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THE FOUNDING FATHERS: A REFORM CAUCUS IN ACTION

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Over the last century and a half, the work of the Constitutional Convention and the motives of the Founding Fathers have been analyzed under a number of different ideological auspices. To one generation of historians, the hand of God was moving in the assembly; under a later dispensation, the dialectic (at various levels of philosophical sophistication) replaced the Deity: "relationships of production" moved into the niche previously reserved for Love of Country. Thus in counterpoint to the Zeitgeist, the Framers have undergone miraculous metamorphoses: at one time acclaimed as liberals and bold social engineers, today they appear in the guise of sound Burkean conservatives, men who in our time would subscribe to *Fortune*, look to Walter Lippmann for political theory, and chuckle patronizingly at the antics of Barry Goldwater. The implicit assumption is that if James Madison were among us, he would be President of the Ford Foundation, while Alexander Hamilton would chair the Committee for Economic Development.

The "Fathers" have thus been admitted to our best circles; the revolutionary ferocity which confiscated all Tory property in reach and populated New Brunswick with outlaws has been converted by the "Miltown School" of American historians into a benign dedication to "consensus" and "prescriptive rights." The Daughters of the American Revolution have, through the ministrations of Professors Boorstin, Hartz, and Rossiter, at last found ancestors worthy of their descendants. It is not my purpose here to argue that the "Fathers" were, in fact, radical revolutionaries; that proposition has been brilliantly demonstrated by Robert R. Palmer in his *Age of the Democratic Revolution*. My concern is with the further position that not only were they revolutionaries, but also they were democrats. Indeed, in my view, there is one fundamental truth about the Founding Fathers that *every* generation of Zeitgeisters has done its best to obscure: they were first and foremost superb democratic politicians. I suspect that in a contemporary setting, James Madison would be Speaker of the House of Representatives and Hamilton would be the *eminence grise* dominating (*pace* Theodore Sorenson or Sherman Adams) the Executive Office of the President. They were, with their colleagues, *political men*—not metaphysicians, disembodied conservatives or Agents of History—and as recent research into the nature of American politics in the 1780s confirms,[1] they were committed (perhaps willy-nilly) to working within the democratic framework, within a universe of public approval. Charles Beard *and* the filiopietists to the contrary notwithstanding, the Philadelphia Convention was not a College of Cardinals or a council of Platonic guardians working within a manipulative, predemocratic framework; it was a *nationalist* reform caucus which had to operate with great delicacy and skill in a political cosmos full of enemies to achieve the one definitive goal—popular approbation.

Perhaps the time has come, to borrow Walton Hamilton's fine phrase, to raise the Framers from immortality to mortality, to give them credit for their magnificent demonstration of the art of democratic politics. The point must be reemphasized; they *made* history and did it within the limits of consensus. There was nothing inevitable about the future in 1787; the *Zeitgeist*, that fine Hegelian technique of begging causal questions, could only be discerned in retrospect. What they did was to hammer out a pragmatic compromise which would both bolster the "National interest" and be acceptable to the people. What inspiration they got came from their collective experience as professional politicians in a democratic society. As John Dickinson put it to his fellow delegates on August 13, "Experience must be our guide. Reason may mislead us."

In this context, let us examine the problems they confronted and the solutions they evolved. The Convention has been described picturesquely as a counter-revolutionary junta and

[1] The view that the right to vote in the states was severely circumscribed by property qualifications has been thoroughly discredited in recent years. See Chilton Williamson, *American Suffrage from Property to Democracy, 1760–1860* (Princeton, 1960). The contemporary position is that John Dickinson actually knew what he was talking about when he argued that there would be little opposition to vesting the right of suffrage in freeholders since "The great mass of our Citizens is composed at this time of freeholders, and will be pleased with it." Max Farrand, *Records of the Federal Convention*, Vol. 2, p. 202 (New Haven, 1911). (Henceforth cited as *Farrand*.)

the Constitution as a *coup d'etat*,[2] but this has been accomplished by withdrawing the whole history of the movement for constitutional reform from its true context. No doubt the goals of the constitutional elite were "subversive" to the existing political order, but it is overlooked that their subversion could only have succeeded if the people of the United States endorsed it by regularized procedures. Indubitably they were "plotting" to establish a much stronger central government than existed under the Articles, but only in the sense in which one could argue equally well that John F. Kennedy was, from 1956 to 1960, "plotting" to become President. In short, on the fundamental *procedural* level, the Constitutionalists had to work according to the prevailing rules of the game. Whether they liked it or not is a topic for spiritualists—and is irrelevant: one may be quite certain that had Washington agreed to play the De Gaulle (as the Cincinnati once urged), Hamilton would willingly have held his horse, but such fertile speculation in no way alters the actual context in which events took place.

I

When the Constitutionalists went forth to subvert the Confederation, they utilized the mechanisms of political legitimacy. And the roadblocks which confronted them were formidable. At the same time, they were endowed with certain potent political assets. The history of the United States from 1786 to 1790 was largely one of a masterful employment of political expertise by the Constitutionalists as against bumbling, erratic behavior by the opponents of reform. Effectively, the Constitutionalists had to induce the states, by democratic techniques of coercion, to emasculate themselves. To be specific, if New York had refused to join the new Union, the project was doomed; yet before New York was safely in, the reluctant state legislature had *sua sponte* to take the following steps: (1) agree to send delegates to the Philadelphia Convention; (2) provide maintenance for these delegates (these were distinct stages: New Hampshire was early in naming delegates, but did not provide for their maintenance until July); (3) set up the special *ad hoc* convention to decide on ratification; and (4) concede to the decision of the *ad hoc* convention that New York should participate. New York admittedly was a tricky state, with a strong interest in a *status quo* which permitted her to exploit New Jersey and Connecticut, but the same legal hurdles existed in every state. And at the risk of becoming boring, it must be reiterated that the *only* weapon in the Constitutionalist arsenal was an effective mobilization of public opinion.

The group which undertook this struggle was an interesting amalgam of a few dedicated nationalists with the self-interested spokesmen of various parochial bailiwicks. The Georgians, for example, wanted a strong central authority to provide military protection for their huge, underpopulated state against the Creek Confederacy; Jerseymen and Connecticuters wanted to escape from economic bondage to New York; the Virginians hoped to establish a system which would give that great state its rightful place in the councils of the republic. The dominant figures in the politics of these states therefore cooperated in the call for the Convention.[3] In other states, the thrust towards national reform was taken up by opposition groups who added the "national interest" to their weapons system; in Pennsylvania, for instance, the group fighting to revise the Constitution of 1776 came out four-square behind the Constitutionalists, and in New York, Hamilton and the Schuyler *ambiance* took the same tack against George Clinton.[4] There was, of course, a large element of personality in the affair: there is reason to suspect that Patrick Henry's opposition to the Convention and the

[2] The classic statement of the *coup d'etat* theory is, of course, Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York, 1913), and this theme was echoed by Vernon L. Parrington, Merrill Jensen and others in "populist" historiographical tradition. For a sharp critique of this thesis see Robert E. Brown, *Charles Beard and the Constitution* (Princeton, 1956). See also Forrest McDonald, *We the People* (Chicago, 1958); the trailblazing work in this genre was Douglas Adair, "The Tenth Federalist Revisited," *William and Mary Quarterly*, Third Series, Vol. VIII (1951), pp. 48–67.

[3] A basic volume, which, like other works by Warren, provides evidence with which one can evaluate the author's own opinions, is Charles Warren, *The Making of the Constitution* (Boston, 1928). The best brief summary of the forces behind the movement for centralization is Chapter 1 of *Warren* (as it will be cited hereafter).

[4] On Pennsylvania see Robert L. Brunhouse, *Counter-Revolution in Pennsylvania* (Harrisburg, 1942) and Charles P. Smith, *James Wilson* (Chapel Hill, 1956), ch. 15; for New York, which needs the same sort of microanalysis Pennsylvania has received, the best study is E. Wilder Spaulding, *New York in the Critical Period, 1783–1789* (New York, 1932).

Constitution was founded on his conviction that Jefferson was behind both, and a close study of local politics elsewhere would surely reveal that others supported the Constitution for the simple (and politically quite sufficient) reason that the "wrong" people were against it.

To say this is not to suggest that the Constitution rested on a foundation of impure or base motives. It is rather to argue that in politics there are no immaculate conceptions, and that in the drive for a stronger general government, motives of all sorts played a part. Few men in the history of mankind have espoused a view of the "common good" or "public interest" that militated against their private status; even Plato with all his reverence for disembodied reason managed to put philosophers on top of the pile. Thus it is not surprising that a number of diversified private interests joined to push the nationalist public interest; what would have been surprising was the absence of such a pragmatic united front. And the fact remains that, however motivated, these men did demonstrate a willingness to compromise their parochial interests in behalf of an ideal which took shape before their eyes and under their ministrations.

