
CHAPTER 1

INTRODUCTION TO THE CONSTITUTION

[Assignment 1]

I. BEFORE THE CONSTITUTION

The Constitution of the United States is a distinctively American innovation and achievement. In the famous case of *Marbury v. Madison*, Chief Justice John Marshall commented approvingly on what he deemed to be “the greatest improvement on political institutions—a written constitution.” 5 U.S. (1 Cranch) 137, 178 (1803). Indeed, the Constitution of the United States was the first written constitution to have three features: it created a national government; it was deliberately considered and adopted by the people; and it was designed to be binding as supreme law on all who would exercise governmental power under it.

The structure of government created by the Constitution was also distinctive. Its features include: the separation of powers among independent, co-equal branches of government, each being able to “check and balance” the others; federalism, in the sense of a division of power between a central government and the governments of several states; a written Bill of Rights to protect certain fundamental liberties against government interference; and popular sovereignty expressed through representative, republican government. The Constitution combined all four of these into a single supreme law.

Yet the Constitution did not spring to life out of nothing. Its arrangements of powers and rights had many sources. The immediate sources from the American experience included the corporate charters that were governing documents for the colonies, the ideological upheavals of the American War for Independence, the experiments of the first state constitutions, and the largely failed government under the Articles of Confederation. The Articles were actually the first national “constitution,” proposed by the Continental Congress in 1777 and ratified in 1781. The defects of the Articles led to the call for a constitutional convention. That convention, held in Philadelphia in 1787, proposed an entirely new governing document. That document is the Constitution we have today (with twenty-seven amendments). The debate in 1787 and 1788 over ratification of the Constitution was heated, and the vote to ratify was very close in many states. Ratification ultimately depended on promises to propose the Bill of Rights, which was adopted as part of the Constitution in 1791, two years after the new national government had come into existence under the Constitution.

Thus the Constitution was the culmination of this nation-making process, from the start of the American War for Independence in 1776 until the ratification of the Bill of Rights in 1791. And the roots of the Constitution lie deeper still, in events of the century and a half between the Jamestown settlement in 1607 and the Declaration of Independence in 1776. Before 1776 the colonists were Englishmen,

and so, to understand the Constitution they drafted, the place to begin is the English constitutional tradition.

English and American Constitutionalism

Americans were heirs to an English constitutional tradition that had emerged over centuries. In that tradition, a central “constitutional” event—one that at the time of the founding of the United States had happened only a century before—was the Glorious Revolution of 1688. In that revolution, the English overthrew the Stuart dynasty of King James II and established the supremacy of Parliament. The following year, Parliament enacted a statute that recognized a set of individual rights against the king, a statute known as the English Bill of Rights of 1689.

To compress drastically, the Glorious Revolution thus restored fundamental individual rights against executive authority, established the supremacy of representative government, and proclaimed that legitimate government must ultimately depend on the consent of the governed. This last principle was understood in 1688 (and again by the Americans in 1776) as implying a constitutional right of the people to alter or abolish their form of government and to create a new social contract. The chief defender of the Glorious Revolution was English political philosopher John Locke, especially in his *TWO TREATISES OF GOVERNMENT* (1690). Locke argued that freedom, not monarchy, was the natural condition of man. Yet people, wanting more security than they had in the state of nature, were willing to trade away some of their natural rights (to a government) in order to preserve all their other rights. That argument—that the true basis of government is not the divine right of kings, or force, but rather a social contract—was taken to heart by the American colonists. The rights that had been secured by the Glorious Revolution—including not only individual rights like those protected by the English Bill of Rights, but even the right of revolution to preserve those individual rights—were all features of the English constitutional tradition as it was known to American Englishmen in the late eighteenth century.

Although that tradition was largely unwritten, it did contain several important documents. These included (1) the Charter of Liberties of King Henry I of 1100, establishing that there was no Norman royal power to suspend the preexisting Anglo-Saxon laws; (2) Magna Carta (“Great Charter”) of 1215, declaring among other things that the king had no royal power to deprive freeholders of life, liberty, or property except by “the law of the land”; (3) the Petition of Right of 1628, holding that there was no royal power of taxation without action by Parliament and no royal power to imprison subjects without trial by jury; (4) the Habeas Corpus Act of 1679, declaring that there was no royal power to imprison without trial by jury; (5) the English Bill of Rights of 1689, protecting rights to be governed by law, to be tried by a jury, to petition for a writ of habeas corpus, and to be represented in any legislative body that possessed the power to enact taxes; and (6) the Act of Settlement of 1701, providing life tenure for English judges.

As important as these documents were as elements of the English “constitution” (understood as a collection of written and unwritten traditions and practices), none of these documents purported to establish a comprehensive, supreme written constitution as the definitive instrument of government. None of them recognized the sovereignty of the people. The earlier documents were agreements by the king to limit or restrain his own sovereignty, and the later ones were agreements embodying

a division of sovereignty between the king and Parliament. None purported to be the one supreme law of the land, and it is even doubtful that all of them were enforceable in court.

