

## CHAPTER 1

### *Constitutional Government*

The selections in this chapter have been chosen to introduce students to differing perspectives on the underlying forces that shaped the Constitution of 1787 and to James Madison's explanation of the theory and practice of the separation of powers in *The Federalist*. An excerpt from John Locke provides one example of the important historical underpinnings of the concept of the rule of law and government by the consent of the people.

Two important themes can be developed from Chapter 1. One is the view of the Constitution as an elitist document, framed by an elite for the purposes of limiting majority rule, and the other is the view that the Constitution was essentially a democratic document, in terms of the forces that operated at the Constitutional Convention of 1787 and in its basic provisions. The congruence between the Declaration of Independence and the Constitution is stressed.

Whether or not one agrees that it was the purpose of the framers of the Constitution to create a democratic government, it seems clear that the Constitution was not intended to make majority rule easy. The fact that only the House of Representatives was to be elected by the people, coupled with the separation of powers and the checks and balances system, suggests a strong apprehension, at the time, of majority rule and of a positive national government. But the flexibility of the Constitution, the ambiguity of many of its provisions, and the possibility of amendments, has led both to forceful government and to a vast expansion of democracy. Amendments to and interpretations of the Constitution have supported an expansion of national power at the same time that they have increased democratic participation. The original system may have been devised by and for an aristocracy, but it soon came to serve the people, the critical turning point perhaps being the Jacksonian era. And, Madison's emphasis upon the importance of checks and balances was soon to be overshadowed by the increasing power of the executive, the rise of an imperial presidency that conformed more to the Hamiltonian than to the Madisonian model of government.

### **CONSTITUTIONAL DEMOCRACY: THE RULE OF LAW**

It is certainly appropriate to begin an introductory text on American government with John Locke. Thomas Jefferson expressed the views of eighteenth-century America when he wrote in May of 1790, "Locke's little book on government is perfect as far as it goes." Jefferson incorporated Locke's theory of the social contract in the Declaration of Independence. Citing the "laws of nature and of nature's God," Jefferson wrote: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and 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." Jefferson's felicitous pen substituted happiness for John Locke's property at the top of the hierarchy of natural rights, but all eighteenth-century Americans, including Jefferson, implicitly recognized that the protection of private property was a principal purpose of government.

Locke's *Second Treatise*, first published in 1690, was an eloquent theoretical justification of the Glorious Revolution of 1688, which established parliamentary rule and Parliament's right to determine succession to the throne and limit the monarch's power.

A belief in reason and scientific progress characterized the eighteenth century, and Locke's treatise was a precursor to the Enlightenment of the eighteenth century. Locke believed that natural law was objectively valid, and therefore once ascertained, governments based on it would have a superior claim to legitimacy. He derived the "best" form of government from natural law and natural rights. Principles of natural law, according to Locke, should control governments created by men.

**Reading 1:**  
**John Locke, *Second Treatise, Of Civil Government***

Locke emphasized that the sovereignty of the people resides in the hands of the legislature, which is bounded by the consent of the people and by the standards of the law of God and nature. Natural law dictates that legislative bodies are "to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at Court and the countryman at plough. Secondly: These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly: They must not raise taxes on the property of the people without the consent of the people given by themselves or their deputies."

**QUESTIONS FOR DISCUSSION**

1. How does John Locke describe the state of nature? (It is a state of freedom and equality, governed by natural law, which requires in part that since all persons are equal and independent, "no one ought to harm another in his life, health, liberty or possessions." The execution of the law of nature is put into every person's hands, "whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation.")
2. Why do people leave the state of nature and join a political society by establishing a government? (They form governments because of the uncertainty of the state of nature, and the inability of people to protect their rights due to the lack of a settled, known law, an impartial judge, and sufficient power to force people to conform to the law of nature. People therefore leave the uncertain state of nature and enter into political society and government to protect their property, as well as their lives and liberties.)
3. Under what conditions can government be dissolved? (When it does not act in accordance with the will of the people.)

**MULTIPLE CHOICE QUESTIONS**

1. One of Locke's fundamental principles is:
  - a) a major goal of government is the pursuit of happiness.
  - b) governments are established to serve the elite.
  - c) all persons should be treated equally by government.
  - d) once established, governments cannot be dissolved.

