1989

Those Indispensable Articles of Confederation-Stage in Constitutionalism, Passage for the Framers, and Clue to the Nature of the Constitution

Arthur R. Landever
Cleveland State University, a.landever@csuohio.edu

How does access to this work benefit you? Let us know!
Follow this and additional works at: http://engagedscholarship.csuohio.edu/fac_articles

Part of the Constitutional Law Commons

Original Citation
THOSE INDISPENSABLE ARTICLES OF CONFEDERATION—STAGE IN CONSTITUTIONALISM, PASSAGE FOR THE FRAMERS, AND CLUE TO THE NATURE OF THE CONSTITUTION*

Arthur R. Landever**

INTRODUCTION

"It was the most wonderful work ever struck off at a given time by the brain and purpose of man."1 Was that spoken about the Articles of Confederation?2 Of course not! It was said of our wondrous Constitution, that document penned in 1787 and glorified in song and story. The speaker was William Gladstone,3 the English Prime Minister during the American centennial celebration. As for the Articles, they are the Rodney Dangerfield of constitutions, getting no respect, with bulging eyes, and hands tugging nervously at a necktie. The Articles, our country's first constitution, have been relegated to oblivion.4 Yet our Constitution surely did not arise with-

---

* This article grew out of research for a lecture presented on March 11, 1987 at Cleveland-Marshall College of Law. See Articles of Confederation: Gateway to the Constitution, 58 CLEV. B. J. 140-41 (1987).

The author wishes to thank his colleague, Professor Joel Finer, and Carolyn M. Landever for their helpful suggestions and also to thank the members of the Arizona Law Review for their fine editorial assistance.

** Professor of Law, Cleveland-Marshall College of Law, Cleveland State University. B.A., J.D., Ph.D., New York University.


4. In the leading hornbook on constitutional law, for example, there are apparently only two references to the Articles in 1720 pages and one of these was in a footnote. Admittedly, the work does not purport to be one in history. See L. Tribe, American Constitutional Law § 3-4, at 32-33 n.7, § 6-3, at 404 (2d ed. 1988). See also G. Gunther, Constitutional Law 82 (11th ed. 1985); but see, for a fuller historical treatment, G. Stone, L. Seidman, C. Sunstein, & M. Tushnet, Constitutional Law 2-5, 115, 133 (1986) (citing Johnson, J., concurring in the judgment in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

At times, the Supreme Court cites the Articles, and contrasts the lack of authority under them with power under the present constitution. See, e.g., Welch v. Texas Dep't of Highways and Public
out antecedents, as if created by demigods from Mount Olympus. It drew upon roots of constitutionalism. A key fertile period of constitutional discovery and experimentation was that swath of time between 1774 and 1787. That was when the American Continental Congress held sway, acting either in anticipation of the ratification of the Articles, or under their authority.

Part of the rich brew of Revolutionary constitution-making, the Articles were a significant stage in the march of constitutionalism. They were invaluable, indeed, indispensable, to the drafters at the Philadelphia Convention as a transitional experience, and as a model to reflect upon. What is more, they still offer insights into our founders' perceptions about constitutions, and thus enrich our understanding about the complex nature of constitutional interpretation.

The author considers the Articles, first on the world's stage as a landmark. He next treats the Articles as a means of readying the Framers for constitution-making in 1787. The Articles would be a crucible, training ground, and failed model to draw upon. He then discusses the pragmatic and complex legal culture which produced the Articles, and ultimately, our open-textured Constitution.

The Traditional View of the Articles—Courting Political and Economic Disaster

One can choose, if one wishes, to peer "through a glass, darkly." Traditionally, that is what we Americans have done, if we have considered the Articles, and the work of the Continental Congress, at all. Not that the case against the Articles is difficult to make: Drafted in final form in 1777, ratified in 1781, and in effect until the new Constitution was implemented in 1789, they created a mere "league of friendship." "Sovereignty" was expressly retained by the thirteen constituent states. The instrument provided for no independent presidency, and it had no separate federal judiciary to enforce the decisions of the hapless Continental Congress. European capitals laughed at the spectacle of American diplomats who could not assure state cooperation. John Adams was asked: "Do you represent one country or thirteen?" Lord Sheffield declared that Britain could name her...
own terms because “America cannot retaliate.”

Foreign governments not only mocked; they took actions based on those attitudes. Thus, after the war, the British continued to occupy forts in the old Northwest, claiming as justification the failure of the United States both to compensate loyalists for confiscated land and to repay pre-war debts. The Spanish, controlling New Orleans, effectively blocked navigation of the Mississippi River, a vital passage for expanded commerce and settlement in the lands west of the Appalachians. The Barbary pirates continued to seize American sailors in the Mediterranean. And confusion abounded. In one instance, a Swedish diplomat mistakenly presented his credentials to the governor of Massachusetts—considering the state a separate and independent sovereignty—much to the chagrin and consternation of Congress’s Secretary of Foreign Affairs, John Jay.

The weakness and misunderstanding stemmed, in large part, from the fact that the Congress was denied the authority to tax. Instead, the legislative body was forced to rely on requisitions imposed upon the states, and unfortunately, only about one-sixth of the requisitions were ever paid. Superintendent of Finance Robert Morris described himself as a “man who is to direct the finances of a country almost without revenue.” By March, 1781, public credit had almost vanished. Government securities were worth only a fraction of their face value. The creditor most feared by the Continental Congress was the Continental Army itself. Indeed, in 1783, the Congress fled Philadelphia in fear of a mutiny, or more, by unpaid troops. There was no money to pay interest on loans—let alone money to repay the principal—or to garrison troops in the West to protect settlers from the Indians.

Moreover, Congress lacked the authority to regulate commerce among the states, and trade wars resulted. Some states were particularly vulnerable. New Jersey, squeezed between the ports of New York and Philadelphia, was likened to a “cask tapped on both ends” forced as it was to pay duties on products obtained from its neighboring states. North Carolina, between South Carolina and Virginia, found itself in the same predicament, a “patient, bleeding at both arms.”

By the mid-1780s the situation grew even worse. The Continental Congress was veering toward bankruptcy. Yet it still could not persuade all thirteen states—unanimity being needed to pass an amendment—to agree to

11. Id. Jefferson, then Ambassador to France, said: “All respect for our government is annihilated on this side of the water from an idea of its want of energy.” D. Unger, These United States—Questions of Our Past 134 (3d ed. 1986).
13. ARTICLES OF CONFEDERATION art. VIII, cl. 1.
17. D. Unger, supra note 11, at 133.
18. Id.
20. Id.
21. ARTICLES OF CONFEDERATION art. XIII.
provide it with meaningful revenue authority. The quality of the Congressional membership continued to decline. In addition, the body found it increasingly difficult even to muster a quorum, and its power began to disintegrate. Most ominous, by 1786, armed bands of farmers, in desperate financial straits and led by former Continental Army officer Daniel Shays, closed the courts in the Massachusetts interior and threatened to lay siege to Boston. To George Washington, there was impending ruin.

A Bum Rap?

But was the situation that bad? After all, we had just defeated the vaunted British. And as for our financial predicament in the 1780s, historians Merrill Jensen and E. James Ferguson do not view it as a desperate one. They stress that, for supporters of the Articles, the key to financial stability lay with the sale of the western territory. The land was a vast, rich, virgin domain of the United States; it was a treasure that could retire the national debt. Indeed, according to Jensen, the national government came to realize forty-four million dollars from the sale of land parcels by the 1830s; such a result justified anti-federalist claims that the problem of the debt was exaggerated.

Rather than state resistance, the picture was one of state willingness to absorb the central government’s debt. The states feared, not without cause, that the Continental Congress might use the excuse of the debt to enhance Congress's revenue powers. Therefore, by the end of the war, the states accepted a substantial part of the federal debt.

Congress might have required the states to absorb even more and in a

22. Black, Articles of Confederation, in GENESIS & BIRTH OF THE FEDERAL CONSTITUTION 245, 256 (J. Chandler ed. 1924); see infra note 109.
25. "Thirteen sovereignties pulling against each other and all tugging at the federal head will soon bring ruin on the whole." J. FLEXNER, GEORGE WASHINGTON AND THE NEW NATION (1783-1793), at 101 (1969).
27. Ferguson, State Assumption of the Federal Debt During the Confederation, 38 MISS. VALLEY HIST. REV. 403 (1951).

Most of the states made earnest efforts to pay federal debts as well as their own. In the closing years of the war they redeemed the remnants of Continental currency, took over a substantial part of the federal certificate debt, and became responsible for sums which Congress owed to the Continental Army for pay and depreciation. Later, at the bidding of the federal creditors, they began to assume the debts which supported Congress's bid for increased power.

..., Had these methods been pursued to the end and Congress's resources in western lands brought into play, the federal public debt would no doubt have been retired sooner and at less cost. ... Most important, however, the public debt would have been stripped of its political functions. It would not have vitalized the movement for national government nor become the pivot of the Hamiltonian [funding] system.

Ferguson, supra note 27, at 424.
few years the debt would have ceased to exist. However, the delegates to the Congress were of two minds. True, the members wanted the central government’s finances put on a sound footing. And this meant, in part, that Congress had to find a way to reduce the debt or deal with it. In that regard, the Northwest Ordinance of 1785 gave each state a quota of western lands to be sold locally, with the funds used to pay war debts. But leading consolidationists—men like Robert Morris, Alexander Hamilton, and James Madison—saw the federal debt from another perspective as well. To them it was a national blessing, a “powerful cement to the union.”

In any event, the nation’s financial situation was not as bleak as typically painted. Jensen contends that “the Confederation [should not be seen as] a government staggering along without an income,” for it was succeeding at “deficit financing,” an approach to government operation not entirely unlike our present modus operandi. Moreover, in the 1780s, most of the states appeared relatively stable and prosperous, even experiencing economic growth. To historian Charles Beard, the period 1781-88 was not so economically critical as traditionally has been charged.

But whatever the economic difficulty, the country remained generally peaceful and stable; Shays’ Rebellion, for example, was put down with little difficulty. Nor could the Articles be blamed, in the main, for the economic woes that did beset the country. After all, the Revolutionary War had nearly destroyed the New England fisheries and had led to agricultural decay in the South. Moreover, the country now lay outside the protective British mercantile system.

Matters Of Perspective, Definitions, and Cause and Effect

Ferguson suggests that Federal Debt historians for too long approached the problem of the new nation’s financial situation from the perspective of the consolidationists in the Continental Congress. Perspective, of course, can both focus and distort one’s view of reality. So much depends upon the kinds of questions asked, the evidence drawn upon, the labels employed, and the criteria used to evaluate what one finds.

And of course one may find, not coincidentally, what one is looking for. Historians may seek out underlying consensus or conflict. Some may
concentrate upon ideas as a major force in history, while others focus upon institutions or actors. Still others may lay stress on demographics.

And what period of time does one choose? Is the period 1775-89 an important and coherent one? Indeed, is it to be considered a "critical" period in our history, with "unselfish patriots rescuing the nation from impending anarchy"? In examining that period, should one focus upon what had come before, in other words, the "legacy," or emphasize what seemed to be "emerging"? Perhaps one needs to have a dual concern, understanding that a particular time in history is an "integral part of the past in which it was rooted and of the future into which it was growing."

Influencing the historian's point of view is the vantage point of his own time period. The noted philosopher-historian Benedetto Croce well said that "[e]very true history is contemporary history." Every generation seeks to "[reinterpret] the past in terms of its own age." To what extent have scholars, looking back, identified their time with that of the struggles of the 1770s and 1780s? It should be no surprise that historians, writing immediately after our wrenching Civil War, believed in strong central government; therefore, they readily accepted the Hamiltonian-Federalist portrait of a dark Confederation period.

Yet with state efforts in the early 1900s to seek their own "progressive" reforms came new historical analyses. These painted a different picture; historians praised Jefferson's emphasis on local government, saw the Confederation period more benignly, and cast a suspicious eye upon the motives of the Framers.

Just as our endeavor can be clouded by our generation's perspective, it can be muddled by the definitions we choose. For example, what do we mean by the "Articles of Confederation"? The draft offered by John Dickinson in 1776, the one considered the most consolidationist? The draft as


42. Some historians have almost deified the actors. See, e.g., G. Grob & G. Billias, supra note 1, at 203. The Americans "were more sensitively religious, better educated, of serener minds and purer souls than the men of any former republic." G. Bancroft, 2 History of the Formation of the Constitution of the United States of America 366-67 (1882).

43. See B. Bailyn, Voyagers to the West—A Passage in the Peopling of America on the Eve of the Revolution (1986).

44. See, e.g., G. Wood, supra note 23; M. Jensen, New Nation, supra note 26; M. Jensen, Articles of Confederation, supra note 26; B. Wright, supra note 39.

45. See M. Jensen, New Nation, supra note 26, at xiii (rejecting the "critical period" view made famous by John Fiske in Critical Period of American History (1893)); M. Jensen, Articles of Confederation, supra note 26, at 244.


49. G. Grob & G. Billias, supra note 1, at 1.

50. Id.

51. Id. at 245-46, 202-203; J. Fiske, supra note 45; G. Bancroft, supra note 42; M. Jensen, Articles of Confederation, supra note 26, at 3.

52. See G. Grob & G. Billias, supra note 1, at 249; C. Beard, supra note 40.

53. See M. Jensen, Articles of Confederation, supra note 26, at 175 (Draft of John Dickinson, dated July 12, 1776). But see Note, United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?, 88 Yale L.J. 142 (1978).
amended in the Continental Congress? The final one offered the states? The Articles, as brought to life by the actions and institutions of the Continental Congress—anticipating the Articles’ ratification and thereafter?

Beyond definitions, how should we evaluate the Articles? In terms of the successes and failures of the central government acting under its auspices? Clearly that approach has been taken by those who evaluate our 1787 Constitution. Moreover, are the Articles to be considered a key independent variable, explaining how we arrived at “Union”? Are they to be viewed, instead, as a product of that union, achieved under the leadership of General Washington, or that of the Continental Congress itself? And were we winning the war and maintaining the peace because of or despite the Articles? Could it be that our enemies, the British and the hostile Indian tribes, were more responsible for our unity than were the Articles?

These same hard questions, of course, might be posed as to our revered Constitution of 1787. To wit: Has the Constitution really been responsible for our liberties? Or should credit go to the two great oceans separating us from Europe and Asia? To the internal squabbles in those lands across the seas that kept distant nations otherwise occupied? To our vast resources? To the availability of a frontier to which the poor, the angry, and those with a wanderlust could seek a new life? To the waves of new immigrants? To our legal heritage? To our politics?

Given these difficulties, what are the author’s premises? First, the Articles are a coherent and presumably important subject, as the national instrument of government preceding the Constitution. Second, the Articles are best understood as encompassing the acts and institutions under their authority, or in clear anticipation of their ratification. Third, assessment of social phenomena is admittedly complex; and there is arbitrariness, of course, in singling out the Articles, because they can hardly be evaluated apart from the political actors and institutions of the time.

A Significant Stage in Constitutionalism

With such premises in mind, let us turn to the place of the Articles in history’s recorded efforts to frame mechanisms for limiting government power. Indeed, the Articles of 1781 were a landmark, richly deserving a place alongside the Magna Carta of 1215, and the United States Constitution of 1787. They constituted the world’s first national written charter

54. See Note, supra note 53, at 142.
55. See Articles of Confederation, supra note 2. In 1781, after having been ratified by Maryland, the last state to approve, the Articles formally came into effect.
56. “Before there was a nation—before there was any symbol of that nation . . . . there was Washington . . . .” Even afterward, “he was still there, steadying the symbols, lending strength to them instead of drawing it from them.” G. WILLS, CINCIKNATUS—GEORGE WASHINGTON AND THE ENLIGHTENMENT xxi (1984). See also R. BERNSTEIN, ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION 124 (1987).
57. W. BAGEHOT, supra note 3, at 224-25, 228.
58. It makes sense to use this definition. The Articles “transformed the Continental Congress from a de facto to a de jure government. Thus the Confederation deserves credit for the accomplishments of the Continental Congress occurring before the formal ratification.” R. BERNSTEIN, supra note 56, at 28. We shall also take account of the legal culture of the period, which served as an important backdrop.
grounded upon fundamental principles of republicanism and federalism. Uniquely, the Articles drew upon and combined several distinct elements: classical notions of republicanism, the Hebrew-Puritan idea of a covenant relationship with God, constitutional notions of the English natural rights school, a history of government under written charters, the idea of a constitution as a limiting document, and the practical necessity of confederation for the Americans' safety and well-being. Moreover, the Articles served the vital task of making our Revolutionary government legitimate. Under them, our national Congress enacted an historic Bill of Rights for the western territory.