Nor did these documents limit the power of Parliament. Parliament consisted of two houses, the House of Lords and the House of Commons, and together with the king these were said to represent the three great estates of the realm: the monarchy (king), the aristocracy (Lords), and the people (Commons). When the king and Parliament acted together, they embodied the entire sovereignty of the English nation, and they were not limited by the English constitutional tradition. They could alter that tradition even by passing an ordinary law—as they did in passing the English Bill of Rights of 1689.

The premises of the U.S. Constitution are quite different. First, the preamble to the Constitution says, “We the People . . . do ordain and establish this Constitution.” Thus sovereignty rests not in a king or legislative body but in the people. The Constitution is a delegation of power from the people, and all government actions must find their root in some grant of power it contains. Second, the Constitution is “the supreme Law of the land” (Article VI) and it can be amended only through the processes that it lays out (Article V). It cannot be changed merely by the agreement of Congress, the president, and the courts.

One consequence is a change in the relative importance of text and tradition. Both constitutional systems rely on text and on tradition. In England, the written constitutional documents are islands of text in a sea of unwritten tradition. In the United States, the written constitutional text—of the original Constitution and the twenty-seven amendments—is like a great continent, a land mass with scattered lakes and ponds and rivers of tradition. The relative importance of text in the United States means that two questions are central: “What does the written Constitution mean?” and “Who gets to interpret it?”

American Antecedents to the Constitution

On the American side of the Atlantic, the antecedents to the Constitution included the corporate charters that established various colonies, the Declaration of Independence, the Articles of Confederation, and the early state constitutions.

The English colonies in North America were governed by corporate charters. A charter defined the powers of the colonial governor and proprietors, and also the rights of colonists. In a sense, they were like ordinary contracts. But they were also prototypes for written constitutions. Some of these charters were issued by the king of England and functioned like articles of incorporation for the societies that colonized certain settlements. Other charters, like the Mayflower Compact, were drafted by the settlers themselves as they disembarked and as colonial life unfolded.

These charters were antecedents of the Constitution in at least two respects. First, they divided power horizontally between royal governors and the popularly elected lower houses of colonial legislatures—a proto-separation of powers. Second, they divided power vertically between the imperial government in London and the colonial governments in the thirteen original colonies—a proto-federalism, with London making decisions about foreign policy, defense, and the regulation of colonial trade while more local powers were devolved to the colonies. As grants from the king, however, colonial charters did not recognize the sovereignty of the people.

In the 1760s, tensions rose between the thirteen colonies and England. In the French and Indian War, England had conquered French Canada, adding the province of Quebec to the empire. But the war was costly. The new king, George III, sought to tax the American colonies in part to pay for the costs of defending them. But the colonists had largely avoided English taxation until the 1760s. They were determined not to acquiesce.

By 1776, the American colonists were outraged about what they perceived as imperial and royal tyranny. They thought it improper for the English government to tax them as long as they were not represented in Parliament. And they accused King George III of being a tyrant, insinuating that he resembled the Stuart dynasty that had been overthrown in the Glorious Revolution. That resemblance suggested another one: the colonists were the defenders of English liberty. History, they thought, was repeating itself.

The grievances of the colonists, and their claims to be defending their English rights, culminated in the Declaration of Independence (1776). Drawing on the ideas expounded a century earlier by Locke, the Declaration proclaimed not only the existence of “self-evident” natural rights to “life, liberty, and the pursuit of happiness” bestowed by the Creator, but also the right of the people to abolish a government that became abusive and tyrannical. To prove that the English government was in fact tyrannical, the Declaration recites a long train of abuses committed by King George III. (Strikingly, the Declaration never mentions abuses of power by Parliament. The omission reflected the colonists’ greater concern with royal tyranny, and also the fact that the colonists denied that Parliament had any power over them since they were not represented in it.) It was widely thought that the right to alter and abolish old governments could be accomplished only through a solemn public act—and that is what the Declaration held itself out to be. In the words of its conclusion, the “Representatives of the united States of America” were undertaking to “solemnly publish and declare, That these United Colonies are, and of Right ought to be, Free and Independent States.”

The Declaration asserted the powers of these “Independent States” to “levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” What this apparently meant in practice was that these powers could be exercised by *each* of the newly independent states. But there was not yet any framework for a common government that would, at least on some questions, unite the colonies.

