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The American Constitutional System--An Experiment in Limited Government

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"To secure private rights, and at the same time to preserve the spirit and form of popular government, was the great object to which their inquiries had been directed."

(James Madison, speaking of the Constitutional Convention)

The Constitution of the United States was fashioned by practical men of affairs who were familiar with and who took advantage of the lessons gained through centuries of struggle for liberty. The roots of many features of the American constitutional system lie deep in the past. The bicameral principle, originating in England in the fourteenth century, as the result of an historical accident, became the most appropriate basis for compromise on the question of representation and was incorporated into the Constitution. The adoption of the principle of the separation of governmental power into three distinct departments, the legislative, the executive and the judicial, represents the influence of Montesquieu on the founders of the Constitution and indicates their acceptance of his admiration for the English type of government as it was understood in his day. Many of the phrases and "words of art" employed in our fundamental law can be traced to the great documents that stand out as landmarks in English constitutional history. The common law, perhaps the greatest contribution of the mother country, is accepted by the states of the Union insofar as it is applicable to American conditions, and the framework of our system of courts is based on the English model.

But the outstanding feature of the American constitutional system is original. In the words of De Tocqueville, the Constitution was based "upon a wholly novel theory which may be considered a great discovery in modern political service."
constitutes a bold experiment in representative government. For the first time in history, a people thoroughly imbued with the ideal of individual liberty, through their representatives in a constitutional convention, performed the difficult tasks of strengthening the existing government and at the same time imposing restraints upon that government in the hope and belief that citizens, thus secured in their rights, would be free men. Those restraints typify the spirit of the American revolt against the tyranny of government.

The men in the constitutional convention were familiar with the history of governments. They knew the experiments that had been made in pure democracy. They knew the history of confederations and leagues of states. They realized that the mother country was a unitary government and that sovereignty rested in the King and Parliament. And knowing these things, they resolved in part to break away from the beaten path and set up a federal government resting on the sovereignty of the people as expressed in a written constitution. Up to this time, federal governments, so-called, had been based on the requisition principle and had been the mere creatures of the states composing them.

The novelty of the American plan of government was threefold: first, in the fact that the founders set up a limited government and that the people kept their sovereignty in their own hands; second, in the establishment of a dual system of government and the nice distribution of power between the states and the nation as expressed in the fundamental law; and third, in the fact that the central government operated directly on the individual. John Fiske describes this accomplishment as "one of the longest reaches of constructive statesmanship ever known in the world."¹

The delegates in the Constitutional convention had learned by bitter experience the truth of the adage, "Misers there be, but not of power." They knew that government, which ought to protect liberty and right, often is used to oppress and destroy. They feared above all things, the tyranny of the temporary majority, a tyranny which is more intolerable than that of any potentate, because as Burke says, "It is multiplied tyranny."

They feared the spirit of the mob which allows its action to be controlled by passion and retaliation and selfish desire and which admits of no responsibility in the use of political power. They were too wise to allow individual liberty to depend on the benevolence of government, so they drew a circle within which government should not penetrate. They set up a constitution which contained fundamental immunities against governmental power and which was intended to protect certain rights of all people, those in the minority as well as those in the majority; aliens as well as citizens.

Madison summed up the general opinion of the Convention when he said that to secure private rights against majority factions, and at the same time to preserve the spirit and form of popular government, was the great object to which their inquiries had been directed.\(^2\)

Abraham Lincoln in his First Inaugural Address visualized the ideal that the framers of the Constitution had attempted to achieve when he said, "A majority, held in restraint by constit-

