

15. Why did Maryland not ratify the Articles of Confederation until much later than the other states?

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16. Between the date when the U.S. declared its independence and the date when the Articles of Confederation went into effect, what body governed the United States?

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# THE FIRST AMERICAN CONSTITUTIONS

DONALD S. LUTZ

The modern written constitution was invented by English-speaking people on North American shores. The process of invention was lengthy and complex, and we can point to no one event or year as decisive. Certainly the writing of the United States Constitution in the summer of 1787 was a dramatic high point in the process, as well as the most important historical moment in American constitutionalism, but by then the modern written constitution had already been developed and was well represented in a number of earlier documents.

Furthermore, despite the Constitution's roots in European intellectual traditions derived from the Bible, classical Greek philosophy, Protestant theology, English common law, English Whig political theory, and the Enlightenment, no European precedent or model for our national constitution existed by 1787. The form and content of the United States Constitution derived largely from experience with the early state constitutions, by both borrowing from them and by reacting to them. These often overlooked state documents occupy a critical position in the development of American constitutionalism. They are at the same time the culmination of a long process, and the foundation upon which the United States Constitution rests.

One way to illustrate this is to consider a prominent, yet often unremarked feature of the Constitution written in that warm summer in Philadelphia. In this, our second national constitution, the states are explicitly or by clear implication mentioned more than fifty times in forty-two different sections. If the proverbial Martian traveler were to show up and attempt to understand the document, he would discover a fact that most Americans have never come fully to appreciate themselves — the United States Constitution is an incomplete document until and unless the state constitutions are also read.

If we want to know who can vote for members of the House of Representatives, we must look, says section 2 of Article I, at who can vote for members of the lower house in each state, and this requires reading the state constitutions. Senators are elected by the state legislatures, and in order to understand the character and composition of these legislatures we must

read the state constitutions. The President is elected by electors "appointed" by the states in a manner determined by the respective state legislatures. Section 2 of Article IV creates a dual citizenship whereby all Americans are simultaneously citizens of the United States and of the states wherein they reside. One result of dual citizenship is the existence of a state court system as well as a national court system, and in order to understand the design and operation of the American judiciary we are once again driven to read the state constitutions.

The obvious point that should require no further belaboring is that the United States Constitution assumes, in fact requires, the existence of state constitutions if it is to make any sense. Put another way, the state constitutions are part of the United States Constitution and are needed to complete the legal text. The Framers of our national document, regardless of their attitude toward the already existing state governments, had no choice but to recognize their existence. The state constitutions are woven into the national constitution because they already existed and could not be ignored and because the interweaving allowed the national document to control the negative effects of the state documents and allowed the Founders to take advantage of the benefits of federalism.

The state constitutions are embedded in the United States Constitution in another, less obvious fashion. The design and theoretical underpinnings for the national document result to a significant degree not only from European theoretical ideas but also from the experience, both positive and negative, of living under the state constitutions. Complete foundation documents in their own right, the state constitutions each produced political systems more or less successful at solving the collective problems of their respective peoples. Viewed to a certain extent as experiments in self-government, the state constitutions were tinkered with and sometimes replaced in an effort to meet the twin goals of effective government and popular liberty. By the summer of 1787, the framers of our national constitution, many of whom had helped write state constitutions, could draw upon a rich experience in the design of institutions and the practical effects of those institutions. It is doubtful that they could have been as successful in their efforts, or been inclined to produce the kind of document they did, without their prior experience with state constitutions and the Articles of Confederation.

Although the early state constitutions were an integral part of the United States Constitution and the base upon which the national document was written, they were not the beginning of American constitutionalism. Instead they were themselves the culmination of a process begun much earlier. In 1776 Rhode Island and Connecticut readopted colonial charters written in the early 1660s as their respective state constitutions. After removing references to the king from the charters, the citizens of these two states simply continued to conduct business as usual. Massachusetts did not even bother to readopt its colonial charter, but continued until 1780 under

its charter of 1691 as if it had constitutional status. These states could act in such a fashion because they already had institutions largely of their own design, based upon popular consent, under which they had successfully reached collective decisions both effective and widely accepted. The Connecticut Charter in turn essentially ratified a form of government adopted by the colonists in 1639, and Rhode Island's charter ratified a form of government designed by the colonists in the 1640s. Massachusetts could trace its basic institutions to documents written by the colonists stretching back to the 1620s.

