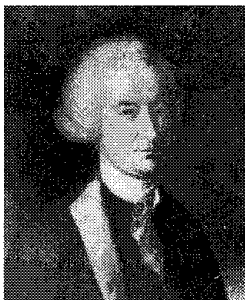


The Constitutional Contributions of John Dickinson

Robert G. Natelson*



"[T]he celebrated John Dickinson . . . a man of ponderous and pretentious ways balanced by great good sense." — Historian Forrest McDonald, describing Dickinson at the federal constitutional convention.¹

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1. FORREST McDONALD, *E PLURIBUS UNUM 271-72* (2d ed., Liberty Press 1979)

I. Introduction

The fact that John Dickinson refused to sign the Declaration of Independence perhaps explains why he is less celebrated than many other Founders.² The neglect is unjust. There is the point, after all, that

(1965).

2. Repeatedly Referenced Works: For convenience, this note collects alphabetically by author or editor sources cited more than once in this Article. The editions and short form citations used are as follows:

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- EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790), available at http://www.constitution.org/eb/rev_fran.htm (last visited Mar. 1, 2003) [hereinafter Burke]
- BURKE'S POLITICS (Ross J.S. Hoffman & Paul Levack eds., 1949) [hereinafter BURKE'S POLITICS]
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- H. TREVOR COLBOURN, THE LAMP OF EXPERIENCE: WHIG HISTORY AND THE INTELLECTUAL ORIGINS OF THE AMERICAN REVOLUTION (Liberty Fund 1998) (1965) [hereinafter Colbourn]
- John Dickinson, *Letters from a Farmer in Pennsylvania*, in EMPIRE AND NATION (Forrest McDonald ed., 1962) [hereinafter *Farmer*]
- John Dickinson, *The Political Thought of John Dickinson*, 39 DICK. L. REV. 1 (1934) (the author and namesake of his subject was then U.S. Assistant Secretary of Commerce) [hereinafter *Political Thought*]
- JOHN DICKINSON, THE POLITICAL WRITINGS OF JOHN DICKINSON (Bonsal & Niles 1801) (2 vols.) [hereinafter WRITINGS]
- JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (5 vols; 1941 ed. inserted in 2 vols.) [hereinafter Elliot's Debates]
- THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1937) (4 vols.) [hereinafter FARRAND, RECORDS]
- MILTON E. FLOWER, JOHN DICKINSON: CONSERVATIVE REVOLUTIONARY (1983) [hereinafter FLOWER]
- THE POLITICAL WRITINGS OF JOHN DICKINSON 1764-1774 (Paul Leicester Ford ed., Da Capo Press 1970) (1895) [hereinafter Ford]
- Elaine K. Ginsberg, *John Dickinson*, at <http://www.anb.org/articles/01/01-00218.html> (last visited Aug. 22, 2003) [hereinafter Ginsberg]
- James H. Hutson, *John Dickinson at the Federal Constitutional Convention*, 40 WM. & MARY Q. 256 (1983) [hereinafter Hutson]
- David L. Jacobson, *John Dickinson and the Revolution in Pennsylvania*, in 78 UNIVERSITY OF CALIFORNIA PUBLICATIONS IN HISTORY (1965) [hereinafter Jacobson]
- Stanley Karl Johannesen, *Constitution and Empire in the Life and Thought of John Dickinson* (1973) (unpublished Ph.D. dissertation, University of

Dickinson was no Tory. His refusal to sign was based on his perception of America's best interests, and within a twinkling of time after Congress made its decision, he was commanding troops in defense of his country.

More positively, however, is the point that by any objective measure, John Dickinson was a leading figure in the founding generation. Until supplanted by Jefferson and Paine, he was the principal theorist for the colonial cause, well earning the sobriquet, "Penman of the American Revolution."³ He was one of the most conspicuous members of the Continental Congress, was the primary drafter of the Articles of Confederation, served as the President of "the Delaware State" and as President of Pennsylvania, and—though the fact is sometimes wrongly denied—was one of the most influential drafters of the United States Constitution.

This Article explores Dickinson's contributions to the Constitution, and finds them almost as great as any man's. Not quite at the level of James Madison, George Washington, or Gouverneur Morris—but as near as can be.

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- Missouri - Columbia) (on file with author) [hereinafter Johannesen]
 - THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen et al. eds., 1976) (multiple vols. projected; not all completed) [hereinafter DOCUMENTARY HISTORY]
 - JOHN LOCKE, OF CIVIL GOVERNMENT: SECOND TREATISE (Russell Kirk intro., 1955) [hereinafter LOCKE]
 - FORREST McDONALD, NOVUS ORDO SECLORUM (1985) (hereinafter McDONALD, NOVUS)
 - Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) [hereinafter Natelson, *Enumerated*]
 - Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353 (2003) [hereinafter Natelson, *Sympathy and Independence*]
 - Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 51 U. KANSAS L. REV. (forthcoming 2003) [hereinafter Natelson, *General Welfare Clause*]
 - J.H. Powell, *John Dickinson and the Constitution*, 60 PA. MAG. OF HIST. & BIOGRAPHY 1 (1936) [hereinafter Powell]
 - CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS: GREECE, ROME, AND THE AMERICAN ENLIGHTENMENT (1994) [hereinafter RICHARD]
 - CHARLES J. STILLÉ, THE LIFE AND TIMES OF JOHN DICKINSON (photo. reprint 1969) (1891) [hereinafter STILLÉ]
 - JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS (Ronald Hamowy ed., 1995) (2 vols.) [hereinafter CATO]
 - GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787 (1969) [hereinafter WOOD].

3. Professor H. Trevor Colbourn says that this common name for him came from Moses Coit Tyler and, perhaps initially, from George Bancroft. *London Letters*, *supra* note 2, at 243 n.3.

II. A Brief Biography Through the Ratification Debates⁴

John Dickinson was born on November 8, 1732 in Maryland. His father, Samuel Dickinson, was a prosperous planter of tobacco, and later wheat, and served as a lawyer and county court judge. Samuel's first marriage produced nine children, most of whom, like their mother, died unseasonably young. His second wife was Mary Cadwalader, and John was their first child.

John may have helped provide his country with a vigorous Constitution, but he certainly did not have one himself. Like his friend and co-worker James Madison, he was troubled from youth with a variety of ailments, and survived into old age only because of rigorous attention to his health.⁵

In 1740, Samuel moved the family to Delaware—specifically to Kent County, the middle county of Delaware's vertically-stacked three. Primarily through private tutors, John received the usual education for his day. As a young boy in Delaware, John studied not only the Greek and Latin languages—the latter equipping one to pick up French, Italian, or Spanish in a flash—but also classical works in subjects such as history, poetry, literature, rhetoric, biography, philosophy, science, and government.⁶ John's fondness for the classics would last all his life.⁷ Mathematics and other subjects supplemented this classical core.

By 1750, John decided he wanted to be a lawyer, and his father sent him for training to the law office of John Moland in Philadelphia. He

4. The only complete modern biography of Dickinson is FLOWER, *supra* note 2. An 1891 biography, STILLÉ, *supra* note 2, is lacking in many respects, perhaps because the author was a lawyer rather than a trained historian, but also because important Dickinson documents were then unavailable.

The best extended treatment of Dickinson is Jacobson, *supra* note 2, but it covers only twelve years, 1764 through 1776, and is limited to his political life.

The best shorter treatment is Ginsberg, *supra* note 2. See also BRADFORD, FATHERS, *supra* note 2; H. Trevor Colbourn, *Editorial Comments, in London Letters, supra* note 2.

The bibliographical information included in this Article draws from these sources.

5. Even of the young man, Milton Flower says, "John Dickinson had never been physically strong. Slight of frame, he was easy prey to pulmonary attacks." FLOWER, *supra* note 2, at 14; see also 2 WRITINGS, *supra* note 2, at 168 (Fabius, Second Series, Letter I) (noting his "infirmities"). Dickinson's letters to his parents from London, written in his early twenties, devote considerable attention to fluctuations in his health. See *London Letters, supra* note 2, at 245, 248-49, 256, 431.

6. RICHARD, *supra* note 2, at 12-38 (providing a general overview of the education system in the founding generation).

7. For example, while in the engrossing business of studying law in London, he took time to read Tacitus one winter. *London Letters, supra* note 2, at 453. His later writings are replete with classical allusions. See *infra* text accompanying notes 17, 64, 262.

was there for three years, but even that distinguished office⁸ was too back-water a training ground for a young man of such promise. Thus, in 1753 his father shipped him off to London, where he studied for three years at the Middle Temple.⁹ In 1757, now nearly 25 years old, John was admitted to the bar in London, and returned to America and entered practice in Philadelphia. Through one of those prestidigital conditions never quite made clear in biographies, Dickinson's success was almost immediate. Besides being a bright young man and a hard worker, he seems also to have had a magnetic presence, though his appearance was like "a shadow—tall, but slender as a reed—pale as ashes."¹⁰ He was the kind of man that people wanted to be around. People also wanted to pay him for his work. Much of that work seems to have been litigation involving decedents' estates and land claims of various kinds.¹¹ He no doubt practiced a good deal in the field of trusts—a point that would become publicly significant later.

People not only wanted Dickinson to be their lawyer, they also wanted him to be an elected official. Before John was 27, he won a seat in the Delaware Assembly, was re-elected in 1760, and was then elected Speaker.¹²

In those days, Pennsylvania and Delaware were tied almost in harness (they had a common governor), so a young man of Dickinson's promise could hope for a political career in both states. After his early success in Delaware, he chose to focus on the broader field of Pennsylvania, winning a special election to fill a vacancy in the Pennsylvania Assembly in 1762. He was re-elected in October, 1763 and in October, 1764. However, this was no vapid up-and-comer of the kind that infest and depress democratic politics. Although he had frequently been critical of the colony's proprietary charter with the Penn family,¹³ when the issue arose as to whether to petition the King to convert Pennsylvania's charter from a proprietary to a royal one,

8. FLOWER, *supra* note 2, at 10 ("John Moland . . . was perhaps the most eminent member of the [Pennsylvania] bar.").

9. *Id.* at 18-19.

10. *Id.* at 112 (quoting a Massachusetts delegate to the continental congress).

11. *Id.* at 24.

12. STILLÉ, *supra* note 2, at 37-38 (who omits his first election); Ginsberg, *supra* note 2.

13. Jacobson, *supra* note 2, at 9, 12. Dickinson had been critical despite his pleasant experiences with Thomas Penn while in London. See, e.g., *London Letters*, *supra* note 2, at 264, 420. In one letter, he wrote to his mother:

Mr. Penn about a week ago sent for me to dine with him: I cannot conceive how he got the dislike of the Philadelphians so much, for I never conversd [sic] in all my life with a more agreeable [sic], affable gentleman. He behavd [sic] with a great deal of goodness and kindness towards me

Id. at 274.

Dickinson firmly resisted the change.¹⁴ He argued that the proprietary charter, with all its faults, was better for Pennsylvanians than any royal charter was likely to be.¹⁵ It was a sound argument, but it took time for many to recognize its veracity. In opposing the petition, Dickinson was bucking both public opinion and two of Pennsylvania's most powerful figures: Joseph Galloway and the sainted (though not at all saintly) Benjamin Franklin. Predictably, Dickinson overwhelmingly lost the vote in the Assembly, and subsequently lost his seat in the Assembly.¹⁶ Fortunately his elegant oration against the petition—reminiscent somewhat, if more pale in force, of a speech by Edmund Burke—was published and admired.¹⁷ The request to cashier the proprietary charter got nowhere in London, and before long British actions gave Pennsylvanians reason to be grateful it had not.

Dickinson was now out of office, but hardly out of public affairs. In 1765, he prepared the primary draft of the Pennsylvania Assembly's resolutions against the Stamp Act.¹⁸ He then served as a representative to the Stamp Act Congress and composed its "Declaration of Rights."¹⁹ Later that year, he wrote his pamphlet on the Sugar Act: *The Late Regulations Respecting the British Colonies on the Continent of America Considered*.²⁰ His greatest literary triumph came in 1767 and 1768, when he published his twelve *Letters from a Farmer in Pennsylvania*—pungent essays justifying colonial resistance to the Townshend Duties.²¹ They were an astounding success. The Farmer was toasted and praised throughout the colonies.²² When it became known that the "Pennsylvania Farmer" was actually a Delaware farmer practicing law in Pennsylvania, no one took offense.²³ Dickinson was feted as much as the

14. See Ford, *supra* note 2, at 21-49. For the text of his principal speech, see *id.*

15. See *id.*

16. In 1765 he decided not to run for re-election, recognizing that he would lose. FLOWER, *supra* note 2, at 65, 68; Jacobson, *supra* note 2, at 30.

17. For the text of this speech, see Ford, *supra* note 2, at 21-49. Both Dickinson's speech and those of Burke feature occasional quotations from the Latin classics. *Id.* Speaking in Philadelphia, Dickinson felt the need immediately to explain or paraphrase each quotation in English. *Id.* Speaking in London, Burke felt no such need.

18. *Id.* at 173.

19. See *id.* at 183.

20. See *id.* at 211.

21. The letters are reproduced in Ford, *supra* note 2, at 305-406. A more recent edition, to which I have cited in this Article, is included in *EMPIRE AND NATION*, *supra* note 2.

The best discussion of the "Farmer" letters appears in Jacobson, *supra* note 2, at 43-69. See also Johannesen, *supra* note 2, at 115-46.

22. The reception of the "Farmer" letters is discussed in Ford, *supra* note 2, at 279-85 (editor's note).

23. See *id.*

Farmer had been.²⁴ His continental reputation was now secured. Also secured was the heart of Mary Norris, a Philadelphia heiress whom the long-time bachelor married in 1770. They had five children, but in submission to the family bane of sickness, three of them died in infancy.

Dickinson apparently never had to campaign arduously for public office. In October of 1770, Philadelphia electors took advantage of his absence to send him again to the Pennsylvania Assembly. He served one year, but did not run for re-election. The following year, he helped draft a petition to the King asking for repeal of the tax on tea,²⁵ but refused to run for re-election to the legislature. In 1773, he composed two public letters, also assailing the tax on tea.²⁶

When the Boston Port Bill became law in the spring of 1774, Dickinson, although firmly opposed to independence, became a central political and literary figure in the colonial resistance. Among other activities, he served as chairman of the Philadelphia Committee of Correspondence; published four anonymous letters to the "Inhabitants of the British Colonies;"²⁷ and accepted election once again to the Pennsylvania Assembly. The Assembly elected him to the Second Continental Congress, where he served as chairman of the Committee of Safety and Defense for Pennsylvania. In 1775, he rewrote for Congress Thomas Jefferson's draft of the *Declaration on the Causes and Necessity of Taking up Arms*.²⁸ With respect to this Declaration and the ensuing *Olive Branch Petition*, Jefferson's *Autobiography* relates Dickinson's continued hope for reconciliation with Britain, and the esteem in which his fellow delegates held him:²⁹

24. *See id.*

25. Reproduced in *id.* at 451.

26. *Id.* at 457-63.

27. *Id.* at 469-501.

28. The Jefferson, Dickinson, and final drafts can be found in 2 J. CONTINENTAL CONGRESS 128-157 (1775).

29. The musical play, *1776*, portrayed quite a different personality for Dickinson than his contemporaries attributed to him. *See* PETER STONE & SHERMAN EDWARDS, *1776: A MUSICAL PLAY* (Penguin ed. 1976) (1970) [hereinafter *1776*]. The play depicts Dickinson in Congressional debate as: being nasty to John Adams, *id.* at 27-28, 39-40; launching personal attacks, *id.* at 42; insulting Benjamin Franklin, *id.* at 40, and James Wilson, *id.* at 139; and making off-color jokes on the floor, *id.* at 41. Apart from the lack of congruence with what we know of the man from sources such as Jefferson, whose comments are immediately above in the text, we have the testimony of John Adams, who had had a personal falling out with Dickinson, but nevertheless stated that he and Dickinson "continued to debate in Congress upon all questions publicly [sic], with all our usual Candor and good humour." JOHN ADAMS, *AUTOBIOGRAPHY*, available at http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=A1_19 (last visited Aug. 22, 2003).

Compounding the play's absurd representation of Dickinson is the authors'

I prepared a draught of the Declaration committed to us. It was too strong for Mr. Dickinson. He still retained the hope of reconciliation with the mother country, and was unwilling it should be lessened by offensive statements. He was so honest a man, & so able a one that he was greatly indulged even by those who could not feel his scruples. We therefore requested him to take the paper, and put it into a form he could approve. He did so, preparing an entire new statement, and preserving of the former only the last 4 paragraphs & half of the preceding one. We approved & reported it to Congress, who accepted it. Congress gave a signal proof of their indulgence to Mr. Dickinson, and of their great desire not to go too fast for any respectable part of our body, in permitting him to draw their second petition to the King according to his own ideas, and passing it with scarcely any amendment. The disgust against this humility was general; and Mr. Dickinson's delight at its passage was the only circumstance which reconciled them to it.³⁰

Although the differences between Dickinson and Jefferson perhaps have been exaggerated,³¹ it is true that throughout the entire period leading up to the Declaration of Independence Dickinson was trying to steer a middle course between submission and rebellion.³² Dickinson

assurance in their "Historical Note" that "it really happen[ed] that way." 1776, *supra*, at 158. Their level of historical accuracy is further demonstrated by their statement that Dickinson "left the Congress to enlist in the Continental Army as a private." *Id.* at 163. Actually he held a colonel's commission in the militia at the time. See *infra* notes 43-46 and accompanying text.

30. THOMAS JEFFERSON, AUTOBIOGRAPHY (1821), available at <http://www.yale.edu/lawweb/avalon/jeffauto.htm> (last visited Feb. 20, 2003). Jefferson added:

The vote being passed, altho' further observn [sic] on it was out of order, [Dickinson] could not refrain from rising and expressing his satisfaction and concluded by saying "there is but one word, Mr. President, in the paper which I disapprove, & that is the word 'Congress,'" on which Ben Harrison rose and said "there is but on word in the paper, Mr. President, of which I approve, and that is the word 'Congress.'"

Id.

31. Jacobson, *supra* note 2, at 97.

32. An excellent review of Dickinson's policies in Congress at that time is contained in *id.* at 86-116.

According to John Adams, Dickinson was under pressure at home to oppose independence. In his *Autobiography*, Adams wrote that in 1775:

Mr. Charles Thompson, who was then rather inclined [to] our Side of the Question, told me, that the Quakers had intimidated Mr. Dickinsons [sic] Mother, and his Wife, who were continually distressing him with their remonstrances. His Mother said to him "Johnny you will be hanged, your Estate will be forfeited and confiscated, you will leave your Excellent Wife a Widow and your charming Children Orphans, Beggars and infamous." From my Soul I pitied Mr. Dickinson. I made his case my own. If my Mother and my Wife had expressed such Sentiments to me, I was certain, that if they did not wholly unman me and make me an Apostate, they would make me the most

was a firm believer in moderation—he once called it “a virtue, and the parent of virtues.”³³ Yet hotheads like John Adams interpreted him not only as “very modest,” but as “delicate, and timid.”³⁴ In a private letter intercepted by the British and made public, Adams characterized him as representative of those of “great Fortune and piddling Genius.”³⁵

On November 3, 1775, Pennsylvania credentialed Dickinson to the Continental Congress for the ensuing year.³⁶ The Congressional Journals for 1776 reveal him as active on numerous committees.³⁷

On June 7, 1776, Richard Henry Lee announced in Congress his famous resolution that “these United Colonies are and of right, ought to be, free and independent States.”³⁸ The resolution also directed that “a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.”³⁹ On June 12, Congress appointed Dickinson to chair the committee to prepare a draft of that plan of confederation.⁴⁰ The draft, which survives, is in his handwriting.⁴¹ These “Articles of Confederation” relied somewhat on an

miserable Man alive.

ADAMS, *supra* note 29.

