

**THE INVENTION OF AMERICAN CONSTITUTIONALISM:  
SOME PROCEDURAL REFLECTIONS**

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Writing about the origins of the federal Constitution of 1787 is an easy topic, and Americans seem to do it with alarming frequency. The past few years, for example, have brought forth three reasonably serious books on the writing of the Constitution, two by academic historians and one by a prominent Washington lawyer. Most of these books necessarily track the notes of debate kept by James Madison, with some aid from other sources, and necessarily regress toward some kind of narrative mean; but the challenge of telling the story anew keeps luring authors back to the trade. These books repeatedly draw us back to certain stock themes: the quarrel between large and small states, the morally distasteful decisions over slavery, the difficulty of creating a republican executive who would be neither a monarch, nor a chief minister, nor a tyrant-in-waiting. We hear inevitably about the problem of federalism, and the difficulty of reducing the member states to a condition where they would enjoy something less than sovereign independence while affirming their underlying autonomy.

The task of writing about the origins of American *constitutionalism* poses greater challenges. The adoption of the written constitution in 1787-1788 was arguably its supreme defining moment in this process. Yet the conventions, innovations, and traditions that made American constitutionalism a possibility cannot be reduced to the best speeches of the leading political actors of that immediate period and the decisions they took. In a conference meant to encourage us to think in hemispheric terms, or to imagine how the American innovations fit into the era of the modern democratic revolutions across the Atlantic, it might be more helpful to think about the process as well as the substance of constitution-making. We would want to ask, that is, how the basic American idea of a constitution took hold in the Revolutionary context, and how Americans in 1787-1788 were able to complete the wholly novel task of producing a set of decisions that were clean and unambiguous, and which allowed their descendants to argue over the meaning of the Constitution without impugning the decisions that made its adoption possible.

To do this successfully, we need to identify and describe four moments or passages of American constitutionalism, beginning (1) with the pre-Revolutionary controversy with Britain, and then moving on (2) to the development of state-based constitution-making concurrent with the movement for independence (1776-1780); (3) the reconsideration of those decisions that dominated the politics of federal constitution-making in 1787-1789; and finally, (4) concluding briefly with the interpretive innovations of the 1790s.

(1) **The Imperial Controversy:** The political controversies that led to American independence in 1776 were, first and foremost, a struggle between two rival yet equally valid views of colonial rights within the British empire. The central British position was that Americans were bound, in the final analysis, to defer to the legislative decisions of Parliament, the sovereign source of law both within Britain and its colonial territories. The operative phrase here was that the colonists were bound to obey Parliament “in all cases whatsoever” (to quote the Declaratory Act of 1766). The contrasting American position originated in a basic claim about representation. Colonists were only obliged to obey laws enacted by legislative assemblies in

which they were directly represented. If they were to adhere to Parliament's judgments on imperial matters, their consent had somehow to be freely obtained. Both positions drew deeply on common traditions of governance: the British by appealing to the legacy of the Glorious Revolution, the Americans by evoking principles of representation and consent. Without a written constitution to help resort this dispute, or an independent institution to rule on the competing claims, the emergence of these ultimately irreconcilable constitutional positions was a formula for political disaster—but only if the sides chose to push their claims to their logical extent.

That disaster broke in 1774, when Parliament punished Massachusetts for the Boston Tea Party with a set of punitive acts that demonstrated that “all cases whatsoever” was not an empty theoretical claim but a legitimate basis for sweeping legislation. When the colonies met at the First Continental Congress (September-October 1774), they adopted a set of positions that effectively required the British to retreat from the principle of parliamentary supremacy. That was a request no imperial government could accept, and from this point on, the American movement for independence was more a matter of timing and politics than anything else.