In the meantime, the states—that term is now appropriate—were drafting their own constitutions. Between 1776 and the writing of the Constitution in 1787, eleven of the thirteen newly independent states drew up constitutions, and all of them did so while keeping in mind the 1776 problem of executive tyranny. In many of these constitutions, governors lost their veto, appointment, and pardon powers, and they often served only short terms. Power was concentrated in the state legislatures, which were seen as closer to the people. Many of these constitutions included a declaration of rights or bill of rights. For example, the 1776 constitution for Pennsylvania declared that “all men are born equally free and independent, and have certain natural, inherent and inalienable rights.” It also declared a number of the specific rights of the people of Pennsylvania. For example, “that all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding”; that the government is “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 sett of men, who are a part only of that community”; “that all elections ought to be free”; “that the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure”; “that the people have a right to freedom of speech, and of writing, and publishing their sentiments”; and “that the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up.”

Finally, there was a first experiment in drafting a constitution for all of the states. This experiment in common government was “the Act of Confederation of the United States of America,” commonly referred to as the Articles of Confederation. The Articles were proposed in 1777. But it was not until 1781—after General Cornwallis had surrendered the British army to General Washington at Yorktown, Virginia—that the Articles were approved by all thirteen states. You should now read the Articles of Confederation (p. 1673). As you read, ask yourself how the government it established differs from the government of the United States today. List the ways. Are there features of the government under the Articles of Confederation that you think the Constitution should have kept but did not? What defects can you detect in the government set up by the Articles of Confederation? Are you surprised that the Articles were eventually replaced?

In reading the Articles of Confederation, you probably noticed that the text begins as if it were a treaty among thirteen sovereigns. Indeed, it explicitly states that “[e]ach 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” (Article II), and that the states “hereby severally enter into a firm league of friendship with each other” (III). The Articles provided for travel and trade between states (IV). The Articles also established a framework for a general government consisting of a unicameral Congress in which each of the thirteen states received one vote, no matter how large the state and no matter how large its congressional delegation (V). Members of Congress were paid by, and could be recalled by, the state governments they represented. The Articles also regulated treaties, duties, and war expenses (VI, VII, VIII)—but revenue was raised through the collection of taxes by the states, an arrangement that proved greatly problematic as it made the “common treasury” of the nation dependent on the separate action, authority, and good faith of each of the states. The Articles also described the powers of the “united states in congress assembled” (IX). And the Articles concluded by declaring that “the union shall be perpetual” and providing for amendments (XIII).

In the fight for independence, the deficiencies of the central government, first under the Continental Congress and then under the Articles of Confederation, became evident. The rule that each state had a single vote made Congress more like an assembly of independent nations—an eighteenth-century United Nations—than a representative legislature for the nation. Combined with the requirement that nine out of thirteen states had to agree on significant matters, this rule meant that Congress could be at the mercy of a small minority. Congress even struggled with

the quorum requirement for ordinary business; it usually lacked representatives from a bare majority of the states.

Moreover, even when Congress could agree, it had little practical authority to enforce its enactments. The central government was completely dependent on the states, which had all of the real power. As Chief Justice John Marshall would later recall, “The confederation was, essentially, a league; and congress was a corps of ambassadors, to be recalled at the will of their masters. . . . They had a right to propose certain things to their sovereigns, and to require a compliance with their resolution; but they could, by their own power, execute nothing.” Marshall’s “A Friend of the Constitution” Essays, No. 7 (July 9, 1819), *reprinted in* JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND 196, 199 (Gerald Gunther ed., 1969). This failure of execution soon became evident. The commands of the Articles of Confederation were not “inviolably observed by every state” but were in fact frequently disregarded. No state paid all that it owed for keeping up the government under the Articles, and one state, Georgia, never paid a cent.

Nor could the defects of the Articles of Confederation be easily remedied. As provided in Article XIII, changes to the Articles required the approval not only of Congress, but also of every one of the state legislatures.

Thus it was unsurprising that there were many striking failures of government under the Articles of Confederation. General Washington had trouble fighting the Revolutionary War because Congress second-guessed his decisions on troop movements and strategy. Congress, unable to tax the states or the people directly, was always short of funds and even failed to pay Washington’s soldiers. And Congress lacked the power to regulate trade between the thirteen states or with foreign powers. Declining trade in the war and its aftermath led to an economic crisis. In this crisis, many debtors faced foreclosure and utter economic ruin (not to mention very high court costs). Outbursts of violence against debt collection, such as Shays’ Rebellion in Massachusetts, frightened property owners. One response by Congress and the states—printing paper money—led to severe inflation, which worsened the economic situation still further. Many merchants found themselves ruined, while some debtors were effectively absolved of their debts by the inflation. And state legislatures threatened to abuse their nearly absolute powers by cancelling debts and further inflating the currency, dashing the hopes of those who thought that legislatures would always be friendly to liberty. Many feared that the bankrupt, incompetent central government under the Articles of Confederation would even be too weak to prevent invasion by a foreign power. Nor was this an idle fear. The army fielded by Congress “had shrunk to some 625 unpaid, poorly equipped men, mostly in western Pennsylvania. . . . The United States was becoming ‘the sport of transatlantic politicians of all denominations.’” Pauline Maier, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788* 13 (2010) (quoting John Adams).