As Stanley Elkins and Eric McKitrick have suggested in a perceptive essay,[5] what distinguished the leaders of the Constitutionalist caucus from their enemies was a "Continental" approach to political, economic and military issues. To the extent that they shared an institutional base of operations, it was the Continental Congress (thirty-nine of the delegates to the Federal Convention had served in Congress[6]), and this was hardly a locale which inspired respect for the state governments. Robert de Jouvenal observed French politics half a century ago and noted that a revolutionary Deputy had more in common with a non-revolutionary Deputy than he had with a revolutionary non-Deputy;[7] similarly one can surmise that membership in the Congress under the Articles of Confederation worked to establish a continental frame of reference, that a Congressman from Pennsylvania and one from South Carolina would share a universe of discourse which provided them with a conceptual common denominator *vis à vis* their respective state legislatures. This was particularly true with respect to external affairs: the average state legislator was probably about as concerned with foreign policy then as he is today, but Congressmen were constantly forced to take the broad view of American prestige, were compelled to listen to the reports of Secretary John Jay and to the dispatches and pleas from their frustrated envoys in Britain, France and Spain.[8] From considerations such as these, a "Continental" ideology developed which seems to have demanded a revision of our domestic institutions primarily on the ground that only by invigorating our general government could we assume our rightful place in the international arena. Indeed, an argument with great force—particularly since Washington was its incarnation—urged that our very survival in the Hobbesian jungle of world politics depended upon a reordering and strengthening of our national sovereignty.[9]

Note that I am not endorsing the "Critical Period" thesis; on the contrary, Merrill Jensen seems to me quite sound in his view that for most Americans, engaged as they were in self-sustaining agriculture, the "Critical Period" was not particularly critical.[10] In fact, the great achievement of the Constitutionalists was their ultimate success in convincing the elected representatives of a majority of the white male population that change was imperative. A small group of political leaders with a Continental vision and essentially a consciousness of the United States' *international* impotence, provided the matrix of the movement. To their standard other leaders rallied with their own parallel ambitions. Their great assets were (1) the presence in their caucus of the one authentic American "father figure," George Washington, whose prestige was enormous;[11] (2) the energy and talent of their leadership (in which one must include the towering intellectuals of the

[5] Stanley Elkins and Eric McKitrick, "The Founding Fathers: Young Men of the Revolution," *Political Science Quarterly*, Vol. 76, p. 181 (1961).

[6] *Warren*, p. 55.

[7] In *La Republique des Camarades* (Paris, 1914).

[8] See Frank Monaghan, *John Jay* (New York, 1935), ch. 13.

[9] "[T]he situation of the general government, if it can be called a government, is shaken to its foundation, and liable to be overturned by every blast. In a word, it is at an end; and, unless a remedy is soon applied, anarchy and confusion will inevitably ensue." Washington to Jefferson, May 30, 1787, *Farrand*, III, 31. See also Irving Brant, *James Madison, The Nationalist* (New York, 1948), ch. 25.

[10] Merrill Jensen, *The New Nation* (New York, 1950). Interestingly enough, Prof. Jensen virtually ignores international relations in his laudatory treatment of the government under the Articles of Confederation.

[11] The story of James Madison's cultivation of Washington is told by Brant, *op. cit.*, pp. 394–97.

time, John Adams and Thomas Jefferson, despite their absence abroad), and their communications "network," which was far superior to anything on the opposition side;[12] (3) the preemptive skill which made "their" issue The Issue and kept the locally oriented opposition permanently on the defensive; and (4) the subjective consideration that these men were spokesmen of a new and compelling credo: *American* nationalism, that ill-defined but nonetheless potent sense of collective purpose that emerged from the American Revolution.

Despite great institutional handicaps, the Constitutionalists managed in the mid-1780s to mount an offensive which gained momentum as years went by. Their greatest problem was lethargy, and paradoxically, the number of barriers in their path may have proved an advantage in the long run. Beginning with the initial battle to get the Constitutional Convention called and delegates appointed, they could never relax, never let up the pressure. In practical terms, this meant that the local "organizations" created by the Constitutionalists were perpetually in movement building up their cadres for the next fight. (The word organization has to be used with great caution: a political organization in the United States—as in contemporary England[13]—generally consisted of a magnate and his following, or a coalition of magnates. This did not necessarily mean that it was "undemocratic" or "aristocratic," in the Aristotelian sense of the word: while a few magnates such as the Livingstons could draft their followings, most exercised their leadership without coercion on the basis of popular endorsement. The absence of organized opposition did not imply the impossibility of competition any more than low public participation in elections necessarily indicated an undemocratic suffrage.)

The Constitutionalists got the jump on the "opposition" (a collective noun: oppositions would be more correct) at the outset with the demand for a Convention. Their opponents were caught in an old political trap: they were not being asked to approve any specific program of reform, but only to endorse a meeting to discuss and recommend needed reforms. If they took a hard line at the first stage, they were put in the position of glorifying the *status quo* and of denying the need for *any* changes. Moreover, the Constitutionalists could go to the people with a persuasive argument for "fair play"—"How can you condemn reform before you know precisely what is involved?" Since the state legislatures obviously would have the final say on any proposals that might emerge from the Convention, the Constitutionalists were merely reasonable men asking for a chance. Besides, since they did not make any concrete proposals at that stage, they were in a position to capitalize on every sort of generalized discontent with the Confederation.

Perhaps because of their poor intelligence system, perhaps because of over-confidence generated by the failure of all previous efforts to alter the Articles,[14] the opposition awoke too late to the dangers that confronted them in 1787. Not only did the Constitutionalists manage to get every state but Rhode Island (where politics was enlivened by a party system reminiscent of the "Blues" and the "Greens" in the Byzantine Empire)[15] to appoint delegates to Philadelphia, but when the results were in, it appeared that they dominated the delegations. Given the apathy of the opposition, this was a natural phenomenon: in an ideologically nonpolarized political atmosphere those who get appointed to a special committee are likely to be the men who supported the movement for its creation. Even George Clinton, who seems to have been the first opposition leader to awake to the possibility of trouble, could not prevent the New York legislature from appointing Alexander Hamilton—though he did have the foresight to send two of his henchmen to dominate the delegation. Incidentally, much has been made of the fact that the delegates to Philadelphia were not elected by the people; some have adduced this fact as evidence of the "undemocratic" character of the gathering.

[12] The "message center" being the Congress; nineteen members of Congress were simultaneously delegates to the Convention. One gets a sense of this coordination of effort from Broadus Mitchell, *Alexander Hamilton, Youth to Maturity* (New York, 1957), ch. 22.

[13] See Sir Lewis Namier, *The Structure of Politics at the Accession of George III*, 2d ed. (New York, 1957); *England in the Age of the American Revolution* (London, 1930).

[14] The Annapolis Convention, called for the previous year, turned into a shambles: only five states sent commissioners, only three states were legally represented, and the instructions to delegates named varied quite widely from state to state. Clinton and others of his persuasion may have thought this disaster would put an end to the drive for reform. See Mitchell, *op. cit.*, pp. 362–67; Brant, *op. cit.*, pp. 375–87.

[15] See Hamilton M. Bishop, *Why Rhode Island Opposed the Federal Constitution* (Providence, 1950) for a careful analysis of the labyrinthine political course of Rhode Island. For background see David S. Lovejoy, *Rhode Island Politics and the American Revolution* (Providence, 1958).

But put in the context of the time, this argument is wholly specious: the central government under the Articles was considered a creature of the component states and in all the states but Rhode Island, Connecticut and New Hampshire, members of the national Congress were chosen by the state legislatures. This was not a consequence of elitism or fear of the mob; it was a logical extension of states'-rights doctrine to guarantee that the national institution did not end-run the state legislatures and make direct contact with the people.[16]

II

With delegations safely named, the focus shifted to Philadelphia. While waiting for a quorum to assemble, James Madison got busy and drafted the so-called Randolph or Virginia Plan with the aid of the Virginia delegation. This was a political master-stroke. Its consequence was that once business got underway, the framework of discussion was established on Madison's terms. There was no interminable argument over agenda; instead the delegates took the Virginia Resolutions—"just for purposes of discussion"—as their point of departure. And along with Madison's proposals, many of which were buried in the course of the summer, went his major premise: a new start on a Constitution rather than piecemeal amendment. This was not necessarily revolutionary—a little exegesis could demonstrate that a new Constitution might be formulated as "amendments" to the Articles of Confederation—but Madison's proposal that this "lump sum" amendment go into effect after approval by nine states (the Articles required unanimous state approval for any amendment) was thoroughly subversive.[17]

Standard treatments of the Convention divide the delegates into "nationalists" and "states'-righters" with various improvised shadings ("moderate nationalists," etc.), but these are *a posteriori* categories which obfuscate more than they clarify. What is striking to one who analyzes the Convention as a case-study in democratic politics is the lack of clear-cut ideological divisions in the Convention. Indeed, I submit that the evidence—Madison's *Notes*, the correspondence of the delegates, and debates on ratification—indicates that this was a remarkably homogeneous body on the ideological level. Yates and Lansing, Clinton's two chaperones for Hamilton, left in disgust on July 10. (Is there anything more tedious than sitting through endless disputes on matters one deems fundamentally misconceived? It takes an iron will to spend a hot summer as an ideological *agent provocateur*.) Luther Martin, Maryland's bibulous narcissist, left on September 4 in a huff when he discovered that others did not share his self-esteem; others went home for personal reasons. But the hard core of delegates accepted a grinding regimen throughout the attrition of a Philadelphia summer precisely because they shared the Constitutionalist goal.