2. In the state of nature described by John Locke:
  - a) all persons are in a state of war with each other.
  - b) life is nasty, brutish, and short.
  - c) liberty is denied to all but the strongest.
  - d) all persons possess liberty.
  
3. In the state of nature, the execution of the law of nature is:
  - a) in the hands of the executive.
  - b) in the hands of the legislature.
  - c) in the hands of the judiciary.
  - d) in every person's hands.
  
4. Persons enter into political society and government because:
  - a) they seek a higher authority to protect their rights against invasion by others.
  - b) the pursuit of happiness can only be guaranteed by government.
  - c) they seek equality with each other.
  - d) the common defense requires a strong government.
  
5. According to John Locke, a primary end of government is:
  - a) the preservation of equality among all citizens.
  - b) to guarantee all citizens happiness.
  - c) economic prosperity.
  - d) the protection of private property.
  
6. Private property is, according to Locke, inadequately protected in a state of nature because:
  - a) the law of nature is not plain and intelligible to all rational persons.
  - b) persons do not agree that the protection of private property is a fundamental right.
  - c) persons in a state of nature are constantly at war with each other.
  - d) the state of nature lacks an impartial judge and an executive capable of upholding judicial decisions protecting property rights.
  
7. In a state of nature a person:
  - a) has no power.
  - b) exerts whatever powers are necessary to preserve himself, and to punish crimes committed against natural law.
  - c) is in a state of war.
  - d) has no respect for property rights.
  
8. According to Locke, the supreme power of the Commonwealth is:
  - a) the executive.
  - b) the judiciary.
  - c) the bureaucracy.

- d) the legislature.
9. Locke argues that government can only be dissolved when:
- a) it fails to protect the Commonwealth against foreign attacks.
  - b) laws are enacted that fail to protect private property.
  - c) the judiciary assumes legislative authority.
  - d) government acts without the consent of the people.
10. In John Locke's model of government, the power that each individual gives to society when he or she enters into it:
- a) can never revert to the individuals again.
  - b) cannot revert to the individuals as long as the society lasts.
  - c) reverts to individuals only with the consent of the government.
  - d) can be reclaimed by individuals only if the government fails to protect private property.

### **FRAMING THE CONSTITUTION: AN ELITIST OR DEMOCRATIC PROCESS?**

#### **Reading 2:**

**John P. Roche, *The Founding Fathers: A Reform Caucus in Action***

John Roche's article on the framing of the Constitution has now been accepted as the classical piece on what actually occurred at the Philadelphia Convention of 1787. When the article first appeared in 1961 in the *American Political Science Review*, its thesis was a startling contrast with the generally accepted notion that the framers were either all-wise Platonic guardians or a conspiratorial economic elite, adhering either to abstract principles of political theory or advancing proposals to protect economic interests, respectively. In either case, no one before Roche had as forcefully presented a view that the Constitutional Convention was essentially a democratic reform caucus. The so-called principles of the Constitution, he writes, were not essentially based upon theoretical considerations or a conspiracy to preserve elite power, but upon practical political trade-offs among the different state interests that had to be reconciled in order to make the idea of a national constitution palatable at home.

### **QUESTIONS FOR DISCUSSION**

1. What does Roche mean when he describes the Constitutional Convention of 1787 as a democratic reform caucus? (“Charles Beard...to the contrary notwithstanding, the Philadelphia Convention was not a College of Cardinals or a Council of Platonic Guardians working within a manipulative, free democratic framework; it was a nationalist reform caucus which had to operate with great delicacy and skill in a political cosmos full of enemies to achieve the one definitive goal—popular approbation.”)
2. What were the major political constraints operating during the Constitutional Convention of 1787? (One of the most important constraints was the existence of powerful states with strong views on state sovereignty that had to be accommodated in various ways, which were reflected in the compromises of the Convention.)

