

Excerpt from  
*Processes of Constitutional Decision making*  
*Cases and Materials*  
4th Edition  
By Brest, Levinson, Balkin & Amar

## **Background to the Constitution**

In June 1776, the Continental Congress, meeting in Philadelphia, appointed committees to draft a declaration of independence and to prepare “the form of a confederation to be entered into between these colonies.”<sup>1</sup> The first committee was distinctly more successful than the second. Within a month, Congress approved the Declaration of Independence of which Thomas Jefferson was the principal drafter. Articles of Confederation were submitted to the states in 1777, but they did not take formal effect until 1781, when the last state, Maryland, gave its assent.

The new nation was called The United States of America, but this only generated the question whether the primary inflection should be placed on the word “United” or the word “States”<sup>2</sup> (What, for example, is the implication to be drawn from the fact that the United States is a member of the United Nations?) Thus one writer has suggested that the Articles of Confederation are better conceived as “a treaty among a group of small nations” than a charter for a single nation.<sup>3</sup> Consider in this context 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.”<sup>4</sup> Representation in the Congress was by states (which, of course, is true today), but each state had only one vote, cast by the majority of its delegates (who could number up to seven). Moreover, the delegates were paid by the states, and they were subject to recall by their respective states should their votes be objectionable. Congressional power was narrowly limited. There was, for example, no authority to regulate interstate or foreign commerce. Even more to the point (especially during the period in which Congress was trying to manage a war against England), Congress had no power to tax the citizenry; it was limited to “requisitioning” funds from the states

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<sup>1</sup> Quoted in *The Formation of the Union* (National Archives Pub. No.70-13), at 34

<sup>2</sup> See Sebastian de Grazia, *A Country with No Name: Tales from the Constitution* (1997), for a fascinating discussion of the theoretical implications of the name. There were some proposals at the time to rename the new nation “Columbia,” but they were resisted in part because any such name would suggest a far more united group of states than many (perhaps most) wished to acknowledge.

<sup>3</sup> *The Formation of the Union*, at 34. ,

<sup>4</sup> This and other quotations from the Articles are taken from *Sources and Documents Illustrating the American Revolution 1764-1788* (Morison ed., 2d ed. 1965), at 178-186.

themselves, which, as a practical matter, amounted to little more than a request for voluntary donations to the national treasury. Congress had the power to coin money, but states retained the power to issue paper money, which some did with abandon. The Articles established neither a national judiciary nor even a genuine executive branch. Congress was authorized to establish such “committees and civil officers as may be necessary for managing the general affairs of the united states under their direction” and to appoint a “president” of the Congress, who could serve only a single one-year term in any three-year period. In 1781, Congress established departments of Foreign Affairs, War, Marine, and Treasury, each under a single secretary.

The perceived deficiencies of the political order established by the Articles, reflected, it was felt by many, in economic turmoil following the completion of the Revolutionary War in 1783, led many to call for revisions, though an additional difficulty generated by the Articles was Article XIII, which required unanimous consent of all of the state legislatures in order to validate any amendments. By definition this gave a single state -- Rhode Island, both the smallest and the most radical, was often selected out for particular opprobrium -- a veto over any changes. In an event, as early as 1783 Alexander Hamilton called for “a General Con- I convention for the purpose of revising and amending the federal Government.” James Madison registered his opposition, noting his fear that such a convention would excite “pernicious jealousies” among the states.<sup>5</sup> The situation changed rapidly, however, as more observers agreed that the system set up by the Articles was not working.<sup>6</sup> Congress was perceived as having both little authority and little legitimacy. “[B]y 1785,” writes Stanford historian Jack Rakove, “its reputation had fallen so low, that any proposal [for amendment] Congress submitted to the states seemed tainted at the source.”<sup>7</sup> And, of course, even if Congress had had a better reputation, amendment was still likely to be frustrated by the unanimity rule. “With Congress clearly losing whatever influence it retained, the initiative for reform necessarily shifted to the states.”<sup>8</sup> Thus in January 1786, the Virginia assembly adopted a resolution calling for an interstate conference that would, among other things, “take into consideration the trade of the United States; to examine the relative situations and trade of the said States; [and] to consider how far a uniform system in their commercial regulations may be necessary to their common interests and their permanent harmony.” Madison supported the resolution.

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<sup>5</sup> 9 Papers of James Madison 115-119 (Rutland & Rachal eds., 1975).

<sup>6</sup> There is, as one might imagine, no consensus about the actual state of affairs of the United States under the Confederation. Although most historians probably agree, more or less, with the critiques of those who supported the Philadelphia Convention, a dissenting view can be found in Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789* (1950), See also Peter S. Onuf, *The First Federal Constitution: The Articles of Confederation*, in *The Framing and Ratification of the Constitution* 82-97 (Leonard Levy & Dennis J. Mahoney eds., 1987). This book includes a number of essays that are clearly relevant to the issues discussed in the following paragraphs.

<sup>7</sup> Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 31 (1996).

