

The Federal Constitution

James Madison and his nationalist-minded colleagues knew that they would never be able to get any substantial changes in the federal government through the Confederation Congress. People were proposing amendments to the Articles in the Congress, but they were going nowhere. Sectional tensions stemming from the aborted Spanish treaty made agreement among the congressional delegates impossible. But Madison and his fellow nationalists had already decided to bypass the Congress and use the upcoming convention in Philadelphia to bring about the necessary changes in the federal government. In an attempt to salvage some of its dignity, the Congress in February 1787 belatedly authorized the Convention due to meet in May “for the sole and express purpose of revising the Articles of Confederation.” Little did many members of the Congress know what Madison and his Virginia delegation to the Convention had in mind.¹

Although the Congress may have been uneasy about what was going on, the situation seemed so dire that most Americans, some reluctantly, agreed that this meeting in Philadelphia ought to occur. Most knew that the Articles of Confederation were deficient, and that some amendments had to be added to the league of states. The Articles were practically defunct anyhow. Not a single state was

complying with the requisitions, and no money was being paid into the public treasury. Even the members of the Congress, noted Madison, “agreed that the federal government in its existing shape was inefficient and could not last long.”²

William Findley, a member of the Pennsylvania assembly from the Pittsburgh area and one of the narrow-minded and illiberal promoters of paper money whom Madison deplored, was asked by his state legislature whether he would like to be one of Pennsylvania’s delegates to the Convention in Philadelphia. When told that the state would not pay for his living expenses while he was in Philadelphia, Findley declined the invitation. He didn’t have the kind of wealth that the rich merchant Robert Morris did to support weeks of living at an inn. Consequently, Pennsylvania’s delegation of seven members, including Robert Morris, all came from the city of Philadelphia, and one of them, Gouverneur Morris (no relation), was a New Yorker and not even a citizen of Pennsylvania.

Findley, who later became a fiery opponent of the Constitution, had no idea that the Convention was going to do what it did—scrap the Articles, not amend them, and create an entirely new and powerful government in their place—all in violation of what the Confederation Congress had authorized. John Tyler of Virginia had expected the Convention simply to vote to add to the Articles a necessary power to regulate commerce. “But,” he said when he saw the results, “it had never entered my head we should quit liberty and throw ourselves in the hands of an energetic government.” Others agreed that they had gotten more than they had expected. Had the American people known beforehand what the Convention was up to, “probably no state,” said “The Federal Farmer” (likely Melancton Smith, a New Yorker), the most literate and powerful writer opposing the Constitution, said that had the American people known beforehand what the Convention was up to, “probably no state

would have appointed members to the convention. . . . Probably not one man in ten thousand in the United States . . . had an idea that the old ship was to be destroyed."³

Startling as it was, the Constitution that emerged from the Convention in September 1787 was not the half of it. If those who were surprised at the extraordinary nature of the national government created by the Constitution had known what had actually gone on in the Convention, they would have been even more shocked. The national government that came out of the Convention was much less powerful than many of the delegates had wanted. The Constitution was a compromise; indeed, in the eyes of some of the leading delegates, including James Madison, it was a failure, inadequate to the crisis facing the nation and probably doomed to collapse. Three and a half months of deliberation and debates at Philadelphia had forced concessions and changes and had created something that no one at the outset had anticipated.

Fifty-five delegates representing twelve states attended the Convention in Philadelphia in the summer of 1787, from May 13 to September 18. Although many of the delegates were young men—their average age was forty-two—most were well educated and experienced members of America's political elite.⁴ Thirty-nine had served in the Continental and Confederation Congress at one time or another, eight had worked in the state constitutional conventions, seven had been state governors, and thirty-four were lawyers. One-third were veterans of the Continental Army, that great dissolver of state loyalties, as Washington described it. Nearly all were gentlemen, "natural aristocrats," who took their political superiority for granted as the inevitable consequence of their social and economic position.

The delegates naturally chose Washington as president of the Convention. Some of the leading figures of the Revolution were

not present. Samuel Adams was ill. Thomas Jefferson and John Adams were serving as ministers abroad, and Richard Henry Lee and Patrick Henry, although selected by the Virginia legislature as delegates, refused to attend. "I smelt a Rat," Henry allegedly said.⁵ The most influential delegations were those of Pennsylvania and Virginia, which included Gouverneur Morris and James Wilson of Pennsylvania, and Edmund Randolph, George Mason, and James Madison of Virginia.

It was a loaded convention. Nearly everyone present was a nationalist and suspicious of state-based democracy. When two of the delegates from New York, Robert Yates and John Lansing, who were not nationalists, came to appreciate the direction the Convention was taking, they bailed out and left the New York delegation without a quorum and unable to record a vote. This is why the Convention's letter of September 17, 1787, sending the final Constitution on to the Congress, lists the states present and voting as "New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey," and so on with the listing of the rest of the states.

