. (1744-1775), of Massachusetts:

I give to my son, when he shall arrive to the age of fifteen years, Algernon Sidney's works,—John Locke's works,—Lord Bacon's works,—Gordon's *Tacitus*,—and *Cato's Letters*. May the spirit of liberty rest upon him.

The authors are Algernon Sidney (1622-1683), Sir Francis Bacon (1561-1626) and John Locke (1632-1704). The works mentioned are Thomas Gordon's (d. 1751) translation of the Roman historian, Tacitus, who wrote scathingly of tyranny, corruption and loss of liberty in the early Roman Empire, after the destruction of the Roman Republic, and John Trenchard (1662-1723) and Gordon's *Cato's Letters*. Bailyn (1967, p. 42) writes that

Princeton). Many of them were familiar with the political writings of David Hume, cited as an authority by the Framers, but controversial because of his religious doubts, his rejection of natural law, and his “Tory” history of England.¹⁵ The Founders seemed to be much less influenced than the Founders by Hume and the other Scottish Enlightenment writers.

On the one hand, Bolingbroke and his Tory circle, as well as the opposition Real Whigs, deplored the corruption that Walpole and his government used to control the House of Commons. This fit in well with the views of those Framers who stressed “clean government” and feared the effects of corruption on government. (Hamilton accepted Hume’s view that corruption was the only weapon the British executive branch had with which to prevent domination by the House of Commons, and thus corruption was necessary in some cases.) Bolingbroke’s emphasis on the need for virtue in government also fit in well, for example, with some moralistic New Englanders such as John Adams. Other Framers were impressed by Bolingbroke’s emphasis on the importance of small and middle size landowners-farmers (the gentry, the squires, or the yeomen) as the bedrock of society. Bolingbroke thought these country people who owned property were the source of virtue and integrity in Britain. In contrast were the moneymen (bankers, financiers and speculators) who arose after the Glorious Revolution of 1688, and were associated in Opposition minds with the Bank of England (1694) and the funding of the national debt. Country life, based on agriculture and landownership, struck many in America, particularly the South, as the true basis for the new republic. Further, many of these Americans, for example, Madison¹⁶ and Jefferson, were suspicious of banks and national debt, and drew counterarguments from the Opposition of

Gordon prefaced his translations with introductory “Discourses” of prodigious length in which he explained beyond all chance of misunderstanding the [Whigish] political and moral meaning of [Tacitus’s work].”

¹⁵ George Wythe, Chancellor of Virginia, signer of the *Declaration of Independence*, and participant in the Constitutional Convention, introduced John Marshall to the study of Montesquieu and Hume in 1780 (Smith 1996, p. 78). There were more than forty students in the law course Marshall took from Wythe.

¹⁶ Madison’s views of the banking system changed back and forth. Jefferson, so greatly changeable in many of this opinions, disliked a federal banking system from the start.

the first half of the eighteenth century. Again, the Real Whigs and Bolingbroke and his circle, perhaps because they were in opposition for decades, were in favor of frequent meetings of Parliament and frequent new elections for Parliament (this demand had become popular as far back as Charles II's reign). This preference for frequent elections and frequent meetings fit in well with experience and practice in many of the colonies and later the states; for example, New England towns traditionally held annual meetings.

On the other hand, Bolingbroke thought the British system was so corrupt that the only hope was a return to first principles under a hero, the *Patriot King* (1749). The Patriot King would rule without parties, selecting the best men, knowing what was good for the country, doing what was best for the country, and thereby winning the country's approval. The Patriot King's great power and charismatic leadership were far from what most of the Framers thought suitable, and would clearly have been deeply unpopular with the average American during and after the American Revolution.