\(^{2}\)Federalist, No. 10. Dean Charles Edward Clark of the Yale Law School has written an article in *Fortune* for February, 1934, p. 68, dealing with the query, "Does the Constitution Protect Individualism?" He attacks the James M. Beck thesis that "the Constitution (as it protects individual rights) has been disintegrating for the last fifty years". Dean Clark asserts that "the Constitution as a bulwark of individualism has not only not been disintegrating for the last fifty years but on the contrary has only begun within the last fifty years to be construed as affording the protection now expected of it". Dean Clark has discussed the problem solely from the "due process" angle. It is true that the due process limitation was not placed in the Constitution as a limitation on state governments until the adoption of the 14th Amendment (1868). The thesis that Clark discusses as contrasted with the thesis that he formulates is to trace the veering of the Supreme Court of the United States in interpreting the due process clause of the 14th Amendment. Professor Cushman has treated this phase of our constitutional development in an admirable article in 20 Mich. L. Rev. 737, entitled "Social and Economic Interpretations of the 14th Amendment". The court has assumed various attitudes in interpreting due process of law: (1) The period of judicial non-interference as illustrated by the Slaughterhouse Cases, 16 Wall. 36, 81 (1873) where J. Miller said the amendment was intended to protect colored men only; In *Munn v. Illinois*, 94 U. S. 113 (1876) the court declared that the due process clause afforded no protection against unreasonable rate regulation by legislatures; that the remedy was at the polls; (2) The second period of Judicial ruthlessness based on a mechanical and legalistic interpretation of the 14th Amendment began in the middle of the eighties. This was a period of extreme individualism when the courts thought in terms of legal concepts such as freedom of contract and would not look at social or economic facts; (3) The period starting with the Brandeis type of brief in *Muller v.*
tional checks and limitations and always changing easily with deliberate changes of popular opinion and sentiment is the only true sovereign of the people. Whoever rejects it, does of necessity fly to anarchy or despotism." Justice Miller of the United States Supreme Court has well expressed the basic principle of the American constitutional system as follows: "The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. . . . A government which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic repository of power is, after all, but a despotism. It is true that it is a despotism of the many—of the majority, if you choose to call it so. But it is none the less a despotism."

Students of history are familiar with the fact that the Constitutional convention was dominated by an entirely different philosophy than that underlying the Declaration of Independence. "The period of 1776 required a philosophy of politics

*Oregon*, 208 U. S. 412 (1908), the courts become social and economic experts; and (4) The latest movement toward judicial self-denial wherein the courts are inclined to accept the legislative finding of the social and economic facts justifying the legislation. Of course, it should be understood that there are no hard and fast lines of demarcation between these various periods and the court sometimes relapses into the technique of an earlier period. We suggest that Dean Clark's article should have been given a title somewhat similar to that of the Cushman article. He does not make out the case for the proposition that the Constitution does not protect individualism. He overlooks (1) the history of the debates in the Constitutional Convention to show the intent of the framers; (2) the history and purpose behind the Bill of Rights; (3) the influence of the natural rights theory on government during the first century, i. e., until the 14th Amendment was adopted (see Meaning of Due Process of Law prior to adoption of 14th Amendment, 18 Calif. L. Rev. 583, and Recognition of Natural Rights in State Constitutions, 20 Col. L. Rev. 187); (4) to prove his thesis, he should show affirmatively how legislatures during the first hundred years passed arbitrary and unreasonable acts infringing on individual and property rights and that similar legislation during the last fifty years has been declared invalid under the due process clause; (5) finally, from the standpoint of individual property protection, the Clark thesis ignores entirely the Charles A. Beard doctrine, that the Constitution was essentially an economic document based upon the concept that the fundamental rights of property are anterior to the government and morally beyond the reach of popular majorities. (See Beard, An Economic Interpretation of the Constitution of the United States (1913), p. 330.)

*Loan Association v. Topeka* (1875), 20 Wall. 655.
to justify rebellion against the mother country, that from 1783 on was guided by the great purpose of establishing a firm national government on the ruins of a feeble confederacy." 

But the leaders of the Constitutional convention intended that that new national government should be a government of limited powers in which the rights of the individual and the minority would be protected from oppression by majority rule. The chief danger, Madison thought, was not to be apprehended "from the acts of government contrary to the sense of its constituents, but from the acts in which the government is the mere instrument of the major number of its constituents." Hence, he defended the new Constitution because among its many merits it secured the rights of the minority against the "superior force of an interested and overbearing majority."

Other leaders in the Constitutional Convention admitted the change in viewpoint since the signing of the Declaration of Independence. Gerry asserted that "the evils we experience flow from the excesses of democracy" and he expressed a belief that the people were the "dupes of pretended patriots." He confessed that "he had been too republican heretofore; he was still however republican, but has been taught by experience the danger of the levelling spirit." The leaders in the Constitutional Convention had not abandoned entirely their belief in the ultimate sovereignty of the people, but their faith in popular administration of the government had received a severe shock, with the result that the structure of the government established by the Constitution was in many respects less democratic than that of the states.