Basic differences of opinion emerged, of course, but these were not ideological; they were *structural*. If the so-called "states'-rights" group had not accepted the fundamental purposes of the Convention, they could simply have pulled out and by doing so have aborted the whole enterprise. Instead of bolting, they returned day after day to argue and to compromise. An interesting symbol of this basic homogeneity was the initial agreement on secrecy: these professional politicians did not want to become prisoners of publicity; they wanted to retain that freedom of maneuver which is only possible when men are not forced to take public stands in the preliminary stages of negotiation.[18] There was no legal means of binding the tongues of the delegates: at any

[16] The terms "radical" and "conservative" have been bandied about a good deal in connection with the Constitution. This usage is nonsense if it is employed to distinguish between two economic "classes"—*e.g.*, radical debtors versus conservative creditors, radical farmers versus conservative capitalists, etc.—because there was no polarization along this line of division; the same types of people turned up on both sides. And many were hard to place in these terms: does one treat Robert Morris as a debtor or a creditor? or James Wilson? See Brown, *op. cit.*, *passim*. The one line of division that holds up is between those deeply attached to states'-rights and those who felt that the Confederation was bankrupt. Thus, curiously, some of the most narrow-minded, parochial spokesmen of the time have earned the designation "radical" while those most willing to experiment and alter the *status quo* have been dubbed "conservative"! See Cecelia Kenyon, "Men of Little Faith," *William and Mary Quarterly*, Vol. 12, p. 3 (1955).

[17] Yet, there was little objection to this crucial modification from any quarter—there almost seems to have been a gentlemen's agreement that Rhode Island's *liberum veto* had to be destroyed.

[18] See Mason's letter to his son, May 27, 1787, in which he endorsed secrecy as "a proper precaution to prevent mistakes and misrepresentation until the business shall have been completed, when the whole may have a very different complexion from that in which the several crude and indigested parts might in their first shape appear if submitted to the public eye." *Farrand*, III, 28.

stage in the game a delegate with basic principled objections to the emerging project could have taken the stump (as Luther Martin did after his exit) and denounced the convention to the skies. Yet Madison did not even inform Thomas Jefferson in Paris of the course of the deliberations[19] and available correspondence indicates that the delegates generally observed the injunction. Secrecy is certainly uncharacteristic of any assembly marked by strong ideological polarization. This was noted at the time: the *New York Daily Advertiser*, August 14, 1787, commented that the ". . . profound secrecy hitherto observed by the Convention [we consider] a happy omen, as it demonstrates that the spirit of party on any great and essential point cannot have arisen to any height."[20]

Commentators on the Constitution who have read *The Federalist* in lieu of reading the actual debates have credited the Fathers with the invention of a sublime concept called "Federalism."[21] Unfortunately *The Federalist* is probative evidence for only one proposition: that Hamilton and Madison were inspired propagandists with a genius for retrospective symmetry. Federalism, as the theory is generally defined, was an improvisation which was later promoted into a political theory. Experts on "federalism" should take to heart the advice of David Hume, who warned in his *Of the Rise and Progress of the Arts and Sciences* that ". . . there is no subject in which we must proceed with more caution than in [history], lest we assign causes which never existed and reduce what is merely contingent to stable and universal principles." In any event, the final balance in the Constitution between the states and the nation must have come as a great disappointment to Madison, while Hamilton's unitary views are too well known to need elucidation.

It is indeed astonishing how those who have glibly designated James Madison the "father" of Federalism have overlooked the solid body of fact which indicates that he shared Hamilton's quest for a unitary central government. To be specific, they have avoided examining the clear import of the Madison-Virginia Plan,[22] and have disregarded Madison's dogged inch-by-inch retreat from the bastions of centralization. The Virginia Plan envisioned a unitary national government effectively freed from and dominant over the states. The lower house of the national legislature was to be elected directly by the people of the states with membership proportional to population. The upper house was to be selected by the lower and the two chambers would elect the executive and choose the judges. The national government would be thus cut completely loose from the states.[23]

The structure of the general government was freed from state control in a truly radical fashion, but the scope of the authority of the national sovereign as Madison initially formulated it was breathtaking—it was a formulation worthy of the Sage of Malmesbury himself. The national legislature was to be empowered to disallow the acts of state legislatures,[24] and the central government was vested, in addition to the powers of the nation under the Articles of Confederation, with plenary authority wherever ". . . the separate States are incompetent or in which the harmony of the United States may be interrupted by the

[19] See Madison to Jefferson, June 6, 1787, *Farrand*, III, 35.

[20] Cited in *Warren*, p. 138.

[21] See, *e.g.*, Gottfried Dietze, *The Federalist, A Classic on Federalism and Free Government* (Baltimore, 1960); Richard Hofstadter, *The American Political Tradition* (New York, 1948); and John P. Roche, "American Liberty," in M. Konvitz and C. Rossiter, eds., *Aspects of Liberty* (Ithaca, 1958).

[22] "I hold it for a fundamental point, that an individual independence of the states is utterly irreconcilable with the idea of an aggregate sovereignty," Madison to Randolph, cited in Brant, *op. cit.*, p. 416.

[23] The Randolph Plan was presented on May 29, see *Farrand*, I, 18–23; the state legislatures retained only the power to *nominate* candidates for the upper chamber. Madison's view of the appropriate position of the states emerged even more strikingly in Yates' record of his speech on June 29: "Some contend that states are sovereign when in fact they are only political societies. There is a gradation of power in all societies, from the lowest corporation to the highest sovereign. The states never possessed the essential rights of sovereignty . . . . The states, at present, are only great corporations, having the power of making by-laws, and these are effectual only if they are not contradictory to the general confederation. The states ought to be placed under the control of the general government—at least as much so as they formerly were under the king and British parliament." *Farrand*, I, 471. Forty-six years later, after Yates' "Notes" had been published, Madison tried to explain this statement away as a misinterpretation: he did not flatly deny the authenticity of Yates' record, but attempted a defense that was half justification and half evasion. Madison to W. C. Rives, Oct. 21, 1833. *Farrand*, III, 521–24.

[24] Resolution 6 gave the National Legislature this power subject to review by the Council of Revision proposed in Resolution 8.

exercise of individual legislation."[25] Finally, just to lock the door against state intrusion, the national Congress was to be given the power to use military force on recalcitrant states.[26] This was Madison's "model" of an ideal national government, though it later received little publicity in *The Federalist*.

The interesting thing was the reaction of the Convention to this militant program for a strong autonomous central government. Some delegates were startled, some obviously leery of so comprehensive a project of reform,[27] but nobody set off any fireworks and nobody walked out. Moreover, in the two weeks that followed, the Virginia Plan received substantial endorsement *en principe;* the initial temper of the gathering can be deduced from the approval "without debate or dissent," on May 31, of the Sixth Resolution which granted Congress the authority to disallow state legislation " . . . contravening *in its opinion* the Articles of Union." Indeed, an amendment was included to bar states from contravening national treaties.[28]

The Virginia Plan may therefore be considered, in ideological terms, as the delegates' Utopia, but as the discussions continued and became more specific, many of those present began to have second thoughts. After all, they were not residents of Utopia or guardians in Plato's Republic who could simply impose a philosophical ideal on subordinate strata of the population. They were practical politicians in a democratic society, and no matter what their private dreams might be, they had to take home an acceptable package and defend it—and their own political futures—against predictable attack. On June 14 the breaking point between dream and reality took place. Apparently realizing that under the Virginia Plan, Massachusetts, Virginia and Pennsylvania could virtually dominate the national government—and probably appreciating that to sell this program to "the folks back home" would be impossible—the delegates from the small states dug in their heels and demanded time for a consideration of alternatives. One gets a graphic sense of the inner politics from John Dickinson's reproach to Madison: "You see the consequences of pushing things too far. Some of the members from the small States wish for two branches in the General Legislature and are friends to a good National Government; but we would sooner submit to a foreign power than . . . be deprived of an equality of suffrage in both branches of the Legislature, and thereby be thrown under the domination of the large States."[29]

