



CENTER FOR THE STUDY OF THE AMERICAN CONSTITUTION

csac.history.wisc.edu > Document Collections > The Creation and Ratification of the Bill of Rights > Serial Essays Related to the Creation and Ratification of the Bill of Rights > Essays by “Foreign Spectator”

Foreign Spectator XXVIII Philadelphia *Federal Gazette*, 16 February 1789

REMARKS on the Amendments to the Federal Constitution, proposed by the Conventions of Massachusetts, New-Hampshire, New-York, Virginia, South and North-Carolina, with the minorities of Pennsylvania and Maryland, by a FOREIGN SPECTATOR, NATIVE of SWEDEN.

NUMBER XXVIII.

My readers are now probably as weary as myself. It was not possible to treat a subject so important and prolix in a more concise manner. The task would indeed have been lessened by omitting the two minorities, especially that of Maryland, which was very small; but a republican writer should respect the opinions of any few among those who were entrusted by the people with such important business. However defective my performance may be, it is totally free from party spirit and personal reflections: I have even carefully avoided the word *antifederal*, and sincerely wish that it may soon *be proscribed from the language* of the United States.

With modest confidence I now repeat, as the result of this enquiry, the assertion “that some of the proposed amendments are repugnant to an effectual confederacy, others of dubious utility, and the most specious improper, until the union is firmly established, and experience has decided between opposite theories.”^(a)

To amend the federal constitution at present is prejudicial for these reasons: *First*, because the best politicians cannot know what improvements are practicable without an impartial and judicious trial. All history, ancient and modern, does not furnish an example of a government like this, which in all its parts is an intimate mixture of national and federal. The political situation of the states is also too new to be susceptible of a system compleat in all its parts. These two circumstances present to the genuine politician a multitude of great objects, and extensive combinations, which escape those who imagine, that politics is a mere routine or indiscriminate application of some good general maxims.

Secondly. Because the supposed defects of the constitution may be supplied by a good administration.^(b) This we may expect at least for some time; *nemo sulito fit pessimus*^(c) is an old adage applicable to public bodies as to individuals. No person that knows the people of this country, can seriously believe that the energy of the present constitution is dangerous.

Thirdly. Because the avenue to amendments is always open. Whenever two thirds of the Congress, or the legislatures of two thirds of the states shall think any necessary, they will be obtained by the mode prescribed in the 5th art. of the constitution. If the people shall in the course of two years desire a reform, they will no doubt choose such a house of representatives,

and such a third of senators as are willing to amend. It is not probable that one half of the remaining senators would presume to stem the popular current. But suppose that the requisite majority of both houses cannot be got, why may we not confide in the state-legislatures, over whom the federal government has no power?

Fourthly. Because any immediate alteration whatever is detrimental. The essential powers of the federal government must not be touched. It must keep the purse and the sword, granted by this constitution; any premature diminution of either would positively endanger the United States. The only question is, whether some less dangerous changes may not be adviseable for the sake of peace and concord? Could such a desirable object be obtained, we ought indeed to go every reasonable length. But it is very improbable that any moderate set of amendments would render the constitution more popular than what it now is; because they would not give general satisfaction to the discontented, and yet displease a great number of warm federalists. Without any gift of prophecy, we may be sure, that the motley mixture of such compromise would take from the constitution some very salutary matters, and add others which cannot claim *probatum est* [Latin: it was proved]; and that, after all, this political hash could not be agreeable to so many different tastes. I question if any such amendments would be ratified by three fourths of the conventions or legislatures of the states;^(d) but for the reason just mentioned the ratification would not be an evident proof of a full approbation. It may with many be rather a measure of necessity than of choice. Should it be attended with great dissention, there is yet more cause to fear that the ill-fated project, instead of uniting, has divided the people. If, for example, ten of the conventions or legislatures ratify with majorities, that collectively amount to three-fifths of the whole ten, and the remaining three reject it with majorities, that aggregate make four-fifths of the whole three; there will be six and three-fifths, against six and two fifths, consequently a trifling majority.

