

Chapter Two



FEDERALISM VS. NATIONALISM AT THE PHILADELPHIA CONVENTION

While the Revolution absorbed much of the attention of the Continental Congresses, and later the Confederation Congress, other issues demanded attention as well during the 1770s and 1780s. Among those was the pressing need to provide some type of governance for the larger colonies' western lands.

The boundary of English settlement at the end of the French and Indian War in 1763 was, essentially, the peaks of the Appalachian Mountains. In fact, King George III issued a proclamation that year banning his subjects from settling beyond those peaks. He did not want further difficulties with the Indians who had sided with the French during the war.

For many wealthy colonists, this royal decree came as a great shock. From John Hancock in Massachusetts to Ben Franklin and the Morrises in the middle states, from George Washington, Thomas Jefferson, Patrick Henry, and George Mason in Virginia to the Laurenses in South Carolina, many wealthy people owned land claims beyond the Appalachians. And the king had made those claims worthless.

Thus one of the first things the elite class did upon independence was resuscitate its land titles—or at least, its purported land titles. As it turned out, the colonies' inland claims often overlapped, and so did the titles the great men thought they owned.

Guess what?

- ✍ In the Treaty of Paris ending the Revolution, King George III recognized the independence not of a single American nation, but of *thirteen* "states" (eighteenth-century-speak for "nations").
- ✍ The delegates rejected attempts by monarchists and nationalists in the Philadelphia Convention of 1787 to create a national (rather than a federal) government.

So far as Virginia was concerned, what we now call the Midwest belonged to it. In fact, colonial Virginia included not just today's Virginia, but also West Virginia, Kentucky, Ohio, Michigan, Indiana, Illinois, Wisconsin, and part of Minnesota. Augusta County, the western county that took in that vast expanse, was the biggest county in history.

When Congress sent the Articles of Confederation to the states for their ratification in 1777, twelve ratified. But Maryland held out. Why? Marylanders said that they would never agree to join in a permanent confederation with Virginia so long as it maintained its enormous western land claims.

Congress periodically attempted to resolve the title disputes and the boundary issues. However, Virginia congressmen, including George Mason, James Madison, and James Monroe, responded that there was nothing in the Articles of Confederation giving Congress authority to say anything about anyone's land titles in Virginia—or about the extent of Virginia's western claims. That being the case, they said, they would not even discuss the matter in Congress.

Once again, the history of the Revolution demonstrates that the revolutionaries understood their states to be sovereign, their “nations” to be . . . their states. If America as a whole had been a nation, and if the Confederation Congress had been a national legislature, such questions should have been resolved by a majority vote. But sovereignty lay in the states. That was the first principle of American government.

A constitution for the “United States”

Even before the Articles finally went into effect in 1781, numerous figures in politics and the military were agitating for a further strengthening of the federal center. These people took the name “Federalists.” Their efforts ultimately resulted in adoption of the federal Constitution of 1788.

Why did the Federalists want a strengthened federation? Mostly because they thought the Revolutionary War had exposed the shortcomings of the Continental and Confederation Congresses. The Continental Army and the various state military units seemed perpetually short of men, money, and supplies. The Federalists leapt to the (false) conclusion that if the thirteen newborn states had had a difficult time in obtaining credit from European monarchies and bankers to fight a war against the greatest power in the world, it must have been because the Articles of Confederation were inadequate!

The Federalists invented a litany of complaints about the state and federal governments of the revolutionary decade. They are familiar to students of history today, because historians—who tend almost unanimously to side with the Federalists in this dispute—have been echoing them ever since.

If states were slow to pay their requisitions, then, it must have been because they were selfish and unpatriotic. Federalists claimed that only a stronger government could solve the “problem” of a government that just barely had enough money and coercive power to do what it was intended to do and did not have the resources to do much of anything else. (What a wonderful problem!)

