I
THE PROBLEM

Sorely divided as Americans were in regard to independence, the Patriots among them, at least in principle, were nearly unanimous in their understanding of what independence entailed. The short-range necessity was to win on the battlefield what they had proclaimed in the halls of Congress. The longer-term necessity, in the language of the Declaration, was "to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

The latter task appeared, with some reason, to pose no difficulty. Almost to a man. Patriots were agreed that the proper ends of government were to protect people in their lives, liberty, and property and that these ends could best be obtained through a republican form. They had had abundant experience—probably more Americans had participated directly in government at one level or another than had any other people on earth—and if their experience turned out to be inadequate, enough of them were familiar with the theoretical works of Aristotle and Polybius, of Machiavelli and Harrington, of Locke and Hume and Montesquieu, to see them through.

But it proved to be far less simple than they had anticipated. In an article published in 1781, not long before the decisive battle at Yorktown, young Alexander Hamilton

(who, as General Washington's aide-de-camp, had witnessed the army's tribulations resulting from the "imbecility" of government) diagnosed what had gone awry. Most Americans who had had political experience beyond the local level, Hamilton wrote, had become Loyalists, and thus Americans "began this revolution with very vague and confined notions of the practical business of government." Accordingly, in the drafting of the Revolutionary state constitutions and the Articles of Confederation, as well as in the management of civil and military affairs, "there have been many false steps, many chimerical projects and utopian speculations." The nub of the problem, in Hamilton's view, was the "extreme jealousy of power" that is "the attendant on all popular revolutions, and has seldom been without its evils."[1]

He elaborated this proposition at length. "History," he said, "is full of examples, where in contests for liberty, a jealousy of power has either defeated the attempts to recover or preserve it in the first instance, or has afterwards subverted it by clogging government with too great precautions for its security, or by leaving too wide a door for sedition and popular licentiousness." If liberty is to endure, as much attention must be paid to giving "a proper degree of authority, to make and execute the laws with vigour" as to "guarding against encroachments upon the rights of the community." An excess of power leads to despotism, whereas "too little leads to anarchy, and both eventually to the ruin of the people."[1 2]

The perception that energetic government is necessary to the security of liberty and property—for, as James Madison put it in the Constitutional Convention, "the more lax the band," the more easily can the strong devour the weak—was a crucial step toward becoming able to devise a viable system of free political institutions.[3] Earlier,

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[1] "Continentalist No. I," July 12, 1781, in *The Papers of Alexander Hamilton,* ed. Harold C. Syrett et al,, 26 vols. (New York, 1961-1979), 2:649-650.

[2]Ibid., 2:651.

[3]*The Records of the Federal Convention of 1787,* ed. Max Farrand, 4 vols. (New Haven, Conn., 1937), 1:448.

Patriots had tended to view the problem as having only one dimension, that of preventing oppression by government. Now they could see a second dimension. As Benjamin Rush said, "In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness."[4] This was the perspective that the Framers brought to bear when they convened in 1787 to reconstitute the Union.

In the undertaking, they were guided as well as limited by four sets of considerations, none of which was so clear as subsequent (or even contemporary) writing would lead one to believe. The first was inherent in their purpose, that of providing protection for the lives, liberty, and property of the citizenry. They repeatedly voiced their agreement about their goals. Charles Pinckney declared that to extend "to its citizens all the blessings of civil & religious liberty ... is the great end of Republican Establishments" and that "the ***landed interest . .*** . are and ought ever to be the governing spring in the system."[5] Madison said that "we ought . . . to provide every guard to liberty that its preservation cd. require" and that "the primary objects of civil society are the security of property and public safety."[6] Roger Sherman insisted that government was "instituted for those who live under it. It ought therefore to be so constituted as not to be dangerous to their liberties."[7] Hamilton said that "one great objt. of Govt, is personal protection and the security of Property."[8] George Mason and Luther Martin concurred.[9]

Only four delegates diverged from the consensus, three of them just slightly. Gouverneur Morris, John Rutledge,

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[4]Rush, "An Address," Philadelphia, 1787, in *Principles and Acts of the Revolution in America,* ed. Hezekiah Niles (New York, 1876), 234. See also James Madison, *Federalist* number 51, in *The Federalist,* ed. Edward Mead Earle (New York, 1937), 337.