On such a question all the states are entitled to an equal vote; and the real majority of the thirteen must be computed in this manner, though it may not coincide with that of the nation, but vary on either side, as greater states or greater majorities shall be placed. But whether we go by states or population, the present constitution has no doubt a far more general approbation than the result in this example.^(e)

The public mind is really as yet too unsettled to be pleased with any plan whatever. Not to suppose any ungenerous views either in public bodies or individuals, there is a surprizing difference in principles and opinions, owing in a great measure to the novelty of our political system. Some apprehend that so close a union of the states must gradually mould them into provinces of one empire; others perceive a natural opposition of interest between the southern and northern states; some again fear that the great will, by a superior representation, govern the small; whereas another set view with regret the generous equality of all in the senate. Many tremble for their personal liberties under this mighty and universal sway of a federal government; and would at least have a long *bill of rights* as a small security against warrants, jails, inquisitions, prosecutions for libels &c. In fine too many well meaning persons regard the federal constitution as a novel piece of artillerie, which, though an excellent defence against foreign or domestic foes, may by unskilful or treacherous hands shatter our brains. It is curious to observe how the distempered eyes of jealousy search every part of the constitution, and make a various, even contrary criticism. Some behold the congress laying taxes on every kind of property, and raising standing armies to collect them: Others view the senate sharing the earnings of speculation and treachery; then

acquitting each other from a mock impeachment: These dread the sword of the president: Those fear more the wiles and cruelty of the federal judges: A few melancholy spirits clearly see all the legislative, executive, and judicial powers in close dreadful array with force irresistible crushing the constitutions of the states and the liberties of the people.

If the conventions, or a majority of them, had agreed on any plan of reform, it would, whatever might be the real merit, have claimed a respectful attention from all the friends of the constitution; but their glaring disagreement is itself a strong reason to question the propriety of the proposed amendments. The convention of N. York makes 32, S. Carolina only four, Massachusetts 9, N. Hampshire 12, The minority of Pennsylvania, 14, that of Maryland 28, Virginia 20, N. Carolina 26. These two have indeed 20 in common, and those of Massachusetts and N. Hampshire have 8; the others agree more or less with these and each other. But upon the whole there is not a perfect unanimity of all on a single article, and a considerable dissention on many essential matters. Some have even separate amendments.

The minority of Penns. limits the federal revenue to imposts and postage. The conv. of Virg. and N. Car. grant excises under the same conditions as direct taxes; that of N. York permits none except on ardent spirits of domestic production or manufacture.^(f)

The conv. of Mass. and S. Car. approve of the federal military powers. The minor. of Penns. absolutely forbid standing armies in time of peace. The conv. of N. Ham. permits it with the consent of three fourths of Congress; the others by the votes of two thirds.^(g) This majority is demanded by the Conv. of N. York for declaration of war, and by that of N. Car. for the introduction of foreign troops.^(h) The Conv. of N. Ham. is silent on the militia: those of Virg. and N. Car. differ materially from the rest, and they much from each other.⁽ⁱ⁾

The two minorities only with the Conv. of N. Ham. make stipulations for liberty of conscience.⁽ⁱ⁾

The two amendments respecting laws of bankruptcy and borrowing money are by the Conv. of N. York; that on navigation laws by those of Virg. and N. Car. and that on paper money by this alone.^(k)

The Conv. of N. Ham. amends the constitutional privilege of the *habeas corpus* writ.^(l) The two minorities request the freedom of the press. The other amendments on personal rights are, except as to warrants, vague declarations, or implied by the constit.^(m)

The Conv. of Virg. N. Car. and N. York criticise the jurisdiction of Congress over the federal town, but the latter with material difference.⁽ⁿ⁾