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Footnotes:

4 Merriam, American Political Theories, pp. 98, 99.
5 The Federalist (Ford's Edition) 55.
6 2 The Madison Papers, p. 753.
7 Ibid., p. 758.
8 Merriam, American Political Theories, p. 100. In Re The Recognition of Natural Rights in State Constitutions. See 20 Col. L. Rev. at p. 187. 1—No less than 31 states have inserted the substance of the statement from the Declaration of Independence in their state constitutions, viz.: "All men are created equal and are endowed by their creator with certain inalienable rights among which are life, liberty and the pursuit of happiness." Ala., Ark., Cal., Del., Fla., Ida., Ill., Ind., Iowa, Kan., Ky., Me., Mass., Neb., Nev., N. H., N. M., N. C., Ohio, Okla., Ore., Pa., S. D., Utah, Vt., Va., W. Va., Wyo. 2—No less than 27 states have declared that "the enumeration therein of certain rights shall not impair or deny others retained by the people." This is the 9th amendment in the Federal Bill of Rights.
Charles A. Beard⁹ in his masterly manner has shown that the Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to the government and morally beyond the reach of popular majorities. Four economic interests were adversely affected by the system of government under the Articles of Confederation: (a) holders of public securities, (b) manufacturers and shippers, (c) money lenders and (d) speculators in western lands. Of the fifty-five delegates to the Constitutional Convention, forty were in class (a), eleven in class (b), twenty-four in class (c), and fourteen in class (d). Whether we like it or not, the theories of government that most men entertain are emotional reactions to their property interests, and the framers of the Constitution were no exception to the rule. With all of the genius at their command they attempted to form a government that would protect their own interests.

Because of stringent property qualifications for suffrage, not more than one-sixth of the adult males participated through representatives in the work of framing and ratifying the Constitution. But the leaders anticipated the time when suffrage might be extended and the "have nots" would outvote the "haves." They feared the power of the temporary majority and sought to curb it by the following devices: First: The establishment of a federal or dual system of government in which the Constitution of the United States as the supreme law of the land, distributed the powers between the states and the national government, the latter being a government of Enumerated powers. Second: The principle of the separation of powers in accordance with which the enumerated powers of the national government were in turn distributed between the three distinct departments of that government, the legislative, executive, and judicial. Third: Under an elaborate system of checks and balances, they provided that the House of Representatives should

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be elected for two-year terms by the people; that the Senate should be chosen for terms of six years by the state legislatures; that the President should be chosen by electors for a four-year term and that the judges of the federal courts should be appointed by the President and the Senate and should hold for life, during good behavior. James Madison\textsuperscript{10} predicted that under this system there would “be little probability of a common interest to cement these different branches in a common policy.” Thomas Jefferson favored the policy of dividing and limiting public power. He said, “An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.”\textsuperscript{11}

In the later years, John Adams\textsuperscript{12} called attention to the intricate and complex system of checks and balances in our federal form of government. He discovered no less than eight different kinds of balances. These are as follows: (1) the states and territories against the federal government; (2) the House against the Senate; (3) the Executive against the Legislature; (4) the Judiciary against the House, the Senate, the Executive, and the state governments; (5) the Senate against the President in respect to appointments and treaties; (6) the people against their representatives; (7) the state legislatures against the Senate; and (8) the electors against the people.\textsuperscript{13}

Fourth: The idea of limited government was further recognized by various express constitutional prohibitions. The federal government could not lay and collect “direct taxes” unless apportioned according to population,\textsuperscript{14} and this limitation made the exercise of this devastating power practically useless except in extraordinary circumstances. The states were prohibited from passing any law impairing the obligation of contracts.\textsuperscript{15}

\textsuperscript{10} James Madison’s Works, p. 342.
\textsuperscript{11} Jefferson’s Works, v. 3, p. 223.
\textsuperscript{12} Works of John Adams (1814), p. 467.
\textsuperscript{13} The seventh and eighth have become obsolete by virtue of the XVII Amendment and political custom.
\textsuperscript{14} Art. I, Sec. 9, Cl. 4.
\textsuperscript{15} Art. I, Sec. 10, Cl. 1.
Sir Henry Maine has said of the contract clause, "It has proven to be the bulwark of American individualism against democratic impatience and socialistic fantasy."

