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Why Was the Constitution Necessary?

I doubt . . . whether any Convention we can obtain, maybe able to make a better constitution; for, when you assemble a number of men, to have the advantage of their joint wisdom, you inevitably assemble with those men all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonishes me, Sir, to find this system approaching so near to perfection as it does.

—Benjamin Franklin, addressing
the Constitutional Convention on September 17, 1787

Do you have a right to hold opinions that differ from others around you? Can you write and publish what you think? Can you worship as you believe? Can you protest to your government if you disapprove of its policies? Can the government search and seize your property? Can you be arrested and held without trial? Can the government treat you differently than it treats other people? As a citizen, you must know your constitutional rights in order to assert them.

Every society sets rules to live by. Our Constitution established the United States government and determined its relationship with the people and the individual states. As constitutions go, it is remarkably short and durable. Most state constitutions are hefty documents, and the proposed constitution of the European Union runs to 60,000 words. The original text of the U.S. Constitution, by comparison, came to only 4,200 words, and all its amendments, made over the course of two hundred years, added just another 3,000 words. Despite its brevity, the Constitution has continued to satisfy the needs of a nation that has grown enormously in territory and population, and has seen a vast expansion in both its international and domestic responsibilities.

In existence for more than two centuries, the Constitution has been amended infrequently. In order to win the campaign to ratify the Constitution, the supporters of the new government promised to add a bill of rights, guaranteeing certain basic protections to the people. Congress proposed the first ten amendments, known as the Bill of Rights, almost as soon as the new government began. Although thousands of amendments have been proposed since then, only seventeen other amendments have been ratified. This means that the basic structure, functions, and powers of the federal government remain essentially the same as when the framers drafted them, giving the United

States a bedrock of continuity and stability.

Because we live under these rules, it is essential that we know what they are, why they were established, how they have been implemented, and how they directly affect us. The Constitution not only designed a government but also placed limits on it to prevent arbitrary rule. Particularly through its amendments, the Constitution guarantees every American fundamental rights and protection of life, liberty, and property.

Our Constitution created an effective national government, one that balances expansive powers with specific limits. By contrast to its sturdy endurance, the first American government established under the Articles of Confederation in March 1781 showed signs of weakness and disorder within a few years after it was organized. That first national government depended upon the states for revenue but could not compel their cooperation. Surrounded by lands controlled by Great Britain, France, and Spain, Congress under the Articles of Confederation had trouble funding its own army. Its weaknesses troubled many of the leaders of the young republic. In 1787, they gathered in Philadelphia to form a more perfect union.

The road to the Philadelphia convention started two years earlier at Mount Vernon, the Virginia estate of General George Washington. The hero of the American Revolution brought together representatives from Virginia and Maryland to settle navigation rights on the Potomac River, which ran between them. Following that gathering, the Virginia Assembly called for a larger conference to deal with trade among all thirteen states. Only five states bothered to send delegates to the meeting in Annapolis, Maryland, the following year. Although disappointed by the turnout, the delegates who had gathered were persuaded by a New Yorker, Alexander Hamilton, to call for a full constitutional convention to tackle the serious weaknesses in their union. They requested that the Confederation Congress issue formal invitations to the states to appoint delegates to meet in Philadelphia.

This Constitutional Convention drew fifty-five delegates from all but one of the states. Rhode Island, fearing national interference in its own state economic initiatives, stayed away. Those who decided to come to Philadelphia gained prestige when General Washington agreed not only to serve as a delegate but also as the convention's presiding officer.

In May 1787, the delegates convened in Philadelphia's Independence Hall, where the Declaration of Independence had been adopted in 1776. The Confederation Congress had also met there until 1783, when American soldiers marched on Philadelphia to demand their unpaid salaries. Unable to raise sufficient funds either to provide for the military, or to protect itself, Congress hastily departed. The Confederation Congress met in several locations before it settled in New York City.

The inability of Congress to handle the soldiers' protest demonstrated the powerlessness of America's first national government. Real power rested with the individual states. The Articles of Confederation established a single legislature but no executive or judiciary branch. In that Congress, all the states had an equal vote, regardless of size. Delegates from seven states had to be present in order to conduct business. To amend the Articles required the unanimous agreement of all the states. These requirements made it difficult to get much done.

