

## 4—Power of Government

Issues:

1. As they consolidated power in a new constitution, the founders also perceived the need to divide or separate power, so as to prevent tyranny.
2. In the US constitution, power was separated first by a division of sovereignty between state and national government in federalism (division of powers), and second by a system of checks and balances among the three principal branches of the federal government (separation of powers).
3. The system of checks and balances among the executive and legislative and judicial branches induced members of each branch to both guard against each other to preserve freedom and cooperate with each other in order to govern effectively. Checks and balances affect the way political parties obtain and use governing power in America.
4. Over time, the federal (central) government's size and power has changed substantially in relationship to that of the state governments.

Student outcomes:

1. Understand Madison's view of "auxiliary precautions" to guard against the tyranny of the majority in democracy.
2. Understand how checks and balances were built into the Constitution, including the division of roles and powers and the varying representative links for the Presidency and each Congressional chamber. Understand the institutional relationship between the executive and legislature and judiciary.
3. Understand the effects of checks and balances on party government (including the costs and benefits of "united" and "divided" government).
4. Understand the relationship between the states and the federal government in the founding generation, how it changed after the Civil War, and how it has changed in recent decades.

**Note: First day's readings: pages 1–6; second day's readings, pages 7–14.**

**Students should come to class prepared to teach the other students in the class what they have learned through preparing for the class and be able to provide evidence to support their ideas.**

## Power of Government

The constitution was created to solve the problems that existed in early state governments and the government under the Articles of Confederation. Generally these problems revolved around instability at the state government level; and a lack of power at the national level to regulate trade domestically and internationally and to enforce federal laws within the states.

One of the primary tensions associated with the issue of governmental power had always been, how do you give government enough power to govern and yet at the same time oblige it to control itself so that it does not develop into a tyranny? To some extent this is the factor in the tension between Agency and Accountability and Rights of Man on one side and Rule of Law on the other. How do you allow people the freedom and right to act and yet at the same time oblige them to control themselves. With people you hope they have developed enough individual and civic virtue to regulate themselves. With governments, although virtue is very important, there needed to be some sort of structure built into the system that regulated and checked the abuse of power.

This tension was explained by James Madison in Federalist # 51 as the tension between Public Virtue and Auxiliary Precautions. The tension is built into the Constitution itself in yet another way as demonstrated in the conflict between passages like the “necessary and proper” clause in Article One, Section Eight, and the enumerated powers phrases in Amendments Nine and Ten.

Generally speaking the creation of the constitution created a much stronger government than what had existed under the Articles of Confederation. The new government certainly had more power to control the states and had the ability to make nationally binding laws. It also had more power to negotiate with foreign powers and regulate domestic and international trade. It is important to note, however, that as powerful as the new government was, and would eventually become, the Constitution was specifically created with the express purpose of protecting the rights of the people. There is little in the Constitution itself that gives the government power to regulate, directly, the rights and actions of the people, and the first ten amendments, the Bill of Rights, were specifically added to the constitution to protect the rights of the people from the encroachment of government. For the most part the Constitution created a stronger government through structure and yet practically every phrase in the document is an attempt to regulate that power.

Despite the efforts to limit and control the power of the national government, its power has grown considerably over the years. Some of the pivotal periods of growth came during the Civil War when the national government enforced its power over state governments in a much more active way than ever before, and as amendments (13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>) were created that put much teeth into the national government’s ability to control the states. During the Progressive Era, 1897-1917, when the national government created legislation that sought to protect the people from the abuses of a growing industrial society. During the New Deal (1932-1940) when the national government under the Roosevelt administration sought to rescue the American economy and the American people from the affects of the Great Depression. And during the Cold war when the national government took on the responsibility of protecting the world from the tyrannical evils of communism by investigating the political activities of private citizens.

Some of these areas, such as the Great Depression and the Cold War will be investigated in more detail later in the semester. This topic will look first at the role virtue plays in controlling the power of government and how the constitution sought to create the mechanisms in which the power of government, through public virtue and auxiliary precautions, would be obliged to control itself. It will then investigate situations in which the power of the national government has increased overtime, why that occurred, and how that power has affected life in America. Of course a detailed exploration of two hundred and twenty-five years of history in this area is beyond the scope of this course, but at least the issues can be explored.