From English Opposition sources, starting in the early eighteenth century up to the Revolution, the Founders knew well the corruption in England under Kings George I, II and III. Many of the Founders believed that this corruption was a major reason that Parliament treated them so badly. Further, they knew that elections to Parliament were often rigged in various ways, particularly through bribery or intimidation by the great men over those smaller men who had the franchise. Many authors insisted that corruption was the proximate cause of the many cases the Founders knew from history of the "enslavement" of peoples under tyrannies. They had seen grave losses of freedom in England, they thought, and had seen the rise of absolute government in Denmark, Sweden and Poland; and the tyranny in Russia and Turkey were commonplaces to them.

The British “Mixed Government.” Locke, Bolingbroke, Montesquieu and virtually all the continental European reformers of the eighteenth century studied the British “mixed government” or “mixed monarchy” and praised it as the best of systems, a combination of monarchy, aristocracy and democracy that took the virtues from each system and avoided their vices. The virtues were respectively Energy, Wisdom and Goodness, and the vices were Tyranny, Oligarchy and Mobocracy. This view went back to ancient times, at least to the Greek historian Polybius, who spent many years at Rome in the ruling circles; he described the Roman Republic as a mixed system and attributed the Republic’s greatness to this system.¹⁷ Seventeenth- and eighteenth-century writers discussed mixed government as a system of checks and balances that took the best from each order—the monarchy, the aristocracy and the commons—and prevented any one group from dominating the others and deteriorating into vice and thence to tyranny. Such deterioration, it was argued, caused the end of that government and the start of a new cycle that would also end with degeneration. Those who advocated mixed government often pointed out that the monarchical role need not be played by a king, but could be filled, for example, by the Roman Republic’s two consuls, elected for only a year, or some other non-royal system of magistrates, as at Sparta or Venice (Machiavelli 1636). Because the monarchical role was limited in mixed government, those who supported royal absolutism tended to be deeply opposed to the concept of mixed government.

Many who wrote on mixed government stressed that the balance between the different groups offset the defects of each and thus offered the potential for the government to survive indefinitely (Machiavelli, Harrington, Milton—see Fink 1945, Chps. 3 and 4 and *passim*). They had all around them examples of governments that had failed, and they emphasized how important they considered continuity in government. At the Constitutional Convention, many Framers spoke

¹⁷ Fink (1945) points out that some parts of the theory of mixed government were foreshadowed in Aristotle.

of the danger of the U.S. collapsing, and that their goal should be to write a Constitution that could survive.

British and other authors meant importantly different things when they talked of mixed government. Bolingbroke thought the mixed government of Queen Elizabeth's reign (d. 1603) was the best. Locke preferred the Whig government of the Glorious Revolution (1688) era. Others argued that the corrupt system of the 1700s is in fact the only period where the mixed system really worked in Britain as it should. At the same time, the mixed government in Britain was far from having the strict separation of powers that Montesquieu wanted and many Framers approved. Checks and balances, as provided by a mixed government, are not the same thing as the separation of powers, and the two concepts are often in conflict in the U.S. Constitution.

Mixed-government theorists in the seventeenth century, and later, did not believe the best arrangement was *equality* among the orders, but *balance*, which was achieved with one order predominant (for example, Harrington and Milton). These writers often suggested dominance of the aristocracy, and some suggested dominance by the popular order, but virtually never monarchical dominance—another reason for the monarchical party to oppose them (Fink 1945, Chps. 3 and 4). Locke (1690) thought of the popular order as dominant, but as inactive except at times of government change, leaving governing mainly to the aristocracy. Milton, among others, put forward the notion that the aristocracy should be taken to mean the “natural aristocracy” based on knowledge, training, skill and particularly character, rather than the aristocracy based on descent or title as in England (Fink 1945, Chp. 4). Jefferson also talked in terms of a “natural aristocracy,”¹⁸ and John Adams agreed.

¹⁸ The republican writer Algernon Sydney later formulated that notion that the descendants of those whose virtue had ennobled them should be considered noble until their actions proved them otherwise (Fink 1945, p. 97). Sydney was born in 1622, was an active republican writer during the Commonwealth period, went into exile after the Restoration, negotiated a pardon from Charles II and returned to England in 1677, and was executed for treason in 1683.