The Convention was supposed to begin on May 13 but not until May 25 was a quorum of states present and not until May 29 did the Convention get down to serious business. The delegates immediately took extraordinary steps to keep their proceedings secret: no copies of anything in their journal were to be communicated to the outside society, and sentries were even posted to keep out intruders. This sensitivity to the public out-of-doors was new; the state constitutional conventions a decade earlier had never made such decisions concerning secrecy. But since 1776 many members of the elite had discovered that there were emerging popular politicians everywhere eager to pounce on anything that might discredit the established leaders. If the Convention's deliberations were likely to be picked up by "imprudent printers" and conveyed to "the too credulous and

unthinking mobility," then the delegates' freedom to discuss issue openly and candidly would be seriously inhibited. Madison later reportedly declared that "no Constitution would ever have been adopted by the convention if the debates had been public."⁶

The Virginia delegation took the lead and presented the Convention with its first working proposal. This Virginia plan was largely the effort of the thirty-six-year-old Madison, who more than any other person deserves the title "Father of the Constitution." Short, shy, and soft-spoken, he had graduated from the College of New Jersey (Princeton), one of the few southerners to attend that Presbyterian college. He had read some law, but had not trained for any particular profession. He possessed a sharp and questioning mind, and, supported by his father's slaveholding plantation, he had devoted his life to public service. He understood clearly the historical significance of the meeting of the Convention. It is because he decided to make a detailed private record of the Convention debates that we know so much of what was said that summer in Philadelphia.

The Virginia plan, presented by Governor Edmund Randolph, was breathtaking. When Randolph moved at the outset that the Convention commit itself to the proposition "that a national government ought to be established consisting of a supreme legislature, judiciary, and executive," many of the delegates were stunned.⁷ They realized that this Virginia plan involved much more than simply amending the Articles. No mere tinkering with the Articles, no mere expedients, would suffice any longer. Indeed, Madison's ideas of reform embodied in the Virginia plan, as he put it, "strike so deeply at the old Confederation, and lead to such a systematic change, that they scarcely admit of the expedient." Madison wanted to create a general government that would exercise direct power over individuals and be organized as most of the state governments were organized, with a single executive, a bicameral legislature, and

a separate judiciary. He was willing to keep the states in the system, he said, but certainly they could not retain any of their "individual independence." His idea of a "middle ground" was "a due supremacy of the national authority," while leaving "in force the local authorities in so far as they can be useful."⁸ This was a far cry from the federalism of the Articles of Confederation.

According to the Virginia plan, representation in both houses of the legislature would be in proportion to population or to the contribution of taxes or to both. The lower house would be elected directly by the people; the upper house would be elected by the lower house from lists of persons nominated by the states. The national executive, the number of which was not specified, would be chosen by the national legislature for a single term of years. The national judiciary, made up of both superior and inferior courts, was to be chosen by the national legislature. The Virginia plan also provided for a council of revision composed of the executive and a number of the national judiciary with a limited veto power over acts of both the national legislature and the state legislatures.

Since the evils of the 1780s flowed from "the turbulence and follies of democracy" within the states, the new government, said Randolph, was to be "a strong, *consolidated* union, in which the idea of the states should be nearly annihilated."⁹ Thus the Virginia plan gave the national legislature the authority to legislate "in all cases to which the states are incompetent" and the power to veto or "to negative all laws passed by the several States, contravening in the opinion of the National Legislature, the articles of Union." This was not quite what Madison had in mind a month or two earlier. He originally had wanted his congressional negative on state legislation to apply "in all cases whatsoever"—a phrase so frightening, echoing as it did Parliament's Declaratory Act of 1766, that his colleagues had the good sense to drop it in the final Virginia plan.¹⁰

This power to negative all state laws contravening the Union was in addition to the veto power over state laws given to the proposed council of revision. This double veto of state legislation was a measure of Madison's deep revulsion with what the states had been doing in the 1780s. He believed the national legislature's proposed veto authority over state legislation "to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions." It would enable the national government to play the same role the English Crown had been supposed to play in the British Empire—that of a "disinterested & dispassionate umpire" over clashing interests.¹¹ By a vote of six states to one, the Convention agreed at the outset to make the Virginia plan the basis for its opening deliberations.

The delegates found it difficult to agree on any one thing, because agreement on one part of the government would later be unsettled by changes made in another part. Some, for example, were reluctant to agree on an executive of one person or several persons until they knew the extent of authority the executive would be granted. Despite fear of creating an elective monarchy, the Convention eventually agreed on a single executive with power to execute the laws.