33. Ford, *supra* note 2, at 271. See also the comments on Dickinson’s moderation by President Franklin Roosevelt’s assistant commerce secretary, also named John Dickinson. *Political Thought*, *supra* note 2, at 4 (“But it was not the ordinary kind of moderation which avoids the taking of positions or the making of courageous decisions. It was moderation simply in the sense of looking at all sides of a question and weighing fairly and coolly the merits of all before coming to conclusions.”). Cf. Jacobson, *supra* note 2, at 5 (quoting Dickinson’s admiration for moderation in all things), 124 (describing him as a moderate in his methods). However, the later Dickinson’s efforts to claim the former for the New Deal were perhaps not as close to the mark. *Political Thought*, *supra* note 2, at 7-9 (inaccurately resorting to the great Dickinson to support the Roosevelt administration’s constitutional theories).

34. JOHN ADAMS, DIARIES, Oct. 24, 1774, available at http://www.masshist.org/digitaladams/aea/cfm/doc.cfm?id=A1_19 (last visited Mar. 18, 2003).

35. Jacobson, *supra* note 2, at 102.

36. 3 J. CONT. CONG. 327 (1775).

37. See generally vols. 4-6 J. CONT. CONG. (1776).

38. 5 J. CONT. CONG. 425 (1776). The resolution specifically provided:

Resolved, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.

That it is expedient forthwith to take the most effectual measures for forming foreign Alliances.

That a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.

Id.

39. *Id.*

40. See James Madison, *Preface to Debates in the Convention of 1787*, reprinted in 3 FARRAND, RECORDS, *supra* note 2, at 539, 541.

41. See *id.*

earlier proposal by Benjamin Franklin, and contemplated a looser union than Franklin's, but a tighter one than that created by the finished Articles.⁴²

As for independence itself, Dickinson opposed it, arguing, among other things, that the time was not yet ripe.⁴³ Nevertheless, when it became clear that the measure would pass, both Dickinson and Pennsylvania's Robert Morris absented themselves to assure that the final vote was unanimous. Dickinson almost immediately departed to fight in the field for the cause he had opposed in the Congress. He earlier had accepted a commission as colonel of the First Battalion of Associators in the City and Liberties of Philadelphia. Now he led Pennsylvania militiamen to northern New Jersey to reinforce General Washington. Because of Dickinson's stand on independence, however, a

42. Franklin's draft was stronger mostly because of a general power given to Congress to regulate commerce (Article V). It can be found in *The Avalon Project at Yale Law School*, available at <http://www.yale.edu/lawweb/avalon/contcong/07-21-75.htm> (last visited Aug. 1, 2003). Dickinson's draft, available at <http://www.yale.edu/lawweb/avalon/artconf.htm> (last visited Aug. 1, 2003), replaced the power to regulate commerce with a much narrower power to regulate weights and measures (Article XVIII). The final draft, available at <http://www.yale.edu/lawweb/avalon/artconf.htm>, was weaker than Dickinson's, not so much for reasons of substance but because it was more explicit on the reservation of non-delegated powers to the states (Article II).

Some historians have exaggerated the differences between Dickinson's draft and the final Articles of Confederation. *E.g.*, 13 DOCUMENTARY HISTORY, *supra* note 2, at 4-6 (editor's introduction); MCDONALD, NOVUS, *supra* note 2, at 38-39; WOOD, *supra* note 2, at 358. Actually, the differences were not that great. The Dickinson draft stated that Congress could not "interfere with the internal Police of any colony, any further than such Police may be affected by the Articles of this Confederation." Based on contemporary usage of the term "internal police" and the enumeration of powers given the confederation, this left a great deal of power in the states. *See The Avalon Project at Yale Law School*, available at <http://www.yale.edu/lawweb/avalon/contcong/07-12-76.htm> (last visited Aug. 1, 2003); *cf.* Jacobson, *supra* note 2, at 118.

In Congress, Thomas Burke of North Carolina sought a more specific reservation of power to the states. 13 DOCUMENTARY HISTORY, *supra* note 2, at 6 (editor's introduction). The result was Article II of the finished Articles ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."). James Wilson, like some historians, purported to see in this a major difference between the drafts. *Id.* at 6. I have examined both drafts point by point, and to me the difference seems to be more one of emphasis than of substance. This conclusion is buttressed by the fact that Burke was not opposed to a fairly strong union. In 1780, he promoted bills to give Congress the power to levy duties and regulate commerce. *Id.* Burke simply wished a more explicit statement of what was reserved.

43. For an outline of Dickinson's argument, see Jacobson, *supra* note 2, at 113-15. Historian Gordon Wood wrote that Dickinson also feared a rupture from Britain because such an event might cut America "off from the source of its own life-blood of liberty." WOOD, *supra* note 2, at 45; *see also* JEFFERSON, *supra* note 30.

For an explanation of Dickinson's opposition to independence based on his personality, see Johannesen, *supra* note 2, at 28-31.

new Pennsylvania constitutional convention dismissed him from Congress.⁴⁴

His initial military career was a short one. After six weeks of service, his unit was recalled to Philadelphia,⁴⁵ and on September 28 he resigned when hostile politicians in Philadelphia promoted two other officers over him.⁴⁶

Dickinson was elected to the Pennsylvania Assembly again in late 1776,⁴⁷ but soon resigned and moved to his estate near Dover, Delaware.⁴⁸ He probably joined the Delaware militia as a private.⁴⁹ In any event, he did not become an active member of Congress again until 1779.⁵⁰ He refused election to the Delaware Assembly in 1780, but accepted election to the Delaware executive council in 1781. The Delaware Assembly then chose him as President of the state for a three-year term by a vote of 25-1, the dissenter being Dickinson himself.⁵¹ The next year his other home state claimed him, making him President of Pennsylvania.⁵² (He was, until he resigned from the Delaware post two months later, the chief executive of both states.)⁵³ He served as President of Pennsylvania for three years. In 1783, at the initiative of Benjamin Rush, the Pennsylvania state assembly chartered a new educational institution in Carlisle to be named Dickinson College.

After leaving office, Dickinson moved to Wilmington. By that time, the deficiencies of the Articles of Confederation as a permanent government had become apparent to nearly all. In 1785, Virginia called a commercial convention for Annapolis. Delaware was one of five states sending representatives, and Dickinson headed its delegation. When the Annapolis Convention met in September 1786, the delegates elected Dickinson the convention chairman.⁵⁴ In that capacity, he was the principal "conspirator"⁵⁵ with Alexander Hamilton and James Madison in promoting the idea of a plenary constitutional convention in Philadelphia.⁵⁶

44. Jacobson, *supra* note 2, at 119.

45. FLOWER, *supra* note 2, at 175; *cf.* Jacobson, *supra* note 2, at 119.

46. FLOWER, *supra* note 2, at 176; Jacobson, *supra* note 2, at 119.

47. FLOWER, *supra* note 2, at 179.

48. Jacobson, *supra* note 2, at 121.

49. There seems to be little documentary evidence for this other than Dickinson's statements. Jacobson, *supra* note 2, at 121-22; *cf.* FLOWER, *supra* note 2, at 185.

50. *See generally* 13-15 J. CONT. CONG. (1779).

51. FLOWER, *supra* note 2, at 201; Jacobson, *supra* note 2, at 122.

52. Jacobson, *supra* note 2, at 122.

53. BRADFORD, FATHERS, *supra* note 2, at 101; FLOWER, *supra* note 2, at 211; Jacobson, *supra* note 2, at 122.

54. FLOWER, *supra* note 2, at 238.

55. MCDONALD, *supra* note 2, at 247; *cf.* FLOWER, *supra* note 2, at 238-39.

56. MCDONALD, *supra* note 2, at 247; *cf.* FLOWER, *supra* note 2, at 238-39.

Delaware sent Dickinson as one of its five delegates to the Philadelphia convention.⁵⁷ He arrived on May 29⁵⁸ and stayed until nearly the end.⁵⁹ During much of the time his health was suffering.⁶⁰ However, he found his fellow delegates politically congenial, for early in the convention, he told Benjamin Rush that the delegates “are all united in their objects, and he expects they will be equally united in the means of attaining them.”⁶¹ During the convention, he prepared his own draft

57. 1 FARRAND, RECORDS, *supra* note 2, at 16.

58. *Id.* at 16, 17. There are two letters extant from his friend and fellow delegate George Read, who was already in Philadelphia, importuning him to come. See Letter from George Reed, to John Dickinson (May 21, 1787), in 3 FARRAND, RECORDS, *supra* note 2, at 24-26; Letter from George Reed, to John Dickinson (May 25, 1787), in 4 FARRAND, RECORDS, *supra* note 2, at 61-62. Nothing of substance had been accomplished in open convention before he arrived, other than the election of Washington as convention president.

59. It used to be thought that Dickinson may have absented himself for about a month because the convention notes do not show him speaking from June 21 to July 25. Hutson, *supra* note 2, at 262; see also 3 FARRAND, RECORDS, *supra* note 2, at 587 (listing dates of attendance). In 1983, however, some of Dickinson’s personal convention notes were published for the first time. They demonstrate he was present on several days in that period. Hutson, *supra* note 2, at 271-80 (notes that can be dated to June 29, June 30, and July 9-14). Ill-health may have prevented him from speaking and may have kept him away some days.

In his famous collection of sketches of his fellow-delegates, William Pierce of Georgia described Dickinson this way:

Mr. Dickinson has been famed through all America, for his Farmers Letters; he is a Scholar, and said to be a Man of very extensive information. When I saw him in the Convention I was induced to pay the greatest attention to him whenever he spoke. I had often heard that he was a great Orator, but I found him an indifferent Speaker. With an affected air of wisdom he labors to produce a trifle,—his language is irregular and incorrect,—his flourishes (for he sometimes attempts them), are like expiring flames, they just shew [sic] themselves and go out;—no traces of them are left on the mind to cheer [sic] or animate it. He is, however, a good writer and will ever be considered one of the most important characters in the United States. He is about 55 years old [actually, he was 54], and was bred a Quaker.

3 FARRAND, RECORDS, *supra* note 2, at 92.

The French chargé de affaires sized up Dickinson thus:

John Dickinson. Auteur des lettres du fermier de Pensylvanie; homme très riche, étant au co[m]mencement de la révolution du parti anti anglican, sans cependant favoriser l’indépendance, contre laquelle il a même voté publiquement. Il est vieux, foible et sans influence

Id. at 237.

That is:

John Dickinson. Author of the Letters of a Farmer from Pennsylvania; very rich man; was from the beginning of the revolution in the anti-English faction, without however favoring independence, against which he voted publically. He is old, weak, and without influence

Id. (translation by Professor Mark Kende)

As this Article suggests, at least the last part of the assessment was inaccurate.

60. Hutson, *supra* note 2, at 262.

61. 3 FARRAND, RECORDS, *supra* note 2, at 33 (Benjamin Rush to Richard Price).

constitution, which I shall refer to as the "Dickinson Plan." It shares many affinities with the final document.⁶²

Certainly Dickinson had no hesitation about endorsing that final document; before departing, he instructed his friend and fellow Delaware delegate, George Read, to affix his signature to the finished Constitution.⁶³

In 1788, Dickinson campaigned for ratification of the Constitution by composing and arranging publication of nine public letters written under the pseudonym "Fabius."⁶⁴ Designed to jump-start a ratification process that Dickinson thought was stalled,⁶⁵ the letters were well received and widely reprinted.⁶⁶

Dickinson's most recent biographer has noted a fundamental shift in Dickinson's religious attitudes during the Confederation period.⁶⁷ Although born a Quaker, Dickinson had never been a particularly religious one, and could never be induced to attend Friends' Sunday Meetings.⁶⁸ Yet he took the faith seriously enough to mind its admonitions on slavery. To be sure, he had never had much use for slavery. As a young man he had written to his father from London to condemn in searing terms the effect of the institution on the masters.⁶⁹ Of course, many slaveholders in the founding generation condemned the institution, but never freed their slaves. Dickinson did. In September 1781 he finished manumitting all of them.⁷⁰ Four years later, he drafted and strenuously supported a bill for the gradual abolition of slavery in Delaware.⁷¹

62. Hutson, *supra* note 2, at 264-69, reproduces both a rough and a more finished draft of the Dickinson Plan.

63. The note containing these instructions is dated September 15, 1787, and is reproduced in 3 FARRAND, RECORDS, *supra* note 2, at 81.

64. The name "Fabius," like many of the pseudonyms used during the ratification process, was drawn from the history of the Roman republic. Quintus Fabius Maximus Cunctator ("the Delayer") was a Roman general who fought Hannibal by avoiding pitched battles (in which Hannibal was almost invincible) in favor of cautious guerilla-style tactics. Because Washington employed similar tactics throughout much of the Revolution, he sometimes was called "the American Fabius." The pseudonym reflects, I think, Dickinson's wish to communicate the cautious nature of his character. Accord McDONALD, NOVUS, *supra* note 2, at 277.

For a summary of the argument in the "Fabius" letters, see Gregory S. Ahern, *The Spirit of American Constitutionalism: John Dickinson's Fabius Letters*, available at <http://www.nhinet.org/ahern.htm> (last visited Nov. 5, 2003).

65. 2 WRITINGS, *supra* note 2, at 69.

66. 17 DOCUMENTARY HISTORY, *supra* note 2, at 79-80 (editor's introduction).

67. FLOWER, *supra* note 2, at 200-01.

68. See generally *id.*

69. *London Letters*, *supra* note 2, at 278.

70. FLOWER, *supra* note 2, at 200. Milton Flower argues that there were also financial incentives for manumission. Only six slaves were involved. *Id.*

71. STILLÉ, *supra* note 2, at 323-24, 424-31.

Looking back from 1787 and 1788, one might say that Dickinson's career had not exactly unfolded in a straight line. Perhaps that was a philosophical strength. Possessed of the wealth of a fine classical education, he drew on it heavily and wore it lightly. By birth a farmer, he had earned his living as one, and as a lawyer as well. With no apparent lust for political office, he had served as legislator, delegate in Congress, and president of two different states. With no desire to sever ties with Britain, he had first remonstrated for and then fought for the American cause. Although suffering the pains of what was in those days advanced middle age, he made the trip to the Philadelphia convention to serve as one of the more experienced delegates. It should be no surprise then that his ideas and life experiences were to seep into the document that convention produced.

III. Dickinson's Political Philosophy

A. *Dickinson's Consistency*

Throughout his life, John Dickinson's basic political philosophy retained a consistency and integrity remarkable for a person actively involved in a career in practical politics.⁷² There were refinements, of course. Yet one can examine writings written over two decades, in the heat of the hour, and find very little inconsistent—and much mutual reinforcement—in them.

B. *Humans as Social Creatures*

Dickinson believed that man was endowed with natural rights as a gift from God.⁷³ In his view, the Creator⁷⁴ wanted man to be self-fulfilled: "Man is born for himself. It is not only his right, but his duty to pursue his own happiness."⁷⁵ Because God made humans to be social creatures, they can find happiness and freedom only in the society of

72. At the end of his otherwise admirable monograph on Dickinson's political career from 1764 through 1776, David L. Jacobson concluded that Dickinson was "not a systematic thinker, but a politician whose expressions were called forth by the needs of the time." Jacobson, *supra* note 2, at 124. However, this conclusion does not follow from Jacobson's own careful tracings of Dickinson's writings nor from independent analysis.

73. Ford, *supra* note 2, at 262 (writing in his *Address to Barbados* that royal charters of liberties were "*declarations* but not *gifts* of liberties" that came from God).

74. Cf. BURKE'S POLITICS, *supra* note 2, at xv (editors' introduction) ("[T]he primary business of the legislator or statesman was to ascertain, obey, and promote obedience to the precepts of the Creator as these could be discerned in the natural order.").

75. 2 WRITINGS, *supra* note 2, at 253 (Fabius, Second Series, Letter XIII).

others.⁷⁶ Humans have a dual nature, with both self-love and social instincts.⁷⁷ These are interwoven and synergistic as such: “In the constitution which our Maker has assigned to man, two dispositions are observable; *love of self* and *social affection*. They are compatible, innocently, virtuously, advantageously, compatible, or they would not have been ‘joined together.’ Their union is the means to good ends.”⁷⁸ And again, stated as follows: “Right involves duty. He grossly errs, if he supposes he can obtain it, by disregarding the happiness of others. Self love and social are as intimately united as colours in a ray of light. The ray without one of them would be imperfect [i.e., incomplete].”⁷⁹

To be sure, Dickinson cautioned, self-love was not the same as unbridled selfishness: “Self-love and selfishness are very different. Self-love has its laws. Selfishness has none.”⁸⁰ “A *people*,” he wrote, “is travelling fast to destruction, when *individuals* consider *their* interests as distinct from *those of the public*.”⁸¹

Prior to entering political society, Dickinson implied, people had two sorts of rights or powers—those whose exercise could harm others

76. 16 DOCUMENTARY HISTORY, *supra* note 2, at 168 (Fabius, First Series, Letter III).

Compare the argument outlined in the text with the following passage from Edmund Burke’s *Reflections on the Revolution in France*:

They all know or feel this great ancient truth: Quod illi principi et praepotenti Deo qui omnem hunc mundum regit, nihil eorum quae quidem fiant in terris acceptius quam concilia et coetus hominum jure sociati quae civitates appellantur. [Among those things that occur on this earth, nothing is more pleasing to that governing and greatly powerful God who rules the whole world than the councils and joining together of people by the law of association that we call civil government] [T]hey think themselves bound . . . to perform their national homage to the institutor and author and protector of civil society; without which civil society man could not by any possibility arrive at the perfection of which his nature is capable, nor even make a remote and faint approach to it. They conceive that He who gave our nature to be perfected by our virtue willed also the necessary means of its perfection. He willed therefore the state—He willed its connection with the source and original archetype of all perfection.

BURKE, *supra* note 2. All translations from the Latin in this Article are by the author.

In the eighteenth century, the verb “to perfect” had the sense of “to complete,” and “perfection” of “completion.” Thus, SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) defines “perfect” primarily in the sense of its Latin root, *perficere*, “to complete.” Cf. U.S. CONST. pmbl. (“to form a more perfect union”).

77. 2 WRITINGS, *supra* note 2, at 248 (Fabius, Second Series, Letter XIII).

78. *Id.*

79. *Id.* at 253 (Fabius, Second Series, Letter XIII). Dickinson’s theme of the intertwining of interest and duty appears in other writings as well. See his discussion of Congress in 17 DOCUMENTARY HISTORY, *supra* note 2, at 122-25 (Fabius, First Series, Letter II).

80. 2 WRITINGS, *supra* note 2, at 253 (Fabius, Second Series, Letter XIII).

81. *Farmer*, *supra* note 2, at 77 (Letter XII).

and those whose exercise affected only oneself.⁸² Upon entering political society, people contributed some of their rights or powers to the central authority.⁸³ Ideally, those contributed should be those in the first category: Man “must submit his will, in what concerns all, to the will of the whole society,”⁸⁴ and “[th]e *authority* of the *whole*, must be co-extensive with its *interests*.”⁸⁵ We may think of the rights contributed as one’s “alienable rights” and those that ought not be contributed as “unalienable rights.” When all people yielded to society the power to injure others, then all could enjoy their retained rights more fully because everyone received protection from injury and freedom from fear.⁸⁶ Everyone benefited as a result. This was the common good or the general welfare.⁸⁷ Dickinson’s rhetorical emphasis on this natural law and social contract theory differs from that of Edmund Burke, another Whig statesman with whom he often has been compared.⁸⁸

82. Dickinson does not seem to have distinguished in this context between rights and powers.

83. 17 DOCUMENTARY HISTORY, *supra* note 2, at 169 (Fabius, First Series, Letter III).

84. *Id.*

85. *Id.* at 170. Dickinson’s concept is superficially similar to Locke’s, but Locke would have granted society a limited power over rights Dickinson believed should be retained:

The first power, viz., of doing whatsoever he thought fit for the preservation of himself and the rest of mankind, he gives up to be regulated by laws made by the society, so far forth as the preservation of himself and the rest of that society shall require; which laws of the society in many things confine the liberty he had by the law of Nature.

Secondly, [t]he power of punishing he wholly gives up, and engages his natural force (which he might before employ in the execution of the law of Nature

LOCKE, *supra* note 2, at 105.

86. 17 DOCUMENTARY HISTORY, *supra* note 2, at 169 (Fabius, First Series, Letter III).

