

THE
CONSTITUTION

An Introduction

MICHAEL STOKES PAULSEN *and* LUKE PAULSEN

CHAPTER 1

UPHEAVAL

The Revolutionary Creation of the US Constitution

IN THE SPRING AND summer of 1787, a group of distinguished Americans gathered in Philadelphia to plot the overthrow of their own government.

The men in attendance included such luminaries as George Washington and Benjamin Franklin, along with brilliant young upstarts like Alexander Hamilton and James Madison. The result of their deliberations was wildly successful: the adoption of an entirely new plan of government, “The Constitution of the United States,” a framework that has endured for over 200 years and that continues to serve America today. It is the oldest written national constitution and has served as a model for democracies around the world.

With only slight exaggeration, it can fairly be said that the adoption of the Constitution was an act of *revolution*—a dramatic break from the former legal order. Since declaring independence in 1776, the states of America had lacked a true, unified central government. The young nation had managed to declare and win its independence while loosely governed, at first by the Second Continental Congress—the assembly that had declared the independence of the American states—and then by a collective agreement known as the Articles of Confederation. But barely a decade after declaring independence, nearly all Americans agreed that the system under the Articles was failing. The Congress, lacking any true powers, could accomplish next to nothing, and the states squabbled like so many petty fiefdoms.

Bowing to the requests of several states, the national Congress under the Articles agreed to call a convention to consider amendments to the Articles of Confederation. That was the assembly of men who gathered in Philadelphia beginning in May 1787. But practically their first act was to defy their instructions. The delegates were charged with suggesting amendments to the Articles—the existing government. Instead, they deliberately took it upon themselves to propose that the current government be scrapped entirely and a dramatically new system erected in its place. What's more, they proposed that the new system be adopted outside the system the Articles had in place for amendments, in plain violation of the Articles. They literally sought to overthrow the existing government—and it did not matter to them if doing so broke the rules of the game. The political situation of the country had become dire: the union was in danger of falling apart, and something had to be done. So the convention exceeded its instructions and did what it felt the situation demanded. What historians today celebrate as “The Constitutional Convention” was at the time practically a coup d'état—a rebellion against and upending of the prior regime.

But it was, of course, a peaceful, bloodless coup—one that to some extent obtained the blessing of the existing regime even as it sought to overturn it and, more fundamentally, one that rapidly came to be accepted by the people of America. The Congress under the Articles had called the convention and in the end agreed to forward the proposal to the people; special ratifying conventions in all the states (eventually) approved the convention's handiwork. Thus, unlike the first American Revolution, launched from the same Philadelphia locale eleven years earlier with the Declaration of Independence, this second American Revolution would be won not on battlefields, with bullets and bayonets, but in legislative halls and town meetings. The weapons would be words—reasoned political argument and debate.

This chapter tells the story of the quasi-revolutionary adoption of the US Constitution. The story begins with the Declaration of Independence of 1776 and the Revolutionary War against Great Britain. It closes with America's decision to create a strong, unified government to replace the weak, decentralized system it had adopted during the war, and under which the young nation had limped along for its first decade.

From the American Revolution of 1776 to the Constitutional Revolution of 1787

The story of the creation of the US Constitution begins with the principles of the American Revolution. The founding principle underlying the Constitution, like that of the Declaration of Independence, was *the ultimate right of the people to freely chosen self-government, protective of their natural rights*.

On July 4, 1776—already more than a year into the actual fighting—America had proclaimed her independence from Great Britain with these stirring words:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, & the Pursuit of Happiness—that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of those Ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

These same principles—the ultimate right of the people to “institute new Government” and to “organiz[e] its Powers in such Form” as they think best—would later be used to justify tossing out the old regime and adopting the Constitution. The famous opening words of the Constitution’s Preamble strongly echo the Declaration of Independence:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States.

The ultimate basis of all legitimate government is the consent of the governed. That was America’s core founding principle. It was that principle that had justified the American Revolution of 1776—that made revolution against Britain morally legitimate. And it was that same principle that would justify the revolution in America’s government created by the Constitution.

But that is getting slightly ahead of the story. Eleven years of upheaval passed between the Declaration of Independence and the proposal of the Constitution in 1787—a period that saw the waging and winning of the Revolutionary War. How did America govern itself during this period? In a word—*loosely*. Britain’s former colonies had nothing even close to a clear,

coherent national government. America was, at best, a tenuous political and military alliance of thirteen separate revolutionary state governments, meeting together in a “Congress” for certain common purposes. The only true unifying national institution was the Continental Army, under the command of General George Washington.