But agreement on these sorts of matters could not hide the basic chasm that was opening up as the delegates became aware of the implications of the Virginia plan. The plan seemed to some delegates to be too consolidating, too nationalistic. It tended to swallow up the states and undermine their integrity. While nearly all the delegates at Philadelphia were eager to create a stronger central government, some of them soon came to realize that the Virginia plan went further than they wanted to go.

The issue was first raised on June 9 by William Paterson of New Jersey. He was bothered by the Virginia plan's proposal that both houses of the national legislature be proportionally representative. This, said Paterson, would destroy the sovereignty of each of the

states and place majority power in the hands of the representatives of the large populous states. New Jersey, he warned, would never agree to confederate on these terms. James Wilson of Pennsylvania retorted hotly that the people of his state would never confederate if each state were to have equal representation in the national legislature. Two days later, on June 11, the Convention reaffirmed the principle of proportional representation embodied in the Virginia plan, but the vote for proportional representation for the upper house, which would become the Senate, was close, six states to five.

This vote galvanized the opposition. On June 15 Paterson proposed nine resolutions, which became the New Jersey plan. These were essentially nine amendments to the Articles of Confederation, maintaining the basic structure of the old Confederation with the equal representation of each state in the Congress but granting to the Congress all the powers of taxation and regulating commerce that most leaders in the 1780s had wanted. New Jersey was supported by the delegates from Connecticut, New York, and Delaware. Paterson and most of the other supporters of the New Jersey plan were not opposed to a strong national government, but, as John Dickinson warned Madison, they thought the Virginia plan was "pushing things too far." As much as they wanted "a good National Government," they would never allow the states to be totally swallowed up.¹² With two such different proposals before it, the Convention was at a crisis.

On June 18, in the midst of this debate over the Virginia and New Jersey plans, Alexander Hamilton of New York suddenly rose and made his own personal proposal for a government in a four- to five-hour-long speech. His proposed government was consolidated to the extreme, virtually abolishing the states as independent entities. He wanted an executive and senate elected for life, with the executive to have absolute veto power over all legislation. The

states would remain as administrative units with their governors appointed by the national government. He accompanied his plan with praise of the English constitution and criticism of the Virginia plan.

Although Hamilton's speech has puzzled historians, the timing of it suggests that he probably saw his extreme proposal as a means of making the Virginia plan seem more moderate, as a middle-of-the-road compromise between his plan and the New Jersey plan. He certainly went out of his way to lump the Virginia plan together with the New Jersey plan as inadequate to deal with "the violence and turbulence of democratic government." "The Virginia plan," he said, was "pork still, with little change of sauce."¹³

Maybe it worked, for on June 19 the Convention voted for the Virginia plan against the New Jersey plan, seven states to three, with one divided. This was a crucial vote. It meant that the basic principle of the Articles—equal state sovereignty—was rejected. The new national government was not to be a league of states but a government in its own right. But the struggle over the precise role of the states in this national government was not over. It occupied the Convention in heated debates for a month longer. As Luther Martin of Maryland later recalled, throughout that time the delegates "were on the verge of dissolution, scarce held together by the strength of a hair."¹⁴

Historians have often pictured the debate over representation of states in the national government as one between the small states and the large states. This is misleading. Madison and Wilson, it is true, were delegates from the large, populous states of Virginia and Pennsylvania, but their opposition to equal representation of the states in either branch of the national legislature was not based simply on a parochial concern with the interests of their respective states. Madison and Wilson were more cosmopolitan and far-sighted than that. To them the issue of the debate was whether or not any semblance of the old Confederation would remain in the

new Constitution. Those nationalists who believed that all the ills of the 1780s flowed from the vicious behavior of the state legislatures were worried that any equal representation of the states in the new national legislature would in effect perpetuate the state sovereignty that had vitiated the Confederation. If the Senate should contain equal representation of each state, it would be only a matter of time before the states would overawe and dominate the national government. It was for this reason that nationalists like Madison and Wilson so vehemently opposed equal representation of the states in the Senate; they wanted proportional representation in both houses.

After a month of deliberation, the crucial vote was taken on July 16. The result was the so-called Connecticut compromise, by which each state secured two senators in the upper house, carried by five states to four, with one divided.¹⁵ Madison was beside himself with anger and anguish. He did not regard the states' equal representation in the Senate as a "compromise." For him and the other nationalists it was a defeat, pure and simple. The "Connecticut compromise" allowed the states to get back into the national government after the Virginia plan had banished them. Indeed, the Virginia plan, with its broad grant of powers to the national legislature and its veto over all state laws, depended on keeping the states as states entirely out of the national government. With this "compromise" the sovereignty of the states was once more in play.