The republic under the Articles was a significant advance over the earlier ones, as the Americans well knew. The republics during the classical age of Athens and Rome, like the confederation under the Articles, were grounded on the idea of government by representatives of the people for the common good. The earlier political systems, however, were not limited by a fixed written constitution; in contrast, the Americans of the 1770s and 1780s were the People of the Charter. They had a tradition of resting government power upon written instruments, the writings seen as different from ordinary legislation. The custom arose from religious notions of a solemn agreement of a people with God and with each other, as well as from British practices in establishing colonies through varied written mechanisms. True, the short-lived unitary Cromwellian state of seventeenth century England had a written constitution, but the Institutes of Government were less an effort to regulate and limit government power than they were an attempt by the military to increase its influence.

59. Federal democracy is the authentic American contribution to democratic thought and republican government. Its conception represents a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitutional ideas of the English natural rights school . . . . Contractual noncentralization—the structured dispersion of power among centers whose legitimate authority is constitutionally guaranteed—is the key to the widespread and entrenched diffusion of power that remains the principal characteristic of and argument for federal democracy.

Belz, supra note 6, at 480, 482; G. WOOD, supra note 23, at 51; Corwin, Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention in CONSTITUTION (J. Smith ed. 1971); infra notes 63-64 and accompanying text; infra notes 146-49 and accompanying text.

See infra note 118.

Jefferson, notwithstanding his concerns, supra note 10 and accompanying text, described the Confederation system as the “[b]est existing or that ever did exist.” M. FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITED STATES 9 (1913). Americans had a “compulsive interest” in the ancient republics. G. WOOD, supra note 23, at 50.

52. G. WOOD, supra note 23, at 52. The Articles in terms, expressly committed the states “in Congress united,” to ensure the common defense and general welfare of the member states. ARTICLES OF CONFEDERATION art. III.

63. “The formation of government was to a considerable extent based on written instruments.” Belz, supra note 6, at 482.

59. Federal democracy is the authentic American contribution to democratic thought and republican government. Its conception represents a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitutional ideas of the English natural rights school . . . . Contractual noncentralization—the structured dispersion of power among centers whose legitimate authority is constitutionally guaranteed—is the key to the widespread and entrenched diffusion of power that remains the principal characteristic of and argument for federal democracy.

Belz, Federalism (Theory), in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, supra note 6, at 704, 705. See also Youg, Articles of Confederation and Perpetual Union, 63 A.B.A. J. 1572, 1575 (1977); Belz, supra note 6, at 480, 482; G. WOOD, supra note 23, at 51; Corwin, Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention in CONSTITUTION (J. Smith ed. 1971); infra notes 63-64 and accompanying text; infra notes 146-49 and accompanying text.

See infra note 118.

Jefferson, notwithstanding his concerns, supra note 10 and accompanying text, described the Confederation system as the “[b]est existing or that ever did exist.” M. FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITED STATES 9 (1913). Americans had a “compulsive interest” in the ancient republics. G. WOOD, supra note 23, at 50.

52. G. WOOD, supra note 23, at 52. The Articles in terms, expressly committed the states “in Congress united,” to ensure the common defense and general welfare of the member states. ARTICLES OF CONFEDERATION art. III.

63. “The formation of government was to a considerable extent based on written instruments.” Belz, supra note 6, at 482.

59. Federal democracy is the authentic American contribution to democratic thought and republican government. Its conception represents a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitutional ideas of the English natural rights school . . . . Contractual noncentralization—the structured dispersion of power among centers whose legitimate authority is constitutionally guaranteed—is the key to the widespread and entrenched diffusion of power that remains the principal characteristic of and argument for federal democracy.

Belz, Federalism (Theory), in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, supra note 6, at 704, 705. See also Youg, Articles of Confederation and Perpetual Union, 63 A.B.A. J. 1572, 1575 (1977); Belz, supra note 6, at 480, 482; G. WOOD, supra note 23, at 51; Corwin, Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention in CONSTITUTION (J. Smith ed. 1971); infra notes 63-64 and accompanying text; infra notes 146-49 and accompanying text.

See infra note 118.

Jefferson, notwithstanding his concerns, supra note 10 and accompanying text, described the Confederation system as the “[b]est existing or that ever did exist.” M. FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITED STATES 9 (1913). Americans had a “compulsive interest” in the ancient republics. G. WOOD, supra note 23, at 50.

52. G. WOOD, supra note 23, at 52. The Articles in terms, expressly committed the states “in Congress united,” to ensure the common defense and general welfare of the member states. ARTICLES OF CONFEDERATION art. III.

63. “The formation of government was to a considerable extent based on written instruments.” Belz, supra note 6, at 482.

59. Federal democracy is the authentic American contribution to democratic thought and republican government. Its conception represents a synthesis of the Puritan idea of the covenant relationship as the foundation of all proper human society and the constitutional ideas of the English natural rights school . . . . Contractual noncentralization—the structured dispersion of power among centers whose legitimate authority is constitutionally guaranteed—is the key to the widespread and entrenched diffusion of power that remains the principal characteristic of and argument for federal democracy.

Belz, Federalism (Theory), in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, supra note 6, at 704, 705. See also Youg, Articles of Confederation and Perpetual Union, 63 A.B.A. J. 1572, 1575 (1977); Belz, supra note 6, at 480, 482; G. WOOD, supra note 23, at 51; Corwin, Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention in CONSTITUTION (J. Smith ed. 1971); infra notes 63-64 and accompanying text; infra notes 146-49 and accompanying text.

See infra note 118.

Jefferson, notwithstanding his concerns, supra note 10 and accompanying text, described the Confederation system as the “[b]est existing or that ever did exist.” M. FARRAND, FRAMING OF THE CONSTITUTION OF THE UNITED STATES 9 (1913). Americans had a “compulsive interest” in the ancient republics. G. WOOD, supra note 23, at 50.

52. G. WOOD, supra note 23, at 52. The Articles in terms, expressly committed the states “in Congress united,” to ensure the common defense and general welfare of the member states. ARTICLES OF CONFEDERATION art. III.

63. “The formation of government was to a considerable extent based on written instruments.” Belz, supra note 6, at 482.
Admittedly, in the Articles' republicanism, the central government would be chosen by the state legislatures instead of by the people directly. Those legislatures, however, were being selected by the broadest suffrage in the western world.66 Furthermore, monarchy was rejected, as were titles of nobility.67 No religious orthodoxy was present in the Articles, either. Indeed, the established church would soon be gone in all the states but Massachusetts and Connecticut.

The republican government, under the Articles, was a confederate one, yet it placed key powers in a national congress and sought to impose substantial restrictions on the states. The fact is that the Articles achieved a remarkable degree of cohesion, for the Confederation that came about was the strongest in history.68

No such unity had been present under history's earlier confederations—the Greek and Roman city states, the Swiss cantons, the Italian cities during the Renaissance.69 For one thing, here Congress was granted substantial authority: it could make war and peace,70 enter treaties,71 send and receive ambassadors,72 raise armies through requisition,73 coin,74 and borrow.75 In addition, the states were obliged, at least theoretically, to honor the provisions of the Articles.76 Moreover, the states were pledged to afford out-of-state citizens the "privileges and immunities" of in-staters.77 Similarly, states were to give another state's judicial proceedings and records "full faith and credit."78 Finally, under the Articles a fugitive from justice (often a euphemism for a runaway slave) could be the subject of extradition.79

Besides these links of union, the American Confederation witnessed another advance. At times the central government did not seek implementation merely through the state governments. Rather, it acted upon...
individuals directly in a number of situations.80

The Articles: Law, Enforceable in the Courts

Significantly, a rudimentary federal court system81 (dependent upon the Congress), as well as some state court practices,82 helped enforce the Articles. That development distinguished American constitutionalism from constitutionalism elsewhere. "[V]iewing a constitution as a species of 'law' was the vital link between constitutionalism and judicial competence to decide constitutional issues."83 Thus, as early as 1776, first, committees of Congress, and then, a special Court of Appeals in Cases of Capture, heard cases dealing with the rights of American privateers who had captured British property.84 Over one hundred cases were heard, about forty percent apparently resulting in reversals of state court judgments.85 Most of the state courts seemed to have honored the reversals.86 In addition, the Articles authorized an arbitration process to resolve disputes between states, or between private persons as to matters respecting state land transactions.87 In fact, though several cases were considered, some informally, only one case,88 involving a dispute between Connecticut and Pennsylvania, went to judgment. As for cases involving piracy, the Articles authorized jurisdiction in the Continental Congress, which in turn assigned such cases to the state courts.89

80. These included matters concerning judicial "cases of capture, piracy, ... the post-office, ... coins, weights and measures, ... trade with the Indians, ... claims under grants of land by different States, and ... in the case of trials by courts-martial." THE FEDERALIST No. 40, at 262 (J. Madison) (J. Cooke ed. 1961).

81. ARTICLES OF CONFEDERATION art. IX, cls. 1, 2.

82. See Note, supra note 53, at 148.

83. Gunther, Judicial Review, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, supra note 6, at 1056; G. WOOD, supra note 23, at 291: "What in the final analysis gave meaning to the Americans' conception of a Constitution was not its fundamentality or its ... creation by the people, but rather its implementation in the ordinary courts of law; the theory that the Articles of Confederation were for some purposes law, directly cognizable by courts, entirely transformed the character of the Confederation ... and must sooner or later have suggested the idea of its entire transformation into a real government ... ." Corwin, supra note 59, at 112. See also infra notes 146-49 and accompanying text.

84. The special committees were created at the urging of General Washington. See ARTICLES OF CONFEDERATION art. IX, cl. 1; Jameson, The Predecessor of the Supreme Court, in ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES IN THE FORMATIVE PERIOD 1775-1789, at 7 (Jameson ed., 1889); H. BOURGUIGNON, FIRST FEDERAL COURT—FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION 1775-1787 (1977); Davis, Federal Courts Prior to the Adoption of the Constitution, in 131 U.S. xix (Appendix 1889); R. MORRIS, supra note 76, at 67-68 (In most cases, execution was routine, even though 49 cases out of 104 over an 11 year period resulted in "out-right reversals" of state court judgments. Id. at 68. Some states did seek to narrow congressional appellate jurisdiction, however.).

85. R. MORRIS, supra note 76, at 68; see also infra note 86.

86. About 118 cases were heard. Jameson, supra note 84, at 36; Note, supra note 53, at 158-59; H. BOURGUIGNON, supra note 84, at 236, 275. As the spirit of 1776 waned, state resistance increased. See Jameson, supra note 84, at 11; but see Davis, supra note 84, at xxix (state courts refused to enforce the rights of persons owning property acquired under Federal decrees).

87. ARTICLES OF CONFEDERATION art. IX, cls. 2, 3.

88. A. KELLY & W. HARBISON, supra note 24, at 97.

89. ARTICLES OF CONFEDERATION art. IX, cl. 1; Jameson, supra note 84, at 3.
Legitimizing the Revolutionary Government

The Articles recognized a "perpetual" union,90 and authorized the Continental Congress to exercise broad powers.91 In doing so, they legitimized the ad hoc American government.92 The Americans who had asserted rights under English common law and who now sought assistance from other nations deemed crucial a government authorized by law. Furthermore, the Articles "performed two [related] services of great moment: they kept the idea of union vital during the period when the feeling of national unity was at its lowest ebb and they awarded formal recognition that the great powers of war and foreign relations were intrinsically national in character."93

At about the same time that the Continental Congress proclaimed America's independence, the national legislature started work on the draft of a charter of confederation. The action was in response to Richard Henry Lee's motion on June 7, 1776 for a "Plan of confederation [to] be prepared and transmitted to the respective Colonies for their consideration and approbation."94 Thus, one can view the Articles as a full partner of the Declaration of Independence, both founding documents of American governance. Indeed, efforts at confederation started even earlier than 1776. The previous year, Benjamin Franklin had urged his colleagues to establish a confederation,95 recalling his 1754 Albany Plan for a broad national union.96 That 1754 proposal, in turn, had drawn upon the confederacy of the six Iroquois Indian "nations."97

"Union" was important to the Americans of the 1770s and 1780s.98 To

90. ARTICLES OF CONFEDERATION preamble, "Articles of Confederation and Perpetual Union;" and art. XIII.
91. See supra notes 70-75.
92. A. KELLY & W. HARBISON, supra note 24, at 95; the state constitutions would do the same for the actions taken by the local congresses and committees. W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS, REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 21 (1980).
93. Corwin, supra note 59, at 107-08.
94. R. BERNSTEIN, supra note 56, at 24. The Congress approved the Articles in 1777 but the requisite thirteenth state did not ratify them until 1781. See supra notes 53-55 and accompanying text.
95. See Levy, Constitutional History 1776-89, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, supra note 6, at 376, 377.
96. M. JENSEN, ARTICLES OF CONFEDERATION, supra note 26, at 108.
97. It would be a very strange thing if Six Nations of Ignorant Savages should be capable of forming a scheme for such a Union and be able to execute it in such a manner as that it has subsisted for Ages, and appears indissoluble, and yet a like Union should be impracticable for ten or a dozen English colonies. Benjamin Franklin to James Parker, 1751. quoted in B. JOHANSEN, FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS AND THE RATIONALE FOR THE AMERICAN REVOLUTION 56 (1982).
98. The idea of American Union can be traced as far back as 1698, when William Penn called for an appointee of the British sovereign to preside over regular meetings of deputies by the colonies. The plan envisioned a congress to settle trade disputes and to resolve disagreements concerning fugitive slaves and debtors. The legislative body would deal with the Indian tribes as well. The plan even contemplated the setting of quotas of men and money. M. JENSEN, ARTICLES OF CONFEDERATION, supra note 26, at 107.
James Wilson describes the heady days early in the war, when there was a great grass roots movement toward a strong national union:
[But by the] spring of 1777, the nationalist momentum was spent. By then most of the states had adopted constitutions and had legitimate governments. Previously, provincial governments of local 'congresses,' 'conventions,' and committees had controlled the states and looked to the Continental Congress for leadership and approval. But the creation of
Virginia, fighting a war and in need of help from other states, it was important enough to cede claims to vast stretches of bitterly disputed virgin western lands. Moreover, the key role of the Continental Congress was also recognized. The provisional committees in Massachusetts willingly appealed to that body for guidance in setting up a new state government. None of the thirteen colonies, for that matter, adopted a state constitution "without an explicit previous recommendation from" the Congress. In addition, other officials of the Continental government helped make the idea of union a meaningful one. These officers included federal judges, federal ambassadors, federal land agents dealing with Indian tribes, managers of the western territory, and Continental Army officers.

The Limits of American Confederate Power

However much the Articles represented an advance in the concept of a Confederate Union, one cannot deny an overriding fact of the time: the Congress essentially played an advisory role and was at the mercy of the states for general implementation. Major resolutions required the approval of nine states. In addition, there was no basic enforcement machinery either against individuals or the "sovereign" states.