The bare outline of the *Journal* entry for Tuesday, June 14, is suggestive to anyone with extensive experience in deliberative bodies. "It was moved by Mr. Patterson [*sic*, Paterson's name was one of those consistently misspelled by Madison and everybody else] seconded by Mr. Randolph that the further consideration of the report from the Committee of the whole House [endorsing the Virginia Plan] be postponed til tomorrow. and before the question for postponement was taken. It was moved by Mr. Randolph seconded by Mr. Patterson that the House adjourn."[30] The House adjourned by obvious prearrangement of the two principals: since the preceding Saturday when Brearley and Paterson of New Jersey had announced their fundamental discontent with the representational features of the Virginia Plan, the informal pressure had certainly been building up to slow down the streamroller. Doubtless there were extended arguments at the Indian Queen between Madison and Paterson, the latter insisting that events were moving rapidly towards a probably disastrous conclusion, towards a political suicide pact. Now the process of accommodation was put into action smoothly—and wisely, given the character and strength of the doubters. Madison had the votes, but this was one of those situations where the enforcement of mechanical majoritarianism could easily have destroyed the objectives of the majority: the Constitutionalists were in quest of a qualitative as well as a quantitative consensus. This was hardly from deference to local Quaker custom; it was a political imperative if they were to attain ratification.

III

According to the standard script, at this point the "states'-rights" group intervened in

[25] Resolution 6.

[26] *Ibid.*

[27] See the discussions on May 30 and 31. "Mr. Charles Pinkney wished to know of Mr. Randolph whether he meant to abolish the State Governts. altogether . . . Mr. Butler said he had not made up his mind on the subject and was open to the light which discussion might throw on it . . . Genl. Pinkney expressed a doubt . . . Mr. Gerry seemed to entertain the same doubt." *Farrand*, I, 33–34. There were no denunciations—though it should perhaps be added that Luther Martin had not yet arrived.

[28] *Farrand*, I, 54. (Italics added.)

[29] *Ibid.*, p. 242. Delaware's delegates had been instructed by their general assembly to maintain in any new system the voting equality of the states. *Farrand*, III, 574.

[30] *Ibid.*, p. 240.

force behind the New Jersey Plan, which has been characteristically portrayed as a reversion to the *status quo* under the Articles of Confederation with but minor modifications. A careful examination of the evidence indicates that only in a marginal sense is this an accurate description. It is true that the New Jersey Plan put the states back into the institutional picture, but one could argue that to do so was a recognition of political reality rather than an affirmation of states'-rights. A serious case can be made that the advocates of the New Jersey Plan, far from being ideological addicts of states'-rights, intended to substitute for the Virginia Plan a system which would both retain strong national power and have a chance of adoption in the states. The leading spokesman for the project asserted quite clearly that his views were based more on counsels of expediency than on principle; said Paterson on June 16: "I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is not such a Governmt. as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve."[31] This is Madison's version; in Yates' transcription, there is a crucial sentence following the remarks above: "I believe that a little practical virtue is to be preferred to the finest theoretical principles, which cannot be carried into effect."[32] In his preliminary speech on June 9, Paterson had stated " . . . to the public mind we must accommodate ourselves,"[33] and in his notes for this and his later effort as well, the emphasis is the same. The *structure* of government under the Articles should be retained:

> 2. Because it accords with the Sentiments of the People
>
> [Proof:] 1. Coms. [Commissions from state legislatures defining the jurisdiction of the delegates]
>
> 2. News-papers—Political Barometer. Jersey never would have sent Delegates under the first [Virginia] Plan—
>
> Not here to sport Opinions of my own. Wt. [What] can be done. A little practicable Virtue preferrable to Theory.[34]

This was a defense of political acumen, not of states'-rights. In fact, Paterson's notes of his speech can easily be construed as an argument for attaining the substantive objectives of the Virginia Plan by a sound political route, *i.e.*, pouring the new wine in the old bottles. With a shrewd eye, Paterson queried:

> Will the Operation and Force of the [central] Govt. depend upon the mode of Representn.—No —it will depend upon the Quantum of Power lodged in the leg. ex. and judy. Departments—Give [the existing] Congress the same Powers that you intend to give the two Branches, [under the Virginia Plan] and I apprehend they will act with as much Propriety and more Energy . . .[35]

In other words, the advocates of the New Jersey Plan concentrated their fire on what they held to be the *political liabilities* of the Virginia Plan—which were matters of institutional structure—rather than on the proposed scope of national authority. Indeed, the Supremacy Clause of the Constitution first saw the light of day in Paterson's Sixth Resolution; the New Jersey Plan contemplated the use of military force to secure compliance with national law; and finally Paterson made clear his view that under either the Virginia or the New Jersey systems, the general government would " . . . act on individuals and not on states."[36] From the states'-rights viewpoint, this was heresy: the fundament of that doctrine was the proposition that any central government had as its constituents the states, not the people, and could only reach the people through the agency of the state government.

Paterson then reopened the agenda of the Convention, but he did so within a distinctly nationalist framework. Paterson's position was one of favoring a strong central government in principle, but opposing one which in fact *put the big states in the saddle.* (The Virginia Plan, for all its abstract merits, did very well by Virginia.) As evidence for this speculation, there is a curious and intriguing proposal among Paterson's preliminary drafts of the New Jersey Plan:

> Whereas it is necessary in Order to form the People of the U. S. of America in to a Nation, that the States should be consolidated, by which means all the Citizens thereof will become equally intitled to and will equally participate in the same Privileges and Rights . . . it is therefore resolved, that all the Lands contained within the Limits of each state individually, and of the U. S. generally

[31] *Ibid.*, p. 250.

[32] *Ibid.*, p. 258.

[33] *Ibid.*, p. 178.

[34] *Ibid.*, p. 274.

[35] *Ibid.*, pp. 275–76.

[36] "But it is said that this national government is to act on individuals and not on states; and cannot a federal government be so framed as to operate in the same way? It surely may." *Ibid.*, pp. 182–83; also *ibid.* at p. 276.

be considered as constituting one Body or Mass, and be divided into thirteen or more integral parts.

Resolved, That such Divisions or integral Parts shall be styled Districts.[37]

This makes it sound as though Paterson was prepared to accept a strong unified central government along the lines of the Virginia Plan if the existing states were eliminated. He may have gotten the idea from his New Jersey colleague Judge David Brearley, who on June 9 had commented that the only remedy to the dilemma over representation was " . . . that a map of the U. S. be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts."[38] According to Yates, Brearley added at this point, " . . . then a government on the present [Virginia Plan] system will be just."[39]

This proposition was never pushed—it was patently unrealistic—but one can appreciate its purpose: it would have separated the men from the boys in the large-state delegations. How attached would the Virginians have been to their reform principles if Virginia were to disappear as a component geographical unit (the largest) for representational purposes? Up to this point, the Virginians had been in the happy position of supporting high ideals with that inner confidence born of knowledge that the "public interest" they endorsed would nourish their private interest. Worse, they had shown little willingness to compromise. Now the delegates from the small states announced that they were unprepared to be offered up as sacrificial victims to a "national interest" which reflected Virginia's parochial ambition. Caustic Charles Pinckney was not far off when he remarked sardonically that " . . . the whole [conflict] comes to this": "Give N. Jersey an equal vote, and she will dismiss her scruples, and concur in the Natil. system."[40] What he rather unfairly did not add was that the Jersey delegates were not free agents who could adhere to their private convictions; they had to take back, sponsor and risk their reputations on the reforms approved by the Convention—and in New Jersey, not in Virginia.

Paterson spoke on Saturday, and one can surmise that over the weekend there was a good deal of consultation, argument, and caucusing among the delegates. One member at least prepared a full length address: on Monday Alexander Hamilton, previously mute, rose and delivered a six-hour oration.[41] It was a remarkably apolitical speech; the gist of his position was that *both* the Virginia and New Jersey Plans were inadequately centralist, and he detailed a reform program which was reminiscent of the Protectorate under the Cromwellian *Instrument of Government* of 1653. It has been suggested that Hamilton did this in the best political tradition to emphasize the moderate character of the Virginia Plan,[42] to give the cautious delegates something *really* to worry about; but this interpretation seems somehow too clever. Particularly since the sentiments Hamilton expressed happened to be completely consistent with those he privately—and sometimes publicly—expressed throughout his life. He wanted, to take a striking phrase from a letter to George Washington, a "strong well mounted government";[43] in essence, the Hamilton Plan contemplated an elected life monarch, virtually free of public control, on the Hobbesian ground that only in this fashion could strength and stability be achieved. The other alternatives, he argued, would put policy-making at the mercy of the passions of the mob; only if the sovereign was beyond the reach of selfish influence would it be possible to have government in the interests of the whole community.[44]

From all accounts, this was a masterful and compelling speech, but (aside from furnishing John Lansing and Luther Martin with ammunition for later use against the Constitution) it made little impact. Hamilton was simply transmitting on a different wave-length from the rest of the delegates; the latter adjourned after his great effort, admired his rhetoric, and then returned to business.[45] It was rather as if they had taken a day off to attend the opera. Hamilton, never a particularly patient man or much of a negotiator, stayed for another ten days and then left, in considerable disgust, for New York.[46] Although he came back to Phila-

[37] *Farrand*, III, 613.