The Virginia delegation was in despair, and Randolph proposed that the Convention adjourn temporarily in order to give both sides time to "consider the steps proper to be taken in the present solemn crisis of the business."¹⁶ The next morning, July 17, the Virginia delegates and some other nationalists caucused to decide whether they should pull out of the Convention, but they were divided, and nothing was done. As Madison observed, this was tantamount to accepting the equality of the states in the Senate.

This nationalist defeat had implications for the whole initial Virginia plan. The "Connecticut compromise" forced a series of changes and adjustments: the powers of the legislature had to be clarified, the nature and election of the executive had to be worked out, and the authority of the judiciary needed to be modified.

In place of the broad and indefinite legislative authority granted by the Virginia plan, the Congress was granted a list of specific powers, which became Article I, Section 8, of the final Constitution. And the authority of the legislature to veto all state laws was abandoned, much to Madison's great chagrin. In its stead, the Convention presented a series of prohibitions on the states, which became Article I, Section 10, of the Constitution. The states were forbidden to levy customs duties on imports or exports, to enter into treaties, to coin money, to emit paper money, and to pass bills of attainder, ex post facto laws, or laws impairing contracts.

These prohibitions were serious. Not only were they directed at the principal legislative vices of the 1780s, but they in effect promised to render the states nearly economically incompetent. In that premodern world customs duties were the most common and efficient form of taxation. With the Constitution the states would lose not only this major source of revenue but also the capacity to print paper money and make it legal tender—something that the colonies and later the states had frequently used during the eighteenth century. At a stroke, the Constitution forbade what the British government in its various currency acts had earlier tried to do.

Madison took the loss of the national legislature's negative over all state laws very hard. Without the negative, he told Jefferson in the fall of 1787, the Constitution would not answer its purposes: it would neither solve the national problems of the Confederation "nor prevent the local mischiefs which everywhere excite disgust against the state governments."¹⁷ Madison had little confidence in

the suggestion made by some that the national judiciary might be able to keep the state legislatures within bounds.

Several of the delegates were, indeed, coming to count on the judiciary increasingly to curb democratic excesses. Early on, the Convention had rejected Madison's plan for a joint executive-judicial council of revision with a limited veto power over both national and state legislation. Most of the delegates thought the judges by themselves could set aside unconstitutional laws and ought not to be mixed up in the passing of these laws. Despite the persistent efforts of Madison and other nationalists to revive the council of revision, the decision to have the judiciary stand alone held.

Far more attention was paid to the executive than to the judiciary. Originally the executive, like the state governors, was to have only restricted powers. Though the president (a shrewdly chosen title) was granted limited veto power over acts of Congress and was made commander in chief of the armed forces, the Committee of Detail initially gave to the Senate sole authority to appoint ambassadors and justices of the Supreme Court and to make foreign treaties. But once Madison and the other nationalists realized the implications of state influence in the Senate following the compromise of July 16, they decided to place these powers in the hands of the president, with the Senate's authority reduced to advising and consenting only.

The compromise of July 16 also affected the mode of electing the president. If he were elected by the whole Congress, including a Senate in which the states would have equal representation, it was feared that he might become a captive of state interests. To avoid this and to keep the executive independent of the legislature, some suggested that his election by Congress be for a single seven-year term without the possibility of re-election. But that seemed to be too long a term. Others, like James Wilson, wanted the president

elected directly by the people. (Wilson, in his arrogance, had no objection to the people en masse; it was middling individuals he found contemptible.) But the delegates did not anticipate political parties with tickets and party-selected candidates. They also did not foresee the important role that newspapers would come to play in party politics. After Washington's election, how would the people in such a huge nation know who were the men best qualified to be president? In a direct election by the people, how would someone in Georgia, for example, know who in New Hampshire or Connecticut was a suitable person to be president?

Finally, after much discussion and many votes, the Convention decided to create an alternative Congress composed of notables who would know who was competent to be president; it would have one function: to elect the president every four years. This electoral college seemed to solve all the problems. It guaranteed the president's independence from Congress without limiting the terms of office. And yet, as an exact replica of Congress, it had all the advantages of the July 16 compromise on representation between the nationally minded delegates and the small-state delegates.

Many expected the electoral college to work as a nominating body in which no one normally would get a majority of electoral votes; therefore, most elections would take place in the House of Representatives among the top five candidates, with each state's congressional delegation voting as a unit. The electoral college was an ingenious solution to delicate and controversial political problems, and the fact that it has rarely worked the way it was intended does not change its ingeniousness.¹⁸

In the end Madison and other nationalists were very pessimistic about the Constitution. Washington is supposed to have said that the new government wouldn't last twenty years. As a remedy for the democratic ills of the 1780s, it fell short of the mark. Still,

it was better than the Articles of Confederation, and Madison and Hamilton began working for its ratification by the states.