<sup>8</sup> *Id.* at 32. A fascinating history of the move toward change can also be found in Bruce Ackerman *We the People: Transformations* 32-68 (1998).

This led to the Annapolis Conference of September 1786; twelve delegates from five states met to consider the situation. Madison wrote to Jefferson, who was in Paris serving as the American ambassador to France, that "Gentlemen both within & without Congs. Wish to make this Meeting subservient to a Plenipotentiary Convention for amending the Confederation. Tho my wishes are in favor of such an event, yet I despair so much of its accomplishment at the present crisis that I do not extend my views beyond a Commercial Reform. To speak the truth I almost despair even of this."<sup>9</sup> The practical authority, not to mention legal mandate, of the Annapolis Convention was obviously limited. Its report therefore proposed yet another meeting "to devise such further provisions as shall appear ..necessary to render the constitution of the Federal Government adequate to the exigencies of the Union."<sup>10</sup> Congress agreed, in February 1787, to authorize a convention "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 federal constitution adequate to the exigencies of Government & the preservation of the union."<sup>11</sup>

The Convention began meeting in Philadelphia the following May, and it ended up, of course, drafting a brand new Constitution. The delegates had little doubt that they were exceeding the scope of their congressional authorization. Edmund Randolph, the Governor of Virginia --he would later become the first Attorney General of the United States -told the Convention, "There are great seasons when persons with limited powers are justified in exceeding them, and a person would be contemptible not to risk it."<sup>12</sup> Alexander Hamilton agreed: "To rely on & propose any plan not adequate to these exigencies, merely because it was not clearly within our powers, would be to sacrifice the means to the end."<sup>13</sup> Hamilton, of course, would, with John Jay and James Madison, go on to write the most influential tract in favor of the new Constitution, *The Federalist*; in the *Federalist* No.40, Madison defended the Convention's action by writing that the delegates "must have borne in mind, that as the plan to be framed and proposed was to be submitted *to the people themselves*. ..its approbation [would] blot out antecedent errors and irregularities." As you read through the materials in this Casebook, you might ask yourself how often such arguments have carried the day against opponents who claim that strict fidelity to constitutional norms would require rejection of what are perceived as highly desirable proposals.

The fact that the Convention went far beyond its congressional mandate was

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<sup>9</sup> Madison to Jefferson, August 12, 1786, in 9 Papers, at 96,

<sup>10</sup> Formation of the Union, at 50.

<sup>11</sup> *Id.*

<sup>12</sup> 1 Records of the Federal Convention of 1787, at 362 (Farrand ed., 1937) (speech of June 16, 1787).

<sup>13</sup> *Id.* at 283 June 18, 1787). See also *id.* at 346 (George Mason).

only one of the procedural problems found in the proposal and ratification of the new Constitution. The February bill assumed that Congress would play an independent role in deliberating upon the Convention's recommendations and, more importantly, that any amendments would be subjected to the requirement of Article XIII that all state legislatures assent to any changes. Instead, Congress turned out to be nothing more than a messenger, agreeing to send on, without a single change, the handiwork of the Philadelphia convention. And Article VII of the proposed Constitution simply ignored Article XII II inasmuch as it stated that "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same." No longer could Rhode Island exercise any veto. (Indeed, Rhode Island, together with North Carolina, had not ratified the Constitution by the time that George Washington was inaugurated as the first President of the reordered American polity on April 30, 1789. The United States at the time therefore consisted only of 11 states, with Rhode Island and North Carolina, juridically speaking, having the status of foreign countries.) Bruce Ackerman describes Article VII's 'assertion that nine state 'Conventions' could adequately ratify on behalf of the People [as] plainly an extra-legal assertion of democratic authority."<sup>14</sup> (One might, of course, conceptualize the events of 1787-88 as the secession by the ratifying states from the confederation established by the Articles and the joining of a new polity established by the Constitution, but this, too, raises obvious problems, especially given similar attempts at secession by 11 states in 1860-61.) In any event, by 1787 the first U.S. constitution, the Articles of Confederation, had become simply irrelevant.

The substantive decisions of the Philadelphia convention were of sweeping import. The delegates nearly deadlocked over the formula for state representation in the new, far more powerful, congress. The Virginia Plan, which served as a working draft for much of the document, in effect proposed that representation in both houses- there was never any serious consideration given to the possibility of a single-house Congress-would be based on the number of free inhabitants in each state. This met with vigorous opposition from less populous states as well as from Virginia's fellow Southern states. Although it was thought that the population of the South would grow more rapidly than that of the North, the South feared the possibility of Northern domination of the Congress and the concomitant threat to the institution of slavery. After more than a month of