Yet, one historian suggests that the very weakness of the central government reflected the democratic philosophy of the eighteenth century. Such a philosophy presupposed that no Continental government could be superior

---

99. Young, supra note 59, at 1574; M. Jensen, Articles of Confederation, supra note 26, at 150; Jensen, Cession of the Old Northwest, 23 Miss. Valley Hist. Rev. 27, 43 (1936).
100. G. Wood, supra note 23, at 131.
102. Note, supra note 53, at 164; The Federalist No. 40, at 262 (J. Madison) (J. Cooke ed. 1961). In addition, "[s]tate judges regularly gave 'full credence... to judgments of the courts in any of the United States.'" Note, supra note 53, at 159.
103. "Congress simply could not make anyone, except soldiers, do anything. It acted on the states, not on the people." Levy, supra note 95, at 379. Of course, that the Americans won the war evidences much state cooperation during the war period. Moreover, the states were willing to assume a good part of the war debt. See supra notes 29-30 and accompanying text. And state judges typically gave credence to the judgments of the Federal Court of Appeal in case of capture. See supra note 102; see also supra note 80 and accompanying text for the proposition that the central government did act upon individuals, at times.
104. Articles of Confederation art. IX, cl. 6.
105. M. Jensen, Articles of Confederation, supra note 26, at xv.
to the local legislature of the people. That writer argues that consolidationists later waged an “anti-democratic” crusade to gain a central government with powers equal to those held earlier by the British king and Parliament.

Unquestionably, Americans seeking to enlarge national power strove to gain an independent source of revenue and effective sanctions for the Congress. They were resisted by “state sovereignty” forces which had gained legitimacy following passage of republican state constitutions. Ironically, it was the Congress, upon the urging of provincial committees, that recommended the enactment of such charters. In any event, by 1777, these state forces took the battle to the Congress, successfully diluting the Dickinson draft of the Articles. Consolidationists slowly regrouped and by the mid-1780s were intensifying efforts to strengthen the “ever-present tendency toward union.”

A NOTABLE CONGRESSIONAL LANDMARK: THE NORTHWEST ORDINANCES

Despite its political struggles, the Continental Congress achieved notable success in holding the nation together during the war and into the 1780s. And even though attendance declined and the quality of the membership admittedly suffered during this time, the Congress was still able to pass the remarkable Northwest Ordinances in the 1780s.

The Ordinances were among the most important laws ever passed by an American national legislature and they say much about republicanism in this period. In large part they dealt with the acquisition, distribution, orderly settlement, and administration of the western territory beyond the Appalachian Mountains to the Mississippi River. Significantly, the Ordinance of 1787 included a “Bill of Rights” for the vast territory, which in a few

---

106. Id. at xviii.

107. Id. at 150.

108. R. Bernstein, supra note 56, at 91.

109. Levy, supra note 95, at 380.

110. Id. at 378-79.

111. J. Rakove, supra note 29, at 81-82; Levy, supra note 95, at 378.

112. R. Morris, supra note 76, at 58.

113. Levy, supra note 95, at 378-79; supra note 53. Contrast Dickinson’s draft of Article III (“Each Colony shall retain and enjoy as much of present Laws, Rights and Customs, as it may think fit, and reserves to itself, the role and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of Confederation,” in M. Jensen, Articles of Confederation, supra note 26, at 254 (emphasis added)) with Articles of Confederation art. II.

114. W. Adams, supra note 92, at 290; see also infra note 211.

115. Documents of American History (H. Commager 8th ed. 1968) Doc. No. 75, Resolution of Congress on Public Lands Oct. 10, 1780, at 119-20 (lands ceded by the states were to be formed into “republican” states); Doc. No. 77, Report of the Government for the Western Territory April 23, 1784, at 121-23 (Jefferson’s plan for the organization of government in the western territory, never put into effect); Doc. No. 78, Land Ordinance of 1785, May 20, 1785, at 123 (lays foundation for public land system, reserving certain lands for public education); Doc. No. 82, The Northwest Ordinance, July 13, 1787, at 128 (basically follows Jefferson’s plan). See infra note 118.

116. R. Morris, supra note 76, at 92.

117. Id. at 94.

years would become the states of Ohio, Indiana, Illinois, Michigan, Iowa, and Wisconsin. (The territory included part of present-day Minnesota as well).

That Bill of Rights expresses powerfully the sentiments of the Congress. Most importantly, slavery was forever outlawed. There were other fundamental guarantees as well: trial by jury, protection of the writ of habeas corpus, judgment in accordance with the law of the land (that is, due process), the right to bail except in capital cases, the prohibition against cruel and unusual punishment, the right to just compensation should private property be taken by government, free public education, and religious freedom. Interestingly, the Ordinance of 1787 could also be viewed as America's first women's rights act because it guaranteed that daughters could inherit property equally with sons.

In addition to a declaration of rights for individuals, the Ordinance made clear that the territory itself would not be subordinate to the original thirteen states. There would be no colonies in America. New states to be carved out of the territory were to enter the Union on an "equal footing with the original States." As settlers moved into the territory, they were also to treat the Indians fairly. In particular, Indian lands were not to be taken against their will.

THEIDEOLOGICAL HERITAGE

Beyond the importance of the Articles as the authorizing instrument for the landmark Ordinances, they proved invaluable to the Framers of the Constitution. The Articles and the resulting Confederation government served as a vital passage for the Framers. Of course, the drafters of the Constitution shared with their earlier counterparts an ideological heritage—drawn from classical thinkers, Enlightenment philosophers, and English lawyers and members of Parliament.

Suspicion of British Motives

That legacy also included a deep suspicion of English political practices in the eighteenth century. As early as the 1760s, the colonists perceived that the British were attempting to take away American liberties. Britisher Edmund Burke said: "Americans had made a discovery, or thought they..."
have made one, that we mean to oppress them." Even Shays' Rebellion in 1786 was attributed, at least in part, to British subversion.

To some extent, the explanation for this deep distrust, perhaps even paranoia, lies in the fact that the Americans were creatures of their seventeenth century beginnings. The Puritan heritage of New England was one particularly born of hatred of kingly assertions of divine right. The colonists in the 1760s remembered the previous century as a time when the people, the Parliament, and the common law courts were united against assertions of Stuart absolutism. Indeed, from the colonial vantage point in the 1760s, there could be no retreat from the constitutional balance achieved by the English Glorious Revolution of 1688.

Early in the eighteenth century, American Whig political tracts began to perceive efforts to reassert kingly tyranny, but this time, indirectly, through devious manipulation. Later, especially during the time between the Declaration of Independence and 1787, a radical and romantic idealization of the seventeenth century—and its worship of the Magna Carta—took place.

To the colonists in the 1760s, the English Parliament was no longer a protector of the people's liberty. The Americans now rejected Blackstone's position that "[w]hat Parliament doth, no power on earth can undo." By 1774, they disputed any Parliamentary jurisdiction over America. The colonists argued that they were not properly represented in that body. In part, their attitude stemmed from their view of representation. While the British had moved to the idea of "virtual representation," in which the legislator could choose to act against the wishes of his constituents, America was moving in the opposite direction.

Furthermore, it was clear to the colonists by the 1770s that royal tyranny, however more subtle and corrupting, confronted them. To John Adams, it was apparent that the British "have [thrown] off the mask." These suspicions puzzled the Tories. To them, never in history had there been so much rebellion grounded upon so "little real cause." But the Americans, having been left pretty much to their own devices for five generations were demonstrating a "fierce spirit of liberty." They were self-confident,
having met the measure of the French in the Seven Years War, and discovered at the same time that the vaunted British soldiers were not their betters. Indeed, the Americans, with their seventeenth century religious roots, considered themselves God's chosen. They were new humans, breathing the purer air of the new world, and they thought themselves "living at the beginning of history."\textsuperscript{145}

The Transformation of Ideas About Governance

In this period of the Revolutionary War and the Confederation, as Americans engaged in factional politics locally and nationally, ideas about the nature of the government were in ferment. Already by the 1770s the colonists began to conceptualize a freer, republican confederacy. In doing so, they owed a debt to classical notions of virtue in the polis, to the ancient charters of Englishmen, to Montesquieu's reflections on separation of powers, and to Lockean ideas of equality and the rights of people to change a despotic government.

A Constitution

In particular, Americans looked at the idea of a "constitution" from a modern perspective. It was now a "supreme law creating government [and] limiting it."\textsuperscript{146} The notion was a radical departure from the British conception of a constitution as merely a nation's system of government—its fundamental legislation, institutions, and custom. Indeed, in a sense, "the triumph in America of a novel concept of 'constitution' was the 'revolution.'"\textsuperscript{147} Thus, for Americans, unconstitutionality went beyond British ideas of inexpediency or mere lack of wisdom of legislation. Unconstitutional government action was void.\textsuperscript{148} Imprecisely grasped in 1776, the American idea was fixed by 1787.\textsuperscript{149}

Religious Freedom

Views about religious freedom evolved during the Confederation period as well. Alongside established churches, Jefferson could speak as a deist in referring to a non-interfering "Nature's God."\textsuperscript{150} By the 1780s, the Virginia Declaration of Rights of 1776,\textsuperscript{151} the Northwest Ordinance of 1787,\textsuperscript{152} and the Constitution of 1787\textsuperscript{153} reflected the new religious tolerance in America.

\begin{thebibliography}{99}
\footnotesize
\bibitem{145} G. Wood, supra note 23, at vii; D. Boorstin, Lost World of Thomas Jefferson 238 (1948).
\bibitem{146} Levy, Constitution, in 1 Encyclopedia of the American Constitution, supra note 6, at 355-57. Views of the nature of a Constitution have changed. \textit{Id.} See Casper, Constitutionalism, 2 Encyclopedia of the American Constitution 474, 475; see generally C. McIlwain, Constitutionalism—Ancient and Modern (1947).
\bibitem{147} Levy, supra note 146, at 355; Casper, supra note 146, at 474.
\bibitem{148} Levy, supra note 146, at 356.
\bibitem{149} \textit{Id.} at 355.
\bibitem{150} The Declaration of Independence para. 1 (U.S. 1776).
\bibitem{151} Virginia Declaration of Rights June 12, 1776, in P. Kurland & R. Lerner, supra note 2, at 6.
\bibitem{152} See supra note 118.
\bibitem{153} U.S. Const. art. VI, cl. 3 provides that "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."
Three Basic Issues of Constitutionalism

In the crucible of war and crisis, as debate raged over the Articles, new ideas were in the air. Notions were changing as to three central questions: Who were "We the People?" Whom did we have to fear more—a central government or the state legislatures? How could we best frame a structure of government to provide stability and liberty?

"The People"

In 1776, "The People" meant a homogeneous interest, a community collectively challenging the exercise of unjust power by the king and Parliament. By 1787, however, the term connoted individuals with heterogeneous inclinations. Thus, government had to control and diffuse their power to assure that no one faction of self-interested persons would dominate the political landscape. Moreover, in the Revolutionary period, a "convention" of the people was seen as an extra-legal legislative body. That explains why the Articles were ratified by ordinary state legislatures. By 1787, however, state conventions, called for the specific purpose of considering the Framers' work in Philadelphia, were now deemed the ultimate expression of "The People."

"Republicanism"

Basic ideas about republicanism also evolved during this period. "Republicanism" generally connoted government by representatives of the people for the common good. Increasingly, though, rejection of an established church and support for public education became part of its definition. But how could such a government maintain itself? Traditionally, it was thought that a republican government could only survive in a small geographic area. Too large a territory would bring the return of despotic

---

154. Levy, Constitution Convention, in 1 Encyclopedia of the American Constitution, supra note 6, at 358-59 ("[A] new sett [sic] of ideas seemed to have crept in," said Oliver Ellsworth, speaking with reference to the fact that back in 1781 "[c]onventions of the people . . . were not then thought of") But for the proposition that the vital change from 1776-87 was not in "ideas or attitudes but in the balance of political power." See M. Jensen, Articles of Confederation, supra note 26, at 245.


156. Id. at 607. The Federalist No. 10, at 56, 61 (J. Madison) (J. Cooke ed. 1961).


158. Id. See Morgan, Constitutional History before 1776 in Encyclopedia of the American Constitution, supra note 6, at 367, 375 (There was "need . . . [to find] a way to relieve popular government from the grip of short-sighted representative assemblies. [The Constitutional Convention] filled the need."); Palmer, The People as Constituent Power, in Constitution 76-77, supra note 59 ("The most distinctive work of the Revolution was in finding a method and furnishing a model for putting [the idea of popular sovereignty] into practical effect . . . The Americans solved the problem [of constituting new government] by the device of the constitutional convention. . . ."); W. Adams, supra note 92, at 139 (The institutionalizing of the right to change a constitution was one step further than the Glorious Revolution of 1688). 159. The established church would soon be gone in all states but Massachusetts and Connecticut. F. McDonald & E. McDonald, Confederation & Constitution 1781-1789, at 5 (1968). The Virginia Bill of Rights, unlike the Declaration of Independence, did not invoke divinity, but rested its claims on natural law and social contract. See W. Adams, supra note 92, at 157. See supra notes 151-53 and accompanying text.

160. See supra note 127 and accompanying text.

kingship, with its oppressive power and standing army. By 1787, however, this notion was turned on its head. According to James Madison, a key political theorist at the Philadelphia convention, the new assessment was that a republican government could best survive in a large geographic area. This was so because such an expanse of territory would have many factions, with no one group being able to dominate throughout the land. By 1787, however, this notion was turned on its head. According to James Madison, a key political theorist at the Philadelphia convention, the new assessment was that a republican government could best survive in a large geographic area. This was so because such an expanse of territory would have many factions, with no one group being able to dominate throughout the land. This insight was crucial. It meant that a republic need not be considered merely a relic of the past—a system of government only possible in small city-states, and even then doomed to fall.

"Mixed Government"

Concepts of "mixed government" were changing as well. In 1776, society was said to be comprised of three distinct interests or estates—monarchy, aristocracy, and the people. By 1787, consolidationists like Madison took the position that all governmental institutions represented the people. Yet, there was still need to have diverse institutions, not because they mirrored distinct elements in society, but rather because a division of power between the central government and the states, and a further separation of power within the national government, would best assure liberty. At the time the Articles were drafted and the first state constitutions came into being, "liberty" was thought best protected by housing sovereign power in the local government legislatures. Indeed, many state leaders were suspicious of any effort to increase central power, fearing a new, American despotism. A decade later, however, consolidationists at the Philadelphia Convention willingly endorsed the idea that only a strengthened, national government, with powers divided, could best achieve protection from "foreign and domestic" enemies.

"Sovereignty"

In the middle of the political battles, of course, lay the concept of "sovereignty." Americans took the position early on that sovereignty lay with the people. That Whig view could be traced to classical Greece, and then to Thomas Hooker in the seventeenth century and through him to the co10-
nists. But could the grant of sovereign power be divided among government institutions? John Adams continued to hold the traditional view that a grant from the people would necessarily be indivisible. But by 1787, a novel “divided sovereignty” compound, dividing power between the central government and the states, formed the underpinning of the new constitution.

“Federalism”

Closely tied to the new ideas about sovereignty lay another key concept, “federalism.” In 1776, it was thought of as referring to a loose confederation of sovereign states. Thus, a central legislature should merely propose laws; it should have only limited power to act directly upon individuals and no power to tax or to regulate interstate commerce. By the time of the Constitutional Convention, the term was captured by the consolidationists, who labeled their opponents “Anti-Federalists” and themselves “Federalists.” Federalism was now used to describe the dual government system that had been formed. Along with the states, this system had a national government of broad powers supreme in its sphere. The central government possessed its own enforcement mechanisms in a President and a court system; it could reach individuals directly, and it had powers to tax and to regulate commerce. Madison described this new Federalist creature as a hybrid national-federal compound.

