1

The Invention of American Constitutionalism

JACK N. RAKOVE

The quarter century separating the Stamp Act crisis of 1765–66 from the adoption of the Constitution in 1787–88 marked the most creative moment in American constitutional history. Midway through this period, the crisis of independence also decisively shifted the tenor and substance of American thinking. Before the outbreak of hostilities in April 1775, colonial leaders' primary objective was to restore the status quo ante, the situation existing before the Seven Years' War. By the fall of 1775, they knew the colonies' independence had become the most likely outcome of the great imperial quarrel. That would entail writing new charters of government to form not only a confederation for all 13 states but also legal government in the states individually.

These new governments were avowedly republican in character. They would draw their authority from the people themselves, and the crux of that authority was broadly defined in the constitutions that the provincial conventions drafted. These constitutions were one element in a cluster of decisions that revolutionary leaders deemed essential to declare independence. They directly embodied the outcome demanded by one of the fundamental rights that the Declaration of Independence affirmed: the collective authority of a people "to alter or to abolish" governments that no longer secured their rights and then "to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

How to secure this safety and happiness became the great challenge state governments faced after 1776. The early state constitutions reflected

the belief that republics relied on their citizens' public virtue, on their capacity to subordinate private interest to public good. But the demands of wartime governance sorely taxed that ideal, forcing state assemblies to legislate far more actively and onerously than their colonial predecessors had ever done. The new constitutions and the governments they created were thus exposed to mounting criticism.

The hard-earned lessons learned from this experience shaped the agenda upon which the framers of the Constitution acted in 1787. They applied those lessons to multiple concerns. Some involved the respective powers that national and state governments should wield, others the institutional design of the truly national government that the Constitution proposed. Many commentators also wondered about the republican character of the citizenry at large, recalling how the sunshine patriotism of 1775 had given way to the self-interested motives upon which most Americans now seemed to be acting.

The critical point is that this second decade-long interval helps explain how the debates of 1787–88 took their reflective form. These debates' first phase occurred behind the sealed doors (and windows) of the legislative chamber of Independence Hall, then known as the Pennsylvania State House. James Madison's notes of the debates, supplemented by other delegates' scattered notes, remain the best historical source for the framers' concerns, goals, and disagreements. While Mary Sarah Bilder has keenly scrutinized the precise composition of Madison's notes and raised some questions about their accuracy, they remain the essential document for our understanding of the convention's politics.[1]

The records of the public debate over the ratification of the Constitution are far more substantial. Three dozen volumes of *The Documentary History of the Ratification of the Constitution* are now in print, with a few stragglers yet to come.[2] Beyond these volumes dedicated to the deliberations of 1787–88, numerous other projects recording the documentary history of the revolutionary era amplify our understanding of its politics. Viewing the constitution-making process as a whole while grasping its numerous distinct components is thus both a daunting and enticing

project. With historians having pursued both approaches for the past half century, four suppositions seem especially relevant to any effort to describe the invention of American constitutionalism.

First, the project was inherently experimental in nature, because Americans not only were acutely aware of the historical novelty of their activity but also drew lessons from their experience conducting a revolution.

Second, the most important issues they faced involved political representation, or, more specifically, the working of legislative or deliberative bodies—initially at the state level, then nationally as well. Their views about the other two branches of government, the executive and judiciary, primarily reflected their critiques of the legislatures.

Third, Americans puzzled about the exact nature and authority of the constitutions they began drafting in 1776. Were these the equivalent of what we now call "super-statutes," acts that are essentially legislative in character but have some superior authority over other statutes? Or were these constitutions instead a different form of law—a fundamental charter adopted through some direct expression of popular sovereignty that was superior to ordinary elections and simultaneously empowered but limited the governments being created?

Fourth, the question of how this popular sovereignty could be expressed also proved puzzling. There was no historical example of how a people dispersed in 13 autonomous states could collectively agree on a national constitution in a mere 11 months. Many latter-day commentators think this outcome pivoted on persuading the Constitution's Federalist supporters to add a bill of rights to the main text. That claim, though not wholly mistaken, overlooks other critical aspects of the Federalist strategy for securing an unequivocal ratification of the Constitution.

Although this framework is not comprehensive, it provides a coherent perspective for conceptualizing this quarter century of history in terms of its most remarkable achievement: the invention of American constitutionalism as an innovative and distinct way of thinking about fundamental problems of republican governance.

Starting Points

Historians always have multiple options for when to start their study of the origins of great events, but at some point they simply need to make a choice.. A complete history of American constitutionalism could easily begin with the great political controversies that racked 17th-century England. It could also reckon with the potent legacy of Machiavelli, the great 16th-century political thinker and statesman, and not merely because the Second Amendment echoes his attachment to the virtues of a citizens' militia.

But for all practical purposes, the Stamp Act crisis of 1765–66 remains the best point of departure. This is not because visions of political independence were already dancing in Americans' heads. The idea of declaring complete independence from British rule emerged only after civil war erupted in Massachusetts in April 1775. The dominant issues in the Stamp Act crisis took a different form.

The American colonists insisted that the only direct taxes they were legally bound to pay were those levied by their own provincial legislatures, not by a distant Parliament to which they sent no members. On the other side of this dispute, the British government's proponents argued that because Parliament was the empire's supreme legislature, the colonists ultimately had to abide by its decisions. Parliament's claimed sovereignty was absolute and indivisible in its nature. Whatever claims the colonists made about the importance of representation had to yield to that fundamental principle.

There was a time, however, when scholars did not take this debate that seriously. The so-called progressive historians, who dominated scholarship in the early 20th century, treated these ideas and arguments simply as the rhetorical devices that political actors used to justify their real interests, which were usually their economic concerns and ambitions. Constitutional arguments were contrived to assert those interests; if one argument did not work, you simply trotted out another. When some colonial spokesmen seemed to fudge the American position, that was evidence of its insincerity.

The critical player was Benjamin Franklin, the most famous American of the age, who had been living in London since the late 1750s, acting as the Pennsylvania assembly's agent. When Franklin testified before the House of Commons, he suggested that the colonists were opposing only the direct taxes the Stamp Act imposed, not the "indirect" duties the colonists ostensibly paid on goods they imported from Britain. Franklin introduced this distinction to facilitate the Stamp Act's repeal, which occurred in March 1766.

A year later, Charles Townshend, the chancellor of the exchequer, revived this distinction as the basis for the new duties on imports that Parliament then approved. In response, John Dickinson, writing the enormously influential *Letters from a Farmer in Pennsylvania*, clarified the American position by arguing that what really mattered was the tax's purpose rather than its "direct" or "indirect" character. If the tax was designed to raise revenue rather than act as a protectionist duty, Dickinson argued, it violated the basic tenet that all taxes required the population's political consent.[3]

Franklin's testimony and Dickinson's clarification of the American argument could be read as evidence of the colonists' disingenuity. That, in an oversimplified sense, was the progressive historians' position.

The decisive refutation of this position came in a major book by Edmund S. and Helen M. Morgan, published in 1953. The Morgans argued that the colonists were largely consistent in their constitutional arguments but that their ideas evolved rapidly during this intense episode. On the one hand, their reliance on the flourishing condition of political representation in America proved quite potent in an era when elections to the House of Commons rested on a minuscule electorate and the manipulation of "rotten" and "pocket" boroughs. On the other hand, British counterclaims that Americans were ultimately subordinate to Parliament, the British Empire's supreme legislature, proved far more challenging. But in both cases, the Morgans demonstrated, these constitutional quarrels were earnest, thoughtful, and intellectually compelling. Equally importantly, colonists laid a foundation on which

the creative phase of American constitutionalism would be erected a decade later.[4]

That did not mean, however, that the Stamp Act crisis marked a first step in that direction. It occurred in the immediate wake of the Seven Years' War, at a moment when imperial patriotism dominated American political culture. Nevertheless, it had a dual legacy for the constitutional issues that Americans were considering as they prepared to declare independence in 1775–76.