By 1786—a mere decade after the Declaration of Independence—it seemed that the experiment of American independence was on the verge of failure. At last Congress agreed to call for a special convention of representatives from each state to consider revisions to the Articles of Confederation. The call produced a convention that met in Philadelphia in 1787.

The Convention and Ratification

The Constitution of the United States was drafted by a convention of fifty-five distinguished citizens assembled in Philadelphia during the hot summer of 1787. The Philadelphia Convention was chaired by (retired) General George Washington. The delegates agreed to keep their proceedings secret—something almost inconceivable today—to enable more vigorous debate and to conceal their disagreements. Accordingly, what we know about the proceedings comes from a few journals kept by those present, especially the notes of James Madison (called *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*), which were published after his death, nearly forty years later. The authoritative collection of these journals and records is *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1911).

The Philadelphia Convention was called for the seemingly narrow purpose of proposing revisions to the Articles of Confederation. But what it produced was dramatically different: a proposal for an entirely new “Constitution of the United States.” The document proposed by the Philadelphia Convention stated in its concluding Article that “[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.” The document thus proposed a different form of national government than had existed under the Articles of Confederation and specified that it would take effect in a manner different from what the Articles of Confederation required for amendment—the *unanimous* concurrence of the *legislatures* of each state.

In many ways the Constitution was a compromise. In the eleven years between 1776 and 1787, attitudes had changed enormously. Where Americans once feared executive and national tyranny, many now feared legislative and local tyranny, and the solution seemed to be a strengthened national government and greater executive power. The Constitution was shaped by these cross-cutting fears. It created a powerful national government, yet that government was given only limited and enumerated powers; it created an executive more powerful than any executive under the state constitutions or the Articles of Confederation, yet that executive was not nearly as powerful as King George III.

At Philadelphia the framers made at least five major decisions. First, they greatly expanded national power. For example, they gave the proposed government the power to regulate commerce and the power to tax and spend to promote the general welfare. The framers decided that members of Congress under the new Constitution would be officers of the national government, with fixed terms and salaries paid by the national treasury. And Congress could legislate upon and directly tax citizens.

Second, in a decision called The Great Compromise, the framers agreed that the new government would have a bicameral legislature with each state having equal representation in the Senate and with representation in the House of Representatives based on each state’s population. This was a deal between the more populous states, such as Virginia, which wanted representation based on population; and the less populous ones, such as New Jersey, which wanted a rule of “one state, one vote” as under the Articles of Confederation.

Third, the framers voted to create separate executive and judicial branches of the national government. It was decided that the executive branch would be led by a

single president of the United States who was to be selected independently of Congress and guaranteed a four-year term. The president was even given a veto, which English monarchs effectively lacked. With respect to the judiciary, the framers voted to create a national Supreme Court, and Congress was given the power to create inferior courts. (No permanent national courts had existed in the government under the Articles of Confederation.)

Fourth, the framers wrangled over and finally reached an unhappy compromise with respect to slavery. Southern states disenfranchised their large slave populations but nonetheless wanted the slaves to count for apportioning seats in the House of Representatives and for votes for the president in the Electoral College. Northern states objected. The compromise adopted was that a slave would be counted as three-fifths of a person, and a clause would be added that imposed a duty to return fugitive slaves. The appeasement of slaveholders was the great tragedy in the work of the framers at Philadelphia.

Fifth, as mentioned above, the framers wrote the Constitution so that it would go into effect upon ratification by only nine of the thirteen states. This provision in Article VII was explicitly contrary to the Articles of Confederation, which could be amended only by unanimous agreement. Article V specified that the Constitution would be amendable by a two-thirds vote of both houses of Congress coupled with ratification by three-quarters of the states. Even though this was a step toward easier amendment, it is today regarded as one of the most difficult amendment processes of any constitution in the world.

The Convention began on May 25, 1787. It adjourned on September 17. The final text incorporating these five fundamental decisions was drafted by a Committee of Detail and by a Committee of Style and Arrangement which included among others Gouverneur Morris, Alexander Hamilton, and James Madison. Given the amount of work accomplished by the fifty-five delegates in this short time and the impact it would have on the United States and the world, the Convention has been called the Miracle at Philadelphia. It bears remembering, though, that the framers were building on a centuries-old constitutional tradition in England and the colonies, and also on the experience since 1776.

The Convention's proposal of the Constitution spurred debate in the thirteen states over whether it should be adopted. The most famous contribution to this debate was *The Federalist*, a series of eighty-five newspaper articles written by Alexander Hamilton, James Madison, and John Jay, all under the name "Publius." These articles urged the people of the state of New York to ratify the Constitution. (They were then collected in rough book form and sent to Virginia for that critical state's ratification debates.) Written in a rush of time and as explicit advocacy documents, *The Federalist* has nonetheless come to be regarded as one of the most important and influential treatises on the meaning of the Constitution. Below are excerpts from *The Federalist No. 1*, which is Hamilton's famous call for careful deliberation about the defects of the Articles of Confederation and the need for the new constitution; and *The Federalist Nos. 40* and *43*, which are Madison's defense of the Convention's proposal of a document that went beyond mere revision of the Articles and departed from the unanimity rule for amendment.

