

# By What Authority

A Publication of the PROGRAM ON CORPORATIONS, LAW & DEMOCRACY

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*By What Authority*, the name of our publication, is English for *quo warranto*.

*Quo warranto* is the sovereign's command to halt continuing exercise of illegitimate privileges and authority. Evolved over the last millennium by people organizing to perfect a fair and just common law tradition, the spirit of *By What Authority* animates people's movements today.

We the people and our federal and state officials have long been giving giant business corporations illegitimate authority.

As a result, a minority directing giant corporations privileged by illegitimate authority and backed by police, courts, and the military, define the public good, deny people our human and constitutional rights, dictate to our communities, and govern the Earth.

*By What Authority* is an unabashed assertion of the right of the sovereign people to govern themselves.

*After Seattle . . .*

## THE WTO, THE US CONSTITUTION, AND SELF-GOVERNMENT

IF THE WORLD TRADE ORGANIZATION (WTO) were disappeared tomorrow, many people in other nations would feel a bit of relief. But nothing fundamental would change in the USA. This is because corporations already have the special privilege (which lawyers call their 'right') to make basic governing decisions. WTO or no WTO, corporations are protected by our constitution and our Supreme Court, and therefore by the police, army, navy, air force, CIA...

In late November, thousands from around the world will join people across the Pacific Northwest to protest WTO maneuvers in Seattle. Outside the United States, WTO decrees will inflict great harms upon human life and biological systems. We in the US have a responsibility to support efforts by activists from other lands to neutralize and abolish the WTO. So POCLAD is participating in and supporting efforts to raise hell in Seattle.

But after Seattle, we in the USA have a formidable challenge: to identify and undo over 200 years of constitutional doctrines and laws designed to clothe corporate property with the power of government.

One example (among a zillion) of how these doctrines work: a few years ago a Massachusetts people's movement got a

law passed banning state officials from buying goods or services from corporations trafficking with Burmese dictators. Corporate directors did not like this public assault upon their "rights." But they did not have to summon the WTO into action. Why? Because men of property in the USA have long relied on the federal courts as their very own safety net. So they *expected* federal judges to nullify this law. And these judges did not disappoint, saying simply that it was beyond the authority of the Massachusetts people to legislate such matters.

We have a long history of corporations vetoing people's laws and making their own. And the idea of merchants using some kind of world trade organization to do this work is nothing new. Towards the end of the 17th Century, a new class of

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### *In this issue...*

In our feature article, we offer wisdom of anti-Federalists from 1787. They sound like today's critics of NAFTA, the WTO, the MAI, and global corporatization.

## After Seattle

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merchants—architects of the expanding British Empire—realized their need “to create or adapt agencies to enforce British law on the one hand and restrain colonial legislatures on the other.” So they set up a *Board of Trade and Plantations* to “scrutinize [the] colonial economy with an eagle eye...[and] recommend...with firm insistence the annulment of objectionable bills passed by colonial legislatures.”<sup>1</sup>

### By What Authority

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The American Revolution unleashed a great democratic spirit. This led to struggles between the more-propertied and the less-propertied. In a number of states, activists were able to qualify more white men to vote, increase the authority of lower legislative houses, lessen the ability of creditors to milk their debtors forever and ever, and limit the veto powers of governors and judges.

This of course is not what the wealthy, landed men who helped lead the revolution had in mind. They were, after all, a small minority of 20%: European and Colonial class structures had already defined the majority — women, slaves, Native peoples, indentured servants and workers in general — as non-legal persons...indeed as property. So in self-defense, Washington, Hamilton, Madison and other leaders of this minority wrote and fixed in place a constitution “to contain the threat of the people rather than to embrace their participation and their competence.”<sup>2</sup> Committed to “preventing popular liberty from destroying itself” because “the anarchy of the property-less would give way to despotism,”<sup>3</sup> they made it extremely difficult for the majority to use the constitution to make basic changes in law even if and when they should ever win the civil and political rights of persons.