[38] *Farrand*, I, 177.

[39] *Ibid.*, p. 182.

[40] *Ibid.*, p. 255.

[41] J. C. Hamilton, cited *ibid.*, p. 293.

[42] See, *e.g.*, Mitchell, *op. cit.*, p. 381.

[43] Hamilton to Washington, July 3, 1787, *Farrand*, III, 53.

[44] A reconstruction of the Hamilton Plan is found in *Farrand*, III, 617–30.

[45] Said William Samuel Johnson on June 21: "A gentleman from New-York, with boldness and decision, proposed a system totally different from both [Virginia and New Jersey]; and though he has been praised by every body, he has been supported by none." *Farrand*, I, 363.

[46] See his letter to Washington cited *supra* note 43.

delphia sporadically and attended the last two weeks of the Convention, Hamilton played no part in the laborious task of hammering out the Constitution. His day came later when he led the New York Constitutionalists into the savage imbroglio over ratification—an arena in which his unmatched talent for dirty political infighting may well have won the day. For instance, in the New York Ratifying Convention, Lansing threw back into Hamilton's teeth the sentiments the latter had expressed in his June 18 oration in the Convention. However, having since retreated to the fine defensive positions immortalized in *The Federalist*, the Colonel flatly denied that he had ever been an enemy of the states, or had believed that conflict between states and nation was inexorable! As Madison's authoritative *Notes* did not appear until 1840, and there had been no press coverage, there was no way to verify his assertions, so in the words of the reporter, " . . . a warm personal altercation between [Lansing and Hamilton] engrossed the remainder of the day [June 28, 1788]."[47]

IV

On Tuesday morning, June 19, the vacation was over. James Madison led off with a long, carefully reasoned speech analyzing the New Jersey Plan which, while intellectually vigorous in its criticisms, was quite conciliatory in mood. "The great difficulty," he observed, "lies in the affair of Representation; and if this could be adjusted, all others would be surmountable."[48] (As events were to demonstrate, this diagnosis was correct.) When he finished, a vote was taken on whether to continue with the Virginia Plan as the nucleus for a new constitution: seven states voted "Yes"; New York, New Jersey, and Delaware voted "No"; and Maryland, whose position often depended on which delegates happened to be on the floor, divided.[49] Paterson, it seems, lost decisively; yet in a fundamental sense he and his allies had achieved their purpose: from that day onward, it could never be forgotten that the state governments loomed ominously in the background and that no verbal incantations could exorcise their power. Moreover, nobody bolted the convention: Paterson and his colleagues took their defeat in stride and set to work to modify the Virginia Plan, particularly with respect to its provisions on representation in the national legislature. Indeed, they won an immediate rhetorical bonus; when Oliver Ellsworth of Connecticut rose to move that the word "national" be expunged from the Third Virginia Resolution ("Resolved that a *national* Government ought to be established consisting of a *supreme* Legislative, Executive and Judiciary"[50]), Randolph agreed and the motion passed unanimously.[51] The process of compromise had begun.

For the next two weeks, the delegates circled around the problem of legislative representation. The Connecticut delegation appears to have evolved a possible compromise quite early in the debates, but the Virginians and particularly Madison (unaware that he would later be acclaimed as the prophet of "federalism") fought obdurately against providing for equal representation of states in the second chamber. There was a good deal of acrimony and at one point Benjamin Franklin—of all people—proposed the institution of a daily prayer; practical politicians in the gathering, however, were meditating more on the merits of a good committee than on the utility of Divine intervention. On July 2, the ice began to break when

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[47] *Farrand*, III, 338.

[48] *Farrand*, I, 321.

[49] Maryland's politics in this period were only a bit less intricate than Rhode Island's: the rural gentry, in much the same fashion that Namier described in England, divided up among families —Chases, Carrolls, Pacas, Lloyds, Tilghmans, etc. —and engaged in what seemed, to the outsider, elaborate political Morris dances. See Philip A. Crowl, *Maryland During and After the Revolution* (Baltimore, 1943). The Maryland General Assembly named five delegates to the Convention and provided that "the said Deputies or such of them as shall attend . . . shall have full Power to represent this State," *Farrand*, III, 586. The interesting circumstance was that three of the delegates were Constitutionalists (Carroll, McHenry and Jenifer), while two were opposed (Martin and Mercer); and this led to an *ad hoc* determination of where Maryland would stand when votes were taken. The vote on equality of representation, to be described *infra*, was an important instance of this eccentricity.

[50] This formulation was voted into the Randolph Plan on May 30, 1787, by a vote of six states to none, with one divided. *Farrand*, I, 30.

[51] *Farrand*, I, 335–36. In agreeing, Randolph stipulated his disagreement with Ellsworth's rationale, but said he did not object to merely changing an "expression." Those who subject the Constitution to minute semantic analysis might do well to keep this instance in mind; if Randolph could so concede the deletion of "national," one may wonder if any word changes can be given much weight.

through a number of fortuitous events[52]—and one that seems deliberate[53]—the majority against equality of representation was converted into a dead tie. The Convention had reached the stage where it was "ripe" for a solution (presumably all the therapeutic speeches had been made), and the South Carolinians proposed a committee. Madison and James Wilson wanted none of it, but with only Pennsylvania dissenting, the body voted to establish a working party on the problem of representation.

The members of this committee, one from each state, were elected by the delegates—and a very interesting committee it was. Despite the fact that the Virginia Plan had held majority support up to that date, neither Madison nor Randolph was selected (Mason was the Virginian) and Baldwin of Georgia, whose shift in position had resulted in the tie, was chosen. From the composition, it was clear that this was not to be a "fighting" committee: the emphasis in membership was on what might be described as "second-level political entrepreneurs." On the basis of the discussions up to that time, only Luther Martin of Maryland could be described as a "bitter-ender." Admittedly, some divination enters into this sort of analysis, but one does get a sense of the mood of the delegates from these choices—including the interesting selection of Benjamin Franklin, despite his age and intellectual wobbliness, over the brilliant and incisive Wilson or the sharp, polemical Gouverneur Morris, to represent Pennsylvania. His passion for conciliation was more valuable at this juncture than Wilson's logical genius, or Morris' acerbic wit.

There is a common rumor that the Framers divided their time between philosophical discussions of government and reading the classics in political theory. Perhaps this is as good a time as any to note that their concerns were highly practical, that they spent little time canvassing abstractions. A number of them had some acquaintance with the history of political theory (probably gained from reading John Adams' monumental compilation *A Defense of the Constitutions of Government*,[54] the first volume of which appeared in 1786), and it was a poor rhetorician indeed who could not cite Locke, Montesquieu, or Harrington *in support* of a desired goal. Yet up to this point in the deliberations, no one had expounded a defense of states'-rights or the "separation of powers" on anything resembling a theoretical basis. It should be reiterated that the Madison model had no room either for the states or for the "separation of powers": effectively *all* governmental power was vested in the national legislature. The merits of Montesquieu did not turn up until *The Federalist;* and although a perverse argument could be made that Madison's ideal was truly in the tradition of John Locke's *Second Treatise of Government*,[55] the

[52] According to Luther Martin, he was alone on the floor and cast Maryland's vote for equality of representation. Shortly thereafter, Jenifer came on the floor and "Mr. King, from Massachusetts, valuing himself on Mr. Jenifer to divide the State of Maryland on this question . . . requested of the President that the question might be put again; however, the motion was too extraordinary in its nature to meet with success." Cited from "The Genuine Information, . . ." *Farrand*, III, 188.

[53] Namely Baldwin's vote *for* equality of representation which divided Georgia—with Few absent and Pierce in New York fighting a duel, Houston voted against equality and Baldwin shifted to tie the state. Baldwin was originally from Connecticut and attended and tutored at Yale, facts which have led to much speculation about the pressures the Connecticut delegation may have brought on him to save the day (Georgia was the last state to vote) and open the way to compromise. To employ a good Russian phrase, it was certainly not an accident that Baldwin voted the way he did. See *Warren*, p. 262.