The crucial fact about this controversy was that it was essentially unsolvable within the constraints of Anglo-American constitutionalism. Both sides clung to positions that were deeply entrenched within the governing principles and practices of a common constitutional tradition, one adhering to the doctrine of parliamentary sovereignty, the other to the hallowed maxim that a people could be governed only by laws made with their own properly given consent. Both positions were wholly convincing to their advocates (though the colonists had to struggle a bit to explain how and why they would accept Parliament's jurisdiction over imperial commerce), and neither could be easily modified, much less abandoned. This constitutional impasse was not, by itself, a sufficient condition for revolution, because both sides had political calculations to make as well. But it illustrated the peculiar dimensions of imperial constitutionalism.

**(2) State-based Constitution-making:** The second, most innovative phase of the revolutionary development of American constitution-making began in the months just before independence, as individual colonies sought to replace the extra-legal apparatus of committees and conventions that had governed most of the country since 1774 with legal governments. These governments would have to take a different form from the existing colonial charters, for the simple reason that the executive branch (which subsumed the judiciary as well) depended directly on the authority of the crown (or the proprietors of Pennsylvania, Delaware, and Maryland). And, of course, there were other aspirations for governance that the colonists naturally wished to pursue, now that they were emerging from royal supervision. As John Adams aptly put it in his influential pamphlet, *Thoughts on Government*, “You and I, my dear Friend, have been sent into life, at a time when the greatest law-givers of antiquity would have wished to have lived.” That sense of innovation offers remarkable evidence of the self-confidence that marked the adoption of the first constitutions.

As Adams also argued, and his pamphlet was meant to show, the only forms of government that Americans could rightly adopt also had to be republican. Explaining what republicanism meant to Americans has been a major enterprise of historical scholarship for the past four decades, and needs no further elaboration here. What does need emphasis, however, is

another, closely related, yet distinct question: What did Americans mean when they spoke of constitutions? Were these documents to be regarded as supreme fundamental law, the highest source of legal authority within the new commonwealths? Or might they better be classified as super-statutes: legal texts endowed with superior authority, perhaps, yet ultimately no different from other statutes that always remained open to legislative revision?

Some American writings from 1776 do indicate that a few colonists were moving toward the advanced higher-law position. Most Americans clearly understood that a written constitution adopted at a fixed moment of time would mark a radical departure from the British tradition, in which a set of practices, understandings, and authoritative legal texts defined the nature of the constitution at any given moment. Yet if that new understanding was something Americans were beginning to explore, it was not yet fully formulated or fixed, and controversy over the nature of the documents they adopted continued to percolate. Two facts were critical. First, the constitutions had been framed by provincial conventions that were themselves surrogate legislatures, and which simultaneously had to do the other business of a law-making kind that the Revolutionary conflict required. If that was true, it followed that the constitutions, whatever they were called, remained legislative texts in nature, and hence could not be wholly (or perhaps even partially) binding on later legislatures. Second, there were no procedures for popular ratification of the completed texts. The most authority the people could exercise was to elect new delegates to the provincial conventions, with the effective understanding that these bodies would include constitution-making among their tasks.

The movement away from these initial conceptions began only after the first constitutions were approved in 1776. Massachusetts was the key locus of action, but the notion that the early constitutions were defective evolved elsewhere (among other places, in a key passage of Thomas Jefferson's *Notes on the State of Virginia*). In Massachusetts the efforts of the state legislature (known as the General Court) to establish a new constitution under its own authority elicited protests from a number of towns, starting with a famous set of resolutions approved in Concord, site of the opening battle of the Revolutionary War, in October 1776. As the legislature pursued this question, popular opposition to its taking a direct role in constitution-making mounted. By 1779 the General Court agreed another course had to be taken. It called for the election of a special convention whose business would be limited to constitution-making alone; and the constitution would then be submitted to the individual towns for their approval. Much of the drafting of this constitution was done by John Adams, briefly home from Europe in 1779; and the efforts of the towns to debate the constitution were muddled by the failure of the convention to specify exactly how the towns were meant to record their responses. But in the end, the constitution was declared ratified, and more important, Massachusetts had resolved its uncertainties about how to proceed by producing an effective means of distinguishing a constitution from ordinary legislation and providing an effective mechanism for popular ratification.