Sovereignty. Starting in the late 1500s and early 1600s, a new, stronger more abstract notion of sovereignty arose. Bailyn (1967, pp. 198-199, italics added) writes that,

The idea of sovereignty current in the English-speaking world of the 1760s was scarcely more than a century old. It had first emerged during the English Civil War, in the 1640's, and had been established as a canon of Whig political thought in the Revolution of 1688.... *[T]here must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself.* Derived in part from the political theory of classical antiquity, in part from Roman law, and in part from medieval thought, this idea came to England most directly in the sixteenth-century writings, especially those of Jean Bodin [English edition, 1606], that sought to justify and fortify monarchical supremacy.

Parliament adopted this view after the Glorious Revolution, with the explicit assertion that Parliament held the sovereign power. Blackstone (1765-1769) wrote that this notion of sovereignty was at the heart of English law. To many in England and America, this view of sovereignty seemed self-evident. In the period from 1763 up to the Revolution of 1776, American writers first accepted this view, and then came to see that they had to modify it. They groped their way towards a federal notion of shared sovereignty, of “a sovereignty within sovereignty,” *imperium in imperio*, a notion that English writers virtually all dismissed out of hand as a logical contradiction. (Bailyn 1967, Chp. V, Section 3; McDonald 1985, pp. 276-282; McDonald 2000, Prologue).¹⁹

The Law. Many of the Framers were trained in the law, and the others, being men of affairs, had some knowledge of the law. Blackstone's *Commentaries* were well known and deeply

Harrington was arrested for treason after the Restoration, treated harshly in jail, leaving mental and physical damage, was never brought to trial and finally released, and died in 1677 without writing further on political topics.
¹⁹ The Framers modified the concept of sovereignty to allow *imperium in imperio*, but the concept retained a strong hold on them. When Hamilton wrote to Washington to urge the constitutionality of the Bank of the United States he argued

It was “*inherent in the very definition of government ... that every power vested in a government is in its nature sovereign, and includes, by the force of [that] term, a right to employ all the means requisite ...*” (Brookhiser 1999, p. 91, italics in original.)

influential;²⁰ virtually all American lawyers after the Revolutionary War studied Blackstone when they read law²¹ in preparation for the bar. (Blackstone published his *Commentaries* in London in 1765-1769; they were published in America in 1772²².) Many of the Founders referred to Sir Edward Coke (1552-1634), and his *Institutes* (first *Institute*, 1626), as an authority, and to other seventeenth century English legal writers (Bailyn 1967, pp. 30-31), and had studied them while reading law in the period before Blackstone published.²³ A fair number of the Framers educated after Blackstone published became familiar through him with ideas of earlier British legal commentators and theorists, and also read these earlier authors' works.

From the Revolution on, American lawyers were engaged in adapting the common law to American conditions of the individual colonies and then states. A number of Founders and Framers played important roles in this adaptation. In 1777, Jefferson, Edmund Pendleton and George Wythe were appointed to a three-person committee to revise Virginia laws; "That famous revision of Virginia's statutes provided for the abolition of primogeniture, the promotion of education, and the guarantee of religious freedom." (Smith 1996, p. 78) In commercial and contract law, the Framers James Wilson and Alexander Hamilton (McDonald 1982, pp. 311-314)

²⁰ The extent of Blackstone's influence has been called into question; see McDonald (1982, p. 378, n. 17). McDonald (1982, pp. 57-62) discusses the ways Blackstone did and did not influence Alexander Hamilton (signer of the Constitution, one of the authors of the *Federalist Papers*, and Secretary of the Treasury under George Washington).

²¹ George Wythe was appointed the first law professor in America in 1779, at the College of William and Mary. Marshall took his course of lectures the second time they were offered, starting May, 1780 (Smith 1996, p. 75ff.). Hamilton, like most other budding lawyers, read law in a practicing lawyer's office (Brookhiser 1999, pp. 55-56; McDonald 1982, pp. 51-52.)