87. The phrase “general welfare” was one of Dickinson’s favorites. *See, e.g., Farmer, supra* note 2, at 9 (Letter II); *id.* at 69 (Letter XI); 14 J. CONT. CONG. 651 (1779) (criticizing price-gougers by claiming that their activities were contrary to the “general welfare” in his draft for Congress of the address, *To the Inhabitants of the United States of America* (May 26, 1779)); *see also id.* at 653; 2 WRITINGS, *supra* note 2, at 168, 181, 195 (Fabius, Second Series, Letters I, III, V).

88. There have been various attempts to claim Dickinson for a sort of Burkean conservatism. His first biographer, Charles J. Stillé, made much of Dickinson’s reliance on English legalisms rather than theories of natural law. STILLÉ, *supra* note 2. Professor M.E. Bradford, a conservative in the tradition of the American South, also described Dickinson as “an American Burke.” BRADFORD, FATHERS, *supra* note 2, at 102-03; *see also* BRADFORD, REASON, *supra* note 2, at 79-96. The comparison to Burke has something to it insofar as they both were Whigs who favored choosing political means more on the basis of experience than of abstract reasoning.

However, the comparison is overdrawn in part because of Dickinson’s heavy reliance on natural law as the source of “first principles.” *See also* Jacobson, *supra* note 2, at 34, 39, 50, 55, 76. (Later, Jacobson seems to overstate Dickinson’s devotion to natural law compared to history. *Id.* at 124). Dickinson then turned to historical and

C. *The Purpose of Government*

Dickinson believed in identifying ends before means.⁸⁹ One should ascertain the purpose of a governmental establishment before choosing its structure or enacting its laws.⁹⁰ The ideal purpose was to promote the common good or general welfare.⁹¹ In his draft of the *Declaration of the Causes and Necessity of Taking up Arms*, Dickinson wrote, “Government was instituted to promote the Welfare of Mankind, and ought to be administered for the Attainment of that End.”⁹² In adopting this view, Dickinson was adhering to Whig faith.⁹³ John Locke had said something very much like it.⁹⁴ So also had the highly influential⁹⁵ essays by John Trenchard and Thomas Gordon published as *Cato’s Letters*, with which Dickinson was familiar.⁹⁶ In this respect, moreover, Dickinson and Burke agreed. Burke had described Parliament as “one interest, that of

prudential considerations only as a *means* of vindicating natural rights. In addition, his later support for the French republic distinguishes him sharply from Burke, whose lasting reputation is built largely on his opposition to that regime.

On a personal level, Dickinson was talented and creative by almost any other measure, but not by the measure of Burke. In the latter’s presence, even the formidable Samuel Johnson could feel pressed. Once when Johnson was ill and reduced in energy, he said of Burke, “That fellow calls forth all my powers. Were I to see Burke now it would kill me.” JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, L.L.D. 287 (Robert Maynard Hutchins et al. eds., 1952).

89. See 1 FARRAND, *RECORDS*, *supra* note 2, at 42 (McHenry, May 30) (proposing that powers of the federal branches ought to be ascertained before their structure was determined); see also *id.* at 74 (Pierce, June 1) (“Mr. Dickinson was of opinion that the powers of the Executive ought to be defined before we say in whom the power shall vest.”).

90. *Id.* at 42, 74.

91. 17 DOCUMENTARY HISTORY, *supra* note 2, at 181 (Fabius, First Series, Letter IV) (identifying the object of government as increasing the safety and repose of the governed and “the advancement of their happiness in other respects”); *id.* at 195 (Fabius, First Series, Letter V) (“government is intended for the happiness of the people” and “the end of legitimate government . . . is, the general welfare”); see also Jacobson, *supra* note 2, at 76 (summarizing the argument in Dickinson’s *Essay on the Constitutional Power of Great Britain*); cf. 17 DOCUMENTARY HISTORY, *supra* note 2, at 80 (Fabius, First Series, Letter I) (“what concerns should be considered by all”); *id.* at 80-81 (Fabius, First Series, Letter I) (regretting that sectional and economic interests could warp even the views of the intelligent as to what is best for the general welfare).

92. 2 J. CONT. CONG. 141 (1775). Although Dickinson and Jefferson were uneasy collaborators on this document, this particular language was Dickinson’s. Jacobson, *supra* note 2, at 96.

93. WOOD, *supra* note 2, at 55.

94. Cf. LOCKE, *supra* note 2, at 106 (“[T]he power of the society or legislative constituted by them can never be supposed to extend farther than the common good.”).

95. BAILY, *supra* note 2, at 54; see also COLBOURN, *supra* note 2, *passim* (discussing the omnipresence of these essays in America).

96. E.g., 1 CATO, *supra* note 2, at 175, 176, 179, 405, 411. Dickinson cited *Cato’s Letters* as early as 1765 in his pamphlet, *The Late Regulations Respecting the British Colonies on the Continent of America Considered*. Ford, *supra* note 2, at 242-43.

the whole, where, not local purposes, not local prejudices ought to guide, but the general good.”⁹⁷

Dickinson believed that to advance the general welfare government must respect freedom⁹⁸ and protect good citizens from bad: “[T]ranquility and prosperity have commonly been promoted [in republics] in proportion to the strength of their government for protecting *the worthy* against *the licentious*.”⁹⁹ This was true of foreign affairs as well: “[S]uch establishments as tend most to protect *the worthy* against *the licentious*, tend most to protect *all* against foreigners” because “the government will partake of the qualities of those whose authority is prevalent.”¹⁰⁰ Perhaps somewhat circularly, he described the “worthy” in the words of Horace, the Roman poet: “Qui consulta patrum, qui leges iuraque servat”¹⁰¹—which, loosely translated, means “those who obey the law and respect the rights of others.” At several points Dickinson suggested that laws inconsistent with government’s general welfare purpose were *ultra vires*, not binding on the citizenry, and should be resisted.¹⁰²

D. *The Public Trust*

John Locke had characterized government as a trust, with officials as trustees and the people as beneficiaries.¹⁰³ The public trust concept

97. BAILY, *supra* note 2, at 84-85.

98. Ford *supra* note 2, at 202 (Dickinson’s *Address on the Stamp Act*); *id.* at 262 (Dickinson’s *Address to the Committee of Correspondence in Barbados*); *cf.* COLBOURN, *supra* note 2, at 78 (Locke’s connection between religion, happiness, virtue, and freedom).

99. 17 DOCUMENTARY HISTORY, *supra* note 2, at 168.

100. *Id.* at 195 (Fabius, First Series, Letter V).

101. *Id.* The reference is to Horace, *Epp.* 1.16.40-41: *Vir bonus est quis? Qui consulta patrum, qui leges iuraque servat, quo multae magnaerque secantur iudice lites, quo res sponsore et quo causae teste tenentur.* Translated as: “Who is a worthy man? He who honors the commands of the senate, the law, and private rights, by whose judgment many and great legal disputes are cut short, by whose guarantee affairs are ordered, through whose testimony cases are judged.”

102. See Jacobson, *supra* note 2, at 39-40, 76; see also Ford, *supra* note 2, at 184 (suggesting, in his draft of the *Declaration of Rights: Resolutions of Stamp Act Congress*, that parliamentary taxes on the colonies were inconsistent with principles of freedom and not binding on the colonists). For an analysis on how Dickinson saw the interplay of local conditions and the general welfare as militating against independence, see Johannesen, *supra* note 2, at 78.

103. LOCKE, *supra* note 2, at 18 (“nor under the dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it”), 110 (“to the legislative, acting pursuant to their trust”), 113-114 (“the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature”), 116-17 (“But government, into whosoever hands it is put, being, as I have before shown, entrusted with this condition, and for this end, that

became very popular among the eighteenth century English Opposition¹⁰⁴ authors who influenced American Whigs. *Cato's Letters* were replete with the language of public trust.¹⁰⁵ So also were the writings of Henry St. John Bolingbroke.¹⁰⁶ We have seen that Dickinson was familiar with "Cato."¹⁰⁷ He had read and admired Bolingbroke while studying at the Middle Temple.¹⁰⁸ Among Americans, there were many in his generation who applied the trust metaphor to government.¹⁰⁹ Indeed, the constitutions of both states in which Dickinson served in elective office—Delaware and Pennsylvania—explicitly referred to government as a trust.¹¹⁰

As a real property and estates lawyer, Dickinson was comfortable with trust principles. That he thought they ought to be applied to government is evident as early as 1764; in that year, he wrote a private letter comparing the royal grant of Pennsylvania to William Penn to a "declaration of trust," with Penn as trustee and his fellow-settlers as beneficiaries¹¹¹—and, presumably, with the Crown as settlor.

men might have and secure their properties."), 129 ("The power of assembling and dismissing the legislative, placed in the executive, gives not the executive a superiority over it, but is fiduciary trust placed in him for the safety of the people.").

104. The term refers primarily to the opposition to the Walpole ministry, although it also denotes seventeenth century opposition to the Stuart kings. On opposition to Walpole, the "Archcorrupter," see COLBOURN, *supra* note 2, at 51-53.

105. 1 CATO, *supra* note 2, at 111, 142, 179, 267, 411, 415, 416; 2 CATO, *supra* note 2, at 558.

106. HENRY ST. JOHN BOLINGBROKE, *A Dissertation Upon Parties*, in 2 THE WORKS OF LORD BOLINGBROKE (1967); see, e.g., *id.* at 45 (a representative in Parliament is the people's trustee), 93 (a representative has a "great and noble trust"), 100 (the king serves as trustee of the public revenues), 101 ("[T]he people should have frequent opportunities of calling their representatives to account, as it were, for the discharge of the trust committed to them.").

On Bolingbroke's influence, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 39-40 n.23 (1967); COLBOURN, *supra* note 2, at 49-50, 87, 109).

107. See *supra* note 96 and accompanying text.

108. FLOWER, *supra* note 2, at 17; *London Letters*, *supra* note 2, at 449. On Dickinson's admiration, see H. Trevor Colbourn's commentary in *London Letters*, *supra* note 2, at 419.

109. For further discussion of the trust idea among the Founders, see Natelson, *General Welfare Clause*, *supra* note 2, and by the same author, *The Constitution and the Public Trust* (forthcoming).

110. DEL. CONST. of 1776, art. 4, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Aug. 1, 2003) ("[A] councilor will remain in trust for three years."); PA. CONST. of 1776, art. IV, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> ("[A]ll power being originally inherent in, and consequently derived from, the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them.").

111. FLOWER, *supra* note 2, at 24-25. Dickinson made the statement in a letter to C.

Throughout his life, he used the figure in political debate, and notably in the constitutional debates of the 1780s.¹¹²

The public trust concept was not mere empty metaphor. Both opposition writers and American Whigs drew from the law of fiduciaries specific conclusions about the standards that should guide public officials.¹¹³ *Cato's Letters* inveighed against diversion of public wealth for private purposes¹¹⁴ and concluded that the crimes of public magistrates were greater than those committed by private parties.¹¹⁵ Samuel von Pufendorf, one of the most popular jurists of the time, had not used explicitly the language of public trust, but had contended for a long list of trust-style duties on rulers.¹¹⁶ Among these were governing for the public welfare,¹¹⁷ acquiring necessary knowledge,¹¹⁸ ultimate responsibility of the ruler for ministers,¹¹⁹ impartiality and the equitable distribution of burdens among citizens,¹²⁰ conservation of assets,¹²¹ and avoidance of faction.¹²² Dickinson himself, following William Penn, argued that the trust duty prohibited officials from changing the form of government without the consent of the people they served.¹²³ He thereby drew a distinction between ordinary laws and the more fundamental law of a constitution.¹²⁴ Thus, Dickinson, like other opinion-molders of the

Marshall on February 9, 1764 (“I think upon the whole it may be justly observed that to consider the deeds of lease and release [i.e., conveyance] executed before the Proprietor [William Penn] set sail to take possession of his grant with his first Adventurers [settlers] as *Declarations of Trust* is to consider them in the same light as those adventurers did.”)

112. For an early example, see Jacobson, *supra* note 2, at 17, 23 (in the dispute over the petition to replace Pennsylvania’s proprietary charter). For examples in the constitutional debates, see 17 DOCUMENTARY HISTORY, *supra* note 2, at 122 (Fabius, First Series, Letter II) (“federal trustees or officers”); *id.* at 171 (Fabius, First Series, Letter III) (stating that the “trustees or servants of the several states” will protect state sovereignty).

113. Locke made the connection with the private law of trusts explicit:

[W]ho shall be judge whether the trustee or deputy acts well and according to the trust reposed in him, but he who deposes him, and must, by having deposed him, have still the power to discard him when he fails in his trust? If this be reasonable in particular cases of private men, why should it be otherwise in that of the greatest moment, where the welfare of millions is concerned

LOCKE, *supra* note 2, at 203-04.

114. 1 CATO, *supra* note 2, at 76.

115. *Id.* at 141.

116. 2 SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN 11.3 (Frank Gardner Moore trans., 1964) (1682), available at <http://www.constitution.org/puf/puf-dut.htm> (last visited Mar. 30, 2003).

117. *Id.*

118. *Id.* at 11.2.

119. *Id.* at 11.9.

120. *Id.* at 11.10.

121. *Id.*

122. *Id.* at 11.12.

123. Jacobson, *supra* note 2, at 23.

124. *Id.* at 17, 26.

time, shared the view that public trustees should be more than merely honest.

In his view, public trustees, like their private counterparts, should be “impartial”¹²⁵—above faction.¹²⁶ Dickinson’s favorite author, Francis Bacon,¹²⁷ had written that the best policy for Kings was to hold themselves above faction¹²⁸—to “order those things which are general, wherein men of several factions do nevertheless agree, or in dealing with correspondence to particular persons, one by one.”¹²⁹ In a simile Dickinson later borrowed for other purposes,¹³⁰ Bacon added, “The motions of factions under the King, ought to be like the motions (as the astronomers speak) of the inferior orbs, which may have their proper motions [i.e., their own motions], but yet still are quietly carried by the higher motion of ‘primum mobile.’”¹³¹

In any event, throughout his political life Dickinson repeatedly promoted the ideal of official impartiality.¹³² Indeed, he applied the ideal

125. RESTATEMENT (SECOND) OF TRUSTS § 183 (1959) (“Duty to deal impartially with beneficiaries. When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.”).

126. BAILYN, *supra* note 2, at 48 (citing the Whig ideal of the king above politics); *see also* PA. CONST. of 1776, pmb., available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/pa08.htm>. The document under which Dickinson served read: “[I]t is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this State, and their posterity, and provide for future improvements, without partiality for, or prejudice against any particular class, sect, or denomination of men whatever.” *Id.*; *see also id.* art. V (“That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sort of men, who are a part only of that community.”).

127. FLOWER, *supra* note 2, at 17. Dickinson once described Bacon as “the greatest man that ever livd [sic].” *London Letters*, *supra* note 2, at 280.

128. BACON, *supra* note 2, at 272-73.

129. *Id.* at 269.

130. *See infra* notes 279-81 and accompanying text.

131. BACON, *supra* note 2, at 273. Note that Bacon carefully avoided the then-still contentious issue of which orbs circled which. This was not the only time Bacon used the planetary simile. *See id.* at 115. *Primum mobile* means “first mover,” that is, the impetus for the system.

132. *See, e.g.*, Ford, *supra* note 2, at 221-22 (criticizing British trade statutes as furthering “partial” rather than “general” interests, in *The Late Regulations Respecting the British Colonies on the Continent of America Considered*); 17 DOCUMENTARY HISTORY, *supra* note 2, at 251 (Fabius, First Series, Letter VIII) (defending the new Constitution by stating, “It cannot be with reason apprehended, that Congress will refuse to act upon any articles calculated to promote the *common welfare*, tho’ they may be unwilling to act upon such as are designed to advance PARTIAL interests . . .”). At the constitutional convention, Dickinson looked for ways to overcome local partiality. *See, e.g.*, 2 FARRAND, RECORDS, *supra* note 2, at 114-15 (Madison, July 25); Hutson, *supra* note 2, at 281 (annotating his copy of a draft of the Constitution with suggestions that “no Preference or Advantage to be given to any persons or places—Laws to be equal”).

even to God; when revising Jefferson's draft of the *Declaration of the Causes and Necessity of Taking up Arms*, Dickinson added an appeal to "the supreme and impartial Judge and Ruler of the Universe."¹³³

E. Dickinson's Political Philosophy Applied to Financial Exactions

His pre-Revolutionary writings on government financial exactions are illustrative of how Dickinson's political philosophy affected his treatment of issues. Those writings make a fundamental distinction between two kinds of financial exactions: taxes and duties.¹³⁴ Taxes were impositions for the sole purpose of levying money.¹³⁵ Duties were impositions for the purpose of regulating commerce rather than raising revenue.¹³⁶ Both taxes and duties should be imposed only for the general welfare.¹³⁷

However, the needs of the general welfare mandated different rules for taxes and for duties.¹³⁸ The general welfare required that only colonial assemblies, not Parliament, have power to control the "internal police" and property of the colonies.¹³⁹ Taxation, like regulation of manufactures and administration of justice,¹⁴⁰ lay within the "internal" category:

Men cannot be happy, without Freedom; nor free, without Security of Property; nor so secure, unless the sole Power to dispose of it be lodged in themselves; *therefore* no People can be *free*, but where Taxes are imposed on them *with their own Consent*, given personally, or by their Representatives.¹⁴¹

133. 2 J. CONT. CONG. 156 (1775) (emphasis added).

134. *Farmer*, *supra* note 2, at 21, 23 (Letter IV).

135. *Id.*; *see also id.* at 44 (Letter VII); *cf.* Ford, *supra* note 2, at 173-74 (adopting, but then dropping, a distinction between internal and external taxes in his draft of the Stamp Act Resolution).

136. *Id.* at 21, 23 (Letter IV).

137. *Id.*

138. *Id.* at 9-10 (Letter II).

139. *Id.*; Jacobson, *supra* note 2, at 92. The idea that colonies ought to control their "internal" government had been popularized by Richard Bland in 1763. COLBURN, *supra* note 2, at 147.

140. Jacobson, *supra* note 2, at 78.

141. Ford, *supra* note 2, at 202 (*Address on the Stamp Act*). From Dickinson's *Address to the Committee of Correspondence in Barbados*:

It would be an insult on the divine Majesty to say, that he has given or allowed any man or body of men *a right to make me miserable*. If no man or body of men has *such a right*, I have a *right to be happy*. If there can be no happiness without freedom, I have a *right to be free*. If I cannot enjoy freedom without security of property, I have a *right to be thus secured*. If my property cannot be secure, in case others over whom I have no kind of influence may take it from me by taxes I have an *exclusive right* to lay taxes on my own property,

Thus, the ultimate reason Parliament had no power to tax the colonies was because that power was contrary to the general welfare.¹⁴²

On the other hand, the general welfare required regulation of commerce throughout the British Empire.¹⁴³ Only Parliament was in the position to regulate commerce.¹⁴⁴ Parliament, therefore, had the power to impose duties for this purpose.¹⁴⁵ (In conceding this last point, Dickinson carried the weight of colonial opinion with him, to Jefferson's discomfort.)¹⁴⁶ Dickinson even defended Parliament's right, although not always its wisdom,¹⁴⁷ to impose duties to restrain the commerce of one part of the empire to protect another—if the imposition was part of an overall plan to advance the general welfare.¹⁴⁸

Dickinson opposed efforts to evade the distinction between taxes and duties.¹⁴⁹ It was, in his view, improper for Parliament to subject the

either by myself or those I can trust

Id. at 262.

142. *Id.* at 174 (Dickinson's draft of the Pennsylvania Stamp Act Resolutions), 195 (in the petition from the Stamp Act Congress); *Farmer, supra* note 2, at 26-33 (Letter V) (pointing out that there is no need to tax the colonies to keep them profitable for and dependent on the mother country).

143. *Farmer, supra* note 2, at 7 (Letter II).

144. *Id.*; see generally Jacobson, *supra* note 2, at 47, 77.

145. *Farmer, supra* note 2, at 7 (Letter II).

146. In his autobiography, Jefferson wrote:

[In the *Summary View of the Rights of British America*] I took the ground which, from the beginning I had thought the only one orthodox or tenable, which was that the relation between Gr. Br. and these colonies was exactly the same as that of England & Scotland after the accession of James & until the Union, and the same as her present relations with Hanover, having the same Executive chief but no other necessary political connection; and that our emigration from England to this country gave her no more rights over us, than the emigrations of the Danes and Saxons gave to the present authorities of the mother country over England. In this doctrine however I had never been able to get any one to agree with me but Mr. Wythe.