First, the advantageous contrast between the norms and practices of political representation in the colonies and Britain gave Americans reasons to take pride in their condition. British North America had no rotten or pocket boroughs, and while the limitations on the suffrage offend modern sensibilities, by 18th-century standards they were quite liberal.

The idea that the new American states could ground their constitutions on republican foundations required no leap of the political imagination. The British claim that Americans were "virtually" represented in a House of Commons, where no colonial members sat, seemed nonsensical. As James Otis put it so well in his 1765 pamphlet, *Considerations on Behalf of the Colonists*, "To what purpose is it to ring everlasting changes to the colonists on the cases of Manchester, Birmingham and Sheffield, who return no members? If those now so considerable places are not represented, they ought to be."[5] This idea implied that representation was something more than a mechanism for selecting a skilled group of legislators from a social elite. It was also a device for replicating the people's will.

Precisely because these arguments were so potent, spokesmen for the British position had to escalate the debate to a higher level of abstraction: the principle of parliamentary sovereignty. Here was the second legacy of the Stamp Act debate. The colonists' argument that the autonomy of their legislative assemblies must be respected—that they were provincial equivalents of Parliament—raised, at least implicitly, questions about federalism in the context of an empire.

Yet no one then understood the imperial controversy in those terms. Only occasionally does one encounter a passing thought that perhaps

the colonies' residual authority could be formally codified. Franklin's 1754 plan for an intercolonial union was inconsequential politically. In the mid-1760s, the claim that unitary absolute sovereignty could be disaggregated—parceled out among institutions governing distinct jurisdictions—remained inconceivable.

Both positions were well-grounded in the Anglo-American tradition. Each could muster powerful arguments on its side, and neither could convincingly vanquish the other. There was no written imperial constitution to which they could appeal, nor any institution capable of resolving the controversy. But there was a deeper irony that exposed an asymmetry between Britain and America. Had Britain actually projected its sovereignty across its provinces, this argument would never have had to be made. But Britain had never governed its colonies in depth. The rhetorical appeal to parliamentary sovereignty was a confession of imperial weakness, not an assertion of effective power.

The same might be said of the Declaratory Act of 1766, the measure that the short-lived ministry of the Marquess of Rockingham introduced to ease the Stamp Act's repeal through a restless, and even resentful, Parliament. Its famous statement affirming that the colonists were subject to Parliament "in all cases whatsoever" was only theoretical.[6] It did not directly threaten the colonists, nor did it promise future legislation. Its implications were nonetheless ominous, and they became even more evident in 1774, when Lord North's ministry initiated a chain of parliamentary acts to punish Massachusetts for the Boston Tea Party and teach all the other colonies a lesson about the dangerous costs of defying the empire.

Becoming Constitution Makers

The Morgans' study of the Stamp Act crisis profoundly altered how historians wrote about the American Revolution's origins. But the true breaking point in the study of the invention of revolutionary constitutionalism

came in the mid-1960s with the appearance of three works by Oscar and Mary Handlin, Bernard Bailyn, and Gordon S. Wood.

Oscar Handlin was Bailyn's mentor, and Bailyn was Wood's, in turn, but Oscar Handlin and Wood were only 18 years apart in age. The Handlins' project was archival and editorial, but their hefty volume, *The Popular Sources of Political Authority*, comprehensively reprinted all the documents relating to the five years of deliberation that produced the Massachusetts Constitution of 1780. The most important of these texts were the "town returns," the opinionated and often lengthy responses that Massachusetts towns gave to the various constitutions they reviewed. These texts recorded thoroughly democratic discussions of major and minor concerns, notably including the critical question of how to distinguish the fundamental law of a constitution from ordinary legislation.[7]

Bailyn's contribution also began with an editorial project: to produce a documentary edition of the *Pamphlets of the American Revolution*. It seemed a modest task at first, but as Bailyn pursued it, he began rethinking his views of the Revolution's origins. His close reading of the pamphlets, Bailyn confessed, "confirmed my rather old-fashioned view that the American Revolution was above all else an ideological, constitutional, political struggle and not primarily a controversy between social groups undertaken to force changes in the organization of the society or the economy," as the progressive historians had argued.[8]

Bailyn originally planned to publish four volumes of scrupulously annotated pamphlets. In the end, only one appeared, but its introduction, "The Transforming Radicalism of the American Revolution," had a transforming impact when it was republished two years later as *The Ideological Origins of the American Revolution*, a Pulitzer Prize–winning book that effectively created a new and dominant school of interpretation. The difference between these two titles illustrated that Bailyn was concerned with not only explaining why the Revolution occurred but also measuring its transformative impact on how Americans thereafter perceived their society.[9]

Wood was finishing his dissertation exactly as Bailyn was completing the *Pamphlets*' introduction. Wood's 1969 book, *The Creation of the American Republic, 1776–1787*, began with the writing of the first state constitutions during the crisis of independence. But its real subject was to explain how this development and its aftermath profoundly reshaped the contours of American political and constitutional thinking.

Wood wrote primarily as a historian of ideas, not decisions, and one could read the whole book without noting that a war was being fought at the same time colonists were drafting state constitutions. But his book, though strikingly complex in its structure, deftly and concisely illustrated how a whole array of complex ideas was dramatically transformed in the decade after independence. Although Wood's book might seem derivative of Bailyn's, that opinion badly misjudges its originality. *The Creation of the American Republic* took a subject that had once been treated with a dry institutional formality and gave it a verve that captured the energetic excitement with which the revolutionaries pursued their republican project.

Whereas Bailyn devoted the first half of his book to explaining why the break with Britain occurred, the Handlins and Wood effectively started with the collapse of royal government in nearly every colony in 1774. Legal government at the provincial level became virtually impossible, because the legislatures were all committed to supporting resistance. In most colonies, effective power flowed to an apparatus of provincial conventions and local committees; in a few colonies, the conventions and legislatures coexisted. Royal governors understood that they were effectively powerless.

By 1776, as a decision for independence appeared increasingly likely, colonial leaders and their constituents grew ever more anxious to restore legal government. With the new states needing to mobilize their resources for war, it was essential to restore legal government, fully empowered to enact statutes, while in local communities, it was also important to get judicial courts operating again.

One other factor was critical to the new constitutional enterprise. Excepting the two corporate colonies of Connecticut and Rhode Island,

the colonies' executive branches were instruments of royal or proprietary power (like the power of the Penn family in Pennsylvania and Delaware and the Calverts' in Maryland). These could not simply be replaced; they had to be reconstituted on new principles.

There was no other way to complete this process than by writing new constitutions of government. This had never been the American objective before 1775. That calculus shifted in the spring and summer of 1775, after war erupted in Massachusetts. After the Second Continental Congress met in May 1775, the delegates had a frank, even heated debate over whether to revise the negotiating positions the First Continental Congress had adopted in October 1774. They even discussed sending a diplomatic mission to London, and one delegate, Dickinson, drafted a model bill he hoped to submit to Parliament as a framework for accommodation.

But in the end, the Second Continental Congress decided to simply restate its existing terms by sending another "olive branch" petition to the Crown. Nor did Lord North's ministry rethink its strategy. Having failed to isolate Massachusetts from the other colonies, the ministry still believed it could prevail by force of arms, even after the skirmishes at Lexington and Concord and the bloody assault on Bunker Hill proved the Americans could not be cowed into submission.

Neither side ever modified these positions. By the autumn of 1775, many American leaders understood that the coming months would require them to take further steps, including seeking foreign allies (above all, the French monarchy of Louis XVI), forming a confederation of the 13 colonies, and writing new constitutions for the emerging states and commonwealths. In this sense, these first written constitutions became an incidental but also necessary consequence of this larger revolutionary process.

Yet that judgment hardly captures the excitement that the drafting of these documents entailed. Some of that excitement was sparked by *Common Sense*, the iconoclastic attack on monarchy that resoundingly jolted public opinion. But John Adams also vividly captured it in his pamphlet *Thoughts on Government*, published in April 1776.