Fifth: The doctrine of "judicial review" has made the courts the guardians of individual and minority rights. This unique American contribution to the science of government is based on the following factors: (a) a profound mistrust of legislative bodies by the framers of the constitution. In 1787 it was a common belief that "the greatest danger to liberty arises from the expanding power of legislative bodies"; (b) that a written constitution is a paramount and supreme law over ordinary acts of a legislature; and (c) that the judiciary is the guardian of the written constitution determining what acts of the legislature are agreeable to the constitution.

Sixth: Convinced of the rightness of their efforts, the framers sought to curb majorities in the future by making the amending cumbersome and difficult. No change could be made in the fundamental law by majority vote. The founders distrusted the "divine right of 51%" and provided for a two-thirds vote in both houses of Congress and a ratification by legislatures or conventions in three-fourths of the states.

Seventh: If there existed any doubt anywhere as to the nature of the government set up under the ORIGINAL constitution, the adoption of the first ten amendments must have conclusively established the proposition that there were powers beyond the reach of government and that certain individual and minority interests were to be protected against the onslaughts of temporary majorities. In the form in which the Constitution was submitted to the states for ratification, it did not contain a bill of rights. Thomas Jefferson and Alexander Hamilton were the great leaders of the two factions for and against the specific enumeration of individual guarantees in the Constitution. Hamilton argued "that the Constitution is itself in every rational sense and to useful purpose a bill of rights. I go further and affirm that bills of rights, in the sense and to the extent in which

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14 Merriam, American Political Theories, 109, 110 (1906).
15 Tucker's Blackstone I, 88 (1803 Ed.); James Iredell, "Letters to an Elector," McRae 2; 145.
they are contended for, are not only unnecessary in the proposed Constitution but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than were granted; for why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power, but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers by the indulgence of an injudicious seal for bills of rights.”

This sort of an argument, coming from Hamilton, does not sound very sincere. It is interesting to note that in stating his case he abandoned his general position as a loose constructionist and became a strict constructionist for the first and only time in his life. He went so far as to deny the existence of implied powers. His real opposition to a bill of rights rested on another ground. He wanted an all-powerful government uncurbed by any “fine declarations” and he believed that the security of the individual “must altogether depend on public opinion and on the general spirit of the people and of the government.” He also said, “Wise politicians will be cautious about fettering the government with restrictions that cannot be observed; because they know that every breach of the fundamental laws, although dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of the country, and forms a precedent for other breaches, where the same plea of necessity does not exist at all, or is less urgent.

19 Federalist, No. LXXXIV, p. 476.
20 Ibid., note 19.
or palpable. Hamilton denied the practicability of constitutional limitations on the power of majorities and was thus opposed to the fundamental principle of the American constitutional system. According to Madison, Hamilton declared in September, 1787, that "No man's ideas were more remote from the plan than his were known to be." 22

Jefferson, on the other hand, although not a member of the constitutional convention was the leader of the movement that demanded a bill of rights. From Paris, he urged that at least four of the states should withhold ratification until a declaration of rights could be annexed, stipulating freedom of religion, freedom of the press, freedom of commerce from monopolies, trial by jury in all cases, no suspension of habeas corpus and no standing armies. 23 In a letter to Madison from Paris, December 20, 1787, he said, "I have a right to nothing which another has a right to take away . . . Let me add, that a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse or rest on inference. 24

Many people were advocating a conditional ratification or a second convention because of the omission of a bill of rights. To them, Madison answered by saying, "A conditional ratification or a second convention appears to me utterly irreconcilable with the dictates of prudence and safety. Recommendatory alterations are the only ground for a coalition among real Federalists." 25 Madison's advice prevailed and the constitution was ratified, but with the understanding that a bill of rights would be added. In fact, seven of the state ratifying conventions submitted a total of one hundred and twenty-four articles of amendment to the constitution. 26

Less than three years after the Constitution went into effect, ten amendments, constituting the American Bill of Rights, were adopted. Madison, in introducing the proposed amendments

23 Ibid., p. 420.
in Congress answered the Hamilton argument and effectively restated the Jeffersonian position. He points out that most of the state constitutions had provided such limitations on their governments and although admitting that the national government was a government of enumerated powers, he contends that that government would have a discretionary power liable to abuse under the Elastic Clause. He said, "The General government has a right to pass all laws which shall be necessary to collect its revenue; the means of enforcing the collection are within the discretion of the legislature; may not general warrants (of arrest) be considered necessary for the purpose, as well as for some purposes which it was supposed, at the framing of their state constitutions, the state governments had in view? If there was any reason for restraining the state governments from exercising this power, there is like reason for restraining the Federal government."  

