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THE CONSTITUTION—1787 AND TODAY

WALTER F. DODD*

On September 17, 1787, George Washington, as president of the Constitutional Convention submitted the results of that Convention's work to the United States in Congress assembled, for submission to and ratification by convention of the several states.

In May, 1787, a small group of delegates from the several states assembled in Philadelphia to consider the revision of the Articles of Confederation. One state, Rhode Island, had already declined to send delegates; another, New Hampshire, had no money with which to send delegates and appointed no delegates until June 1787, after a public-spirited citizen had agreed to bear the expense. Delegates from only two states assembled on May 14, 1787, and it was not until May 25, that seven states were represented and George Washington was elected president of the convention. In the interval the delegates who were in Philadelphia were not altogether idle, nor were they without something of entertainment. Benjamin Franklin, then president of the State of Pennsylvania and a delegate to the convention from that state, wrote on May 18 that "the members of the convention did me the honor of dining with me last Wednesday, when the cask was broached and its contents met with the most cordial reception and universal approbation." It was well that the delegates should in the beginning be unanimous upon one matter, for they were soon to face fundamental differences which might have defeated a real union of the American states.

Of those at first designated to serve in the federal convention, at least eleven declined to serve. Patrick Henry, who refused, later used the whole force of his eloquence to defeat the ratification of the convention's work. Of those who did not decline, at least eight did not attend. Of the fifty-five who did attend, all did not attend regularly. Thirty-nine signed the constitution and three refused to do so.

Those who framed the constitution have in the modern day been the subject of unrestrained adulation, and if judged

* An Address given before Indianapolis Bar Association, September 6, 1944.

only by their ablest members, they were a body of high distinction. Certainly no one today will subscribe to the statement of a contemporary that "I will venture to affirm that twenty assemblies of equal number might be collected, equally respectable both in point of ability, integrity and patriotism." A fairer estimate is that of Max Farrand:

"Great men there were, it is true, but the convention as a whole was composed of men such as would be appointed to a similar gathering at the present time; professional men, business men, and gentlemen of leisure; patriotic statesmen and clever, scheming politicians; some trained by experience and study for the task before them, and others utterly unfit. It was essentially a representative body, taking possibly a somewhat higher tone from the social conditions of the time, the seriousness of the crisis, and the character of the leaders."

The convention met secretly with sentries within and without the chamber in which it met. Its secrecy was violated by none of its members, either in correspondence or otherwise, and when a confidential paper was lost by one of the members and turned in to Washington, no one dared disclose himself as owner when Washington, at a meeting of the convention announced, "I know not whose paper it is, but there it is, let him who owns it take it."

Although its proceedings were secret, and the smallness of its number afforded little opportunity for oratory, the convention was blessed with the usual types of personality to be found in a similar body today: Robert Morris of Pennsylvania, the financier of the revolution, who exerted an influence, but spoke not at all; Luther Martin of Maryland, who chose the hottest days of a Philadelphia summer to deliver a two-day speech, which Ellsworth wrote to Martin "might have continued two months but for those marks of fatigue and disgust you saw strongly expressed on which-ever side of the house you turned your mortified eyes;" Charles Pinckney of South Carolina, the youngest and perhaps, in his own opinion, the ablest member of the convention, who was sufficiently summed up in a later letter from Washington to Madison: "Mr. C. Pinckney is unwilling to lose any fame that may be acquired by the publication of his sentiments;" Gouverneur Morris of Pennsylvania, a skillful penman who gave final form to the text of the constitution, but whose political morals did not forbid an attempt to alter the purpose of the framers by changes in punctuation—

a socially charming but impudent young man, who had the daring, on a wager, to slap George Washington on the back; Alexander Hamilton, whose views were too extreme for the convention and whose power in his own delegation was negligible because the other two delegates from New York were completely out of sympathy with him—discouraged, he left the convention some time after his two associates withdrew and left New York without official representation, but returned in time to serve on the committee on style and to sign the constitution, and later performed brilliant services in the contest for the adoption of the constitution and in the task of establishing our federal system under that constitution.

But let us turn for a moment to those who were most influential in the convention: George Washington, its president, who spoke almost not at all, but who was the balance wheel of the convention—who presided with dignity, and who courageously took the view that a new and more effective form of government should be substituted for the Articles of Confederation—although he knew that such a view would lead to the withdrawal of the New York delegates. The general opinion that Washington would be the first president under the constitution led to concurrence in support of a strong executive. James Madison of Virginia and James Wilson of Pennsylvania stand out by virtue of their leadership; and though Benjamin Franklin's views on governmental matters may have been of slight influence, his personal share in bringing about necessary compromises was great.