²² "Its initial subscribers included George Wythe, John Jay, James Wilson, Roger Sherman, John Adams and virtually every leading member of the legal profession." (Smith 1996, p. 77.) Thomas Marshall, father of John Marshall, was a charter subscriber. "For the next several years, father and son studied Blackstone together." (Smith 1996, p. 75) Wythe was Chancellor of Virginia, a signer of the *Declaration of Independence*, and a participant in the Constitutional Convention. Jay (NY) was first Chief Justice of the United States and an author of the *Federalist Papers*. Wilson (PA) and Sherman (CT) were signers of the Constitution, and played important roles in its ratification. Adams (MA) was a leader in the Revolution and the second president of the United States. Thomas Marshall was a surveyor, not a lawyer.

²³ From the start, Blackstone has been viewed by some as a conservative influence. Brookhiser (1999, pp. 170-171) writes of Jefferson's views:

Fretting about the conservatism of law professors at the University of Virginia, he complained that Coke had once been "the universal elementary book of law students, and a sounder Whig never wrote." But when

helped adapt, revise and simplify common law. (St. George Tucker's (1803) edition of Blackstone, with comments attempted to reinterpret British common law in Blackstone to fit American circumstances, was influential.)

On international law, a number of the Framers knew Grotius (1625), Pufendorf (1703), Vattel (1758) and others (McDonald 1985, pp. 52-57)²⁴, and these authors' ideas were also incorporated in other works with which the Framers were familiar.²⁵

Political Economy. The Founders and Framers had access to many mercantilist writers from the seventeenth and eighteenth centuries. One frequently mentioned is Mandeville and his *Fable of the Bees*, which argued that private vice led to public virtue.²⁶ The Framers knew Adam Smith and his *Wealth of Nations* (1776), with his "invisible hand," and they and their peers widely referred to the book. The Founders of course had no access to the *Wealth of Nations* until after 1776, when they were already deeply involved in the Revolutionary War. Smith was not the only influential economist, however. Hamilton in particular seems to have been influenced by another Scottish economist, Sir James Steuart (1767), who was more favorable to government intervention in the economy than was Smith. In particular, Steuart thought that especially when the economy is starting to manufacture, it "needs" protection, as Hamilton thought (mainly in the form of subsidies rather than tariffs). The Framers also knew the French Physiocrat School; for example, Jefferson, Adams and Marshall met with physiocrats at various times in Paris. François Quesnay (1694-1774) was the leading physiocrat; they worked out their ideas from the 1750s to the 1770s.

"honeyed ... Blackstone became the students' hornbook, from that moment," the legal profession "began to slide into toryism."

²⁴ Hamilton cited Grotius and Pufendorf, as well as Locke and Montesquieu, in a pamphlet he wrote in 1775; there is some question of whether he read Grotius and Pufendorf in any depth until later, and he read Vattel after the war but before the Constitutional Convention in 1787.

²⁵ Bailyn (1967, p. 43), writes,

By 1728, in fact, *Cato's Letters* [Trenchard and Gordon] had already been fused with Locke, Coke, Pufendorf and Grotius to produce a prototypical American treatise in defense of English liberties overseas [by Daniel Dulany, Sr., Annapolis, 1728, *The Rights of the Inhabitants of Maryland to the Benefits of the English Laws*].

The physiocrats' great intellectual contribution was to analyze the "circular flow" of income in an economy, their *Tableau Économique* (1766). Their key belief was that only agriculture was productive, in the sense of producing more than the value of the inputs used in production. All other economic activities were sterile, using as much as they produced. This absurd economics appealed to many Americans who already viewed agriculture and yeoman farmers (landowning farmers) as the backbone of the republic, for example, Thomas Jefferson.²⁷ This is an example of how the Founders and Framers could take up authors for support of a political position they already held. As an example of how the Founders and Framers were able to pick and choose among various authors' ideas, Quesnay argued that only an absolute monarch, anathema to the Founders and Framers, could run France. The physiocratic view of the primacy of agriculture remained long in the air in the U.S. In his "Report on Manufactures" (December, 1791), Hamilton felt compelled to discuss at length and offer

an answer to the question whether manufacturing added to "the produce and revenue" of society or whether it merely diverted useful effort from agriculture. (Bookhiser 1999, p. 93.)