3. Although the delegates to the Constitutional Convention were not elitists in the Beardian sense, most of the framers did share certain political views, which they sought to institutionalize over strong opposition in the country. How does Roche characterize the framers of the Constitution? (“An interesting amalgam of a few dedicated nationalists with the self-interested spokesmen of various parochial bailiwicks.” They possessed a “continental” approach to political, economic, and military issues.)
4. What does Roche feel was the role of political theory at the Constitutional Convention? (Essentially that theory was the servant of practical political necessity. “. . . While the shades of Locke and Montesquieu may have been hovering in the background, and the delegates may have been unconscious instruments of a transcendent *telos*, the careful observer of the day-to-day work of the Convention finds no overarching principles. The separation of powers to him seems to be a by-product of suspicion, and federalism he views as a *pis aller*, as the furthest point the delegates felt they could go in the destruction of state power without themselves inviting repudiation.”)
5. What evidence is there that the retrospective symmetry given to the Constitution by *The Federalist* has been influential in the American political tradition? (*The Federalist* essentially supplied the theory of the Constitution that has become accepted in our political tradition. Witness the many citations to *The Federalist* in Supreme Court decisions and in political literature generally. Regardless of what different framers may have thought they were doing, the fact is that the Constitutional system they established is consistent with certain theoretical principles, and *The Federalist* helps to explain these.)

#### MULTIPLE CHOICE QUESTIONS

1. John P. Roche describes the founding fathers as:
  - a) an economic elite.
  - b) philosopher kings who followed abstract principles of political theory.
  - c) practical politicians striving to accommodate state and national interests.
  - d) believers in an aristocracy of talent.
2. According to John P. Roche, the delegations to the Constitutional Convention were dominated by:
  - a) nationalists.
  - b) proponents of states' rights.
  - c) Jeffersonian republicans.
  - d) conservatives.
3. Roche argues that the Virginia Plan:
  - a) capitulated to state interests.
  - b) provided for an essentially unitary form of government.
  - c) embodied the “Madisonian model.”
  - d) would have allowed the large states to dominate the national government.

4. Roche concludes that federalism:
- a) represented a victory for states' rights.
  - b) reflected a necessary compromise to gain state support for a national government.
  - c) originally incorporated the doctrine of state nullification of national laws.
  - d) gave the states more power than the national government.

**Reading 3:**  
**Charles A. Beard, *Framing the Constitution***

This selection by Charles A. Beard on the framing of the Constitution is taken from his book, *The Supreme Court and the Constitution* (1912), which appeared one year before his famous work, *An Economic Interpretation of the Constitution* (1913). The earlier work contains a concise statement of the famous economic theme of Beard, which was that the Constitution reflected nothing more nor less than the work of an economic elite that was out to protect its own interests against possible incursions from popular majorities. Beard's elite consisted of landholders, creditors, merchants, public bondholders, and wealthy lawyers, all of whom were well represented at the Constitutional Convention.

Just as Roche's thesis of a democratic Constitutional Convention was startling in 1961, Beard's conspiratorial economic elite theme had a profound impact after it appeared in full form in 1913. At that time the prevailing view was that the Constitution had been formulated by wise philosopher kings who impartially followed the dictates of accepted political theory in deciding what was best for the nation. Before Beard, the folklore of American democracy suggested at a minimum that the framers of the Constitution, although an elite, were nevertheless looking out for the best interests of the people. Beard, however, suggested that in effect the Constitutional Convention of 1787 was a conspiracy of an economic elite.

After reading Beard, students may ask who is right about the Constitutional Convention—Roche or Beard? At this point, a few select quotes from Robert E. Brown's work, *Charles A. Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"* (Princeton, N.J.: Princeton University Press, 1966), should serve to illustrate to students that although Beard was indeed interesting and provocative, his evidence did not support his conclusions. Brown points out that:

Having reviewed all this evidence on the economic holdings of the Convention delegates, the important question is whether Beard's historical method justified his conclusions that personal property was responsible for the Constitution. The answer must be an emphatic no. . . .

Anyone would concede that the founding fathers had education, property, and influence far greater than the average at that time, but the same would be true of colonial legislatures, the Confederation Congress, and legislatures today. Had Beard cited this evidence to prove that the convention delegates represented property in general and were interested in a government which would protect property, he would have been on firm ground. All the delegates believed in the sanctity of property; some even believed that the chief function of government was the protection of property. This was undoubtedly important, but it was not their only concern. Beard did not contend, however, that the Convention was rigged to protect property *in general*. What he emphasized was *personalty* [personal property], and in fact, a particular kind of personalty which did not include livestock and slaves. We shall see later that he even refined personal property to mean predominantly one kind of personal property—public securities.