Adams had already earned a reputation as a learned and insightful political thinker. The basis for *Thoughts on Government* was a letter Adams had sent to a North Carolina colleague in Congress, discussing what kind of constitution the states should write. Though less striking than *Common Sense*, Adams's *Thoughts* proved to be the more important political writing in its impact on American constitutional thinking. "You and I, my dear Friend, have been sent into life, at a time when the greatest lawgivers of antiquity would have wished to have lived," Adams boasted. "When! Before the present epocha, had three millions of people full power and a fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?"[10]

Thomas Jefferson, newly returned to the Continental Congress, struck the same note a month later. "In truth," he wrote one Virginian friend, this task had become "the whole object of the present controversy; for should a bad government be instituted for us in future it had been as well to have accepted at first the bad one offered to us from beyond the water without the risk and expence of contest."[11]

Beyond this sense of enthusiasm and historical novelty, one other commitment also mattered: *Thoughts on Government* was an avowedly republican tract. The new American states were destined to become republics, not least because there was no monarchy or aristocracy to incorporate in their new governments. But republics were regarded as by nature fragile and unstable governments, best suited for geographically small and homogeneous societies, like the ancient Greek city-states.

Equally importantly, in all the constitutions adopted in 1776, the dominant institutions in state governments were the legislatures, typically staffed with political novices who usually served an annual term or two and then went home. Executive power was reduced to just that: an administrative agent of the legislative will.[12] Only after New York belatedly adopted its state constitution in 1777 did reformers begin to think about reviving the executive branch's authority.

This legislative predominance in state governance became the crucial factor shaping American constitutional thinking after 1776. The state

legislatures formed under the first constitutions differed from their colonial antecedents in two important respects. First, although the right of representation had customarily been extended to communities as they were settled and organized, support for the Revolution's common cause made the new governments more directly representative of their populations than had been the case previously. Second, and more importantly, because a war was raging and resources had to be mobilized, the legislatures had to make law to a broad extent unknown to the colonial assemblies. They faced urgent challenges and a public scrutiny that their colonial predecessors had rarely encountered.

Much of that scrutiny was directed against the policies the legislatures were compelled to adopt to keep the war effort going. But over time, that criticism generated constitutional concerns as well. After all, there was much to be said for having an energetic executive in wartime. Moreover, because they were faithful readers of Montesquieu's great work *The Spirit of the Laws*, with its formative contribution to the concept of the separation of powers, Americans had a new respect for the importance of judicial power, and with it the primitive notion of the judicial review of problematic legislation.

Popular Constitutionalism

Lessons from this experience of revolutionary governance could emerge only over time. After 1776, the republican enthusiasm generated by the crisis of independence gave way to a new realism about political conduct. But the conclusions from this experience were not immediately obvious. This was especially true in the realm of state constitutions. When those documents were written in 1776, the immediate incentive was to replace the apparatus of extralegal conventions and committees of safety with lawful government. How to revise these constitutions was a problem the drafters barely considered.

These provincial conventions were not limited to constitutional deliberations. They were surrogate legislatures, charged with pursuing all the governance tasks the situation required. But a surrogate was not equivalent to the real thing. The very use of the word "convention" implied some inferior legal status.

To note one important historical example, the Convention Parliament that summoned William of Orange and his wife, Mary, to the throne in 1688 was not technically a legal parliament because it had not been called by the deposed king, James II. Hence, when a legally convened Parliament gathered in 1689, it readopted the original Declaration of Rights, which the new monarchs had accepted as a condition of their accession, as the Bill of Rights.

This might initially appear to be a distinction without a difference. If a constitution was deemed legitimate and used to set up a working frame of government, that would be sufficient in itself. But substantive problems arose about a written constitution's nature and authority as Americans considered exactly what kind of institution the provincial conventions of 1776 had been. If they were surrogate legislatures, every action they took would be classified as legislative in nature. And a standing legal maxim held that one legislature could not bind its successors' decisions. In that case, a constitution would be only statutory in nature and not binding on later generations—or even the legislature's next session.

Amid the strain of the Revolutionary War, with all its other demands, there was no need to resolve this question—except in one state, Massachusetts. In 1775, when its governor was General Thomas Gage, a British general commanding a small army occupying its capital, Massachusetts became the first colony that urgently needed to restore legal government. To do that, however, it had to get the Continental Congress's assent, and Congress did not want to counteract imperial authority too flagrantly. It accordingly permitted Massachusetts to resume legal government under its second royal charter (1692)—which had been radically altered when Parliament adopted the Massachusetts Government Act in 1774. The main change was to allow the colonial council to act collectively as the executive, thereby displacing General Gage.[13]

This was only a stopgap measure, however. Like other states, Massachusetts wanted to write a new constitution, but it took almost four years to figure out how to do so. In the fall of 1776, the Massachusetts General Court asked towns for permission to draft a new constitution. Some of the town returns suggested this should not be the legislature's job; a special convention should be called to perform that task. When in 1778 the legislature instead proceeded to draft a constitution, the towns overwhelmingly rejected it.

The next year, the General Court took its cue and summoned a convention to pursue this task. Its 300 members were far too many to do the work. They appointed a drafting committee of 30, who in turn named a subcommittee of three, who then gave Adams, newly returned from diplomatic service abroad, the real work. This was a duty Adams relished; at last he could act like the great lawgivers of antiquity (even though Congress sent him back to Europe before the project was finished).

The convention completed the constitution in early March 1780, and citizens reviewed it in their town meetings. They compiled their returns in May and June, but those returns had their ambiguities. The convention had not provided a simple checkbox asking whether the towns finally approved or rejected the constitution as a whole. The returns instead presented a broad array of comments—some quite concise, other more elaborate—on different articles. But in the end, the constitution was declared to have been ratified.[14]

With that decision, a new doctrine of American constitutionalism had emerged in ideal form. It held that a constitution should be drafted by a convention summoned for that purpose alone and then ratified through some direct expression of popular sovereignty. Whereas conventions were once regarded as inferior versions of a legally embodied representative authority, Americans now viewed them as a superior expression of popular sovereignty. Nor was this idea a mere legal fiction, because its application provided a way to distinguish a constitution's supreme law from ordinary legislation.

This distinction proved fundamental to the divergence of American constitutionalism from its English antecedent. In the latter tradition, after 1688, what was legal—that is, what Parliament enacted and ordained—determined what was constitutional.[15] In the American variant, a written constitution would function as a test for the legality of specific government actions, undertaken by either political department.

Nor was this concept merely an abstract notion that appealed only to well-educated minds. True, Jefferson wrote an eloquent passage on this point in his *Notes on the State of Virginia*. "Constitution" was an equivocal word, Jefferson observed, susceptible to a variety of definitions.[16] But as the Massachusetts town returns demonstrate, the citizenry who gathered in their town meetings understood this crucial point just as well. Here was proof that the revolutionary era was itself a sustained episode in popular constitutionalism.[17]

Strategies of Constitution Making

Yet this account still points to an important question: Why did this transformation in the concept of a constitution occur?

In the long sweep of Anglo-American political history, constitutionalism's grand purpose had been to impose checks on arbitrary executive power. Before 1765, colonists had fully shared that commitment. Then, their concern shifted to Parliament, but only in part, because the leaders of colonial resistance believed the House of Commons no longer enjoyed the independence secured by the Glorious Revolution. The state constitution makers of 1776, as Madison recalled in 1785, had been preoccupied with the need to check executive power. "The want of *fidelity* in the administration of power having been the grievance felt under most Governments, and by the American States themselves under the British Government" was what led these constitution makers to pay too little attention to the potential dangers and deficiencies of legislative power.[18] (Emphasis in original.)