Together with John Jay, they wrote under the pseudonym "Publius" eighty-five papers, published initially in newspapers between October 1787 and the summer of 1788 and later collected in book form as *The Federalist*. The essays were designed principally to convince New Yorkers to ratify the new document. Precisely because the issue of the Constitution's republican character seemed so much in doubt, the authors spent a considerable amount of time describing just how republican the new government was. In the Constitution, wrote Madison in *Federalist* No. 10, "we behold a republican remedy for the diseases most incident to republicanism."¹⁹

But how was it a remedy? Why was the new federal government better able to deal with the popular vices of the system than the states? Since both were republics with elected legislatures, why should the Congress of the national government be trusted and the legislatures of the states not trusted? In what ways was Congress different from the state governments?

Madison, for one, saw the relevance of these questions. "It may be asked," he told Jefferson a month after the Convention adjourned, "how private rights will be more secure under the Guardianship of the General Government than under the State governments, since they are both founded on the republican principle which refers the ultimate decision to the will of the majority."²⁰ What, in other words, would keep the new national government from succumbing to the same popular pressures, the same vices, that had afflicted the state governments? How could the new federal government avoid the same problems of excessive democracy that had plagued the states?

The answers that the supporters of the Constitution—or the Federalists, as they shrewdly called themselves—gave to these questions reveals their elitist social perspective. They believed

that they could trust the national government more than the state governments because they expected different sorts of men to sit in the national government from those who sat in the legislatures of the state governments. They believed that most of the problems of majoritarian factionalism and popular politics in the state legislatures came from the narrow-minded middling kinds of people getting elected to these legislatures. The Federalists thought that too many of the state legislators were obscure and ordinary men with "factious tempers" and "localist prejudices," middling men like William Findley, who were bypassing traditional gentry leadership and using popular demagogic skills to vault into power in the state legislatures.²¹

The Federalists hoped that the elevated nature of the new national government would keep such illiberal and narrow-minded men out of government and allow more educated, more cosmopolitan, and more enlightened sorts of men to hold office. Madison called the process by which this would take place one of "filtration." By enlarging the electorate and decreasing the number of representatives, the new federal structure would ensure that better sorts of men would be elected, "men," wrote Madison in *The Federalist*, "who possess the most attractive merit and the most diffusive and established character."²²

The five congressmen from North Carolina in the new government, for example, were apt to be more respectable and more enlightened, more apt to be college graduates, more apt to be gentlemen than the 232 who sat in the North Carolina legislature. The first House of Representatives in the Congress comprised only sixty-five members, a group smaller than most of the state legislatures, and these fewer members were more likely to be better educated and more cosmopolitan than the hundreds who sat in the various state legislatures. Or so the Federalists hoped.

No one tried to work out the intellectual and theoretical implications of the new government more thoroughly or more consistently than Madison. Madison turned the traditional assumptions about republicanism on their head. Instead of agreeing with Montesquieu that a republic has to be small in size and homogeneous in interests, Madison borrowed an insight from Scottish philosopher David Hume and argued that a republic was most suited to a large territory with a heterogeneity of interests. "What remedy can be found in a republican Government, where the majority must ultimately decide," Madison argued, "but that of giving such an extent to its sphere, that no one common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit."²³ The large extent and the elevated nature of the new national government was the best way of dealing with democratic passions and interests.

But Madison did not expect the new national government to have no common interest or no public good to promote. "I mean not by these remarks," he cautioned Jefferson, "to insinuate that an esprit de corps will not exist in the national Government."²⁴ Madison was not an originator of what is now called an "interest group" or a "pluralist" conception of politics. Despite his hardheaded appreciation of the prevalence of interests in politics, he did not believe that public policy or the common good would emerge naturally from the give-and-take of hosts of competing interests. Instead, he hoped that these clashing interests and factions in an enlarged national republic would neutralize themselves and thereby allow liberally educated, rational men "whose enlightened views and virtuous sentiments," said Madison, "render them superior to local prejudices and to schemes of injustice," to promote the public good in an disinterested manner.²⁵

It worked that way in religion, he said. The multiplicity of religious denominations in America prevented any one of them from

dominating and thus permitted the enlightened reason of secular-minded men like Madison and Jefferson to shape public policy and church-state relations. He had gained this insight when he successfully shepherded Jefferson's bill for religious freedom through the Virginia legislature. Although Jefferson thought that his bill became law because enlightened reason had spread through Virginia's society, Madison knew better. It was the competition among the various denominations in the state—Presbyterians, Baptists, Methodists, Quakers—that enabled Jefferson's bill to pass. Each of the denominations feared that one of the others might replace the Anglicans as the established church. Rather than let that happen, they all agreed to neutralize the state's role in religion. Nothing like that had ever occurred before in Western history. This was not toleration, which was already acceptable in Britain and parts of Europe and implied an establishment that tolerated dissenters; this was true religious liberty, with the state having no role whatsoever in religious life. Madison took the lesson to heart and applied it to the new federal government in *Federalist* No. 51.