A principal source of Beard in support of his economic argument was *The Federalist*; however, as Brown points out, although the authors of *The Federalist* did appeal to economic interests, they also appealed to many other interests and sentiments, as can be observed in all of the selections from *The Federalist* in this edition. The need for limited government, for example, detailed by Madison in papers 47, 48, and 51 of *The Federalist*, is not premised on the need to protect private property, but on the need to prevent tyranny, the fallibility of man, and the natural division of governmental power into legislative, executive, and judicial categories. By contrast, note that Alexander Hamilton argued in *Federalist 70* that an energetic executive was essential for good government. Hamilton was in favor of protecting private property, as were all of the delegates to the Convention, and a vigorous executive could be interpreted as essential to preserve property, as can most other provisions of the Constitution. A strong and effective national government, which at the same time is constructed in such a way that popular majorities cannot control it, can become the instrument of an economic elite in the preservation of its interests. However, such a government serves other purposes, such as national defense, political stability, and uniformity of laws, which benefit many interests in society apart from significant property holders.

## QUESTIONS FOR DISCUSSION

1. Beard observes that the revolutionists—Samuel Adams, Thomas Paine, Patrick Henry, and Thomas Jefferson, among others—“were not, generally speaking, men of large property interests or of much practical business experience. In a time of disorder, they could consistently lay more stress upon personal liberties than upon social control; and they pushed to the extreme limits those doctrines of individual rights which had been evolved in England during the struggles of the small landed proprietors and commercial classes against royal prerogative, and which corresponded to the economic conditions prevailing in America at the close of the eighteenth century. They associated strong government with monarchy, and came to believe that the best political system was one which governed least. A majority of the radicals viewed all government, especially if highly centralized, as a species of evil, tolerable only because necessary and always to be kept down to an irreducible minimum by a jealous vigilance.”

The emphasis of the revolutionists upon the need to preserve individual freedom from governmental interference, particularly from the power of the national government, led to a weak Articles of Confederation that failed “to accomplish the accepted objects of government; namely, national defense, the protection of property and the advancement of commerce.” Note here that Beard does not as forcefully present the thesis that the Constitution represented the interests of the propertied classes as he did in his *An Economic Interpretation of the Constitution*.

From this introduction students may be asked to contrast the philosophy and forces behind the Articles of Confederation with those supporting the new Constitution of 1787. Most of the revolutionists who supported the Articles of Confederation in the first place did not wish to see a new and powerful national government, although some, such as Jefferson, clearly supported the new Constitution with certain reservations. To Beard, the Constitution of 1787 reflected the emergence of a new *class* of persons with power, namely the “men of business and property and the holders of public securities.” The philosophy behind and conditions leading to the Constitution of 1787 are stated by Beard in the following terms: “The close of the revolutionary struggle removed the prime cause for radical agitation and brought a new group of thinkers into prominence. When independence has been gained, the practical work to be done was the maintenance of social order, the payment of the public debt, the provision of a sound financial system, and the establishment of conditions favorable to the development of the economic resources of the new country.”

2. What was the effect of the state constitutions and the Articles of Confederation upon the dominant economic classes? (“Under the state constitutions and the Articles of Confederation established during the Revolution, every powerful economic class in the nation suffered either immediate losses or from impediments placed in the way of the development of their enterprises.”)
3. How does Beard characterize the delegates to the Constitutional Convention of 1787? (They were an economic, political, and intellectual elite. Although Beard graphically refers to the economic elitist characteristics of the delegates, he also paints them as intellectual, patriotic, and political giants of their time. The economic theme becomes clear as Beard writes that the “makers of the federal Constitution represent the solid, conservative, commercial and financial interests of the country—not the interests which denounced and proscribed judges in Rhode Island, New Jersey, and North Carolina, and stoned their houses in New York. The conservative interests, made desperate by the imbecilities of the Confederation and harried by state legislatures, roused themselves from their lethargy, drew together in a mighty effort to establish a government that would be strong enough to pay the national debt, regulate interstate and foreign commerce, provide for national defense, prevent fluctuations in the currency created by paper emissions, and control the propensities of legislative majorities to attack private rights. . . . The radicals, however, like Patrick Henry, Jefferson, and Samuel Adams, were conspicuous by their absence from the Convention.”)
4. What were the views of the delegates to the Convention on democracy and equality, according to Beard? (“Indeed, every page of the laconic record of the proceedings of the Convention preserved to posterity by Mr. Madison shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on the one hand against the possibilities of despotism and on the other against the onslaught of majority.”)
5. Aside from describing the delegates as representatives of the propertied classes desiring to protect their interests, what other evidence does Beard present to support his thesis that the principal purpose of the Constitution was to protect most forms of private property (slaves and livestock were excluded from the property to be protected, which mostly included public securities)? (Beard writes that the delegates “were anxious above everything else to safeguard the rights of private property against any leveling tendencies on the part of the propertyless masses.” James Madison, among others, made strong arguments for property qualifications for voting, but these were not adopted by the Convention because it “could not agree on the nature and amount of the qualifications.” Beard argues that the principal purpose of the system of checks and balances was to protect property rights. “Nevertheless, by the system of checks and balances placed in the government the Convention safeguarded the interests of property by attacks by majority.” The arguments of *Federalist 10* are introduced by Beard, who suggests that Madison recognized a “natural inequality” due to the unequal distribution of property, and that the constitutional system should take this inevitability into account by guarding against the possibility of a majority faction forming that would dispossess minority property holders. Beard returns to his point regarding the checks and balances system as a major check against majorities and therefore those dispossessed of property, noting that “this very system of checks and balances, which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property.”)
6. Beard relies upon *The Federalist* to support his argument that the Constitution was designed to protect the economic interest of property holders. In the selection you have read, what arguments does Beard