Consider the Declaration of Independence itself. It was adopted by the Second Continental Congress as the “Unanimous Declaration of the thirteen united States of America.” Note carefully which words are capitalized—and which are not—in this phrase. The Declaration was not adopted by the “United States of America,” with an upper-case *U* as if part of the title of a new nation. The Declaration was the *united* (lower-case *u*) action of thirteen *separate* States (upper-case *S*) jointly declaring their independence. Thus, in 1776, “united States of America” referred to little more than an *alliance* of thirteen separate, small nations. To be sure, the signers of the Declaration had pledged their lives, their fortunes, and their sacred honor to this common enterprise on behalf of their States. But America was not (yet) a single nation; it was a collection of thirteen little nations.

The Second Continental Congress worked to craft a formal document cementing the alliance—a grand treaty to which each of the States would agree. That agreement became known as the Articles of Confederation. It was eventually adopted by all the States—but not until 1781, five years after independence had been declared. The Articles did provide for a collective government of sorts. But the arrangement remained more like a “united nations” than a true national government. It was in effect a *treaty* for mutual defense and the waging of the war for independence, plus a *promise* of a perpetual “firm league of friendship” (Articles of Confederation, Article III). Each state retained its sovereignty, meaning that each state government had final authority—not the government of the “united States” as a whole.

All the while, the Continental Army, led by General Washington, was fighting a desperate war of survival against the British. Washington’s task was made more difficult by the lack of a central government that could act effectively for all the states. America’s “government”—if one could even call it that—was a complete disaster. The Continental Congress had no governing power at all, and the Congress operating under the Articles of Confederation was little better. Because each state retained its own sovereignty, Congress could “require” the states to provide their shares of money or troops, but had no effective power to enforce such requisitions; in

practice, Congress was reduced to *asking* states to help. The “president” under the Articles had no true executive power, but was only the presiding officer of Congress—the head of its executive committee. There was no national judicial branch. Though the Articles were in theory a binding agreement, the Congress could take no actions to enforce the terms of the treaty. In effect, the States could do as they pleased. And they often did.

KEY PROVISIONS OF THE ARTICLES OF CONFEDERATION

Articles I and II established the Articles of Confederation as a confederacy, rather than a unified national government, and explicitly preserved the “sovereignty, freedom, and independence” of each State. Article III declared that the arrangement was a “firm league of friendship”—essentially, a treaty among friendly nations—for mutual defense and other purposes. Article XIII, the last article, pledged that the arrangement established would be “inviolable” and that any alterations would require the unanimous agreement of the legislatures of each of the thirteen separate States.

The Articles of Confederation

ARTICLE I:

The stile of this confederacy shall be “The United States of America.”

ARTICLE II:

Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III:

The said states hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

ARTICLE XIII:

. . . [T]he articles of this confederation shall be inviolably observed by every state, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state. . . .

Yet, despite the lack of a real government, the “united States” managed to survive—barely—the early war years. The story is well known: General

Washington somehow kept his tattered army in the field, avoiding complete defeat until finally, with badly needed help from the French navy, he reversed America's fortunes by capturing a British army at Yorktown, Virginia, in 1781. American independence was finally recognized by Britain in 1783, after eight long years of war.

Ironically, with independence came greater division. America, having survived a terrible war for independence with essentially no central government in place, was at greater risk of collapse now that the unifying goals of independence and peace had been achieved. At a critical moment, Washington blocked a military coup d'état. In 1783, when some of Washington's officers and soldiers, frustrated with Congress's ineptitude—and failure to pay their wages—urged Washington to march on Congress and seize authority as emperor, Washington emphatically declined. In the end, he did exactly the opposite. In December 1783, in a dramatic act of symbolism and selflessness, Washington publicly resigned his commission to the Confederation Congress meeting in Annapolis, Maryland, and rode home to Mount Vernon, Virginia. America was to remain a republic.

The states had, thanks to Washington, avoided the authoritarian alternative of unity under an emperor. But the essential problem remained unresolved. The end of the war seemed, if anything, to make the problem of the lack of a unified government worse. The states imposed tariffs on goods imported from other states. They discriminated against each other's citizens. They refused to abide by the decisions of Congress. Their self-serving pettiness was ruining the national economy. Now that freedom had been won, there was a very real threat that the "united States of America" would disintegrate into the *dis*united states of America, with multiple separate nations at loggerheads with each other. More than that, some state governments had become miniature democratic despotisms—fickle, inconstant, poorly managed little republics running roughshod over individual rights of life, liberty, and property.

