

The Formation of the Constitution

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The creation of the United States Constitution-John Adams described the Constitutional Convention as "the greatest single effort of national deliberation that the world has ever seen"-was a seminal event in the history of human liberty. The story of that creation in the summer of 1787 is itself a significant aspect in determining the meaning of the document.

In June 1776, amid growing sentiment for American independence and after hostilities with the British army had commenced at Lexington, Massachusetts, Richard Henry Lee of Virginia introduced a resolution in the Second Continental Congress for the colonies to collectively dissolve political connections with Great Britain, pursue foreign alliances, and draft a plan of confederation. These actions resulted in the Declaration of Independence of 1776, the Franco-American Alliance of 1778, and the Articles of Confederation, which were proposed in 1777 and ratified in 1781.

From its conception, the inherent weaknesses of the Articles of Confederation made it awkward at best and unworkable at worst. Each state governed itself through elected representatives, and the state representatives in turn elected a weak national government. There was no independent executive, and the congress lacked authority to impose taxes to cover national expenses. Because all thirteen colonies had to ratify amendments, one state's refusal prevented structural reform; nine of thirteen states had to approve important legislation, which meant five states could thwart any major proposal. And although the congress could negotiate treaties with foreign powers, all treaties had to be ratified by the states.

The defects of the Articles became more and more apparent during the "critical period" of 1781-1787. By the end of the war in 1783, it was clear that the new system was, as George Washington observed, "a shadow without the substance." Weakness in international affairs and in the face of continuing European threats in North America, the inability to enforce the peace treaty or collect enough taxes to pay foreign creditors, and helplessness in quelling domestic disorder, such as Shays's Rebellion-all intensified the drive for a stronger national government.

If that were not enough, the Americans faced an even larger problem. Absolutely committed to the idea of popular rule, they knew that previous attempts to establish such a government had almost always led to majority tyranny-that of the overbearing many disregarding the rights of the few. In *The Federalist* No. 10, James Madison famously described this as the problem of faction, the latent causes of which are "sown in the nature of man." Previous solutions usually rendered government weak, and thus susceptible to all the problems with which the Founders were most concerned. This was the case in the individual states, which, dominated by their popular legislatures, routinely violated rights of property and contract and limited the independence of the judiciary.

In 1785, representatives from Maryland and Virginia, meeting at George Washington's Mount Vernon to discuss interstate trade, requested a meeting of the states to discuss trade and

commerce generally. Although only five states met at Annapolis in 1786, James Madison and Alexander Hamilton used the failed conference to issue a clarion call for a general convention of all the states "to render the constitution of government adequate to the exigencies of the Union." After several states, including Virginia and Pennsylvania, chose delegates for the meeting, the congress acquiesced with a narrower declaration that the "sole and express purpose" of the upcoming Convention would be to revise the Articles of Confederation.

The next year, from May 25 to September 17, 1787, state delegates met in what is now called Independence Hall, in Philadelphia, Pennsylvania-as it says in the Constitution's Preamble-to "form a more perfect Union." It was an impressive group. Not only were there leaders in the fight for independence, such as Roger Sherman and John Dickinson, and leading thinkers just coming into prominence, such as Madison, Hamilton, and Gouverneur Morris, but also already-legendary figures, such as Washington and Benjamin Franklin. Every state was represented, except for one: Rhode Island, fearful that a strong national government would injure its lucrative trade, opposed revising the Articles of Confederation and sent no delegates. Patrick Henry and Samuel Adams, both of whom opposed the creation of a strong central government, did not attend. Notably absent were John Jay, who was then U.S. secretary of foreign affairs, and John Adams and Thomas Jefferson, who were out of the country on government missions. Nonetheless, Jefferson described the gathering as "an assembly of demigods."

The Constitutional Convention

As its first order of business, the delegates unanimously chose Washington as president of the Convention. Having initially hesitated in attending the Convention, once decided, Washington pushed the delegates to adopt "no temporizing expedient" but instead to "probe the defects of the Constitution to the bottom, and provide radical cures." While they waited in Philadelphia for a quorum, Washington presided over daily meetings of the Virginia delegation (composed of Washington, George Mason, George Wythe, John Blair, Edmund Randolph, James McClurg, and James Madison) to consider strategy and the reform proposals that would become the plan presented at the outset of the Convention. Although he contributed to formal debate only once at the end of the Convention, Washington was actively involved throughout the three-and-a-half-month proceedings.