He concurred in it from the first dawn of the question: what was the political relation between us & England? Our other patriots Randolph, the Lees, Nicholas, Pendleton stopped at the half-way house of John Dickinson who admitted that England had a right to regulate our commerce, and to lay duties on it for the purposes of regulation, but not of raising revenue. But for this ground there was no foundation in compact, in any acknowledged principles of colonization, nor in reason: expatriation being a natural right, and acted on as such, by all nations, in all ages.

JEFFERSON, *supra* note 30.

147. Ford, *supra* note 2, at 175 (criticizing, in his draft of the Pennsylvania Stamp Act Resolutions, British trade restraint on prudential rather than constitutional grounds), 186 (making same argument in his draft of the "Declaration of Rights" (Resolutions) of the Stamp Act Congress); see also *id.* at 213-45 (criticizing British trade policy entirely on prudential grounds in his pamphlet, *The Late Regulations Respecting the British Colonies on the Continent of America Considered*).

148. *Farmer, supra* note 2, at 8-9 (Letter II).

149. FORD, *supra* note 2, at 231-32.

colonies to taxes by disguising them as duties.¹⁵⁰ Dickinson understood that when a charge is imposed on a particular item, the true incidence (burden) of the charge depends on what we now call the “elasticity of demand”—the extent to which demand for an item changes in response to fluctuations in price.¹⁵¹ Charges on articles for which demand was inelastic (relatively insensitive to fluctuations in price) were really paid by the consumer, even if the tax was nominally levied on the seller. Charges on articles for which demand was elastic (sensitive to price fluctuation), fell on the seller or could, perhaps, be divided between seller and consumer. From this it followed that when Britain required colonials to buy a necessary article from her (thereby assuring inelasticity of demand), she must not load the article with impositions to raise revenue.¹⁵² Even if Parliament nominally levied the imposition on sellers in the mother country, the real burden fell on consumers in the colonies. Such impositions were taxes. More, they were deceptive taxes: “This mode of taxation therefore is the mode suited to arbitrary and oppressive governments.”¹⁵³

Colonial governments legitimately could tax Americans to promote the general welfare. Yet a government, like other trustees, should treat those under its care fairly and impartially.¹⁵⁴ In the realm of taxation, whoever enjoyed the benefit from the revenue derived should feel also the burden: “Qui sentit commodum sentire debet et onus.”¹⁵⁵ Moreover, “[t]axes in every free state have been, and ought to be, as exactly *proportioned as is possible to the abilities of those who are to pay them*. They cannot otherwise be *just*.”¹⁵⁶

150. *Id.*

151. *Id.* (writing in *The Late Regulations Respecting the British Colonies on the Continent of America Considered*); see also Farmer, *supra* note 2, at 42 (Letter VII).

152. Farmer, *supra* note 2, at 14-15 (Letter II).

153. *Id.* at 41 (Letter VII).

154. See *id.* at 50 (Letter VIII).

155. *Id.*

156. *Id.* at 66 (Letter X) (emphasis in original); see also Ford, *supra* note 2, at 230 (supporting taxes proportioned to ability to pay in *The Late Regulations Respecting the British Colonies on the Continent of America Considered*).

These two principles—that burden should follow benefit and that taxes ought to be based on ability to pay—potentially may conflict with each other. One way to reconcile them, at least in part, is to identify classes of beneficiaries and impose the tax only on them, but scale the imposition according to each person’s ability to pay. Thus, a proposed park may benefit a particular neighborhood disproportionately, and the rest of the area not at all. Property taxes to pay for the park could be assessed only on the benefited neighborhood, but according to the value of each owner’s property.

F. *Using the Lessons of History To Structure Government To Serve Its Purpose*

How does one, in a fallen world, induce government to rise to such ideals? “Cato’s” answer had been pessimistic: “Nothing but fear and selfish considerations can keep men within any reasonable bounds.”¹⁵⁷ For John Dickinson, matters weren’t quite as dreadful as that. The passions could be the source of great evil, but “[d]uly governed, they produce happiness.”¹⁵⁸ Indeed, “[t]he due regulation of the affections is the perfection [completion] of man’s character.”¹⁵⁹ One achieved that “due regulation” through well-structured societal institutions; particularly important were constitutional institutions: “The best foundations of this protection, that can be laid by men, are a constitution and government secured, as well as can be, from the undue influence of *passions* either in the people or their servants.”¹⁶⁰

The role of a constitution was to lay down procedures for managing the rights and powers that citizens had contributed to the central authority: “a *Constitution* is the *organization of the contributed rights in society*.”¹⁶¹ A good constitution featured mechanisms to maximize human advantages and minimize disadvantages.¹⁶² It encouraged good results and discouraged or raised obstacles to bad ones¹⁶³—the “cultivation of virtues and correction of errors.”¹⁶⁴ For example, Dickinson recognized that government should be structured to effectuate the will of the people.¹⁶⁵ But “the will of the people” could mean their immediate, short-term, passionate will or their long-term sense of advantage.¹⁶⁶ A well-constructed constitution would increase the likelihood that government would further “a reasonable, not a distracted

157. 2 CATO, *supra* note 2, at 551; cf. BAILYN, *supra* note 2, at 56 (attributing to the Whigs a belief that man was a depraved creature and that power was a threat to liberty).

158. 17 DOCUMENTARY HISTORY, *supra* note 2, at 195 (Fabius, First Series, Letter V).

159. 2 WRITINGS, *supra* note 2, at 253 (Fabius, Second Series, Letter XIII).

160. 17 DOCUMENTARY HISTORY, *supra* note 2, at 195 (Fabius, First Series, Letter V). Note Dickinson’s use of the phrase “undue influence,” a phrase common in the law of fiduciaries.

161. *Id.* at 180 (Fabius, First Series, Letter IV).

162. *Id.* at 196 (Fabius, First Series, Letter V) (“[T]he principles of their governments, the advantages and disadvantages of their situations, the methods employed to avail themselves of the first, and to alleviate the last.”).

163. *E.g.*, Hutson, *supra* note 2, at 272 (“Let us endeavor with united Councils to establish a Government that not only may render our Nation great respectable free and happy but also VIRTUOUS.”).

164. 17 DOCUMENTARY HISTORY, *supra* note 2, at 213 (Fabius, First Series, Letter VI).

165. *See id.* at 182 (Fabius, Second Series, Letter IV).

166. *See id.*

will.”¹⁶⁷

Those crafting a good constitution—placing principles into practice—could not proceed *à priori*.¹⁶⁸ Prudent constitution-makers sought information about how different arrangements had worked in the past.¹⁶⁹ “Experience must be our only guide,” was Dickinson’s most famous remark at the Philadelphia convention; “Reason may mislead us.”¹⁷⁰

Accordingly, Dickinson sought guidance in the teachings of history.¹⁷¹ He resorted mostly to the well-documented histories of Greece,¹⁷² Rome,¹⁷³ and Britain. He found British history especially useful because it “abounds with instances” of how a people had protected their liberties against their rulers.¹⁷⁴ The course of British development demonstrated the centrality of certain basic liberties, such as the right of the people to approve all laws and taxes, either in person or through their representatives; trial by jury; the writ of habeas corpus; holding of lands by tenure with easy rents; and freedom of the press.¹⁷⁵

British history also demonstrated how government might be induced to adhere to trust standards. One way was to align power and consequences—a principle inherent in the maxim already cited: “Qui sentit commodum sentire debet et onus.”¹⁷⁶ Another was to align, as much as possible, the interests of the governors with those of the governed—another device common in the law of fiduciaries. To the

167. *Id.* This passage continues: “When frenzy seizes the mass, it would be madness to think of their happiness, that is, of their freedom.” *Id.*

168. 2 FARRAND, RECORDS, *supra* note 2, at 278 (Madison, Aug. 13).

169. *Id.*

170. *Id.* Compare this statement to Dickinson’s comment that “if we are to judge of the future from the past, which perhaps is a good way of judging such cases.” 2 WRITINGS, *supra* note 2, at 178 (Fabius, Second Series, Letter II).

171. For a brief, although incomplete overview of Dickinson’s reliance on history, see COLBOURN, *supra* note 2, at 129-44. Jacobson, *supra* note 2, at 124 is somewhat dismissive of Dickinson’s resort to history, and his monograph does not inform the reader of the frequency of his subject’s use of historical materials.

172. 17 DOCUMENTARY HISTORY 81-82 (Fabius, First Series, Letter I) (discussing how the ancient Greeks suffered because they sacrificed the general interest for local interests).

173. For example, his second set of “Fabius” letters contains as much Roman history as anything else. *See generally* 2 WRITINGS, *supra* note 2, at 167-286.

174. WOOD, *supra* note 2, at 7. On Dickinson’s use of history, see also *id.* at 38-39, 49.

175. Dickinson, writing on behalf of Congress, cited these rights in a sort of primer for French citizens of Quebec unfamiliar with English liberty. 2 WRITINGS, *supra* note 2, at 6-8 (*Address of Congress to the Inhabitants of Quebec*).

Freedom of the press was important if only because under a free constitution it was the duty of the governed to rectify governors’ errors by rectifying mistakes and appeasing passions. *Farmer*, *supra* note 2, at 17 (Letter II).

176. *See supra* note 189 and accompanying text.

extent possible, therefore, a constitution should foster identity of interest, rather than conflict of interest, between public officials and the citizenry.¹⁷⁷ To underscore the value of alliance of interests, Dickinson paraphrased the Roman historian Sallust: “Idem velle, ac idem nolle, id demum amicitia est”¹⁷⁸—“to want and not want the same things; that in the final analysis is friendship.” In the founding generation the most common word for what Dickinson was seeking in this regard was “sympathy.”¹⁷⁹

Dickinson favored various constitutional mechanisms for promoting “sympathy” and the closely allied value of official dependence on the citizenry. These included frequent elections,¹⁸⁰ large legislatures,¹⁸¹ “rotation in office” (term limits),¹⁸² and assurance that citizens with the vote were themselves independent.¹⁸³ As to that last—citizen independence—neither Dickinson, nor practically any other public figure among the founding generation,¹⁸⁴ wanted electors who might sell their political support for bowls of porridge.¹⁸⁵ Only citizens who were independent, financially and otherwise, could employ unfettered judgment in public affairs.¹⁸⁶ That was one reason why, Dickinson said,

177. See, e.g., 2 FARRAND, RECORDS, *supra* note 2, at 209 (McHenry, Aug. 7) (Dickinson defending a freehold voting requirement on the ground that the interests of freeholders and the general public were identical); cf. *Fairfax County Resolves*, in THE FOUNDERS’ CONSTITUTION, available at <http://.press-pubs.uchicago.edu/founders/documents/v1ch17s14.html> (last visited Aug. 1, 2003) (“Resolved that the most important and valuable Part of the British Constitution, upon which it’s very Existence depends, is the fundamental Principle of the People’s being governed by no Laws, to which they have not given their Consent, by Representatives freely chosen by themselves; *who are affected by the Laws they enact equally with their Constituents*; to whom they are accountable, and *whose Burthens they share.*”) (emphasis added).

178. 2 WRITINGS, *supra* note 2, at 265 (Fabius, Second Series, Letter XIV). Dickinson adapted the quotation from Sallust’s *Bellum Catalinae*, c. 20, available at <http://www.thelatinlibrary.com/sall.1.html> (last visited Aug. 1, 2003) (“*nam idem velle atque idem nolle, est demum firma amicitia est*”—“for to want and not want the same things is, in the final analysis, what strong friendship is all about.”).

179. On sympathy as a constitutional value, see Natelson, *Sympathy and Independence*, *supra* note 2, at 358-82. See also Farmer, *supra* note 2, at 39 (Letter VII) (noting that legislators are less scrupulous in making laws that do not bind them personally).

180. 17 DOCUMENTARY HISTORY, *supra* note 2, at 123 (Fabius, First Series, Letter II).

181. *Id.* at 122-23.

182. *Id.* at 123.

183. *Id.*

184. On the Founders’ universal belief that only independent citizens should have political influence, see Natelson, *Sympathy and Independence*, *supra* note 2, at 382-90. This was a standard Whig position. 2 CATO, *supra* note 2, at 607 (identifying bad effects of dependence).

185. See 2 FARRAND, RECORDS, *supra* note 2, at 123 (Madison, July 26).

186. See *id.* (expressing the view that only freeholders should vote). Madison wrote: Mr. Dickenson [sic] had a very different idea of the tendency of vesting the

“we cannot be free, without being secure in our property.”¹⁸⁷ This is consistent with his support for institution of the militia, which offered citizens military independence, as the preferred alternative to standing armies.¹⁸⁸

Not only should voting citizens be independent, but so also should branches of government remain independent from each other. Neither Dickinson nor practically any other Founder was a proponent of branches of government “working together.”¹⁸⁹ As the principal drafter of the Continental Congress’s *Address to the Inhabitants of Quebec*, he related at length the evils of the political system that the British government had erected in that province.¹⁹⁰ Prominent among those evils was a legislature and judiciary dependent on the governor, and a governor dependent on the Crown.¹⁹¹ Dickinson, like the other Founders, was convinced that to promote free and impartial government, a constitution ought to institutionalize tension between the branches of government.¹⁹² Each branch would be ultimately dependent on the people, and independent from the others who compete to serve the popular interest: “FOR WHO ARE A FREE PEOPLE? Not *those*, over whom government is reasonable and equitably exercised, but *those*, who live under government so *constitutionally checked and controlled*, that proper provision is made against its being otherwise exercised.”¹⁹³ And again:

[A] government should be divided into three or four parts—as thereby there will be more obstructions interposed, against errors, feuds, and frauds, in the administration, and the interference of the people need be less frequent . . . the departments so constituted may therefore be said to be balanced.¹⁹⁴

Dickinson was an admirer of the British Constitution.¹⁹⁵ In Great

right of suffrage in the freeholders of the Country. He considered them as the best guardians of liberty; And the restriction of the right to them as a necessary defence agst. [sic] the dangerous influence of those multitudes without property & without principle . . .

Id. at 202 (Madison, Aug. 7).

187. *Farmer*, *supra* note 2, at 80 (Letter XII).

188. *See, e.g., London Letters*, *supra* note 2, at 445, 448-49 (expressing disgust at the British government’s willingness to rely on mercenaries for defense rather than local militia).

189. Natelson, *Sympathy and Independence*, *supra* note 2, at 417-18.

190. 2 WRITINGS, *supra* note 2, at 13-14.

191. *Id.*

192. *See infra* notes 193-94 and accompanying text.

193. *Farmer*, *supra* note 2, at 43-44 (Letter VII).

194. 17 DOCUMENTARY HISTORY, *supra* note 2, at 181 (Fabius, First Series, Letter IV); *cf.* Hutson, *supra* note 2, at 264-69 (proposing a plan for a federal constitution that would divide the government into judicial, executive, and two legislative branches).

195. 1 FARRAND, *supra* note 2, at 136 (Madison, June 6).

Britain, liberty had been preserved largely by the balance between the House of Lords, the House of Commons, the executive, and the judiciary.¹⁹⁶ The House of Lords derived its independence from the other branches through a power to block bills enacted by the Commons, and from the independence its members enjoyed due to their personal estates and influence.¹⁹⁷ The House of Commons derived its power from the people, on whom it was duly dependent.¹⁹⁸ Its most important check on the other branches was control over salaries and other aspects of the “purse-strings,” so that the executive could “be brought into order without violence,”¹⁹⁹ thereby rendering both the executive and courts at least somewhat dependent on the people.²⁰⁰ The executive should be denied any appropriation power, for those who applied the money should not have the right to levy it.²⁰¹ All governmental funding should flow from legislative appropriations; there should be no “PERMANENT support for the offices of government.”²⁰²

In Britain, the executive preserved its independence from the other branches though the prestige of the Crown, the power to create peers, the authority to veto legislation, and the ability to influence the Commons with patronage.²⁰³ The British judiciary had become relatively independent, a development Dickinson supported to ensure the “purity of the courts of law.”²⁰⁴ For like other good Whigs,²⁰⁵ he supported the rule

196. Cf. BURKE'S POLITICS, *supra* note 2, at xix (editors' introduction) (noting that Edmund Burke also desired to preserve the monarchic, aristocratic, and democratic elements of the British constitution); see also WOOD, *supra* note 2, at 604.

197. Cf. 17 DOCUMENTARY HISTORY, *supra* note 2, at 122 (Fabius, First Series, Letter II) (pointing out that, with a numerous senate, “influence must encrease [sic] with enlargement”).

198. See *supra* note 231 and accompanying text.

199. Farmer, *supra* note 2, at 51 (Letter IX).

200. *Id.* at 55 (Letter IX); see also *id.* at 57 (Letter IX) (“Is it possible to form an idea of a slavery more complete, more miserable, more disgraceful, than that of a people, where justice is administered, government exercised, and a standing army maintained, AT THE EXPENSE OF THE PEOPLE, and yet WITHOUT THE LEAST DEPENDENCE UPON THEM?”).

201. *Id.* at 52.

202. *Id.* at 51 (Letter IX). This is a caution often disregarded in the drafting of state constitutions, where particular programs or executive branch agencies are provided with permanent funding. See, e.g., MONT. CONST. art. XII, § 4 (permanent funding for anti-tobacco programs), art. X, §§ 2, 3 (state lands serving as a permanent funding source for public schools).

203. Farmer, *supra* note 2, at 36 (Letter VI) (“The crown, by the constitution, has the prerogative of creating peers. The existence of that order, in due number and dignity, is essential to the constitution . . .”); *id.* at 39 (Letter VII) (stating that the veto of the lords and crown “seems . . . to have been vested in them, more for their own security, than for any other purpose”); see also 17 DOCUMENTARY HISTORY, *supra* note 2, at 123 (Fabius, First Series, Letter II) (stating that the presidential veto would help prevent cabal).

204. Farmer, *supra* note 2, at 52-54 (Letter IX).

205. E.g., 1 CATO, *supra* note 2, at 181.

of law. That meant that the law was to be kept certain, for uncertainty “RENDERS PROPERTY PRECARIOUS, and GREATLY EXPOSES US TO THE ARBITRARY DECISION OF BAD JUDGES.”²⁰⁶ He followed Beccaria’s dictum that good laws should prevent radical inequalities and “diffuse their influence universally and equally.”²⁰⁷

Dickinson, like many other Founders, believed that the greatest enemies of free, impartial government were those who conspired to prostitute political power for non-public ends.²⁰⁸ The founding generation called those conspiracies “cabals,” “combinations,” “juntos,” “parties,” or “factions.”²⁰⁹ The public happiness required that the schemes of factions be curbed before they came to fruition.²¹⁰ Otherwise, “usurpations, which might have been successfully opposed at first, acquire strength by continuance, and thus become irresistible.”²¹¹ The preferred way to check factions was constitutionally, so that intense public response did not become necessary.²¹²

Thus, a good constitution provided for elections in which voters were physically dispersed rather than crowded together.²¹³ Dispersion made passion and conspiracy less feasible.²¹⁴ A good constitution extended governmental units over wide areas, embracing a multiplicity of private interests, so as to reduce the power of any small group of interests.²¹⁵ Nevertheless, even the best of constitutional devices might fail, so the public must be ever vigilant:

A perpetual jealousy, respecting liberty, is absolutely requisite in all free states. The very texture of their constitution, in mixed governments demands it. For the cautions with which each power is distributed among the several orders, imply, that each has that share which is proper for the general welfare, and therefore that any further acquisition must be pernicious.²¹⁶

Indeed,

206. *Farmer, supra* note 2, at 55 (Letter IX).

207. 2 WRITINGS, *supra* note 2, at 5 (*The Address of Congress to the Inhabitants of Quebec*).

208. *See Farmer, supra* note 2, at 16 (Letter III).

209. Natelson, *Sympathy and Independence, supra* note 2, at 363-65.

210. *Farmer, supra* note 2, at 16 (Letter III).

211. *Id.*

212. *Id.*

213. 17 DOCUMENTARY HISTORY, *supra* note 2, at 123 (Fabius, First Series, Letter II).

