Some Constitutional Backgrounds

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There is a disposition, at least in the North, to assume that the adoption of the Constitution in 1788 was but an implementation of the great Declaration of 1776 and that the two combined to make up a sort of American Magna Charta or Bill of Rights. The Declaration, of course, was primarily a proclamation of secession from the British Crown, and the Constitution, by no stretch of the imagination could have rated as a Bill of Rights. Except for the stipulation that trial of federal crimes shall be by jury and held in the State where committed; that conviction of treason must rest on the testimony of two witnesses or confession in open court,[1] there were no provisions in the Constitution prior to the first eight amendments that were directed to the protection of personal, or even political rights, unless we count the stipulation in Article VII that "no religious test shall ever be required as a qualification to any office or public trust under the United States." The first ten amendments, it is true, followed close upon the Constitution but it must be remembered that they were restrictive only on federal action and furnished no protection to the individual against aggression by his own State.[2] In fact, until the ratification of the 14th Amendment the only federal protection extended to personal rights against possible State infringement was found in Article I, Section 10 of the Constitution which forbids a State to "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Prior, therefore, to 1868, the date of the Amendment, a State was free, so far as the Federal Constitution was concerned, to play havoc with traditional rights except as self restrained by its own Constitution or the determination by its own courts of the proper scope of legislative action.

The delegates who foregathered in Philadelphia in the summer of 1787 nurtured no thoughts of a modern Runnymede. They had been sent by their respective States to confer upon suggestions of amendment or possible revision of the compact which formed an existing confederation, then showing signs of disintegration. The first link in the chain of events which led up to the convention had been forged in the same city some thirteen years before. Less than a month after the clash of arms at Lexington and Concord the second session of what

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[1] U. S. CONST. Art. III, §§2, 3.

[2] Barron v. Baltimore, 7 Peters 243 (U. S. 1833).

came to be called the Continental Congress convened at Philadelphia. At the earlier meeting in September, 1774, the assembly, composed roughly of committees from the several Colonies, had petitioned the King to put an end to Colonial grievances and had specified the Acts of Parliament deemed violative of the peoples' rights. All the Colonies were urged to join in the boycott of British trade and it was voted to reassemble on the tenth of the following May unless the obnoxious Acts had by then been repealed. Events had moved rapidly by May 10, 1775, when the Congress reconvened and conditions now called for immediate and drastic action. The assembly had really no official and certainly no juridical status but presumably with the tacit consent of the Colonies and in their behalf, the body, by degrees assumed quasi powers of government. It issued paper money, dispatched agents abroad, negotiated foreign loans, appointed Washington commander of a Continental army and declared a defensive war against England. A year later came the Declaration of Independence and a recommendation to the Colonies to disregard the King's officials and set up governments of their own. This the States did by adopting what were termed Constitutions, doubtless suggested by, and in some instances modeled closely upon, the former English charters.

As early as July, 1775, Franklin had urged a formal Colonial Union, but it was not until November, 1777, that Congress approved the draft of Articles of Confederation prepared by a Committee of Thirteen with John Dickinson of Pennsylvania as chairman. These provided for a perpetual league of friendship among the thirteen States to become operative only upon the assent of all. Although promptly submitted by Congress to the legislatures of the several States, the Articles did not become effective until March 1, 1781, on final acceptance by Maryland. It was not, then, until that date that the Congress passed from a *de facto* to a *de jure* status and that its earlier commitments were by implication, at least, ratified by the States. The acquisition of juridical character by Congress facilitated peace negotiations then impending and must have been a controlling consideration in a later judicial determination of the legal status of the treaty signed with Great Britain. In 1816 in a case involving a land title that traced back to the Lord Fairfax grant which had been confiscated by Virginia, the Supreme Court speaking through Justice Story declared that the title in dispute "depended on the construction of the treaty of 1783 between the United States and Great Britain,"[3] thus recognizing that document as the supreme law of the land, superior to a conflicting Act of the Legislature of Virginia.

[3] Martin v. Hunter's Lessee, 1 Wheat. 304 (U. S. 1816).