[5]Farrand, *Records,* June 25, 1:402.

[6]Ibid., June 26, 1:423; Pierce's notes, June 6, 1:147.

[7]Ibid., June 26, 1:423.

[8]Ibid., June 18, 1:302.

[9]Ibid., June 26, 1:428; June 27, 1:440.

and Rufus King put the protection of property ahead of liberty as the main object of society.[10] [11] James Wilson alone departed entirely from the consensus: rejecting the idea that the protection of property was "the sole or the primary[7] [7] purpose of government, he asserted that "the cultivation & improvement of the human mind was the most noble object[77] of government and society.[11]

All this—except for Wilson's comment—would at first glance appear to constitute an unambiguous set of aims; but though the concept of life was straightforward enough until the advent of modern medicine, the other two terms, ***liberty*** and ***property,*** were cloudy in the extreme. Indeed, the fact—rarely taken into account by scholars[12]—is that the vocabulary of political discourse was, during the eighteenth century, in a state of flux. Many pivotal words were new and not yet in general usage, and others had not even been coined. For example, ***society,*** in the sense of an abstract whole, had first been employed in the late seventeenth century and still most often connoted its earlier meaning of a narrow, specially constituted association of people with an identity and interest different from those of the whole. Similarly, the concept of an "economy[77] as an entity having a life of its own was just emerging; and though ***capital,*** in its economic meaning, had been in use for several decades, the word ***capitalist*** was novel and ***capitalism*** had not yet been minted. And thus, as we shall see, though virtually every American believed that ***property*** and ***liberty*** were both ***natural*** and ***civil rights,*** it transpired during the Constitutional Convention that delegates had different understandings of all five of the words set here in italics.

The same was true of the second governing and limiting consideration, the commitment to republicanism. A few of the Framers questioned the desirability of adhering to a republican form of government, thinking that form to be less compatible with liberty than limited monarchy was, but

[10]Ibid., July 5, 1:533, 534; July 6, 1:541.
[11] Ibid., july 13, 1:605.
[12]Increasing numbers of scholars are studying eighteenth-century political vocabulary; see, e.g., the works of J. G. A. Pocock and Garry Wills.

none believed that any other form would be acceptable to the American electorate. And yet, though the Framers shared the commitment in the abstract, they were far from agreed as to what republicanism meant, apart from the absence of hereditary monarchy and hereditary aristocracy. For example, Hamilton, who had inherited almost nothing, was wont to define a republic as any government in which no one had a hereditary status; whereas his friend Madison, who had inherited the status of freeman amidst slavery and whose blacks had inherited their status as slaves, preferred a definition that would avoid the sticky question of status and merely considered as republican any system in which governmental power derived from the consent of the "public." Moreover, no matter how republicanism was defined, the concept— again as we shall see— carried with it a number of implications that were not entirely consonant with most Americans' ideas about liberty and property.

The third guiding and limiting factor was history, in several senses of the term. One concerned history in the conventional sense: most of the Framers were versed in the history of ancient Greece and Rome, of confederations and republics, and of England at least since Elizabethan times. Moreover, most of them thought historically and used references to history to support or illustrate their reasoning. During the first three weeks of the convention, for instance, delegates buttressed their arguments with historical examples at least twenty-three times, not counting references drawn from British or colonial or recent American history, inclusion of which would treble that total. John Dickinson, Pierce Butler, Benjamin Franklin, George Mason, James Madison, James Wilson, Alexander Hamilton, and Charles Pinckney delivered to their colleagues mini lectures and lectures that sometimes lasted for several hours on the lessons to be drawn from ancient or modern history.[13]

[13]Farrand, *Records,* Dickinson, June 2, 7, 1:87, 153; Butler, June 5, 11, 1:125, 204; Franklin, June 4, 1:103; Mason, June 4, 1:112; Madison, June 6, 7, 16, 19, 1:135, 151-152, 254, 317, 319; Wilson, June 6, 7, 18, 1:137 (143), 254, 305; Hamilton, June 18, 1:285, 290; Pinckney, June 25, 1:399, 401-402.