214. *Id.*

215. *See, e.g.,* 1 FARRAND, RECORDS, *supra* note 2, at 158-59 (King, June 7). This point was made more famously by James Madison in *Federalist No. 10*.

216. *Farmer, supra* note 2, at 68 (Letter XI); *see also* 17 DOCUMENTARY HISTORY, *supra* note 2, at 181 (Fabius, First Series, Letter IV) (stating that it is the people’s duty to oversee government if bad administration occurs notwithstanding the constitutional balance).

The rights of the subject therefore cannot be *too often* considered, explained or asserted: And whoever attempts to do this, shows himself, whatever may be the rash and peevish reflections of pretended wisdom, and pretended duty, a friend to *those* who injudiciously exercise their power, as well as to *them*, over whom it is so exercised.²¹⁷

In extreme cases, the public might have to respond militarily to break the excesses of faction.²¹⁸ This would be unfortunate, for “[t]he cause of liberty is a cause of too much dignity to be sullied by turbulence and tumult.”²¹⁹

G. Dickinson’s Understanding of Federalism

As the principal author of the Articles of Confederation and as the president of two states, Dickinson had thought a good deal about federalism. He viewed the relationship between confederation and member state as analogous to that between political society and individual.²²⁰ Just as individuals contributed some of their rights or powers to society so as to better enjoy those retained, members of confederations contributed some of their rights/powers to a central authority so as to more fully enjoy the rest.²²¹ Just as individuals should contribute to society those rights/powers whose exercise might harm others, member states should contribute rights/powers to the confederation whose exercise might harm other member states.²²²

In essence, Dickinson’s was an “externality” theory of federalism. The central power ought to govern matters with interstate consequences or, to formulate it a different way, matters in which control by member states could impose negative externalities on other member states.²²³ This sort of federalism required a fairly tight combination of states.²²⁴ Dickinson contended that, historically, the predominant vice of confederations had been insufficient unity in the face of common

217. *Farmer*, *supra* note 2, at 69 (Letter XI).

218. *Id.* at 17 (Letter III).

219. *Id.*; *see also id.* at 18 (stating that if requests are disregarded, citizens should oppose without breaking laws, and that force is the last resort), 70 (Letter XI).

220. 17 DOCUMENTARY HISTORY, *supra* note 2, at 167-68 (Fabius, First Series, Letter III).

221. *Id.*

222. *Id.*

223. *Cf. Political Thought*, *supra* note 2, at 8-9 (“[H]e nevertheless believed that the scope of the powers of the Federal Government should always be broad enough to cover the whole field of national interests.”). I discuss this externality approach to constitutionalism briefly in Natelson, *Enumerated*, *supra* note 2, at 489-93.

224. 17 DOCUMENTARY HISTORY, *supra* note 2, at 247 (Fabius, First Series, Letter VIII).

problems: “The uniform tenor of history . . . holds up the *licentiousness* of the people, and *turbulent temper* of some of the states, as the only causes to be dreaded, not the conspiracies of *federal officers*.”²²⁵

In the course of discussing confederations in his 1788 “Fabius” letters, Dickinson offered both negative and positive historical illustrations.²²⁶ The Amphictyonic Council of ancient Greece was his primary negative model.²²⁷ In that confederation, he argued, “the parts were not sufficiently combined, to guard against the ambitious, avaricious, and selfish projects of some of them”²²⁸ The member states had retained too many powers to harm others. He drew a positive model from ancient Greece as well—the Achaean League, which he said had been more unified and therefore more successful:²²⁹

[T]he wit of man never invented such an antidote against monarchical and aristocratical projects, as a strong combination of truly democratical republics. By strictly or truly democratical republics, the writer means republics, in which all the officers are from time to time chosen by the people.

The reason is plain. As liberty and equality, or as termed by Polybius, benignity, were the foundations of their institutions, and the energy of the government pervaded all the parts in things relating to the whole, it counteracted for the common welfare, the designs hatched by selfishness or in separate councils.

225. *Id.* at 222 (Fabius, First Series, Letter VII).

226. *See infra* notes 227-38 and accompanying text.

227. The Amphictyonic Council (or “League,” see Hutson, *supra* note 2, at 274) was one of the Founders’ favorite historical illustrations. *See* RICHARD, *supra* note 2, at 104-05 (stating that the participants in the constitutional debates, particularly the Federalists, “did not forget the Amphictyonic League . . . nor would they allow anyone else to do so”). The League was organized around the temple of Apollo at Delphi; and while primarily religious (a fact the Founders did not understand, *id.*, it did have a few political powers. OXFORD CLASSICAL DICTIONARY 54 (2d ed. 1970).

The League had two governing bodies: the *ekklesia* (assembly) and the *synedrion*. In the latter, each tribe had two votes. *Id.* Professor E. Christian Kopff argues that the Constitution’s rules allocating two senators to each state likely was inspired by the Amphictyonic *synedrion*. E. Christian Kopff, *Open Shutters on the Past: Rome and the Founders*, in VITAL REMNANTS: AMERICA’S FOUNDING AND THE WESTERN TRADITION 83 (Gary L. Gregg II ed., 1999).

228. 17 DOCUMENTARY HISTORY, *supra* note 2, at 197 (Fabius, First Series, Letter V).

229. *Id.*; *see also id.* at 222-23 (Fabius, First Series, Letter VII).

If folly or wickedness prevailed in any parts, friendly offices and salutary measures restored tranquility. Thus the public good was maintained.²³⁰

Dickinson contended that the constitution of a good federation, like other constitutions, promoted advantages and suppressed disadvantages: “[T]he political Virtues of a Confederation suppresses the political Vices of a Confederation.”²³¹ In the sixth “Fabius” letter in the 1788 series, Dickinson offered another positive historical case study: the Scottish union with England.²³² At length, he described the dire predictions some Scots had made in advance of the union, but that, he said, all proved false.²³³ According to Dickinson, the actual results of union had been the cultivation of virtues and correction of errors; protection for the lower classes; improvements in agriculture, science, arts, trade, and manufactures; the rule of law; “peace and security at home, and [i]ncrease[d] respectability abroad.”²³⁴ The Scottish Church and laws, courts, and judicature all had remained established and secure.²³⁵

Dickinson argued that confederation on sound principles made all members stronger.²³⁶ In a good union as in the body, “A stroke, a touch upon any part, will be immediately felt by the whole.”²³⁷ A diseased member of the body severed from the rest could not recover, while one that remains connected could be saved.²³⁸ The union between England and Scotland had shown that “[t]he *stock* of their union or ingraftment, as perhaps it may be called, being strong, [was] capable of drawing better nutriment and in greater abundance, than they could ever have done apart.”²³⁹ If, for example, sentiment for monarchy or aristocracy arose in particular American states, confederation could protect the whole against it: “[I]s not this a disorder in *parts* of the union, and ought it not to be rectified by *the rest*? Is it reasonable to expect, that the disease will seize *all* at the same time? If it is not, ought not the sound to possess a right and power, by which they may prevent the infection from spreading[?]”²⁴⁰

As for the United States under the Articles of Confederation—in

230. *Id.* at 223.

231. Hutson, *supra* note 2, at 278.

232. 17 DOCUMENTARY HISTORY, *supra* note 2, at 213 (Fabius, First Series, Letter VI).

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 249 (Fabius, First Series, Letter VIII).

237. *Id.*

238. *Id.* at 171 (Fabius, First Series, Letter III).

239. *Id.* at 213 (Fabius, First Series, Letter VI).

240. *Id.* at 225 (Fabius, First Series, Letter VII).

Dickinson's estimation it was, like the Amphictyonic League, a negative model. The Articles had left the common power insufficient, and states retained the power to hurt each other. Moreover, this inadequate constitution actually contained incentives for states to act selfishly. Dickinson demonstrated the point in one of his more turgid passages,²⁴¹ which may be clarified thus:

There is severe civil unrest in Maryland. This civil unrest threatens the state's tobacco crop. Using the requisition provisions of the Articles, Congress asks the other states to contribute funds to assist the Maryland authorities in restoring order. North Carolina considers whether to honor the Congressional request. If North Carolina sends aid, it incurs expenses. Especially if other states don't bear their part of the burden, honoring Congressional demands could be costly for North Carolina. Moreover, the civil unrest in Maryland really does not threaten North Carolina. In fact, it benefits the latter state, because a reduction of Maryland tobacco in the international market will mean higher prices for North Carolina tobacco. Thus, the incentives encourage North Carolina to reject the Congressional request.²⁴²

Thus, the Articles had created a dysfunctional institutional arrangement that encouraged anti-social "free-riding."²⁴³

Yet Dickinson also recognized that centralization could go too far. Where there were no externalities, there was no reason for central control.²⁴⁴ He affirmed that each member state should be sovereign in all matters that related to that state only.²⁴⁵ Writing in support of ratification, Dickinson found it a source of satisfaction that under the Constitution, "*America* is, and will be, divided into several sovereign states, each possessing every power proper for governing within its own limits for its own purposes, and also for acting as a member of the union."²⁴⁶ Any states that allowed the federal government to interfere in their sovereign jurisdiction would be guilty of a breach of trust, for it was

241. The illustration in the text is based on the following passage: "Thus, while one state should be relied upon by the union for giving aid, upon a recommendation of Congress, to another in distress, the latter might be ruined; and the state relied upon, might suppose, it would gain by such an event." *Id.* at 170 (Fabius, First Series, Letter III).

242. *Id.*

243. The article that popularized for modern audiences how dysfunctional legal institutions create anti-social incentives was, of course, Garrett Hardin, *The Tragedy of Commons*, 162 *SCIENCE* 1243 (1968).

244. 17 *DOCUMENTARY HISTORY*, *supra* note 2, at 170-71 (Fabius, First Series, Letter III).

245. *Id.*

246. *Id.* at 249 (Fabius, First Series, Letter VIII).

the obligation of the “trustees or servants of the several states” to protect from outside agents the power that citizens have placed in them.²⁴⁷

H. Summary of Dickinson’s Political Thought

By way of summary, then, John Dickinson believed that government was a collection of contributed rights or powers—powers that, if exercised singly, could harm others. The contributed powers should be administered in trust and impartially for the general welfare. A constitution consisted of the rules by which those powers were administered. To draft a good constitution, one must consult the lessons of history. A good constitution would promote the general welfare by encouraging good behavior and discouraging bad behavior. If the constitution was to govern a confederation, it must set a proper balance of contributed and retained rights. Tools employed by good constitutions included:

1. retention by the people of certain fundamental rights;
2. alignment of public officials’ interests with those of the governed;
3. ultimate dependence by the main branches of government on an independent citizenry;
4. independence of those branches from each other;
5. motivation and power in the branches to check each other; and
6. rules to discourage faction and turbulence.

IV. Philosophy in Action: John Dickinson at the Constitutional Convention

A. Dickinson as a Resource

Some issues at the federal convention involved technical points of law, finance, or history. As an expert in the first field and a person tolerably knowledgeable in the other two, Dickinson often served as a source of information and probing questions.²⁴⁸ When the question arose as to whether an ex post facto law could be civil in nature or criminal only, it was Dickinson who examined Blackstone’s Commentaries and reported back to the house that the term was criminal only²⁴⁹—a

247. *Id.* at 171 (Fabius, First Series, Letter III).

248. *See infra* Part IV.A.

249. 2 FARRAND, RECORDS, *supra* note 2, at 448-49 (Madison, Aug. 29).

conclusion some thought incorrect.²⁵⁰ Dickinson and his former pupil James Wilson informed the convention that the common law defined felonies on the high seas.²⁵¹ Dickinson insisted that the term “treason” be delineated precisely to avoid abuse of the charge.²⁵² He advocated precision in the definition of “disability,”²⁵³ in the mode of election of the President,²⁵⁴ and in the residence requirement for members of the House of Representatives.²⁵⁵ He posed the question as whether the existing Congress had to approve the new Constitution.²⁵⁶ He asked what, if the Constitution were approved, the position would be of states refusing to ratify.²⁵⁷ With Wilson, he queried whether the clause specifying the allocation of Representatives²⁵⁸ should include a reference to direct taxes.²⁵⁹

250. Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 IDAHO L. REV. 489, 517-22 (2003) (stating that prior to adoption of the Constitution it was unclear whether *ex post facto* laws were criminal only, but concluding that the final constitutional bargain was that they were).

251. 2 FARRAND, RECORDS, *supra* note 2, at 316 (Madison, Aug. 17) (Dickinson agreeing with Wilson).

252. *Id.* at 346 (Madison, Aug. 20). Madison wrote:

Mr Dickenson,[sic] thought the addition of “giving aid & comfort” unnecessary & improper; being too vague and extending too far—He wished to know what was meant by the “testimony of two witnesses”, whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt act ought to be expressed as essential in the case.

Id.

253. *Id.* at 427 (Madison, Aug. 27) (successfully moving for postponement of consideration because the term “disability” was too vague).

254. *Id.* at 515 (Madison, Sept. 5) (“Mr. Dickinson moved, in order to remove ambiguity from the intention of the clause as explained by the vote, to add, after the words ‘if such number be a majority of the whole number of the Electors’ the word ‘appointed.’”) (The motion passed).

255. *Id.* at 218 (Madison, Aug. 8) (“Mr. Dickenson [sic] proposed <that it should read> ‘inhabitant actually resident for—year.’ This would render the meaning less indeterminate.”).

256. *Id.* at 469 (Madison, Aug. 30) (“Mr. Dickinson asked whether the concurrence of Congress is to be essential to the establishment of the system, whether the refusing States in the Confederacy could be deserted—and whether Congress could concur in contravening the system under which they acted?”); *cf.* Hutson, *supra* note 2, at 282 (including the issue in his annotations to the report of the Committee of Detail, August 7, 1787).

257. 2 FARRAND, RECORDS, *supra* note 2, at 469 (Madison, Aug. 30); *cf.* Hutson, *supra* note 2, at 282 (including the issue in his annotations to the report of the Committee of Detail, August 7, 1787).

258. U.S. CONST. art. I, § 2, cl. 3.

259. 2 FARRAND, RECORDS, *supra* note 2, at 607-08 (Madison, Sept. 13):

Mr. Dickenson [sic] & Mr. Wilson moved to strike out “and direct taxes,” from sect. 2. art. I. as improperly placed in a clause relating merely to the Constitution of the House of Representatives.

Mr. Govt. Morris. The insertion here was in consequence of what had passed on this point; in order to exclude the appearance of counting the Negroes in the Representation—The including of them may now be referred to the object of

Dickinson's financial expertise likely proved useful when he served as Delaware's representative on the Grand Committee of Eleven to resolve the issue of federal assumption of state debts.²⁶⁰ He also served on Judge Brearly's Committee of Eleven, created near the end of August to fill in some of the Constitution's missing substance.²⁶¹

In the realm of history, Dickinson contributed some interesting information relevant to the size of the Senate. Madison had argued that the Senate should be kept small. He argued that as the number of Roman tribunes grew, the college of tribunes as a whole lost influence because it could no longer act with as much coolness and wisdom.²⁶² Dickinson demonstrated that the analogy was poorly chosen because the number of tribunes never approached that of a legislative body: "If the reasoning of (Mr. <Madison>) was good it would prove that the number of the Senate ought to be reduced below ten, the highest no. of the Tribunitial corps."²⁶³

B. Dickinson as a Problem Solver

Dickinson's more significant contributions to the convention lay in his role in solving problems that had to be overcome before the new Constitution could be viable. The first of these was the distribution of powers between central government and states. The second was the composition and powers of the federal legislature. The third was the composition and powers of the executive, and the fourth was the composition and powers of the judiciary. In addition, he contributed to the resolution of several more peripheral issues. These included the scope of Congress's financial powers, the integrity of state boundaries, voter qualifications, and the slave trade. His influence on the resolution of the last two was small. On the integrity of state boundaries, his influence was significant; on the scope of financial powers, it probably was decisive.

Historian Forrest McDonald has pointed out that most of the convention delegates used sources and principles eclectically to support

direct taxes, and incidentally only to that of Representation—
 On the motion to strike out "and direct taxes" from this place
 N— H— no— Mas— no— Ct. no. N— J— ay. Pa. no. Del. ay. Md ay. Va.
 no— N. C. no. S. C. no. Geo. no. [Ayes—3; noes—8].

Id.

260. *Id.* at 328 (Madison, Aug. 18) (listing those appointed to the Grand Committee of Eleven).

261. *Id.* at 473 (Journal, Aug. 31) (listing those appointed to Judge Brearly's Committee of Eleven).

262. 1 FARRAND, RECORDS, *supra* note 2, at 151 (Madison, June 7).

263. *Id.* at 153 (Madison, June 7). Dickinson's notes for undelivered convention speeches are also replete with classical references. Hutson, *supra* note 2, at 274, 277-78.

the needs of the moment.²⁶⁴ I think the following discussion will show that, with respect to principles, that was not true of John Dickinson. The convention records reveal that, while he acted as a small-state partisan in some ways,²⁶⁵ on several occasions he took positions adverse to small-state interests. For example, during the battle over apportionment of representation in the new legislature, Dickinson refused to back the small-state sponsored New Jersey Plan.²⁶⁶ Instead, he proposed a balance between it and the Virginia Plan,²⁶⁷ thereby disregarding instructions from the Delaware legislature not to consent to changes in the congressional one-state one-vote rule.²⁶⁸ Shortly thereafter, he offered compromise language to define the scope of the convention's mission.²⁶⁹ (His procedural motion passed, but he lost a substantive vote the next day.)²⁷⁰ Later in the convention, he promoted a larger role for the House of Representatives in treaty making, even though, as he noted, keeping the process in the Senate alone would have strengthened the smaller states.²⁷¹ Dickinson's political principles tend to explain his

264. See generally MCDONALD, *supra* note 1.

265. See, e.g., 2 FARRAND, RECORDS, *supra* note 2, at 456 (Madison, Aug. 29) (opposing the guarantee that states not be broken up without their consent—a guarantee of most importance to large states: “Mr Dickinson hoped the article would not be agreed to. He dwelt on the impropriety of requiring the small States to secure the large ones in their extensive claims of territory”); *id.* at 465 (Madison, Aug. 30) (successfully moving for a guarantee important to smaller states: “Nor shall . . . any State be formed by the junction of two or more States or parts thereof, without the consent of the Legislatures of such States, as well as of the Legislature of the U. States”).

266. For his objections to the New Jersey Plan, see Hutson, *supra* note 2, at 270. See also *id.* at 258 (noting Dickinson's disagreement with major parts of the Plan).

267. 1 FARRAND, RECORDS, *supra* note 2, at 281 (Journal, June 18); *id.* at 327 (Yates, June 18).

268. 3 FARRAND, RECORDS, *supra* note 2, at 574-75; see also *id.* at 575 n.6 (quoting a letter of January 17, 1787 from George Read to John Dickinson); *id.* at 24-26 (quoting a letter of May 21, 1787 from George Read to John Dickinson).

269. 1 FARRAND, RECORDS, *supra* note 2, at 281 (Journal, June 18) (“Resolved that the articles of confederation ought to be revised and amended, so as to render the government of the United States adequate to the Exigencies, the preservation, and the prosperity of the Union.”).

Dickinson's handwritten notes reveal several of his efforts at compromise. Hutson, *supra* note 2, at 270 (stating that both large and small states have “something to part with”), 272 (“Let the Property of the larger states be secured. Let the Property and Liberty of the lesser be also secured. Let Neither dictate to the other.”), 275 (“neither great states to dictate to smaller ones nor smaller ones to great ones”).

270. 1 FARRAND, RECORDS, *supra* note 2, at 312-13 (Journal, June 19).

271. 2 FARRAND, RECORDS, *supra* note 2, at 393 (Madison, Aug. 23) (“Mr. Dickinson concurred in the amendment, as most safe and proper, tho' he was sensible it was unfavorable to the little States; wch would otherwise have an equal share in making Treaties.”). For another example of Dickinson's independence of small-state interests, see *id.* at 513 (Madison, Sept. 5) (favoring, in the event the electoral college did not give a majority to any candidate, “giving the eventual election to the Legislature, instead of the Senate,” although the convention already had decided to give equal representation to

actions more reliably than his personal interest or the interest of the state he represented.