## Structure and Virtue

The American Constitution is based on the idea that there is sufficient virtue in the people to sustain self-government and that it is the peoples’ sacred right to exercise their will under such a government. But the writers of the Constitution were wise enough to create a system of government that had sufficient strength and energy to control the excesses and passions of the people through law and order. They were also able to solve the great difficulty in creating such a government — how that government must be forced to control itself.

As James Madison wrote in *Federalist 51*, “It may be a reflection on human nature, that such devices [as auxiliary precautions] should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. **A dependence on the people is, no doubt, the primary control on the government;** but experience has taught mankind the necessity of auxiliary precautions.” *Federalist Papers # 51*

The following characteristics were included in the notion of public virtue by the patriot philosophers or have been added by subsequent generations of Americans. First, citizens must be committed to Rule of Law and to the principles of liberty. Second, citizens must be willing to exercise reasoned self-restraint, compassion, and decency. Third, citizens must be willing to serve and participate in public office. Fourth, citizens must be willing to subordinate some private interests for the good of society. Fifth, citizens must be able to seek political compromise even when they cannot personally compromise on an issue. And sixth, citizens must exercise individual virtue in public as well as private affairs.

When virtue exists in a society and is practiced by the people it creates a strong desire among the people to practice regulated and restrained self-interest. This allows the people to live by the principles of rule of law as discussed in Topic 1. When virtue begins to decline in a society, there usually follows the development of majority factions that willingly disregard minority rights, strong minority factions develop that demand special rights or agendas, and the two sides become less and less willing to engage in or even seek political compromise.

**1. What according to Madison is the “primary” control on government? What do you think is the definition of the word “public” virtue? What role should virtue play in a civic society? What happens when virtue begins to decline in a society?**

The following statements illustrate the need for public virtue. They effectively demonstrate the potential challenges when virtue is lost. They also demonstrate our responsibility as citizens in maintaining government.

“Even this nation will be on the very verge of crumbling to pieces and tumbling to the ground and when the Constitution is on the brink of ruin, this people will be the staff upon which the nation shall lean, and they shall bear the Constitution away from the very verge of destruction.”\* Joseph Smith

“Whence shall we see the approach of danger? Will some trans-Atlantic giant destroy us at a single blow? Never in the trial of a thousand years will the nations of Europe or of Asia leave a track on the Blue Ridge Mountains or take a drink from the Ohio. If destruction be our lot, then we must be its authors and finishers. As a nation of free men we will live forever; or die by suicide.” Abraham Lincoln

“Now it is not common that the voice of the people desireth anything contrary to that which is right; but it is common for the lesser part of the people to desire that which is not right; therefore this shall ye observe and make it your law--to do your business by the voice of the people.

And if the time comes that the voice of the people doth choose iniquity, then is the time that the judgements of God will come upon you; yea, then is the time he will visit you with great destruction even as he has hitherto visited this land.” Mosiah 29: 26-27.

“Virtue in a society has a ... tendency to procure superiority and additional power ... by rendering public good, an object and end, to every member of the society by putting every one upon consideration and diligence, resolution and self-government, both in order to see what is

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\* Quoted in the following: Ezra Taft Benson, *The Constitution, A Heavenly Banner* (Salt Lake: Deseret Book, 1986) 28. See also Ezra Taft Benson, “Our Divine Constitution,” *Ensign* (November, 1987). Joseph Smith’s original prophesy was given on 19 July 1840 and was recorded by Martha Jane Knowlton Coray - the manuscript is in the Church Historian’s Office, Salt Lake City, Utah.

the most effectual method, and also in order to perform their proposed part, for obtaining and preserving it; by uniting a society within itself, and so increasing its strength; and, which is particularly to be mentioned, uniting it by means of veracity and justice. For as these last are principle bonds of union, so benevolence or public spirit, undirected, unrestrained by them, is, nobody knows what.” John Adams

The education of youth in useful knowledge and the principles of virtue, being essential to the preservation of a free government and the public welfare, should be a main object of every wise government. The faculties of the human mind, in their natural state, are like precious metal in the ore, which must be refined and polished by the hand of education to make them useful. Knowledge is not only necessary in rulers to qualify them to fill public posts with dignity and reputation; but also in the people to make them good subjects. A wise and knowing people will think it no less their interest than duty to support government and yield obedience to the laws; whereas the ignorant being governed wholly by their passions are dangerous subjects of any government, especially a free one. They are mere machines, and ever liable to be excited by an artful designing demagogue to such acts of violence and outrage as have sometimes brought the public to the brink of ruin.” (Samuel McClintock, “A Sermon on Occasion of the Commencement of the New-Hampshire Constitution,” Portsmouth, 1784.)