[54] For various contemporary comments, see *Warren*, pp. 814–818. On Adams' technique, see Zoltan Haraszti, "The Composition of Adams' *Defense*," in *John Adams and the Prophets of Progress* (Cambridge, 1952), ch. 9. In this connection it is interesting to check the Convention discussions for references to the authority of Locke, Montesquieu and Harrington, the theorists who have been assigned various degrees of paternal responsibility. There are no explicit references to James Harrington; one to John Locke (Luther Martin cited him on the state of nature, *Farrand*, I, 437); and seven to Montesquieu, only one of which related to the "separation of powers" (Madison in an odd speech, which he explained in a footnote was given to help a friend rather than advance his own views, cited Montesquieu on the separation of the executive and legislative branches, *Farrand*, II, 34). This, of course, does not prove that Locke and Co. were without influence; it shifts the burden of proof, however, to those who assert ideological causality. See Benjamin F. Wright, "The Origins of the Separation of Powers in America," *Economica*, Vol. 13 (1933), p. 184.

[55] I share Willmoore Kendall's interpretation of Locke as a supporter of parliamentary supremacy and majoritarianism; see Kendall, *John Locke and*

Locke whom the American rebels treated as an honorary president was a pluralistic defender of vested rights,[56] not of parliamentary supremacy.

It would be tedious to continue a blow-by-blow analysis of the work of the delegates; the critical fight was over representation of the states and once the Connecticut Compromise was adopted on July 17, the Convention was over the hump. Madison, James Wilson, and Gouverneur Morris of New York (who was there representing Pennsylvania!) fought the compromise all the way in a last-ditch effort to get a unitary state with parliamentary supremacy. But their allies deserted them and they demonstrated after their defeat the essentially opportunist character of their objections—using "opportunist" here in a non-pejorative sense, to indicate a willingness to swallow their objections and get on with the business. Moreover, once the compromise had carried (by five states to four, with one state divided), its advocates threw themselves vigorously into the job of strengthening the general government's substantive powers—as might have been predicted, indeed, from Paterson's early statements. It nourishes an increased respect for Madison's devotion to the art of politics, to realize that this dogged fighter could sit down six months later and prepare essays for *The Federalist* in contradiction to his basic convictions about the true course the Convention should have taken.

V

Two tricky issues will serve to illustrate the later process of accommodation. The first was the institutional position of the Executive. Madison argued for an executive chosen by the National Legislature and on May 29 this had been adopted with a provision that after his seven-year term was concluded, the chief magistrate should not be eligible for reelection. In late July this was reopened and for a week the matter was argued from several different points of view. A good deal of desultory speech-making ensued, but the gist of the problem was the opposition from two sources to election by the legislature. One group felt that the states should have a hand in the process; another small but influential circle urged direct election by the people. There were a number of proposals: election by the people, election by state governors, by electors chosen by state legislatures, by the National Legislature (James Wilson, perhaps ironically, proposed at one point that an Electoral College be chosen by lot from the National Legislature!), and there was some resemblance to three-dimensional chess in the dispute because of the presence of two other variables, length of tenure and re-eligibility. Finally, after opening, reopening, and re-reopening the debate, the thorny problem was consigned to a committee for resolution.

The Brearley Committee on Postponed Matters was a superb aggregation of talent and its compromise on the Executive was a masterpiece of political improvisation. (The Electoral College, its creation, however, had little in its favor as an *institution*—as the delegates well appreciated.) The point of departure for all discussion about the presidency in the Convention was that in immediate terms, the problem was non-existent; in other words, everybody present knew that under any system devised, George Washington would be President. Thus they were dealing in the future tense and to a body of working politicians the merits of the Brearley proposal were obvious: everybody got a piece of cake. (Or to put it more academically, each viewpoint could leave the Convention and argue to its constituents that it had *really* won the day.) First, the state legislatures had the right to determine the mode of selection of the electors; second, the small states received a bonus in the Electoral College in the form of a guaranteed minimum of three votes while the big states got acceptance of the principle of proportional power; third, if the state legislatures agreed (as six did in the first presidential election), the people could be involved directly in the choice of electors; and finally, if no candidate received a majority in the College, the right of decision passed to the National Legislature with each state exercising equal strength. (In the Brearley recommendation, the election went to the Senate, but a motion from the floor substituted the House; this was accepted on the ground that the Senate already had enough authority over the executive in its treaty and appointment powers.)

This compromise was almost too good to be true, and the Framers snapped it up with little debate or controversy. No one seemed to think well of the College as an *institution;* indeed, what evidence there is suggests that there

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the Doctrine of Majority Rule (Urbana, 1941). Kendall's general position has recently received strong support in the definitive edition and commentary of Peter Laslett, *Locke's Two Treatises of Government* (Cambridge, 1960).

[56] The American Locke is best delineated in Carl Becker, *The Declaration of Independence* (New York, 1948).

was an assumption that once Washington had finished his tenure as President, the electors would cease to produce majorities and the chief executive would usually be chosen in the House. George Mason observed casually that the selection would be made in the House nineteen times in twenty and no one seriously disputed this point. The vital aspect of the Electoral College was that it got the Convention over the hurdle and protected everybody's interests. The future was left to cope with the problem of what to do with this Rube Goldberg mechanism.

In short, the Framers did not in their wisdom endow the United States with a College of Cardinals—the Electoral College was neither an exercise in applied Platonism nor an experiment in indirect government based on elitist distrust of the masses. It was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content. When an elector from Oklahoma in 1960 refused to cast his vote for Nixon (naming Byrd and Goldwater instead) on the ground that the Founding Fathers intended him to exercise his great independent wisdom, he was indulging in historical fantasy. If one were to indulge in counter-fantasy, he would be tempted to suggest that the Fathers would be startled to find the College still in operation—and perhaps even dismayed at their descendants' lack of judgment or inventiveness.[57]

The second issue on which some substantial practical bargaining took place was slavery. The morality of slavery was, by design, not at issue;[58] but in its other concrete aspects, slavery colored the arguments over taxation, commerce, and representation. The "Three-Fifths Compromise," that three-fifths of the slaves would be counted both for representation and for purposes of direct taxation (which was drawn from the past—it was a formula of Madison's utilized by Congress in 1783 to establish the basis of state contributions to the Confederation treasury) had allayed some Northern fears about Southern over-representation (no one then foresaw the trivial role that direct taxation would play in later federal financial policy), but doubts still remained. The Southerners, on the other hand, were afraid that Congressional control over commerce would lead to the exclusion of slaves or to their excessive taxation as imports. Moreover, the Southerners were disturbed over "navigation acts," *i.e.*, tariffs, or special legislation providing, for example, that exports be carried only in American ships; as a section depending upon exports, they wanted protection from the potential voracity of their commercial brethren of the Eastern states. To achieve this end, Mason and others urged that the Constitution include a proviso that navigation and commercial laws should require a two-thirds vote in Congress.

These problems came to a head in late August and, as usual, were handed to a committee in the hope that, in Gouverneur Morris' words, " . . . these things may form a bargain among the Northern and Southern states."[59] The Committee reported its measures of reconciliation on August 25, and on August 29 the package was wrapped up and delivered. What occurred can best be described in George Mason's dour version (he anticipated Calhoun in his conviction that permitting navigation acts to pass by majority vote would put the South in economic bondage to the North—it was mainly on this ground that he refused to sign the Constitution):

> The Constitution as agreed to till a fortnight before the Convention rose was such a one as he would have set his hand and heart to. . . . [Until that time] The 3 New England States were constantly with us in all questions . . . so that it was these three States with the 5 Southern ones against Pennsylvania, Jersey and Delaware. With respect to the importation of slaves, [decision-making] was left to Congress. This disturbed the two Southernmost States who knew that Congress would immediately suppress the importation of slaves. Those two States therefore struck up a bargain with the three New England States. If they would join to admit slaves for some years, the two Southern-most States would join in changing the clause which required the $\frac{2}{3}$ of the Legislature in any vote [on navigation acts]. It was done.[60]

On the floor of the Convention there was a virtual love-feast on this happy occasion. Charles Pinckney of South Carolina attempted to overturn the committee's decision, when the compromise was reported to the Convention, by

[57] See John P. Roche, "The Electoral College: A Note on American Political Mythology," *Dissent* (Spring, 1961), pp. 197–99. The relevant debates took place July 19–26, 1787, *Farrand*, II, 50–128, and September 5–6, 1787, *ibid.*, pp. 505–31.

[58] See the discussion on August 22, 1787, *Farrand*, II, 366–375; King seems to have expressed the sense of the Convention when he said, "the subject should be considered in a political light only." *Ibid.* at 373.

[59] *Farrand*, II, 374. Randolph echoed his sentiment in different words.

