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Debating the Constitution, 1787-1788: "This Plan Is Only Recommended'

Second Circuit Steering Committee on the Bicentennial of the U.S. Constitution

Second Circuit History

Debating the Constitution, 1787-1788
"This Plan Is Only *Recommended*"

Second Circuit Committee
on the Bicentennial
of the United States Constitution

United States Courthouse
Foley Square

Foreword

This pamphlet, and the exhibition at the United States Courthouse in Manhattan which it accompanies, are sponsored by the Second Circuit Committee on the Bicentennial of the United States Constitution, established in 1986 by the Honorable Wilfred Feinberg, Chief Judge, and chaired by the Honorable James L. Oakes. John D. Gordan, III, Esq., serves as Chairman of the sponsoring subcommittee and has collaborated with Circuit Judge Lawrence W. Pierce in this endeavor.

Funding for the exhibit has been provided by the Federal Bar Council in New York City. The Committee deeply appreciates its continuing support of the Second Circuit exhibits, publications and lectures.

We extend special thanks to the exhibit's creator, Professor Harold Fruchtbaum, School of Public Health, Columbia University. His scholarly research and analysis bring to life the controversy and conflict which surrounded the ratification of the Constitution two hundred years ago. The nation continues to debate many of these issues to this day.

The Subcommittee on Commemorative Events, Second Circuit Committee on the Bicentennial of the United States Constitution

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When the convention that wrote the United States Constitution closed in Philadelphia on September 17, 1787 with the signing of the document by the delegates of the 12 states attending, the fight for ratification began. Before the end of the month, the first criticism of the plan appeared. In speeches and reports to state legislatures, and in newspapers and pamphlets, the Constitution was debated with fervor and in great detail.

The Anti-Federalists, those who opposed the ratification of the Constitution or who sought significant amendment, developed an array of insightful and troubling arguments that could not easily be dismissed. After 200 years, we can recognize the cogency of their critique. Men of extraordinary intellectual ability came forward to meet the challenge in the public arena. The New Yorkers Alexander Hamilton and John Jay and the Virginian James Madison wrote and published over the name Publius eighty-five essays in the New York press between October 1787 and May 1788. Collectively known as *The Federalist*, these essays are the most famous of the works written in defense of the Constitution.

"...This plan is only *recommended*, not imposed," John Jay, later the first Chief Justice of the United States Supreme Court, wrote of the Constitution in one of the Federalist essays. The impact of the public debate in winning ratification of the "plan" in the intensely political state conventions can only be estimated. In several states, however, ratification of the Constitution proved to be a close thing.

This exhibition focuses on six of over a dozen issues that fueled the ratification struggle. Anti-Federalist arguments, printed in red, are countered by selections from *The Federalist*, printed in blue. What two centuries of hindsight enable us to say is offered as "200 Years Later".

Did the Convention Violate Its Mandate?

Yes: "Our powers were explicit, and confined to the *sole and express purpose of revising the articles of confederation*, and reporting such alterations and provisions therein, as should render the federal constitution adequate to the exigencies of government, and the preservation of the Union."
—*Robert Yates and John Lansing (New York)*

No: "From a comparison and fair construction..., is to be deduced the authority under which the convention acted. They were to frame a *national government*, adequate to the *exigencies of government*, and *of the Union*; and to reduce the articles of Confederation into such form as to accomplish these purposes."
—*James Madison (Virginia), The Federalist, No. 40*

200 years later: The Articles of Confederation and Perpetual Union, adopted by Congress in 1777 but not finally ratified by the 13 states until 1781, provided a plan for the government of the United States of America even before the successful end of the War of Independence. By February 1787, however, Congress believed the defects in the system of confederacy were serious enough to require a convention to meet in Philadelphia "for the sole and express purpose of revising the Articles of Confederation" to "render the federal constitution adequate to the exigencies of Government & the preservation of the Union."The convention may have violated its mandate, but Madison put the question this way: "whether it was of most importance to the happiness of the people of America, that the articles of Confederation should be disregarded, and an adequate government be provided, and the Union preserved; or that an adequate government should be omitted, and the articles of Confederation preserved."

Is the Constitution a Threat to the States?

Yes: "It was urged, that the government we were forming was not in reality a *federal* but a *national* government, not founded on the principles of the *preservation,* but the *abolition* or *consolidation* of all *State governments* –..."
—Luther Martin (Maryland)

No: "The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government."
—Alexander Hamilton (New York), The Federalist, No. 9

200 years later: The one compromise that saved the constitutional convention of 1787 from collapse gave the people of the United States a uniquely structured Congress. Luther Martin, who participated in the convention, and other fervent believers in states' rights opposed the ratification of the Constitution because they thought it called for a too powerful central government that would threaten the sovereignty of the states. While the fears of the states' rights advocates were exaggerated, federal-state conflict has been important in the history of the American republic.