## **2. How does “virtue” relate to these statements by Joseph Smith, Lincoln, and King Mosiah?**

### The Civil war as a case study for declining virtue in America

It has been said by some historians that Americans must understand something about the Civil War if they really want to understand the American character. The Civil War certainly redefined federalism and the nature of the American Union. It wasn’t until after the Civil War that singular verbs were used with the title “The United States.” After the doctrines of nullification and secession never raised their heads again in the same way they had before the war. But in perhaps a more significant way, the Civil War defined the difference between Americans and other people—it really did demonstrate something about the character of individual Americans. It defined in significant fashion the way in which public virtue seeks to moderate and restrain the American character and remains absolutely essential to the operation of government and the maintenance of liberty. In the end it provided a warning and taught a valuable lesson – if virtue declines too far, the constitutional system is in danger of collapse and the life of the Union is indeed threatened.

The issue of slavery must certainly be considered one of the causes of the Civil War. But if slavery was the cause, why did it take 250 years (1619-1860) for the war to begin? Historians frequently argue that it was not slavery itself that caused the war but the expansion of slavery. In other words, if the size of the United States would have remained the same after Independence, then the issue of slavery could have been settled once and it would have either continued on or died (most likely) a natural death overtime. Since the geographic size of the United States continued to grow with the Louisiana Purchase and the Mexican American War, the issue of slavery and its expansion into new territory continually appeared on the political agenda and like an open wound continued to fester and irritate political passions. Although the blame for the war could be fixed on either slavery generally or the expansion of slavery more narrowly, it also seems reasonable that the primary reason for a Civil War over the issue of slavery in 1861 was that the passions of the people had risen to such a fever pitch by 1861 that compromise over the issue became impossible.

The pros and cons, evils and benefits, of slavery had long been discussed prior to the writing of the Declaration of Independence. But it was probably at that writing, when Thomas Jefferson in his early draft suggested that the phrase “all men are created equal” applied to black slaves too, that it became an intense political issue. Intense enough that without striking Jefferson’s references to slavery in the Declaration, the Declaration would not have been adopted. As discussed earlier in Topic 3, slavery was one of the defining issues of the constitutional convention as well. Here again the delegates found a way to compromise politically on the issue.

Slavery surfaces next as a political issue over the debate to allow the state of Missouri into the union as a slave state in 1820. By that time most states in the North had abolished slavery and they were hoping to eventually rid the entire country of the abominable practice. Thomas Jefferson referred to this debate over slavery in Missouri as a “fire bell in the night,” seeing the debate to be as much of a warning of future harm to the nation as a fire alarm to the destruction of a home. In the end, a political compromise was reached

allowing Missouri into the union as a slave state but balancing that entrance with the entrance of Maine as a free state, thus maintaining the equal balance of political power between free and slave states in the senate. Additionally the agreement mandated that in future state admissions, states above the Mason Dixon Line (a line drawn even with the bottom of the state of Missouri) would be free states and those below the line slave states. Supposedly the, the issue was solved forever.

In 1831, William Lloyd Garrison began publishing an anti-slavery newspaper called the *Liberator*. This was the first paper in the country devoted specifically to the destruction of slavery. Garrison did not mince words. He called slavery a “sin,” and those who supported it “criminals.”

By 1850 the size of the country was growing again with the end of the Mexican American War and the addition of large amounts of western territory. California sought to come into the nation as a state but since its territory actually fell half above the Mason Dixon Line and half below, the political issue of slavery was reopened. This was a much tougher compromise than the Missouri Compromise. Those who had participated in earlier slavery compromises were dead or getting older and the newer generation of politicians were more entrenched in their positions over slavery. Nevertheless eventually a complex compromise was reached. California would come into the union as a free state thus giving free states a majority of votes in the senate. In return, the South got a Fugitive Slave Act that significantly aided in their efforts to recapture run-away slaves. The compromise succeeded politically but left deep wounds in the hearts of northerners who were now faced with helping return run-away slaves or face jail time.