²⁶ Kramnick (1968, p. 201, and n. 37) raises the issue of whether Mandeville's thought is mercantilist or laissez-faire.

²⁷ Gibbon's *Decline and Fall of the Roman Empire*, consciously or not, essentially takes a physiocratic view of the relationship of the countryside to cities.

Table 1. Time Line of Historical Events and Publications, 1600-1780

1603 Elizabeth I d. James I -	1625 James I d. Charles I -	1640 English Civil War	1649 Charles I executed --Commonwealth	1654 Cromwell Lord Protector (b. 1599)	1658 Cromwell d.	1660 Restoration Charles II
1606 First Virginia Charter	1620 Plymouth Colony	1632 Maryland Charter		1652 Expulsion of Rump Parliament		1663 North Carolina Rhode Island, colonies
Machiavelli (1469-1527) <i>Discourses on Livy</i> (Eng. Trans. 1636)	1621 Francis Bacon impeached. <i>Essays Critical and Moral</i> (1605), <i>Novum Organum</i> (1620)	1625 Grotius (1583-1645) <i>Rights of War and Peace</i>		1653 Parliament of Saints	1656 Harrington <i>Oceana</i> publ.	1669 South Carolina (Locke's charter)
	1628 Edward Coke (1552-1634) <i>Institutes</i>			1651 Hobbes <i>Leviathan</i>		
			<----->			
			John Milton (1608-1674), Commonwealth poetry and prose			
			<i>The Reason of Church Government</i> (1641)	<i>Aeropagitica</i> (1644)		
				<i>To the Lord General Cromwell</i> (1652)		
				<----->		
				Levelers: Equal distribution of wealth, manhood suffrage		
				<----->		
				Diggers: millenarial equality		

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1685 d. Charles II James II -	1688 James II flees to France	1689 William and Mary -	1702 d. William Anne -	1714 d. Anne George I, of Hanover	1721 Walpole	1742 Walpole resigns	1760 d. George II George III -	1776 American Revolution -- <i>Declaration of Independence</i>
1680 Filmer <i>Patriarca</i> publ. (written c. 1630)		1689 English Bill of Rights (succession determined)	1694 Mary d.	1708 Jacobean Rising		1745 Jacobean Rising		1776 Adam Smith <i>Wealth of Nations</i>
1679-1681 Exclusion Controversy (succession of James)		<-----> Nine Years War (1689-1698); King Williams War in America	<-----> War of the Spanish Succession (1701-1713); Queen Anne's War in America		<-----> War of the Spanish Succession (1740-48); King George's War in America	<-----> Seven Years War (1756-1763); French and Indian War in America		
		<-----> Whig and Tory Parties coalesce						
	1690 Locke <i>Two Treatises</i> publ. (written c. 1680)			1721 Trenchard and Gordon <i>Cato's Letters</i> (1621-1623)		1749 Bolingbroke (1678-1751) <i>Patriot King</i>	1667 Sir James Steuart <i>Principles</i>	
	1698 Algernon Sidney (1622, executed 1683) <i>Discourses on Government</i> publ. (written c. 1680)			1719 Daniel Defoe (1660-1731) <i>Robinson Crusoe</i>	1733-1734 Alexander Pope (1688-1744) <i>Essay on Man</i>		1765-1769 Blackstone <i>Commentaries</i>	
				1726 Jonathan Swift (1667-1745) <i>Gulliver's Travels</i>			1776 Edward Gibbon <i>Decline and Fall of the Roman Empire</i>	
							1758 Vattel <i>Law of Nations</i> publ. in English	

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²⁸ When revised or reprinted volumes are used, the most common previous publication date is typically given in parentheses.

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