Are Rights and Liberties Unprotected?

Yes: "...The system is without the security of a bill of rights....Should the citizens of America adopt the plan as it now stands, their liberties may be lost: Or should they reject it altogether Anarchy may ensue."
—Elbridge Gerry (Massachusetts)

No: "...Bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do?... The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS....And the proposed Constitution, if adopted, will be the bill of rights of the Union."
—Alexander Hamilton (New York), The Federalist, No. 84

200 years later: Whether the Constitution should include a bill of rights was debated and voted down in the last days of the 1787 convention. Delegates from the South worried about the implications of a bill of rights for the slave system. Moreover, the advocates of states' rights believed that the bill of rights in the constitutions of the states should remain binding. A federal bill of rights, Hamilton argued, could be used later by the national government to take powers not prohibited it. Yet the demand for a bill of rights was so strong during the ratification process that Congress passed at its first session in 1789 amendments to the Constitution. With the approval of three-fourths of the state legislatures by December 15, 1791, these became the Bill of Rights – the bulwark of American liberty.

Is Representation of the People Unequal?

Yes: "The essential parts of a free and good government are a full and equal representation of the people in the legislature, and the jury trial...in the administration of justice – a full and equal representation, is that which possesses the same interests, feelings, opinions, and views the people themselves would were they all assembled – a fair representation, therefore, should be so regulated, that every order of men in the community, according to the common course of elections, can have a share in it....The representation cannot be equal, or the situation of the people proper for one government only – if the extreme parts of the society cannot be represented as fully as the central – It is apparently impracticable that this should be the case in this extensive country–..."
—The Federal Farmer, identity uncertain

No: "The idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary. Unless it were expressly provided in the Constitution, that each different occupation should send one or more members, the thing would never take place in practice."
—Alexander Hamilton (New York), The Federalist, No. 35

200 years later: In the writing of the Constitution and in the debates over its ratification, class interests were of fundamental importance. The Federal Farmer, arguing against ratification, and Hamilton, campaigning in favor, recognized that the issue of full and equal representation of the people (other than women, slaves and Indians) in the government was critical. Much of American constitutional and political history is about the continuing struggle to achieve it for every person.

Did the Constitution Foster Slavery?

Yes: "What adds to the evil is, that these states are to be permitted to continue the inhuman traffic of importing slaves, until the year 1808 – and for every cargo of these unhappy people, which unfeeling, unprincipled, barbarous, and avaricious wretches, may tear from their country, friends and tender connections, and bring into those states, they are to be rewarded by having an increase of members in the general assembly."
—Brutus (New York), identity uncertain

No: "It were doubtless to be wished, that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation....It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate forever, within these States, a traffic which has so long and so loudly upbraided the barbarism of modern policy; that within that period, it will receive a considerable discouragement from the federal government, and may be totally abolished, by a concurrence of the few States which continue the unnatural traffic, in the prohibitory example which has been given by so great a majority of the Union."
—James Madison (Virginia), The Federalist, Number 42

200 years later: The word "slave" is not in the Constitution, but Article 1, Section 2 established a House of Representatives and direct taxation based on each state's population calculated by adding to "the whole number of free persons,...and excluding Indians not taxed, three-fifths of all other persons." Section 9 prohibited Congress from ending before 1808 "the migration or importation of such persons" the states "think proper to admit" and allowed a federal import tax on each. Without these compromises with the slave system, agreement at Philadelphia might not have been possible, but the awful price was the continuation of slavery until the civil war that ended it.

Will the Judiciary Make Justice Unattainable?

Yes: "The Judiciary of the United States is so constructed and extended, as to absorb and destroy the Judiciarys of the several States; thereby rendering Law as tedious, intricate and expensive, and Justice as unattainable, by a great part of the Community, as in England, and enabling the Rich to oppress and ruin the Poor."
—George Mason (Virginia)

No: "...I hold that the State courts will be divested of no part of their primitive jurisdiction, further than may relate to an appeal;...When...we consider the State governments and the national governments, as they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."
—Alexander Hamilton (New York), The Federalist, No. 82

200 years later: Questions about the role of the federal judiciary and its relation to other branches of government as well as to the state courts generated much controversy in the ratification year. Advocates of a system in which the rights of the states would be protected saw the proposed federal bench as a potential bastion of strong central government at the expense of local sovereignty. Whatever the merit in this point of view – and the subject is still debated – both state and federal judiciaries developed systems for adjudication and review to protect individual rights.