But the Federalist version leaves out some important facts. For instance, the total amount of voluntary state contributions supposedly owed to the Confederation by the states in 1788 exceeded the amount of gold and silver (that is, money) in the entire United States! And political scientist Keith L. Dougherty has demonstrated that the states actually contributed more to the war effort than any rational choice model would predict.



A Book You're Not Supposed to Read

Collective Action under the Articles of Confederation by Keith L. Dougherty; New York: Cambridge University Press, 2001.

Federalists in the Continental and Confederation Congresses repeatedly attempted to get the states to cede more power to Congress. In each case, they were unsuccessful: Americans from New Hampshire to Georgia simply refused. They did not want to trade one distant, unaccountable authority in the British Parliament for another in a more powerful American Congress. Especially heroic on this score was little Rhode Island, which refused to ratify a tariff amendment when all twelve other states did. Virginia responded by repealing its ratification, and for Federalists, that was the last straw.

The campaign for a stronger federal government grew—even when King George III admitted defeat. But he admitted defeat to the “sovereign and independent states.” As Article I of the Treaty of Paris put it, “His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign and independent States; that he treats with them as such, and for himself, his heirs and successors, relinquishes all claims to the Government, propriety and territorial rights of the same, and every part thereof.” Note that King George was required by the terms of the treaty not to admit that “America” was independent or that “the United States” was independent, but that the thirteen named states were independent.

Interestingly, in Article V, the American commissioners undertook on behalf of Congress to implore the states to restore confiscated rights and property to Loyalists. This provision, which never bore the fruit the British hoped for, recognized the constitutional situation of the American states—independent not only of Great Britain, but also of each other. Article VII said that there would be a “perpetual” peace between Great Britain and the United States—which meant that the treaty did not have a fixed expiration date.

Reforming the Confederation

In 1785, the states of Maryland and Virginia appointed delegates to a conference to meet at George Washington's home, Mount Vernon, on the Potomac River. Their task was to negotiate an arrangement for sharing the river—establishing each state's navigation and taxing rights. The conference failed—Virginia's delegates didn't show—but a new meeting was set for the following year at Annapolis. This time, the goal was a reform of the Confederation.

When only five states sent delegates to the Annapolis Convention of 1786, leading figures like Alexander Hamilton of New York and James Madison of Virginia called for a new convention to take place the following summer in Philadelphia.

Why would a new convention meet in 1787? The Federalists told the state governments that its purpose would be to propose amendments to the Articles of Confederation. Rhode Island, which had no interest in

Portrait of a Patriot

Alexander Hamilton (1757–1804), a native of Nevis, was among the most significant figures in American constitutional history. His monarchist musings in the Philadelphia Convention (in which he represented New York) did not have much effect on the shape of the Constitution. In support of ratification, he organized the series of newspaper essays that ultimately came to be known as *The Federalist*, which formed the nub of the Federalist case in New York, writing more than half the essays. In time, the series would form the backbone of nationalist interpretation of the Constitution. As secretary of the treasury under Washington, Hamilton enunciated the clearest argument ever made for a liberal (loose) construction of the Constitution. He was killed by a political enemy, Vice President Aaron Burr, in an 1804 duel.¹



strengthening the Confederation, did not send a delegation. New York, where Governor George Clinton and the majority of the legislature were skeptical of the Federalists, sent a moderately pro-reform three-man delegation. (Nationalist Alexander Hamilton received an appointment, but his friend and political ally John Jay missed out.)

In Virginia, which agreed to send a delegation to help propose amendments, Richard Henry Lee and Patrick Henry—long the dominant voices in the all-powerful General Assembly—stayed home. Lee confided that

he did not think the convention likely to do work he approved; Henry, more prone to offer up a memorable line, later said he “smelt a rat.”

Why? There was a little history behind it.