The Confederation Congress was practically powerless to change things. It could not act to amend the Articles unless every state legislature agreed—the Articles themselves required that any changes be adopted unanimously (Article XIII)—and there was always some state that disagreed, out of self-interest. In short, now that the mutual-defense treaty seemed disposable, the promises of a "firm league of friendship" were being broken on every side.

And so it was that the Constitution of the United States came to be born out of a sense of urgency and desperation. By 1786, ten years after the Declaration of Independence, matters had degenerated into nearly a state of crisis. The nation, as a unified whole, was on the verge of collapse. The crisis, ironically, created the opening for radical—even revolutionary—reform: a complete (and arguably illegal) break with the arrangements set up during the war. All that was needed to light the fuse of reform was an intrepid assembly of revolutionary men.

The Constitutional Convention and Its Key Players

The generation that produced the American Revolution was filled with men willing to consider radical upheavals in politics and government. In late 1786, leaders from several states joined forces to press Congress for a convention to consider reforming the system. Three men stood out as most influential in this effort. First, there was George Washington. Probably the most admired man in America for his leadership in the Revolutionary War, Washington had long supported a stronger central government. His support for a constitutional convention, his willingness to attend, his role as presiding officer, and his backing of the final product were absolutely indispensable. Without Washington, the convention might have lacked the credibility it needed. With Washington's backing, what had been thought impossible suddenly became a realistic possibility.

A second key figure was Washington's young protégé and former chief military aide, the brilliant Alexander Hamilton of New York. Hamilton, just thirty years old at the time, was a driving force of raw energy for reform. It was Hamilton who drafted the letter asking Congress to call a general convention of the states to consider amendments to the Articles of Confederation. Hamilton had little influence at the convention itself, his views generally being considered too extreme in the direction of executive authority and national consolidation of power at the expense of the states. Hamilton's main contributions came before the convention—spearheading the drive to have Congress call a convention—and after it, as a leading figure pressing for ratification in the crucial state of New York, the lead author of *The Federalist* papers defending the Constitution and urging its adoption, and the chief architect of the Constitution's early implementation in his role as the

nation's first Treasury Secretary and President Washington's principal adviser.

But perhaps the most important figure in the push for reform was Washington's fellow Virginian, the unassuming intellectual James Madison. He was a master planner and student of government, skilled in the art of persuading others with careful reasoning. Never was there a quieter, smarter, humbler revolutionary. Madison, a (relatively) young man of thirty-six, would eventually become an influential member of Congress, an adviser to President George Washington, Secretary of State for President Thomas Jefferson, and finally the fourth President of the United States, from 1809 to 1817. Yet for all these other distinguished accomplishments, James Madison is best known as “the Father of the Constitution.” Madison was the one who convinced other prominent leaders to press for and, eventually, attend the Philadelphia convention of 1787. He was instrumental in persuading Washington to come out of retirement at Mount Vernon and support the movement for a constitutional convention. Madison then played a central role in drafting the entirely new Constitution and persuading the convention to adopt it. It was his plan—the “Virginia Plan,” introduced by Governor Edmund Randolph—that quickly provided the framework for the convention's deliberations over a new constitution. Madison served as the unofficial secretary of the Constitutional Convention. His records of the convention debates—all 659 pages of them—have become a vital source for understanding the Constitution.

GEORGE WASHINGTON: FOUNDING FATHER



“The Father of Our Country” was in important ways a father of the Constitution too. George Washington (1732–1799) was the presiding officer—literally the “president”—of the

Constitutional Convention in 1787, overseeing the debates, keeping disputes under control, and stepping in at critical moments to keep the delegates on course. Although not personally active in drafting the document, he exercised a silent influence over the delegates' fashioning of the vital office for which he was destined to be the first occupant: President of the United States.

Washington's life, fame, and character were well known to all by 1787. A Virginia planter by birth and upbringing, Washington first gained distinction—and a certain degree of notoriety—as a military officer during the French and Indian War (1754–1763). By 1775, he had become committed to the cause of American liberty. He was elected a delegate to the Second Continental Congress, which in turn made him General and Commander in Chief of the Continental Army. For eight long years, from 1775 to 1783, Washington led America's forces—through myriad defeats, indescribable hardships, and a few daring successes—to ultimate victory in the Revolutionary War, securing American independence.