What the Articles of Confederation created was less a nation than a "league of friendship" among the thirteen states. The national government could make

treaties and declare war, but it could not raise taxes or require the states to provide the funds that it requested. Nor could it stop the states from imposing taxes on each other's exports. The weak national government was in no position to prevent the American economy from sinking into depression.

In Massachusetts, during the winter of 1786, deeply indebted farmers whose land was being foreclosed refused to pay their state taxes, shut down the local courts, and seized a government arsenal. Troops from Massachusetts put down the farmers' revolt—known as Shays's Rebellion after its leader, Daniel Shays—while the Confederation Congress stood helpless in the crisis. "From the high ground we stood upon," General Washington despaired in a May 18, 1786, letter to John Jay, "to be so fallen! So lost! It is really mortifying." To national leaders, including Washington, the need for a stronger central government grew increasingly evident. Yet Americans had only recently rebelled against a tyrannical government, and remained suspicious of a concentration of government power.

This was the dilemma facing the delegates who gathered in Philadelphia. Fortunately, they were well educated and experienced in law and government. Eight of them had signed the Declaration of Independence. A third had served in the Continental Army during the American Revolution. Most had been members of the Continental Congress or the Congress under the Articles of Confederation. They ranged from young men, including James Madison and Alexander Hamilton, who were still in their thirties, to the eighty-year-old Benjamin Franklin. They were merchants, planters, and professionals who had a personal interest in creating and preserving a stable society. Some of them had read widely in history and philosophy and had studied other forms of government, from republics to monarchies.

The delegates did not intend to produce the type of "pure democracy" that existed in the ancient Greek city states, where citizens voted on everything. Instead, during their debates several of the delegates warned against the "excesses of democracy," with its "turbulence and follies," and "dangerous leveling spirit." They were more impressed with the ancient Roman republic, where representatives of both the aristocracy and the people had a say in passing laws.

As British subjects by birth, all the delegates shared in the British legal tradition dating back to the writing of the Magna Carta (the Great Charter) in 1215, which stated that all people have rights that even a king has to respect. The delegates to the Constitutional Convention were also influenced by the ideas of philosophers from the European Enlightenment, the eighteenth-century intellectual movement that emphasized rational thought. These philosophers had defined ideal governments as ones in which power was separated between executive, legislative, and judicial branches that could check and balance each other.

As North Americans, the delegates had the additional example of the Iroquois Confederation, in which five Native American tribes in New York State governed themselves independently but also sent their chiefs to a Great Council to make decisions on larger issues of war and peace affecting the five tribes.

In writing a constitution the delegates departed from the practice in Great Britain, where the government was established not by a single document but rather by the entire body of British common law, the rulings of judges and parliamentary legislation. The delegates were instead continuing a colonial tradition that dated back to the Mayflower Compact of 1620, and other colonial charters. These systems had accustomed Americans to the idea of a single document

FOR RATIFICATION OF THE CONSTITUTION

Often called the Father of the Constitution, James Madison was born in 1751 and raised on a plantation in Orange County, Virginia. He graduated from the College of New Jersey (later Princeton University) during the American Revolution, but his fragile health kept him from military service. Madison instead involved himself in public affairs by helping to write Virginia's first constitution. He served in both the Continental Congress and the Confederation Congress, and was a delegate to the Annapolis Convention. Having lost faith in the government formed under the Articles of Confederation, he actively promoted the Constitutional Convention and took the lead in drafting the Virginia Plan, which offered the basic structure of the new government. After winning Virginia's ratification of the Constitution, Madison was elected to the House of Representatives during the First Congress. There he led the Federalists and sponsored the Bill of Rights.

Madison grew troubled over the policies of Presidents George Washington and John Adams. He joined with Thomas Jefferson in founding the Democratic-Republican Party in opposition to the Federalists. When Jefferson became President in 1801 he named Madison as his secretary of state. Later Madison succeeded Jefferson, serving as President from 1809 to 1817. During his administration, the United States declared war on Great Britain. In August 1814, British troops invaded Washington, D.C., and burned the Capitol and White House, forcing Madison to flee to safety. America's pride was salvaged by victory of its troops at New Orleans. Madison devoted his last years as President to rebuilding the capital and the national economy. At the time of his death in 1836, James Madison was the last surviving delegate to the Constitutional Convention.

serving as a contract between the people and their government.