In 1854, the issue of slavery arose again in connection with the efforts to build a transcontinental railroad. Kansas, on the route of the proposed railroad, sought to come into the union. It was north of the Mason Dixon line and should therefore have been a free state, but its eastern boundary was adjacent to Missouri, a slave state, and many settlers in Kansas came from Missouri with their slaves. This time the national congress came up with a compromise that was really no compromise. They decided that rather than make the final decision, the national congress would let the state decide through “popular sovereignty,” or a direct popular vote, and in this case an example of the worst of a pure democracy, whether the state would come into the union as a free or slave state. As a result of this compromise, two state constitutional conventions were called in Kansas, one free and one slave, and the citizens began fighting with each other politically and physically, in what became known as “bleeding Kansas,” to determine which constitution would get the most votes. The United States’ congress accepted the “free state” constitution, but the issue was not truly settled until after the Civil War.

In 1857, the Supreme Court took its turn in trying to settle the issue of slavery. Their decision arose over a slave, Dred Scott, who had been taken by his master from the South to live in the North for several years before both master and slave moved back to the South. Based on the argument that by living in a free state he deserved his freedom, Dred Scott sued in the court system. When the case reached the Supreme Court, the court through Chief Justice Roger B. Taney, made a sweeping decision. First, they ruled that since Dred Scott was a piece of property (slave) he had no right to sue for freedom. That would be in essence like a chair suing its owner for freedom. Then the court went on to rule on the entire issue of slavery and its expansion when it ruled that under the Constitution neither the national nor state governments had a right to restrict the rights of property and since slaves were property there could be no laws restricting slavery and therefore no such thing as free and slave states. This ruling in effect called into question all previous compromises on the issue of slavery and negated any state’s efforts to abolish slavery within its own territory.

In 1859, an avowed abolitionist, John Brown, decided to act for himself on the issue of slavery and attacked the federal arsenal in Harpers Ferry, Virginia. His plan was to rally abolitionists to his cause, march through the South freeing slaves, and arm them to rise up against their masters. Brown’s attempt failed but the fact that northern abolitionists were willing to end slavery through encouraging slave revolts, scared southerners to death. In the South, Brown became the quintessential example of an evil abolitionist. In the North, Brown became a martyr for abolitionism and a symbol of virtue.

It was into this atmosphere that Abraham Lincoln was elected president in 1860. Lincoln was opposed to slavery but could really be considered a moderate on the slavery issue since he did not believe he had the constitutional power to end it in the states where it existed and he had vowed not to meddle with slavery as president. In his first inaugural address, Lincoln explained that “apprehension seems to exist among the people of the Southern States that by the accession of a Republican Administration their property and their peace and personal security are to be endangered. There has never been any reasonable cause for such apprehension. Indeed, the most ample evidence to the contrary has all the while existed and been open to their inspection. It is found in nearly all the published speeches of him who now addresses you. I do but

quote from one of those speeches when I declared that —I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.” From the Southern perspective, however, Lincoln had spoken strongly against slavery in the famous Lincoln—Douglas debates, he was the candidate representing the newly formed Republican Party that had vowed to abolish slavery, and he had been elected president without one electoral college vote from the South. Without any political power in the national legislature, and now in the executive branch, southerners felt the only way they could protect their rights was to leave the union altogether through secession.

### **3. How do these events illustrate declining public virtue as a force in regulating passion in political affairs?**

The following statements illustrate the passionate division that existed between the majority faction in the north and the minority faction in the south and the moderate voice of Abraham Lincoln.

#### **John Brown**

“I, John Brown, before God and these witnesses, dedicate my life to the destruction of slavery.”

“I say I am yet too young to understand that God is any respecter of persons. I believe that to have interfered as I have done, as I have always freely admitted I have done, in behalf of his despised poor, I did not wrong but right. Now, if it is deemed necessary that I should forfeit my life for the furtherance of the ends of justice, and mingle my blood further with the blood of my children and with the blood of millions in this slave country whose rights are disregarded by wicked, cruel, and unjust enactments, I say let it be done.”