Following a preliminary agreement reached in November, 1782, the formal treaty of peace with Great Britain was signed on September 3, 1783. By its terms the boundaries of the United States were conceded to extend to the Mississippi River on the west and, roughly, to the Great Lakes and St. Lawrence River on the north. No serious dispute had ever arisen over rights in the territory south of the Ohio River, but following the French cessions to England in 1763, Massachusetts, Connecticut, New York and Virginia advanced conflicting claims to the regions north of that river, the claims of Virginia having perhaps the most merit. These Colonial controversies naturally were inherited by the succeeding States, but upon the organization of the Confederacy in 1781 they put an end to the controversy by joining in a cession of their several claims to the United States in Congress Assembled; Maryland had made such action a condition to its ratification of the Articles of Confederation. More significant, however, than a settlement of an interstate conflict was the fact that title to an imperial domain was now held by Congress in trust for all the States, thus giving each an interest in common with the others in a Confederation that might be bankrupt in money but was rich in land.

The Northwest had been explored by the French but was very sparsely settled, the few outposts were widely scattered and the region was rated as Indian country. Following peace with England, however, emigration, partly organized, started into the Ohio country, many war veterans soon joining the trek to take up land which had been granted to them. Early in 1784 Congress by resolutions set up some "rules and regulations respecting the territory," but it was not until July 13, 1787, that it enacted the famed Ordinance providing for the organization of the Northwest Territory and the establishment of civil government therein.[4]*

The Ordinance, which seems to have served as a pattern for later Congressional organic and enabling acts, delimited as a first district the section of the territory which, roughly, became the State of Ohio. The district was placed under a governor and three judges appointed by Congress and empowered to organize the district and to "adopt and publish therein such laws of the original States as may be necessary and best suited to the circumstances of the district," the same to remain in force until the establishment of a general assembly or until disapproved by Congress. When the district had acquired five thousand free male inhabitants, there should be organized therein a territorial government consisting of an elective governor and a representative

[4]* Declared Webster in the Senate forty years later: "I doubt whether any single law of any lawgiver . . . has produced effects of more distinct and lasting character than the Ordinance of 1787."

assembly which might choose a delegate to Congress who would have the right of debate but not of voting. There should ultimately be formed out of the entire territory not less than three nor more than five States and the territory and States formed therein "shall forever remain part of this Confederacy of the United States subject to the Articles of Confederation and to all acts and ordinances of the United States in Congress Assembled conformable thereto." Upon attaining a population of sixty thousand free inhabitants a district should be at liberty to form a permanent Constitution and State Government and "such State shall be admitted by its delegates into the Congress of the United States on equal footing with the original States in all respects whatever." The inhabitants of the territory were made subject to payment of a part of the federal debt and a proportional part of the expenses of government, apportioned among them by Congress, and taxes for such payment "shall be laid and levied by the legislatures of the districts." Here, objection might have been raised that since Congress itself had no power to tax it could not delegate such power to a territory; further, it might have been urged that the Articles of Confederation gave Congress no power to acquire territory. It could only have been answered that all the States had agreed to the acquisition of the territory knowing that it would have, in some manner, to be governed by Congress and that the right to govern would involve the right to tax or to grant such right to a territorial government.

Perhaps the most memorable of the articles of the Ordinance was the final one which forever forbade slavery within the territory or States formed therein; a prohibition with which the earlier references to free inhabitants seems scarcely in accord. By way of *obiter* in some early decisions mention is made of academic speculation as to whether this slavery prohibition would have been binding on States later carved out of the territory and admitted to the Union under the Constitution. A somewhat analogous speculation, had it arisen in the heat of the slavery agitation, might have assumed a wider and perhaps less academic scope. The slavery agitation, of course, centered about the admission of new States and the question whether they should come in "free" or "slave," it being assumed, apparently, that a condition imposed by Congress on a State's admission could fix for all time its status as to slavery. The admission of Kansas, for instance, was conditioned on the incorporation in its Constitution of an irrevocable prohibition of slavery. The Constitutional issue involved was not raised or decided until half a century later. The Congressional Enabling Act of 1906 under which Oklahoma was admitted stipulated that the Capital, then at Guthrie, should not be changed therefrom prior to 1913 and that the Constitutional Convention, authorized by the Act, should irrev-

ocably accept the condition. This was done, but after admission the condition was violated by a legislative enactment removing the Capital to Oklahoma City. In upholding the right of the State to make the removal, the Supreme Court, speaking through Justice Lurton, declared that the power of Congress "is not to admit organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is the power to admit States; the definition of State is found in the powers possessed by the original States which adopted the Constitution."[5] Had the principle of the Missouri Compromise been in some such manner circumvented by a State admitted on a pledge of no slavery, an anti-slavery Congress thereafter would have been exceedingly wary of admitting a State regarded by it as a suspect and such a Congressional attitude, very possibly, might have led to revolutionary agitation for Free States in a political connotation of the words.