Washington was also famous for laying down his sword at the conclusion of the war to return to his home, Mount Vernon, even though some wanted to crown him emperor. Washington thwarted those—including some of his own officers—who wanted to establish military rule for America. He thus might well be credited with *twice* saving America from monarchy—once through his military achievements and a second time through his character and republican virtue. Washington was deservedly the most admired man in America.

James Madison considered it vital to enlist Washington's support in the drive for a new constitution, since his prestige would give the work of the Constitutional Convention credibility. Indeed, it was public faith in Washington that probably enabled the delegates to take the daring step of scrapping the Articles of Confederation entirely. When the convention sent its proposal to Congress, it included a formal transmission letter from Washington as president of the convention. For many, that was enough. When Congress sent the Constitution to the states for approval, many supported it simply because it had the backing of Washington and of the convention's other luminary—the great patriot, diplomat, scientist, and author Benjamin Franklin.

Washington was an important constitutional founding figure in other ways too. When the delegates at Philadelphia were creating the Presidency, they had Washington in mind as the likely first President of the United States. (They proved right. Washington was elected unanimously and began serving as President in 1789.) The idea that Washington would be President helped the delegates feel free to give the office strong powers, without the fear that it would become a dictatorship. General Washington's dramatic act of resigning his commission and riding home to Virginia after the war had shown that he could be trusted to wield power but not cling to it. There was no fear that Washington would become a new "King George" to hate.

As the first President of the United States, Washington almost singlehandedly defined the American Presidency. His actions, policies, and considered interpretations of the Constitution set precedents that have endured for more than 200 years. They continue to guide our understanding of the Constitution's most important office—an office created with the Father of Our Country in mind.

Once the convention agreed on a final document, on September 17, 1787, Madison campaigned for the new Constitution's ratification. This demanding task included writing more than a third of *The Federalist* papers, the brilliant series of newspaper articles explaining and defending the proposed

Constitution, coauthored with Hamilton (who wrote the majority of them) and the respected diplomat John Jay (who contributed several papers on foreign affairs powers). Jay would later serve as both the first Chief Justice of the Supreme Court and Washington's special envoy to negotiate a treaty with Great Britain.

Madison successfully argued for the Constitution's ratification in his home state of Virginia, the largest and most important state, outmaneuvering and outlasting such prominent opponents as Patrick Henry, the fiery rhetorician of the Revolution and popular former governor. And finally, after the Constitution was adopted, Madison became a leader in the House of Representatives of the First Congress under the new Constitution, where he wrote and sponsored amendments that became the Constitution's Bill of Rights, containing some of the nation's most important freedoms. Truly, if any one man could be said to be the father of the Constitution, it would be James Madison.

JAMES MADISON: “THE FATHER OF THE CONSTITUTION”



More than any other one person, James Madison (1751–1836) is responsible for the existence, structure, and content of the US Constitution. He led the movement for a constitutional convention and was integral to securing the attendance of George Washington. He was the ghostwriter of the “Virginia Plan” that became the framework for the convention's discussions. He worked tirelessly at the convention to forge alliances, craft compromises, and write the Constitution's language. Almost immediately after the convention, he and Alexander Hamilton wrote nearly all of the essays of *The Federalist*, which quickly proved to be the definitive work on the meaning of the new Constitution. Madison successfully fought for the adoption of the Constitution in his home state of Virginia. And finally, as a member of the House of Representatives in the First Congress under the Constitution, he introduced and sponsored the proposals that became the Bill of Rights. Truly, *no one* did more to give us the Constitution than James Madison.

The son of a wealthy Virginia landowner, “Jemmy” Madison was short, slender, quiet, bookish, and gifted with great intelligence. He graduated from the College of New Jersey (present-day Princeton University) in 1772 and came of age during the revolutionary crisis of 1774–1776, a period that awoke his political genius. Unlike Washington and Hamilton, Madison never served in the army during the Revolution. Instead, he served in political positions beginning at an early age. He helped draft revolutionary Virginia’s state constitution of 1776 (at age twenty-five), served on Virginia’s Council of State, and became one of the state’s delegates to the Congress under the Articles of Confederation—a post from which he observed firsthand the system’s grave defects.

Madison was soft-spoken and unassuming, yet extraordinarily effective at working in committees and legislative bodies—nowhere more so than at the Constitutional Convention and in Congress. All respected his intelligence. He was a thorough, careful student who often prevailed in political debates simply by outpreparing everybody else. He won his points by thoughtful persuasion rather than through force of personality, powerful rhetoric, or military stature.