“I, John Brown, am now quite convinced that slavery cannot be purged from this guilty land without the shedding of blood.” John Brown

#### **Southern “fire-eater”**

“You want war, fire, blood to purify you ... [?] You are called to the fiery baptism, and I call upon you to step up to the alter.” Southern “fire eater”

#### **Abraham Lincoln**

“We are not enemies, but friends. We must not be enemies. Though passion may have strained it must not break our bonds of affection. The mystic chords of memory, stretching from every battlefield and patriot grave to every living heart and hearthstone all over this broad land, will yet swell the chorus of the Union, when again touched, as surely they will be, by the better angels of our nature.” Abraham Lincoln, *First Inaugural*, 1861

### **4. How intense is the division between Southerners and abolitionists? How difficult is compromise when divisions are this deep and passionate? What role is Lincoln trying to play in his inaugural address?**

*[End of first day's reading.]*

## Auxiliary Precautions

The auxiliary precautions are intended to supply through “opposite and rival interests” the structures of government which truly force it to control itself. Often people think that the specific “checks and balances” built into the Constitution which allowed the executive, legislative, and judicial branches to control each other were the only auxiliary precautions. But it appears that James Madison had other “checks” in mind when he coined the term “auxiliary precautions.”

### 5. What do you think James Madison meant by the need for “auxiliary precautions” as another control on the power of government?

**Auxiliary Precaution # 1: A written constitution** established a body of fundamental law which clearly limited the power of the government. The Constitution placed the original will of the people in constant opposition to the will of those who were chosen to govern. In this case the limits on government were that the powers of government were specifically listed and the government was specifically prohibited from doing certain things.

#### The Federalist Papers: No. 41, JAMES MADISON.

“THE Constitution proposed by the convention may be considered under two general points of view. The FIRST relates to the sum or quantity of power which it vests in the government, including the restraints imposed on the States. The SECOND, to the particular structure of the government, and the distribution of this power among its several branches. . . .

That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union; and that this may be the more conveniently done they may be reduced into different classes as they relate to the following different objects: 1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5. Restraint of the States from certain injurious acts; 6. Provisions for giving due efficacy to all these powers....”

#### Examples:

##### Amendment IV

The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.

##### Article I, Section 8. (Powers of congress)

“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States....”

##### Section 9. (Restrictions of the powers of congress)

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Tax or Duty shall be laid on Articles exported from any State.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Today the Constitution is often spoken of as being a “living” document, meaning that overtime it can be amended and interpreted to reflect the changing conditions and attitudes in America. Some argue that the “living” nature of the document has allowed it to be changed beyond its original meaning. This tension,

between its “living” and written or “established” form, represents a tension, established by rule of law, that serves as an auxiliary precaution.

**6. Describe in your own words auxiliary precaution # 1. How does a written constitution act as a check on the ambitions of those who govern and the government as a whole? What is meant by saying that the constitution is a living document? How can its “living” nature best be balanced against its role as an auxiliary precaution?**

Auxiliary Precaution # 2: A government resting on republican principles — where **the people participated and continued to be the ultimate sovereigns of their government**. Voting for those who govern continually placed the will of the people against the will of those who were chosen to govern. Some officials were elected directly, others elected indirectly. Some were not elected at all but received office through appointment. All were chosen at different times for different terms. Members of the lower house were elected directly by the people every two years. Senators were originally elected by state legislatures (now directly by the people) for six year terms, and those terms were staggered so that only one-third of the senate stood for re-election in any given year. Members of the judicial branch were appointed by the president, and those appointments must be ratified by the senate. Judges served for life. The president was elected to a four-year term by the electoral college (not directly by the people). In this way every officer serves to some extent at the will of the people but the system somewhat checks the passions of the people.

**The Federalist Papers : No. 37** James Madison.

“The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept [dependent] on the people, by a short duration of their appointments; and that even during this short period the trust should be placed not in a few, but a number of hands. Stability, on the contrary, requires that the [persons] in which power is lodged should continue for a length of time the same.... [E]nergy in government requires not only a certain duration of power, but the execution of it by a single hand.”

**The Federalist Papers : No. 39**, James Madison.

“If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices [by selection of the people]. It is ESSENTIAL to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is SUFFICIENT for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character....

On comparing the Constitution planned by the convention with the standard here fixed, we perceive at once that it is, in the most rigid sense, conformable to it. The House of Representatives, like that of one branch at least of all the State legislatures, is elected immediately by the great body of the people. The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people. The President is indirectly derived from the choice of the people, according to the example in most of the States. Even the judges, with all other officers of the Union, will, as in the several States, be the choice, though a remote choice, of the people themselves, the duration of the appointments is equally conformable to the republican standard, and to the model of State constitutions....

Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter....”

**7. Describe in your own words auxiliary precaution # 2. How does the election process allow the people to control the ambitions of those who represent them?**

**What role does terms of office place in this check? Why would all government officers not be elected directly by the people at the same time? How does the proposal of “term limits” relate to this issue?**

**Auxiliary Precaution # 3:** The creation of a **republic of continental size** guarded against the tyranny of any one faction. The will of one faction was constantly pitted against the will of another faction.

**The Federalist Papers : No. 9, Alexander Hamilton**

A FIRM Union will be of the utmost moment to the peace and liberty of the States, as a barrier against domestic faction and insurrection. It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy....

... The opponents of the plan proposed have, with great assiduity, cited and circulated the observations of Montesquieu on the necessity of a [small] territory for a republican government....

When Montesquieu recommends a small extent for republics, the standards he had in view were of dimensions far short of the limits of almost every one of these States. Neither Virginia, Massachusetts, Pennsylvania, New York, North Carolina, nor Georgia can by any means be compared with the models from which he reasoned and to which the terms of his description apply. If we therefore take his ideas on this point as the criterion of truth, we shall be driven to the alternative either of taking refuge at once in the arms of monarchy, or of splitting ourselves into an infinity of little, jealous, clashing, tumultuous commonwealths, the wretched nurseries of unceasing discord, and the miserable objects of universal pity or contempt....

**The Federalist Papers : No. 10, James Madison.**

AMONG the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished;...

By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one, by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

[To take away liberty, makes the cure] worse than the disease. Liberty is to faction what air is to fire,... But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves....

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society....

The inference to which we are brought is, that the CAUSES of faction cannot be removed, and that relief is only to be sought in the means of controlling its EFFECTS....

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit

of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole.... Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths....

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.

The two great points of difference between a democracy and a republic are: first, the delegation of the government [in a Republic] to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the [republic] may be extended.

The effect of [choosing representatives] is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.... [I]t may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose ...

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of republican than of democratic government; and it is this circumstance principally which renders factious combinations less to be dreaded in [a republic] than in [a democracy]. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens ... to act in unison with each other....

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic, — is enjoyed by the Union over the States composing it. Does the advantage consist in the substitution of representatives whose enlightened views and virtuous sentiments render them superior to local prejudices and schemes of injustice? It will not be denied that the representation of the Union will be most likely to possess these requisite endowments.... Here, again, the extent of the Union gives it the [best] advantage....

**8. Describe in your own words auxiliary precaution # 3. What are the proposed advantages of a large Republic over a small one? How does a large republic guard against the effects of factions? How is this characteristic an auxiliary precaution built into the structure of government?**

Auxiliary Precaution # 4: The **power to govern surrendered by the people must be carefully divided**. The creation of the new federal structure (“neither wholly federal nor wholly national”) divided the power surrendered by the people into state and national levels of government. Thus, the interests of the states are constantly pitted against the interests of the national government, and the national government against that of the states. This is often referred to as the “**division of power.**” As stated in the 10<sup>th</sup> Amendment, “The powers not *delegated* to the United States by the Constitution, nor prohibited by it to the states, are *reserved* to the States respectively, or to the people.” (italics added)

**The Federalist Papers : No. 45, James Madison.**

HAVING shown that no one of the powers transferred to the federal government is unnecessary or improper, the next question to be considered is, whether the whole mass of them will be dangerous to the portion of authority left in the several States....

The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State. The operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States....

## The Federalist Papers : No. 46, James Madison.

“RESUMING the subject of the last paper, I proceed to inquire whether the federal government or the State governments will have the advantage with regard to the predilection and support of the people....

Ambitious encroachments of the federal government on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke; and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other. But what degree of madness could ever drive the federal government to such an extremity ...

On summing up the considerations stated in this and the last paper, they seem to amount to the most convincing evidence, that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union”

### Examples:

Necessary and proper

Article I, Section 8.

[Congress shall have power to] to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Supremacy clause

Article VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, Section 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder [loss of rights upon imprisonment or imprisonment without trial], ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

### 9. Describe in your own words auxiliary precaution # 4. What is meant in our constitutional system by the term “division of power”? How does dividing power between the states and the national government act as an auxiliary precaution?