The Revolution's course quickly reversed that omission. Two parallel processes made regulating legislative behavior a dominant concern in American thinking. The need to treat a constitution as supreme law was driven no longer by the familiar desire to constrain the executive but rather by the need to regulate the legislature, the dominant branch in all the state governments. The initial force behind this lay in the unprecedented surge in legislative activity that the war effort required. Whereas colonial legislatures had rarely enacted general-purpose laws for the whole society, laws in the service of wartime mobilization were far more extensive and intrusive.

Second, this *political* development was accompanied by a shift in how Americans thought about the adequacy of political representation. Before 1776, colonists had distinguished their practices of actual representation from the decayed state of affairs in Georgian Britain. But in a process that Wood referred to as "the disintegration of representation," popular grievances were now directed against the legislatures themselves. Broadly representative as they still were, they could not escape the criticisms that the costs of an extended war generated.[19]

As these examples indicate, the crucial innovations in American constitutional and political thought after 1776 took place at the state level. That was the key discovery that gave Wood's account in *The Creation of the American Republic* its animating power. The genius of his book lies in the intricacy of his explanation of how these discrete ideas emerged and evolved within the states.

By contrast, the discussion of the confederation's nature was far less intense, nuanced, or sophisticated.[20] The Continental Congress was an isolated and secretive institution—typically numbering between two dozen and 30 delegates at any given time—that received little attention in the American press. Conversely, the state legislatures repeatedly enacted laws that affected the daily lives of every American. Their members were elected annually, represented small communities, and were well-known to their constituents.

Yet this disparity in the attention that Americans paid to their state and national governments worked to the advantage of the constitutional

reformers of the 1780s, the group that became the Federalist supporters of the Constitution. As the Continental Congress's authority and influence waned in the mid-1780s, the need for national constitutional reform became evident. But pursuing any reform scheme still appeared implausible. Amending the Articles of Confederation required all 13 state legislatures' approval. The amendments that Congress proposed in 1781, 1783, and 1784 all failed to pass.

By the autumn of 1786, the most committed advocates of national constitutional reform understood that the confederation's rules, and indeed its underlying principles, had to be abandoned. The federal union had to be reconstructed as a normal government, capable of enacting, executing, and adjudicating its own laws. Such a government would also have to be republican. But what republicanism meant by 1787 was no longer identical with what it had meant a decade earlier. When the framers of the Constitution asked how republicanism could be reformed and improved, the lessons they drew on most—and the sources of their creativity—came from the states.

In the great constitutional moment of the late 1780s, Americans collectively gained an opportunity to assess the initial phase of constitution making in 1776. A decade had passed, lessons had been learned, received principles and assumptions were subject to challenge, and an occasion had been created for a sustained debate on what form of national constitution the nation now needed.

That debate took place within the sealed chambers of Independence Hall in Philadelphia—where the framers drafted the Constitution that was first published on September 19, 1787—and in the polity as a whole, in a rich and extremely well-documented public colloquy. Because the published and digital record of these debates and other relevant events and developments in the revolutionary era is, in a word, humongous, scholars and other writers have a wide field of interpretation open to their analysis.

Many of the questions scholars ask focus on basic issues of constitutional theory. How did the framers, Federalists, and Anti-Federalists analyze the nature of American federalism or the separation of powers?

What form of judicial review did the framers envision, and how did this potent idea emerge? Other questions arise from current legal and political controversies that require examining how and why individual clauses were inserted in the Constitution or initially applied. Many of these controversies generate questions that historians would ordinarily deem not worth pursuing, yet they still deserve historically informed answers. The Second Amendment is the best example of this phenomenon, but it is hardly the only instance.

However, one major question has not received the attention it merits. That question relates to the process of constitutional formation itself, which, in turn, devolves into two major problems. The first concerns the role of strategically placed individual actors who determined how the process of adopting the Constitution would unfold. The second involves examining how the polity as a whole participated in this process.

Michael Klarman's recent interpretation described the process as "the framers' coup," precisely because the framers and their supporters precluded the people from actively affecting the debate.[21] But one can reach that judgment only after examining the political options that were available in the three-year period that began with the Annapolis Convention in September 1786 and ended when the First Congress sent its list of 12 constitutional amendments to the 11 state legislatures that had already ratified the Constitution (North Carolina and Rhode Island being the two exceptions).

Most efforts to survey these developments emphasize the role of Madison, who is routinely called the father of the Constitution. Other contenders have recently entered this titular competition: George Washington, James Wilson, and Gouverneur Morris. But the paternal title itself is more of an honorific tribute than a useful analytical device for explaining how the Constitution took shape. A document drafted over four months of debate, with several committees playing essential roles, by definition has multiple authors. Indeed, two of Madison's most intriguing contributions to the *The Federalist*, the 37th and 38th essays, not only stress the collective nature of the convention's deliberations but also contrast them with

the heroic efforts of the ancient solo "lawgivers," who fascinated Madison much as they had Adams.

One fact becomes evident when we track Madison's career in the 1780s. Putting the claims of paternity aside, he emerges as the leading *strategist* of national constitutional reform. He was actively involved in every phase of this process, first guiding the drawn-out ratification of the Articles of Confederation in 1781, next framing the revenue-related compromise amendments to the Articles that Congress sent to the states in April 1783, and then weighing the changing political landscape in the mid-1780s, after Congress sank into a state of political "imbecility."[22]

Until 1786, the agenda for reform was quite modest. Amending the Articles was no less daunting a task than their original ratification, which Maryland had delayed a good three years. Rhode Island played a similar obstructive role in the mid-1780s. The most reformers could hope for was that adopting carefully tailored amendments would set useful precedents that would abate states' reigning disdain for Congress. But they still needed to take that first step forward.

Other alternatives to amending the Articles of Confederation were conceivable. Madison had come to know Alexander Hamilton when they both served in the Continental Congress in 1782 and 1783. Although they agreed on many points, they were not full political allies. They took distinctly different paths when Congress was preoccupied with revising the revenue program that Superintendent of Finance Robert Morris had presented in July 1782. After Congress reached an impasse on Morris's proposals, Hamilton launched a risky maneuver to enlist the Continental Army's officer corps and even its commander, Washington, to support the Morris program. By late February 1783, Madison instead concluded that the only feasible option was to modify the program to make it more palatable to state legislatures. He then became the major architect of the three amendments to the Articles of Confederation that Congress submitted to the states on April 18.[23]

Hamilton rejected that compromise. He continued to dwell on an idea he had first discussed in 1780. Rather than deal with the Articles

of Confederation's obvious defects even before they were ratified, he believed the time had come to have a national convention to propose a fresh framework of federal union. He clung to that idea in 1782 and 1783, even drafting resolutions calling for a constitutional convention as the debate over the Morris program was ending. But ultimately, his proposal was never introduced. It had to be "abandoned," Hamilton noted, "for want of support."[24]

Eager to launch his legal practice, Hamilton left Congress in July 1783. By then, Madison had served more than three uninterrupted years as a Virginia delegate. In October 1783—with some irony—he was term limited out of Congress, finally returning to Montpelier, the family plantation outside Orange, Virginia. Quickly gaining election to the House of Delegates, he became its dominant member over the next three years, though he sometimes exasperated colleagues who were far less disciplined legislators.

Madison had become a professional politician when most lawmakers were avocational public servants. But from his service in Congress and the Virginia legislature, Madison had an extensive body of memories to draw on and a creative intellect that placed him in the top rank of American constitutional thinkers. Moreover, Madison had become a reflective student of collective deliberation, becoming one of the first to realize that positive lawmaking, in the broad sense of the term, would henceforth define the working agenda of American legislatures.

Throughout this period, Madison repeatedly applied and thought about the basic structure and problems of American federalism. He played a major role in negotiating the congressional acceptance of Virginia's claims to what became the Northwest Territory, which had ostensibly been why the neighboring state of Maryland had delayed ratifying the Articles of Confederation. Once that was accomplished, he chaired a small committee charged with asking how Congress could implement the powers that the Articles of Confederation formally vested in it.