When the delegates convened, Virginia's Governor Edmund Randolph offered a bold proposal that they not simply revise the Articles of Confederation but create an entirely new form of national government. Randolph introduced the Virginia Plan, which outlined a Congress with two bodies: a House of Representatives and a Senate. The new government would also have a separate executive branch, headed by a president, who would be both chief executive and commander in chief of the armed forces. The plan also called for an independent judiciary.

Although Randolph introduced the Virginia Plan, its actual author was James Madison, a young Virginian who served in the Confederation Congress and knew its weaknesses firsthand. Much of what we know today about the Constitutional Convention we owe to Madison, who kept detailed notes of the secret sessions. In an effort to avoid public pressures that might hinder their ability to reach a consensus, the delegates had barred the doors and windows and conducted all their business away from public view. The official minutes of the convention recorded little of the debate between the delegates. But Madison took a seat in front of the chamber, where he could hear the presiding officer and members on both sides, and he diligently kept a daily journal that summarized the members' arguments. His notes reveal the shared sentiments and disagreements among the delegates, the alternative proposals they considered, and the compromises they reached. Not published until after his death, Madison's notes have become an essential source for jurists who ponder the founders' intent for each provision of the Constitution.

The Virginia Plan envisioned a republic based on popular consent. Elected officials would represent the people, although the people could vote directly only for members of the House of Representatives. State legislatures would elect senators. Members of an Electoral College, chosen by the people, would elect the President. The Virginia Plan provided that each state would have representation in the House and Senate that reflected the size of their populations. This was the desire of the larger states, which blamed the Articles of Confederation's weakness on the equal representation of the states. Because every state had one vote under the old system, the smaller states, representing a minority of the population, could block the will of the majority.

The smaller states refused to accept any plan that sacrificed their equality. They countered with a plan, introduced by William Patterson of New Jersey, that would have preserved the government structure under the Articles of Confederation. The convention voted to reject the New Jersey Plan in favor of the Virginia Plan, granting the larger states the most members in both houses of the new Congress. But the smaller states would not tolerate inequality, and they continued to fight for their rights. The convention reached an impasse, just as it planned to take a few days off to celebrate the Fourth of July. It appointed a special committee to try to work out the disagreement during the recess. Chaired by Roger Sherman of Connecticut, the committee split the difference between the two factions. It proposed that the larger House of Representatives reflect the size of each state's population, while the states would have equal representation in the Senate. This became known as the Connecticut Compromise, or the Great Compromise. The delegates accepted the compromise and, as an additional assurance to the smaller states, wrote into the Constitution that no state would lose its equality in the Senate without its consent (which, of course, no state would

give). Through this compromise, the Constitution went on to create a single nation from a confederation of states. Yet, the states remained as permanent and integral parts of the new federal system.

The absence of anyone representing Rhode Island served as a reminder to the other delegates that it would be folly for them to require unanimity in any new form of government. They provided that the Constitution could be ratified by the vote of nine of the thirteen states. Nor would unanimity be needed for future amendments. Instead, the approval of two-thirds of both houses of Congress and three-quarters of the states would be required to ratify an amendment.

From May until September 1787, the delegates deliberated over all aspects of the new government. They worked out its structure and listed the specific powers of each branch. However, they left considerable flexibility in implementing those powers, by giving Congress the power to make all laws “necessary and proper” for carrying out its explicit powers. The great difficulty in framing a government, as James Madison pointed out in *The Federalist*, the papers written to support ratification of the Constitution, was first to “enable the government to control the governed; and in the next place, oblige it to control itself.” Assuming that human nature would always be the same, and that powerful leaders would inevitably try to amass greater power, the Constitution divided power among the branches of government and created a system of checks and balances. Madison reasoned that “ambition must be made to counteract ambition.”