Although the other states wrote new constitutions, they also built directly upon colonial documents, documents that provided extensive experience with elected legislatures, elected local government, and institutional design. Georgia's experience was the shortest, going back only a half-century in 1787. Pennsylvania and New York had experience stretching back a full century, New Jersey to the 1670s, the Carolinas to the 1660s, Maryland to the 1640s, and New Hampshire to the 1630s. Virginia's experience went back to its first legislative assembly in 1619. Without exception, the colonial charters provided for local self-government as long as legislation did not run contrary to the laws of England. The colonists took advantage of this provision and wrote a long string of documents designing and regulating their local and colony-wide governments.<sup>1</sup>

The early state constitutions thus stand as the fulcrum in American constitutional history. On the one hand, they were the culmination of colonial experience, and they embodied and summarized that rich experience. On the other hand, they formed the ground upon which first the Articles of Confederation and then the United States Constitution were erected. The design of our national constitution in 1787 deeply benefited from the experience of state constitutional design. There are few institutions in the national document, including federalism, that had not been tried out earlier in state or colonial documents. Even more, the state constitutions interpenetrated the national constitution to the point of virtually becoming part of it.

This is not to imply that the state constitutions were the inevitable product of what came before anymore than that the United States Constitution was simply a composite of state documents. The last three decades of the eighteenth century constituted a time of extraordinary political experimentation and innovation. Between 1776 and 1798 the first sixteen states wrote a total of twenty-nine constitutions, two of which were rejected. The two national constitutions bring the total for the era to thirty-one. The willingness to experiment with new institutions in the service of old, well-established political goals and principles was impressive. Surrounding the writing of constitutions there was an outpouring of pamphlets and newspaper articles commenting upon them that numbered in the thousands.

If we accept estimates that in the 1780s about 60 percent of white, adult males in America participated in politics at least to the extent of voting, then

we had about 300,000 persons, on average, generating about three constitutions every two years for twenty-two years, and during the same period writing at least 1,300 pamphlets and newspaper articles a year on political and constitutional matters. When we add the consideration that all but one state had annual elections, and elections were used to fill at least 8,000 political positions from president to town surveyor, the numbers suggest a virtual maelstrom of activity for several decades. At the center of all this activity, and engaging the attention of some 30,000 men in the most active political class, was the design, operation, and alteration of constitutions, especially at the state level.

How successful were these extensive efforts? Despite seven of the first states replacing their initial constitutions within a decade or less, the average state constitution written during the era lasted for more than sixty years. One of them, the Massachusetts Constitution of 1780, is currently the world's oldest constitution. Also, despite the tremendous changes that have occurred in America, the state constitutions we write today are deeply indebted to, and, with only a handful of exceptions, are essentially based upon the models developed between 1776 and 1787. The United States Constitution, erected upon and derived from these state documents, has survived for two centuries with only twenty-six amendments. Finally, the symbols, principles, and values found in the early state constitutions continue to inform our political thinking in late-twentieth-century America.

### THE EARLY STATE CONSTITUTIONS— A GENERAL OVERVIEW

It is useful to divide eighteenth-century state constitutions into three "waves" of adoption. The first wave followed quickly after the Continental Congress in May of 1776 recommended that the states erect new govern-

FIRST WAVE	SECOND WAVE	THIRD WAVE
1776 New Hampshire	1777 New York	1789 Georgia
1776 South Carolina	1777 Vermont	1790 South Carolina
1776 Virginia	1778 South Carolina	1790 Pennsylvania
1776 New Jersey	1780 Massachusetts	1792 Delaware
1776 Maryland	1784 New Hampshire	1792 Kentucky
1776 Delaware	1786 Vermont	1792 New Hampshire
1776 Rhode Island		1793 Vermont
1776 Connecticut		1796 Tennessee
1776 Pennsylvania		1798 Georgia
1776 North Carolina		
1777 Georgia		

ments. The second wave included three constitutions that were the result of longer deliberations than those of the first wave plus three constitutions in which states reconsidered and replaced earlier documents. The third wave will not concern us in this study. It includes constitutions by three new states plus a reconsideration by seven states of their earlier constitutions in light of federalist political principles.<sup>2</sup>

Each of these constitutions defines a political system — a set of institutions for reaching collective decisions. Each constitution also defines a political culture — the values that inform and animate a political system. What is striking about the early constitutions as a group is that, despite considerable inventiveness, there are strong institutional similarities and a basic political culture underlying all of them.

Looking at the first eighteen state constitutions (including, here, Massachusetts's 1691 charter), we find the following inventory of basic institutions.