The Articles' underlying premise was that the states would reliably implement Congress's resolutions. But as evidence mounted of states'

inability or failure to do so, Madison began wondering whether Congress should possess the power to coerce them to do their federal duty—say, by stationing a naval frigate or two outside their main harbors. This coercive tactic was more a confession of desperation than a constitutionally viable solution, but Madison continued to ponder the problem it identified. On January 28, 1783, amid the debate over the Morris program, he gave a thoughtful speech emphasizing the fatal naivete of believing states would uniformly comply with congressional recommendations and why their mutual suspicions of each other's good faith would cripple the whole federal system. This continuing concern became one of the main foundations of his approach to federalism issues in 1787.[25]

Once back in Virginia, Madison considered these questions from a different angle. He had two main objectives during his three years in the House of Delegates. One was to enact the revised code of laws that Jefferson and his fellow committeemen, George Mason and George Wythe, had drafted in the late 1770s. The revision was itself a latently constitutional act, because it sought to consolidate the commonwealth's statutory law on suitably republican grounds. The greatest achievement in this process was the Statute of Religious Freedom, which legally codified the principle of the free exercise of religion that Madison had managed to incorporate in Virginia's 1776 Declaration of Rights.

But legal codification was not fully equivalent to constitutional incorporation, as the concluding passage in the statute made clear. Conceding that any future legislature could alter the statute as it wished, Jefferson and his ally Madison declared nonetheless that "if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."[26]

Madison's second concern in the mid-1780s was to align Virginia with the confederation's reform, primarily by convincing the assembly to endorse the two sets of amendments to the Articles of Confederation that Congress had proposed in 1783 and 1784. On this matter, Madison and his allies followed a cautious path. There was only one way to amend the Articles: Congress had to propose amendments, and all 13 legislatures had to

ratify them. To step outside these set procedures risked undermining the confederation itself. The revenue and commercial amendments proposed in 1783 and 1784 were not radical steps. Both proposals were carefully drawn, and it was not unrealistic to imagine that, with some patience, they could finally be ratified.

Only in the winter of 1785–86 did this calculus begin to shift. The Virginia assembly took the initiative. During its winter session, Madison had urged the assembly to adopt a resolution vesting permanent regulatory powers over commerce in Congress. But when his colleagues diluted his proposal, Madison wrote Washington that he thought "it better to trust to further experience and even distress, for an adequate remedy, than to try a temporary measure which may stand in the way of a permanent one" and which would confirm the British belief that they could exploit the states' distrust of Congress.[27]

On the session's last day, however, the assembly adopted a measure calling for an interstate conference to consider the need for uniform commercial regulations and propose a resolution vesting that power in Congress. Although Madison initially had mixed feelings about this idea, his thinking soon shifted. "Something it is agreed is necessary to be done, towards the commerce at least of the U.S.," he wrote his friend James Monroe, who had replaced him in the Virginia delegation, "and if anything can be done, it seem[s] as likely to result from the proposed Convention, and more likely to result f[rom] the present crisis, than from any other mode or time."[28]

Monroe disagreed. If a genuine convention were to be held, he replied, its agenda should be broader than the one planned for Annapolis in September. Madison apparently changed Monroe's mind, however. In Madison's view, Congress had exhausted its political credit; nothing it proposed was likely to be approved. Trying a convention, especially one with a limited agenda, could set a useful precedent that could be repeated later. The situation was further complicated by deliberations in Congress, where ideas of calling a national convention or proposing further amendments to the Articles were discussed inconclusively during the spring and summer of 1786.

In the end, the Annapolis Convention became the preferred option, less because anyone was confident of the result than because no alternative seemed attractive. Several considerations drove this conclusion. One was the effective discrediting of Congress, another the insuperable barrier that the Articles of Confederation's unanimity rule raised against any amendment, no matter how reasonable or limited.

A different and more urgent challenge came from an issue that was badly dividing Congress: the stark sectional division that arose when John Jay, the secretary of foreign affairs, asked permission to yield American claims to the free navigation of the Mississippi for 20 years to secure a commercial treaty with Spain. The eight northernmost states favored this proposal; the five southernmost states opposed it. Given that the Articles required nine states to approve a treaty, the negotiations seemed unlikely to succeed. But the real danger was not the impasse in Congress. It was that a sectionally divisive issue with an enfeebled Congress could lead the Union to devolve into two or three regional confederacies. In that case, the clock of constitutional change might run out. Instead of pursuing the gradualist strategy reformers had favored, the whole enterprise might collapse.

Envisioning the Convention

The mid-September meeting in Annapolis could have proved to be yet one more setback. Although eight states had agreed to send commissioners, only a dozen delegates from five states finally caucused at Mann's Tavern. This was too small a group to issue any substantive proposal for action. But it was still a politically talented group, including not only Madison and Hamilton but also Dickinson, the main author of the Articles of Confederation; Edmund Randolph; and Abraham Clark, a veteran New Jersey leader. Rather than adjourn empty-handed, the commissioners ventured a desperate gamble: to propose that the states send delegates to a general convention to assemble at Philadelphia in mid-May 1787.

In the aftermath of Annapolis, Madison became the premier strategist in the proto-Federalist movement and its most creative thinker. While spending a few more autumn weeks in Philadelphia, Madison wrote Monroe an intriguing letter reflecting on the Mississippi crisis. It raised a fundamental question of political theory he would continue to revolve in the months and years ahead. "There is no maxim in my opinion which is more liable to be misapplied," he wrote, "and which therefore more needs elucidation than the current one that the interest of the majority is the political standard of right and wrong."[29]

Perhaps the two of them discussed that subject further as they rode south together to Virginia, accompanied by Monroe's very pregnant bride. En route, they stopped at Mount Vernon, where they discussed the events at Annapolis and the plans for Philadelphia. From there, Madison went directly to Richmond, where the state legislature was meeting. He quickly introduced a bill that would have Virginia invite the other states to the Philadelphia convention and appoint its own delegation. Madison had *not* told Washington that he intended to place Washington's name atop the list, but he knew the former commander in chief was the most formidable asset he could wield, and he needed to keep that option open.

After the legislature adjourned, Madison spent a few days at home and then headed north to New York City, where he would rejoin Congress. En route, he spent one more night at Mount Vernon. Although he and Washington must have discussed the coming convention, that was not the only subject of public concern in the winter of 1787. The Mississippi question was still being disputed in Congress, and Shays's Rebellion in Massachusetts, which everyone regarded as a well-governed state, was unsettling. The New England states had not yet endorsed the convention, and many delegates to Congress were uncertain whether they should do so.

Finally, on February 21, after some procedural wrangling, Congress resolved that the convention should meet

> for the sole and express purpose of revising the *Articles of Confederation* and reporting to Congress and the state legislatures

> such alterations and provisions within *therein* as shall when agreed to in Congress and confirmed by the States render the federal Constitution adequate to the exigencies of *Government and the preservation of the Union*.[30] (Emphasis in original.)

Madison noted that many members "considered this resolution as a deadly blow to the existing confederation," yet "the reserve" of other delegates "made it difficult to decide their real wishes & expectations."[31]

Observations like these provide a useful reminder of the convention's persisting uncertainty. How would delegates shape its agenda? Would it simply identify additional powers to vest in the existing Congress, or would it decide that some new set of national governmental institutions should be formed? In early January, Secretary of Foreign Affairs Jay and Secretary of War Henry Knox sent Washington lengthy and detailed letters expressing their thoughts about the coming convention. Both agreed it should propose a tripartite government with a bicameral legislature and an independent executive (or "governor-general") and judiciary. But neither yet believed that public opinion was ready to approve whatever the convention proposed, nor did they think Washington should commit to attending.[32] Well into spring, Washington remained hesitant on that point, as did Madison.

Doubtless, there were many conversations among the national elite on these subjects, but few of these survive in the archives. Nor is there much evidence that the delegates, as they were appointed by their state legislatures, began drafting tentative government plans, with the exceptions of Charles Pinckney and Dickinson. Madison was the delegate who prepared most carefully for the convention and the one whose assessment of its potential agenda was the most comprehensive and thoughtful.