make based on *The Federalist* to support his conclusions? (Beard cites *The Federalist* a number of times to indicate that the overriding concerns of the framers related to economic matters. Beard cites the tenth paper of *The Federalist* in support of his claim that the leaders of the Convention recognized the maldistribution of wealth and feared its consequences. Beard notes that page after page of *The Federalist* is directed to that portion of the electorate that was disgusted with the mutability of the public's councils. The legislative power was to be feared, said the author of *The Federalist*, and Hamilton argued that a presidential veto was necessary to curb the unreasoned passions of the legislature. Beard notes that Hamilton argued in *The Federalist* that it was important that the process of ratification of the Constitution be removed from the direct control of the people. Parenthetically, some students may be interested in the esoteric argument discussed in selection 2 by John P. Roche that *The Federalist* is not an accurate description of the philosophy of the framers since it was largely campaign propaganda for the ratification of the Constitution. Question 5 above, in reference to Roche's piece, gives my views on the importance of *The Federalist* in constitutional interpretations even though it was after the fact. Beard, who greatly relies upon *The Federalist*, notes also that it was a piece of campaign literature but nevertheless “has remained a permanent part of the contemporary sources on the Constitution and has been regarded by many lawyers as a commentary second in value only to the decisions of the Supreme Court.”)

### **MULTIPLE CHOICE QUESTIONS**

1. The thesis of Charles A. Beard is that the framers of the Constitution:
  - a) represented the propertied classes.
  - b) were a highly talented and elite group.
  - c) opposed majority rule.
  - d) all of the above
  
2. Beard states that the revolutionists and radicals:
  - a) were well represented at the Constitutional Convention.
  - b) owned no property.
  - c) were not men of large property interests or practical business experience.
  - d) were skeptical of equality and democracy.
  
3. Beard concludes that under the state constitutions and the Articles of Confederation:
  - a) property interests were well protected.
  - b) every powerful economic class in the nation suffered losses.
  - c) a strong national government was unnecessary.
  - d) majority rule was restricted.
  
4. Beard sees the separation of powers in the Constitution primarily as a device:
  - a) to curb popular majorities and thereby protect property interests.
  - b) to make the government more democratic by forcing compromise among the three branches.
  - c) to increase the power of the president.
  - d) to establish conservative domination of Congress.

### **LIMITATION OF GOVERNMENTAL POWER AND OF**

## MAJORITY RULE

These are the first selections from *The Federalist*, and since *The Federalist* is used throughout the text to provide the constitutional background of our political institutions and processes, a few words about *The Federalist* at this point would be very helpful to students. In the folklore of American democracy, *The Federalist* is as firmly embedded as the Constitution itself as a guide to the premises, purposes, and mechanisms of our government. It is almost universally used to explain the Constitution and the way in which the system is supposed to work. John Roche pointed out in selection 2 that for the purposes of historical research on the Constitutional Convention of 1787 and the motives and incentives of the delegates, *The Federalist* must be viewed as campaign propaganda. In fact, James Madison and Alexander Hamilton, the principal authors of *The Federalist*, wished in some cases to see different provisions of the Constitution than they were arguing for in *The Federalist*, but they certainly supported the Constitution. From the standpoint of an introductory course in American government, it is probably not desirable to go beyond John Roche's study of the Constitutional Convention in assessing the historical forces that helped to shape the Constitution. And *The Federalist* should be accepted not only for what it was but for what it has become, namely an accepted version of the views of James Madison and Alexander Hamilton on the Constitution, and indirectly, the views of the nationalists who supported the Constitution at the time.