1. Except for Pennsylvania (1776) and Georgia (1777), the states used a bicameral legislature (Georgia adopted bicameralism in 1789 and Pennsylvania in 1790).
2. In all seventeen constitutions the lower house was elected directly by the people.
3. Although the percentage of white, adult males enfranchised varied from state to state, on average the percentage was eight to ten times what it was in England.
4. If the sixteen constitutions using bicameralism, all but one had the Senate elected directly by the people, usually by the same electorate for both houses. Maryland voters elected an electoral college, which in turn elected the Senate.
5. With only one exception (South Carolina, 1776), all constitutions provided that the lower house be elected annually.
6. Of the sixteen bicameral constitutions, ten had annual elections for the Senate, and three had staggered, multi-year terms.
7. Nine of the constitutions had the executive elected by the legislature, and six more used a popular election essentially to identify the major candidates from among whom the legislature picked the governor.
8. Fourteen constitutions provided for annual elections of the governor, two for biennial elections, and two for triennial elections.
9. Twelve of the constitutions required voters to own property, usually between twenty and fifty acres or the equivalent, four required them to be taxpayers, and two had no property requirement.

10. Of the sixteen bicameral legislatures, thirteen had the same property requirement to vote for the upper house as for the lower house.
11. Of the nine states that involved the people in selecting the governor, eight required the same amount of property to vote for the executive as to vote for the lower house.
12. All but two of the constitutions required ownership of property to run for the legislature, with few exceptions requiring more property to run for office than to vote.
13. Ten of the sixteen bicameral legislatures required more property to run for the upper house than for the lower house, and usually even more property was required to run for governor.
14. Except for Massachusetts, Connecticut, and Rhode Island, which initially operated as states under colonial charters, and two states that wrote constitutions before the Declaration of Independence (New Hampshire, 1776; South Carolina, 1776), most early state constitutions included bills of rights.
15. With only two consistent exceptions, the rights listed in the bills of rights, including the right to property, were alienable by the legislature (the exceptions were the right to free exercise of religion and the right to trial by jury).
16. Thirteen of the seventeen constitutions were written by the respective state legislatures, usually after an election in which it was made clear that the new legislature would also write a new constitution. Only two constitutions, Massachusetts in 1780 and New Hampshire in 1784, were written by a convention elected solely for that purpose and submitted to the people for ratification.
17. Only four constitutions in the first wave mention an amendment process, and in two of those instances the legislature is the amending agent. During the second wave, an amendment process is mentioned more frequently, but except for Massachusetts and New Hampshire — which give the amendment power to the people — the power is invariably given to the legislature.

One should not conclude that the differences among the state constitutions were insignificant. It was a time of experimentation, and the willingness to try out new ideas and institutions was impressive. Nevertheless, the most significant fact about the early state constitutions is that despite the many differences there was a common set of commitments, assumptions, and institutions defining the continuing American constitutional tradition. The commonalities produced not only shared strengths but also widely shared weaknesses that required addressing.



# Great Debates

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## in American History

### The Great Compromise

#### Debate Overview

When the delegates arrived in Philadelphia for the Constitutional Convention in the summer of 1787, they faced the daunting prospect of reaching agreement on a broad range of controversial issues. Perhaps the most important of these, and the one over which tempers flared most, was the issue of representation: Should each state have the same number of representatives, or should representation be determined on the basis of population?

Delegates from the small states were so strongly opposed to any plan giving larger states additional power that representation became the single issue that threatened the convention's ability to draft a workable constitution. "We would sooner submit to a foreign power than submit to be deprived of an equality of suffrage [votes] in both branches of the legislature," one delegate declared. James Madison, delegate from Virginia, noted that no other topic prompted such heated argument: "The great difficulty lies in the affair of Representation, and if this could be adjusted, all others would be surmountable."

As the issue was being debated, a paper was circulating among the delegates. On it were listed the names of ten states, and beside each name was listed the number of representatives each state would have in a Congress based on proportional representation. The list looked like this: Georgia—1; Delaware—1; Rhode Island—2; New Hampshire—3; New Jersey—5; South Carolina—6; North Carolina—6; New York—8; Connecticut—8; Maryland—6; Massachusetts—14; Pennsylvania—12; Virginia—16. This list made the situation obvious to all. Under the Virginia Plan, three states would control Congress. The small states would lose their equality. But the large states argued that a population of 700,000 (Virginia), *should*, in fact, have greater strength than a population of 59,000 (Delaware).

After six weeks of debate, the Great Compromise was born. This brilliant compromise gave both sides what they wanted: Each state would receive an equal vote in the upper house of Congress (the Senate), while votes would be distributed according to population in the lower house (the House of Representatives). Almost half the proceedings of the Constitutional Convention had been devoted to this single issue. The excerpts that follow, drawn from the records of the convention, present the points of view of both the large and the small states.