As you read these passages, consider the legality of the Constitution's adoption. Did it violate the rules for amendment specified by the Articles? Was it an exercise

of the right of the people to abolish their government, like the Glorious Revolution of 1688 and the American Revolution of 1776? If so, was the Constitution an act of revolution? Or was it like states withdrawing from a treaty and forming a new nation? Thankfully, these are no longer live questions. The Constitution was eventually ratified by all the states and is now accepted by all as the United States' fundamental governing document. Still, understanding the change from the Articles to the Constitution may help us understand whether and how we can change the Constitution.

The Federalist No. 1

Alexander Hamilton, Oct. 27, 1787

To the People of the State of New York.

AFTER an unequivocal experience of the inefficacy of the subsisting Fœderal Government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences, nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire, in many respects, the most interesting in the world. It has been frequently remarked, that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force. If there be any truth in the remark, the crisis, at which we are arrived, may with propriety be regarded as the æra in which that decision is to be made; and a wrong election of the part we shall act, may, in this view, deserve to be considered as the general misfortune of mankind. . . .

Among the most formidable of the obstacles which the new Constitution will have to encounter, may readily be distinguished the obvious interest of a certain class of men in every State to resist all changes which may hazard a diminution of the power, emolument and consequence of the offices they hold under the State establishments—and the perverted ambition of another class of men, who will either hope to aggrandise themselves by the confusions of their country, or will flatter themselves with fairer prospects of elevation from the subdivision of the empire into several partial confederacies, than from its union under one government. . . .

I propose, in a series of papers, to discuss the following interesting particulars—*The utility of the UNION to your political prosperity—The insufficiency of the present Confederation to preserve that Union—The necessity of a government at least equally energetic with the one proposed to the attainment of this object—The conformity of the proposed constitution to the true principles of republican government—Its analogy to your own state constitution—and lastly, The additional security, which its adoption will afford to the preservation of that species of government, to liberty and to property.*

In the progress of this discussion I shall endeavor to give a satisfactory answer to all the objections which shall have made their appearance that may seem to have any claim to your attention.

It may perhaps be thought superfluous to offer arguments to prove the utility of the UNION, a point, no doubt, deeply engraved on the hearts of the great body of the

people in every state, and one, which it may be imagined has no adversaries. But the fact is, that we already hear it whispered in the private circles of those who oppose the new constitution, that the Thirteen States are of too great extent for any general system, and that we must of necessity resort to separate confederacies of distinct portions of the whole. This doctrine will, in all probability, be gradually propagated, till it has votaries enough to countenance an open avowal of it. For nothing can be more evident, to those who are able to take an enlarged view of the subject, than the alternative of an adoption of the new Constitution, or a dismemberment of the Union. It will therefore be of use to begin by examining the advantages of that Union, the certain evils and the probable dangers, to which every State will be exposed from its dissolution. This shall accordingly constitute the subject of my next address.

The Federalist No. 40

James Madison, Jan. 18, 1788

To the People of the State of New York.

THE *second* point to be examined is, whether the convention were authorised to frame and propose this mixed Constitution.

The powers of the Convention ought in strictness to be determined, by an inspection of the commissions given to the members by their respective constituents. As all of these however had reference, either to the recommendation from the meeting at Annapolis in September 1786, or to that from Congress in February, 1787, it will be sufficient to recur to these particular acts. [*The Annapolis meeting had been held to discuss the need for uniform regulations of commerce. Five states were represented. Its one accomplishment was calling for a convention, to be held the following year in Philadelphia, that would propose revisions to the Articles of Confederation.—Editors*]

The act from Annapolis recommends the “appointment of commissioners to take into consideration, the situation of the United States, to devise *such further provisions* as shall appear to them necessary to render the Constitution of the Fœderal Government *adequate to the exigencies of the Union*; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the Legislature of every State, will effectually provide for the same.”

The recommendatory act of Congress is in the words following: “Whereas there is provision in the articles of confederation and perpetual Union, for making alterations therein, by the assent of a Congress of the United States, and of the Legislatures of the several States: And whereas experience hath evinced, that there are defects in the present confederation, as a mean to remedy which, several of the States, and *particularly the State of New-York*, by express instructions to their delegates in Congress, have suggested a Convention for the purposes expressed in the following resolution; and such Convention appearing to be the most probable mean of establishing in these States, *a firm national government*.