The Government Under the Articles: A Training Ground

Not only was the period of the 1770s and 1780s a fertile one in which ideas about governance were in flux; it was also a time when persons could try out their philosophies. Confederation government would serve as a training ground for the men who would later be delegates at the Philadelphia Convention and who would serve in important seats of power. Young leaders like Hamilton and Madison gained valuable experience, principally at the national level, and they began to develop a “vision of national politics” to resolve the problems of the Confederation. Other members of the Continental Congress later became delegates to the Philadelphia Convention or to the state ratifying conventions, or they served in the first several Congresses starting in 1789. Indeed, more than half the Congressmen and Senators in the very first Congress previously had been members of the Continental Congress. Many of them made their mark in the early executive adminis-
trations. Besides Madison and Hamilton, they included John Adams, Thomas Jefferson, John Jay, and James Monroe. Each of them drew upon their earlier experiences as they entered upon new duties. Lesser-known members of the Continental Congress, or of the bureaucracies of that body, came to occupy key chairs in the new administrations after 1789. Moreover, bureaucracies of the Continental Congress\textsuperscript{177} saw their staffs move into the front offices of the new presidential branch.\textsuperscript{178}

**Confederation Leaders—Madison and Washington**

During this Confederation period, two leaders in particular, Madison and Washington, rose above the rest. The two engaged in activities that would lead the way in making the enterprise in Philadelphia a success. Forced by the Articles' "three year out of six" rule\textsuperscript{179} to relinquish his seat in Congress, James Madison returned home to Virginia in 1783. Nonetheless, his work for a broader republicanism and strengthened union continued. He demonstrated his commitment to religious freedom by opposing efforts to provide state financial support for teachers of religion.\textsuperscript{180} Ever seeking ways to assure viable national power, he urged his colleagues in the state legislature to enforce the terms of the peace treaty. Indeed, along with Hamilton, he took a leadership role in the consolidationist movement, inducing his legislature to issue a call for the Annapolis Convention of 1786 and advocating a general convention the following year.\textsuperscript{181}

Clearly most important, however, Madison used his time away from Philadelphia to engage in a systematic study of government and history, producing seminal ideas. These included his thoughts about the nature of republics, and about mechanisms for checking and balancing power.\textsuperscript{182}

\textsuperscript{177} These included the departments of foreign affairs, Indian relations, war, finance, and postal services.

\textsuperscript{178} J. Sanders, *Evolution of the Executive Departments of the Continental Congress 1774-1789* (1971); C. Thatch Jr., *Creation of the Presidency 1775-89—Study in Constitutional History* (1969); Guggenheimer, *Development of the Executive Departments 1775-89*, in Jameson, *supra* note 84, at 116-85; M. Jensen, *New Nation*, *supra* note 26, at 348; A. Kelly & W. Harbison, *supra* note 24, at 96-97. "Had the Confederation government lasted, it is probable that the various departments would have drawn together under the control of a single executive committee or cabinet. Indeed the Committee of the States, established in 1784, was a step in that direction. . . ." *Id.* at 47.

\textsuperscript{179} *Articles of Confederation* art. V, cl. 2.


\textsuperscript{181} *Id.* at 889.

\textsuperscript{182} James Madison [would outdistance] all the other delegates by his initial preparation [as well as] his sustained and ubiquitous efforts in the Convention.

. . . [He prepared two influential papers.] One was his lengthy analysis and criticism of the pattern of weakness he discovered in the history of ancient and modern confederations. His diagnosis of the decline and fall of the Lycian, Amphictyonic, Achaean, Helvetic, Belge, and Germanic confederacies reverted usually to the theme that the decisive fault lay in the inadequate powers of the federal authority over its member states. The second—a short outline . . . emphasized the American experience . . . . If anything, this short piece, entitled "Vices of the Political System of the United States," is the more consequential, since Madison's seminal ideas of an extensive republic with certain vigorous features of a national state would be applied in the Convention, employed . . . in the debates in the Virginia Ratifying Convention, and elaborated with sharper and more finished logic in his essays for The Federalist.

Drawing upon his decade of experience within his home state and with continental affairs, the young Virginian became “unquestionably the leading spirit” at the Convention of 1787.

By the end of the Revolutionary War, Madison’s compatriot, George Washington, was already a great hero. It is instructive, however, to consider his impact beyond his status as General. For one thing, he was instrumental in forging interstate commercial cooperation between Virginia and Maryland, a process which would lead to both the Annapolis and Philadelphia Conventions. Washington owned vast holdings of land in the West and partly as a result of concerns about his own financial situation, he urged Maryland and Virginia to work together to solve the problems of Potomac River navigation. Indeed, he became the president of the Potomac River project, an effort that envisioned passage into the interior—from the Potomac through the Chesapeake, to the Ohio River, and then on to the Great Lakes. But more than that effort, Washington was simply the indispensable man of the consolidationist cause; for to his countrymen, he symbolized the American Union. That fact was recognized by his colleagues. Indeed, he was prevailed upon by Madison, Hamilton, and others to preside at the Convention in Philadelphia. All delegates at the Convention looked toward him and what they believed was his example of “[e]nergy, probity, disinterestedness and a magnificent tactfulness” as they discussed the new office of the presidency.

A Changed Attitude

By 1787, consolidationist arguments gained force, especially among the younger, more continental-minded individuals. Undoubtedly, this receptivity was fostered by heightened efforts to increase national power. Interstate networks “replicated the growth of groups opposed to British policy two decades earlier.” However, the new attitude was explained less by such organized efforts than by the simple fact that the times had changed. Indeed, the Constitution of 1787, “unthinkable in 1776, [and] impossible in 1781, or at any time before it was framed,” had become a realistic goal by 1787. The Articles proved an “indispensable transitional stage.” Many more Americans were now willing to accept what they bitterly resisted

*Vices of the Political System of the United States (1787), quoted in P. Kurland & R. Lerner, supra note 2, at 166-69.*

*Notes of Debate, supra note 182, at xvii (quoting Max Farrand).*

*A. Weinstein & R. Wilson, supra note 14, at 167, 172. R. Bernstein, supra note 56, at 98. Washington was involved in a “massive engineering project to connect the Potomac, Shenandoah and Ohio River Valleys by a system of locks and canals.”

*A. Weinstein & R. Wilson, supra note 14, at 172.

*See supra note 56 and accompanying text.*

*C. Thatch, supra note 178, at 65.

*C. Warren, The Making of the Constitution 759 (1937).*

*See R. Bernstein, supra note 56, and accompanying text.*

*Levy, supra note 95, at 376, 379. Even in 1787, had the Framers called for ratification by the state legislatures, passage would have been doubtful. *Id.* “Not even the Constitution would have been ratified if its Framers had submitted it for approval to the state legislatures that kept Congress paralyzed in the 1780’s.” *Id.*

*Id.*
twenty years earlier. They no longer dwelt upon the fears and deep suspicions of strong central taxing and commerce power—British or American. There was a broader agreement that the central authority had to be substantially increased. The new powers were needed to guard against dangers posed by the British and the Indian tribes; to end state trade wars; and, thought fervent consolidationists, to protect against domestic threats to property and credit.

THE ARTICLES: A FAILED MODEL TO LEARN FROM

Ready to strengthen central power, consolidationists looked to the Articles and to the experiences under them. Thus, the Articles served as the key model of government, albeit an unsuccessful plan, a first try at a Union that would prove invaluable at Philadelphia. Doubtless, the state constitutions—and the practices under them—were also an influence upon the Framers. Max Farrand, the foremost constitutional scholar at the turn of the twentieth century, declared that the Framers seldom went outside their own experiences while piecing together the new constitution. They saw their task as one of remediying definite defects, each of which had been revealed in the experience of the previous ten years. Almost every single provision in the

193. In focusing upon the significance of the Articles, the author does not mean to discount the role of the state constitutions. The latter played an integral role in the rich mosaic of political action and theory that resulted in the 1787 document. Consolidationists both looked upon the example of republican state constitutions with pride and sought to assure that the national government could be protected from abuses being carried out under those charters.

[T]he experiment in state constitution-making provided a depth of experience upon which the Framers of the federal Constitution drew . . . . Speaking of the Massachusetts Constitution, John Adams quite rightly referred to it as 'Locke, Sidney and Rousseau and DeMably reduced to practice.' Separation of powers, checks and balances, a strong executive, an independent judiciary could be found in some, in by no means all, of the state constitutions, while the need to add a Bill of Rights to the federal constitution attested to the popularity of the provisions almost universally incorporated by the states either in their constitutions or their evolving legal systems.

R. Morris, supra note 76, at 129.

The new instrument reproduced the main features of the Massachusetts constitution of 1780: the strong president, the senate, the house of representatives, the partial executive veto, the independent judiciary, the separation and balance of power . . . . The president [was not] designated by the legislative assembly, like the president in Pennsylvania and governors in the Southern States.

Quoted in Palmer, supra note 158, at 91-92.

John Adams, a major influence in state constitution-making, considered the New York constitution "by far the best . . . yet adopted" since the executive was stronger than in the others. R. Bernstein, supra note 56, at 52, 56.

But Madison cautioned that a strengthened national government was needed to confine state abuses as well. In his Vices position paper, discussed supra in note 182, Madison attacked the states for failing to comply with the requisitions of Congress, for violations of treaties, and for trespassing on the rights of others. See Corwin, supra note 83, at 113-14. He also reserved the "strongest words of condemnation" for the "vicious legislation" in the states. Id. at 114.

Therefore, Madison deemed the "most important" of the proposed amendments he submitted in the first congress in 1789 the one that would have prohibited state abuses of basic rights. R. Morris, supra note 76, at 319. At times, courageous state judges stood firm against legislative interference with court operation. Id. at 125-26.

194. Farrand, supra note 192, at 532.

It was a time when men indulged in philosophical speculation and in political theorizing, but farmers and traders are practical people, and the compelling characteristic of the framers of the constitution was hard-headed common sense. While several of the delegates in
Constitution can be attributed to such an examination.\textsuperscript{195} Of course, the Framers could not have foreseen every development.\textsuperscript{196} Nor could they do more than speculate about the dimensions of the new branches of government that the Constitution created—especially an independent presidency and an independent federal judiciary. Moreover, even though the Continental Congress had established a national Bank of North America,\textsuperscript{197} the Framers could not foresee the breadth of the role of such an institution.

\textit{Borrowing from the Articles}

Major ideas were lifted bodily from the Articles.\textsuperscript{198} These included the central government’s power of war and peace,\textsuperscript{199} the power to make treaties,\textsuperscript{200} and the power to borrow\textsuperscript{201} and coin.\textsuperscript{202} There continued to be protection of national legislators for their speeches in the halls of Congress.\textsuperscript{203} The states were still forbidden to enter into treaties,\textsuperscript{204} make war,\textsuperscript{205} join alliances,\textsuperscript{206} or grant titles of nobility.\textsuperscript{207} Once more, there were assurances of interstate comity and equality. Out-of-state citizens were again guaranteed the privileges and immunities of in-staters.\textsuperscript{208} In addition, states were still required to recognize another state’s records and judicial proceedings.\textsuperscript{209} Finally, the obligation to return fugitive slaves remained.\textsuperscript{210}

\textit{Great Departures from the Articles}

Despite the adoption of these provisions from the Articles, changes were so substantial\textsuperscript{211} that a new, intricate model had to replace the Articles.

---

\textsuperscript{195} Farrand, supra note 192, at 540.

\textsuperscript{196} For example, they could not have anticipated the impact of population growth beyond the Appalachians, the Embargo device of 1807, and the protective tariff of 1816. \textit{Id.} at 542.

\textsuperscript{197} Note, supra note 53, at 163.

\textsuperscript{198} \textit{But see} R. MORRIS, WITNESSES AT THE CREATION—HAMILTON, MADISON, JAY AND THE CONSTITUTION 217 (1985). He minimizes the importance of the Articles as a model. The Committee of Detail at the Federal Convention of 1787, he says, "adopted or paraphrased a number of clauses in the old Articles of Confederation, perhaps to convey the illusion that the Constitution was a mere revision of the Articles—a fiction that was transparent to everyone." \textit{Id.} (Emphasis added).

\textsuperscript{199} Compare \textit{ARTICLES OF CONFEDERATION} art. IX, cl. 1 with U.S. CONST. art. I, § 8, cl. 11 and art. II, § 2, cl. 1.

\textsuperscript{200} Compare \textit{ARTICLES OF CONFEDERATION} art. IX, cl. 1 with U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{201} Compare \textit{ARTICLES OF CONFEDERATION} art. IX, cl. 6, 7 with U.S. CONST. art. I, § 8, cl. 2.

\textsuperscript{202} Compare \textit{ARTICLES OF CONFEDERATION} art. IX, cl. 4, 5, 6 with U.S. CONST. art. I, § 8, cl. 5.

\textsuperscript{203} Compare \textit{ARTICLES OF CONFEDERATION} art. V, cl. 5 with U.S. CONST. art. I, § 6, cl. 1.

\textsuperscript{204} Compare \textit{ARTICLES OF CONFEDERATION} art. IX, cl. 1 with U.S. CONST. art. I, § 10, cl. 1.

\textsuperscript{205} Compare \textit{ARTICLES OF CONFEDERATION} art. VI, cl. 5 with U.S. CONST. art. I, § 10, cl. 3.

\textsuperscript{206} Compare \textit{ARTICLES OF CONFEDERATION} art. VI, cl. 1, 2 with U.S. CONST. art. I, § 10, cl. 1.

\textsuperscript{207} Compare \textit{ARTICLES OF CONFEDERATION} art. VI, cl. 1 with U.S. CONST. art. I, § 10, cl. 1.

\textsuperscript{208} Compare \textit{ARTICLES OF CONFEDERATION} art. IV, cl. 1 with U.S. CONST. art. IV, § 2, cl. 1.

\textsuperscript{209} Compare \textit{ARTICLES OF CONFEDERATION} art. IV, cl. 3 with U.S. CONST. art. IV, § 1, cl. 1.

\textsuperscript{210} Compare \textit{ARTICLES OF CONFEDERATION} art. IV, cl. 2 with U.S. CONST. art. IV, § 2, cl. 2.

\textsuperscript{211} However, the new Constitution would not represent a counter-revolution or a restoration . . . but simply the extension of centralizing tendencies that had existed since the beginning of the war for independence . . . . The presidential system at the federal level can be ascribed [not to a desire to install the
Requisitions under the Articles had only brought in about one-sixth the allotted amounts.\textsuperscript{212} Accordingly, the national government needed the power to tax individuals directly.\textsuperscript{213} The power to regulate commerce among the states was added in order to end state trade wars.\textsuperscript{214} The Framers removed the requirement of unanimity needed for amendment;\textsuperscript{215} no amendment had ever made it through that roadblock. Instead, amendments to the new constitution required for enactment the approval of only two-thirds of the Congress and three-fourths of the states.\textsuperscript{216} Rather than the two-thirds vote generally required to pass important legislation,\textsuperscript{217} a simple majority now sufficed—except in the instances of amendment,\textsuperscript{218} treaty-making,\textsuperscript{219} and the vote necessary to override a presidential veto.\textsuperscript{220} A unified, independent, and powerful presidency replaced the collective boards and committees answerable to the Continental Congress.\textsuperscript{221} The new United States Government committed itself to guaranteeing each state a "republican form of government" under the Constitution.\textsuperscript{222} Instead of a federal court dependent for its existence upon the old Continental Congress and possessed of limited jurisdiction,\textsuperscript{223} the Constitution established an independent court system. There was now broad judicial power in the central government, including at least a national Supreme Court.\textsuperscript{224}

The Articles’ "supremacy clause"\textsuperscript{225} was also strengthened. The Constitution required state judges and other state officials, along with federal officers and legislators, to take individual oaths to abide by the provisions of the new Constitution.\textsuperscript{226} The document also acknowledged the new Constitution, federal laws in pursuance of that fundamental law, and treaties made "under the Authority of the United States" as the "Supreme Law."\textsuperscript{227}

Furthermore, there was a major redesign of the national legislature. In-

---

\textsuperscript{1} equivalent of a monarchy but much more to the beliefs of the authors of the first state constitutions that free government, stability, and efficiency were most likely to be found with the combination of governor, assembly, and courts to which they were accustomed from colonial times, and to the fact that the architects of the Federal Constitution of 1787 adhered to the outline of the familiar building plan.