There were three basic rules of the Convention: voting was to be by state, with each state, regardless of size or population, having one vote; proper decorum was to be maintained at all times; and the proceedings were to be strictly secret. To encourage free and open discussion and debate, the Convention shifted back and forth between full sessions and meetings of the Committee of the Whole, a parliamentary procedure that allowed informal debate and flexibility in deciding and reconsidering individual issues. Although the Convention hired a secretary, the best records of the debate-and thus the most immediate source of the intended meaning of the clauses-are the detailed notes of Madison, which, in keeping with the pledge of secrecy, were not published until 1840.

As soon as the Convention agreed on its rules, Edmund Randolph of the Virginia delegation presented a set of fifteen resolutions, known as the Virginia Plan, which set aside the Articles of Confederation and created in its stead a supreme national government with separate legislative, executive, and judicial branches. This was largely the work of James Madison, who came to the Convention extensively prepared and well-versed in the ancient and modern history of republican government. (See his memorandum on the "Vices of the Political System of the

United States.") The delegates generally agreed on the powers that should be lodged in a national legislature, but disagreed on how the states and popular opinion should be reflected in it. Under the Virginia Plan, population would determine representation in each of the two houses of Congress.

To protect their equal standing, delegates from less-populous states rallied around William Paterson's alternative New Jersey Plan to amend the Articles of Confederation, which would preserve each state's equal vote in a one-house Congress with slightly augmented powers. When the delegates rejected the New Jersey Plan, Roger Sherman proffered what is often called "the Great Compromise" (or the Connecticut Compromise, after Sherman's home state) that the House of Representatives would be apportioned based on population and each state would have an equal vote in the Senate. A special Committee of Eleven (one delegate from each state) elaborated upon the proposal, and then the Convention adopted it. As a precaution against having to assume the financial burdens of the smaller states, the larger states exacted an agreement that revenue bills could originate only in the House, where the more populous states would have greater representation.

In late July, a Committee of Detail (composed of John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania) reworked the resolutions of the expanded Virginia Plan into a draft Constitution; the text now included a list of eighteen powers of Congress, a "necessary and proper" clause, and a number of prohibitions on the states. Over most of August and into early September, the Convention carefully worked over this draft and then gave it to a Committee of Style (William Johnson of Connecticut, Alexander Hamilton of New York, Gouverneur Morris of Pennsylvania, James Madison of Virginia, and Rufus King of Massachusetts) to polish the language. The notable literary quality of the Constitution, most prominently the language of the Preamble, is due to Morris's influence. The delegates continued revising the final draft until September 17 (now celebrated as Constitution Day), when delegates signed the Constitution and sent it to the Congress of the Confederation, and the Convention officially adjourned.

Some of the original fifty-five delegates had returned home over the course of the summer and were not present at the Convention's conclusion. Of the forty-one that were, only three delegates—Edmund Randolph and George Mason of Virginia and Elbridge Gerry of Massachusetts—opposed the Constitution and chose not to sign. Randolph (who had introduced the Virginia Plan) thought in the end that the Constitution was not sufficiently republican, and was wary of creating a single executive. Mason and Gerry (who later supported the Constitution and served in the First Congress) were concerned about the lack of a declaration of rights. Despite these objections, George Washington thought that it was "little short of a miracle" that the delegates had agreed on a new Constitution. Thomas Jefferson, who was also concerned about the lack of a bill of rights, nevertheless wrote that the Constitution "is unquestionably the wisest ever yet presented to men."

On September 28, Congress sent the Constitution to the states to be ratified by popular conventions. *See* Article VII (Ratification). Delaware was the first state to ratify the Constitution, on December 7, 1787; the last of the thirteen original colonies to ratify was Rhode Island, on May 29, 1790, two-and-a-half years later. It was during the ratification debate in the state of New York that Hamilton, Madison, and John Jay wrote a series of newspaper essays under the pen name of Publius, later collected in book form as *The Federalist*, to refute the arguments of the Anti-Federalist opponents of the proposed Constitution. With the ratification by the ninth state—New Hampshire, on June 21, 1788—Congress passed a resolution to make the new Constitution

operative, and set dates for choosing presidential electors and the opening session of the new Congress.