On the executive department we observe a striking disagreement. The Conv. of S. Car. Mass. and N. Ham. are satisfied. The two minorities project an executive council, in order to exclude the senate from any share of the administration.^(o)

The Conv. of N. York stipulate, that the president shall not grant pardon for treason without the consent of Congress, and with the minor. of Mary. that he shall not, but on this condition, command the army in person.^(p) The Conv. of Virg. and N. Car. request some tribunal for trying impeached senators; that of N. York proposes one.^(q) Those two demand the consent of two thirds of the whole senate in commercial treaties, and of three fourths of both houses in treaties that might cede or suspend the rights of the states, &c.^(r)

The amendments of the judicial department are very discordant. The convention of Virginia and N. Carolina prescribe very narrow limits to the federal jurisdiction.^(s) The minority of Mary-

land disapproves of any inferior federal courts, and any appeal from fact;^(t) that of Pens. condemn the want of express provision for trial by jury in civil cases.^(u) The convention of N. York demand appeal from the supreme federal court in cases of its original jurisdiction.^(v) The convention of Massachusetts makes but two moderate requests; that of N. Hampshire agrees in one, but has another much different.^(w) The convention of S. Carolina approbates the whole.

The amendments relative to elections &c. are also dissentient, except those on the 4th sect. 1st art. of the constitution, and on the proportion of representatives. The minority of Pennsylvania, desire annual elections of representatives.^(x) The conventions of Virginia, N. Carolina, and N. York, make the re-election of the president conditional; that of N. York more especially. This convention has seven separate amendments on this subject, those of Virginia and N. Carolina two different from all the rest.^(y)

These cogent reasons dissuade from any present amendments, but some will be useful at a future period. I view the federal constitution as a noble design, of which the capital lines are well drawn, but the minute parts omitted to be delineated with that accuracy which experience only can teach. In the progressive stage of the confederacy, the boundaries between the federal government and those of the respective states will be traced with more nicety, though I positively assert that it never can in every instance; but that *mutual complacency* will all times be indispensable.^(z) As to personal rights, besides the express provision already made for trial by jury in criminal cases, the privilege of the writ of *habeus corpus*, safety from bills of attainder and from *ex post facto* laws, &c. some further security may be given in cases when the operations of government shall be found most formidable or troublesome. Thus the various degrees of treason and insurrection may be defined, the powers of granting warrants modified, the freedom of the press granted in all the latitude consistent with the public safety and the protection due to every good citizen against the darts and poison of scandal. At the same time it is idle to expect that any such barriers can be raised between a government and its subjects, as to prevent all occasional injury from a bad administration, because the most necessary power may be abused. What is there in the world that may not? We may kill ourselves by eating! A physician may kill us by opobalsam or the Peruvian bark. The constitution provides against treason in general but very mild terms.^(aa) It is silent on the rest, because it was impossible not to say too much or too little.

Direct taxation is not generally relished in America. For the present congress ought really to have this discretionary power.^(bb) But when the wants and resources of the United States shall be better ascertained, the federal revenue may be confined to imposts and excises of the most easy kind.

The military powers of the federal government may also hereafter be more definitive.

The best organization of the federal militia, is a work of judicious theory and trial. When effected, it may be adopted as a part of the constitution. The quotas of the respective states for actual service may also be inserted, yet with reserve of a discretionary power in urgent exigencies. In that national security which will be a certain blessing of solid union, the number of standing troops in time of peace may also be limited; but as it ought to be small, congress must be permitted to increase it in case of real danger.