The great compromise of the convention and that without which the national government could not have been established was the creation of a bicameral legislature, in one house of which the states should be equally represented, though perhaps the delegates regarded as of almost equal importance the plan of giving each state but one vote in the House of Representatives in choosing a president when no candidate had a majority of the electoral vote. And with the problem of representation was closely united that of the powers to be conferred upon the new national government.

When in late June of 1787 compromise between the large and the small states seemed impossible, Dr. Franklin moved that prayers be held each morning, but Hamilton is

said to have replied irreverently that the convention had no need of "foreign aid", and differences of opinion made desirable a device not uncommon in our day—an adjournment without vote on the question.

But divine aid may have intervened without prayers, for a compromise committee was appointed, and the weather had turned cool when its recommendations came to be acted upon by the convention. The constitution of 1787 was, in the words of the members, the result of "bargain and compromise." The bargain and compromise were aided by the close social relations of the delegates in a relatively small community, and by the further fact that a group of the leading members of the convention stayed together at the same tavern in Philadelphia.

When their work was done, the builders of the constitution were unconscious of having achieved a great result. Robert Morris wrote of it "as the work of plain, honest men." Before the convention had adjourned, Madison wrote to Jefferson:

"I hazard an opinion— . . . that the plan, should it be adopted, will neither effectually answer its national object, nor prevent the local mischiefs which everywhere excite disgust against the state governments."

But the doers of great things seldom realize the greatness of their achievements. In the language of Emerson, "They builded better than they knew." And they have taught us that we may best build for the future by dealing adequately with the problems of the present. A form of government drafted for a group of states small in number and area with less than four million people has become the constitution of a great nation of forty-eight states and more than one hundred and thirty million people. Those who labored in Philadelphia during the hot summer months of 1787 did not create a great nation by genius or brilliancy. They did so by recognizing the problem before them and solving it through the application of common sense.

The primary difficulties before the convention of 1787 resulted from the weakness of the Articles of Confederation. The centrally established government had no authority to levy taxes, and could only apply to the states for revenue, which the states did not produce. It had no power to prevent commercial discrimination by one state against another,

and the existence of such discrimination is what brought about the constitutional convention. With the framing and adoption of the constitution we for the first time had a real central government which could act upon the citizens of the several states, finance itself, and prevent one state from acting in its own interest in violation of the rights of another state and of its citizens. In 1787 the chief purpose of the commerce power and of the numerous restrictions upon state interference with commerce were not to produce federal regulation but to prevent discriminations by states.

The constitution framed in 1787 has met the growing needs of our country and has been sufficient to meet such needs primarily because it dealt only with fundamental principles and used language broad and flexible enough to apply to new problems as they have arisen. Little of substantial change has come through the twenty-one amendments to the constitution. The first ten of these amendments were proposed in 1789 and ratified in 1791, and were largely based upon recommendations of ratifying conventions in Massachusetts, New Hampshire, Virginia and New York. They may be regarded as a supplement to the original constitution, and may well be termed the federal bill of rights. Of subsequent amendments, the fourteenth (1868) altered the relations between state and nation by providing federally enforceable guarantees against deprivation of "due process of law" or denial of "equal protection of the laws" by state action, and the sixteenth (1913) gave to the national government a new and flexible source of revenue which has made more readily possible a dominance of state policy by the nation through the use of federal subsidies to the states. Otherwise, except for the ill-fated eighteenth amendment (1919), changes in the text of the constitution have little affected the rights of the citizens or the respective powers of state and nation. But although substantially unaltered in text, the constitution today applies to conditions essentially different from those of 1787, and such application has been made possible through broad and statesmanlike construction of its provisions by the Supreme Court of the United States.

The terms of the constitution as a written instrument may not change, but the conditions to which it applies have fundamentally changed. The grant of power to regulate commerce "among the several states" could not have been

thought of in 1787 as conveying the power now exercised by the national government. This result comes primarily not from a broader judicial construction of the power, but from the wider scope of transactions, to which it applies. Transactions in interstate commerce have multiplied by the thousands. It required thirteen days for knowledge of the battle of Lexington to reach South Carolina. Now Boston and Seattle are next-door neighbors. Through the telegraph, the telephone and the radio, and through the steamboat, the railroad, the motor vehicle and the airplane, distances have been abolished, and once local problems have become national in character. There is some basis now for a unanimous opinion of the United States Supreme Court sustaining under the commerce power a restriction upon the amount of wheat a farmer may raise for use on his own farm. *Wickard v. Filburn*, 317 U.S. 111. Chief Justice Waite properly said in 1878:

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."