Ironically, the same talents that made Madison such an effective legislator and constitution-maker made him a relatively weak President and Commander in Chief. After serving as Secretary of State to his longtime friend and political ally Thomas Jefferson, Madison was elected to be the nation’s fourth President, serving from 1809 to 1817. This was the only role in which he is not regarded as having been spectacularly successful. The War of 1812 with Britain, called “Mr. Madison’s War” by many disgruntled citizens, saw the ruin of New England’s economy, the burning of Washington, DC, and the near breakup of the United States. The three-year ordeal came to a merciful end with the Treaty of Ghent, which enabled Madison to make peace on better terms than had been expected.

Madison’s prestige grew during his retirement to Montpelier, the family plantation. He remained a respected elder statesman until his death in 1836—the last surviving delegate to the Constitutional Convention. Madison’s detailed *Notes of Debates in the Federal Convention of 1787*, published only after his death, have become an indispensable source for understanding the Constitution’s formation and meaning.

Joining Washington, Hamilton, and Madison at Philadelphia were many other respected men, including Philadelphia’s own leading citizen, Benjamin Franklin. Franklin, eighty-one years old, was second only to Washington in national fame and respect. Internationally renowned as a printer, inventor, scientist, and patriot, Franklin had rendered perhaps his greatest service to the united states as a diplomat during the Revolutionary War, securing the vital military and financial support of France for the American cause. His success in enlisting France’s aid was every bit as important as Washington’s military success in keeping America’s ragtag army from being crushed by the British. While not a major player at Philadelphia, the ailing and aged Franklin remained a major *figure*: his presence, wisdom, gentle interventions, and support of compromise and of the convention’s final product were all important to its success.

Franklin's fellow Pennsylvanian James Wilson was, next to Madison, probably the most important draftsman of the new Constitution at the convention. And a third Pennsylvania delegate, the flamboyant Gouverneur Morris, spoke more than any other delegate and actually *wrote* the draft of the Constitution that gave the final product its shape, its organization, and much of its wording.

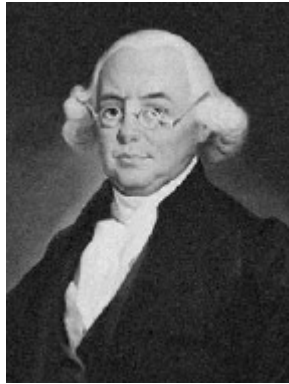
There were many others—an all-star cast of colorful figures from nearly every state. All told, fifty-five men attended the Constitutional Convention, including eight who had signed the Declaration of Independence eleven years earlier—in the very same room of the red-brick State House where the convention deliberated for 116 days throughout a hot Philadelphia summer. (The eight who served in both bodies were Franklin, Wilson, Robert Morris, and George Clymer, all of Pennsylvania; Roger Sherman of Connecticut; George Read of Delaware; Elbridge Gerry of Massachusetts; and George Wythe of Virginia.)

Creating and Adopting the Constitution: Choices, Controversies, Opposition

The debates over a proposed new Constitution were long, intense, convoluted, and often passionate. The questions, after all, were enormous. How strong should the national government be? How much power should be kept with the individual states? Should the national government be supreme over the state governments? Should there be a strong executive branch? What should its powers be? How should representation in Congress be allotted—should it be according to population, or should large and small states have equal weight, as under the Articles of Confederation? How would the powers of the national government be held in check? Was there need for a bill of rights? What should be done about the question of slavery, on which Northern states and Southern states were sorely divided? These were only some of the issues that the delegates debated before finally producing an entirely new “Constitution of the United States”—the same basic constitution (plus twenty-seven amendments) that we have today.

FACES AT THE CONSTITUTIONAL CONVENTION

Alongside the Constitutional Convention's best-known names—Washington, Madison, Hamilton, Franklin—stood many other prominent American politicians of the day, less famous to history but of enormous importance to the formation of the Constitution.



James Wilson (1742–1798). Second only to Madison as an architect of the Constitution, James Wilson was a brilliant lawyer and the intellectual leader of the influential Pennsylvania delegation. Constantly active at the convention, Wilson was a close ally of Madison in the debates, especially on representation and the need for a strong national government. An expert on the judiciary and the prime architect of Article III of the Constitution, Wilson was later appointed by Washington to serve on the Supreme Court of a national judiciary he had helped design.