**(3) The Federal Reappraisal:** The precedent set in Massachusetts also provided critical support for the grander project of federal constitutional revision that got under way in 1787. Under the Articles of Confederation (proposed to the states in 1777, finally ratified in 1781) amendments required a nine-state approval by the unicameral Continental Congress and then unanimous ratification by all thirteen state legislatures. None of the amendments proposed to the

Articles after 1781 overcame the second obstacle, and as a result, the architects of constitutional reform, led by James Madison, began considering alternative means of proceeding. The idea of calling an independent constitutional convention, as proposed by the Annapolis Conference of September 1786, was the first innovation, but others followed. Because at least one state, Rhode Island, refused to attend the 1787 meeting in Philadelphia, it seemed improbable that it would ever ratify any set of proposition that convention proposed. That pointed the way toward abandoning the unanimity rule of state approval, and once one rule was abandoned, others became vulnerable as well. Rather than submit its proposals to the legislatures, as the Confederation required, the Convention required them to be submitted to popularly elected ratification conventions in the states, with nine required for approval.

Scholars still debate whether the Convention acted legally in this way, but that debate seems pointless. Twelve of the thirteen legislatures followed the Convention's suggestion, enacting election laws for the conventions. The thirteenth, holdout Rhode Island, went the Convention one better, submitting the Constitution to a popular referendum, where it was soundly defeated.

This entire process was remarkable in at least three respects. First, it took the precedent originally set in Massachusetts, and transformed it into a satisfactory basis for adopting a national constitution. Second, the high level of agreement with which the states responded to the Convention's procedural proposals indicates a striking level of agreement across the country about the proper means of constitutional reform. Opponents of the Constitution felt free to criticize the Federalists' behavior on numerous grounds, yet in the end, from any comparative perspective, the American experiment in adopting a national constitution making radical changes from the existing Confederation, within a space of roughly fifteen months, remains an impressive achievement.

That achievement was more impressive, in the third place, because once assembled, the conventions could have followed a far more radical path. As the sovereign voice of a sovereign people, they might have opted to alter the procedures under which they acted, not only by devising rules of debate, but by determining the form their acts of ratification would take. They could, in theory, have ratified the Constitution in parts, or insisted that some parts be revised first, before a final approval was given. Instead, Federalists argued successfully that the Constitution had to be voted up or down in its entirety; amendments could be proposed for subsequent discussion, but no decision of a contingent or deferred nature would be allowed. The Constitution's Anti-Federalist opponents are regularly given credit for insisting that some amendments be made, and the Federalists praised, a bit more grudgingly, for acceding to that request. But the greater attainment of the Federalists was to insist that the essential decision of the states be clear and unequivocal.

**(4) The Invention of Interpretation:** These factors acquire additional importance when we consider one last fact about the Constitution. Within months of its taking effect, Americans began dividing over its meaning, developing new and disparate theories of interpretation that we still deploy and refine, with no end in sight. Starting with the famous dispute over the authority of Congress to charter a national bank, and culminating in the controversies over freedom of speech and press in after 1798, Americans developed an impressive array of techniques for

interpreting the constitutional text. The accompanying disputes proved quite bitter, and are generally compared by scholars to the equally sharp, and more terrifying, quarrels of the 1850s. Yet as Americans learned how to take this interpretive turn, controversies over the meaning of constitutional clauses never evolved into disputes over the legitimacy of the Constitution itself. Interpretive diversity became, in a sense, a tribute to the underlying stability of the original document and the procedures that endowed it with its stature as “the supreme law of the land.”

There is an obvious conclusion to be drawn from the developments so briefly sketched here. Beyond all the substantive aspects of the Constitution that continue to generate so much commentary (and controversy), the development of an underlying doctrine of constitutionalism, as expressed in the procedures used to draft, ratify, and define its authority, remain quite an impressive feat in their own right—all the more so because there were no national precedents that Americans could readily emulate. When we compare this aspect of the larger constitutional experience with the experience of other states, whether in revolutionary transitions or other forms of political transformation, it remains an object worthy of study and respect.