Another sense was that of history as legacy, which means mainly English political institutions and the common law as received and adapted selectively by the thirteen American political societies. Again considering just the first three weeks of the convention, on more than twenty separate occasions the delegates cited British constitutional practice as being instructive concerning the tasks at hand. Interestingly, in light of the vehemence with which Americans had rejected British "tyranny" in 1776, only a handful of delegates—Elbridge Gerry, James Wilson, Edmund Randolph, Pierce Butler—argued against using British constitutional practice as a guide, and for the most part these did so in regard to the relevance of the British constitution to an immediate question before the convention.[14]

The delegates were acutely conscious of history in yet another sense, that of their place in its ongoing flow. From the outset of the Revolution, public men in America had shared this awareness. "You and I, my dear friend," John Adams had written to Richard Henry Lee in 1777, "have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making election of government . . . for themselves or their children."[15] By 1787 the joy that Adams had expressed had given way to a sense of urgency. It was "more than probable," Madison said in the convention, that the delegates "were now digesting a plan which in its operation wd. decide forever the fate of Republican Govt."[16] Hamilton agreed, adding that "if we did not give to [the republican] form due stability and wisdom, it would be disgraced & lost among ourselves, disgraced & lost to mankind for ever."[17] Franklin said that if the convention failed, "mankind may hereafter from this unfortunate instance, despair of establishing Governments by Human Wisdom and leave

[14]lbid., May 31, June 1, 7, 13, 1:50, 65, 66, 153, 233.

'"lame and the Founding Fathers: Essays by Douglass Adair, ed. Trevor Colbourn (New York, 1974), 21; and *Letters of Members of the Continental* Congress, ed. Edmund C. Burnett, 8 vols. (Gloucester, Mass., 1963 reprint), 1:526, 2:67, 228.

[16]Farrand, *Records,* June 26, 1:423.

[17]lbid., June 26, 1:424.

it to chance, war and conquest."[18] Rufus King said that his fears were "more agitated for his Country than he could express, that he conceived this to be the last opportunity of providing for its liberty & happiness."[19] And even after the convention had successfully completed its work, Washington declared, in his Inaugural Address, that "the sacred fire of liberty and the destiny of the republican model of government" were deeply and irrevocably staked "on the experiment intrusted to the hands of the American people."[20]

Finally, the Framers had a large body of political theory at their disposal. To be sure, most of them were prone to dismiss such "speculative" theory lightly. ("Experience must be our only guide," said John Dickinson, for "Reason may mislead us.")[21] Yet it formed a greater part of their understanding and of their perceptive apparatus than they always realized or were willing to admit. Several times in the convention, Ffamilton and Madison quoted or paraphrased David Flume without acknowledging that they were doing so. Luther Martin cited several theorists of natural law. George Mason gave a speech that might have been taken directly from James Flarrington's ***Oceana.*** The contract and natural-rights theories of John Locke were repeatedly iterated without reference to their source. Six delegates cited Montesquieu, and the spirit of that philosopher (and, through him, Bolingbroke) permeated the debates; and though Blackstone was mentioned only twice, his work was also pervasive.[22]

Given all this and given the common goal of the Framers and the common material with which they had to work, one might suppose that the outcome of their deliberations

[18]Ibid., June 28, 1:452.

[19]Ibid., June 30, 1:490.

[20]*Documents of American History,* ed. Henry Steele Commager, 7th ed. (New York, 1963), 152.

[21]Farrand, *Records,* Aug. 13, 2:278.

[22]Ibid., June 4, 1:110-114; Wilson, June 1, Sept. 6, 1:71, 2:530; Hamilton, June 18, 29, 1:308, 472; Butler, June 23, 1:391; Madison, June 30, July 17, 1:485 (497), 2:34; Randolph, July 11, 1:580; Pinckney, app. A, 3:109; Dickinson, Aug. 29, 2:448.

in Philadelphia—provided that a few compromises regarding conflicting interests could be reached—was more or less a foregone conclusion. But there was a catch, just one. The ingredients were incompatible.