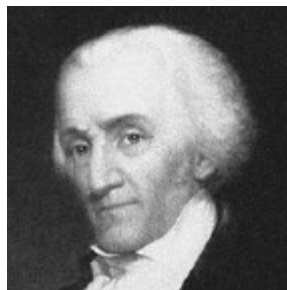
Gouverneur Morris (1752–1816). Morris, the peg-legged Pennsylvania aristocrat originally from a prominent New York family, was colorful, charismatic, and irreverent. Famed for his rhetorical flair, Morris was a strong supporter of a powerful national government and an outspoken opponent of slavery. Morris spoke more often than any other convention delegate. He chaired the Committee of Style, which was responsible for writing the draft Constitution, and chose the Preamble's stirring first three words: "We the People." Gouverneur Morris literally *wrote* the Constitution.



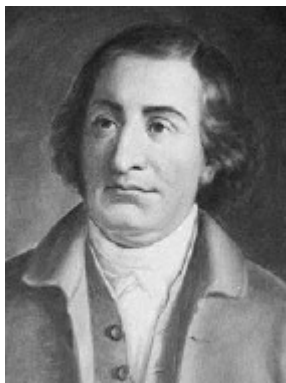
Roger Sherman (1721–1793). Roger Sherman, a self-taught Connecticut lawyer, scholar, and politician, was a standout among the convention delegates for his humble origins. Dedicated and hardworking, Sherman was a man of moderate views and a consensus-seeker. He was one of the early and persistent proponents of the Great Compromise (or “Connecticut Compromise”) to resolve disagreement between small and large states over representation. He is also remembered for his role as a member of the committee that drafted the Declaration of Independence in 1776 and as an important member of the First Congress, closely associated with Madison in the crafting of the Bill of Rights.



George Mason (1725–1792). Among the older and more experienced delegates, George Mason was a Virginia planter and lawyer who had been the draftsman of Virginia’s Constitution and Bill of Rights. On the convention’s last day, Mason declined to sign the draft Constitution, voicing concerns that it granted too much power to a central government and lacked a “Declaration of Rights.” He opposed Virginia’s ratification of the Constitution and never served in the new national government, but his voice of dissent was influential in leading to the eventual amendment of the new Constitution to provide a national Bill of Rights.



Elbridge Gerry (1744–1814). Gerry was a fiercely partisan Massachusetts merchant who led early resistance to British taxation. The irascible Gerry ended up opposing the draft Constitution, believing that it advanced central government and radical democracy at the expense of individual rights. He later served as Governor of Massachusetts and Vice President under President James Madison. He is immortalized in political history by the term “gerrymander,” referring to accusations that he redrew state election districts to favor his own political party.



Edmund Randolph (1753–1813). Governor Edmund Randolph of Virginia, the nominal leader of Virginia’s delegation, proved an inconsistent supporter of the Constitution. He put forward the Virginia Plan that served as the basis for the Constitution, but declined to sign the finished document due to his concerns over state and individual rights. He changed course again to support the Constitution in the Virginia ratifying convention, and served as the first Attorney General of the United States, under President Washington.

The delegates at the convention obviously did not agree on everything in the proposed Constitution. The most serious disputes concerned representation—the relative weight of large and small states in the new government—and the degree of protection, support, and political power accorded to the institution of slavery. Near the end of the convention, several delegates objected strenuously to the absence of a bill of rights, refused to sign the document, and became leading opponents of its ratification. One state was so opposed to the whole idea of change that it never showed up at all: tiny Rhode Island sent no delegates to Philadelphia. But through compromises large and small, the convention achieved enough of a consensus to create a document that all but three of the delegates present signed—an imperfect, perhaps, but to most delegates satisfactory balance of the interests of large and small states, of North and South, and of those who favored stronger central government authority and others who wished to preserve the autonomy of the state governments. Benjamin Franklin probably summed up

the majority sentiment better than anyone, in a speech delivered on the last day of the convention:

Mr. President, I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them. . . . Sir, I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us, and there is no form of Government but what may be a blessing to the people if well administered. . . . 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; . . . Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best. The opinions I have had of its errors, I sacrifice to the public good.

Convention president George Washington sent a letter to the Congress under the Articles, transmitting the Constitution as agreed to by the convention and asking that Congress forward it to the states for their consideration. The new Constitution had specified a unique ratification process: each state would call a special convention for the purpose of considering the proposal, rather than having its legislature vote on the plan (as provided under the Articles). In the months ahead, this ratification procedure would become an issue in the debates over the Constitution. Nonetheless, Congress agreed to the proposed method of ratification—lending it an air of legitimacy—and sent the new Constitution on to the states for their consideration.