While the Constitution is usually described as embodying the “Madisonian model” of government, it can also be seen as a reflection of the views of Alexander Hamilton. The contrast between the Madisonian and Hamiltonian models of government reflects the different premises that support fragmentation and dispersion of power on the one hand (the Madisonian model), and concentration of power on the other, particularly an energetic executive and extensive national power (the Hamiltonian model). As students are about to embark upon reading *The Federalist*, the instructor might wish to alert them to the contrasting Madisonian and Hamiltonian views on government that are expressed in the different nuances of the selections written by the two men. *Federalist 47*, *48*, and *51* develop the Madisonian model, but this should not be taken as the last word on what the framers meant the Constitution to be. Contrast, for example, these papers written by James Madison with the 70th paper of *The Federalist* written by Alexander Hamilton, and immediately the different constitutional emphases of the two men can be seen. Hamilton's emphasis in *Federalist 70* upon the need for an energetic executive is in direct contrast to Madison's balances as a mechanism to control power through its dispersion among the three branches of the government.

<p style="text-align: center;"><b>Reading 4:</b> <b>James Madison, <i>Federalist 47, 48, 51</i></b></p>
---

## QUESTIONS FOR DISCUSSION

1. Madison points out in *Federalist 47* that the powers of the three branches of government are distributed and blended together in certain ways. At the same time, he notes that “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.” How does Madison justify the intermixture of powers with his theory of the separation of powers? (1. Montesquieu, one of the important theorists used as a guide for the separation of powers, did not imply that the separation of powers has to be absolute. One branch of the government can have a “partial agency” in, and some control over, the acts of coordinate branches. Montesquieu meant only that the whole power of one department cannot be exercised by the same hands that possess the *whole power* of another department. 2. Looking at the individual states, “there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.” 3. Unless the branches of

government “be so far connected and blended, as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.” The maintenance of the separation of powers system requires the existence of checks and balances among the three branches of government.)

2. What is Madison's view of the inherent power potentials of the legislative, executive, and judicial branches of government? (The legislative branch is potentially the most powerful, the executive is carefully limited, and the judiciary also.) To what does Madison attribute the potential power of these branches of government? (Note here, for example, the inference that the direct popular election of the House of Representatives tends to inspire it with “an intrepid confidence in its own strength,” and the fact that the legislature's powers are more extensive and less capable of precise limits. These factors in combination with the power of the purse all contribute to a potentially very powerful legislative body. See *Federalist 48*.)
3. What does Madison mean when he says (*Federalist 51*), “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”? (Here he is referring to the checks and balances system—the constitutional means—and the role of the separate political constituencies for the House, Senate, and the presidency that supply contrasting personal motives, which establish the will to resist encroachments from other branches.)
4. How did Madison's view of human nature affect his theory of government? (“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.” See *Federalist 51*.)
5. The entire thrust of Madison's argument in *Federalist 47, 48, and 51* seems to be in the direction of controlling and even weakening the exercise of governmental power. This is a negative view of the role of government. The main question *The Federalist* raises seems to be how to prevent the arbitrary exercise of political power, rather than how to guarantee effective political leadership. Do you accept Madison's goal as the primary one in establishing a governmental system? Is the Constitution really as negative as Madison implies? (Note here that the separation of powers, with its establishment of an independent chief executive, guaranteed effective leadership by enabling the president to take independent action that would overcome the negative implications of the separation of powers. The Constitution can be viewed as a very positive instrument of government; in fact, wasn't the purpose of the constitutionalist, particularly Hamilton, to establish effective national government, not a government that would be crippled?)