[60] Mason to Jefferson, cited in *Warren*, p. 584.

insisting that the South needed protection from the imperialism of the Northern states. But his Southern colleagues were not prepared to rock the boat and General C. C. Pinckney arose to spread oil on the suddenly ruffled waters; he admitted that:

> It was in the true interest of the S [outhern] States to have no regulation of commerce; but considering the loss brought on the commerce of the Eastern States by the Revolution, their liberal conduct towards the views of South Carolina [on the regulation of the slave trade] and the interests the weak Southn. States had in being united with the strong Eastern states, he thought it proper that no fetters should be imposed on the power of making commercial regulations; *and that his constituents, though prejudiced against the Eastern States, would be reconciled to this liberality.* He had himself prejudices agst the Eastern States before he came here, but would acknowledge that he had found them as liberal and candid as any men whatever. (Italics added)[61]

Pierce Butler took the same tack, essentially arguing that he was not too happy about the possible consequences, but that a deal was a deal.[62] Many Southern leaders were later—in the wake of the "Tariff of Abominations"—to rue this day of reconciliation; Calhoun's *Disquisition on Government* was little more than an extension of the argument in the Convention against permitting a congressional majority to enact navigation acts.[63]

VI

Drawing on their vast collective political experience, utilizing every weapon in the politician's arsenal, looking constantly over their shoulders at their constituents, the delegates put together a Constitution. It was a makeshift affair; some sticky issues (for example, the qualification of voters) they ducked entirely; others they mastered with that ancient instrument of political sagacity, studied ambiguity (for example, citizenship), and some they just overlooked. In this last category, I suspect, fell the matter of the power of the federal courts to determine the constitutionality of acts of Congress. When the judicial article was formulated (Article III of the Constitution), deliberations were still in the stage where the legislature was endowed with broad power under the Randolph formulation, authority which by its own terms was scarcely amenable to judicial review. In essence, courts could hardly determine when "... the separate States are incompetent or ... the harmony of the United States may be interrupted"; the National Legislature, as critics pointed out, was free to define its own jurisdiction. Later the definition of legislative authority was changed into the form we know, a series of stipulated powers, *but the delegates never seriously reexamined the jurisdiction of the judiciary under this new limited formulation.*[64]

[61] August 29, 1787, *Farrand*, II, 449–50.

[62] *Ibid.*, p. 451. The plainest statement of the matter was put by the three North Carolina delegates (Blount, Spaight and Williamson) in their report to Governor Caswell, September 18, 1787. After noting that "no exertions have been wanting on our part to guard and promote the particular interest of North Carolina," they went on to explain the basis of the negotiations in cold-blooded fashion: "While we were taking so much care to guard ourselves against being over reached and to form rules of Taxation that might operate in our favour, it is not to be supposed that our Northern Brethren were Inattentive to their particular Interest. A navigation Act or the power to regulate Commerce in the Hands of the National Government ... is what the Southern States have given in Exchange for the advantages we Mentioned." They concluded by explaining that while the Constitution did deal with other matters besides taxes—"there are other Considerations of great Magnitude involved in the system"—they would not take up valuable time with boring details! *Farrand*, III, 83–84.

[63] See John C. Calhoun, *A Disquisition on Government* (New York, 1943), pp. 21–25, 38. Calhoun differed from Mason, and others in the Convention who urged the two-thirds requirement, by advocating a functional or interest veto rather than some sort of special majority, *i.e.*, he abandoned the search for quantitative checks in favor of a qualitative solution.

[64] The Committee on Detail altered the general grant of legislative power envisioned by the Virginia Plan into a series of specific grants; these were examined closely between August 16 and August 23. One day only was devoted to the Judicial Article, August 27, and since no one raised the question of judicial review of *Federal* statutes, no light was cast on the matter. A number of random comments on the power of the judiciary were scattered throughout the discussions, but there was another variable which deprives them of much probative value: the proposed Council of Revision which would have joined the Executive with the judges in *legislative* review. Madison and Wilson, for example, favored this

All arguments on the intention of the Framers in this matter are thus deductive and *a posteriori*, though some obviously make more sense than others.[65]

The Framers were busy and distinguished men, anxious to get back to their families, their positions, and their constituents, not members of the French Academy devoting a lifetime to a dictionary. They were trying to do an important job, and do it in such a fashion that their handiwork would be acceptable to very diverse constituencies. No one was rhapsodic about the final document, but it was a beginning, a move in the right direction, and one they had reason to believe the people would endorse. In addition, since they had modified the impossible amendment provisions of the Articles (the requirement of unanimity which could always be frustrated by "Rogues Island") to one demanding approval by only three-quarters of the states, they seemed confident that gaps in the fabric which experience would reveal could be rewoven without undue difficulty.

So with a neat phrase introduced by Benjamin Franklin (but devised by Gouverneur Morris)[66] which made their decision sound unanimous, and an inspired benediction by the Old Doctor urging doubters to doubt their own infallibility, the Constitution was accepted and signed. Curiously, Edmund Randolph, who had played so vital a role throughout, refused to sign, as did his fellow Virginian George Mason and Elbridge Gerry of Massachusetts. Randolph's behavior was eccentric, to say the least—his excuses for refusing his signature have a factitious ring even at this late date; the best explanation seems to be that he was afraid that the Constitution would prove to be a liability in Virginia politics, where Patrick Henry was burning up the countryside with impassioned denunciations. Presumably, Randolph wanted to check the temper of the populace before he risked his reputation, and perhaps his job, in a fight with both Henry and Richard Henry Lee.[67] Events lend some justification to this speculation: after much temporizing and use of the conditional subjunctive tense, Randoph endorsed ratification in Virginia and ended up getting the best of both worlds.

Madison, despite his reservations about the Constitution, was the campaign manager in ratification. His first task was to get the Congress in New York to light its own funeral pyre by approving the "amendments" to the Articles and sending them on to the state legislatures. Above all, momentum had to be maintained. The anti-Constitutionalists, now thoroughly alarmed and no novices in politics, realized that their best tactic was attrition rather than direct opposition. Thus they settled on a position expressing qualified approval but calling for a second Convention to remedy various defects (the one with the most demagogic appeal was the lack of a Bill of Rights). Madison knew that to accede to this demand would be equivalent to losing the battle, nor would he agree to conditional approval (despite wavering even by Hamilton). This was an all-or-nothing proposition: national salvation or national impotence with no intermediate positions possible. Unable to get congressional approval, he settled for second best: a unanimous resolution of Congress transmitting the Constitution to the states for whatever action they saw fit to take. The opponents then moved from New York and the Congress, where they had attempted to attach amendments and conditions, to the states for the final battle.[68]

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technique—which had nothing in common with what we think of as judicial review except that judges were involved in the task.

[65] For what it may be worth, I think that judicial review of congressional acts was logically on all fours with review of state enactments and that it was certainly consistent with the view that the Constitution could not be amended by the Congress and President, or by a two-thirds vote of Congress (overriding a veto), without the agreement of three-quarters of the states. *External* evidence from that time supports this view, see Charles Warren, *Congress, the Constitution, and the Supreme Court* (Boston, 1925), pp. 41–128, but the debates *in* the Convention prove nothing.

[66] Or so Madison stated, *Farrand*, II, 643. Wilson too may have contributed; he was close to Franklin and delivered the frail old gentleman's speeches for him.

[67] See a very interesting letter, from an unknown source in Philadelphia, to Jefferson, October 11, 1787: "Randolph wishes it well, & it is thought would have signed it, but he wanted to be on a footing with a popular rival." *Farrand*, III, 104. Madison, writing Jefferson a full account on October 24, 1787, put the matter more delicately—he was working hard on Randolph to win him for ratification: "[Randolph] was not inveterate in his opposition, and grounded his refusal to subscribe pretty much on his unwillingness to commit himself, so as not to be at liberty to be governed by further lights on the subject." *Ibid.*, p. 135.

[68] See Edward P. Smith, "The Movement Towards a Second Constitutional Convention in

At first the campaign for ratification went beautifully: within eight months after the delegates set their names to the document, eight states had ratified. Only in Massachusetts had the result been close (187–168). Theoretically, a ratification by one more state convention would set the new government in motion, but in fact until Virginia and New York acceded to the new Union, the latter was a fiction. New Hampshire was the next to ratify; Rhode Island was involved in its characteristic political convulsions (the Legislature there sent the Constitution out to the towns for decision by popular vote and it got lost among a series of local issues);[69] North Carolina's convention did not meet until July and then postposed a final decision. This is hardly the place for an extensive analysis of the conventions of New York and Virginia. Suffice it to say that the Constitutionalists clearly outmaneuvered their opponents, forced them into impossible political positions, and won both states narrowly. The Virginia Convention could serve as a classic study in effective floor management: Patrick Henry had to be contained, and a reading of the debates discloses a standard two-stage technique. Henry would give a four- or five-hour speech denouncing some section of the Constitution on every conceivable ground (the federal district, he averred at one point, would become a haven for convicts escaping from state authority!);[70] when Henry subsided, "Mr. Lee of Westmoreland" would rise and literally poleaxe him with sardonic invective (when Henry complained about the militia power, "Lighthorse Harry" really punched below the belt: observing that while the former Governor had been sitting in Richmond during the Revolution, *he* had been out in the trenches with the troops and thus felt better qualified to discuss military affairs).[71] Then the gentlemanly Constitutionalists (Madison, Pendleton and Marshall) would pick up the matters at issue and examine them in the light of reason.