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<sup>14</sup> Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1017 n.6. See also Richard Kay, *The legality of the Constitution*, 4 *Constitutional Commentary* 57 (1987). The most vigorous defense of the legality of the procedures by which the Constitution was adopted has been offered by Ackerman's Yale colleague Akhil Reed Amar, who relies on the notion that the Articles were indeed only a "treaty" among the various sovereign states. 'By 1787, the Articles had been routinely and flagrantly violated on all sides. And under well-established legal principles in 1787, these material breaches freed each compacting party-each state- to disregard the pact.' See Amar, *Popular Sovereignty and Constitutional Amendment*, in Sanford Levinson ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 92-95 (1995). You might ask yourself if the extent your esteem for the members of the founding generation depends on their fidelity to existing legal norms. If, at the end of the day, you do not really care who is correct between Ackerman and Amar, does that have implications for your views today about the importance of fidelity to the existing Constitution? Is it more important to be faithful to the law or to respond imaginatively to the "exigencies" of the moment?

passionate controversy, the Convention agreed on a compromise: Each state would receive equal representation in the Senate -- a voting distribution that was ultimately entrenched in Article V by requiring unanimity for amendment--and the distribution of votes in the House would be proportionate not to the numbers of free citizens, but, rather to the sum of “the whole number of free persons” and “three-fifths of all other persons” in each state, a clear reference, given the politics of the time, to slaves.<sup>15</sup>

The debate about representation was so deep in part because Congress was getting significant new power. It would, among other things, get the ability directly to tax the citizenry. It was given the power to regulate interstate and foreign commerce. In addition the explicit topics set out in Article I, §8, the conclusion of that section included an authorization “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” The bulk of the pages below will be devoted to the ramifications of these (and other) grants of congressional power.

Slavery accounted for two other patches of constitutional text, albeit the words "slave" or "slavery" were never actually used. Article I, §9 limited Congress's right to control the "Migration or Importation of such Persons as any of the states now existing shall think proper to admit" until 1808, when Congress in fact passed a law Prohibiting the importation of slaves into the United States from abroad. (The internal slave trade was not affected.) And Article IV, §2, Cl. 3, establishes a duty of states to return any “Person held to Service or Labour in one State, under the Laws thereof," who attempts to escape into another state (one that presumably does not recognize the ownership of one human being by another) .We will have ample opportunity in this book to consider the constitutional implications of these, and other, clauses in regard to America's "peculiar institution" of race-based chattel slavery.

What is most obviously lacking in the original Constitution is the explicit protection of the rights of the citizenry. Indeed, Virginia’s George Mason, one of the most respected members of the Philadelphia delegation, refused to sign the Constitution because it lacked what the Virginia constitution included, a declaration of rights. This became one of the central arguments of those opposing ratification of the Constitution. In the 84th Federalist, Hamilton responded to such calls:

I affirm that the bills of rights ...are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colorable pretext to claim more than were granted. for why declare that

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<sup>15</sup> It should be noted that it is unfair to view the South as believing that slaves were only three-fifths human beings. Southern states would have been delighted to count each slave as the equivalent of two free persons, for that would have obviously enhanced their representation immensely. Thus the South Carolina delegation at the Convention demanded full representation for slaves. See Rakove, at 73. The South Carolinians were obviously not afraid to count slaves as full human beings, so long as they were disallowed any rights to participate in the polity as voting members ( or, of course, in any other capacity) . Concomitantly, Northern states would have wished to exclude slaves entirely from the pool of those counted for representation. The complement to the three-fifths compromise on representation was a similar three-fifths compromise in regard to taxation. See Article I, §2, Cl. 2.

things shall not be done which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the constitution ought not to be charged with the absurdity of providing against the abuse of an authority, which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it, was intended to be vested in the national government. This may serve as a specimen of the numerous hurdles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights.<sup>16</sup>

The principal anti-Federalist response to this argument emphasized the limitations contained in Article I, §9. Why, if the powers of the national government were limited to assigned powers, was it necessary to prohibit Congress from, say, granting titles of nobility? In any event, there was sufficient support for a bill of rights that it became a de-facto condition of ratification by many of the delegates. Madison, who had initially agreed with his then-colleague Hamilton on the inefficacy of a formal bill of rights, became the primary architect of the first amendments to the Constitution during the first session of Congress in 1789. Twelve such amendments were proposed, ten of which were ratified in 1791. (One of the two initially non-ratified amendment, the original second amendment, was deemed to have been ratified in 1992, 203 years after its initial proposal in 1789. The legitimacy of its ratification is considered below at 393-97.) One question you might ask yourself as you confront cases dealing with the scope of congressional powers, is whether Hamilton's and Iredell's fears have been vindicated by events.

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<sup>16</sup> Hamilton was scarcely unique in making this argument. Probably the most influential version at the time was that of Philadelphia's James Wilson, in an address to the citizens of that city during their consideration of the Constitution, which occurred far earlier than New York's. And James Iredell of North Carolina, who with Wilson would be appointed by George Washington to the Supreme Court, told that state's convention that it would be 'not only useless, but dangerous, to enumerate a number of rights which are not intended to be given up, because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation.' Speech of July 29, 1788, before the North Carolina ratifying convention, quoted in Dan Farber and Suzanna Sherry, *A History of the American Constitution* 224 (1990).