## MULTIPLE CHOICE QUESTIONS

1. A central premise of James Madison in numbers 47, 48, and 51 of *The Federalist* is that:
  - a) weak government is the best government.
  - b) the combination of legislative, executive, and judicial power is the very definition of tyranny.
  - c) men are not angels and therefore those who exercise political power must be limited.
  - d) b and c
2. According to Madison, the branch of government to be most feared because of its inherent power is:

- a) the executive.
  - b) the judiciary.
  - c) the legislature.
  - d) the bureaucracy.
3. Madison argues that the separation of powers can only be maintained if:
- a) each branch of government is kept entirely separate from coordinate branches.
  - b) the powers of the three branches of the government overlap.
  - c) a strong presidency exists.
  - d) an alert citizenry checks government.

## INTERPRETING THE CONSTITUTION

How to interpret the Constitution has been a perennial issue in American politics. At the outset of the republic, Thomas Jefferson took the strict constructionist viewpoint while Alexander Hamilton argued for loose construction, which was the Federalist position strongly supported by Chief Justice John Marshall in such historic opinions as *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824).

Constitutional interpretation, whether from a “strict” or “loose” approach, always involves a certain amount of conjecture regarding the intentions of the framers. Original intent, the holy grail of strict constructionists, is often far from clear, as the authors of the next selection argue.

<p><b>Reading 5:</b> <b>Laurence H. Tribe and Michael C. Dorf, <i>How Not To Read The Constitution</i></b></p>
--

Here a leading constitutional theorist, Professor Laurence Tribe of the Harvard Law School, who has been actively involved in the politics of judicial nominations, particularly in opposition to Judge Robert H. Bork in his testimony before the Senate Judiciary Committee in 1987, argues that the Constitution is not written in stone. The Constitution is a framework, not a blueprint. Instructors might wish to contrast Tribe's views with those of Robert H. Bork.

Tribe and his co-author emphasize that the overarching principle was the need to balance and restrain governmental power. The Constitution broadly outlines its plan for the new government, but of necessity leaves out many details. As Chief Justice John Marshall stated in *McCulloch v. Maryland* (1819) (set forth in Chapter 2, selection 12), referring to the Article 1 powers granted to Congress, the Constitution enumerates, but does not define, congressional powers. Congress, the Supreme Court, and the president all become involved in constitutional interpretation as they undertake their constitutional responsibilities.

The authors ask: “Is the Constitution simply a mirror in which one sees what one wants to see?” No, but “we must look beyond the specific views of the framers to apply the Constitution to contemporary problems...” That is neither a liberal nor conservative viewpoint, for “not even the most 'conservative' justices today believe in a jurisprudence of original intent that looks only to the framers' unenacted views about particular institutions or practices.” Point out to students that the conservative Court in *Lochner v. New York* (1907) invented the constitutional right to liberty of contract out of whole cloth, just as the liberal justices found a new constitutional

right to privacy in *Griswold v. Connecticut* (1965) and in *Roe v. Wade* (1973). The authors conclude: “It is therefore not surprising that leaders on both the right and the left of the American political center have invoked the Constitution as authority for strikingly divergent conclusions about the legitimacy of existing institutions and practices, and that neither wing has found it difficult to cite chapter and verse in support of its 'reading' of our fundamental law.”

### QUESTIONS FOR DISCUSSION

1. Pick a constitutional provision, such as the Commerce Clause in Article I, and ask students to interpret it. They will see immediately that the Constitution is, in the words of the authors of this selection, a framework, not a blueprint. The Supreme Court has interpreted congressional authority to regulate commerce among the states in different ways throughout history.
2. Refer students once again to the Roche and Beard selections earlier in the chapter and discuss their views of the framers' intent. Does either author help us to understand the framers' intentions? If so, how would each author interpret, for example, the separation of powers, presidential prerogative powers, and the scope of congressional authority?

### MULTIPLE CHOICE QUESTIONS

1. From its creation, the Constitution was perceived as the document that sought to:
  - a) reserve extensive powers to the states.
  - b) strike a delicate balance between governmental power and individual liberty.
  - c) make the president dominant over Congress.
  - d) all of the above
2. Which of the following statements is *incorrect*?
  - a) There is genuine controversy over how the Constitution should be read.
  - b) The framers' intent is clear with regard to most constitutional provisions.
  - c) The Constitution has been interpreted in various ways over the years.
  - d) The Constitution is a framework, not a blueprint.
3. The text of the Constitution:
  - a) leaves much room for the imagination.
  - b) clearly reflects the framers' intentions.
  - c) has been consistently interpreted by the Supreme Court over the years.
  - d) is viewed in the same way by liberals and conservatives.