# THE CONSTITUTIONAL CONVENTION AND THE FORMATION OF THE UNION

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SECOND EDITION

*Edited, with an Introduction, by*  
WINTON U. SOLBERG

UNIVERSITY OF ILLINOIS PRESS  
*Urbana and Chicago*

## THE WORK AND ACHIEVEMENT OF THE FRAMERS

The most difficult problem to confront the Framers merits a word of explanation. This, the battle for control of the central government, arose out of the attempt to establish national government and the need to determine its source of authority. The latter involved defining in its American setting the age-old problem of the locus of sovereignty. While there was never any serious question that the Virginia Plan introduced at the opening would be adopted, its resolutions concerning the rule of suffrage in the national legislature and making that body supreme over the states quickly aroused bitter opposition. Although the word "national" was soon replaced, the real contest over the resolutions submitted by Randolph was never over how strong a government to create, but rather who should control the new establishment.

The immediate background to this contest for power, which involved important material interests and opposing interpretations of political philosophy, was the predominant Lockean theory and the legacy of the Revolution. The first attributed authority to the whole community; the second was responsible for different views as to just where this power had reverted when America declared independence: the whole people, the people of the states, or the states themselves, six of which avowed the doctrine of state sovereignty in their state constitutions. The political structure of the United States largely ruled out the former alternative, so that two conflicting schools dominated Convention thought. One favored

<sup>18</sup> Arthur M. Wilson attributes this phrase to Dean Christian Gauss of Princeton University in a review in *William and Mary Quarterly*, 3 ser. XIV (January, 1957), 93.

strong and popularly based government. Significantly, this contained the leaders and undoubtedly the best minds in Philadelphia, which of course does not validate the "rightness" of their views nor establish the "intention" of the Framers as a whole. The other threatened to wreck the proceedings unless it obtained a measure of equality for each state under the proposed constitution. With this assured by early July, the gravest crisis passed. Thus when members turned to consider how much power to grant the federal government, both groups, having received the means of self-defense, were able to face that problem without fear.

The strife over the basis of representation in the national legislature raised many important and lasting issues. The argument that authority lay with the people rather than the states emphasized popular sovereignty. And in the Convention suffrage based on wealth rather than numbers lost out repeatedly. Defense of proportional representation inevitably advanced the concept of democracy by furthering the principle of the equality of persons. Yet in the final result the states rather than the people were to be represented in one chamber. However, proponents of this dearly bought victory subsequently lost its advantage: when the Convention made voting in the Senate per capita rather than by states. A government approaching the democratic and majoritarian principle was nevertheless limited, both by the "higher" law and the fact that all its powers were derived from the people, who did not delegate all their authority. The people conferred on the government certain powers but not sovereignty, although representatives in Philadelphia were confused or lacked understanding on this point. Even so, too great stress cannot be laid on the fact that, although the combined national-federal features of the Constitution prevented the government from being as high-mounted as many Framers wished, in 1787 Convention leaders insisted that the states were political societies entitled to rights, but not separate entities possessing sovereignty. These spokesmen, who met opposition from some colleagues, wished definitely to subordinate the states, but they did not, with two

exceptions, desire to destroy the states. The result was to incorporate separate subordinate political units within the federal system. Failure to announce explicitly in the Constitution where sovereignty lay gave rise subsequently to prolonged and bitter controversy. This helped bring on the War for Southern Independence and continues to trouble relations between the federal and state governments until today.

The achievement of the constitution-makers was to blend old and new features in the fundamental law which they proposed for ratification. Members reached far back through time to bring lessons of the past to bear upon pressing contemporary problems. Although extremely practical in their approach, they nevertheless constantly invoked both European history and European theorists to illuminate their way. While the document produced in Philadelphia owes a heavy debt to the rich constitutional inheritance antedating New World beginnings, it is primarily a product of American growth—a skillful synthesis of mainly indigenous elements, drawn mostly from existing state constitutions, but also from the Articles of Confederation and other native sources as well as experience.

Not only was it an act of creative statesmanship to combine these materials into fresh combinations, but the Framers also, in devising original solutions to unique problems, transcended the point to which history and experience had brought them. Perhaps the most important of these innovations was the federal union. For this history knew no precedent, although previous structures had borne similar names and certain resemblances. Rather than a loose federation depending on force to coerce member states, the new federal-national system was to operate directly on individuals. This, plus the judicial power of the central government, made the proposed unit the first federation ever to find a peaceful means of securing the obedience of states. Could this confederated republic, unlike all predecessors, prove successful?