W. ADAMS, suprat note 92, at 290.
\textsuperscript{212} See supra note 14 and accompanying text.
\textsuperscript{213} U.S. CONST. art. I, § 8, cl. 1.
\textsuperscript{214} Id. at cl. 3.
\textsuperscript{215} ARTICLES OF CONFEDERATION art. XIII, cl. 1.
\textsuperscript{216} U.S. CONST. art. V.
\textsuperscript{217} ARTICLES OF CONFEDERATION art. IX, cl. 6.
\textsuperscript{218} U.S. CONST. art. V.
\textsuperscript{219} U.S. CONST. art. II, § 2, cl. 2.
\textsuperscript{220} U.S. CONST. art. I, § 7, cl. 3.
\textsuperscript{221} U.S. CONST. art. II. The Continental Congress was "burdened with legislative and administrative responsibilities unprecedented in the colonial past, and the most debilitating weakness it suffered ultimately lay in its own inefficiency." J. RAKOVE, supra note 29, at 185. The independent, unified national executive was designed, in part, to overcome that weakness. Id.
\textsuperscript{222} U.S. CONST. art. IV, § 4.
\textsuperscript{223} E.g., a federal appeals court in cases of capture, ARTICLES OF CONFEDERATION art. IX, cl. 1; and a complex arbitration procedure in cases of state disputes and land grant litigation, ARTICLES OF CONFEDERATION art. IX, cls. 2, 3.
\textsuperscript{224} U.S. CONST. art. III, § 1.
\textsuperscript{225} ARTICLES OF CONFEDERATION art. XIII, cl. 1.
\textsuperscript{226} U.S. CONST. art. VI, cls. 2, 3.
\textsuperscript{227} U.S. CONST. art. VI, cl. 2.
stead of a unicameral legislature, there were now two houses.\textsuperscript{228} Moreover, the new legislative membership could establish a base of authority independent of the states. Although United States Senators were to be chosen by their respective state legislatures, Senators and Representatives were not limited as to the period of time they could hold office. They now voted as individuals and they could not be removed by their home states. In contrast, members of the Continental Congress could serve only three years in every six year period,\textsuperscript{229} they voted as a unit,\textsuperscript{230} and they were subject to recall.\textsuperscript{231} Finally, unlike its predecessor, the new Congress was given specific authority to govern territory under the domain.\textsuperscript{232}

\section*{The Legal Culture of the 1780s}

The Articles played a vital role for the Framers. More important, perhaps, they instruct us even today. In studying the Confederation period, we learn about the environment in which the Framers worked. The legal culture of the time included a mix of several elements: pragmatism, natural law, common law, a unique written constitution, and a judicial role in enforcement.

The delegates to the Continental Congress and the younger, more continental-minded leaders who framed our second charter, the Constitution, were first and foremost pragmatists. They construed their mandates expansively in order to achieve what they thought was necessary. Of course, that spirit had been reflected even earlier as Americans interpreted colonial charters. Thus, despite the fact that such charters were written in the language of a grant, the colonists denied that the charters could be forfeited. Any such restrictive terms were interpreted as mere "form and not . . . substance."\textsuperscript{233} Like the Magna Carta, charters were said to be reciprocal, however they might be phrased. They were the "recognition, not the source, of the people's liberties."\textsuperscript{234}

As for the members of the Continental Congress, they readily assumed the role of an ad hoc government even before ratification of the Articles. Beginning in 1774, the Congress sought to exercise extensive "political, military, and economic power over the colonists. Even absent a written charter, the legislative body adopted commercial codes, established and maintained an army, issued a continental currency, erected a military code of law, defined crimes against the Union, and sent officials to negotiate abroad.\textsuperscript{235} Furthermore, the Congress began acquiring western territory, established a federal court of appeal in cases of capture of prizes, and permitted the

\begin{itemize}
  \item \textsuperscript{228} U.S. Const. art. I, § 1.
  \item \textsuperscript{229} Articles of Confederation art. V, cl. 2.
  \item \textsuperscript{230} Id. at cl. 4.
  \item \textsuperscript{231} Id. at cl. 1.
  \item \textsuperscript{232} U.S. Const. art. IV, § 3, cl. 2.
  \item \textsuperscript{233} G. Wood, supra note 23, at 269.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id. at 355. The states, especially after 1781, however, treated Congressional resolutions as "mere recommendations." Id. at 356. "Congressional power, which had been substantial during the war years, now began precipitously to disintegrate . . . By the middle eighties, Congress had virtually ceased trying to govern." Id. at 359. See also Note, supra note 53, at 142, 163.
\end{itemize}
seizure of property by the Continental Army.\textsuperscript{236}

Enactment of the Articles witnessed a continuation of this pragmatic Congressional attitude. Thus, without specific authority,\textsuperscript{237} the Congress continued to acquire land and to establish and implement mechanisms for governing the territory. The legislature enacted a far-reaching bill of rights for the Northwest Territory, and it authorized disposition of sections of the territory in order to defray part of the central government's debts.\textsuperscript{238} In addition, the Continental Congress established the Bank of North America to ease wartime shortages of capital, even while the step was being assailed as wholly unauthorized.\textsuperscript{239} The Bank's supporters, like James Wilson, nonetheless considered the Bank's creation justified under the central government's general powers since the financial situation could not be dealt with by individual states.\textsuperscript{240} James Madison later supported these expansive interpretations of the Articles, given the charter's defects.\textsuperscript{241}

Many members concurred as to the necessity to construe the Articles flexibly,\textsuperscript{242} although there was reluctance to take the ultimate step: adopting amendments for a tax power and a commerce authority, absent state unanimity. Madison identified Article XIII as a "general and implied power" of Congress to enforce the Articles against recalcitrant states.\textsuperscript{243} Indeed, almost immediately after the Articles came into being in 1781, a Committee of Congress interpreted Article XIII similarly, although the committee also sought to propose an amendment to make such a power official.\textsuperscript{244} James Monroe urged implied authority as well,\textsuperscript{245} in particular to compel the states to meet their requisition assessments; however, such compulsion was rejected. But the Congress by March 1787 did adopt a resolution that denied the right of a state legislature to enact laws in conflict with a treaty and that called upon local judges to uphold the treaty's provisions.\textsuperscript{246} Apparently, a

\textsuperscript{236} Note, \textit{supra} note 53, at 150-51; Young, \textit{supra} note 59, at 1575; Jameson, \textit{supra} note 84, at 28-29.

\textsuperscript{237} Harmon, \textit{supra} note 16, at 306.

\textsuperscript{238} It is true, however, that authority to govern the territory may be inferred from the general acquisition of the land, the fact of possession, and the circumstances under which the Articles were adopted. McLaughlin, \textit{supra} note 167, at 52; Note, \textit{supra} note 53, at 142, 150; Treat, \textit{Origin of the National Land System Under the Confederation}, \textit{I Annual Report of the Am. Hist. Ass'n} 231-33 (1906). See Harmon, \textit{supra} note 16, at 306.

\textsuperscript{239} Note, \textit{supra} note 53, at 163. "[T]he opposition to the exercise of a power not expressly delegated remained so intense that the bank had to be rechartered by a state." Levy, \textit{supra} note 95, at 380.

\textsuperscript{240} Wilson thought it an example of a "situation in which an object occurs, to the direction of which no state is competent . . . ." Note, \textit{supra} note 53, at 163.

\textsuperscript{241} A "list of the cases in which Congress have [sic] been betrayed, or forced by the defects of the Confederation into violations of their chartered authorities, would not a little surprise those who have paid no attention to the subject." \textit{Id.} at 150. \textit{The Federalist No. 42, at 280; No. 44, at 303, 299 (J. Madison) (J. Cooke ed. 1961).}

\textsuperscript{242} Note, \textit{supra} note 53, at 150.

\textsuperscript{243} Congress could "enforce . . . [the Articles] against any of the states which shall refuse or neglect to abide by such their determinations, or shall otherwise violate any such article." Brant, \textit{Fighting for Implied Powers}, in \textit{JAMES MADISON, NATIONALIST 1780-87}, at 104-20 (1948).

\textsuperscript{244} McLaughlin, \textit{supra} note 15, at 142.

\textsuperscript{245} M. JENSEN, \textit{NEW NATION, supra} note 26, at 419.

\textsuperscript{246} E. CORWIN, \textit{The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention}, in \textit{AMERICAN CONSTITUTIONAL HISTORY 19} (Mason & Garvey eds. 1970).
majority of state legislatures promptly endorsed the resolution.247

The Framers’ Pragmatism: Interpretation of Their Mandates

The delegates to the Philadelphia Convention viewed themselves as free to follow the expansive example set by the members of the Continental Congress before them. The February 21, 1787 call by Congress for a Convention was only for the purpose of revising the Articles, and the convention was to submit its work to Congress. Only upon the latter’s approval were proposals to be sent on to the states, and then only in conformity with the Articles’ amending procedure.248

Yet the members in Philadelphia rejected mere revision of the Articles, “boldly [disregarded] their instructions,”249 and instead chose to create an entirely new frame of government. And “[o]nly the tremendous prestige of many of the delegates and common recognition of the national danger could secure acceptance of their work.”250 Moreover, they declined to seek congressional approval for their actions, and established an entirely new procedure for ratification. The Constitution was to be declared ratified, not upon the unanimous consent of the thirteen states through their state legislatures. Rather, the approval of nine states would suffice, as manifested through specially chosen conventions.251 Presumably, the state convention route was chosen because the Framers were aware that chances for approval of the document, even by nine state legislatures, was slim.252

Some of the delegates were uneasy about the proposal to scrap the Articles entirely. Patterson, proponent of the New Jersey plan, objected in particular to the fact that ratification would require the assent of only nine states.253 Gerry of Massachusetts dissented to the plan to change the government without seeking the approval of Congress.254 Even consolidationist Hamilton shared those concerns.255 James Wilson’s view, however, reflected

247. Id.
248. Such Convention appearing to be the most probable means of establishing . . . a firm national government . . . [the call was for] revising the articles of confederation and reporting to Congress and the several Legislatures, such alterations and provisions therein, as shall, when agreed to in Congress, and confirmed by the states [be enacted].

250. Id.
252. Levy, supra note 95, at 379.
253. “If the confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them ourselves . . . What is unanimously done, must be unanimously undone.”

254. Id. at 611 (Statement of Gerry Sept. 10, 1787).
255. Hamilton concurred with Mr. Gerry as to the in-decorum of not requiring the approval of Congress. He considered this as a necessary ingredient in the transaction. He thought it wrong also to allow nine States . . . to institute a new Government on the ruins of the existing one. He would propose that the constitution should be sent to Congress in
that of the majority of the delegates: "With regard to the power of the Convention, he conceived himself authorized to conclude nothing, but to be at liberty to propose anything." Ultimately, the delegates at Philadelphia decided that instead of seeking the approval of Congress, they would merely have the document "laid before the [United] States in Congress assembled," requesting the Congress to forward it to the states for their consideration.

Madison, "Father of the Constitution," found no impropriety either in framing a new constitution or in departing from the Articles' amending process. He emphasized that the Framers were acting in accord with a mandate to establish a national government adequate to the exigencies of the Union, taking into account both the call of the Annapolis Convention and that of the Continental Congress. He noted that the "most plausible" objection was to the requirement that only nine states' approval would suffice for ratification (and that approval only by convention). Yet that objection was hardly voiced. He observed that strict literalists could have questioned the legitimacy of the Convention itself.

Pragmatism was an attribute of the constitutional founders of the 1770s and 1780s. "It was this tempered combination of adherence to ideals and pragmatism in concrete situations that made possible the comparatively quick, smooth, and successful founding of the American constitutional system." Because they might prove too controversial and be an obstacle to achieving a national union, challenges to slavery, efforts to expand the vote,
and some claims for religious accommodation were shunted aside. This pragmatic attitude was expressed by "such diverse political temperaments as John Adams and Patrick Henry." The Founders knew that racial discrimination and slavery were not compatible with the principles of freedom and equality. "But economic and political interests outweighed ideological considerations. . . . The cohesion of the newly formed nation clearly had priority over the realization of the postulate of equality."

That practical bent continued into the early 1800s, and was later reflected in the constitutional interpretations of men like Jefferson and Marshall. For example, President Jefferson adopted a practical resolution to the Louisiana Territory challenge, one at odds with his philosophical bent toward strict construction. The problem he confronted was whether to accept the French offer of the entire territory. He came to support the purchase of the vast region, even absent any specific provision in the Constitution authorizing it. He well understood the grave risks to America posed by a foreign power continuing to border the young republic. He sadly acknowledged at the time, however, that failure to pass an amendment made the Constitution "a blank paper by construction."

John Marshall also appreciated practical necessity as he took his seat as Chief Justice. Important to him, in addition to constitutional principle, was an "empiricism in not tying the Court to rigid formulas." Only through flexible construction would a powerful Court emerge, given the complex federal system. His Marbury opinion is an example of his masterwork in practical politics to strengthen the Court, while identifying vested rights.

The Legal Culture: Natural Law

The pragmatic delegates to the Philadelphia Convention of 1787 were developing their constitutional weave from a myriad of confusing strands present in the 1780s. As a result, no one judicial mode of interpretation of the 1787 document, or of the amendments that followed, can truly claim legitimacy.

Besides pragmatism, another thread in the weave was the notion of natural law. A higher law took precedence over ordinary legislation, and that
law could not be completely codified by a constitution.\textsuperscript{271} Earlier, in \textit{Dr. Bonham's Case},\textsuperscript{272} Lord Coke drew upon ancient and medieval ideas and asserted that "common right and reason"\textsuperscript{273} was superior even to acts of Parliament.\textsuperscript{274} That position was restated by James Otis, in \textit{Paxton's Case}\textsuperscript{275} in 1761. William Paca, a judge of the Continental Congress's federal court of appeal in cases of capture raised the basic question: did the rights of Americans "[rest] upon . . . charters . . . . Or did they deduce [rights] from a higher source, the \textit{laws of God and nature}?"\textsuperscript{276} As if to answer Paca, counsel James Varnum in \textit{Trevett v. Weeden}\textsuperscript{277} invoked "natural law" in challenging legislation in Rhode Island.\textsuperscript{278} Reflecting the loose connotation of the word "law" in eighteenth century America, he also invoked "the Rhode Island charter," "general principles," "invariable custom," "Magna Carta," "fundamental law," and "the law of God."\textsuperscript{279}

The force of the natural law argument, existing in the 1780s, continued as the Supreme Court began to hear and decide cases. For example, in \textit{Calder v. Bull}\textsuperscript{280} Justice Chase declared that there are "certain \textit{vital} principles in our \textit{free Republican} governments which will determine and over-rule an

\textsuperscript{271} Grey, \textit{Do We Have an Unwritten Constitution?}, 27 \textit{Stan. L. Rev.} 703, 715-16 (1975).

For the generation that framed the Constitution, the concept of a 'higher law' protecting 'natural rights' and taking precedence over ordinary positive law as a matter of political obligation was widely shared and deeply felt. An essential element of American constitutionalism was reduction to written form—and hence to positive law—of some of the principles of natural rights. But at the same time, it was generally recognized that written constitutions could not completely codify the higher law. Thus in the framing of the original American constitutions it was widely accepted that there remained unwritten but still binding principles of higher law. The ninth amendment is the textual expression of this idea in the federal Constitution.

\textsuperscript{272} Dr. Bonham's Case, 8 Coke Rep. 107 (C.P. 1610).

\textsuperscript{273} "The Common Law will controul (sic.) Acts of Parliament, [and] adjudge them to be utterly void, when they are against 'common right and reason.'" Gunther, supra note 83, at 1054, 1055. Coke's statement was not even "respectable OBITER DICTA." The actions of the Privy Council in invalidating Colonial legislation, on rare occasion, were more relevant. \textit{Id.} at 1056.