Based on his experience in Congress and the Virginia legislature, Madison had become a close student of collective deliberation, the political activity that is the defining characteristic of a republican government. His ideas were recorded principally in four documents written between March 19 and April 16: a memorandum—written really for himself—he

titled "Vices of the Political System of the United States" and letters to Jefferson, Randolph, and Washington. These four texts provide evidence of not only what Madison *thought* but also his mode of *thinking*, in the active sense of that word.

The "Vices" memorandum was primarily a study of the Articles of Confederation's constitutional failure. The fatal illness afflicting Congress was that its lack of legal and coercive authority proved it wanted "the great vital principles of a Political Cons[ti]tution," making it "in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States."[33] When Madison later presented this analogy at the convention, his fellow delegates were skeptical. But the analysis's real point was not the definition of the failed confederation but Madison's explanation of that failure's origins. His effort to explain the root causes of the federal system's debilities—its vices—became the foundation of his constitutional theory, and with it what we sometimes call, rightly or wrongly, our Madisonian constitution.

The first set of vices derived from the innate parochialism and inexperience of the state legislators, who inhabited the most powerful institutions in the American constitutional system. They simply lacked the knowledge, experience, and capacity to adequately assess their duties to national interests and other states' valid rights. This was the sour lesson Madison had learned from his three years of earnest service in the Virginia House of Delegates and, more generally, his congressional observations of states' incapacity to fulfill their federal obligations.

The second set of vices, brilliantly described in item seven, addressed the Articles of Confederation's inherent structural defects. Its sustaining premise was that Congress could rely on states to voluntarily implement its decisions. No legal or coercive authority was needed to attain that effect. That supposition, Madison recalled, faithfully reflected the fervent patriotism of the mid-1770s and (though less consistently) the pressure of the Revolutionary War.

But those exceptional conditions would not exist forever, Madison argued. In what is recognizably a brilliant game theory analysis, Madison

concluded that a federal governance structure relying on states' voluntary compliance would never work. Three factors would repeatedly come into play: essential interests diverging across states; politicians' opposition within individual states, including "Courtiers of popularity" like Virginia's great leader, Patrick Henry; and the way in which "a distrust of the voluntary compliance of each other may prevent the compliance of any, although it should be the latent disposition of all." Here, Madison grimly concluded, were "causes & pretexts which will never fail to render federal measures abortive."[34]

Two conclusions immediately followed from this deft analysis. First, the national government had to be reconstituted as a government fully capable of enacting, administering, and adjudicating its own laws. Second, the Articles of Confederation must be abandoned, not merely revised or amended. The formal resolutions of Congress and the state legislatures had said otherwise. But the convention, once assembled, would be free to set its own agenda.

This analysis of the confederation's central defect marked only the start of Madison's effort to set the convention's broader agenda. These further thoughts let us articulate a broader conception of his ideas that goes beyond the famous statements in *Federalist* 10 and 51, which are the locus classicus for the prevailing conception of our Madisonian constitution. Understanding the fashioning of Madison's agenda as a culminating stage in the invention of American constitutionalism requires identifying at least five further elements in his thinking and strategy.

Madison's Constitutionalism

The one strategic proposal to which Madison was most closely attached involved voting rules in the new legislature. In place of the equal state vote that had always been the rule in the Continental Congress, he argued that representation in the new bicameral Congress should be proportioned to population or property (or both). Without that adjustment, he feared,

the most populous states would oppose any major enhancement of the national government's authority. Madison believed this would appeal to the Northern states because of their existing superiority in population, to the Southern states because of their anticipated future growth, and to the small states, in the end, because they had nowhere else to go.

This proposal was inherently democratic not because it imagined a more participatory form of popular politics but because it argued that states' interests were ultimately reducible to the aggregated preferences of their electorates, the individual voters who embodied a sovereign people. This was in effect an equality principle, not for states as political communities exercising the same autonomy but for citizens as such. It would also implement the prevailing maxim, which held that a representative legislature should be a mirror or miniature of the larger polity that legislatively "re-presented" the distribution of interests within society. But Madison added one further element to that principle: The articulation of those interests would be improved or "refined" by legislators' collective discussions and the moderating impulses of an upper house, which he had long viewed as a critical institution.

The second objective to which Madison was most strongly committed was to vest the national government with a negative "in all cases whatsoever" on state laws. That fateful phrase knowingly echoed the Declaratory Act of 1766, and Madison regarded it as "the least possible encroachment on the State jurisdictions."[35] It could use this negative to attain two ends. The first would be preventing states from enacting laws that were inimical to national policies. But the second, and more important, would be intervening in states' internal governance. As the final three items of the "Vices" memorandum put it, the "multiplicity," "mutability," and, worst of all, "injustice" of state legislation called "into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights."[36]

Madison then asked a simple question: "To what causes is this evil to be ascribed?" His first answer, involving "the Representative Bodies," was

quite succinct. This was a matter he had long considered, and because he was writing for himself, he felt no need to elaborate. The second answer, concerning "the people themselves," was quite different. The ensuing passage marked the first draft of what became the most influential political analysis in American constitutional history, best known from *Federalist* 10. Against "the prevailing Theory" of 1776, which held that republics should be small and homogeneous, Madison argued "all civilized societies are divided into different interests and factions."[37]

Those last two key words contradicted the fundamental tenet that republican citizens had to be virtuous in nature, knowing how to subordinate private interest to public good. The central thesis Madison developed in this extended passage is that the best check on the insidious effects of faction lay not in seeking a uniformity that could never be attained but in recognizing that a diversity of interests within society provided the best political security against majority misrule.

One further conclusion can be derived from this analysis. The smaller the society, the easier it would be for the wrong kinds of majorities to form, at large and within the legislature. That meant state governments would prove far more dangerous than a national republic, and thus more likely to produce the unjust laws that threaten republican government's core premise.

The negative on state laws would solve this problem by protecting minorities and individuals against their own governments' unjust legislation. This formulation offered a vision of federal constitutional reform quite different from any that had existed previously. The task was not merely to rebalance the legal authority allocated between state and national governments. It was also to implement a new vision of the federal relationship in which states would retain autonomy over their "internal police" while the national government would acquire a residual but superior power to limit majoritarian rule's dangerous aspects.[38]

Madisonian majoritarianism is thus a nuanced subject. Majority rule *was* an essential element in his political thinking, but the deeper question was, How does one promote or establish the right kinds of majorities?

Madison's position on proportional representation in both houses of Congress was decidedly majoritarian, though the three-fifths compromise affecting apportionment in the House and the selection of presidential electors certainly complicated the subject. But his constructive emphasis on fostering congressional deliberation indicated that representation was not merely a device for translating popular preferences and interests into law. Each session of the House of Representatives—which he rightly predicted would be stocked largely with novice lawmakers—would be its own learning cycle. Thinking comparatively, he also thought there would be qualitative differences between more cosmopolitan national legislators and their backwater provincial counterparts. Even though he was strongly disappointed that the Senate retained the equal state vote, he continued to believe it was constitutionally essential.[39]

When Madison wrote about the Senate in *Federalist* 62 and 63, his final contributions to that project, he retrospectively described the equal state vote as a compromise between the more and less populous states. But that was merely a rhetorical claim. He knew it had been a defeat for his side and his theory, and he took pains to note, somewhat indirectly, "that the peculiar defence which it involves in favour of the smaller states would be more rational, if any interests common to them, and distinct from those of the other states, would otherwise be exposed to peculiar danger."[40] But Madison knew no such common interests existed; to his way of thinking, this whole pretense was irrational.

Yet the idea of compromise was highly relevant to one last facet of Madison's constitutional strategy: his approach to the problem of ratification and the potential amendment of the Constitution in response to the public debates of 1787 and 1788. Three major ideas shaped his strategy. One was deeply conceptual, one rested on a raw political calculation, and one combined a substantive problem with an assessment of the optimal strategy for concluding this entire course of constitutional deliberations via a consensus.