Moreover, other novel features characterized the Constitution as the basis of a federation. Among these were provisions

assuring the federal government an independent and adequate revenue and control of all external and interstate commerce, a refusal to allow individual states to make treaties with foreign powers or each other, a willingness by the supreme government to dispossess itself of territory under its exclusive control, and readiness to leave the separate states unreserved power over internal police. Likewise, proportional representation in the lower house was original as applied to a federation. In effect, the American federal union was a new form of government.

The presidential system established in Philadelphia was also new. Creation of a separate executive branch, which other federations had lacked, followed the practice in the American states and in various monarchies. Yet the chief magistracy as established in the Constitution was unique: the office was more powerful than that of the state governors and yet denied the special claims to authority possessed by royal rulers. Delegates who feared both impotence and tyranny rejected both the idea of a plural executive and of a king. Yet they provided for a powerful president whom they denied support by an executive council or council of revision, and this isolated official they subjected to checks by two other branches of government.

In one of these the Convention made still further innovations. Having denied Congress power to negative state laws, the Framers made the Constitution along with federal enactments and treats the supreme law of the land and gave the judicial branch coextensive authority to hear cases which arose. Hence the written charter enabled the federal courts to become the guardian of public welfare by preserving the constitutionality of fundamental and statutory law and protecting the rights of the people.

Finally, the guiding principles of the federal union were new as applied to such a political organization, or such fresh statements of older themes as to appear novel. For in spirit the proposed American government was republican and even democratic, and the implicit corollary was the need for virtue

in the people who would attempt to make it work. It was in these people and the fundamental or "higher" law, and not in priests or kings or legislative assemblies, that absolute power was to rest.<sup>16</sup>

## The Great Debate: Ratifying the Constitution of 1787

Eleven days after the Philadelphia convention ended, Congress recommended that the final draft of the Constitution be submitted to the thirteen states. Although the convention delegates had gone well beyond the scope of their instructions, no objections to their proposal were raised in Congress.

Congress also approved the controversial procedure suggested by the convention for ratifying the Constitution. According to the Articles of Confederation, the individual state legislatures should have voted on the Constitution. The convention delegates, however, called on each state legislature to assemble a state convention for the purpose of voting on the Constitution. The method for selecting the delegates was to be decided by the states.

Several states reacted quickly, organizing state conventions and approving the draft Constitution with little debate. The Delaware convention unanimously accepted the Constitution on December 6, 1787. A few days later, supporters of the Constitution in Pennsylvania rushed the document through the ratification process before their opponents could present their case. Within a month, New Jersey, Georgia, and Connecticut also approved the Constitution.

### **What were the issues in the ratification debate?**

By early 1788, however, fierce debates on ratification were already underway in the states of New York, Massachusetts, and Virginia. Four central issues stood out.

- Were the security and prosperity of the United States threatened by the shortcomings of the Articles of Confederation?

- Were the delegates to the Philadelphia convention justified in drafting a new Constitution, rather than following their instructions to revise the Articles of Confederation?

- Did the powers granted to the national government under the proposed Constitution pose a threat to individual liberty and the rights of the states?

- Should amendments guaranteeing individual rights be added to the Constitution to prevent the abuse of power by the national government?

In theory, the Constitution could have taken

effect with the approval of nine of the thirteen states. In fact, rejection of the document by a major state would have forced a new round of negotiations, and might very well have sunk attempts to form a stronger national government.

The Philadelphia convention had conducted its deliberations in secret. Nonetheless, the public quickly entered the ratification debate. Opinions on both sides of the issue were expressed with conviction.

Supporters of the Constitution viewed the document as a means for rescuing the country from the shortcomings of the Articles of Confederation. They expected that the Constitution would win the backing of America's most prominent citizens. Opponents, however, found much to criticize. They saw in the Constitution a threat to their liberties and an attempt to create a dominant aristocracy in American society.

*These lawyers, and men of learning, and moneyed men, that talk so finely, and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill, expect to get into Congress themselves; they expect to be the managers of the Constitution, and get all the power and all the money into their own hands, and then they will swallow up all of us little folks, like the great whale.*

—Opponent of the draft Constitution

The ratification debate hardened the political divisions in American society. The Federalists, who had been behind the drive to draft a new Constitution, now faced a well-defined opposition, known as the "Anti-Federalists."

The Anti-Federalists were in fact supporters of confederation, or even a loose form of federalism. The Federalists were best described as "nationalists" because they favored a strong national government.

The Federalists and Anti-Federalists engaged in a war of words in America's newspapers. Not since the months just before the outbreak of the War of Independence had the temperature of American politics reached such heights. As the ratification battle raged in early 1788, three distinct positions emerged.