Then a second wave of debate began, fully as intense as the first. Most of the men who met at Philadelphia had agreed from the start on the need for a stronger national government. They adopted for themselves the name “Federalists,” a term for those who favored division of power between a national government and local governments. Not everybody in the states—and certainly not everybody in the current state *governments*, which held most of the true power under the old Articles of Confederation—could be expected to agree with the political vision laid out in the Constitution. Thus, a substantial opposition arose; these opponents became saddled with the more negative-sounding label “Anti-Federalists.” In addition to persuading the citizenry of the Constitution’s merits, the campaign to adopt the Constitution would need to overcome the local political power of those with

vested interests in retaining the old system. The debate over the Constitution generated a raging war of words, with Federalist and Anti-Federalist speeches, writings, pamphlets, and newspaper articles by the hundreds—including the famous series of eighty-five essays by Hamilton, Madison, and Jay explaining and defending the Constitution, *The Federalist*, a work that has come to be regarded as the most important American contribution to political theory in our nation's history.

It was an enormously intense period of political debate. And the outcome was hardly foreordained. Powerful arguments, and powerful interests, were lined up against the proposed new “Constitution of the United States.”

Was the Constitution Illegally Adopted?

The Federalists not only had to defend the proposed Constitution's provisions; they also had to defend their brazen actions in proposing an entirely new constitution in the first place. After all, the convention had been authorized only to propose *alterations* to the Articles of Confederation. Instead, the delegates had designed a whole new system of government: a strong national government with three separate branches—legislative, executive, and judicial—rather than a mere league of independent states. The new Constitution's strong Presidency and judicial branch were entirely new creations. The Congress of the new Constitution was entirely different from the Congress under the Articles. It included two houses instead of one: a Senate in which the states would be equally represented, and a House of Representatives based on population. It had real, substantial powers to act directly for the people of the nation as a whole, as did the President and the new national judiciary. What gave the Constitutional Convention the right to propose an entirely new form of government? Hadn't this gathering of radical statesmen grossly exceeded its authority?

There was another, related problem, perhaps even more serious than the audacity of the proposal itself. That problem concerned the convention's proposed method for adopting the new Constitution to replace the Articles of Confederation. The Articles stipulated that any changes to the Articles required the unanimous approval of the legislatures of all thirteen states. The proposed new Constitution claimed that it would take effect when any *nine* out of thirteen agreed to it. Furthermore, it proposed to give this ratifying power to special state ratifying conventions rather than state legislatures,

evading the state governments' power base but also defying the terms of the Articles. The Anti-Federalists were appalled. How dare the Constitutional Convention circumvent the Articles' rules in such an audacious manner? Wasn't the method proposed for adopting the Constitution actually *illegal* under the terms of the Articles of Confederation?

In responding to these concerns, the Constitution's defenders appealed to *the ultimate right of the people to decide on the form of government they preferred*. This argument drew on the rhetoric of the Declaration of Independence, the founding document of the American Revolution. Recall that the Declaration proclaimed the unalienable right of the people to govern themselves; to choose the form of government that best secured their happiness, well-being, security, and liberty; and to cast aside any form of government that failed to serve these interests. These were the arguments that the American colonies had used in 1776 to justify declaring independence from Great Britain. They were fresh in the minds of the people of America, who considered them foundational principles for the new nation. To the founding generation, these principles were what made the existence and independence of the United States legitimate and proper in the first place—and worth fighting for.

How could it be wrong, the Federalists asked, to invoke these same principles in creating a new constitution of government? *The People* had the ultimate, unalienable right to establish the form of government they preferred and to alter or abolish prior forms of government that did not serve their needs, secure their rights, and promote their happiness. What the framers of the Constitution had done was no more revolutionary—and certainly no more improper—than what America had done in declaring independence.

James Madison, writing under the pen name “Publius” in *The Federalist* Nos. 40 and 43, responded to the objections with a series of arguments. First and foremost, because the Constitution was submitted to “the people themselves,” the question of whether the delegates had gone too far was beside the point. In America, the people ruled themselves. They had the ultimate choice. To put the point bluntly, did the people want this new Constitution or not? If they wanted it as their new form of government, they should adopt it; it should not matter whether the convention had exceeded its authority. The approval of the people, Madison wrote, would “blot out” any “antecedent errors and irregularities.” Likewise, if the people did *not* want this Constitution, they could reject it. In either event, the will of the people

would prevail. Madison cited the Declaration of Independence in support of his position.