Pensacola Telegraph Co. v. Western Union Telegraph Co.,
96 U.S. 1.

The increased scope of national powers and of national activities is not limited to the commerce clause. There is substantially no limit upon the taxing power or upon the uses to which it may be put. We have in fact come to a situation in which there are no limits upon federal power; and the Tenth Amendment, once relied upon as evidence that there are powers reserved to the states, is now "but a truism that all is retained which has not been surrendered."

U.S. v. Darby Lumber Co., 312 U.S. 100. And, if all has been surrendered, nothing is retained.

The forces which have enlarged the scope of national power have also caused other essential changes in the operation of our constitutional system. Due process of law under both the Fifth and Fourteenth Amendments now permits a wider exercise of governmental regulatory powers. Present conditions have produced a much wider delegation of legislative power and a more extensive operation of administrative agencies. Such a development has also been essential. Neither Congress nor a state legislature can prescribe and adapt the changing regulations necessary for safety in production, nor the rates to be charged by railroads and other public utilities. And early experiments with workmen's compensation made it clear that courts were not the proper bodies to pass upon compensation claims, but that this duty should be placed in the hands of an administrative agency, subject to judicial review. These are but illustrations of the conditions which have made administrative law one of the most vital subjects in our present legal system. And the present methods of communication and transportation have also a vital share in determining our relations with the rest of the world.

The governmental problems which face us today do not involve the amendment or construction of the constitution. They rather involve issues of policy under the constitution. Three such problems definitely face us today.

The first and most important problem is that of a permanent world peace the conditions of which may be approved by the two houses of Congress and not subject to defeat by a minority of the Senate, who may represent a much smaller minority of our people. A foundation for such action has already been laid by the joint resolution enabling the United States to participate in the work of the United Relief and Rehabilitation Administration. The forces which have transferred local into national problems have also transferred many previously national problems into ones international in character—into problems which cannot be solved by one nation alone.

A second and highly important problem is that of assuring justice through the administrative agencies which have become a part of our governmental structure. Such justice

may be accomplished through adequate organization and judicial review.

A third problem, the solution of which is fundamental to our federal system and to our popular government, is the maintenance of our states and of their subordinate local governments as essential elements of our government. Constitutional guarantees make the states permanent units in our governmental system; but the construction now given to the constitution of the United States gives to the national government an opportunity for substantially complete dominance.

All governments—national, state and local—have more to do today than ever before; and it is likely that their burdens will increase rather than diminish. And no function national in its character will remain permanently under the control of state and local authority, nor should it so remain.

But many functions can best be handled by the states and their local governments, and the continuance of popular government requires a popular control of the governments which are nearest to the individual. Popular influence over such governments is of little weight if they are dominated by instructions from the national capital. And, in view of the present construction of our constitution, which is unlikely to change, the future powers of the state and local governments must be determined at the polls and not in the courts.

And it is possible to maintain such powers. The two things that may contribute most to the reduction of such powers are inefficiency in state and local governments; and the effort in each state to profit to the disadvantage of others, as was the situation in 1787. Discriminatory state legislation still remains.

Another major danger to undominated state power arises from the efforts of the members chosen to the Senate and House of Representatives to obtain advantages for their states or districts from the federal treasury. The future of state and local governments depends upon those governments and upon those whom they choose to represent them in the House and Senate.

National cooperation or national supervision is necessary, but it can be so arranged as not to dominate state or local administration. Our democratic principles make it

necessary that the state and local governments, which are nearest to popular participation and control, should remain as governmental agencies.

At an early stage of our constitutional history Thomas Jefferson said that "our country is too large to have its affairs directed by a single government," and Honorable Hatton W. Sumners has properly said that "the necessity for the states, for the smaller units of government, to govern within the scope of their governmental capacity is of the first importance if the people are to retain their capacity to govern."

We now celebrate the signing of our constitution on September 17, 1787. We can best celebrate Constitution Day by meeting the problems which now face us in the government operating under that constitution—problems of a character not known to the framers of that constitution but fundamental to our present civilization.