In addition, these Federalist<sup>4</sup> founders defined decisions about investment, production, labor and technology as private property’s “rights.” They believed such decisions were proper matters only for the wealthy landed gentry and commercial class (the corporate managers of today). Accordingly, at the 1787 constitutional convention in Philadelphia, Federalist delegates maneuvered a leap from the Articles of Confederation — which had kept power and authority in state legislatures — to a totally new constitution erecting a powerful central government. In the constitution’s commerce clause (article I, section 8), they forbade majorities, through state legislatures, from making rules for production, commerce and trade.

And to appointed Supreme Court justices, they gave the authority of kings.

So when today’s corporate managers assemble at a meeting of the World Trade Organization, it is in this triumphant Federalist tradition that they deny legisla-

tures representing communities, states, provinces and national governments the right to make decisions over what shall be produced, where it will be produced and who shall produce it under what conditions.

Photographs of the blue-green Earth floating in space help people see our planet’s fragile place in the Cosmos. A decade’s experience with the North American Free Trade Agreement (NAFTA), the proposed Multilateral Agreement on Investment (MAI) and the World Trade Organization can help us examine our country’s camouflaged histories.

With critics properly identifying the Seattle WTO meeting as an illegitimate global constitutional convention, we can now recognize the US constitution as the *first* NAFTA. Sent to Philadelphia by their states to address some problems of interstate commerce under the Articles of Confederation, the (mostly Federalist) delegates pledged themselves to secrecy. Once behind closed doors, they replaced the Articles with a new plan...and denied the public any details about their deliberations for 53 years.<sup>5</sup> Their constitution turned a cooperative venture among sovereign states into a set up where Congress would decide commerce, an unelected Senate<sup>6</sup> would approve treaties, a Supreme Court would dictate the law of the land, and an indirectly-elected president<sup>7</sup> would command a standing army.

There are many similarities in the critiques put forward by the foes of the 1787 constitution and by foes of today’s corporate WTO:

- ◆ Ultimate authority to govern should be in the hands of elected legislators meeting in decidedly public processes, not of appointed judges;
- ◆ Government should promote democracy, community and public virtue, not special privileges for the few, not a commercial empire based on accumulation of wealth; property should not translate into privilege and political power;
- ◆ Communities and states should not give up their authority to distant, absentee rulers...especially to an appointed Supreme Court or to tribunals of corporate lawyers and trade bureaucrats;

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# ANTI-FEDERALISTS SPEAK

## *Property vs. Democracy in 1787*

People who look beyond the corporate press can find tons of informed opposition to the corporate global production and trade agreements of the 1990s. Similarly, if we look, we can find many perceptive critics of the US constitution in 1787-88. Loosely labeled "Anti-Federalists," they contested the peddling of the constitution by Washington, Hamilton, Madison, Jay and other Federalists fresh from the Philadelphia convention at Independence Hall. And guess what? They sound very much like today's critics of the North American Free Trade Agreement (NAFTA), the Multinational Agreement on Investment (MAI), and the World Trade Organization (WTO), and of corporate domination in general.

The fact is, more people than most of us ever heard about in school discussed, critiqued, debated — and opposed — the many undemocratic features of the US constitution.

But they lost.

Men of property had come out of the Revolution in good shape. About 10% of the white population controlled half of the country's wealth. Many had converted paper profits from war-time contracting and profiteering into land, mortgages, goods, and government securities.<sup>1</sup> According to Howard Zinn, these wealthy planters and merchants thought they had it made: "...the inferior position of blacks, the



exclusion of Indians from the new society, the establishment of supremacy for the rich and powerful in the new nation — all this was already settled in the colonies by the time of the Revolution. With the English out of the way, it could now be put on paper, solidified, regularized, made legitimate, by the Constitution of the United States..."<sup>2</sup>

But they soon discovered that the successful revolution against England had triggered challenges to rigid class structures and to authority in general. Rebellions by farmers, workers and debtors — many of whom were Revolutionary War veterans — began sprouting in Massachusetts, Rhode Island, New Hampshire, North Carolina and elsewhere. By blocking sheriffs from auctioning debtor's property, taking up arms, closing court houses, claiming former Crown lands, running for office and trying to vote, they were resisting the 18th Century version of today's "structural adjustment."