As for the objection that the Articles of Confederation required that all thirteen states agree to any changes, and that the convention's proposal requiring only nine ratifications was unfair and even illegal, Madison had three answers. First, it would be far more unfair and harmful for the will of the vast majority of the people to be frustrated by a tiny minority. Madison pointed out "the absurdity of subjecting the fate of twelve states, to the perverseness or corruption of a thirteenth" and that Rhode Island had just 1/60th of the population of America—a useful example, given that Rhode Island had repeatedly frustrated reform and had boycotted the Constitutional Convention. Should 1/60th of the people be permitted to overrule the wishes of the other 59/60ths?

Second, Madison argued, the Articles of Confederation was, legally speaking, more like a treaty—an alliance—of thirteen separate countries. It was not a true constitution of government for a single nation. Everybody agreed that this alliance was on the verge of falling apart and that this treaty had been violated by just about every state. Should not the people of those states have the right to form a new arrangement, given that the existing treaty was broken? Finally, Madison wrote of his hope that the situation would take care of itself—that in the end, all thirteen states would ratify the Constitution, not just nine—a hope that eventually would be realized, but not for several years.

As to the question of whether the convention had exceeded its authority, Madison argued that the convention had been charged with proposing whatever changes it considered necessary to the Articles. The convention had decided that correcting the defects of the Articles as an arrangement for the nation as a whole required a completely new frame of government. Who was to say that this was too great a departure, other than the people themselves? After all, the Constitutional Convention never had power to *enact* the Constitution on its own; it merely had the power to *propose* changes. It was ultimately for the people to decide whether or not to adopt the proposal for a new constitution. Again, the appeal was to the revered rhetoric of the American Revolution concerning the ultimate right of the people to choose how to govern themselves.

The Final Hurdle: The Troubling Absence of a Bill of Rights

And so the debate over the Constitution was joined on the merits of the plan itself. Anti-Federalist opponents of the Constitution raised numerous objections. But none was more potent than the charge that the Constitution was badly defective because it lacked a bill of rights setting forth the liberties of the people. The Federalists' rejoinder was that the government would never be able to endanger the rights of the people, because it could only do those things that the Constitution said it could do; therefore, under a system of limited powers, there was no need for a bill of rights.

Anti-Federalist critics were not convinced—and with good reason. The powers of the new national government were set forth in broad, sweeping terms (as we will see in detail in [Chapter 3](#)). Was there any reason to doubt that these powers could be employed in such a way as to impair the freedom of speech, or freedom of religion, or freedom of the press? What was to keep the government, armed with the broad powers given it by the Constitution, from restricting the freedom of speech, conducting unreasonable searches and seizures, or forcing people to make confessions of guilt against their will? And why did the Constitution not contain a provision protecting the right to trial by jury for violations of federal law? Besides, if the Federalists were so confident that the Constitution would not violate these rights, what would be the harm in making doubly sure by making them part of the Constitution? As Virginia's Patrick Henry sarcastically asked, would it have taken too much paper?

The Anti-Federalists prevailed on this point. Defenders of the proposed Constitution promised to take up a bill of rights as a set of amendments to the Constitution as the first order of business of the new government—as long as the Constitution was ratified *first*. The Federalists did not want to risk the whole proposal falling apart when it was so close to being adopted. A second constitutional convention—which is what opponents of the Constitution had been urging—would have risked everything accomplished at Philadelphia.

The Federalists prevailed on *this* point, and the opposition failed to keep the Constitution from being ratified in New Hampshire (the magical ninth state), Virginia (the tenth, just days afterward), and New York (a critical eleventh state, and the fourth large state), all in the summer of 1788. North Carolina did not come along until November 1789, and pesky Rhode Island held out until May 1790—more than a year after George Washington had

been sworn in as the first President of the United States under the new Constitution.

James Madison and the other champions of the new Constitution would keep their promise by proposing a bill of rights as one of the first orders of business in the First Congress under the new Constitution, in 1789—an honored promise that would both improve the original Constitution and better secure the revolution in government that it achieved. But before turning to that story—[Chapter 5](#) explores the Bill of Rights in detail—we need to examine the original Constitution. What kind of government did it establish? Benjamin Franklin, when asked this question by a citizen on the streets of Philadelphia shortly after the Constitutional Convention, is reported to have said, “A republic, if you can keep it.”

What were the key features and powers of this revolutionary new “republican” federal government? And how could Franklin’s words be squared with the Constitution’s preservation—and even encouragement—of slavery? Did the Constitutional Revolution of 1787 truly produce a document that matched its aspirations “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity”? These are the subjects of the chapters that follow.