Congress had been receptive, in 1785–1786, when John Jay assured it that he could negotiate an agreement with Spain that would grant the states valuable trade concessions in the Caribbean. All he needed to offer in return, he said, was an American commit-

ment to forgo use of the Mississippi River (which then belonged to Spain) for twenty-five years. Under the Articles of Confederation, nine states needed to agree to any treaty, but Congress authorized Jay to negotiate the agreement anyway, despite the objections of the five southern states.

According to James Madison, this move by Congress converted Patrick Henry from “the Champion of the federal cause” to a lukewarm advocate at best. If Mississippi navigation rights were actually surrendered, Madison said, Henry would become an outright opponent.

The year 1787 also saw the Confederation Congress adopt its most significant legislative initiative, the Northwest Ordinance. In that law, Congress provided that states could be carved out of Virginia’s former trans–Ohio River territory (what we now call the Midwest). Among other



Legal Latinisms

Senate: from the Latin *senatus*, the great national council of the Roman people. The federal government and most of the states have legislative bodies so named.²

things, it said in Section 13 that once they had been organized, the new states would be admitted to the Union on an equal footing with the original states. The federal principle—the principle of state equality—would guide their incorporation into the United States.

A vision of national government: The Virginia Plan

James Madison spent several months researching the history of confederations before the Philadelphia Convention met. He found much to encourage his desire for a stronger federation. He decided, in fact, to push for the abandonment of America's federal experiment.

Madison, a veteran of many legislative battles in Virginia and in Congress, encouraged his fellow Virginia delegates—Governor Edmund Randolph, George Washington, and George Mason among them—to arrive in Philadelphia several days early. If the Old Dominion presented its plan at the beginning of the convention, he thought, that blueprint would guide the convention's deliberations.

Thus, when the Philadelphia Convention opened, its first acts were to install George Washington as president of the convention, to vote to close the doors so that the public would not know what was being discussed, and to take up the constitutional proposals on which the Virginians had agreed. Those provisions came to be called the Virginia Plan.

The Virginia Plan was the outline of a national government. It would have substituted a central government with all the power national officials could want for the federal government of the Confederation. This was a type of government to which the people were known to be averse—which explains why the Philadelphia Convention operated in secret, and why its minutes, like James Madison's famous notes, were kept secret for decades after the event.

Fortunately for us, there were delegates to the Convention who kept notes of what was said up to the point of their departure. Most notable

are those of New York delegate Robert Yates, one-time chief justice of the Empire State. He tells us that Virginia's governor, Edmund Randolph, explained the Virginia proposals' rationale with three resolutions:

1. Resolved, That a union of the States merely federal, will not accomplish the objects proposed by the articles of the confederation, namely, common defence, security of liberty, and general welfare. 2. Resolved, That no treaty or treaties among any of the States as sovereign, will accomplish or secure their common defence, liberty, or welfare. 3. Resolved, That a national government ought to be established, consisting of a supreme judicial, legislative, and executive.

As Yates explains matters, another delegate objected at that point that the goal of the Convention was to propose amendments to the Confederation, not to create a national government. If it adopted the first two resolutions, then, the Convention would be at an end. When asked what the third resolution meant by the word "supreme," the answer was that the states should yield when they conflicted with the federal government. Six states voted for that resolution, which was thus temporarily adopted. Over the following days, the Convention adopted resolutions about a "national" legislature and a "national" executive. The limit of the Convention's nationalism in its early days was reached when James Wilson of Pennsylvania proposed multi-state districts for the Senate and the Convention rejected his proposal.

Monarchists and nationalists and federalists—oh my!