To the amazement of many, this separation of church and state did not lead to any loss of religious fervor; indeed, religious enthusiasm increased in the decades following the Revolution, as the hordes of middling people moving upward in the society brought their religiosity with them.

The opponents of the Constitution, the Anti-Federalists as they were labeled, saw very clearly what Madison and the Federalists were up to. But instead of seeing enlightened patriots simply making a constitution to promote the national interest, they saw groups of interested gentry trying to foist an "aristocracy" onto republican America. They reacted by attacking the Constitution for being an aristocratic document designed to benefit the few at the expense of the many. In state after state, the Anti-Federalists reduced the issue

to these social terms that the Federalists themselves had created. The Constitution, they charged, was "a continual exertion of the *well-born* of America to obtain that darling domination which they have not been able to accomplish in their respective states."²⁶

The offices of the new government, the Anti-Federalists said, were "too high and exalted to be filled but [by] the *first Men* in the State in point of Fortune and Influence," while ordinary, local-minded men were to be excluded from national politics.²⁷ "Every man of reflection," wrote the "Federal Farmer," who was most likely the petty merchant Melancton Smith of New York, "must see that the change now proposed, is a transfer of power from the many to the few." The opponents of the Constitution grumbled that the Federalists, "those lawyers and men of learning, and monied men, . . . talk so finely and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill." The smooth-talking men expected to go to Congress, to become the "managers of this Constitution, and to 'get all the power and all the money into their own hands.' Then they would 'swallow up all us little folks, like the great *Leviathan* . . . yes, just as the whale swallowed up *Jonah*.'"²⁸ What was needed in government, said Melancton Smith, who had no college education but more than held his own in the debates in the New York convention with Alexander Hamilton and Robert R. Livingston, King's College (later Columbia) graduates, was "a sufficient number of the middling class," who "tended to be more temperate, of better morals, and less ambitious," to offset and control the "few and great."²⁹

The Scotch-Irish backcountry man William Findley also gave as good as he got in the debates in the Pennsylvania convention. Although the Federalists in the Pennsylvania convention overwhelmed the opponents of the Constitution and used ham-handed techniques to prevent the Anti-Federalists from being

heard, Findley made himself felt. He even had a small victory in embarrassing his intellectually formidable opponents. When he claimed during the debate that Sweden lost its freedom when it lost its jury trials, the Federalists, in particular Thomas McKean, the state's chief justice, and James Wilson, the celebrated lawyer and a graduate of St. Andrews, mocked him and laughingly denied that Sweden had ever had jury trials. When the Pennsylvania convention reassembled following the Sabbath, Findley produced evidence that there had indeed been jury trials in Sweden, citing especially the third volume of William Blackstone's *Commentaries on the Laws of England*, every lawyer's bible. McKean had the good sense to remain quiet, but Wilson could not. "I do not pretend to remember everything I read," he sneered. "But I will add, sir, that those whose stock of knowledge is limited to a few items may easily remember and refer to them; but many things may be overlooked and forgotten in a magazine of literature." He ended by reminding Findley of the famous put-down by the notable seventeenth-century English barrister Sir John Maynard, of "a petulant student who reproached him with an ignorance of a trifling point: 'Young man, I have forgotten more law than ever you learned.'"³⁰

No wonder the opponents of the Constitution resented Wilson's arrogance; they thought he conceived himself to be "born of a different race from the rest of the sons of men."³¹ The little exchange between Findley and Wilson was a microcosm of the social division revealed in many of the ratifying conventions, especially in the North.

In addition to seeing the Constitution as a vehicle of aristocracy, the Anti-Federalists raised the fear of what they called "consolidation"—that the federal government would eventually overwhelm the states and reduce them to nonentities. The Anti-Federalists invoked the doctrine of sovereignty that had been raised in the

imperial debate in the 1760s and '70s. That doctrine held that there had to be in every state, one final, supreme, indivisible lawmaking power, and because of the supremacy clause, the Anti-Federalist claimed, that sovereignty would necessarily end up in the federal government. In time, the states would be diminished, involved only in trivialities—the laying out of roads and the measuring of fence posts. There was no alternative: either the federal government would absorb all power unto itself or the states would remain independent and sovereign as they were under the Articles. There was no possibility of dividing sovereignty; that would create an *imperium in imperio*, a power within a power. As Americans had learned from the debate with Great Britain, two supreme authorities could not exist in the same state.