“Resolved, That in the opinion of Congress, it is expedient, that on the 2d Monday in May next, a Convention of delegates, who shall have been appointed by the several States, be held at Philadelphia, for the sole and express purpose of *revising the articles of confederation*, and reporting to Congress and the several

Legislatures, such *alterations and provisions therein*, as shall, when agreed to in Congress, and confirmed by the States, render the Fœderal Constitution *adequate to the exigencies of government and the preservation of the Union.*”

From these two acts, it appears, 1st. that the object of the Convention was to establish in these States, *a firm national government*; 2d. that this Government was to be such as would be *adequate to the exigencies of government and the preservation of the Union*; 3d. that these purposes were to be effected by *alterations and provisions in the articles of confederation*, as it is expressed in the act of Congress, or by *such further provisions as should appear necessary*, as it stands in the recommendatory act from Annapolis; 4th. that the alterations and provisions were to be reported to Congress, and to the States, in order to be agreed to by the former, and confirmed by the latter.

From a comparison and fair construction of these several modes of expression, is to be deduced the authority, under which the Convention acted. They were to frame a *national government*, adequate to the *exigencies of government, and of the Union*, and to reduce the articles of confederation into such form as to accomplish these purposes. . . .

We have seen that in the new government, as in the old, the general powers are limited; and that the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.

The truth is, that the great principles of the Constitution proposed by the Convention, may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation. The misfortune under the latter system has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it; and to require a degree of enlargement which gives to the new system, the aspect of an entire transformation of the old.

In one particular it is admitted that the Convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation of *the Legislatures of all the States*, they have reported a plan which is to be confirmed by the *people*, and may be carried into effect by *nine States only*. It is worthy of remark, that this objection, though the most plausible, has been the least urged in the publications which have swarmed against the Convention. The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of 12 States, to the perverseness or corruption of a thirteenth; from the example of inflexible opposition given by *a majority of 1-60th of the people of America [i.e., Rhode Island—Editors]*, to a measure approved and called for by the voice of twelve States, comprising 59-60ths of the people; an example still fresh in the memory and indignation of every citizen who has felt for the wounded honor and prosperity of his country. As this objection, therefore, has been in a manner waived by those who have criticised the powers of the Convention, I dismiss it without further observation. . . .

The *third* point to be enquired into is, how far considerations of duty arising out of the case itself, could have supplied any defect of regular authority. . . .

Let us view the ground on which the Convention stood. It may be collected from their proceedings, that they were deeply and unanimously impressed with the crisis which had led their country almost with one voice to make so singular and solemn an experiment, for correcting the errors of a system by which this crisis had been

produced; that they were no less deeply and unanimously convinced, that such a reform as they have proposed, was absolutely necessary to effect the purposes of their appointment. . . . They must have borne in mind, that as the plan to be framed and proposed, was to be submitted *to the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities. . . .

But that the objectors may be disarmed of every pretext, it shall be granted for a moment, that the Convention were neither authorised by their commission, nor justified by circumstances, in proposing a Constitution for their country: Does it follow that the Constitution ought for that reason alone to be rejected? If according to the noble precept it be lawful to accept good advice even from an enemy, shall we set the ignoble example of refusing such advice even when it is offered by our friends? The prudent enquiry in all cases, ought surely to be not so much *from whom* the advice comes, as whether the advice be *good*.

The sum of what has been here advanced and proved, is that the charge against the Convention of exceeding their powers, except in one instance little urged by the objectors, has no foundation to support it; that if they had exceeded their powers, they were not only warranted but required, as the confidential servants of their country, by the circumstances in which they were placed, to exercise the liberty which they assumed, and that finally, if they had violated both their powers, and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America. How far this character is due to the Constitution, is the subject under investigation.

The Federalist No. 43

James Madison, Jan. 23, 1788

. . . The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole to the caprice or corruption of a single member. It would have marked a want of foresight in the Convention, which our own experience would have rendered inexcusable.

Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the confederation, which stands in the solemn form of a compact among the States, can be superceded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it.

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. PERHAPS also an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation, that in many of the States, it had received no higher sanction than a mere legislative ratification. The principle of reciprocity seems to require, that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is

an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorises them, if they please, to pronounce the treaty violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it, the part which the same motives dictate.

The second question is not less delicate; and the flattering prospect of its being merely hypothetical, forbids an overcurious discussion of it. It is one of those cases which must be left to provide for itself. . . .

NOTES

1. Using legal arguments, evaluate James Madison's claim that the Convention did not exceed its mandate. Consider the argument that the nature of the "government" under the Articles of Confederation was more like a "league" of sovereignties than a government proper, so that the violation of its requirements on all sides left it with essentially the status of a breached treaty, no longer binding on anyone. What do you think? And what do you think of the quite different argument that if the Convention did go too far, subsequent ratification by the people cures the irregularity?