Auxiliary Precaution # 5: The “**separation of power**” among the branches (departments) of the government further divided the power surrendered by the people. The functions of each branch were specific. Those who administered each branch of the government were given the necessary constitutional

power to resist encroachments by the other branches. The legislative branch made the law, the executive branch enforced the law, and the judicial branch interpreted and applied the law.

**The Federalist Papers : No. 51**, Most likely James Madison

“TO WHAT expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own;...

It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal. But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.... Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.... But it is not possible to give to each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different [houses];... As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified....

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”

**10. Describe in your own words auxiliary precaution # 5. What is meant in our constitutional system by the term “separation of power”? How does separating power between three branches of government act as an auxiliary precaution?**

Auxiliary Precaution # 6: The specific **checks and balances** (specific responsibilities) built into the system allowed each branch particular constitutional means to check the power of the other branches. Thus, the interests of those in each branch of government were pitted against the interests of those in the other branches. For example, the executive branch recommends legislation to congress, calls special sessions of the legislature, and vetoes bill passed by the legislature. Yet the legislature checks the executive by overriding vetoes, approving appointments, and possible impeaching the executive. The executive appoints members of the judicial branch, yet the judicial branch can declare acts of the executive unconstitutional. The judicial branch also checks the power of the legislative branch by declaring laws unconstitutional and the legislative branch approves or disapproves the appointment of judges. Even the senate and the house check each others power because of the bicameral system.

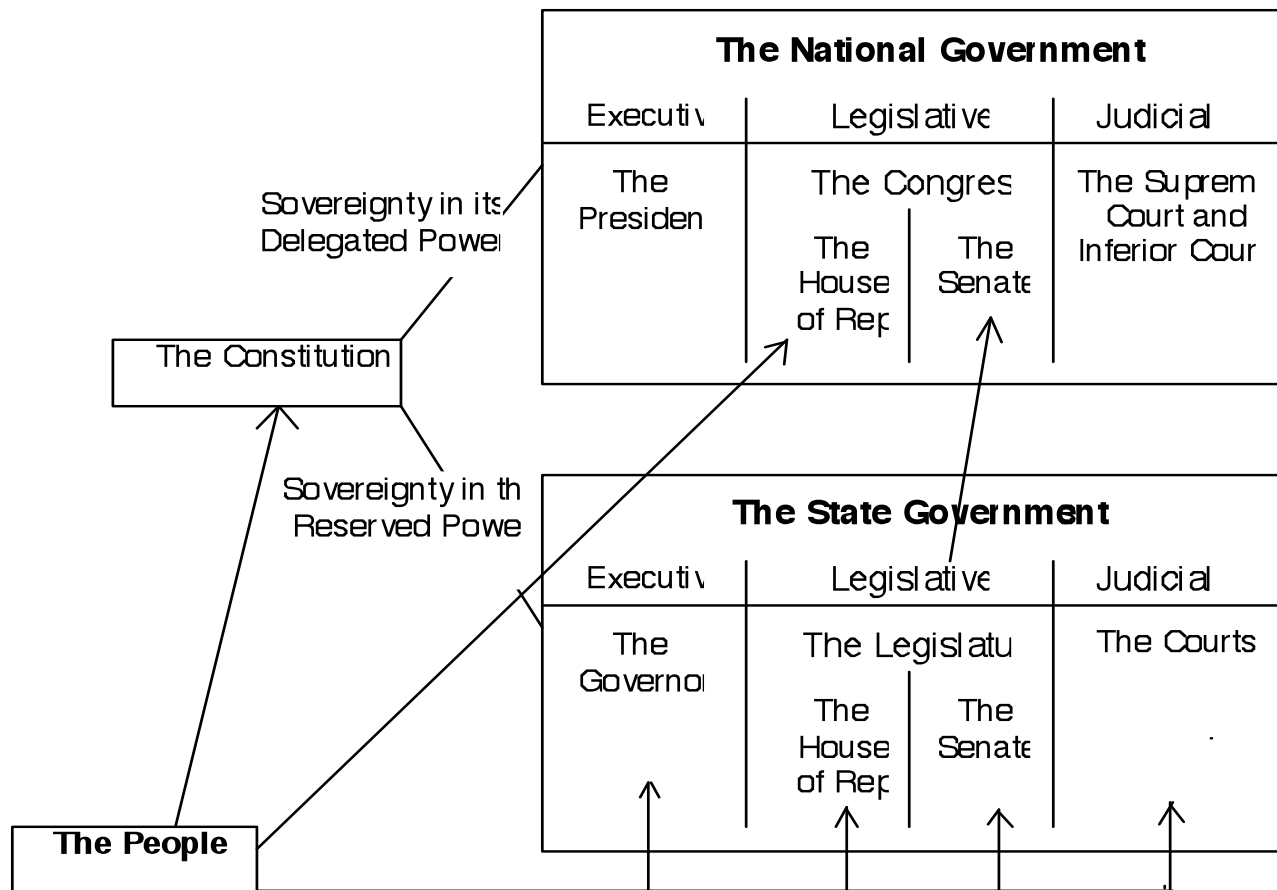
**The Federalist Papers : No. 47**, James Madison.