\textsuperscript{274} It should be noted that Coke objected to interference with substantive rights, especially by the Crown, rather than to a fusion of legislative and judicial powers. Such a fusion in the "High court of Parliament" represented Coke's "teachings (as) the highest of all legal authorities before Blackstone." Corwin, supra note 83, at 97. Thus it was understandable that early constitutional practices in the new states had a similar fusion, dominated by the legislature. "[E]qually important, the Cokian doctrine corresponded exactly to the contemporary necessities of many of the colonies in the earlier days of their existence." \textit{Id.} In contrast, Locke declared limits on legislative jurisdiction, contending that the "legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees." \textit{Id.} at 105.

\textsuperscript{275} Cuddihy, \textit{James Otis Jr.}, in 3 \textit{Encyclopedia of the American Constitution}, supra note 6, at 1351. "To say the Parliament is absolute and arbitrary is a contradiction . . . . Should an act of Parliament be against any of [God's] natural laws . . . . their declaration would be contrary to eternal truth, equity and justice, and consequently void."

\textsuperscript{276} G. Wood, supra note 23, at 291, 291-94 ("Ambiguity of American Law"). "Putting [rights] on parchment did not create them; it only affirmed their natural existence." \textit{Id.} at 294. Accordingly, as Otis had so strongly argued: "the rights and principles of the Constitution did not have to be specified and written down to be in force." \textit{Id.} At the same time "the Americans were firmly committed to the modern notion of law, based on legislative enactment" and "appréhensive of the possible arbitrariness and uncertainties of judicial discretion." \textit{Id.} at 295, 304.

\textsuperscript{277} Corwin, supra note 246, at 11 (also Corwin, supra note 83, at 104).

\textsuperscript{278} \textit{Id.}

\textsuperscript{279} \textit{Id.}

\textsuperscript{280} 3 U.S. (3 Dall.) 386 (1798).
apparent and flagrant abuse of legislative power." And in *Fletcher v. Peck*, Chief Justice Marshall declared a state statute unconstitutional, in part because it violated "general principles which are common to our free institutions," notably that of the inviolability of vested rights.

**Interpreting a Writing**

Notwithstanding ideas of natural law, America's constitution was now embodied in a written document. That development was momentous. It provided the opportunity for systematic judicial construction. To some extent, at least, the Articles of Confederation had also been regarded by courts as amenable to judicial interpretation and enforcement. But the Constitution, with its independent federal judiciary, now offered a far greater opportunity for involvement of the courts.

**The Common Law**

The common law heritage was also a key element in that weave of constitutionalism in the 1780s. To what extent were common law principles useful in judicial interpretation of the Constitution? However Americans might rebel against British political rule, they did not cast out the common law. True, it now had to take account of local American circumstances; nonetheless, the common law continued to be revered on this side of the Atlantic. Thus, once constitutional principles became identified primarily with a fixed written document, the drafters at Philadelphia—and the delegates to the state ratifying conventions—could draw upon their common law training in construing it. The Americans, of course, lacked a significant tradition of judicial interpretation of written constitutions. Obviously, no soci-

281. *Id.* at 388. But see Justice Iredell, disputing the authority of courts to invoke natural law to strike down laws. *Id.* at 398-99.
282. 10 U.S. (6 Cranch) 87 (1810).
283. *Id.* at 139.
284. "America's innovation was to identify 'the Constitution' with a single normative document instead of a historical tradition, and thus to create the possibility of treating constitutional interpretation as an exercise in the traditional legal activity of construing a written instrument." Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902 (1985).
285. *Id.; see also supra* notes 81-89 and accompanying text.
ety of the time had such a tradition. Yet the Framers "possessed almost an embarrassment of [interpretive] riches in the common law's centuries of dealing with wills, deeds, contracts, and statutes."287

This was not to say that the common law could furnish a clear path of constitutional interpretation; too many threshold questions remained to be decided. First, what was that common law heritage? It was not always discernable. Blackstone was the foremost exponent of the common law in the eighteenth century, but as he systemized the English common law, he fused the science of the law with what he believed was its deep mystery. For science was not enough; there must also be a "decent veil to protect ultimate values from the devouring gaze of Reason."288 Blackstone's Commentaries had many contradicting ways of thinking, and reason was to be subordinated to prior values.289 Yet despite the common law's supposed mystery, Blackstone found no difficulty in invoking it to justify the Glorious Revolution of 1688. "However [that Revolution] might in some respects go beyond the letter of our ancient laws [it] was agreeable to the spirit of our constitution and the rights of human nature."290

Beyond the difficulty of ascertaining common law principles in general lay several other problems. How much discretion would a judge have in accommodating existing common law principles to local conditions? Moreover, what would the common law instruct as to how to determine the meaning of the document? For example, would the search be for the actual intent of the makers, or for the "plain meaning" of the text? If plain meaning, how obvious would that be to discover? Would canons of construction have to be revised because there was no simple analogy to an ordinary statute—because, that is, the constitution was sui generis? Would the search for meaning provide options based upon the "level of generality" chosen in interpreting a clause's meaning? Who were the "makers" of the 1787 document? How legitimate was legislative history in ascertaining meaning? How important would court decisions be?

Dispute still continues as to the elements of that common law heritage. To Raoul Berger, for example, one instruction was clear: the search was for the actual intent of the Framers, even when that intent seemed to contradict the supposed command of the text.291 In contrast, H. Jefferson Powell fo-

287. Powell, supra note 284, at 894.
288. "[E]ven the scholar of law must approach his subject with awe, and with the certainty that there would be much that he could not understand . . . . [T]here were limits beyond which man should not let his reason wander." D. Boorstin, supra note 286, at 25-26.
289. "[I]n every document which attempts to subject institutions to rational analysis, the function of reason is in a sense subordinate. Reason must be used to show man the consequences of his system of values and to persuade others to accept that system. But man must know his values and he should be unafraid to assert them." Id. at 187, 191.
290. Id. at 29.
291. Berger, "Original Intention" in Historical Perspective, 54 Geo. Wash. L. Rev. 296 (1986) [hereinafter "Original Intention"] "[E]verything which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter and intent also." Id. at 301 (citing Stowel v. Zouch, 1 Plowden 353, 366, 75 Eng. Rep. 536, 556 (Ex. Ch. 1569)).

Berger is critical of those who seek to discredit "original intent" because they believe it bars the way to "judicial revision" of the Constitution. "[T]he founders did not contemplate judges in the 'legislative,' policy-making role." R. Berger, CONGRESS V. THE SUPREME COURT 340 (1969).
See also judges reasonably construe a provision's language. Moreover, the dispute is complicated by lack of agreement as to what evidence to consider, what canons to invoke, and what other criteria to include.

Three decades after the Constitution was adopted, Chief Justice Marshall emphasized the "plain meaning" canon. He declared that a provision's spirit is "collected chiefly from its words." Marshall added that the words of the Constitution should be construed as used "in the common affairs of the world or in approved authors" at the time of enactment. Marshall's colleague and constitutional scholar, Joseph Story, agreed with the Chief Justice. Although the fundamental rule was that intent must be determined, such intent was to be found primarily by focusing upon the wording used.


"The intention of the law maker is the law, rising even above the text." R. Berger, Federalism: Founders' Design 15-17 (1987) (citing Hawaii v. Mankichi, 190 U.S. 197, 212 (1903)).

292. Powell, supra note 284, at 896 ("what judges . . . understood 'the reasonable and legal meaning' of those words to be").

293. Examples of complexities in assessment of historical evidence include (a) differing foci and interpretations of the evidence (see, e.g., exchange of charges between Berger and Powell; Berger says Powell has misread Selden, Blackstone, and Coke, "Original Intention, supra note 291, at 304-06; Powell accuses Berger of misinterpreting Madison and Story, Powell, supra note 284, at 896 n.56); (b) context ("artificial reason" of judge was used by Coke, not to minimize any search for actual intent but rather as part of a lecture to a king who was seeking to usurp the court's judging role, Berger "Original Intention," supra note 291, at 300, 306); (c) historical reality (legislative history was not focused upon in the 18th century because there was no recorded legislative history then, id. at 307); (d) the absence of action (evidence that the Framers thought that the debates and records of their convention were important is the fact that they did not destroy the journals and records, id. at 313); (e) inferences from proximity (given the records of five states ratifying conventions, there is reason to assume that general agreement on "major issues reflects the sentiments of six adjoining states," id. at 321); (f) non-time proximity (Madison's statement years later, since it was not an "intention" simultaneously recorded, is to be given less weight, id. at 322); (g) minimizing the particular language chosen by Madison to comment on the issue (Madison, in distinguishing between "true meaning" and "whatever may have been the opinions entertained in forming the Constitution," was only "reflect[ing] caution," id. at 325); and (h) principles of construction, Hamilton's principles of construction, infra notes 310, 331 and accompanying text.

294. [A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. [I]f . . . the plain meaning of a provision . . . is to be disregarded, because we believe the framers . . . could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application. . . .


295. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). "Necessary" as used "in the common affairs of the world, or in approved authors . . . frequently imports more than that one thing is convenient, or useful, or essential to another." Id. at 413.

Subjective intent was a factor. "This word, . . . like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using [it], are all to be taken into view." Id. at 415 (emphasis added).

296. The first and fundamental rule . . . is to construe [instruments] according to the sense of the terms, and the intention of the parties. Mr. Justice Blackstone has remarked, the intention of a law is to be gathered from the words, the context, the subject matter, the effects and consequences, or the reason and spirit of the law . . . [W]ords are generally to be understood in their usual and most known significance, their general and popular use . . . [W]here its words are plain, clear and determinate, they require no interpretation.

Story, supra note 286, at 405.
Even if the "plain meaning" canon of construction was embodied in the 1780s common law tradition in interpreting a document, finding any such meaning would prove no easy task. That proposition is demonstrated by two early classic cases, *Marbury v. Madison* 297 and *McCulloch v. Maryland*. 298 Chief Justice Marshall, himself a delegate to the Virginia ratifying convention, took the following positions, among others, in *Marbury*: (1) The Court lacked original jurisdiction because the express mandate of Article III excluded it, absent a party’s being a state or a foreign ambassador 299 and (2) Article III, given its language and logic, created mutually exclusive categories of original and appellate jurisdiction in the Supreme Court. 300 Marshall’s predecessor as Chief Justice, Oliver Ellsworth—delegate at Philadelphia and primary draftsman of the Federal Judiciary Act of 1789—disagreed with Marshall’s first position. 301 And even Marshall, in *Cohens v. Virginia*, 302 clarified that earlier position in *Marbury*. He explained that the Court in *Cohens* had appellate jurisdiction, notwithstanding that a state was a party. In *Cohens*, unlike in *Marbury*, jurisdiction existed because there was a federal question; the nature of the parties was irrelevant. 303 Moreover, the Court later disagreed with Marshall’s second position that such jurisdiction was “mutually exclusive.” 304

In construing the constitution of the United States, ... consider ... its nature and objects, its scope and design as apparent from the structure of the instrument ... [w]here its words are plain, clear and determinate, they require no interpretation, and [external evidence] should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil.

*Id.*

297. 5 U.S. (1 Cranch) 137 (1803).
299. 5 U.S. (1 Cranch) at 173-74. Article III of the Constitution states: In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONSTR. ART. III, § 2, cl. 2.

300. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate, the distribution of jurisdiction, made in the constitution, is form without substance.

5 U.S. at 174.

301. F. MCDONALD, CONSTITUTIONAL HISTORY OF THE UNITED STATES 39 (1982). As to how Ellsworth interpreted the provision differently, McDonald states:
The paragraph [art. III, § 2, cl. 2] can be read in two different ways. One way is this: ‘In all the other cases,’ the Supreme Court will have jurisdiction, on appeal from a lower court, unless the Congress deprives it of jurisdiction. The other way is this: The Supreme Court will have jurisdiction in both kinds of cases, and its jurisdiction in the second kind will be appellate unless Congress makes it original. Ellsworth’s bill took the latter position and gave the Supreme Court original jurisdiction in certain cases in which jurisdiction would otherwise have been appellate.

*Id.* (emphasis added). Presumably, had Ellsworth stayed on, he would have voted that the Court had original jurisdiction in *Marbury*. “In sum, the constitution of the judiciary was for practical purposes [to be] left to the Congress.” *Id.* at 30.


*Id.* at 383-401.

The inherent difficulty with finding "plain meaning" is exemplified best by disagreements voiced in 1791 over the constitutionality of the National Bank, ultimately producing the McCulloch litigation. In part, dispute centered upon how to interpret the "necessary and proper" clause. To Jefferson, the key to unlocking the meaning of that clause lay in focusing upon another provision, the tenth amendment. He argued that incorporating a National Bank was beyond the powers of Congress because the Bank was not necessary to carry out the national government's enumerated powers. An overbroad construction endangered local government and liberty.

Jefferson's arch-rival, Hamilton, disagreed. The Constitution gave a wide latitude to Congress, as reflected in the "necessary and proper" clause. Moreover, it was imperative that the great powers of the new national government be exercised effectively. As for the definition of "necessary," too rigid a construction, he said, would "beget endless uncertainty and embarrassment."

Interpreting a Permanent Charter

The essential difficulty in interpreting the necessary and proper clause, or countless other provisions, was that even though the 1787 document might be a positive legislative enactment, it was still something almost brand new: a written constitution, and one enforceable by courts as "law." Whatever the common law heritage, those facts could not be ignored. More was at stake here. Change by formal amendment would be different in kind and much slower than traditional changes in ordinary legislation. As a result, the Court had to interpret Congress's powers flexibly to assure that the document would remain viable.

305. President Washington asked his principal subordinates whether they viewed the contemplated national bank as within Congressional authority. See G. GuntHER, supra note 4, at 83.
308. "I consider the foundation of the Constitution as laid on [the tenth amendment]. . . . [T]o take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition." G. GuntHER, supra note 4, at 84.
309. "[Enumerated powers] can all be carried into execution without a bank. A bank therefore is not necessary, and consequently not authorized by this phrase. . . . [N]ecessary [means are to be defined properly] as 'those . . . without which the grant of power would be nugatory.'" Id.
310. "[A] sound maxim of construction . . . [is that] powers contained in a constitution of government, [especially those which concern the general administration of the affairs of a country, its finances, trade, defense, etc.] [ought] to be construed liberally in advancement of the public good." Id. at 86.
311. "Necessary" meant "no more than needful, requisite, incidental, useful, or conducive to," "when construed in its 'obvious and popular sense.'" Id. at 85.
312. The Articles helped lead the way. See supra notes 81-89 and accompanying text.
313. [W]e must never forget that it is a constitution we are expounding . . .

... a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code.
The Constitution and Our Political Traditions

The perceptive English observer, Walter Bagehot, was fascinated by America's exercise in constitutional interpretation. This nineteenth century student of government took note of the complex and burdensome amending process.\(^{314}\) The way courts got around that difficulty, he found both amusing and wondrous; for Americans had to use "the most absurd fictions . . . to evade the plain sense of the mischievous clauses."\(^{315}\) Bagehot gave as an instance of strained constitutional construction: reading the President's "war powers"\(^ {316}\) as authorizing him to issue paper money.\(^ {317}\) While there was a risk in establishing such a precedent, Bagehot believed that protection lay in the moderate American tradition.\(^ {318}\) Americans, he noted, extol their institutions. They ought to praise themselves for their political sense in maneuvering through the complexities of constitutional obstacles.\(^ {319}\)

Constitutional Interpretation: The Levels of Generality

Moderate political tradition as a safeguard or not, American judges who engaged in the process of constitutional decision-making had to realize the loose fabric they were fitting. Canons of statutory construction would offer only limited guidance when the writing was an enduring Constitution. Included within the interpretive menu was a choice among several levels of generality.