C. The Distribution of Power Between Federal Government and States

Early in the federal convention, the momentum was towards national centralization. The Virginia Plan, which was the basis for early discussions, was highly centralized. Under its provisions the states would have survived, but only as “corporations”—fulfilling the subordinate role that local government played in England.²⁷² Gouverneur Morris argued that in some cases the states ought not have the power to govern their internal affairs.²⁷³ Alexander Hamilton presented a scheme that would have given Congress the power to enact any legislation whatsoever.²⁷⁴ Dickinson’s friend and fellow Delaware delegate, George Read, suggested abolishing the states entirely.²⁷⁵ It was in this atmosphere that Dickinson arose on June 2 to champion his idea of federalism:

A House of Nobles was essential to such a [balanced] Govt. Could these be created by a breath, or by a stroke of the pen? No. They were the growth of ages, and could only arise under a complication of circumstances none of which existed in this Country. But though a form the most perfect perhaps in itself be unattainable, we must not despair. If antient [sic] republics have been found to flourish for a moment only & then vanish forever, it only proves that they were badly constituted; and that we ought to seek for every remedy for their diseases. One of these remedies he conceived to be the accidental lucky division of this country into distinct States; a division which some seemed desirous to abolish altogether.²⁷⁶

In other words, Dickinson was suggesting that the states, which the majority of delegates thus far had considered mostly a nuisance, could inject into the new American system the same sort of balance that baronies provided in English government. The pre-existing fact of state governments could be turned to positive advantage. His ideas paralleled Madison’s insofar as Dickinson proposed spreading government over a wide area so as to render it more stable and less subject to faction.²⁷⁷ But

small states in the Senate).

272. Some anti-federalists later charged that this was exactly what the Constitution would do. See, e.g., 4 DOCUMENTARY HISTORY, *supra* note 2, at 277 (“American Herald”); 5 DOCUMENTARY HISTORY, *supra* note 2, at 638.

273. 2 FARRAND, RECORDS, *supra* note 2, at 25-26 (Madison, July 17).

274. 1 FARRAND, RECORDS *supra* note 2, at 291 (Madison, June 18).

275. *Id.* at 136 (Madison, June 6).

276. *Id.* at 87 (Madison, June 2).

277. See *supra* note 249.

Dickinson's analysis was more complicated than Madison's. Madison's Virginia Plan did not contemplate employing powerful states as additional checks.²⁷⁸

Thus, on June 7, in response to the objection that he was trying to unite distinct interests, Dickinson stated, "I do not consider this an objection, Safety may flow from this variety of Interests—there exists this Diversity in the constitution of G. Britain. We cannot abolish the States and consolidate them into one Govt—Indeed if we could I shd. be agt. it."²⁷⁹

Dickinson then produced two of the most colorful figures of speech of the convention. As Madison reported it:

The preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other. To attempt to abolish the States altogether, would degrade the Councils of our Country, would be impracticable, would be ruinous. [Dickinson] compared the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits. The Gentleman from Pa. (Mr. Wilson) wished he said to extinguish these planets.²⁸⁰ If the State Governments were excluded from all agency in the national one, and all power drawn from the people at large, the consequence would be that the national Govt. would move in the same direction as the State Govts. now do, and would run into all the same mischiefs. The reform would only unite the 13 small streams into one great current pursuing the same course without any opposition whatever.²⁸¹

Dickinson got the solar system simile straight from Francis Bacon.²⁸² However, Madison's summary of Dickinson's remarks does not capture one aspect of the simile that Rufus King's notes reveal: "Let our Govt. be like that of the solar System; let the Genl. Govt. be the Sun and the States the Planets repelled yet attracted . . ."²⁸³ The two independent

278. 17 DOCUMENTARY HISTORY, *supra* note 2, at 182 (Fabius, First Series, Letter VI) (praising the Constitution by asking, "Where was there ever and where is there now upon the face of the earth, a government so diversified and so attempered?").

279. 1 FARRAND, RECORDS, *supra* note 2, at 158-59 (King, June 7).

280. Actually, he had not.

281. 1 FARRAND, RECORDS, *supra* note 2, at 152-53 (Madison, June 7); *see generally id.* at 156-57 (Yates, June 7). Yates apparently misunderstood the river analogy, reporting that Dickinson had spoken of "the union of several small streams, would at last form a respectable river, gently flowing to the sea," when what Dickinson was trying to avoid was the creation of a torrent. *See id.*

Dickinson also compared the federal system to "A Father surrounded by a Family of hearty, affectionate strong sons." Hutson, *supra* note 2, at 278.

282. *See supra* note 2 and accompanying text.

283. 1 FARRAND, RECORDS, *supra* note 2, at 159. For a modern use of the same figure

levels of government would both repel and attract each other, forming an “attenuated”²⁸⁴ whole. It was not a mere compromise; it was the perfect answer to those who argued that a republic could govern only a small territory.²⁸⁵

We previously have explored Dickinson’s theory that confederation, if properly structured, would maximize the strengths of the member states while minimizing their weaknesses, all to the advantage of the whole, and that for a confederation to be properly structured, each member must yield the power to do others ill.²⁸⁶ A good example of Dickinson applying this theory in the convention occurred on September 12, when the delegates were considering whether to limit state powers to levy inspection duties on imports.²⁸⁷ Dickinson favored federal control.²⁸⁸ He stated, “Nothing will save States in the situation” of New Hampshire, New Jersey, and Delaware—states with only lesser ports—“from being oppressed by their Neighbors, but requiring the assent of Congress to inspection duties.”²⁸⁹

On the other hand, when it came to the militia, Dickinson favored state governance. Dickinson always had favored use of a militia in preference to standing armies.²⁹⁰ Here the risk was an overreaching federal government; state control over the militia would serve as an obstacle to federal tyranny.²⁹¹ By rendering a large federal military establishment less likely, reliance on the militia would check the desire for empire:

The other fault [damaging to republics] of which, as yet, there are no symptoms among us, is the thirst of empire. This is a vice, that ever has been, and from the nature of things, ever must be, fatal to republican forms of government. Our wants, are sources of happiness our desires, of misery. The abuse of prosperity, is

of speech in discussing prospective European Federalism, see the comments by Nobel Laureate political economist John Buchanan. JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, *PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE* 182-83 (1999).

284. 17 DOCUMENTARY HISTORY, *supra* note 2, at 182 (Fabius, First Series, Letter VI).

285. *Id.* at 247 (Fabius, First Series, Letter VIII).

286. *See supra* Part III.G.

287. *See* 2 FARRAND, RECORDS, *supra* note 2, at 589 (Madison, Sept. 12).

288. *Id.*

289. *Id.*

290. *See, e.g., London Letters, supra* note 2, at 445, 448-49 (expressing disgust at the British government’s willingness to rely on mercenaries for defense rather than local militia). For another example of traditional Whig dislike for standing armies, see 1 CATO, *supra* note 2, at 102.

291. 17 DOCUMENTARY HISTORY, *supra* note 2, at 247 (Fabius, First Series, Letter VIII).

rebellion against Heaven: and succeeds accordingly.²⁹²

Perhaps the most striking aspect of Dickinson's contribution to American federalism was not known until about twenty years ago, when his convention notes were published. Among the notes is an outline of a federal constitution.²⁹³ The Dickinson Plan, dated June 18, was prepared during the period when Madison, Wilson, and other advocates of "consolidation" held the initiative at the convention and were expressing doubts about the practicality of enumerating Congressional powers.²⁹⁴ The Dickinson Plan responded to this skepticism by providing a detailed enumeration. It is inconceivable that Dickinson did not share this draft, or at least his ideas, with other delegates, and the hypothesis that he did is supported by the fact that the enumeration is similar to, if shorter than, the enumeration in Article I, Section 8 of the finished Constitution.²⁹⁵ Congressional powers on Dickinson's list include control over foreign affairs; authority to levy imposts, excises, and other taxes; regulation of foreign and interstate commerce; emission of money and regulation of the alloy and value of coin; operation and profit from a postal service; and creation of tribunals inferior to the Supreme Court.²⁹⁶

It comes as a surprise, therefore, that Dickinson agreed with Madison on the need for a plenary federal veto of state laws. The explanation appears to be Dickinson's belief that the Constitution should allocate state and federal responsibilities according to the likelihood of externalities from the exercise of state powers, and that a federal veto of state laws seemed the most practicable way of preventing any state from harming the others:

Mr. Dickenson [sic] deemed it impossible to draw a line between the cases proper & improper for the exercise of the negative. We must take our choice of two things. We must either subject the States to the danger of being injured by the power of the Natl. Govt. or the latter to the danger of being injured by that of the States. He thought the danger greater from the States. To leave the power doubtful, would be opening another spring of discord, and he was for shutting

292. *Id.* at 224 (Fabius, First Series, Letter VII). Dickinson suggested that federal interference with the militia could be prevented by popular representation in the House of Representatives and by "the mode of appointing the Senate." See 1 FARRAND, RECORDS, *supra* note 2, at 172 (King, June 8).

293. Less and more finished versions of the Dickinson Plan are reproduced in Hutson, *supra* note 2, at 264-69.

294. See, e.g., 1 FARRAND, RECORDS, *supra* note 2, at 53 (Madison, May 31).

295. U.S. CONST. art. I, § 8.

296. Hutson, *supra* note 2, at 265, 268; see also *id.* at 270 (objecting to, in the outline to his speech, indefinite grants of power to Congress).

as many of them as possible.²⁹⁷

This was early in the convention. Ultimately, the delegates rendered the projected veto unnecessary by adopting the Supremacy Clause.²⁹⁸

Because he generally stood athwart the centralizing trends of the early weeks of the convention, some have depicted John Dickinson as a states-rights advocate. Compared to nationalists like Wilson and Hamilton, he was. Later in the process of drafting, ratification, and amendment, however, the scope of federal powers was narrowed beyond that demanded by Dickinson's externality theory. The final constitutional settlement provided for a weaker federal government than Dickinson had advocated, because some matters of interstate import were left outside the immediate federal sphere.²⁹⁹ To the extent, nonetheless, that they could be regulated by interstate compact, they were still subject to the Congressional veto Dickinson had sought.³⁰⁰

D. Dickinson's Contributions to the Structure and Powers of Congress

At the Philadelphia convention, Dickinson was the leading promoter of the election of Senators by the state legislatures. Madison reported him as telling the convention on June 6:

Mr. Dickinson considered it as essential that one branch of the Legislature shd. be drawn immediately from the people; and as expedient that the other shd. be chosen by the Legislatures of the States.³⁰¹ This combination of the State Govts. with the National Govt. was as politic as it was unavoidable. In the formation of the Senate we ought to carry it through such a refining process as will assimilate it as near as may be to the House of Lords in England.³⁰²

The following day, he again argued that the best "refining process" for Senators was election by the state legislatures rather than popular election in districts³⁰³ or election by the House of Representatives.³⁰⁴ He acknowledged that if the convention adopted his proposal but apportioned the Senate by population, there would be a rather large upper

297. 1 FARRAND, RECORDS, *supra* note 2, at 167 (Madison, June 8); *see also id.* at 172 (King, June 8); Hutson, *supra* note 2, at 268.

298. U.S. CONST. art. VI, cl. 2.

299. Natelson, *Enumerated*, *supra* note 2, at 489-93.

300. U.S. CONST. art. I, § 10, cl. 2.

301. *See also* Hutson, *supra* note 2, at 264, 267.

302. 1 FARRAND, RECORDS, *supra* note 2, at 136 (Madison, June 6).

303. *Id.* at 158 (Madison, June 7) (as proposed by James Wilson); *see also id.* at 149 (Journal, June 7).

304. As proposed in the Virginia Plan. *Id.* at 20 (Madison, May 29).

house, because each state would have to have at least one Senator.³⁰⁵ He was not troubled by this; on the contrary, he favored a large Senate because he wanted to “assimilate it as near as may be to the House of Lords,” which at that time had a membership of about 208.³⁰⁶ According to Madison’s notes,

Mr. Dickenson [sic] had two reasons for his motion. 1. because the sense of the States would be better collected through their Governments; than immediately from the people at large. 2. because he wished the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a likeness to the British House of Lords as possible; and he thought such characters more likely to be selected by the State Legislatures, than in any other mode. The greatness of the number was no objection with him. He hoped there would be 80 and twice 80. of them. If their number should be small, the popular branch could not be [ba]lanced by them. The legislature of a numerous people ought to be a numerous body.³⁰⁷

Madison attacked the ideal of encouraging state influence in the Senate; how, he wanted to know, could “family weight, as desired by Mr. D. . . . be more certainly conveyed into the Senate through elections by the State Legislatures, than in some other modes.”³⁰⁸ Moreover, Madison continued, the states’ irresponsible practices, such as issuing paper money, had been a major reason for the calling of the convention.³⁰⁹ If the state legislatures were irresponsible, then it was contradictory to say that the national legislature would act like the state legislatures unless checked, but that the state legislatures were the only proper check.³¹⁰

Of course, Madison was wrong, and the convention’s decision to

305. *Id.*

306. A.S. TURBERVILLE, *THE HOUSE OF LORDS IN THE AGE OF REFORM 1784-1837*, at 478 (1958) (indicating that there were 208 peers in 1784).

307. 1 FARRAND, *RECORDS*, *supra* note 2, at 150 (Madison, June 7). Compare Rufus King’s report:

First, that the mind & body of the State as such shd. be represented in the national Legislature. Second, that the men of first Talents may be employed in the national Legislature; they first will have a chance in the Election of the people, failing there, wealth, family, or Talents may hold them up to the State Legislatures as fit characters for the Senate—let their numbers be more than 200; by enlarging [sic] their Numbers you increase their consequence & weight & by combining the families and wealth of the aristocracy, you establish a balance that will check the Democracy—

See id. at 158-59; *see also id.* at 156-57 (Yates).

308. *Id.* at 154 (Madison, June 7).

309. *Id.*

310. *Id.*

adopt Dickinson's proposition was correct for the times.³¹¹ The benefits of filtration do not necessarily depend on the independent merits of the people doing the filtering. Even a venial legislature elected directly by the people was likely to select better Senators than the people who had elected that legislature. The proof was observed by Alexis de Tocqueville several decades later:

On entering the House of Representatives at Washington, one is struck by the vulgar demeanor of that great assembly. Often there is not a distinguished man in the whole number

At a few yards' distance is the door of the Senate, which contains within a small space a large proportion of the celebrated men of America. Scarcely an individual is to be seen in it who has not had an active and illustrious career: the Senate is composed of eloquent advocates, distinguished generals, wise magistrates, and statesmen of note, whose arguments would do honor to the most remarkable parliamentary debates of Europe.

How comes this strange contrast . . . ? The only reason which appears to me adequately to account for it is that the House of Representatives is elected by the people directly, while the Senate is elected by elected bodies.³¹²

Although the eventual decision of the convention to give each state only two Senators resulted in a smaller assembly than Dickinson would have liked, he later reconciled himself to that decision, and even defended it.³¹³

In Dickinson's view, "refining" was not the only reason state legislatures ought to elect Senators. While everyone else was thinking in exclusively national or exclusively "foederal" [sic] (i.e., confederation) terms, Dickinson was thinking of an entirely original blend—a government that was both federal and national.³¹⁴ This was, of course,

311. *Id.* at 148 (Journal) (adopted unanimously on June 7); *see also id.* at 156 (Yates); *id.* at 408 (Madison) (confirmed by 9-2 vote on June 25).

312. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 211-12 (Henry Reeve & Francis Bowen trans., 1945).

313. *See infra* notes 387-389 and accompanying text.

314. 1 FARRAND, *RECORDS*, *supra* note 2, at 143 (King, June 6):

We cannot form a national Govt. as is proposed unless we draw a Br. from the people, & a Br. from the legislatures—it is necessary in theory—And essential to the success of the project—The objections to an election by the people arise from the nature of a Free Government and are slight when compared with the excellence of the Government—The 2d Br. must come from the State sovereignties or Legislature, they will be more respectable and they must for yr respectability & duration be something like the British House of peers—But can one Br. be drawn from the Legislatures who are and have been opposed to

what resulted; and Madison later recognized the importance of the breakthrough by celebrating it in *Federalist No. 39*. One of America's leading constitutional historians has given credit to Dickinson for developing "an approach that was theoretically sound, practically sound, and tailored to American realities . . . Dickinson alone had perceived that the United States already had institutional substitutes [for English baronies] in the form of the individual states—which, in a manner of speaking, were permanent and hereditary."³¹⁵

I already have observed that Dickinson believed different branches of government should be independent of each other so they could exercise unsullied judgment and compete freely with other branches for popular favor.³¹⁶ Congress under the Articles of Confederation had been too dependent on the states. Dickinson was conscious that the same vice might be attributed to his proposal for the Senate to be chosen by state legislatures. So he suggested that "[t]he objection agst. making the former dependent on the latter might be obviated by giving to the Senate an authority permanent & irrevocable for three, five or seven years. Being thus independent they will Speak & decide with becoming freedom."³¹⁷ Of course, the ultimate solution of a six year term, without explicit right of legislative recall,³¹⁸ was very close to his proposal.

He promoted several other ideas to ensure Congressional independence. He recommended that the salaries of Senators and Representatives be paid by the central government rather than by the states,³¹⁹ the view that ultimately prevailed.³²⁰ During the discussion on

ye Genl. Govt. It can—the appointment of the Legisture [sic]. of the States, to be in office 3 – 5 or 7 yrs; not subject to a recall and to depend on the Genl. Govt. for yr. support

Id. Somewhat later in the convention, other delegates began to enunciate the view that the union would be partly national and partly federal. *See, e.g., id.* at 468 (Oliver Ellsworth) (Madison, June 29), 474 (Yates, reporting the same statement by Ellsworth), 488 (Jonathan Davy) (Madison, June 30).

315. MCDONALD, NOVUS, *supra* note 2, at 213, 215; *see also* Powell, *supra* note 2, at 9 ("One of the conspicuous states-rights leaders in the Convention, he was not doctrinaire, and advocated at the same time a strong national government, which led him in his thinking to the sort of compromise finally adopted.").

Robert Yates, in writing his convention notes, misunderstood Dickinson. 1 FARRAND, RECORDS, *supra* note 2, at 141 ("Mr. Dickinson is for combining the state and national legislatures in the same views and measures, and that this object can only be effected by the national legislature flowing from the state legislatures.").

316. *See supra* notes 223-38 and accompanying text.

317. 1 FARRAND, RECORDS, *supra* note 2, at 136 (Madison, June 6).

318. U.S. CONST. art. I, § 3, cl. 1.

319. 2 FARRAND, RECORDS, *supra* note 2, at 292 (Madison, Aug. 14):

Mr Dickenson [sic] took it for granted that all were convinced of the necessity of making the Genl. Govt. independent of the prejudices, passions, and improper views of the State Legislatures. . . . He proposed that an Act should be passed every 12 years by the Natl. Legislr [sic] settling the quantum of

what was to become the Guarantee Clause,³²¹ he opposed limiting federal suppression of domestic violence to cases where the state legislature had applied for relief. Defeated on this point, he successfully urged the convention to allow federal intervention on application either of the state legislature or the executive.³²² He expressed reservations about judicial review of Congressional acts because the court might use it as a pretext for invading the legislative sphere.³²³

In addition to assuming the leading role in determining the method of electing Senators, Dickinson also took a leading part in fixing the apportionment of Senators. He was one of the first to promote (on June 2) the concept of a bicameral legislature with one house equally apportioned among states.³²⁴ Had his view been accepted then, the convention's proceedings would have moved along much faster.³²⁵ But it was not accepted then, and the convention was to slog through weeks of contention before finally arriving at the conclusion Dickinson had suggested in the first place. During the delay, he incorporated his proposal in the Dickinson Plan—not specifying how many Senators there

their wages. If the Genl. Govt. should be left dependent on the State Legislatures, it would be happy for us if we had never met in this Room.

Id.

320. U.S. CONST. art I, § 6, cl. 1.

321. U.S. CONST. art. IV, § 4.

322. 2 FARRAND, RECORDS, *supra* note 2, at 466-67 (Madison, Aug. 30):

Mr. Dickinson moved to strike out "on the application of its Legislature against" He thought it of essential importance to the tranquillity of the U— S. that they should in all cases suppress domestic violence, which may proceed from the State Legislature itself, or from disputes between the two branches where such exist (Defeated 3-8)

* * * *

Mr. Dickinson moved to insert the words, "or Executive" after the words "application of its Legislature"—The occasion itself he remarked might hinder the Legislature from meeting. On this question, N.H. ay. Mas. no. Ct. ay. N.J. ay. Pa. ay. Del. ay. Md divd. Va. no. N.C. ay. S.C. ay. Geo. ay. [Ayes—8; noes—2; divided—1.]