It may be useful to note at this point that there were three parties in the Convention. The first was a monarchist party, the chief exemplar of which was New York's Alexander Hamilton. The monarchists were intent on wiping the states from the map and substituting one unitary govern-

Portrait of a Patriot

George Mason (1725–1792) was one of the towering figures in American constitutional history. His Virginia Declaration of Rights (1776), the first American bill of rights, provided a template—and in many cases language—for the other states', the federal, the French, the UN, and numerous other bills of rights. Mason played an extremely significant role in the Philadelphia Convention that wrote the Constitution, including helping to defeat efforts to draft a national—in lieu of a federal—constitution and insisting that the assent of nine states be required for ratification. He also proposed that the House of Representatives initiate all money bills, that Congress be able to ban slave importation, that export taxes be banned, that lawmakers not be able to hop into plush positions in other branches, and that the House resolve electoral college deadlocks. Mason played a key role in devising the procedure for overriding presidential vetoes, and his refusal to sign the Constitution, coupled with his resounding insistence that it not be ratified until a bill of rights was added, helped spur Federalists to pledge to submit a bill of rights to the states in the first Congress.



ment for the entire continent. In the Convention, Hamilton made a famous speech in which he avowed his admiration for the British constitution and said that while the American people were not prepared to assimilate their government to the British model so closely as he could wish, he owed it to himself to speak frankly. He called for a president with a life term, senators with life terms, and appointment of governors by the president—all in the manner of Great Britain. Hamilton here displayed two of his outstanding characteristics: candor and intellectual brilliance. Many delegates, we are told, thought very highly of Hamilton's learned disquisition, although none joined him in his characteristic near-suicidal frankness.

The second party consisted of nationalists, people who—without ever avowing admiration for the monarchical form—wanted to push

centralization as far as reasonably could be hoped. These people hoped to establish a centralized government largely dominated by their own states. Most prominent among these was Virginia's James Madison, long Hamilton's coadjutor in the Federalist cause, whose work the Virginia Plan chiefly was. In the wake of the Convention, Madison would be greatly dismayed by the discrepancy between what he had wanted and what the Convention had yielded. He repeatedly acted in positions of high public trust over the next four decades to bring the federal regime into consonance with his proposals—even to the extent of arguing that the Constitution meant what the Convention had squarely decided that it should not mean. We will return to the topic of Madison's peculiar role in American constitutional history again and again.

Finally, there was a cohort in the Convention of members insistent on proposing a reinforcement of the central government while maintaining the primary place of the states in the American polity—a truly federal, rather than national, government. They would have their way in the short run. In time, however, “constitutional law” would undo their victory almost completely.

Early in the Convention, the committee of the whole house very narrowly agreed to create a national government with a national executive, a national legislative, and a national judicial branch. It also agreed that the national legislature ought to be empowered to legislate in all cases to which the separate states might be incompetent and all areas in which the harmony of the states might be interrupted by separate state legislation. In addition, it decided that the national legislature should have a veto over state laws it considered contrary to the articles of union. At this early stage in the convention, the committee of the whole also decided that the national judiciary should have power to decide all cases affecting the “national peace and harmony.”

How do we know these things? We can extract them from the record of deliberations provided by two of the delegates, Maryland's Luther

Martin—who first provided the three-party classification of the delegates given above—and New York’s Robert Yates. In addition, we have the journal of the Convention. As the Philadelphia Convention early on decided to create a national government with an overwhelmingly powerful national legislature and a very strong national judiciary, and as by the end of the Convention it had produced a federal constitution without either of those features, we are on firm ground in concluding that the change was no accident.

The Constitution as finally referred to Congress by the Convention featured a federal legislative body, or Congress, without either the sweeping legislative authority or the veto over state laws earlier proposed by the advocates of a national government (and supported, through the summer, by the theoretical monarchists). We know that this decision was a carefully considered one because delegate James Madison of Virginia repeatedly implored the other delegates to restore the congressional veto of state laws, only to see his arguments repeatedly rejected.

Rather than wiping the states off the map, the Convention made their continued existence essential to the selection of members of Congress. First, members of the House of Representatives would be elected by voters eligible to vote for members of the relevant state legislatures. No state, no representatives. And as for senators, they would not be selected by the president (as Hamilton, following the model of the British House of Lords, would have preferred) or by the lower house of Congress (as Madison and the Virginia nationalists proposed), but were to be chosen by the state legislatures.