Indeed, modern Americans who tend to think of James Madison as a rather dessicated character should spend some time with this transcript. Probably Madison put on his most spectacular demonstration of nimble rhetoric in what might be called "The Battle of the Absent Authorities." Patrick Henry in the course of one of his harangues alleged that Jefferson was known to be opposed to Virginia's approving the Constitution. This was clever: Henry hated Jefferson, but was prepared to use any weapon that came to hand. Madison's riposte was superb: First, he said that with all due respect to the great reputation of Jefferson, he was not in the country and therefore could not formulate an adequate judgment; second, no one should utilize the reputation of an outsider—the Virginia Convention was there to think for itself; third, if there were to be recourse to outsiders, the opinions of George Washington should certainly be taken into consideration; and finally, he knew from privileged personal communications from Jefferson that in fact the latter *strongly favored* the Constitution.[72] To devise an assault route into this rhetorical fortress was literally impossible.

VII

The fight was over; all that remained now was to establish the new frame of government in the spirit of its framers. And who were better qualified for this task than the Framers themselves? Thus victory for the Constitution meant simultaneous victory for the Constitutionalists; the anti-Constitutionalists either capitulated or vanished into limbo—soon Patrick Henry would be offered a seat on the Supreme Court[73] and Luther Martin would be known as the Federalist "bull-dog."[74] And irony of ironies, Alexander Hamilton and James Madison would shortly accumulate a reputation as the formulators of what is often alleged to be our political theory, the concept of "federalism." Also, on the other side of the ledger, the arguments would soon appear over what the Framers "really meant"; while these disputes have assumed the proportions of a big scholarly business in the last century, they

1788," in J. F. Jameson, ed., *Essays in the Constitutional History of the United States* (Boston, 1889), pp. 46–115.

[69] See Bishop, *op. cit.*, *passim*.

[70] See *Elliot's Debates on the Federal Constitution* (Washington, 1836), Vol. 3, pp. 436–438.

[71] This should be quoted to give the full flavor: "Without vanity, I may say I have had different experience of [militia] service from that of [Henry]. It was my fortune to be a soldier of my country. . . . I saw what the honorable gentleman did not see—our men fighting. . . . " *Ibid.*, p. 178.

[72] *Ibid.*, p. 329.

[73] Washington offered him the Chief Justiceship in 1796, but he declined; Charles Warren, *The Supreme Court in United States History* (Boston, 1947), Vol. 1, p. 139.

[74] He was a zealous prosecutor of seditions in the period 1798–1800; with Justice Samuel Chase, like himself an alleged "radical" at the time of the Constitutional Convention, Martin hunted down Jeffersonian heretics. See James M. Smith, *Freedom's Fetters* (Ithaca, 1956), pp. 342–43.

began almost before the ink on the Constitution was dry. One of the best early ones featured Hamilton versus Madison on the scope of presidential power, and other Framers characteristically assumed positions in this and other disputes on the basis of their political convictions.

Probably our greatest difficulty is that we know so much more about what the Framers *should have meant* than they themselves did. We are intimately acquainted with the problems that their Constitution should have been designed to master; in short, we have read the mystery story backwards. If we are to get the right "feel" for their time and their circumstances, we must in Maitland's phrase, ". . . think ourselves back into a twilight." Obviously, no one can pretend completely to escape from the solipsistic web of his own environment, but if the effort is made, it is possible to appreciate the past roughly on its own terms. The first step in this process is to abandon the academic premise that because we can ask a question, there must be an answer.

Thus we can ask what the Framers meant when they gave Congress the power to regulate interstate and foreign commerce, and we emerge, reluctantly perhaps, with the reply that (Professor Crosskey to the contrary notwithstanding)[75] they may not have known what they meant, that there may not have been any semantic consensus. The Convention was not a seminar in analytic philosophy or linguistic analysis. Commerce was *commerce*—and if different interpretations of the word arose, later generations could worry about the problem of definition. The delegates were in a hurry to get a new government established; when definitional arguments arose, they characteristically took refuge in ambiguity. If different men voted for the same proposition for varying reasons, that was politics (and still is); if later generations were unsettled by this lack of precision, that would be their problem.

There was a good deal of definitional pluralism with respect to the problems the delegates did discuss, but when we move to the question of extrapolated intentions, we enter the realm of spiritualism. When men in our time, for instance, launch into elaborate talmudic exegesis to demonstrate that federal aid to parochial schools is (or is not) in accord with the intentions of the men who established the Republic and endorsed the Bill of Rights, they are engaging in historical Extra-Sensory Perception. (If one were to join this E. S. P. contingent for a minute, he might suggest that the hard-boiled politicans who wrote the Constitution and Bill of Rights would chuckle scornfully at such an invocation of authority: obviously a politician would chart his course on the intentions of the living, not of the dead, and count the number of Catholics in his constituency.)

The Constitution, then, was not an apotheosis of "constitutionalism," a triumph of architectonic genius; it was a patch-work sewn together under the pressure of both time and events by a group of extremely talented democratic politicians. They refused to attempt the establishment of a strong, centralized sovereignty on the principle of legislative supremacy for the excellent reason that the people would not accept it. They risked their political fortunes by opposing the established doctrines of state sovereignty because they were convinced that the existing system was leading to national impotence and probably foreign domination. For two years, they worked to get a convention established. For over three

[75] Crosskey in his sprawling *Politics and the Constitution* (Chicago, 1953), 2 vols., has developed with almost unbelievable zeal and intricacy the thesis that the Constitution *was* designed to establish a centralized unitary state, but that the political leadership of the Republic in its formative years betrayed this ideal and sold the pass to states'-rights. While he has unearthed some interesting newspaper articles and other material, it is impossible for me to accept his central proposition. Madison and the other delegates, with the exceptions discussed in the text *supra*, did *want* to diminish the power of the states and create a vigorous national government. But they were not fools, and were, I submit, under no illusions when they departed from Philadelphia that this end had been accomplished. The crux of my argument is that *political realities* forced them to water down their objectives and they settled, like the good politicians they were, for half a loaf. The basic difficulty with Crosskey's thesis is that he knows *too* much—he assumes that the Framers had a perfectly clear idea of the road they were taking; with a semantic machete he cuts blandly through all the confusion on the floor of the meeting to the *real* meanings. Thus, despite all his ornate research apparatus, there is a fundamentally nonempirical quality about Crosskey's work: at crucial points in the argument he falls back on a type of divination which can only be described as Kabbalistic. He may be right, for example, in stating (without any proof) that Richard Henry Lee did *not* write the "Letters from a Federal Farmer," but in this country spectral evidence has not been admissible since the Seventeenth Century.

months, in what must have seemed to the faithful participants an endless process of give-and-take, they reasoned, cajoled, threatened, and bargained amongst themselves. The result was a Constitution which the people, in fact, by democratic processes, did accept, and a new and far better national government was established.

Beginning with the inspired propaganda of Hamilton, Madison and Jay, the ideological build-up got under way. *The Federalist* had little impact on the ratification of the Constitution, except perhaps in New York, but this volume had enormous influence on the image of the Constitution in the minds of future generations, particularly on historians and political scientists who have an innate fondness for theoretical symmetry. Yet, while the shades of Locke and Montesquieu *may* have been hovering in the background, and the delegates *may* have been unconscious instruments of a transcendent *telos*, the careful observer of the day-to-day work of the Convention finds no over-arching principles. The "separation of powers" to him seems to be a by-product of suspicion, and "federalism" he views as a *pis aller*, as the farthest point the delegates felt they could go in the destruction of state power without themselves inviting repudiation.

To conclude, the Constitution was neither a victory for abstract theory nor a great practical success. Well over half a million men had to die on the battlefields of the Civil War before certain constitutional principles could be defined—a baleful consideration which is somehow overlooked in our customary tributes to the farsighted genius of the Framers and to the supposed American talent for "constitutionalism." The Constitution was, however, a vivid demonstration of effective democratic political action, and of the forging of a national elite which literally persuaded its countrymen to hoist themselves by their own boot straps. American pro-consuls would be wise not to translate the Constitution into Japanese, or Swahili, or treat it as a work of semi-Divine origin; but when students of comparative politics examine the process of nation-building in countries newly freed from colonial rule, they may find the American experience instructive as a classic example of the potentialities of a democratic elite.

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[Footnotes]

[5] **The Founding Fathers: Young Men of the Revolution**
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[54] **The Origins of the Separation of Powers in America**
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