It was a formidable argument, and the Federalists were hard pressed to answer it. At first, like the American patriots in the 1760s and '70s, the defenders of the Constitution tried to deny the doctrine of sovereignty. They claimed that power could be divided between the national government and the state governments. The federal government had some specific powers and the states had all the rest. This was the same argument the colonists had tried to make in the 1760s: that Parliament could regulate their trade, but it could not tax them. But the Anti-Federalists, as William Knox and Thomas Hutchinson had done in the 1760s and '70s, threw the powerful doctrine of sovereignty in their faces. Since there had to be in every state one final supreme lawmaking authority, there was no alternative: either Americans had to accept the total authority of the new Congress or they had to deny it totally and revert back to the Articles of Confederation.

Finally, James Wilson, the haughty Scotsman, came up with a solution to break the deadlock. Like the colonists in 1774, he gave up trying to divide legislative authority and fully accepted the logic

of the doctrine of sovereignty. "In all governments, whatever is their form, however they may be constituted," he declared in the Pennsylvania ratifying convention, "there must be a power established from which there is no appeal, and which is therefore called absolute, supreme, and uncontrollable. The only question," he said, "is where that power is lodged." After posing the dilemma Wilson shrewdly avoided choosing between the federal government or the states. Instead of lodging this sovereignty in either Congress or the state legislatures, he relocated it outside of both. Sovereignty in America, he said, did not reside in any institution of government, or even in all the institutions of government put together. Instead, sovereignty, the final, supreme, indivisible lawmaking authority, remained with the people themselves, the people at large. Unlike in England, in America the people were never eclipsed by representation. Wilson was not saying simply that all power was derived from the people, which was conventional wisdom for all English speakers in the eighteenth century, but that final lawmaking authority actually remained with the people. "While this doctrine is known and operates," said Wilson, "we shall have a cure for every disease."³²

It seemed that way. In America, the word *people*, as the poet Joel Barlow noted, had assumed a new meaning, broader and deeper than what it meant in Europe. In the Old World the people remained only a portion of the society; they were the poor, the *canaille*, the rabble, the *miserables*, the *menu peuple*, the *Pöbel*.³³ This was not true in the new republic of the United States. In America there were no orders, no estates, and the people were no longer a fragment of the society, no longer the lowest strata in a hierarchy of strata. The people had become everything, the whole society, and they were taking on a quasi-sacred character.

Wilson's notion of vesting sovereignty in the people thus seemed totally intelligible and sensible. As the idea spread through the

country, the Federalists could scarcely restrain their enthusiasm in drawing out its implications—implications that had been inherent in the concept of actual representation from the beginning. In order to justify the radical constitutional changes they were making, the supporters of the Constitution began arguing that all parts of all the state governments as well as the federal government, the senates as well as the executives, were just different kinds of representatives of the people. The people retained ultimate sovereignty and doled out bits and pieces of their sovereign power to their different representatives and agents at the both the state and national levels. As Wilson in particular recognized, locating sovereignty in the people themselves makes possible the idea of federalism. The people were everywhere in all the governments, and the houses of representatives lost their once exclusive role of speaking for the people. Except for John Adams, American theorists ceased talking about politics in the way Europeans since Aristotle had—as the balancing and maneuvering of social estates. The Federalists created not just the Constitution but an entirely new intellectual world of politics.

Despite considerable opposition in many of the states to the Constitution, its eventual ratification seemed almost inevitable. Often the critics of the Constitution were unable to make their voices heard. They had fewer newspapers than the Federalists, and, as one Connecticut Anti-Federalist complained, "they were browbeaten by many of those Cicero'es as they think themselves and others of Superior rank."³⁴

Besides, the Articles of Confederation were defunct; the old Congress of the Confederation had ceased meeting and it seemed inconceivable that it could be reassembled. The alternative to the Constitution seemed to be governmental chaos or the breakup of the United States into several confederations. Many who wanted to keep the Union but not the Constitution found themselves

forced, as Richard Henry Lee complained, to accept "this or nothing."³⁵

Most of the small states—Delaware, New Jersey, Connecticut, and Georgia—commercially dependent on their neighbors or militarily exposed, ratified immediately. The critical struggles took place in the large states of Massachusetts, Virginia, and New York. These states accepted the Constitution by only narrow margins and the promise of future amendments.