2. What difference does it make whether the Constitution was adopted legally? Could anyone seriously argue that we are still governed by the Articles of Confederation rather than the Constitution of 1787? Does it matter in any way today whether or not the Constitution was legally adopted in the 1780s?

3. Think about the Constitution's legitimacy more broadly. Suppose one did regard the Constitution as illegitimate because it was adopted by a mild-mannered *coup d'état*. Or suppose one regards it as illegitimate because it was adopted by undemocratic or unrepresentative bodies. Or suppose one simply regards it as a very bad constitution, full of foolish or unjust provisions. Or suppose one thinks it illegitimate as a matter of principle for one generation to bind another—for the work of dead, white, male, propertied slave-holders to govern us from the grave after more than two centuries. Do these suppositions affect what the Constitution, as a legal document, means? In other words, does its legitimacy or illegitimacy affect its interpretation?

Ratification and the Bill of Rights

One of the most contentious issues surrounding the ratification of the Constitution was the absence in the document of a statement of the rights that the people held against the government—in other words, a "Bill of Rights." Those who championed the new Constitution denied that one was necessary or even desirable. Federalists such as Alexander Hamilton, James Madison, and James Wilson argued that the Constitution would create a federal government of only limited, enumerated powers. To include a Bill of Rights, they maintained, would wrongly imply that the government had more powers than were intended and that all of the many individual rights that were not enumerated could be invaded at will by the national government. It would flip the presumption of the Constitution, because now everything the federal government did would be presumptively constitutional unless

it contravened the Bill of Rights. The Anti-Federalist opponents of the Constitution, such as George Mason and Richard Henry Lee, replied that the powers of the federal government, even though enumerated, might still be construed broadly. In particular, the Anti-Federalists called the Necessary and Proper Clause “the Sweeping Clause,” and they said that without a Bill of Rights it would sweep away all of the people’s liberties.

The Anti-Federalists won the political argument, and the Federalists agreed to propose amendments in the First Congress—after ratification of the Constitution. Based in part on these assurances, the critical states of Massachusetts, New Hampshire, Virginia, and New York ratified the Constitution while also calling for amendments in the nature of a Bill of Rights. Representative James Madison of Virginia took the lead in drafting a series of proposed amendments. Eventually, Congress sent to the states twelve proposed amendments. Ten of these were promptly ratified, and it is these ten amendments that are called the Bill of Rights.

As you read the following passages from an essay called “What the Anti-Federalists Were *For*,” evaluate the contending positions. What insights do you draw about the powers granted to the federal government?

Herbert Storing, What the Anti-Federalists Were *For*

1 THE COMPLETE ANTI-FEDERALIST 64–70 (1981)

It is often said that the major legacy of the Anti-Federalists is the Bill of Rights. Many of their suggestions found their way into the proposals for amendments made by state ratifying conventions and thence into the first ten amendments adopted in 1791. Three kinds of rights were stressed: the usual common law procedural rights in criminal prosecutions, liberty of conscience, and liberty of the press. The Anti-Federalists insisted that the Constitution should explicitly recognize the traditional procedural rights: to be safe from general search and seizure, to be indicted by grand jury, to trial by jury, to confront witnesses, and to be protected against cruel and unusual punishments. The most important of these was the trial by jury, and one of the most widely uttered objections against the Constitution was that it did not provide for (and therefore effectively abolished) trial by jury in civil cases. The Federalists’ claim that practice among the states in this respect varied too much to provide a general rule was either denied by the Anti-Federalists or used as a further argument against the feasibility of consolidation. Regarding liberty of conscience, the Anti-Federalists’ position was complex. Typically they favored both governmental encouragement of religion and liberty of individual conscience. The first proposal of the minority of the Pennsylvania convention was that rights of conscience shall be held inviolable and that no state provision regarding liberty of conscience shall be abridged by the federal government. Some Anti-Federalists professed to see in the prohibition against a religious test for officers of the United States a power to regulate religious beliefs in general, to which this prohibition was an exception. The rights of conscience should be secured, even though there was no immediate threat. Times change, and “the seeds of superstition, bigotry and enthusiasm, are too deeply implanted in our minds, ever to be eradicated. . . .” The third area of concern was liberty of the press, often declaimed by the Anti-Federalists as the palladium of American liberties. “It is the opinion of some great writers,” Centinel argued, “that

if the liberty of the press, by an institution of religion, or otherwise, could be rendered sacred, even in *Turkey*, that despotism would fly before it.” “I say,” another Anti-Federalist insisted, “that a declaration of those inherent and political rights ought to be made in a BILL OF RIGHTS, that the people may never lose their liberties by construction. If the liberty of the press by an inherent political right, let it be so declared, that no despot however great shall *dare to gain say it*.” All of these concerns were pressed with enough vigor so that the Constitution was adopted only on the understanding that one of the first items of business in the new government would be the framing of amendments.