In 1787, George Washington wrote: "...Commotions of this sort,

like snowballs, gather strength as they roll, if there is no opposition in the way to divide and crumble them." And: "... There are combustibles in every State, to which a spark might set fire."<sup>3</sup> He and other Federalist founders set in motion a process to create a new central government powerful enough to keep order, but accessible and flexible enough to attract the support necessary from less-wealthy white farmers, merchants and artisans in each of the 13 states (Washington's "divide and crumble" strategy).

Anti-Federalists publicized the underlying fear of Federalist constitution writers. As was increasingly apparent in village squares and legislatures, in newspapers and across the culture, the revolution had inflamed democratic thought and action. Joyce Appleby described the implications of this trend: "A large proportion of adult white men held land, voted, and engaged in debates on issues elsewhere considered the province of officials. Foreign visitors in the 18th century invariably commented on the vitality of public discussions and on the political confidence of ordinary men. Had the states been left with the economic powers they had before the ratification of the constitution, the momentum of popular politics would not have been checked. Never having lost the normal scope of legislative power, the states could more easily have maintained the traditional con-

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nection between the government and the economy..."<sup>4</sup>

Anti-Federalists saw the landed gentry and commercial men of property mobilizing against the leveling spirit of the Revolution. They saw Madison's and Hamilton's propaganda machines building support for a plan of government which would reverse the popular politics that had been unleashed in the states. Less unified and focused than the Federalists, they nevertheless responded with speeches, articles, pamphlets and organizing.

Here are brief selections from Anti-Federalist discourse:

### ***I. Who had written the constitution, and who were working so hard to rush the states to ratification?***

"In many of the states, particularly in this and the northern states, there are aristocratic juntos of the well-born few, who had been zealously endeavoring since the establishment of their constitutions, to humble that offensive upstart, equal liberty; but all their efforts were unavailing, the ill-bred churl obstinately kept his assumed station."<sup>5</sup>

"Take the word Federalism directly or indirectly, and it amounts neither to more nor less in its modern acceptation than a conspiracy of the Well-born few, against the sacred rights and privileges of their fellow citizens."<sup>6</sup>

### ***II. What were Federalist organizing and public relations tactics?***

"...The idea of destroying ultimately, the state government, and forming one consolidated system, could not have been admitted — a convention, therefore, merely for vesting in congress power to regulate trade was proposed...

*"...the struggle over the Constitution...represented a broad social division between those who believed in the right of a natural aristocracy to speak for the people and those who did not."*

*—historian Gordon Wood*

September 1786, a few men from the middle states met at Annapolis, and hastily proposed a convention to be held in May, 1787, for the purpose, generally, of amending the confederation...still not a word was said about destroying the old constitution, and making a new one — The States still unsuspecting, and not aware that they were passing the Rubicon, appointed members to the new convention, for the sole and express purpose of revising and amending the confederation — and, probably, not one man in ten thousand in the United States, till within these ten or twelve days, had an idea that the old ship was to be destroyed, and he put to the alternative of embarking in the new ship presented, or of being left in danger of sinking. The States, I believe, universally supposed the convention would report alterations in the confederation, which would pass an examination in congress, and after being agreed to there, would be confirmed by all the legislatures, or be rejected..."<sup>7</sup>

"While the gilded chains were forging in the secret conclave, the meaner instruments of the despotism without were busily employed in alarming the fears of the people with dangers which did not exist, and exciting their hopes of greater advantages from the expected plan than even the best government on earth could produce....While every measure was taken to intimidate the

people against opposing it, the public papers teemed with the most violent threats against those who should dare to think for themselves, and tar and feathers were liberally promised to all those who would not immediately join in supporting the proposed government, be it what it would."<sup>8</sup>

"We are now told...that we shall have wars and rumours of wars, that every calamity is to attend to us, and that we shall be ruined and disunited forever, unless we adopt this constitution. Pennsylvania and Maryland are to fall upon us from the north, like the Goths and Vandals of old; ...the Indians are to invade us with numerous armies on our rear...and the Carolinians, from the South, (mounted on alligators, I presume) are to come and destroy our corn-fields, and eat up our little children!...These, sir, are the mighty dangers which await us if we reject — dangers which are merely imaginary, and ludicrous in the extreme!"<sup>9</sup>

### ***III. Behind their "We the people..." generalities, what were the real intentions of the Federalists?***

"What does this proposed Constitution do? It changes, totally changes the form of your present government. From a well-digested, well-formed democratic, you are at once rushing into an aristocratic government..."<sup>10</sup>