Id.

323. *Id.* at 299 (Madison, Aug. 15):

Mr. Dickenson [sic] was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute. The Justiciary of Aragon he observed became by degrees the law-giver.

Id.

324. 1 FARRAND, RECORDS, *supra* note 2, at 87 (Madison).

325. McDONALD, NOVUS, *supra* note 2, at 280:

Early in the convention John Dickinson arose and wisely pointed out that the delegates could save themselves a good deal of time and save their nerves a good deal of wear by making the legislature bicameral, with representation apportioned by population in one branch and with each state having one vote in the other.

Id.

were to be from each state, but only that each state would have an equal vote.³²⁶ Under that Plan, Senators would be selected for seven years, with one-seventh of the group to turn over annually.³²⁷

The convention's failure for so long to grasp the obvious must have been frustrating to Dickinson. We have his notes for an oration never delivered—notes that speak powerfully for equal representation in the Senate.³²⁸ Even in scanty and unfinished form, they form a composition of shining eloquence.³²⁹ Their arguments include: (1) the danger that, without equal apportionment in the upper house, large states would oppress smaller ones; while (2) there was a corresponding lack of danger to large states under his plan; (3) the clash of interests among states; (4) the sacrifices made by smaller states in the Revolution and the loyalty they had exhibited; and (5) the moral need to honor the compact of the Articles of Confederation, for convenience could not justify breach of faith.³³⁰

With respect to the lower house of the new national legislature, Dickinson's successes were more mixed. On June 2, he argued that he "supposed the sums paid within each state would form a better ratio for the other branch than either the number of inhabitants or the quantum of

326. Hutson, *supra* note 2, at 264, 267.

327. *Id.*

328. *Id.* at 272-79.

329. *Id.* A sample of Dickinson's rough notes:

What has N.J. done or neglected to do to merit this treatment. Overwhelmed with hostile Armies, her people plundered, her towns burnt, her Matrons and Virgins butchered. Did New Jersey falter. No. A mournful Monument of human Virtues assailed yet faithful.

Thro[ugh] the little State of Delaware, the Army of the Enemy passed, while her whole seaboard was exposed to the continual Hostilities of her naval forces darting upon her wherever they pleased and not to be protected because the points of attack were unknown, till the Injuries were committed. Weak as her arm was yet did her Mind ever waver? No. All succor cut off. Held by the Throat, swords incontinently pointed. She was ready and willing to be sacrificed rather than renounce the Fate of her Country.

What pretense then for this Conduct to the smaller states. Is it necessary. I hope what has been said on the first Head [i.e., topic] demonstrates that it is not. Is Necessity a proper plea in the Mouths of those who are to gain by that Plea. What did the Patriots of England think and say of such a Plea in the Days of Charles the II. I will not repeat what they said. What did the patriots of America say of this Plea in the Days of George the 3d. I need not repeat what they said.

But it is perhaps convenient. Convenient for whom, for those who are to profit by it? So are Tender Laws to Debtors and the Violation of Treaties to some Individuals. But does this Convenience outweigh the Considerations for an adherence to sacred Obligations?

Id.

330. *Id.*

property.”³³¹ On June 11 he repeated the proposition. “By thus connecting the interest of the States with their duty, the latter would be sure to be performed.”³³² As we have seen, this sort of connection of interest and duty was very Dickinsonian.³³³ The risk, he said, of allocating representatives by population was that as western states were admitted to the union, their inhabitants would become numerous, but would likely be poor compared with those of the older states.³³⁴ With representation by population in the House, they could oppress the states that paid the bills.³³⁵ Obviously, Dickinson’s arguments did not prevail.

Yet he did prevail in his defense of a traditional buttress of the independence of the lower house: its exclusive right to initiate revenue bills. This issue arose during the larger conflict over whether Senators ought to be allocated by population or by state. To resolve that larger conflict, a select committee submitted a compromise, reputed to have originated from Benjamin Franklin, whereby the larger states conceded equal representation in the Senate and the smaller conceded that the House would have the exclusive power to initiate money bills. Some delegates from larger states were dissatisfied with this proposal, arguing that the exclusive right to initiate revenue measures really was of little consequence.³³⁶ Dickinson disagreed:

Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has give a sanction to them And has not experience verified the utility of restraining money bills to the immediate representatives of the people. Whence the effect may have proceeded he could not say; whether from the respect with which this privilege inspired the other branches of Govt. to the H. of Commons, or from the turn of thinking it gave to the people at large with regard to their rights, but the effect was visible & could not be doubted. Shall we oppose to this long experience, the short experience of 11 years which we had ourselves,

331. 1 FARRAND, RECORDS, *supra* note 2, at 87 (Madison). In recognition of the fact that importing states would pay all the imposts and that states without good ports could not collect imposts, Dickinson contemplated capping the ratio by which one state’s representation could outweigh another. Hutson, *supra* note 2, at 264, 267.

332. 1 FARRAND, RECORDS, *supra* note 2, at 196 (Madison); *see also id.* at 205 (Yates); *id.* at 207 (Paterson, June 11). On Dickinson’s preference for tying benefit to obligation, *see supra* notes 189, 210, 211 and accompanying text.

333. *See supra* Part III.B.

334. Hutson, *supra* note 2, at 279; *see also id.* at 262.

335. *Id.*; *see also id.* at 260-61.

336. *See 2 FARRAND, RECORDS, supra* note 2, at 278 (Madison, Aug. 13).

on this subject . . . He observed that all the prejudices of the people would be offended by refusing this exclusive privilege to the H. of Repress. and these prejudices shd. never be disregarded by us when no essential purpose was to be served. When this plan goes forth, it will be attacked by the popular leaders. Aristocracy will be the watchword; the Shibboleth among its adversaries. Eight States have inserted in their Constitutions the exclusive right of originating money bills in favor of the popular branch of the Legislature. Most of them however allowed the other branch to amend. This he thought would be proper for us to do.³³⁷

This was an extraordinary speech for several reasons. It identified the value of the right to originate money bills (“the respect with which this privilege inspired the other branches of Govt. to the H. of Commons”).³³⁸ It also anticipated by three years Edmund Burke’s great pamphlet, *Reflections on the Revolution in France*, wherein Burke observed that many wise institutions arise by historical accident³³⁹ and that constitutions must be grounded in the prejudices³⁴⁰ and long-time practices³⁴¹ of the people. Finally, it showed that Dickinson could be a political prophet—for he predicted precisely the line Anti-Federalists would take against the constitution (“aristocracy”),³⁴² and wisely

337. *Id.*

338. *Id.*

339. See BURKE, *supra* note 2 (“If you are desirous of knowing the spirit of our constitution and the policy which predominated in that great period which has secured it to this hour, pray look for both in our histories, in our records, in our acts of parliament, and journals of parliament.”).

340. Burke wrote:

Many of our men of speculation, instead of exploding general prejudices, employ their sagacity to discover the latent wisdom which prevails in them. If they find what they seek, and they seldom fail, they think it more wise to continue the prejudice, with the reason involved, than to cast away the coat of prejudice and to leave nothing but the naked reason; because prejudice, with its reason, has a motive to give action to that reason, and an affection which will give it permanence. Prejudice is of ready application in the emergency; it previously engages the mind in a steady course of wisdom and virtue and does not leave the man hesitating in the moment of decision skeptical, puzzled, and unresolved. Prejudice renders a man’s virtue his habit, and not a series of unconnected acts. Through just prejudice, his duty becomes a part of his nature.

Id. Russell Kirk summarized Burke’s view of prejudice in this manner: “[Burke] knew . . . the mass of beliefs we often call ‘prejudices’ to be the moral sense of humanity.” RUSSELL KIRK, EDMUND BURKE: A GENIUS RECONSIDERED 152 (1967); *cf. id.* at 161-62 (“Only in a state governed by constitution, convention, and prescription can the rights—or the aspirations of men be realized.”).

341. See BURKE, *supra* note 2 (“[T]he time of prescription which, through long usage, mellows into legality governments that were violent in their commencement.”).

342. A great many examples of this charge appear in anti-federalist tracts. See, e.g., 17 DOCUMENTARY HISTORY, *supra* note 2, at 52-56 (“An Old Whig,” Letter VIII); 18

cautioned against strengthening their case.³⁴³

E. Dickinson's Contributions to the Structure and Powers of the Presidency

When the delegates' attention turned to the executive, Dickinson again argued that ends should come before means.³⁴⁴ In his June 2 speech to the convention, he focused on the problem that he and his fellow delegates, who personally had known only monarchy, would encounter in creating a republican chief executive.³⁴⁵ The executive should be independent from the other branches. But hitherto executive independence had been achieved only in limited monarchies. In England, the executive's power was extensive; it arose from the monarch's wide powers and from the "attachments which the Crown draws to itself"³⁴⁶—that is, the monarch's prestige as a national symbol and his power of patronage, by which he could attach private citizens and members of the House of Commons to the royal cause.³⁴⁷

In America, a monarchy was out of the question: "The spirit of the times—the state of our affairs, forbade the experiment, if it were desirable [sic]."³⁴⁸ The convention's task, therefore, was to look for institutional substitutes that would render a republican executive as independent from the legislature and judiciary as the King was in England.

Part of Dickinson's solution was to achieve "stability" among the branches by weakening the powers opposing the executive.³⁴⁹ As in

DOCUMENTARY HISTORY, *supra* note 2, at 5 ("The Federalist's Political Creed").

343. Some of his proposals were not so well thought out. At one point, he moved that the Constitution require that the wages of the members of both houses be identical. When it was pointed out that the duties of Senators would likely be more extensive than those of Representatives, he withdrew the motion. 2 FARRAND, RECORDS, *supra* note 2, at 293 (Madison, Aug. 14).

344. 1 FARRAND, RECORDS, *supra* note 2, at 74 (Pierce, June 1) ("Mr. Dickinson was of opinion that the powers of the Executive ought to be defined before we say in whom the power shall vest."). This speech, like Dickinson's earlier comment on the legislature, also went unreported by Madison.

345. *Id.* at 86 (Madison). The speech is not well reported, and the discussion in the text makes limited use of inference.

346. *Id.*

347. Whigs described the Crown's ability to influence members of Parliament with pensions and sinecures as "corruption." American distaste for the practice is reflected in U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased [sic] during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

348. 1 FARRAND, RECORDS, *supra* note 2, at 87 (Madison).

349. Hutson, *supra* note 2, at 264, 269.

England, the legislature would be divided into two branches, and both branches would be less formidable than their British counterparts.³⁵⁰ Membership in the House of Lords was hereditary and for life terms, but the Senate would be elective and chosen only for fixed terms, with regular rotation.³⁵¹ Members of the House of Commons served for seven years, but members of the House of Representatives would serve for a much shorter period; Dickinson proposed three years, with annual rotation.³⁵² Parliament's power was plenary throughout the realm; Congress would be limited by the reservation of much authority in the states.³⁵³ In Britain, the constitutional balance among the branches of government was akin to the equilibrium among three (or four) iron rods opposing each other teepee-style. In America the delegates could achieve the same balance with light wooden poles.³⁵⁴

Throughout the convention, Dickinson generally took the side of a firm, independent executive.³⁵⁵ In his view, America could achieve this best with a plural executive.³⁵⁶ He contemplated three officers, serving for seven-year, staggered terms.³⁵⁷ The authors of the Virginia Plan had suggested that Congress elect the executive,³⁵⁸ assuring its independence by denying re-eligibility.³⁵⁹ Dickinson, as unsure of how to elect the executive as most other delegates were, initially supported, then backed away from this idea.³⁶⁰ He also opposed election by the state legislatures

350. 1 FARRAND, RECORDS, *supra* note 2, at 86 (Madison); Hutson, *supra* note 2, at 264, 267.

351. Hutson, *supra* note 2, at 264, 267 (seven years, with annual rotation).

352. 1 FARRAND, RECORDS, *supra* note 2, at 360-61 (Madison, June 21); Hutson, *supra* note 2, at 264, 267.

353. 1 FARRAND, RECORDS, *supra* note 2, at 86 (Madison, June 2) ("One source of stability is the double branch of the Legislature. The division of the Country into distinct States formed the other principal source of stability. This division ought therefore to be maintained, and considerable powers to be left with the States.").

354. This dreadful metaphor is mine, not Dickinson's.

On Dickinson's desire to replicate the balance of the British Constitution, see WOOD, *supra* note 2, at 554. In Fabius, First Series, Letter IX, he discussed the lighter weight of the American constitutional poles, noting that the House of Representatives was far more democratic than House of Commons, the President much more restricted in power than the King, and twenty-six senators far less dangerous than a "hereditary aristocratic body, consisting of many hundreds, possessed of immense wealth in lands and money, strengthened by a host of dependents, and who availing themselves of defects in the constitution, send many of these into the house of commons; who hold a third part of the legislative power in their own hands; and who form the highest court of judicature in the nation." 17 DOCUMENTARY HISTORY, *supra* note 2, at 262.

355. Hutson, *supra* note 2, at 264, 269.

356. *Id.*

357. *Id.*

358. 1 FARRAND, RECORDS, *supra* note 2, at 21 (Madison, May 29).

359. *Id.*

360. Hutson, *supra* note 2, at 266 (legislature to elect executive), 269 (legislature elects executive by two-thirds vote).

or governors:³⁶¹

He had long leaned towards an election by the people which he regarded as the best and purest source. Objections he was aware lay agst this mode, but not so great he thought as agst the other modes. The greatest difficulty in the opinion of the House seemed to arise from the partiality of the States to their respective Citizens. But, might not this very partiality be turned to a useful purpose. Let the people of each State chuse [sic] its best Citizen. The people will know the most eminent characters of their own States, and the people of different States will feel an emulation in selecting those of which they will have the greatest reason to be proud—Out of the thirteen names thus selected, an Executive Magistrate may be chosen either by the Natl Legislature, or by Electors appointed by it.³⁶²

This passage is vintage Dickinson: an instinct toward popular government, but a way to institute it that would turn its vice—partiality—to good purpose.³⁶³

Dickinson favored limiting the legislature's power to remove the executive to impeachment for cause or in response to an application by a majority of state legislatures³⁶⁴ (later governors).³⁶⁵ He successfully suggested a measure that may have expanded the President's power to appoint executive officers.³⁶⁶

Two of Dickinson's positions at the convention may seem at first glance to be contradictory, but actually were complementary. These were (1) his opposition to veto or revision of laws by a revisionary council, and (2) his support for an executive council, once it had become clear that the chief executive would be unitary. A revisionary council was a committee of executive officers (including the chief executive and one or more judges) that could veto or recommend changes in bills the

361. 2 FARRAND, RECORDS, *supra* note 2, at 114 (Madison, July 25).

362. *Id.* at 114-15.

363. *Cf. supra* Part III.B.

364. 1 FARRAND, RECORDS, *supra* note 2, at 85 (Madison, June 2). According to Robert Yates, when this idea was rejected, Dickinson submitted, and the convention adopted, wording that authorized Congress to impeach for "cause." *Id.* at 89-90 ("Mr. Dickinson moved that in the seventh resolution, the words, *and removable on impeachment and conviction for malconduct or neglect in the execution of his office*, should be inserted after the words *ineligible a second time*. Agreed to."). However, both Madison's notes and the official journal state that Hugh Williamson of North Carolina made this motion. *Id.* at 78 (Journal), 88 (Madison). The official journal shows Delaware as voting "no" on the measure. *Id.* at 79.

365. Hutson, *supra* note 2, at 269.

366. 2 FARRAND, RECORDS, *supra* note 2, at 405 (Madison, Aug. 24) ("Mr. Dickinson moved to strike out the words 'and shall appoint to offices in all cases not otherwise provided for by this Constitution' and insert—'and shall appoint to all offices established by this Constitution, except in cases herein otherwise provided for, and to all offices which may hereafter be created by law'"); *see also* Hutson, *supra* note 2, at 281.

legislature had passed. Under the then-existing constitution of New York, for example, the council consisted of the governor, the chancellor, and the justices of the state supreme court.³⁶⁷ One could find support for this approach in the pages of Dickinson's favorite author, Francis Bacon.³⁶⁸

Bacon, however, had lived under a monarchy, and Dickinson concluded that a republican executive needed the additional prop of sole exercise of the veto power.³⁶⁹ Moreover, he thought that adding judges to the veto process would mix improperly the judicial and executive powers.³⁷⁰ Although Dickinson was dubious about judicial review of laws on constitutional grounds,³⁷¹ when all was said and done he apparently considered it a superior alternative to a revisionary council.³⁷²

An executive council differed from a revisionary council in that it consisted only of executive branch officers.³⁷³ Thus, an executive council preserved separation of powers.³⁷⁴ Presidential decision making would be better and more supportable if it were the product of deliberation.³⁷⁵ No doubt the President would deliberate with other executive branch officials even if there were no council; however, the fact that those officials were dependent on the President for their offices might induce them to be less candid than they otherwise might be.³⁷⁶ In any case, their dependence might cloud their judgment.³⁷⁷ Council

367. N.Y. CONST. of 1777, art. III, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/ny01.htm> (last visited Feb. 26, 2003).

368. BACON, *supra* note 2, at 288 (writing, "Judges should consult with kings and [e]states when a consideration of state intervenes in law. Estates and kings should consult with judges when a matter of law intervenes in business of state").

369. Hutson, *supra* note 2, at 266, 269. In Dickinson's Plan, as in the finished constitution, the veto would have been subject to a two-thirds override. *Id.*

370. 1 FARRAND, RECORDS, *supra* note 2, at 140 (Madison, June 6) ("Mr. Dickinson. Secrecy, vigor & dispatch are not the principal properties reqd. in the Executive. Important as these are, that of responsibility is more so, which can only be preserved; by leaving it singly to discharge its functions. He thought too a junction of the Judiciary to it, involved an improper mixture of powers."); *see also id.* at 108-09 (King, June 4) ("Dickerson [sic]—agt. It—you must separate the Leg. Jud. & Ex.—but you propose to give the Executive a share in Legislation—why not the Judicial—There is a Difference—the Judges must interpret the Laws they ought not to be legislators. The Executive is merely ministerial—besides we have Experience in the British Constitution of the Executive's having a negative—").

371. 2 FARRAND, RECORDS, *supra* note 2, at 298 (Madison, Aug. 15).

372. 17 DOCUMENTARY HISTORY, *supra* note 2, at 182 (Fabius, First Series, Letter IV).

373. *See id.*

374. *See id.*

375. 2 FARRAND, RECORDS, *supra* note 2, at 542 (Madison, Sept. 7) ("Mr. Dickinson was for a Council. It wd. be a singular thing if the measures of the Executive were not to undergo some previous discussion before the President.").

376. *See id.*

377. On the Founders' belief in how dependence clouds judgment, see Natelson,

members would owe their appointment to other sources, perhaps the legislature.³⁷⁸

Assent of a council could increase the public acceptance of executive decisions. In crafting his own plan for a constitution, Dickinson obviously had this in mind, for he provided that each executive officer was responsible for all decisions unless he had dissented in writing.³⁷⁹ Giving the executive more legitimacy was a priority, for in the colonies the executive power had been intrusive, but brittle.³⁸⁰ “Swollen claims and shrunken powers, especially when they occur together, are always a source of trouble.”³⁸¹

Of course, Dickinson’s preference for an executive council was not the product of abstract speculation. Both as president of Delaware and as president of Pennsylvania, he had operated through such councils.³⁸² In each case, the council members had been selected so as to leave them independent of the president.³⁸³

The finished constitution did not create an executive council per se, but Dickinson thought he had obtained a good substitute in the Senate. In truth, that body shared certain characteristics with the executive councils of Delaware and Pennsylvania. It was relatively small and elected for staggered terms.³⁸⁴ It was associated with the executive in the appointment process.³⁸⁵ It had an “advice and consent” function.³⁸⁶ Like

Sympathy and Independence, *supra* note 2, at 384-85.