On September 17, 1787, most of the delegates signed the new Constitution. A few of them, notably Virginia’s George Mason, declined to add their signatures on the grounds that the Constitution lacked a bill of rights that would identify and protect the rights of citizens. The weary delegates had voted down a bill of rights on the grounds that the state constitutions already protected the people’s liberties. Otherwise, the signers had good reason to feel satisfied with their accomplishment. The elderly Benjamin Franklin pointed out at the end of their deliberations that the back of the chair where General Washington sat while presiding had a half-sun carved upon it. Often during the debates he had “looked at that behind the president without being able to tell whether it was rising or setting,” he said. “But now at length I have the happiness to know that it is a rising and not a setting sun.”

Afterward, some of the delegates traveled directly to New York City to serve in the Confederation Congress. They presented the Constitution to the Congress, which transmitted it to the states for ratification. Proponents of the Constitution identified themselves as Federalists. Its skeptics became known as Anti-Federalists. The opponents feared the Constitution would create a powerful central government that would overwhelm the states and would run contrary to the democratic spirit of the American Revolution. They were particularly agitated over the Constitution’s lack of a bill of rights.

Unlike the idealistic Declaration of Independence, which had declared that “all men are created equal . . . [and] endowed by their Creator with certain unalienable rights,” the Constitution made little reference to religion, except to prohibit any religious test as a qualification for candidates for federal office. It did, however, date its completion “in the year of our Lord one thousand seven hundred and eighty-seven,” as was customary at the time. The Constitution was a pragmatic document that sought to balance the varied interests of the large and small states, the mass of people and the wealthier elite, and those who supported and those who opposed human slavery.

AGAINST RATIFICATION OF THE CONSTITUTION

George Mason had never left his native Virginia until he traveled to Philadelphia as a delegate to the Constitutional Convention. He preferred to remain at his comfortable home, Gunston Hall, but went to the convention because he favored a stronger national government. Born on a Virginia plantation in 1725, Mason was a planter and also treasurer of the Ohio Company, which sold land to settlers moving westward. To assist his work with the Ohio Company, he read each of the colonial charters. This experience proved handy in 1776, when he joined with Virginia patriots in writing the state’s Declaration of Rights and its first constitution.

Mason served as a delegate to the conference held at Mount Vernon in 1785, and became one of Virginia’s delegates to the Constitutional Convention in 1787. At first he worked closely with his fellow Virginia delegate, James Madison, but soon their thinking diverged and Mason grew disillusioned. Mason feared the Constitution gave too much authority to the President over Congress, and too much power to the national government over the states. When Mason lost a motion to add a bill of rights he told the delegates that he would rather “chop off his right hand than put it to the constitution as it now stands.” Back in Virginia, he fought against ratification. Not even Congress’s enactment of the Bill of Rights appeased Mason. He died in 1792, suspicious of the Constitution to the end.

Slavery seemed to many Americans contradictory to their Revolution's principles of freedom and equality. The northern states had already begun to abolish slavery at the time of the Constitutional Convention, but the southern states were growing more dependent on slave labor. At the convention, southern delegates insisted that the Constitution not interfere with slavery. Northerners agreed, both because they considered slavery a state matter, and because they felt that the southern states would never enter the Union without such a guarantee.

The framers did not use the word "slave" in the Constitution, but referred instead to "other persons" when addressing issues related to slavery and the slave population. The Constitution prohibited Congress from ending the importation of slaves before 1808. It also provided that slaves be counted as three-fifths of a person to determine taxation and representation in Congress. (At the time, slaves accounted for about 20 percent of the U.S. population, mostly concentrated in the South.)

During the ratification of the Constitution, the most inflammatory issue was not its toleration of slavery but its lack of a bill of rights. Thomas Jefferson, who had drafted the Declaration of Independence, was away serving as the American minister to France. Jefferson admired the delegates' work, but he wrote to his friend James Madison that "a bill of rights is what the people are entitled to against every government on earth . . . and what no just government should refuse." Many other Americans shared Jefferson's concern about the protection of their rights.