"The real effect of this system of government, will therefore be brought home to the feelings of the people, through the medium of the judicial power...The opinions of the supreme court, whatever they may be, will have the force of law; because there is not power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal... I mean, an entire subversion of the legislative, executive and judi-

cial powers of the individual states..."<sup>11</sup>

"There are no well-defined limits of the Judiciary Powers, they seem to be left as a boundless ocean, that has broken over the chart of the Supreme Lawgiver 'thus far shalt thou go and no further.' And as they cannot be comprehended by the clearest capacity, or the most sagacious mind, it would be an Herculean labor to attempt to describe the dangers with which they are replete."<sup>12</sup>

#### IV. What kind of nation would result?

"...Upon an attentive examination [of the Constitution] you can pronounce it nothing less, than a government which in a few years, will degenerate to a compleat Aristocracy, armed with powers unnecessary in any case to bestow ...and which in its vortex swallows up every other Government upon the Continent. In short, my fellow citizens, it can be said to be nothing less than a hasty stride to Universal Empire in this Western World, flattering, very flattering to young ambitious minds, but fatal to the liberties of the people..."<sup>13</sup>

"...Large and consolidated empires may indeed dazzle the eyes of a distant spectator with their splendour, but if examined more nearly are always found to be full of misery...We accordingly find that the very great empires have always been despotick."<sup>14</sup>

"...the progress of a commercial society begets luxury, the parent of inequality, the foe to virtue, and the enemy to restraint; and that ambition and voluptuousness aided by flattery, will teach magistrates, where limits are not explicitly fixed to have separate and distinct interests from the people..."<sup>15</sup>

"...The great easily form associations; the poor and middling class

form them with difficulty. If the elections be by plurality, — as probably will be the case in this state, — it is almost certain none but the great will be chosen, for they easily united their interests: the common people will divide, and their divisions will be promoted by the others. There will be scarcely a chance of their uniting in any other but some great man, unless in some popular demagogue, who will probably be destitute of principle. A substantial yeoman, of sense and discernment, will hardly ever be chosen..."<sup>16</sup>

*"This, sir, is the language of democracy — that a majority of the community have a right to alter government when found to be oppressive.... How different from the sentiments of freemen, that a contemptible minority can prevent the good of the majority!"*

*—Patrick Henry of Virginia*

"...We are told the objects of Section 9 are slaves, and that it is inserted to secure for the southern states the right of introducing negroes for twenty-one years to come, against the declared sense of the other states to put an end to an odious traffic in the human species, which is especially scandalous and inconsistent in a people, who have asserted their own liberty by the sword, and which dangerously enfeebles the districts wherein the laborers are bondsmen. The words, dark and ambiguous, such as no plain man of common sense would

have used, are evidently chosen to conceal from Europe, that in this enlightened country, the practice of slavery has its advocates among men in the highest stations...Has not the concurrence [at the convention] of the five southern states to the new system, been purchased too dearly by the rest..."<sup>17</sup>

#### V. What did the Anti-Federalists offer as alternative ways of thinking?

"What, sir, is the genius of democracy?...whenever any government shall be found inadequate, or contrary to those purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right to reform, alter, or abolish it, in such...manner as shall be judged most conducive to the public weal. This, sir, is the language of democracy — that a majority of the community have a right to alter government when found to be oppressive. But how different is the genius of your new Constitution from this? How different from the sentiments of freemen, that a contemptible minority can prevent the good of the majority!"<sup>18</sup>

"And while we are willing to establish a government adequate to the purposes of the Union, let us be careful to establish it on the broad basis of equal liberty."<sup>19</sup>

"What have you been contending for these ten years past? Liberty? What is liberty? The power of governing yourselves."<sup>20</sup>

Alas, we have not found advocates among Anti-Federalists for including women, Native peoples, African Americans, indentured servants, or other species and places, in We the People, with equal rights and equal opportunity to shape the democratic

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life of communities and the nation. But this does not negate that fact that many people across the 13 states read the Federalists' words with care, scrutinized their tactics, recognized the foundation for a universal commercial empire run by a relative few, and raised a great hue and cry.

