

CONCLUSION

MARKING THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION

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It is with pleasure that I participate in this tribute to the lives and work of William Paterson, Joseph Bradley, Mahlon Pitney, and my own colleague William Brennan—all distinguished practitioners of the law whose professional successes in New Jersey led to their national recognition and ultimately to their appointments to our highest Court. New Jersey has rightly taken great pride in its gift of this pre-eminent legal talent to the nation.

The early leaders of this country helped people shift from parochial attitudes to a national consciousness. The response of New Jersey troops a decade before when General Washington attempted to gain their sworn allegiance to the United States is particularly noteworthy. You will recall that with less than all due respect, they refused, crying, “*New Jersey is our country!*”¹ Nevertheless, after its delegation led a nearly stalemated Convention at Philadelphia to negotiation and compromise over the structure of representation in the national government, New Jersey became the third state to give its blessing to the proposed Constitution.

The period between 1776 and 1787, known to historians as the “critical period of American history,” furnishes countless examples of barriers to the forging of a continental nation out of thirteen newly sovereign and independent states. For example, despite the unanimous wish of the Continental Congress for a March 10, 1778 ratification by the states of the Articles of Confederation, three-and-a-half years passed before the states were persuaded of the Articles’ necessity and granted them constitutional force.² William Henry Drayton, speaking against the Articles’ ratification in South Carolina, found that under them “scarce the shadow of sovereignty remains to any”³ of the states. It is testimony to the strength of local attachments after the

¹ See J. POMFRET, *COLONIAL NEW JERSEY* 274 (1973).

² M. JENSEN, *THE ARTICLES OF CONFEDERATION* 184 (1940).

³ *Id.* at 186.

Revolution that Drayton's criticism of our first national charter, which proved in short order to be woefully inadequate for the preservation of the union, was a common refrain in the state assemblies.⁴

The language of the Articles of Confederation reflects how jealous the thirteen states were about their own sovereignty. The very enabling resolution creating the Continental Congress reads in the terms of a multilateral treaty among sovereigns: "The said states hereby severally enter into a firm league of friendship with each other. . . ."⁵ The Confederation had no power to levy taxes and no authority to raise armies.⁶ It is nothing short of a miracle that the Revolution was successful, and thus that there was any occasion to convene the Constitutional Convention.

When the Continental Congress met in New York early in 1787 and voted to support the calling of a convention in Philadelphia, the authorizing resolution was carefully circumscribed. Washington, Hamilton, and Madison, among others, wanted a true constitutional convention. The Congress consented only to a convention to consider reviewing the existing Articles, however. The resolution was explicit; the convention was called "for the sole purpose of revising the Articles of Confederation."⁷ Yet a transformation in the very structure of the union was necessary. As Hamilton wrote in the fifteenth essay of *The Federalist*, "The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist."⁸ This vice, of course, was intrinsic to the idea of state sovereignty, which lay at the base of the Articles. As James Wilson remarked at the Convention, "If no state will part with any of its sovereignty, it is in vain to talk of a national government."⁹

It is surely clear now that a loose federation of thirteen sovereign states would have doomed us to a Balkanization that would have made us easy victims of the predatory world powers

⁴ See *id.* at 185-97.

⁵ U.S. ARTICLES OF CONFEDERATION of 1781, art. III, cl. 1.

⁶ C. WARREN, *THE MAKING OF THE CONSTITUTION* 6 (1937).

⁷ *Id.* at 42.

⁸ *THE FEDERALIST* No. 15, at 108 (A. Hamilton)(New American Library ed. 1961).

⁹ 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 183 (M. Farrand ed. 1911).

of that day and doubtless would have hindered our economic and political development. If ever in history there were persons who should be honored for going somewhat beyond their charge, they were the delegates in Philadelphia.

Contrary to the position taken by many of the Anti-Federalists, to praise the formation of a strong national government is not to disparage the important role of the states in the constitutional framework that emerged from the Convention. The Great Compromise guaranteeing equal representation of the states in the Senate in exchange for a population-based representation in the House is but one example of the Convention's recognition of state authority. For this brilliant aspect of our constitutional system, aptly described by Madison as "neither wholly *national* nor wholly *federal*,"¹⁰ we owe a debt of gratitude to no one more than William Paterson.

At certain times in our history, the complex system of divided powers and checks and balances created by the Constitution has rendered it difficult and controversial to determine precisely where institutional sovereignty resides in a particular instance. The Constitution has always been the touchstone for resolving those questions. It is, in Paterson's words, "the work or will of the People themselves, in their original, sovereign, and unlimited capacity."¹¹

The efficacy of the Constitution in securing free, responsible government for Americans is evidenced by the fact that it is the oldest written national constitution in the world. The occasion of the 200th anniversary of the United States Constitution gives the legal community a special duty to reflect upon the reasons for its durability and continued vitality. Only through such reflection can we hope to preserve the ideals of constitutional government for future citizens of this great nation.

¹⁰ THE FEDERALIST No. 39, at 246 (J. Madison)(New American Library ed. 1961).

¹¹ *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 308 (Paterson, Circuit Justice 1795).