The organization and rapid settlement of the Northwest Territory proved of social as well as political significance. The immigration came largely from New England, New Jersey and Virginia and the pioneers for the most part were sturdy, land-hungry young men who quickly made this new country their own. Former state ties and loyalties had been severed and, politically, the settlers became wards of the federal government to which they looked for protection against the Indian and from which they received the grant or patent to their land. Inevitably, there was nurtured in the pioneer and his descendants a strong sense of nationalism and thus in '61 it was not abolition sentiment, but an instinctive impulse to sustain the government at Washington, that sent the youth of the old Northwest Territory into the Northern Army. There was, perhaps, a more immediate implication in the Confederation's proprietorship of lands beyond the Ohio. The fact that title now vested in Congress and that Congress was the only agency to govern the territory, must have proved a controlling consideration in the sustained effort to keep the Confederation alive and the Congress in session. What with the war ended, the army disbanded, the treasury empty, and credit exhausted, there would seem to have been little purpose or reason—other than the common interest in a common domain—for the States longer to maintain representation at Philadelphia or to respond to pleas for contributions to a federal working fund. More than one of them, in fact, had already ceased to do so.

The historian, John Fiske, is best remembered for having called the post-war years of the 1780's "the critical period" of American history. They were truly the cradle years of our indigenous system of duality

[5] Coyle v. Oklahoma, 221 U. S. 559, 31 Sup. Ct. 682, 55 L. ed. 851 (1910).

in government. Little more than a month after final ratification of the Articles of Confederation, Madison proposed that they be amended to give Congress "authority to employ force by land or sea to compel any delinquent state to fulfill its federal obligations" and in 1783 Washington wrote in identic letters to the governors of the states: "There should be lodged somewhere a supreme authority to regulate the general concerns of the Confederated Republic, without which this Union cannot be of long duration." It so happened that a dispute over navigation of the Potomac River which brought commissioners from Maryland and Virginia into conference at Alexandria in 1785 led on to a convention the next year at Annapolis where delegates from New York, Pennsylvania and New Jersey were also in attendance. The avowed purpose of the convention was to consider the trade and commercial interests of the United States as a whole, but the outcome of its deliberations was a formal request to Congress to call a general convention for consideration of suggested amendment or revision of the Articles of Confederation. The request, naturally, met approval in the tottering Congress; a call was issued and the legislatures of all the States, save Rhode Island, responded by appointing delegates to meet at Philadelphia in May, 1787. John Adams and Thomas Jefferson were abroad serving, respectively, as Minister at London and Paris, Samuel Adams and Patrick Henry were in stout opposition to the project, but except for these four, practically every man of distinction or renown in America had been chosen a delegate to the convention. However, of the total number of sixty-five delegates chosen, ten failed to attend the sessions and sixteen others either withdrew from the convention before its conclusion or failed or refused to sign the Constitution.

In most discussions of the Constitutional Convention stress is placed upon the spirit of compromise shown by the delegates in such matters as equality of State representation in the Senate and the counting of three-fifths of all slaves in the apportionment of representation in the House. The overshadowing feature of the Convention, however, was the revolutionary character of its work and final action. The authority of the delegates extended only to proposal of amendments to the Articles of Confederation which by their terms were unalterable except upon agreement in Congress, "confirmed by the legislature of every State." Almost at the outset, however, the delegates put the Articles aside and in strictly secret sessions, on their own initiative, proceeded to draft the instrument, styled the Constitution, which spoke in the name of the people of the United States and concluded with the stipulation that ratification by conventions in nine States "shall be sufficient for the establishment of this Constitution between the States so rati-

fying the same." Gerry of Massachusetts in characterizing the Conventions's action as usurpation, declared that "not one legislature in the United States had the most distant idea when they appointed members for a convention, chiefly commercial, that they would without any warrant from their constituents presume on so bold or daring a stride," and in the Virginia ratifying convention Patrick Henry wanted to know who had authorized these delegates at Philadelphia, holding commissions from their several states, to speak in the name of the people of the United States. "Why this fundamental change," he demanded. "Even from that illustrious man who saved us by his valour, I would have a reason for his conduct."