Anti-Federalists were not perfect. But they saw the Federalist founders for what they were. Nowadays, wealth flows from global corporations richer than most counties to men of property who have fixed their gaze upon the whole Earth. In the US, the richest 2.7 million people are still in good shape: the top 1 percent possess "as many after-tax dollars" as the bottom 100 million people. "More than 90% of the increase" in national income belongs "to the richest 1 percent of householders."<sup>21</sup> This wealth defines elections, law-making, education, thought, life and death.



The constitution, writes Herbert Storing, editor of a 7 volume edition of Anti-Federalist thought, "did not settle everything. It did not finish the task of making the American polity." This is not what most lawyers, judges, politicians, educators and editors say, but is what millions and millions of people mobilizing against corporate assaults need to believe. We will never "finish the task," but the job of every generation is to pick up the struggle. And a clear leg up over 1787 is that the classes of people which the constitution, the Supreme Court and the culture had defined as property or non-existent are now legal persons — thanks to generations of their own vigorous political movements.

Over the last half-century, this majority has been organizing mostly defensive struggles against corporate violence. These have been necessary,

difficult and valiant struggles — closing toxic dumps, preserving forests, saving and creating jobs, raising the minimum wage, decreasing toxic chemicals, winning right-to-know, limiting budget cuts, ad infinitum...

But isn't it time to raise our aspirations? Anti-Federalists clearly answer YES. They encourage people to move beyond getting great corporations to cause a little less harm; beyond getting labor and environmental side agreements added to a corporate global constitution.

And they help people who wish to challenge governance by today's corporate men of property to understand the rules yesterday's propertied elite cemented into place.

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2. Howard Zinn, *A People's History of the United States*, New York: Harper & Row, 1980, pp. 79, 89.
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Hartford: S. S. Scranton and Company, 1875, p. 20.

4. Joyce Appleby, "The American Heritage: The Heirs and the Disinherited," *Journal of American History*, volume 74, number 3, December 1987.

5. "Centinel," (thought to be Samuel Bryan), Pennsylvania, in Kenyon p. 17

6. "One of the Well-Born Conspirators," Pennsylvania, in Storing, volume 3 p. 195.

7. "The Federal Farmer," Richard Henry Lee, Virginia, Ford p. 285

8. "The Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents," Pennsylvania, in Kenyon p. 31.

9. William Grayson, Virginia, in Kenyon p. 281-2.

10. James Lincoln, South Carolina, in Kenyon p. 184

11. Robert Yates, New York, in Kenyon p. 335.

12. Mercy Otis Warren, *On the New Constitution And on the Federal and State Conventions by a Columbian Patriot*, Massachusetts Historical Society.

13. "John De Witt," Massachusetts, in Kenyon p. 104-5.

14. "Agrippa," (John Winthrop?), Massachusetts, in Kenyon p. 133

15. "Cato," (George Clinton), New York, in Storing "What Were..." p. 75.

16. Melancton Smith, New York, in Kenyon p. 384.

17. Samuel Bryan, Pennsylvania, in Kenyon p. 23; [background note by Zinn: "For the purpose of uniting the thirteen states into one great market for commerce, the northern delegates wanted laws regulating interstate commerce, and urged that such laws require only a majority of Congress to pass. The South agreed to this, in return for allowing the trade in slaves to continue for twenty years..." - op. cit. p. 97].

18. Patrick Henry, Virginia, in Kenyon p. 246-7.

19. Melancton Smith, New York, in Kenyon p. 389.

20. James Lincoln, South Carolina, in Kenyon p. 184.

21. *New York Times*, 5 September 1999.

## After Seattle...

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- ◆ The majority must be able to amend bedrock doctrines and laws without waging a revolution every time;
- ◆ Mechanisms must exist to cut out of the body politic all institutions which improperly seize property and governing authority, or cause vast harms.

Overpowered and outmaneuvered by the Federalist founders, critics of the constitution yielded when promised a Bill of Rights. With spotlights on global production and trade deals revealing our constitution as the first NAFTA, our Bill of Rights stands exposed as the first diversionary "side agreement!" This is because, just as the labor and environmental "side agreements" did not alter NAFTA's basic undemocratic design, the Bill of Rights did *nothing* to change the very specific language of the constitution which empowered the propertied minority to rule.