378. 2 FARRAND, RECORDS, *supra* note 2, at 329 (Madison, Aug. 18) (“Mr. Dickenson [sic] urged that the great [i.e., council] appointments should be made by the Legislature, in which case they might properly be consulted by the Executive—but not if made by the Executive himself.”).

379. Hutson, *supra* note 2, at 266, 269.

380. BAILYN, *supra* note 2, at 66-96.

381. *Id.* at 96.

382. *See infra* note 383 and accompanying text.

383. In Delaware, each house of the legislature elected two members of the privy council for fixed terms, who then lost their legislative seats. DEL. CONST. of 1776, art. 8, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Aug. 1, 2003). In Pennsylvania, the members of the executive council were elected by voters in districts, also for fixed terms. PA. CONST. of 1776, § 19, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (last visited Aug. 1, 2003).

384. U.S. CONST. art I, § 3, cl. 2; *cf.* DEL. CONST. of 1776, art. 8, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Aug. 1, 2003) (staggered two year terms); PA. CONST. of 1776, § 19, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (last visited Aug. 1, 2003) (staggered three year terms).

385. U.S. CONST. art. III, § 2; *cf.* DEL. CONST. of 1776, art. 12, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Aug. 1, 2003); PA. CONST. of 1776, § 20, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (last visited Aug.

the Pennsylvania council, it tried impeachments.³⁸⁷

So it is understandable that although Dickinson would have preferred a large upper house, during the ratification process he defended the decision for a small one.³⁸⁸ Rebutting claims that the Senate would be an aristocratic body, he wrote, "One could really have supposed that the smallness of numbers could not be termed a cause of danger, as influence must encrease [sic] with an enlargement [as in the House of Lords]."³⁸⁹ Perhaps this was just Dickinson making a case,³⁹⁰ but one might as well have concluded that in losing his large upper house he had gained a small assembly with significant executive and consultative powers, and appointed so as to be thoroughly independent of the President. Very much like the council he had sought.³⁹¹

One last point on the executive: All of the methods I have mentioned for assuring executive independence complied with the principle of separation of powers. However, Dickinson, like other Founders, subordinated that principle to the principle of independence. In other words, they were willing to blur powers if necessary to secure to one branch independence from the others. The premier example was executive veto. This was essentially a legislative power, but Dickinson supported giving it to the President for his protection.³⁹²

F. Dickinson's Contributions to the Structure and Powers of the Federal Judiciary

At the constitutional convention, Dickinson worked toward a firm federal judiciary, independent of the states and of other branches of government. John Rutledge of South Carolina argued that the federal government needed only a supreme court, and moved that inferior

1, 2003).

386. U.S. CONST. art. III, § 2; *cf.* DEL. CONST. of 1776, art. 9, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Aug. 1, 2003); PA. CONST. of 1776, § 20, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (last visited Aug. 1, 2003).

387. PA. CONST. of 1776, § 20, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (last visited Aug. 1, 2003).

388. 17 DOCUMENTARY HISTORY, *supra* note 2, at 122 (Fabius, First Series, Letter II).

389. *Id.*

390. He still seemed to have had some regrets; he made a point of the weakness of the Senate by reason of it being overawed by the numbers of the House. He added that proper representation in the upper house is unattainable, but is the source of some objections to the system. *Id.* at 125.

391. *Cf. id.*

392. Hutson, *supra* note 2, at 266, 269. On the use of "blurring" of powers to assure independence, see Natelson, *Sympathy and Independence*, *supra* note 2, at 400-01.

tribunals be left in state hands.³⁹³ Dickinson contended “strongly that if there was to be a National Legislature, there ought to be a national Judiciary, and that the former ought to have authority to institute the latter.”³⁹⁴ Rutledge’s motion was defeated, five states to four.³⁹⁵ Wilson and Madison then moved for acceptance of Dickinson’s idea that Congress have the right (although not the duty) to establish tribunals inferior to the Supreme Court.³⁹⁶ This passed, eight to two, with one state divided.³⁹⁷

Just as Dickinson opposed permitting Congress to remove a President without cause, he also opposed allowing Congress untrammelled power to remove judges.³⁹⁸ Instead, he would have required the concurrence of both President and Congress.³⁹⁹ On this point, he lost.⁴⁰⁰ He was successful, however, in his motion to grant the Supreme Court appellate jurisdiction of fact as well as law.⁴⁰¹

G. Dickinson’s Contributions on Other Issues

John Dickinson was involved less prominently in several other issues at the convention. These included defining the scope of Congress’s financial powers, establishing the rules by which states could be divided and combined, setting property qualifications for voting and for federal office, and limiting the slave trade.

1. Congress’s Financial Powers

Dickinson’s trust theory of government urged him to seek limitations on federal authority to reduce the chances that government power would be used for purely local or “partial” benefits. When drafting the Articles of Confederation, he had included provisions limiting Congressional powers to those that would serve the “general welfare” rather than the interests of particular states, sections, or factions.⁴⁰² Thus, his draft of the Articles provided a statement of

393. 1 FARRAND, RECORDS, *supra* note 2, at 124 (Madison, June 5).

394. *Id.* at 125; *see also* Hutson, *supra* note 2, at 266, 269.

395. 1 FARRAND, RECORDS, *supra* note 2, at 125 (Madison, June 5).

396. *Id.*

397. *Id.*

398. *See* 2 FARRAND, RECORDS, *supra* note 2, at 428-29 (Madison, Aug. 27).

399. *Id.*

400. *Id.*

401. *Id.* at 431; *cf.* U.S. CONST. art. III, § 2, cl. 2 (“In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

402. The General Welfare Clause was intended to be a *limitation* on Congress’s financial power rather than a grant of power. On this subject, *see* Natelson, *General*

purpose to the effect that, “The said Colonies unite themselves . . . for their common Defence, the Security of their Liberties, and their mutual and general Welfare.”⁴⁰³ This document would authorize spending of money only “for the common Defence, or general Welfare.”⁴⁰⁴ Purchases of Indian lands⁴⁰⁵ and disposition of lands⁴⁰⁶ could occur only for the “general Benefit.”

At the constitutional convention on August 6, the Committee of Detail presented to the convention a draft constitution embodying the delegates’ agreements thus far.⁴⁰⁷ The draft did not limit federal taxing or spending to general welfare purposes, nor did it restrict spending to appropriations authorized by Congress.⁴⁰⁸ Dickinson’s handwritten annotations to this document include the following suggestion: “no Preference or Advantage to be given to any persons or places—Laws to be equal . . . no money to be drawn out of the National Treasury, unless by an appropriation thereof by Law.”⁴⁰⁹

Later in August, Dickinson served on a Committee of Eleven chaired by William Livingston.⁴¹⁰ Although we do not have records of that committee’s deliberations, we do know that it proposed adding a general welfare limitation to the financial powers of Congress.⁴¹¹ Similarly, on September 4, another Committee of Eleven, headed by Judge David Brearley, and also including Dickinson,⁴¹² recommended adding to the Taxation Clause the specific phrase, “to pay the Debts and provide for the common Defence and general Welfare.”⁴¹³ This, of course, is the wording we now call the General Welfare Clause.⁴¹⁴ The Brearley Committee further recommended adding the Appropriation Clause that Dickinson had suggested in his notes.⁴¹⁵ Thus, while it is always possible that Dickinson simply had written down someone else’s suggestions, given his long association with the “general welfare” concept and his presence on both committees, we probably can credit

Welfare Clause, supra note 2.

403. *Articles of Confederation and Perpetual Union; July 12, 1776*, art. II, *The Avalon Project at Yale Law School*, available at <http://www.yale.edu/lawweb/avalon/contcong/07-12-76.htm> (last visited Jan. 9, 2003).

404. *Id.* at art. XI.

405. *Id.* at art. XIV.

406. *Id.* at art. XVIII.

407. Hutson, *supra* note 2, at 281.

408. *See id.*

409. *Id.*

410. 2 FARRAND, RECORDS, *supra* note 2, at 328 (Madison, Aug. 18).

411. *Id.* at 352 (Journal, Aug. 21).

412. *Id.* at 473 (Journal, Aug. 31).

413. *Id.* at 493 (Journal, Sept. 4).

414. U.S. CONST. art. I, § 8, cl. 1.

415. 2 FARRAND, RECORDS, *supra* note 2, at 505 (Journal, Sept. 5).

Dickinson as the delegate most responsible for adding the General Welfare Clause. He may also have been the delegate most responsible for inserting the Appropriation Clause.⁴¹⁶

2. Integrity of State Boundaries

The draft constitution prepared by the Committee of Detail included language requiring, before a state could be broken into smaller states, that the legislature of the original state consent.⁴¹⁷ Several larger states included within their asserted boundaries substantial land claims, such as New York's claim to Vermont.⁴¹⁸ On the other hand, some smaller states—such as Delaware and Maryland—enjoyed no such claims, and argued that the territory involved should be carved into new states.⁴¹⁹

On August 29, Dickinson and representatives of the claim-less states of Maryland and New Hampshire argued that state legislative consent ought not be necessary for the creation of new states within asserted boundaries.⁴²⁰ Dickinson “dwelt on the impropriety of requiring the small States to secure the large ones in their extensive claims of territory.”⁴²¹ The following day, however, the convention voted to retain the provision, eight states to three.⁴²²

Dickinson accordingly decided that he might at least win a counterbalancing protection for the smaller states—that they not be combined with others without their consent. He therefore moved, “Nor shall any State be formed by the junction of two or more States or parts thereof, without the consent of the Legislatures of such States, as well as of the Legislature of the U. States.”⁴²³ This was agreed to without dissent,⁴²⁴ and its substance became part of the finished Constitution.⁴²⁵

416. U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

417. 2 FARRAND, RECORDS, *supra* note 2, at 188 (Madison, Aug. 6).

418. *See id.*

419. *See id.*

420. *Id.* at 456 (Madison, Aug. 29).

421. *Id.*

422. *Id.* at 464 (Madison, Aug. 30).

423. *Id.* at 465.

424. *Id.*

425. U.S. CONST. art. IV, § 3. Section 3 reads:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Id.

3. Independence of Citizens

Like virtually all the other Founders, Dickinson believed that for citizens to participate in public life with unclouded judgment, they needed to possess independent means.⁴²⁶ Accordingly, Dickinson urged the convention to limit the franchise to freeholders.⁴²⁷ Characteristically, he urged as a reason his perception of an identity of interest between freeholders and the general public.⁴²⁸

He also shared the dominant view that officeholders should be dependent on the people,⁴²⁹ which may be one reason he opposed George Mason's insistence that officeholders be subject to property qualifications.⁴³⁰ He did say that there ought to be no excessive

426. See *supra* notes 218-22 and accompanying text.

427. 2 FARRAND, RECORDS, *supra* note 2, at 202 (Madison, Aug. 7):

Mr. Dickenson [sic] had a very different idea of the tendency of vesting the right of suffrage in the freeholders of the Country. He considered them as the best guardians of liberty; And the restriction of the right to them as a necessary defence agst. the dangerous influence of those multitudes without property & without principle, with which our Country like all others, will in time abound. As to the unpopularity of the innovation it was in his opinion chemirical [sic]. The great mass of our Citizens is composed at this time of freeholders, and will be pleased with it.

Id.; see also *id.* at 207 (King, Aug. 7).

The franchise was limited to freeholders in Delaware. DEL. CONST. of 1776, arts. 3, 4, available at *The Avalon Project at Yale Law School*, <http://www.yale.edu/lawweb/avalon/states/de02.htm> (last visited Aug. 1, 2003).

428. 2 FARRAND, RECORDS, *supra* note 2, at 209 (McHenry, Aug. 7):

Mr. Dickinson contended for confining the rights of election in the first branch to free holders. No one could be considered as having an interest in the government unless he possessed some of the soil.

The fear of an aristocracy was a theoretical fiction. *The owners of the soil could have no interest distinct from the country.* There was no reason to dread a few men becoming lords of such an extent of territory as to enable them to govern at their pleasure.

Id. (emphasis added).

429. He did not, however, favor extending the state system of annual elections to the federal government from prudential considerations:

Mr. Dickenson [sic]. The idea of annual elections was borrowed from the antient [sic] usage of England, a country much less extensive than ours. He supposed biennial would be inconvenient. He preferred triennial: and in order to prevent the inconveniency of an entire change of the whole number at the same moment, suggested a rotation, by an annual election of one third.

1 FARRAND, RECORDS, *supra* note 2, at 360-61 (Madison, June 21); see also *id.* at 365 (Yates).

430. 2 FARRAND, RECORDS, *supra* note 2, at 123 (Madison, July 26):

Mr. Dickenson [sic] was agst. any recital of qualifications in the Constitution. It was impossible to make a compleat [sic] one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions. The best defence lay in the freeholders who were to elect the Legislature. Whilst this Source should remain pure, the public interest would be safe. If it ever should be corrupt, no little expedients would repel the danger.

eneration of wealth in a republic.⁴³¹ Of course, requiring voters to be freeholders was not an “excessive veneration of wealth” because, as he pointed out, “The great mass of our Citizens is composed at this time of freeholders.”⁴³² In any event, the convention left voting qualifications to the states,⁴³³ and did not adopt a property requirement for public office.

4. The Slave Trade

Dickinson was not a highly observant Quaker, but he took his religion seriously enough to induce him to oppose slavery and to manumit his own slaves.⁴³⁴ His notes for an undelivered speech composed in July show him opposing the three-fifths rule,⁴³⁵ both for the reason that it was shameful and because it created the wrong incentives; states that imported slaves would benefit from increased representation in Congress. On the floor, he opposed the slave trade on “general welfare” grounds:

Mr. Dickenson [sic] considered it as inadmissible on every principle of honor & safety that the importation of slaves should be authorized to the States by the Constitution. The true question was whether the national happiness would be promoted or impeded by the importation, and this question ought to be left to the National Govt. not to the States particularly interested. If Engd. & France permit slavery, slaves are at the same time excluded from both those Kingdoms. Greece and Rome were made unhappy by their slaves. He could not believe that the Southn. States would refuse to confederate on the account apprehended; especially as the power was not likely to be immediately exercised by the Genl. Government.⁴³⁶

That was August 7.⁴³⁷ On August 25, recognizing the fact that the Constitution would authorize the continuation of the slave trade until 1808, he urged limiting that extension to those states that had not already

Id.

431. *Id.* at 123 (Madison, July 26):

He doubted the policy of interweaving into a Republican constitution a veneration for wealth. He had always understood that a veneration for poverty & virtue, were the objects of republican encouragement. It seemed improper that any man of merit should be subjected to disabilities in a Republic where merit was understood to form the great title to public trust, honors & rewards.

Id.

432. *Id.* at 202 (Madison, Aug. 7).

433. U.S. CONST. art. I, § 2, cl. 1.

434. *See supra* notes 97-99 and accompanying text.

435. U.S. CONST. art. I, § 2, cl. 3.

436. 2 FARRAND, RECORDS, *supra* note 2, at 372-73 (Madison, Aug. 22).

437. *Id.*

banned the trade, i.e., South Carolina and Georgia.⁴³⁸ Not a single state voted to support him.⁴³⁹

V. Conclusion

Some historians have downplayed Dickinson's contributions to the Constitution.⁴⁴⁰ This is an error. If James Madison was the "father of the Constitution," then John Dickinson was at least a kindly uncle. In part, this conclusion can be inferred from the results, which were much closer to Dickinson's ideas than to Madison's.⁴⁴¹ More importantly, we have explicit evidence that Dickinson played pivotal roles at numerous points of constitutional decision making: choosing a method of electing Senators, setting the formula for apportioning the Senate, establishing the balance between state and federal powers, deciding to enumerate the powers of Congress,⁴⁴² excluding judges from the executive veto,⁴⁴³ creating independent federal courts below the Supreme Court,⁴⁴⁴ protecting states from being forcibly combined with other states,⁴⁴⁵ and adding trust-style limitations on Congress's financial powers.⁴⁴⁶ One historian whose assessment of Dickinson's contribution was closer to the mark was Professor M. E. Bradford: "Possibly the most learned of the Framers [he said of Dickinson], undoubtedly the most undervalued and misunderstood of their notable company He is . . . definitive of the moderate Federalist position of 1787-1788 and a key to the meaning of what was achieved."⁴⁴⁷ Professors Forrest and Ellen Shapiro McDonald

438. *Id.* at 416 (Madison, Aug. 25).

439. *Id.*

440. *E.g.*, Powell, *supra* note 2, at 6 ("He was, therefore, a conspicuous figure in the Convention of 1787, although for several reasons he did not have a large part in the final result."); see Johannesen, *supra* note 2, at 170 (calling Dickinson's participation in the convention "a singularly lack-luster performance"); see also CLINTON ROSSITER, 1787: THE GRAND CONVENTION 204 (1966) ("Dickinson, although an important figure in the construction of the Great Compromise, behaved more and more like a sick old man, which indeed he was."); see also *id.* at 250 (conceding that Dickinson was "very useful," but stating that he was "a victim of old age, poor health, and an unfortunate lack of perspective, whose overall performance, despite flashes of brilliance, failed to match his considerable reputation").

441. The fundamental differences between Madison's vision of the Constitution and the final results are outlined in MCDONALD, NOVUS, *supra* note 2, at 206-09.

442. See *supra* notes 339-41 and accompanying text.

443. Madison favored associating judges in the "revisionary" power. 1 FARRAND, RECORDS, *supra* note 2, at 138-39 (Madison, June 6).

444. See *supra* Part IV.F.

445. See *supra* Part IV.G.2.

446. See *supra* Part IV.G.1.

447. BRADFORD, FATHERS, *supra* note 2, at 99, 103; see also BRADFORD, REASON, *supra* note 2, at 79 ("Of all the men significantly involved in the major events leading up to and following from the American Revolution none has been so undeservedly neglected by our political historians as the mysterious John Dickinson.").

agree that “the most underrated of all the Founders of this nation was John Dickinson.”⁴⁴⁸

* * * *

Dickinson had reason to be pleased with the convention’s work. He believed that the new federal government would indeed “protect the worthy against the licentious.”⁴⁴⁹ When, the following year, he perceived that the ratification process might be slowing, he weighed in with his first set of “Fabius” letters.

The “Fabius” letters were widely re-printed and well-received.⁴⁵⁰ By then, Dickinson was fifty-five years old—a relatively advanced age for the time—and nearing the end of his political career. Yet in 1791 and 1792, he served as president of the Delaware constitutional convention, which rewrote the state’s original constitution.⁴⁵¹ Moreover, in December, 1792, he again was elected to the Delaware legislature—although he resigned after a few months.

Late in the 1790s, Dickinson became a supporter of revolutionary France and an admirer of Tom Paine. Dickinson republished his first “Fabius” letters, adding excerpts from Paine’s *Rights of Man* in footnotes.⁴⁵² In 1797, he published fifteen new “Fabius” letters, calling on Americans to support the cause of France.⁴⁵³ However, his defense of France was a defense of a republic besieged on all sides only after she had rid herself of the agents of the Terror. For Dickinson openly and profoundly regretted the execution of Louis XVI,⁴⁵⁴ and celebrated the end of the Terror: “At length the reign of tyrants, or rather of monsters, ended.”⁴⁵⁵

Dickinson had been born the same year as Washington. Unlike Washington, though, he lived to enjoy a long and quiet retirement. Dickinson closed his career principally as a gentleman farmer, his life punctuated by occasional publications (including his collected Works) and by correspondence with his old drafting and sparring partner, Thomas Jefferson.

In February, 1808, near the end of Jefferson’s time as President, John Dickinson died at the age of 75.

On Dickinson’s learning, see also *Political Thought*, *supra* note 2, at 3 n.2 (itemizing the range of references in Dickinson’s works).

448. Forrest McDonald & Ellen Shapiro McDonald, *John Dickinson: Founding Father*, 23 DEL. HIST. 24 (1988).

449. WOOD, *supra* note 2, at 475.

450. 17 DOCUMENTARY HISTORY, *supra* note 2, at 74-80 (editor’s introduction).

451. FLOWER, *supra* note 2, at 254.

452. *Id.* at 252.

453. 2 WRITINGS, *supra* note 2, at 167-286.

454. *Id.* at 170.

455. *Id.* at 172.