In fathoming a clause's meaning or a maker's intent, what question should be put? Take, for example, Article II's provision that the President is to be "Commander-in-Chief." One can ask about the general concept, considering it akin to a living organism, remaining vital whether in the age of

---


314. W. BAGEHOT, supra note 3, at 225.

315. The consequence is that the most obvious evils cannot be quickly remedied, that the most absurd fictions must be framed to evade the plain sense of the mischievous clauses; that a clumsy working and curious technicality mark the politics of a rough-and-ready people. The practical arguments and the legal disquisitions in America are often like those of trustees carrying out a misdrawn will—the sense of what they mean is good, but it can never be worked out fully or defended simply, so hampered is it by the old words of an old testament.

Id.

316. U.S. CONST. art. 2, § 1, cl. 1; id. at § 2, cls. 1, 2; id. at § 3, cl. 3.

317. It sounds a joke, but it is true nevertheless, that this power to issue greenbacks is decided to belong to the President as commander-in-chief of the army; it is part of what was called the 'war powers.' In truth, money was wanted in the late war, and the administration got it in the readiest way; and the nation glad not to be more taxed, wholly approved of it.

W. BAGEHOT, supra note 3, at 224.

318. But the fact remains that the President has now, by precedent and decision, a mighty power to continue a war without the consent of the Congress, and perhaps against its wish. Against the united will of the American people a President would of course be impotent; such is the genius of the place and nation that he could never think of it.

Id.

319. But if they had not a genius for politics; if they had not a moderation in action singularly curious where superficial speech is so violent; if they had not a regard for law, such as no great people have yet evinced, and infinitely surpassing ours—the multiplicity of authorities in the American Constitution would long ago have brought it to a bad end. Sensible shareholders, I have heard a shrewd attorney say, can work any deed of settlement; and so the men of Massachusetts could, I believe, work any constitution.

Id. at 228.
the Yankee peddler or in the nuclear age. Much more narrowly, one can inquire as to the specific evil of the time, and the response—the "conception" intended by the drafters in that 1787 setting. 320

The Legal Culture: Who Were The Makers?

Interpretive choice, in the legal environment of the period, is complicated by another basic problem: Who were the makers of this new document, those to whom one should look for instruction, or at least for guidance? The answer is important because it sheds light upon the nature of the union created and upon the role of the states. Were the "sovereign states" the makers, and thus powerful independent actors? Or were the "American people" the drafters, with the states being mere convenient political instruments for the people's will? 321 The Articles, in terms at least, con-

320. The controversy centers on the level of generality on which an interpreter should try to apprehend the adopters' intentions. On the highest or broadest level, an interpreter poses the questions: "What was the general problem to which this provision was responsive and how did the provision respond to it?" On the most specific level, she inquires: "How would the adopters have resolved the particular issue that we are now considering?" Brest, Constitutional Interpretation, in 1 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, supra note 6, at 465-66. 321. In considering who the makers of the Constitution were, we must deal with a number of preliminary, interrelated questions: Did the Congress create the states, or the reverse? Were we "one" people or several peoples? What did the Framers mean by "We the People," the phrase in the Constitution's preamble? And finally, did the political leaders or other actors of the time take much interest in these questions?

Levy takes the position that Congress created the states. "Congress, representing the United States, authorized the creation of the states," yet he notes the complexity of the matter, by adding that Congress "ended up, as it had begun, as their creature," for Congress had no means for enforcing the powers delegated to it by the Articles. Levy, supra note 95, at 379.

Lincoln accepted the view that the "Union is older than the States, and in fact created them as States." Levy, supra note 95, at 376-77. See also R. MORRIS, supra note 76, at 55: "A national government was in operation before the formation of the states." It was Congress which issued the call to the people of the colonies to organize state governments . . . . The historic date which should settle this issue [whether sovereignty originated in the Congress or the states] is May 10, 1776 [when Congress passed a resolution] urging the provinces to organize state governments." Id. at 58. Even Burke, the author of the amendment to specify that sovereignty remained in the states, took the position, three years before the Articles were ratified, that state laws in conflict with Congressional resolves were void. Id. at 90. Chief Justice Marshall declared that "the colonies were confederated from the beginning and that federal power, within its assigned sphere, was supreme from the start of the Second Congress in 1775." Id. Those who say that sovereignty originated in the states rely on the Articles, but "the Articles did not go into effect until March 1, 1781." Id. at 55.

The Declaration of Independence of 1776 hedged on the question whether one people or several peoples were declaring their independence. In its preamble, the document spoke of "one people" but in its final affirmation it used a plural "these United Colonies are, and of Right ought to be Free and Independent States." Morgan, supra note 158, at 374. Moreover, the members of the Continental Congress "did not consider their Declaration . . . complete until it had been ratified by each of the separate states whose freedom and independence it declared." Id. at 375. On the other hand, "in stating what constituted free and independent statehood, the Declaration specified only 'power to levy war, conclude peace, contract alliances, establish commerce.' These were all things, with the possible exception of the last, that had been done or would be done by the Congress." Id. at 374-75.

What explains the use of the expression, "We the People of the United States" in the Constitution's preamble? Charles Warren explained that the choice of wording was a less philosophical premise of a national Union than strategic ambiguity. The expression was used because the Framers could not know which nine states would ratify. C. WARREN, supra note 188, at 395. Patrick Henry immediately demanded to know "by what right" the expression had been employed. Morgan, supra, at 367. In effect, in using the wording, "the Philadelphia delegates . . . invented the American people . . . distinct from and superior to the peoples of the states." Id. at 376. Yet as far back as 1774, use of the expression "People of the United States" was employed in the Continental Congress. M.
stipulated a "compact," expressly among sovereign states; an amendment required every state's endorsement for passage.

But did the drafters in 1787 intend the new constitution to be viewed as a mere agreement among the states? The language in the new document seems to militate against the conclusion that the Constitution was also a compact. The new, invigorated enforcement machinery seems to rule out the "compact" approach as well. Yet the nature of the union created in the 1780s was not finally resolved until the Civil War.

The Legal Culture of the 1780s: Legislative History

Beyond the effort to identify the Constitution's makers is a related question. Is it appropriate to look at external evidence, legislative history, to fathom their intent? Indeed, in the legal culture of the time, was a statute's legislative history considered at all in determining its meaning? Powell maintains that the practice was "almost wholly nonexistent." That may be so, but was the practice deemed improper or simply a function of the unavailability of records of legislative debates, as Raoul Berger maintains?

There is no assurance as to the answers. But what is clear is that, given

---

322. Powell, supra note 284, at 904.
323. Articles of Confederation art. II.
324. Id. at art. XIII.
325. The Constitution is "the Supreme Law of the Land," U.S. Const. art. VI, cl. 2; oaths are taken by individual state officials, id.; and there is no unanimity requirement for passage of an amendment. U.S. Const. art. V.
326. The executive branch, U.S. Const. art II; and the new independent federal judiciary, with broad jurisdiction, U.S. Const. art III.
327. Powell, supra note 284, at 897.
328. The "late eighteenth century common lawyer conceived an instrument's 'intent'-and therefore its meaning—not as what the drafters meant by their words but rather as what judges, employing the 'artificial reason and judgment of law,' understood 'the reasonable and legal meaning' of those words to be." Id. at 896. "The framers shared the traditional common law view—so foreign to much hermeneutical thought in more recent years—that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case by case interpretation." Id. at 903-04.
329. Powell triumphantly asserts that "[t]he modern practice of interpreting a law by reference to its legislative history was almost wholly non-existent." The reason is simple: there was no legislative history. In England, Thomas Hansard, 'began in 1803 to print the Parliamentary Debates'. . . . The journal of our own Constitution was not published until 1819; Madison's notes of the Convention first appeared in 1840; and the debates in the state ratification conventions were collected in 1827 . . . . [I]t passes understanding why Powell resists inclusion of recorded intent, i.e. legislative history, as evidence of 'intention.'

a revered fundamental instrument, it is no surprise that legislative history came to play an important role. Thus, by 1791, Jefferson argued in the National Bank debate that the Constitutional Convention’s rejection of a grant of power to Congress to establish corporations was significant. On the other hand, Hamilton rejected an inquiry into legislative background, at least there, where he believed the language of the Constitution was clear.

How significant would legislative history be, even if it were considered? And whose account would be authoritative? In part, it depended upon who the “makers” were, and upon the availability of evidence. The journals of the Constitutional Convention were not available until 1819 and Madison’s notes, the most complete and accurate of the diaries, not until 1840. Moreover, not all the debates in the ratifying conventions were recorded. In any event, Story cautioned that the “private interpretations of any particular man, or body of men, must manifestly be open to much observation.” He added that there was no certainty of “the same uniform interpretation” in the ratifying conventions. Yet, for Madison, “the voice of the people [spoke] through the several State Conventions.” As for the statements and records at the Constitutional Convention, he would later minimize their importance.

The Role of Precedent

If legislative history was not determinative, could subsequent government action, in the absence of such a record, resolve the matter of a provision’s meaning? Madison thought so. He eventually “waived” his

330. [T]he very power now proposed as a means was rejected as an end by the Convention. [A] proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.

G. GUNTHER, supra note 4, at 84 (quoting Jefferson).

331. [W]hatever may have been the nature of the proposition or the reasons for rejecting it, it includes nothing in respect to the real merits of the question. [I]f a power to erect a corporation in any case be deducible, by fair inference, from the whole or any part of the numerous provisions of the Constitution of the United States, arguments drawn from extrinsic circumstances, regarding the intention of the Convention, must be rejected.

Id. at 86 (quoting Hamilton).


333. Id.


335. Story, supra note 286, at 388, ¶ 406.

336. Id.

337. Powell, supra note 284, at 938 (quoting Madison).

338. “As a guide in expounding and applying the provisions of the Constitution, debates and incidental decisions of the Convention can have no authoritative character.” Id. at 936. “As the instrument came from [the drafters], it was nothing more than the draft of a plan, nothing but a dead letter, until life and validity were breathed into it by the voice of the people, speaking through the several State Conventions.” Id. at 938.

339. It could not but happen, and was foreseen at the birth of the Constitution, that . . . differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them.

Id. at 941 (quoting Madison).
objection to the federal establishment of a National Bank on that basis. Nonetheless, meaning was fixed in the document. In 1831, Madison expressed the view that precedent "can expound but not alter the Constitution."

An Unfinished Constitution

What of case precedent? A focus on precedent, especially judicial decisions, emphasized a case-by-case, evolutionary process. That meant that ascertaining meaning could take time. Indeed so, for not only was there disagreement about what had been done at the Convention, but just as important, there were gaps in the document itself. The Constitution created in 1787 was unfinished. In part, it was incomplete because it was subject to change through formal amendment. But that was far from the only reason. There was also uncertainty as to the flesh on the bones of the new constitutional creation. Even more important, there was uncertainty as to the nature of the skeleton itself. What was the nature of the Union created? How would the national financial system be set up? Would political parties be a legitimate system of channeling political power? What was the scope of presidential removal power?

Indeed, "almost every significant issue considered by the Congress required . . . constitutional construction." The first Congress enacted so much fundamental law, that it is likened to "the second constitutional convention." The 1789 Congress fulfilled the pledge to propose a bill of rights and it established a federal court system. It also created a funding system in which the public debt was to serve as the basis of the national monetary system. In that regard, Congress took steps to make the Secretary

---

340. Further challenge to the Bank’s constitutionality was "precluded in my judgment by repeated recognition under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government." G. GUNThER, supra note 4, at 89 (quoting Madison).

341. R. BERGER, "Original Intention", supra note 291, at 330, 335 (quoting Madison (1831)). Madison preferred fixed meaning to unbounded judicial construction. Id. at 326 ("as understood by the nation at the time of its ratification").

342. A. KELLY & W. HARBISON, supra note 24, at 134-35 (as to the scope of the division of power between the nation and the states). "[I]t is clear that the Convention did not make a decision dispositive of the locus of sovereignty in the new union." Id. at 143. "Were the states still sovereign?" "Who had the ultimate power to interpret the nature of the Constitution, and to decide disputes between state and national authority?" Id. at 144.

[The Constitution] had blanks and ambiguities that needed to be worked out by compromise, experience, and precedent . . . [I]t left open two crucial questions: who determines when government is acting unconstitutionally, and what is the remedy? . . . [I]t failed to anticipate . . . the emergence of political parties . . . [I]t was not until 1807 (and after 12 amendments) that the constitutional system had firmly jelled.

F. MCDONALD, supra note 301, at 35; R. MORRIS, supra note 76, at 322.

343. "The virtue of the Federal Constitution seemed its flexibility rather than any novel principle of federalism or republicanism. Its real immortality would consist in its capacity by amendment, to 'keep pace with the advance of the age in science and experience.'" D. BOORSTIN, supra note 145, at 212.

344. A. KELLY & W. HARBISON, supra note 24, at 134-35.

345. Powell, supra note 284, at 913 (from the matter of a cabinet system, to the protective tariff, to the national bank, to the slave trade, to public debt policy).

346. F. MCDONALD, supra note 301, at 36 (e.g., the Bill of Rights, the funding of the debt under the Hamiltonian system, and the Judiciary Act of 1789).
of Treasury responsible, not only to the President, but to itself as well.  

Madison's actions as Congressman in the first Congress and thereafter, reflected his own interpretations of some of the Constitution's uncertainties. For example, the Constitution did not state if the Senate's approval was required when the President wanted to remove a subordinate. Madison urged Presidential prerogative here so that a President could control his department. Hamilton, in *The Federalist*, took a contrary view: Senate involvement was mandatory because there was an obvious design of symmetry in the appointment and removal powers here.

Although the Framers (Madison included) apparently considered parties contrary to republican principles, Madison's position would appear to shift over time. His premise in the 1780s seemed to be that political factions were evils, while it was counterproductive to try to eliminate them, they should be sharply confined. He appeared to revise that assessment in the face of the development of the Federalist Party. He once hoped that a large republic could limit any one faction's power, but by 1800, he came to the view that parties were a legitimate channel of politics. Indeed, he became Jefferson's lieutenant in creating the Democratic Republican Party.

Madison's views also shifted as to the dangers threatened by Congressional powers. He was a nationalist at the Convention, but by 1798, in the face of the passage of the Alien and Sedition Acts, he seemed to move toward a compact model of the Constitution. He and Jefferson came to urge "interposition" by the states, in an effort to stop national government enforcement of the statute. But it remains unclear what Madison meant by "interposition" in his Virginia Resolutions, beyond the effort to instruct members of Congress to seek repeal.

*The Legal Culture of the 1780s: The Phenomenon of Judicial Review*

The Constitution of 1787 continued to evolve. Indeed, it did not "jell" until about 1807. Even further complicating present day constitutional interpretation is the ultimate dilemma: was the Constitution unfinished in the invention of judicial review itself? And was the process of examination

348. U.S. Const. art II.
351. H. Henderson, *supra* note 162, at 432 (growth of parties was contrary to republican precepts). See also *The Federalist* No. 10, at 56, 57 (J. Madison) (J. Cooke ed. 1961). "[P]arties ... were not recognized in the Constitution. None of the Founding Fathers had professed affection for them, but in the long run it was the party system that seemed to make the Constitution more workable and more responsive to the American people." R. Morris, *supra* note 198, at 261.
352. Rudimentary legislative political parties were present in the Continental Congress and were the prelude to our first national party system. See generally H. Henderson, *supra* note 162.
353. F. McDonald, *supra* note 301, at 35, 45 (The delegates failed to contemplate political parties and expected the Constitution to make parties impossible.).
354. Powell, *supra* note 284, at 948 n.331. *A. Kelly & W. Harbison*, *supra* note 24, at 108 (The Virginia Plan was "probably mostly his work" and was an "exceedingly nationalistic solution."). I. Brant, *supra* note 243, at 114.
357. F. McDonald, *supra* note 301, at 35.
and review of the new constitution to take place in the course of ordinary lawsuits? Furthermore, even if judicial review was intended or was properly deducible from the language of the Constitution, what was to be its nature and scope?