In order to win ratification, the authors of the Constitution needed to explain and defend their handiwork to the people. Under the joint pen name of Publius (Latin for "the public" or "the people"), James Madison, Alexander Hamilton, and John Jay wrote a brilliant series of essays published in newspapers throughout the states in 1788. These essays have been reprinted in book form in many editions since then, and are known today as *The Federalist*. They explained how the new government would work, and sought to calm people's apprehensions about it. In one of his essays, Madison discussed the failure of past republics when one faction grew so strong that it dominated and suppressed all others. Madison predicted that the American republic would survive because of its size and its continued growth. In a large republic, no single faction would predominate, he reasoned. This would prevent a powerful majority from suppressing the rights of the minority. As Americans moved westward into new territories, they would form new states that would join the Union and add even more groups into the equation. The arguments put forth by the authors of *The Federalist* carried great weight, and they still inform us about the thinking of the framers of the Constitution.

On December 7, 1787, Delaware became the first state to ratify the Constitution, and other states quickly followed. The fiercest battles took place in the larger states. In Virginia, Revolutionary War patriots such as Patrick Henry and Richard Henry Lee opposed the Constitution, while Washington and Madison argued in its favor. To gain support, Madison pledged that the new government would move speedily to adopt a bill of rights. On June 25, 1788, after four months of debate, the Virginia convention voted 89 to 79 for ratification. On July 26, New York concluded an equally divisive debate and approved the Constitution by the narrow margin of 30 to 27. North Carolina's convention voted against ratification, however, and Rhode Island never called a convention. Still,

eleven of the thirteen states had ratified the Constitution, which was two more than required. North Carolina eventually joined the Union in 1789, and Rhode Island in 1790.

Among its last acts, the outgoing Confederation Congress set the first Wednesday in January of 1789 as the date for the first Presidential election. The Electoral College would cast its ballots on the first Wednesday in February, and the new government would begin on the first Wednesday in March. But on March 4, 1789, neither the House nor the Senate could establish a quorum. Both had to wait until April, when enough members arrived to conduct the business of implementing the new Constitution. Many of the delegates to the Constitutional Convention were elected as members of the First Congress, including James Madison, who served in the House of Representatives.

Representative Madison, true to his word, introduced a bill of rights. Congress crafted his proposals into twelve amendments. The states ratified ten of them, which became known as the Bill of Rights. Two hundred years later, in 1992, the states ratified the eleventh of these original amendments, which dealt with congressional pay increases. (The unratified twelfth amendment would have set the number of people to be represented in each congressional district at fifty thousand, a number so low that the House of Representatives would by now have grown to many thousands of members.)

Over the following centuries, Congress continued to enact all laws “necessary and proper” to carry out the powers enumerated in the Constitution. Presidents vastly expanded their power in competition with Congress. The Supreme Court became the final arbiter of whether acts of Congress or Presidential actions were constitutional. Beginning with the case of *Marbury v. Madison* (1804), the Supreme Court asserted its right to declare laws unconstitutional—a power that is implied but not specified in the Constitution. In the case of *McCulloch v. Maryland* (1819), Chief Justice John Marshall observed that the Constitution provided only the “great outlines” of government. The brevity of the document suggested that its authors expected judges to interpret its meaning, and anticipated flexibility in its implementation.

Growing from thirteen to fifty states, the United States spread from the Atlantic to the Pacific Ocean, with a larger population, a more complex economy, and a mightier military than the authors of the Constitution could possibly have imagined. Yet the Constitution remains essentially the same document they drafted during the summer of 1787. The Constitution’s succinctness helped it to survive largely intact, forcing Presidents, Congress, and the courts to find new applications periodically to meet changing circumstances and cope with new problems. Understanding the Constitution requires careful reading of the original document and its amendments, taking into consideration what we know about its framers’ intent, and the ways in which generations of judges have construed its language to make it work.

THE FEDERALIST NO. 10: GROWTH WILL STRENGTHEN THE REPUBLIC

*At the time that the Constitution was written, people worried that past republics had worked best in small governments such as city-states. James Madison saw different possibilities and argued in *The Federalist* that the American republic would grow stronger as it expanded because it would be harder for any one group to dominate it.*

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that, where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust in proportion to the number whose concurrence is necessary.

Hence, it clearly appears, that the same advantage which a republic has over a democracy, in controlling the effects of faction, is enjoyed by a large over a small republic—is enjoyed by the Union over the States composing it.