While the Federalists gave us the Constitution, then, the legacy of the Anti-Federalists was the Bill of Rights. But it is an ambiguous legacy, as can be seen by studying the debate. Indeed, in one sense, the success of the Bill of Rights reflects the failure of the Anti-Federalists. The whole emphasis on reservations of rights of individuals implied a fundamental acceptance of the “consolidated” character of the new government. A truly federal government needs no bill of rights. Indeed, there were some Federalists who tried to use the Anti-Federalists’ federalism to destroy the Anti-Federalists argument for a bill of rights (incidentally undermining their own position). One Alfredus contended, for example, that a bill of rights was not necessary because the Constitution was a compact not between individuals but between sovereign and independent societies. This argument is easy enough to answer, and the Anti-Federalists often answered it: the government under the Constitution was not a mere compact of sovereign states—at least not in its operation—and it was not exempt from the need for a bill of rights on that account. But in making this reply the Anti-Federalists decisively abandoned the doctrine of strict federalism.

A more substantial “federal” argument against a bill of rights was made by James Wilson in his famous “State house speech” on 4 October 1787. Wilson acknowledge that maxim often put forward by the Anti-Federalists that in establishing governments all powers not expressly reserved are presumed to be granted, but he denied that it applied to the proposed general government, because that was to be a government of specifically enumerated powers. Whereas in the state constitutions the people “invested their representatives with every right and authority which they did not in explicit terms reserve,” under the proposed Constitution “the congressional power is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union. Hence, it is evident, that in the former case, everything which is not reserved is given; but in the latter the reverse of the proposition prevails, and everything which is not given is reserved.” Thus, Wilson concluded, “it would have been superfluous and absurd to have stipulated with a federal body of our own creation, that we should enjoy those privileges of which we are not divested, either by the intention or the act that has brought the body into existent.” This is a substantial argument; it was heavily relied on by defenders of the Constitution; and the basis theory on which it rests has become a part of American constitutional orthodoxy. Yet it has some serious difficulties, especially when applied to the question of a bill of rights.

Wilson’s position depends on the assumption that the “powers” delegated to the government are fairly easily identifiable and unambiguous. Thus, for example, he contended that there is no “power” granted to the federal government “to regulate literary publications” and therefore no need for a reservation in favor of the liberty

of the press. If Congress should enact such a law, the judges would declare it null and void because “inconsistent with those powers vested by this instrument in Congress. . . .” But (even leaving aside the question of libel and seditious libel) the general government is given authority to lay and collect taxes and to regulate commerce, for example, and could not either of these be used to stifle the press? More generally, does not the general government, in the pursuit of its delegated powers, have implied powers that need to be limited for the sake of individual liberties? Cannot the federal government define crimes and criminal procedures, in connection with federal postal regulations, for example; and is there not therefore a need for procedural restraints of the traditional kind? Brutus made the argument thus: “The powers, rights, and authority, granted to the general government by this constitution, are as complete, with respect to every object to which they extend, as that of any state government—It reaches to every thing which concerns human happiness—Life, liberty, and property, are under its controul. There is the same reason, therefore, that the exercise of power, in this case, should be restrained within proper limits, as in that of the state governments.”

The constitutional grant of power to Congress—so laconic and broad—is an argument in favor of a bill of rights, not against it. . . . The inadequacy of Wilson’s argument is further demonstrated by the presence in the Constitution of a truncated bill of rights. Why was there any need to restrict the suspension of the writ of habeas corpus or to prohibit granting titles of nobility? Where were such powers granted? The very few Federalists who made any attempt to meet this objection sought to show that these were exceptions to implied powers, but this only reinforced the contention that the “powers” granted are anything but simple and unambiguous—that they are in fact complex and doubtful and capable of great extension. . . .

Even if it were granted that a bill of rights was, strictly speaking, unnecessary, the Anti-Federalists asked, why not be safe? What is the harm? Would it, Patrick Henry asked, have taken too much paper? One answer was that a bill of rights would be positively dangerous, because, as Wilson explained, “it would imply that whatever is not expressed was given, which is not the principle of the proposed constitution.” There is some basis for this view. Yet the Anti-Federalists could forcefully contend that any harm of this kind had already been done by the reservations in behalf of individual rights included in the Constitution. And, all things considered, this Federalist argument seemed a bit sophistical.

NOTES

1. Who was right in this struggle over the interpretation of the original Constitution? Were the Anti-Federalists’ fears exaggerated? Were the Federalists’ assurances too confident? Does it make a difference, for the protection of the freedom of speech, that there is a First Amendment? Why?

2. The preceding pages have passed quickly over a lot of history—the ideas and conflicts that sparked the American Revolution, the course of that Revolution, the failure of the government under the Articles of Confederation, the Philadelphia Convention, and the debate over ratification. If this is unfamiliar territory, two introductions to the major ideas and debates at the founding are Forrest McDonald, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); and Jack N. Rakove, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).