The conceptual problem pivoted on deciding how to distinguish a written constitution from ordinary legislation, the same issue that had

vexed constitution making in Massachusetts and had also troubled other thinkers, notably including Madison's close friend Jefferson. In the eighth item of the "Vices" memorandum, Madison noted that most states had approved the Articles of Confederation by legislative resolution, raising the question of whether a law "repugnant to an act of Congress" would prevail if it were adopted more recently than the Articles. Such legal questions would also have to be resolved by state judges.[41]

For the Constitution to attain legal supremacy and the "new system" to gain "its proper validity and energy," Madison wrote Washington, "a ratification must be obtained from the people, and not merely from the ordinary authority of the Legislatures."[42] The appropriate mechanism would be to have the people elect the ratification conventions. The only role state legislatures would play would be to oversee the election of delegates to these conventions. Here again, the decision of 1787 culminated a process that had begun in 1776.

The raw political calculation that shaped the decision of 1787–88 had a more urgent and contingent origin. At different points in the long-running efforts to ratify the Articles of Confederation and then its amendments, individual states had played particularly obstructive roles. After Delaware and New Jersey had relented on their opposition to the Articles, Maryland waged a lonely fight that kept them unratified until the winter of 1781. For the various amendments that were proposed thereafter, Rhode Island and New York became the main hurdles. In 1787, Rhode Island was the sole state that refused to send a delegation to the federal convention, while the three-member New York delegation was controlled by two members who left the proceedings early and later became open Anti-Federalists. The nationalist Hamilton still attended for a while, but as a lone delegate, he could not vote and eventually went back to New York City to pursue his quite successful legal practice.

Under these circumstances, it became pointless to adhere to the confederation's unanimity rule. Why spend months debating a radical transformation of the federal union when a lone (and tiny) state could nullify the entire endeavor? The framers of the Constitution instead

proposed that it could be ratified with the approval of nine states. Having rejected the Articles of Confederation in this way made it easier to vest the authority to ratify the Constitution in state conventions rather than their legislatures.

These preliminary changes in the rules for ratification, however, left other important matters still open. Under what framework would the ratification conventions act? Would they approve or reject the Constitution article by article or clause by clause? Could they make their approval contingent on the prior adoption of amendments, so that this convention (or another one) might be resummoned (or called anew) to debate these changes? If such a meeting were called, could state legislatures appoint new delegations of a different complexion or issue binding instructions to their delegates? Once such a cycle began, how would it ever reach a prompt and consensual decision?

Historians generally do not deal in counterfactual hypotheses like these. It is hard enough explaining what actually happened in the past without conjuring speculative possibilities. But when one needs to explain a decision, it is often helpful to know what other contingencies were available and under consideration.

Having worked so hard over the past seven years to ratify and amend the Articles of Confederation, Madison was deeply mindful of all the risks associated with the process and equally anxious to ease the path to ratification. Some of that concern rested on his self-conscious reflections on the inherent difficulty of constitution making, which drew in part on his own experience in 1776 at Virginia's Fifth Provincial Convention, in part on his historical reading, and mostly on his active role in the constitutional reform movement. Two of his essays in *The Federalist*, 37 and 38, addressed these difficulties directly, and a third, *Federalist* 49, instructed readers that "these tasks are of too ticklish a nature to be unnecessarily multiplied."[43] These were, again, the reflections of a working and thinking politician, rather than the "abstract" ideas "an ingenious theorist" might have "planned in his closet or in his imagination."[44]

Rights and Ratification

Three goals dominated Madison's thinking about the strategy for ratification. The first was that the Constitution had to be accepted or rejected in its entirety. The final voice of the sovereign people, as expressed through the ratification conventions, had to be loud and clear, but it could utter only one of two words: yes or no. Although there is no record in Madison's writings of his thoughts about the popular ratification of Massachusetts's constitution of 1780, it is plausible that he did know something about the ambiguity arising from the open-ended way in which the town meetings could vote on the text. The decision on the Constitution would have to be transparent and unequivocal.

This calculus changed somewhat, however, when the Massachusetts convention became the first to append a list of amendments to its resolution ratifying the Constitution. Amendments could come in two forms. We casually assume that adding a bill of rights or new clauses affirming particular rights was the preeminent Anti-Federalist demand. But that modern belief reflects the extraordinary importance that the first eight ratified amendments have acquired over the past century of constitutional jurisprudence.

Before the 1920s, the Bill of Rights was not important as a focal point for jurisprudence, save for in a few cases, like *Reynolds v. US*, involving the admission to the Union of Mormon-dominated Utah, that did set important precedents. But the Anti-Federalists proposed a second broad category of amendments that called for changes in the powers vested in Congress or the structure of the government. These changes would undo many provisions the convention had labored hard to attain. On this basis, Madison was adamant that such proposals could be treated only as recommendations for further action, presumably in the First United States Congress but manifestly not in a second convention. States could not make their approval of the Constitution contingent on the prior adoption of amendments.

In the fall of 1788, after 11 states had ratified the Constitution, Madison decided to take the lead in supporting the adoption of rights-protecting

amendments. Several considerations led to that decision: the narrow Federalist victory in the Virginia convention; the urgings of religious dissenters, primarily Baptists, whose rights Madison had long championed; and his competitive race against Monroe for election to the first House of Representatives. Madison had also engaged in a fascinating correspondence on the subject with Jefferson, who was still serving as minister to France. Those letters reveal Madison's substantive concerns on the subject, which reflected the new ways in which Americans were thinking about the very function a bill of rights could serve.

Madison had made his first contribution to American constitutionalism in 1776. As a young member of the Fifth Provincial Convention, he had one noteworthy achievement: leading an effort to alter the religion article in the Virginia Declaration of Rights from a statement of toleration to a broader recognition of the individual freedom of conscience. But the declarations of rights written in 1776 were not fully equivalent to the bills of rights that would later appear in American constitutions. Excepting Pennsylvania's (1776) and Massachusetts's (1780) bills of rights, these documents were not incorporated in states' constitutional texts. They functioned instead as rhetorical statements that justified the transition to republicanism. They operated not as legal commands binding the legislature but as principles lawmakers should follow, generally using the monitory "ought" rather than the imperative "shall."

A decade later, when the idea of a written constitution as supreme law had taken hold, legislators could view these declarations in a new light. When the Constitution's First Amendment opens by saying "Congress shall make no law," it is issuing a command, not simply endorsing a principle. Contemporary thinkers, notably including Madison, were coming to recognize that including a right within a constitutional text would enhance its legal authority.

But explicit inclusion carried with it two other risks. One was that elevating particular rights to this elite position risked relegating others not mentioned to an inferior status. That is why the protection of unenumerated rights in the Ninth Amendment mattered, at least conceptually,

even though the amendment has remained an empty category doctrinally. The second risk, which particularly alarmed Madison, was that reducing a right to a concise textual formula might weaken its scope. That might prove especially the case for the one right Madison valued most: the free exercise of religion.

His deepest insight, however, lay in identifying from where the greatest dangers to rights would emanate in a republic:

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *cheifly* [*sic*] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.[45] (Emphasis in original.)

This was the same argument Madison had first made in the final passages of his "Vices" memorandum. Such majorities would be dominant through their influence on the legislature, making the people themselves the virtual sovereigns in a republic. In this situation, Madison concluded, a bill of rights' true value would not come from its legal application. It would develop instead from its impact on public opinion, "as [its declarations] become incorporated with the national sentiment." Religious dissent would be protected not through litigation, as we would expect, but because Americans would become morally attached to the free exercise of conscience as one of the "fundamental maxims of free Government."[46]

Securing the Constitution

These concerns and opinions again illustrate the dynamic shifts in American ideas about constitutional rights that had occurred since 1776. They also reveal the nuances in Madison's thinking on this subject. But precisely because modern commentators obsess about the original meaning

of these individuated rights, they overlook the major concern that compelled Madison to place the adoption of constitutional amendments atop his list of priorities, to the great annoyance of his congressional colleagues.