There had been some discussion among the delegates of the need for a bill of rights, a proposal that was rejected by the Convention. The lack of a bill of rights like that found in most state constitutions, however, became a rallying cry for the Anti-Federalists, and the advocates of the Constitution (led by James Madison) agreed to add one in the first session of Congress. Ratified on December 15, 1791, the first ten amendments-called the Bill of Rights-include sweeping restrictions on the federal government and its ability to limit certain fundamental rights and procedural matters. The Ninth and Tenth Amendments briefly encapsulate the twofold theory of the Constitution: the purpose of the Constitution is to protect rights, which stem not from the government but from the people themselves; and the powers of the national government are limited to only those delegated to it by the Constitution on behalf of the people.

Auxiliary Precautions

In addition to the provisions of the document, three important unstated mechanisms are at work in the Constitution: the extended Republic, the separation of powers, and federalism. The Founders believed that citizen virtue was crucial for the success of republican government but they knew that passion and interest were permanent parts of human nature and could not be controlled by parchment barriers alone. "A dependence on the people is, no doubt, the primary control on the government," Madison explained in *The Federalist* No. 51, "but experience has taught mankind the necessity of auxiliary precautions." Rather than hoping for the best, the Founders designed a system that would harness these opposite and rival interests to supply "the defect of better motives."

The effect of representation-of individual citizens being represented in the government rather than ruling through direct participatory democracy-is to refine and moderate public opinion through a deliberative process. Extending the Republic, literally increasing the size of the nation, would take in a greater number and variety of opinions, making it harder for a majority to form on narrow interests contrary to the common good. The majority that did develop would be more settled and, by necessity, would encompass (and represent) a wider diversity of opinion. This idea that bigger is better reversed the prevailing assumption that republican government could work only in small states.

The Founders also knew, again as Madison explained in *The Federalist* No. 48, that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." In order to distribute power and prevent its accumulation, they created three separate branches of government, each performing its own functions and duties and sharing a few powers-as when the President shares the legislative power through the veto-so that they would have an incentive to check each other. Jefferson called the "republican form and principles of our Constitution" and "the salutary distribution of powers" in the Constitution the "two sheet anchors of our Union." "If driven from either," he predicted, "we shall be in danger of foundering."

And although national powers were clearly enhanced by the Constitution, the federal government was to exercise only delegated powers, the remainder being reserved to the states or the people. Despite the need for additional national authority, the Framers remained distrustful of

government in general and of a centralized federal government in particular. "The powers delegated by the proposed Constitution to the federal government are few and defined," Madison wrote in The Federalist No. 45. "Those which are to remain in the State governments are numerous and indefinite." To give the states more leverage against the national government, equal state representation in the Senate was blended into the national legislature (and guaranteed in Article V). "This balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of the utmost importance," Hamilton argued at the New York state ratifying convention. "It forms a double security to the people. If one encroaches on their rights they will find a powerful protection in the other. Indeed, they will both be prevented from overpassing their constitutional limits by a certain rivalry, which will ever subsist between them."

A Momentous Work

When the Constitutional Convention assembled on the morning of September 17, 1787, the completed document was read aloud to the delegates for one last time. Thereupon Benjamin Franklin, the eighty-one-year-old patriarch of the group, rose to speak. He declared his support for the new Constitution-"with all its faults, if they are such"-because he thought a new government was necessary for the young nation. Franklin continued:

I doubt too whether any other convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an Assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does; and I think it will astonish our enemies. . . . Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best.

As the delegates came forward, one at a time, to sign their names to the final document, Madison recorded Franklin's final comment, just before the Constitutional Convention was dissolved. Referring to the sun painted on the back of Washington's chair, Franklin said that he had

often in the course of the Session, and the vicissitudes of my hopes and fears as to its issue, looked at that behind the President without being able to tell whether it was rising or setting. But now at length I have the happiness to know that it is a rising and not a setting Sun.

"The business being thus closed," George Washington recorded in his private diary, the delegates proceeded to City Tavern, where they

dined together and took a cordial leave of each other; after which I returned to my lodgings, did some business with and received the papers from the Secretary of the Convention, and retired to meditate on the momentous work which had been executed. . . .

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