Congress, in submitting the bill of rights to the ratifying conventions expressed very clearly in a preamble that the purpose of the proposed amendments was simply to prevent misconstruction and abuse of powers by declaratory and restrictive limitations. Mr. Justice Davis, in one of his great decisions, pointed out the occasion for the bill of rights when he said, "So strong was the sense of the country of their importance, and so jealous were the people, that these rights highly prized, might be denied them by implication that when the original constitution was prepared for adoption it encountered severe opposition; and but for the belief that it would be so amended as to embrace them, it would never have been ratified." Those great and good men foresaw that troublous times would arise when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principle of constitutional liberty would be in peril unless established by irrepealable law. The history of

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28 In Virginia it was ratified by a majority of 10 in a body composed of 168 delegates. In N. Y. by a majority of 3 in a convention of 57 delegates. In Mass. by a majority of 19 in a convention of 325 members. These were the three largest states. See Tucker, Limitations on the Treaty Power, p. 423.
the world had taught them that what was done in the past might be attempted in the future."

Roughly speaking, the first eight amendments may be classified into two groups: those designed to protect personal liberty and those to protect private property against arbitrary interference and irregular action on the part of the federal authorities. The more important provisions in the first class are those guaranteeing freedom of speech and the press, freedom of religion, freedom of assembly, and the safeguards thrown around persons accused of crime. In the second class is the "due process" clause, the protection against unreasonable search and seizure and the provision for payment of just compensation for private property taken for a public use.

It is to be noted that the first eight amendments contain no novel declaration of principles. They constitute a restatement of fundamental rights taken in part from Magna Charta (1215), the Petition of Rights (1627), The Habeas Corpus Act (1679), and The Bill of Rights (1689). These great documents are milestones in the struggle of the English race for liberty. "Each rising wave of freedom left its record in some historic document—then perhaps the times caused it to recede again—until the next flood of liberalism came to leave a higher record still." They are of incalculable value to the cause of freedom because they represent in solemn written form the victories of the people in their fight against tyranny. C. J. Doe of the Supreme Court of New Hampshire has said, "An American Bill of Rights is a declaration of private rights in a grant of public powers. The general purpose of such a bill of rights is to declare those fundamental principles of the common law, generally called the principles of English constitutional liberty, which the American people always claimed as their English inheritance, and the defense of which was the justification of the War of 1776."

Although this priceless heritage comes to us from the mother country, we must not forget that, in law, the bill of rights in our Constitution affords a greater protection to the individual American than does Magna Charta or any other great document.

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29 Ex Parte Milligan, 4 Wall. 2.
in English history to the English citizen. The English Constitution evolved to protect the people from the tyranny of one department, the executive. Magna Carta was a contract between King John and the barons. In theory the English Parliament is always omnipotent and, in fact, the great English constitutional documents were no protection against the Rump Parliament of the later Commonwealth or against the corrupt Parliament of the Tudor kings. On the contrary, the first eight amendments to our Constitution, unless specifically limited, are restrictions on ALL departments of the government, the legislative, executive, and judicial. The famous case of Barron v. Baltimore is authority for the proposition that the federal bill of rights is a limitation on the national government only.

As an extra precaution, these amendments were recommended by the ratifying conventions, who feared both the excesses of democracy and the excesses of governmental authority. In order that there might be no misunderstanding, the Ninth and Tenth Amendments specifically declared the intent of the founders to try out a great experiment in government. The Ninth amendment reads, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others by the people." The Tenth amendment provides, "The powers not delegated to the United States by the Constitution nor prohibited to it by the states, are reserved to the states respectively, or to the people."