The reason demanded by Henry would have been found in what may have been the revolutionary but was certainly the very realistic statesmanship of the delegates at Philadelphia. No revision of the Articles could have changed the essential character of the Confederation. It would have remained a league of States pledged to more or less limited cooperation through the agency of a Congress in which each had one vote—any act of Congress still fundamentally the joint act of the States which alone were sovereign. No amendment of the compact would be valid unless by consent of all the States and it was inconceivable that all would ever agree to abrogate the stipulation in the Articles that "Each State retains its sovereignty, freedom and independence." It was also highly unlikely that all would ever join in a grant of power to Congress to lay and levy taxes within their borders, yet without such power Congress would remain a financial supplicant. Conditions called for a *coup d'état* and the delegates forged an implement for its accomplishments. Revolutionary in character was the stipulation that the Constitution could be implemented by ratification of conventions in nine States. However, a vote of that number would have sufficed for Congressional approval and the delegates, who were not lacking in political acumen, naturally realized the unlikelihood of approval by all the States. As it turned out, North Carolina did not ratify until six months after Washington's inauguration and Rhode Island, which had ignored the Convention, refused to relinquish its lone independence until May, 1790, and then only under threat of being treated as a foreign nation under the terms of the federal tariff act. Notable was the provision for submission of the proposed Constitution to conventions rather than to legislatures of the States. But here again, the delegates probably calculated the chances of ratification and figured them better in conventions than in the more politically minded legislatures, sensitive always to reactions in their constituencies. Similar considerations doubtless prompted Congress in 1933 to submit the repeal of the 18th Amendment to conventions instead of legislatures as had been the unvarying practice from

the beginning of the government. As it turned out in Virginia, the Legislature promptly manifested its disapproval of the State's ratification of the Constitution by appealing to Congress for an immediate call of a second convention in Philalelphia to modify the work of the first. Finally, the omission from the Constitution of a pronouncement of indissolubility is noteworthy. Such pronouncement scarcely would have enhanced the prospects of ratification; it would have been futile, and, at best, would have fitted awkwardly into an instrument which proposed the dissolution, on the action of any nine States, of the existing compact which had been declared unalterable except by consent of all.

On the seventeenth of September, 1787, nearly all of the delegates who had stayed on throughout the Convention signed the Constitution in behalf of their respectives States (Washington signing as President of the Convention "and deputy from Virginia"). The instrument was submitted to Congress and by Congress transmitted to the legislatures of the States for action by conventions to be elected by the people therein. Following the lead of Delaware, whose convention met and gave unanimous approval early in December, most of the smaller States promptly, and with little controversy, ratified the Constitution. On all sides, however, it was realized that the fate of the project must be determined in the dominant States of Massachusetts, New York, Pennsylvania and Virginia. In his *Life of John Marshall,* the late Senator Beveridge gives a carefully documented and very graphic account of the political battles for ratification in those States. The popular reaction to the new plan of government, naturally enough, was unfavorable; the people had but recently thrown off one super-government and were not keen for replacing it with another. The mild governments of their own States seemed quite sufficient to most persons and many of them, as Richard Henry Lee wrote Madison, "would oppose any system, were it sent from heaven, which tends to confirm the union of the States." Probably having in mind the recent Shays uprising in Massachusetts, Washington saw in the Constitution "the only alternative to anarchy," while Patrick Henry looked "upon that paper as the most fatal plan that could possibly be conceived to enslave a free people." The cleavage in public opinion was as much along economic as political lines—Beveridge, for instance, drawing this picture: "In one camp the uninformed and credulous, those who owed debts and abhorred government, with a sprinkling among them of educated and well-meaning men who were philosophic apostles of theoretical liberty; and in the other camp men of property and lovers of order, the trading and money interests whose first thought was business; with here and there a prophetic and constructive mind who sought to build a nation."[6]

[6] BEVERIDGE, THE LIFE OF JOHN MARSHALL (1916), Vol. I, p. 317.

The "men of property and lovers of order," however, were by far the better organized and they constituted an effective minority—politically alert and trained and presumably well supplied with the sinews of political war.