As for those amendments which require majorities of two-thirds and three-fourths in several important cases,^(cc) their propriety will depend on the future situation of national affairs. When a momentous resolve can be delayed for a certain time, uncommon unanimity should till then

be required. If in any case it is more safe not to act at all, than to move by a small majority, a certain plurality must be an absolute requisite. When the state of defence and finances of the confederacy shall be well established, it may be prudent not to encrease the fixed number of troops or borrow money without the consent of two thirds of both houses. Should there appear any permanent opposition of interest in some cases between certain states, the same caution is then salutary, as it will enable the neutral states to balance the scales. It is probably on this principle that the conv. of Virg. and N. Car. with the minor. of Mary. request such plurality of votes in passing *navigation laws* or *laws regulating commerce*.^(dd)

The judicial department will gradually be delineated by the constitutional regulations of Congress. Science and practice will here point out many excellent things, which may afterwards be established by the constitution: thus the mode and extent of appeals, trial by jury in civil cases, and concurrent jurisdiction will be essentially defined.

The clause respecting the times, places and manners of holding elections for senators and representatives, which is an object of general criticism, will in the growing stability of our union be improved by substituting constitutional rules in lieu of the discretionary regulations of Congress or the state governments.^(ee)

A constitution so short and indefinite as the present would in a mature government be very faulty; but this seeming defect makes it at this time excellent: a detail of many things hereafter necessary, would now be an absurdity. Let us then be wise enough to be contented with it. It is universally agreeable in several states, and in the others becomes daily more acceptable. In this state it has gained many proselytes in the course of a twelvemonth, and considerably soothed the displeasure of its enemies. How different is the language of the minority from that of the Harrisburgh convention.^(ff)

It is ten to one that no set of amendments will be received without the condition of *new amendments*. This *doubly patched constitution* would be a poor object of pity, scorn, aversion; thus not even permitted to effect what good it otherwise might, and after a short duration cut up to make new patch-work. In the mean time the encreasing jealousies, fears, and discontent of the nation may render any other impracticable.

Heaven forbid any conventions for a while! I dread the work of fifteen hundred reformers in the present fluctuation of sentiments. If we must at all amend, I pray for merely amusing amendments; a little frothy garnish. But why do we not rather sit down as brothers, and feast on the substantial meat, for which we have fasted so long!

- (a) *Num. I.*
- (b) *Most of the amendments request what is constitutionally in the power of the federal government.*
- (c) *Corruption is gradual.*
- (d) *Either mode may be used. 5th art. Con.*
- (e) *A bare majority of ten, and an absolute majority of three, may force a ratification by a real minority.*
- (f) *n. 3.*
- (g) *n. 6.*
- (h) *n. 7.*
- (i) *n. 8.*

(j) n. 9.

(k) n. 10.

(l) n. 11.

(m) n. 12.

(n) n. 13.

(o) n. 15.

(p) n. 14.

(q) n. 16.

(r) n. 17.

(s) n. 18.

(t) n. 19–20.

(u) n. 21.

(v) n. 23.

(w) n. 19–20.

(x) n. 25.

(y) n. 26–27.

(z) No. 2.

(aa) 3d art. 5th sect. *The Federal constitution is in this respect, and many other, more liberal than that of Great Britain, which is so much vaunted by some amenders. See Blackstone on treason, riots, libels.*

(bb) n. 3. 4. 5.

(cc) n. 6. 7. 10–17.

(dd) *The letter from the hon. R. H. Lee to Governor Randolph, dated New York, October 16th, 1787, betrays a strong jealousy on this subject “The representatives of the seven northern states, as they will have a majority, can by law create the most oppressive monopoly upon the five southern states, whose circumstances and productions are essentially different from theirs, although not a single man of these voters are the representatives of, or amenable to the people of the southern states, &c.” Vide Carey’s Museum for Decemb. 1787. Such extraordinary collision cannot be supposed. Seven states in many respects so different opposed to the other five or six! South Carolina and Georgia say nothing about it. Such dismal principles are premature before a sufficient experience.*

(ee) n. 24.

(ff) *Carey’s Museum for September 1788.*

CITE AS: John P. Kaminski et al., eds., *The Documentary History of the Ratification of the Constitution*, Vol. XL: Bill of Rights [4] (Madison, Wis.: Wisconsin Historical Society Press, 2024), 109–17.