Thomas Jefferson expressed the political philosophy underlying the Constitution of the United States when he said, "It is jealousy and not confidence which prescribed limited constitutions to bind down those whom we are obliged to trust with power. In questions of power, then, let no more be heard of

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"Ex Parte Milligan, 4 Wall. 2.
"7 Peters 243. In Gitlow v. New York, 268 U. S. 652, it was assumed for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the 14th Amendment from impairment by the states. If the implications of this case are followed, the "liberty" provision of the 14th Amendment will have the effect of automatically extending the federal bill of rights as limitations on state governments; a result which was repudiated in Maxwell v. Dow, 176 U. S. 681, when the attempt was made under the privileges and immunities clause of the 14th Amendment. See Warren, The "New Liberty" under the 14th Amendment, 39 Harv. L. Rev. 431."
confidence in man, but bind him down from mischief, by the chains of the Constitution." Having thus set up mere "parchment barriers", how was this nice distribution of powers between the states and the central government to be maintained? What machinery was devised to enforce the constitutional safeguards in behalf of individual rights? The judiciary has come to "play the role of maintaining the supremacy of the Constitution and preventing usurpation. It is the function of the Supreme Court of the United States to settle disputes between a state and an individual, between state and state and between a state and the national government. In our constitutional system, this highest court stands as the ultimate arbiter, the master referee.

Ex-Senator Lawrence Y. Sherman, of Illinois, has said, "The history of free government is largely the struggle of minorities to secure their rights against the dominant and sometimes arrogant majority. While majorities change, memories of what a majority did while in power, endures. This leads to retaliation. Constitutions defend against it. The illustrious men, who participated in the Constitutional Convention of 1787 understood this principle."

Many of the world's great political thinkers have been obsessed by the same fear of majority tyranny. Jellinek declared, "The continued struggle between Authority and Liberty will again be fought. The dams which today as yet confront a too-powerful majority-will, may perhaps be demolished. And then a great crisis will have arrived for the civilized world. We hope and believe that Society will ultimately discover and realize this principle, which alone is sufficient to keep it from desolate intellectual and moral flats and bogs; the recognition of the rights of minorities."

De Tocqueville said, "If ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority." Lord Acton has pointed out that the pure democracies of ancient times failed because there was no check on the majority. . . . The emancipated people of

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"10 Ill. L. Rev. 399.
* The Rights of Minorities. Translated by A. M. & T. Baty (1912), p. 34.
Athens became a tyrant, and their government, the pioneer of European freedom, stands condemned with a terrible unanimity by all the wisest of the ancients. ... The repentence of the Athenians came too late to save the Republic; but the lesson of their experience endures for all times."

William Howard Taft has said, "The result in the Roman Republic for similar reasons was the same. ... Unrestrained tyranny of the majority will lead to anarchy, and anarchy will lead the people to embrace and support the absolute rule of one rather than the turbulent and unreasonable whim of a fractional majority." Professor Hearnshaw, an English writer, says in his "Democracy at the Crossways", "There are few things that have excited graver apprehension among students of democratic institutions than the possible tyranny of the majority. This apprehension is not limited to antagonists of democracy like Sir Henry Maine, or Mr. G. Lowes Dickinson; it is shared by men of pronounced popular and progressive views. Harrington, the seventeenth century author of Oceana, was a man of advanced views, yet he expressed dread of the "motions of the multitude"; Lord Acton was a thinker of a most liberal type, yet he said, "The one pervading evil of democracy is the tyranny of the majority."

Above all, John Stuart Mill displayed the most consuming anxiety "lest the great Leviathan, whose claims he had so earnestly advocated, should, when established in power; behave like a brute." In his writings he advocated four specifics: proportional representation; greater weight to the suffrage of the more educated voter; education in the broad sense; and the growth of the historical spirit in politics, which may abate the rashness of reform. All of these expedients are no doubt valuable, but we believe that the framers of the American Contribution have made the most practical and important contribution toward the prevention of majority tyranny by virtue of

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27 "Essay on History of Freedom in Antiquity" (1877), republished in "History of Freedom and Other Essays" by Lord Acton (1907), pp. 12, 13.
28 "Popular Government" (1913), pp. 70, 86.
29 (1918), p. 331.
30 "Representative Government," ch. VII.
31 "Dissertations and Discussions," v. III, p. 44.
their novel conception of limited government, whereby in normal times at least, the misuse of power by the people's own elected representatives is rendered difficult. Anticipating the rigidity of their delicately contrived creation, they provided a safety valve in the amending process.44

44 For a general discussion of the thesis of this chapter, see Stimson, "The American Constitution as it Protects Private Rights" (1923).