For two centuries, people — especially those disinherited by the Federalist founders — have sought to use these first ten amendments to gain their rights and stop assaults by the wealthy and powerful. But to this day, the courts have not used the Bill of Rights to protect people from entities defined as "private" — such as corporations. That is why, for example, workers on corporate property enjoy no Bill of Rights powers such as freedom of speech and assembly. Indeed, the Bill of Rights has been used to *give even greater powers to the propertied* — as with the Supreme Court's creation and expansion of corporate "free speech."

What's more, invoking the Bill of Rights frequently requires appeals to property's safety net — the federal courts. Such appeals legitimate federal court authority — particularly the Supreme Court's — to nullify the laws of towns, cities and states (just as we legitimate the whole cockamamie NAFTA structure by invoking a NAFTA "side agreement" to save a worker or a tree). In other words, we empower the Supreme Court (or NAFTA) to amend the constitution. This is what Supreme Court justices did by ruling that the slave Dred Scott had no rights a court must respect because he was someone's property; that states could not control railroad corporations within their borders; that unions were criminal conspiracies; that the

*"With spotlights on global production and trade deals revealing our constitution as the first NAFTA, our Bill of Rights stands exposed as the first diversionary 'side agreement!'"*

14th amendment made the corporation a legal person; that speaking out against war was a crime.

The surface language of the US constitution is about We the People, our delegated authority, consent of the governed, the blessings of liberty. But the coercive power of the constitution is directed to limiting authority of the majority to make the rules for governing this country.

The surface language of the WTO is about the free trade of goods and services across national borders. But the coercive power of the WTO is directed to limiting the authority of the majority *in every country* to govern — that is, to control their own labor, spend their natural wealth, use their property, conserve their resources, structure their communities, define their institutions, choose their technologies. Backed by the military power of governments controlled by men of property (especially by the United States), the WTO is about enabling a few to rule over multitudes.

Let us all help get the WTO off the backs of other countries. But after Seattle, we'd best start changing the rules which the propertied minority put into our constitution two hundred years ago. Growing numbers of people have been exploring this challenge, but a definitive blueprint is yet to emerge. So there is great need for creative people from all walks of life to help frame this work.

As throughout human history, our collective task is protecting human rights over property privileges; empowering local, elected and public authority against private

and distant unilateral decree; nurturing democracy, equal opportunity and the Earth, as opposed to protecting the wealthy minority's "property rights" in governing, accumulating and denying others.

This minority uses elections, mayors, governors, legislatures, regulatory agencies, courts, police, armed forces, and the president to keep the people from assembling to make the rules for investment, production, work, property, and self-governance. We can replace the legal codes, judicial precedents, and corporate culture which enables them to do so.

It is up to We the People — now including whole classes (such as women, African Americans, workers, and Native peoples) who the culture, law and the Federalist Founders once defined as property — to define corporations as public instruments subordinate to the people, and not as private contracts.<sup>8</sup> Let us break the hold which dead Federalists and Supreme Court justices have maintained over our lives and this fragile Earth.

### Endnotes

1. Charles and Mary Beard, *The Rise of American Civilization*, volume 1, pp. 197-98.
2. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and Its Legacy*, Chicago: University of Chicago Press, 1994, p. 159.
3. Nedelsky, pp. 27-28.
4. Wealthy planters, land speculators, bondholders and slaveholders like Washington and Madison who sought a strong central government, and organized states to ratify the constitution (written largely by Madison), were known as "Federalists." Those who opposed these men and their constitution were labeled "Anti-Federalists." Among the most famous were Patrick Henry, Richard Henry Lee, Mercy Otis Warren. See page 3 in this issue for selections from Anti-Federalist writings..
5. Only after Madison's death were his detailed notes on the constitutional convention published..
6. The 17th amendment, ratified in 1913, replaced selection of senators by state legislators with direct election.
7. Electors appointed by each state — comprising the so-called "electoral college" — technically control selection of the president.
8. In an 1819 decision (*Trustees of Dartmouth College v. Woodward*, 4 Wheaton 518), the Supreme Court decreed that corporate charters were contracts which legislatures could not change.