Madison was very unhappy that the new Congress, like the old ones, would be federal, not national. He confided to Thomas Jefferson on



Legal Latinisms

Veto: Latin for “I forbid.” A refusal by the president or a governor to sign into law a bill that has been passed by a legislature. Unlike the British royal veto, American vetoes can be overridden by supermajority vote.

October 24, 1787, that he feared the ongoing state role in federal policy-making meant that the new government would be too responsive to the people's whims. This new government would be inadequate to nationalist aims, just as the old one had been. (Madison had also broached the idea that Congress should be empowered to sic the U.S. Navy on states that did not comply with national commands. The Convention rejected that idea too.)

There were other provisions displeasing to the monarchist-nationalist coalition as well. Instead of saying "Congress may legislate as it will" or "Congress may legislate in any area to which it considers the states incompetent," the final Constitution carefully hedged congressional power.

In Article I, Section 8 the draft Constitution included a list of congressional powers. Virtually all of them were related to foreign affairs and trade. They were also few and provided little wiggle room for expansion. And in the course of the ratification dispute of 1787–1788, Federalists from north to south promised to take a tightly constricted view of constitutional interpretation.

The judiciary article of the Constitution also lived up to the hopes of the delegates favoring a federal over a national structure. Instead of giving federal courts power to hear any cases Congress wanted them to hear (that is, cases "affecting the national peace and harmony"), as the Hamilton-Madison, monarchist-nationalist coalition had proposed, the Convention restricted federal courts' jurisdiction in two ways. First, the Constitution did not require that there be any federal trial courts at all. In fact, Madison would promise in the ratification debate in Virginia that the new government would try to get along without them. Only if that experiment failed, he said, would federal trial courts be created.

The Constitution also provided a list of the kinds of cases Congress might authorize federal courts to decide—which meant, as lawyers understood things in those days, that Congress could not authorize

Portrait of a Patriot

James Madison (1751–1836) played a major role in assembling the Philadelphia Convention but had a checkered constitutional record thereafter. In the Convention, Madison attempted to create a national, instead of federal, government with military power to attack states that did not comply with federal mandates, a Congress with unlimited legislative powers and a veto on state legislation, and courts with unlimited jurisdiction. He soon knuckled under to Virginian pressure for amendments, but he intentionally provided amendments without serious effect. As a congressman, he enunciated a strict constructionist reading of the Constitution in 1791, but he flip-flopped on congressional authority to charter banks in 1816. His Bonus Bill Veto Message (1817) sounded like the Madison of 1791, as did his criticism of Marshall’s *McCulloch v. Maryland* decision, but his confused response to nullification was both disingenuous and destructive. Madison was as unpredictable an oracle as the Pythia at ancient Delphi.



federal courts to decide any other kinds of cases. Instead of a national judiciary, in other words—one with power to hear any case that came to hand—Article III created a *federal* judiciary and left most judicial power in the state governments.

Not coincidentally, the various contentious issues roiling the American political waters today—flag burning, abortion, state government recognition of religion (say through public prayer), and homosexual marriage—are not among those the federal courts were given power to decide by the federal Constitution written in Philadelphia. Had the Hamilton-Madison axis had its way, the federal courts’ purview would have been greater. But the point is that the Hamilton-Madison axis did not prevail, and the Constitution the people ultimately ratified gives the federal courts no scope to interfere in or rule on these issues. Nor did the Federalists, when they advocated ratifying the Constitution, pretend otherwise.

This might surprise those “educated” in modern “constitutional law.” But it should not surprise anyone familiar with the factors leading to the

American Revolution. After all, the people who advocated, in the 1760s and 1770s, a national authority to bind the states “in all cases whatsoever” were called Tories or monarchists, and they lost.

The Patriots, on the other hand, had argued for home rule, for the right of the individual states to govern themselves through their elected representatives. They had won the Revolution. And then they won in Philadelphia. But, alas, the fight was not over.