As to the matter of founder intent, debate still persists. On one side stand scholars Corwin, Levy, and Gunther:

People who say the Framers intended [judicial review] are talking nonsense... people who say they did not intend it are talking nonsense.358

On the other side are Warren, Farrand, and Hart and Wechsler, among others:

[T]he Convention's understanding [that the Framers intended it] emerges from its records with singular clarity.359

Bickel appeared to agree with the latter group, while conceding that such intent cannot be "ascertained with finality."360 To some students of history, judicial review was hardly entrenched until the 1800s.361 Yet to the most revered jurist in American history, John Marshall, the power had always inhered in the Constitution.362

We cannot resolve the issue whether the phenomenon was intended. At best, we are left with a case for and one against. What is the evidence in support? It includes the following: Lord Coke's admonition that a parliamentary measure at odds with "common right and reason" could be adjudged void;363 the Framers' belief that the revered Coke spoke "the law;"364 Otis' invoking of natural law principles in Paxton's Case in 1761;365 the occasions, however rare, when the Privy Council nullified colonial legislation;366 the several instances in which state court judges struck down state legislation in the 1780s, while purporting to rest, at least in part, upon state constitutional provisions;367 the several remarks by important Framers,368 in the course of the Convention's rejection of a Council of Revision in which

358. G. GUNTHER, JUDICIAL REVIEW, supra note 83, at 1056 (quoting Conwin).
360. [I]t is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President, as well as of the several States. Moreover, not even a colorable showing of decisive historical evidence to the contrary can be made. Nor can it be maintained that the language of the Constitution is compelling the other way.

At worst it may be said that the intentions of the Framers cannot be ascertained with finality; that there were some who thought this and some that, it will never be entirely clear just exactly where the collective judgment—which alone is decisive—came to rest.

361. See G. GUNTHER, JUDICIAL REVIEW, supra note 83, at 1056; F. MCDONALD, supra note 301, at 35.
363. See supra note 273 and accompanying text.
365. See supra note 275 and accompanying text.
366. G. GUNTHER, JUDICIAL REVIEW, supra note 83, at 1056.
367. Corwin, supra note 246, at 10 (discussing Holmes v. Walton (1780)); at 11 (discussing Trevett v. Weeden (1786)); at 15 (discussing Bayard v. Singleton (1787)); at 17 (discussing Rutgers v. Waddington (1784)); see also A. KELLY & W. HARBISON, supra note 24, at 93-94.
368. G. GUNTHER, JUDICIAL REVIEW, supra note 83, at 1056.
the Supreme Court would have played a veto role; statements by several leaders in some of the state conventions; Hamilton's argument in *The Federalist* Number 78; *Article III*'s broad statement of federal court jurisdiction; *Article VI*'s supremacy clause, with its oath commitments of state and federal officials; the action of the first Congress through the 1789 Judiciary Act, purporting to establish jurisdiction in the Court over state court judgments resting on federal questions; the precedent of the Articles as a "species of law," enforceable by the courts; and finally, the overall structure and format of the document itself.

The case against an intent to establish judicial review minimizes those elements: Coke's dicta represented a position never actually taken by the English courts; the state court precedents in the 1780s were scattered, usually not representing a clear holding grounded upon constitutional objection, and generally not supported as legitimate by the legislatures in question; there was surprisingly little discussion about judicial review at the convention; accordingly, there should be caution about attributing to that body any position on the matter; debates at several of the state conventions, being unrecorded, are unclear at best; Article III left unstated any such important role for the courts; the supremacy clause need not be interpreted as providing a power of judicial review in the Supreme Court, especially vis-a-vis the Congress.

Madison, the father of the Constitution, seemed to be of two minds in reflecting upon the scope of judicial power. On the one hand, he cautioned against a view that the courts were paramount in interpreting the Constitution. On the other hand, he believed that the federal courts would be a

374. See supra notes 81-89 and accompanying text.
376. G. GUNTHER, JUDICIAL REVIEW, supra note 83, at 1056. Judicial review had been "around for a long time . . . had been discredited in eighteenth century England and before the 1790's won little acceptance in America . . . And yet it was taken for granted by many lawyers that the Supreme Court would have the power of judicial review under the Constitution." F. McDONALD, supra note 301, at 48.
377. G. GUNTHER, JUDICIAL REVIEW, supra note 83, at 1056 (state court precedents "hardly established a well-entrenched practice"); see also F. McDONALD, supra note 301, at 48; Corwin, supra note 246, at 18; A. KELLY & W. HARBISON, supra note 24, at 93 (practice was "shadowy and uncertain").
378. "Probably nothing in the whole debates is more astonishing than the slight discussion reported by Madison as given to the Judiciary Article in the Report of the Committee of Detail of August 6. It is probable . . . that Madison considerably condensed his Notes at this point, owing to the technicalities of the subject." C. WARREN, supra note 188, at 531. See also G. GUNTHER, JUDICIAL REVIEW, supra note 83, at 1056.
379. Berger, "Original Intentions", supra note 291, at 321 (apparently there are extant, records of less than half the ratifying conventions).
380. U.S. Const. art. III.
381. U.S. Const. art. VI.
bulwark against unlimited government.\textsuperscript{383}

Whether intended or not, judicial review has been the practice since 1803.\textsuperscript{384} But the dispute is important, even today. Thus, a scholar like Herbert Wechsler, certain that judicial review was intended, asserts a duty by the justices to confront constitutional issues, although he urges the courts to follow "neutral principles"\textsuperscript{385} transcending the particular dispute. Learned Hand believed that judicial review was more a matter of necessity than of logical deduction from Framer intent or the language of the text. Thus, he cautioned that the courts should exercise self-restraint.\textsuperscript{386}

\textbf{The Mix}

Yet, as we have seen, the lack of clarity regarding the judicial role was simply one element—albeit an important one—in the richly complex brew of the Confederate legal culture in which the Framers drafted the Constitution. Among the other ingredients were a republican ideology, notions of a higher law and ancient English rights, a century of being the people of the Charter, and the common law with all its instruction and mystery. Stirring that soup was a confidence that the Framers could change the world, and, at the same time, a cautious skepticism about human nature. Pragmatism overcame Framer concerns that they might be violating the technicalities of the language of their mandates, just as it impelled them earlier to read loosely colonial charters purporting to confine colonial liberties. Political realities also served to restrain their most doctrinaire enthusiasms. Thus, while principle might dominate in the legal culture, history, including precedent, and practicalities would mediate.

\textbf{The Constitution's Message}

Given such a culture, did the document of 1787, together with its Bill of Rights, transmit any mandated, identifiable message? Did the king wear any clothes? Doubtless, he was outfitted in a fine garment. And many parts of the weave were clearly visible. Perhaps the best example is the description of the composition and powers of Congress.\textsuperscript{387} Yet several other parts could be seen only faintly, in broad outline, and these were fundamental to any understanding. They included principles bearing upon the function of the

\textsuperscript{[There is] no provision \ldots for the case of a disagreement in expounding [the state constitution or the federal constitution] as the courts are generally the last in making the decision, it results to them by refusing or not refusing to execute a law, to stamp it with its final character. This makes the Judiciary Department paramount in fact to the legislature, which was never intended and can never be proper. I do not see that any one of these independent departments has more right than another to declare their sentiments [as to the boundaries of the departments] \ldots.}

\textsuperscript{383. \textit{Id.} at 267.}

\textsuperscript{384. \textit{Marbury}, 5 U.S. 137.}

\textsuperscript{385. Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 \textit{Harv. L. Rev.} 1 (1959) (Judicial review is "grounded in the language of the Constitution and [it] is not mere interpolation."). \textit{Id.} at 3 (The courts should employ "neutral principles."). \textit{Id.} at 6 (Moreover, there is a judicial duty of the Supreme Court to decide constitutional issues properly before the tribunal.). \textit{Id.} at 6.}

\textsuperscript{386. Since judicial review is "not a logical deduction \ldots but only a practical condition, it need not [always] be exercised." \textit{L. Hand, Bill of Rights 14}, 15 (1958).}

\textsuperscript{387. U.S. Const. art. I.}
Supreme Court as boundary keeper and guardian of human rights, the dimensions of the President’s responsibility as “stewart” during crises, and the relationship between nation and state.

Indeed, focusing upon Supreme Court decisions in particular, an observer is hard pressed to name any constitutional interpretations which have definitely violated the Court’s “mandate.” Not that we would not consider some past rulings abhorrent. Some were! However, others were wonderful and many others at least reasonable. But our assessments rest upon how each of us identifies and balances included principles, infuses them with our own moral values, and perceives practical necessity.

Today’s Justices legitimately choose from a menu of starting points and emphases. They are free to draw upon their own value predispositions, stressing ideas they consider preeminent in our constitutionalism. Moreover, they can select any level of generality—narrow or broad—upon which

388. See, e.g., Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857). This decision protected slavery, even in the territories. Yet the Court just as readily could have (1) invoked the broad statement of Congressional power in Art. I; (2) emphasized history both predating and subsequent to the enactment of the constitution, in which the Congress outlawed slavery in the Northwest Territory; and (3) noted the lack of direction contained in the fifth amendment’s right to “property.” U.S. CONST. art. I, § 8; amend. V; NORTHWEST ORDINANCE, art. VI.

389. See, e.g., Brown v. Board of Educ., 347 U.S. 483 (1954). The Court interpreted the fourteenth amendment equal protection clause to proscribe state-enforced racial segregation in the public schools. The Court emphasized the apparent Framers’ commitment to protect the former slaves, the broad principle of racial equality, and the negative impact in modern times of such racial equality, and the negative impact in modern times of such segregation upon educational opportunity. Id. at 490, 492. It called “inconclusive,” and seemed to deemphasize, the significance of Framer views on the narrow question of whether segregated schools came within the prohibition. Id. at 489. The post-Civil War amendments, of course, worked another constitutional revolution, yet the basic ambiguities in Court role and power, stemming from the 1780s traditions, remained. This was so, given the almost one hundred years of received amorphous legal tradition.

390. See, e.g., Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398 (1934). In Blaisdell, the Court upheld a temporary extension of the period within which a mortgagor could be protected from foreclosure, notwithstanding the Constitution’s proscription against a state’s “impairment of the obligation of contracts.” U.S. CONST. art. I, § 10. The Court found no impairment, only a change in remedy. Obviously, however, it recognized the need to assure meaningful state police power during the Depression, rather than to focus on framer concerns about state laws benefiting debtors.

In Luther v. Borden, 48 U.S. (87 How.) 1 (1849), the Court, announcing the doctrine of “political question,” chose not to intervene in a dispute in which two groups each claimed to be the lawful government of Rhode Island. In order for the United States to assure each state a “republican form of government” under article IV, section 4, swift and unmistakable action by the national political branches was needed. It was neither sensible nor workable for the slow-moving, deliberative Court to get involved.

In United States v. Nixon, 418 U.S. 683 (1974), the Court upheld a status independent of the President, for a special prosecutor, appointed under a rule made by the President’s own Attorney General. The Court then compelled the President to turn over evidence unrelated to his responsibilities and bearing materially upon serious federal felonies. The Court recognized practicalities in legitimizing such a prosecutorial status. It asserted the moral principle that “no one is above the law.” However, it implied that the case’s value as precedent is limited, given the fundamental place of an independent Presidency with substantial authority to carry out the oath under Article 2 to protect the nation’s constitution. Id. at 706. “The President’s need for complete candor and objectivity from advisers calls for great deference.” Id. In Nixon, there was an absence of “a claim of need to protect military, diplomatic, or sensitive national security secrets.” Id.

391. Landever, Perceptions of Judicial Responsibility—the Views of the Nine United States Supreme Court Justices as They Consider Claims in Fourteenth Amendment Non-criminal Cases: A Post-Bakke Evaluation, 14 WAKE FOREST L. REV. 1097 (1978).

392. These include commitment to federalism as they understand it, policy-making by the elective branches, special guardianship for insular political minorities, etc. The Justices exercise their authority, based upon their own conceptions of its scope as members interface with other institutions. Judicial attitudes toward presumptions of constitutionality, burdens of proof, the significance
the words of the text are to be understood.393

**Self-Imposed Limits**

In view of such wide discretion inherited by the present members of the Supreme Court, are there any limits they can place upon themselves as they come to their task?394 Three restraints come to mind. (1) **Candor.** The Justices ought to be frank in stating their own perceptions of judicial role, and in explaining their reasons for their choices among arguably relevant principles and precedents. (2) **A respect for history.** The Justices should probably presume in favor of precedent in order to safeguard against their own biases. History, however, including prior case law, ought not to be blindly confining. With its story of our constitutional march toward expanding freedom and equality, history should instead serve to illumine the way. Of course, it cannot provide ready-made answers to today's constitutional dilemmas; only superficial or simplistic history presumes to furnish such solutions. (3) **A willingness to listen and to be persuaded.** The Justices ought not to consider themselves as lawyers from nine separate law firms who assemble merely to state their positions and vote.395 They should actually engage in dialogue and hard debate; and they should attempt, through their opinions, to bring into the discussion of the constitutional enterprise the democratically elected institutions.396

**CONCLUSION**

Complexities abound; yet the story of the Confederation period, and the culture in which the delegates in Philadelphia found themselves, can provide

of silence by such institutions, access rules, new mechanisms for broad remedial relief will be affected accordingly.


394. Obviously, there are significant external limits to Court authority, including, among others, constitutional amendment, appointment power, presidential enforcement power, Congressional funding power, willingness of individuals to be parties in litigation, attorney skills, institutional resistance strategies, etc.; and the Court may invoke prudential rules of restraint. *See* Ashwander *v.* Tenn. Valley Auth., 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

395. *See Ruing Fixed Opinions*, N.Y. Times, Feb. 22, 1988, at A16, col. 5. Justice Scalia stated that "'[n]ot very much conferencing goes on' at the conferences. . . . By 'conferencing' . . . he meant efforts to persuade others to change their views by debating points of disagreement . . . .' Scalia added that 'to call our discussion of a case a conference is really something of a misnomer. It's much more a statement of the views of each of the nine Justices, after which the totals are added and the case is assigned . . . .'" Chief Justice Rehnquist, in a recent book said that "as a newly appointed Justice in 1972, he was 'surprised and disappointed at how little interplay there was between Justices' at conferences." *Id.*

396. *See*, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 58-59 (1973). Justice Powell's majority opinion, while rejecting the constitutional claim, encouraged the state legislatures to reexamine their tax systems. *Id.*

We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of scholars . . . . But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

*Id.*
a point of departure in undertaking the task of constitutional interpretation today. At the least, the Articles and the government of the Confederation period deserve better than oblivion. Nor is it a fair match to compare the scrapped ten year-old Articles with our beloved 200 year-old Constitution, credited with all the good things that have happened in America since that fateful, hot summer.

It is time to restore the Articles to their rightful place, as a former champion. Here we are in 1988. Floyd Patterson and Ingemar Johannson, heavyweight boxers who fought in championship bouts twenty-five years ago recently trained together in Los Angeles for a marathon run. A photograph shows them jogging side by side. They are friends now; the turmoil of the past is forgotten. It is equally time for a return to respectability for the Articles. There should be an accommodation between our two great constitutions. The Articles, we have seen, were a significant stage in world history and in American constitutionalism, a crucible through which our constitutional enterprise was transformed. They were the product of pragmatists, guided, not blinded, by history. That history of which the Articles were a part, challenges as it instructs. It tells us that there is much reason to celebrate the Articles.

Oh sing, if you will, deserved songs, in praise of our Constitution. And of the men who framed that law. But I implore you to recall the Articles. Of these, stand also in awe. (A.R.L.)

397. Old enemies, old friends, Cleveland Plain Dealer, Oct. 30, 1986, at 10G.