“HAVING reviewed the general form of the proposed government and the general mass of power allotted to it, I proceed to examine the particular structure of this government, and the distribution of this

mass of power among its constituent parts. The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

The legislative, executive, and judiciary powers ought to be kept as separate from, and independent of, each other AS THE NATURE OF A FREE GOVERNMENT WILL ADMIT.... The executive magistrate has a qualified negative on the legislative body, and the Senate, which is a part of the legislature, is a court of impeachment for members both of the executive and judiciary departments. The members of the judiciary department, again, are appointable by the executive department, and removable by the same authority on the address of the two legislative branches....

**11. Describe in your own words auxiliary precaution # 6. What are some of the specific rules of interaction between the three branches of government? How do the specific rules of interaction between the three branches allow (force) them to check and balance each other?**

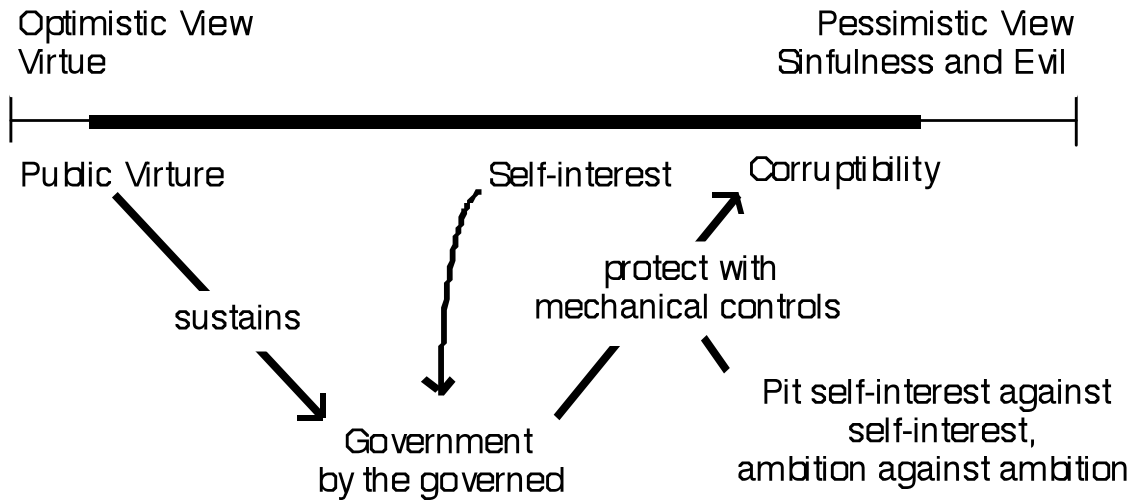


**12. What were the basic features of the new “federal” structure created by the Constitution?**

**13. What are the important relationships between public virtue, self-interest, and auxiliary precautions (mechanical controls) in our constitutional system? (see below)**

What are some ways in which the power of the national government has increased over the states?

- 19<sup>th</sup> Amendment (women's suffrage)
- Aid to education
- Baker v. Carr 1964 (political redistricting)



Ways in which the power of the people over the government has been enhanced?

- National and state political primaries
- 17<sup>th</sup> Amendment (direct election of senators)

Ways in which the power of the judicial branch has increased over time?

- Plessy v. Ferguson / Brown v. Board of Education
- School prayer
- Forced busing
- Re-introduction of wolves into the West

**14. How do the above examples represent challenges to separation or division of powers?**

*[NB: Some of the material herein may be the work of Gary Marshall and Eric Walz. Marshall's content may appear in a forthcoming publication.]*