High-handed methods, it was charged, were resorted to in Pennsylvania to secure ratification. Before an official copy of the Constitution had yet reached it, the Legislature rushed through a resolution calling for election of delegates to a ratifying convention which was to meet within a few weeks—opponents who sought by absence to break a quorum having been "dragged through the streets to the State House and thrust into the assembly chamber with clothes torn and faces white with rage."[7] Due to this device in timing, it was claimed, ratification was secured in Pennsylvania by a convention that represented less than one-tenth of the voting population, and the event was marked by rioting and burnings. In Massachusetts, physical violence was avoided, although Levi Lincoln noted "many Shays insurgents in the convention." Madison, present as an observer, reported back to Virginia that "all men of abilities, property and influence" strongly supported the Constitution and that "scarce a man of respectability could be found among the opposition."[8] One such man was Gov. John Hancock who remained strong in opposition until near the close of the convention when he was won over by an agreement that certain amendments advocated by him would be incorporated into the certificate of ratification to be forwarded to Congress. Rufus King, after the event, intimated to a correspondent that Hancock's conversion was not uninfluenced by assurances from responsible sources that Hancock "would be considered the only fair candidate for President if Virginia does not unite, which is problematical."[9] The Constitution was ratified by a majority of only 21 votes in a convention of 355 members. In New York the commercial and financial interests were not active in support of a proposed government that might impinge upon the State's supremacy in trade and commerce and would definitely cut off a source of State revenue by taking over the collection of duties at its great port. All of the New York delegates, except Hamilton, had withdrawn from the Philadelphia Convention at an early date. However, after a sharp contest, in which Hamilton was most active, the convention ratified by the very close vote of 30 to 27.

The Virginia Convention which met on June 3, 1788, and was stenographically reported by Elliott, became notable for the high stand-

[7] McMaster and Stone, Pennsylvania and the Federal Constitution (1888), pp. 4, 459.
[8] Hunt, The Writings of James Madison (1910), Vol. V, pp. 101, 109.
[9] King, Life and Correspondence (1894), Vol. I, p. 319.

ard of its discussions and the distinction of so many of its members. It preceded the New York Convention and the influence of its action on the New York gathering was probably decisive. Patrick Henry insisted that three-fourths of the State's inhabitants were opposed to the new plan of government and the fact is certain that not more than a small minority were active in its support. At the popular elections, however, many delegates to the Convention were chosen because of personal worth or distinction without close scrutiny of their views or demands from them of pledges. Henrico County, the site of Richmond, was strongly anti-federalist, yet it placed on its delegation the Governor, Edmund Randolph, and the rising young lawyer, John Marshall, both of whom supported the Constitution in the Convention. Then, too, many delegates, especially from the far country, had not seen a copy of the Constitution until reaching Richmond and many of them must have entered the Convention with minds open to persuasion. Washington's ardent advocacy of the project could not have been without great influence, especially with the many veterans of his army within the State. The Convention remained in session throughout the greater part of June. Chancellor Edmund Pendleton was chosen President and the gentle George Wythe was made Chairman of the Committee of the Whole in which were held the chief debates. Madison who spoke with authority for Washington assumed floor leadership of the proponents and Patrick Henry thundered for the opposition. With Henry stood George Mason who as a delegate at Philadelphia had refused to sign the Constitution. It was on Mason's motion that the Convention resolved to discuss the Constitution "clause by clause"—a tactic that proved of no special advantage to the opposition, for seperate debate of separate parts of the instrument tended, if anything, to dissipate the ominous impression of the whole.

On the third day of the sessions the Convention went into Committee of the Whole for clause by clause discussion, with Wythe in the chair. Patrick Henry then hurled what might have proved a bombshell. He rose and moved the reading of the legislative acts pursuant to which the Convention had assembled in Philadelphia—insisting that these would show that the proceedings of the Convention were illegal and that the plan proposed by it was, therefore, a "creature of usurped power." Before Henry could speak to his motion, Pendleton secured the floor. "Whether the federal Convention had exceeded their powers," he pronounced, "ought not to influence our deliberation." Regardless of the legality of the proceedings at Philadelphia he pointed out, the instrument before the Committee had been submitted by the Legislature of Virginia to the people of the State who had freely chosen a Convention to pass upon it; clearly it was within the power of that

Convention to do so. The Chancellor of Virginia had spoken. Henry withdrew his motion and the Committee of the Whole proceeded to debate the issue.[10] Naturally, the resolution to limit discussion to one clause at a time frequently was departed from and the debate took a wide range and at times assumed a lofty character. On June 25, 1788, by a vote of 90 to 78, the Constitution was ratified. New York followed apace. With eleven States now committed, the bloodless revolution became a *fait accompli;* Congress named the first Monday of March, 1789 as the date of inauguration and, perhaps to disassociate the new Congress from the old, designated the City of New York as the temporary Capital of the new Republic.

[10] ELLIOTT, DEBATES (1836), Vol. III.