North Carolina and Rhode Island rejected the Constitution, but after New York's ratification in July 1788 the country was ready to go ahead without them. The New York ratification illustrates the Anti-Federalists' dilemma. Melancton Smith was the most vigorous and articulate of the opponents of the Constitution in the New York ratifying convention, but in the end he voted for it. His fear of disunion eventually overcame his fear of the consolidation and aristocracy that he believed the Constitution portended.

It soon became obvious to some of the Federalists that the omission of a bill of rights—a declaration of individual rights against the government—made the Constitution very vulnerable to criticism. Bills of rights had been included in many of the Revolutionary state constitutions, and the federal Constitution's lack of such a declaration of rights seemed a grave political error. Consequently, some Federalists in the state ratifying conventions promised to work for some amendments, including a bill of rights, once the Constitution was fully approved. Although Jefferson in France gave a qualified approval of the new government, he was upset that it did not include a bill of rights. "A bill of rights," he told Madison, "is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference."

Actually, the Philadelphia Convention had scarcely discussed a bill of rights. Only during the final moments of the Convention did George Mason, the author of the Virginia declaration of rights, bring up the issue, and it was voted down by every state delegation. Most Federalists thought that a national government of specifically delegated powers made a traditional bill of rights irrelevant. But the extent of Anti-Federalist concern for this omission combined with Jefferson's public stand in favor of a bill of rights eventually forced the Federalists to give way.

Living in monarchical France, Jefferson could appreciate threats to liberty coming only from arrogant kings. So he was upset and embarrassed at the absence of a bill of rights in the new Constitution, especially since Lafayette and his other liberal French friends expected such a protection of the people's liberties against power. "The enlightened part of Europe," he told his fellow Americans, "have given us the greatest credit for inventing this instrument of security for the rights of the people, and have been not a little surprised to see us so soon give it up."³⁶

Madison responded to Jefferson in October 1788. He denied that he had ever really opposed a bill of rights; he just didn't think such "parchment barriers" were very important. He conceded rather halfheartedly that a bill of rights "might be of use, and if properly executed could not be of disservice." Besides, "it is so anxiously desired by others." But then he went on with one of his usual perceptive and probing analyses of politics in an effort to explain why he had originally been reluctant to back a bill of rights. Such bills of rights in the state constitutions had not been very effective in protecting the people's liberties. In addition, writing out the rights might actually limit them. He was especially concerned with the rights of conscience, which "if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power."

But then he proceeded to put the issue in its proper context and to explain to his friend that the classical theories of politics were no longer applicable in America. He told Jefferson that he appreciated the "tendency in all Governments to an augmentation of power at the expense of liberty." The power of the one and the few had always posed a threat to the liberty of the many. But this was not the problem in republican America at that moment. "Wherever the real power in a Government lies," he said, "there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents." There was no doubt, said Madison, that magisterial or executive "power, when it has attained a certain degree of energy and independence goes on generally to further degrees" and to become despotic and subvert liberty. Then a bill of rights protecting the people's rights made sense. "But when below that degree," which was the present situation in republican America with its weak state governors, "the direct tendency is to further degrees of relaxation, until the abuses of liberty begat a sudden transition to an undue degree of power." Too much democracy—licentiousness, in other words—led not to anarchy, as the classical theorists had predicted, but to a new and unprecedented kind of popular power or tyranny. The United States, he said, had little to fear from the classic abuse of power by the few over the many. "It is much more to be dreaded that the few will be unnecessarily sacrificed to the many."³⁷

Still, bills of rights, said Madison, might have some use in a popular government. By declaring political truths in a solemn manner, they could eventually become part of the nation's culture, and they

could be invoked on those rare occasions when the government is out of touch with the community.

As the leader in the new House of Representatives that convened in the spring of 1789, Madison immediately sought to fulfill the promise that he had made to support a bill of rights. He shrewdly beat back the Anti-Federalists' efforts to use their amendments to fundamentally change the structure of the Constitution and instead extracted from the variety of suggested amendments those that were least likely to drain energy from the new government. To the disappointment of many Anti-Federalists, the bill of rights—the ten amendments that were ratified in 1791—were mostly concerned with protecting from the federal government the rights of individuals rather than the rights of the states. No wonder the Anti-Federalists complained that the final bill of rights was simply "a tub to the whale," a mere diversion designed to save the main structure of the ship of state.³⁸

Only the Tenth Amendment, which reserved to the states or the people those powers not delegated to the United States, was a concession to the main Anti-Federalist fear the federal government would swallow up the states. Thus, even the bill of rights that had begun as an Anti-Federalist weapon ended up being effectively wielded by the Federalists.

But the Anti-Federalists' day was coming. They had a deep and abiding fear of political power, and in 1801 they would elect a popular leader as president who would implement much of what they had wanted.