While Madison conceded that a well-crafted set of amendments would make a useful addition to the Constitution, he never thought the Constitution would be defective without them. He had a greater political project to complete: to bring the entire process of constitutional adoption to a happy conclusion by assuaging the well-meaning, if somewhat misguided, concerns of its moderate Anti-Federalist opponents.

Other members of Congress disparaged "the nauseous project of amendments" as a waste of time.[47] But Madison had a deeper ambition. Two years and a week separated the federal convention's adjournment from the dispatch of 12 proposed amendments to the states. Another 27 months passed before Virginia ratified the Bill of Rights. But once the amendments were dispatched to the states, their fate became politically irrelevant. Madison had achieved his great objective in August 1789. There was no longer any basis to challenge the Constitution's legitimacy or worry that its framers had committed some kind of coup against the body politic. Room aplenty existed, world without end, to dispute the meaning of its clauses. But Madison's reputation as a constitutional strategist was now secure.

Notes

1. Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Harvard University Press, 2015).

2. Merrill Jensen et al., eds., *The Documentary History of the Ratification of the Constitution* (Wisconsin Historical Society Press, 1976–).

3. John Dickinson, *Letters from a Farmer in Pennsylvania, to the Inhabitants of the British Colonies* (Philadelphia, 1774).

4. Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution* (University of North Carolina Press, 1953). This argument was previewed in Edmund S. Morgan, "Colonial Ideas of Parliamentary Power, 1764–1766," *William and Mary Quarterly* 5, no. 3 (1948): 311–41, https://www.jstor.org/stable/1923462.

5. James Otis, *Considerations on Behalf of the Colonists: In a Letter to a Noble Lord*, 2nd ed. (London, 1765), 6.

6. British Parliament, "Declaratory Act," March 18, 1766, Avalon Project, https://avalon.law.yale.edu/18th_century/declaratory_act_1766.asp.

7. Oscar Handlin and Mary Handlin, eds., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Belknap Press of Harvard University Press, 1966).

8. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Belknap Press of Harvard University Press, 1967), vi.

9. I discuss this dual thrust of Bailyn's argument in Jack N. Rakove, "Ideas, Ideology, and the Anomalous Problem of Revolutionary Causation," *The New England Quarterly* 91, no. 1 (2018): 36–56, https://www.jstor.org/stable/26405904.

10. John Adams, "Thoughts on Government," in *The Founders' Constitution*, ed. Philip B. Kurland and Ralph Lerner (University of Chicago Press, 1987), 1:107–10.

11. Thomas Jefferson to Thomas Nelson, May 16, 1776, Founders Online, https://founders.archives.gov/documents/Jefferson/01-01-02-0153.

12. Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (University of North Carolina Press, 1969), 132–59.

13. Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Alfred A. Knopf, 1979), 76–77.

14. Wood, *The Creation of the American Republic, 1776–1787*, 339–41.

15. Wood, *The Creation of the American Republic, 1776–1787*, 306–43.

16. Thomas Jefferson, *Notes on the State of Virginia*, in *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (Library of America, 1984), 245–51.

17. This is a sustaining theme in the Handlins' introduction to *The Popular Sources of Political Authority*. The classic expression of the need for a special convention came from the Concord town meeting of October 21, 1776. See Handlin and Handlin, *The Popular Sources of Political Authority*, 1–54, 152–53.

18. James Madison to Caleb Wallace, August 23, 1785, Founders Online, https://founders.archives.gov/documents/Madison/01-08-02-0184. When Madison wrote "administration," he meant the executive.

19. Wood, *The Creation of the American Republic, 1776–1787*, 363–72. See also Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review* 49, no. 5 (1997): 1051–56, https://www.jstor.org/stable/1229247.

20. Wood, *The Creation of the American Republic, 1776–1787*, 354–63. For a full account of the drafting of the Articles of Confederation, see Rakove, *The Beginnings of National Politics*, 135–81.

21. Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford University Press, 2016). For my thoughts on this analysis, see Jack N. Rakove, "The Real Motives Behind the Constitution: The Endless Quest," *Reviews in American History* 48, no. 2 (2020): 216–28, https://www.researchgate.net/publication/342168434_The_Real_Motives_Behind_the_Constitution_The_Endless_Quest.

22. Max Farrand, ed., *The Records of the Federal Convention of 1787* (Yale University Press, 1937), 3:547.

23. Rakove, *The Beginnings of National Politics*, 297–320. For a more recent survey of these events, see David Head, *A Crisis of Peace: George Washington, the Newburgh Conspiracy, and the Fate of the American Revolution* (Pegasus Books, 2019). For further thoughts on the Hamilton–Washington relationship, see Jack N. Rakove, *Revolutionaries: A New History of the Invention of America* (Houghton Mifflin Harcourt, 2010), 396–442.

24. Rakove, *The Beginnings of National Politics*, 297–320.

25. Jack N. Rakove, *A Politician Thinking: The Creative Mind of James Madison* (University of Oklahoma Press, 2017), 29–30.

26. Merrill D. Peterson and Robert C. Vaughan, eds., *The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History* (Cambridge University Press, 1988), xiii–xiv. For my own thoughts, see Jack N. Rakove, *Beyond Belief, Beyond Conscience: The Radical Significance of the Free Exercise of Religion* (Oxford University Press, 2020), 1–12, 66–100.

27. James Madison to George Washington, December 9, 1785, Founders Online, https://founders.archives.gov/documents/Madison/01-08-02-0228.

28. James Madison to James Monroe, March 14, 1786, Founders Online, https://founders.archives.gov/documents/Madison/01-08-02-0265.

29. James Madison to James Monroe, October 5, 1786, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0054.

30. *Federalist*, no. 40 (James Madison), https://founders.archives.gov/documents/Madison/01-10-02-0236.

31. James Madison, "Notes on Debates," February 21, 1787, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0149.

32. John Jay to George Washington, January 7, 1787, Founders Online, https://founders.archives.gov/documents/Washington/04-04-02-0427; and Henry Knox to George Washington, January 14, 1787, Founders Online, https://founders.archives.gov/documents/Washington/04-04-02-0444. See Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (Simon & Schuster, 2010), 17–25; and Akhil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (Basic Books, 2021), 202–6.

33. James Madison, "Vices of the Political System of the United States," April 1787, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0187.

34. Madison, "Vices of the Political System of the United States."

35. James Madison to George Washington, April 16, 1787, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0208.

36. Madison, "Vices of the Political System of the United States."

37. Madison, "Vices of the Political System of the United States."

38. James Madison, "Notes on the Debates in the Federal Convention, September 15," Yale Law School, Lillian Goldman Law Library, Avalon Project,, https://avalon.law.yale.edu/18th_century/debates_915.asp.

39. Jack N. Rakove, "A Model for Deliberation or Obstruction: Madison's Thoughts About the Senate," in *What Would Madison Do? The Father of the Constitution Meets Modern American Politics*, ed. Benjamin Wittes and Pietro S. Nivola (Brookings Institution Press, 2015), 111–28.

40. *Federalist*, no. 62 (James Madison), https://founders.archives.gov/documents/Hamilton/01-04-02-0212.

41. Madison, "Vices of the Political System of the United States."

42. James Madison to George Washington, April 16, 1787, Founders Online, https://founders.archives.gov/documents/Madison/01-09-02-0208.

43. *Federalist*, no. 49 (James Madison), https://founders.archives.gov/documents/Madison/01-10-02-0270.

44. *Federalist*, no. 37 (James Madison), https://founders.archives.gov/documents/Madison/01-10-02-0227.

45. James Madison to Thomas Jefferson, October 17, 1788, Founders Online, https://founders.archives.gov/documents/Madison/01-11-02-0218.

46. Madison to Jefferson.

47. James Madison to Richard Peters, August 19, 1789, Founders Online, https://founders.archives.gov/documents/Madison/01-12-02-0230.