

# THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES

MAX FARRAND

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BY  
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## PREFACE

For over ten years the writer has been engaged in collecting and editing the material available upon the work of the convention that framed the constitution of the United States. Collating of texts is a wearisome and often merely a mechanical task, but in the process the editor becomes more or less familiar with the content of the documents. In the present instance the form in which the work finally shaped itself required a knowledge of the proceedings of the convention not merely as a whole, but from day to day, and it necessitated a familiarity with the thought and expressions of the individual members. When to this was added an acquaintance with the personalities of the more important delegates, a mental picture of the convention was formed which developed into a conviction as to what the delegates were trying to do and what they actually accomplished.

It is with no idea of attempting the final history of the formation of the constitution that the present book is written. If there be any truth in the epigrammatic definition that "history is past politics," it is equally true that, in the case

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of an institution still existing, history is present politics as well. So long as it remains the instrument under which the government of the United States is conducted, it is doubtful that any one, any American at least, can write the final word regarding the framing of our constitution.

Nor is this intended to be a complete history. It is a brief presentation of the author's personal interpretation of what took place in the federal convention. It is merely a sketch in outline, the details of which each student must fill out according to his own needs.

This book is founded upon the work the author has already referred to as edited by himself, *The Records of the Federal Convention* (New Haven, Yale University Press, 1911. 3 vols.). In the writing of it scarcely anything else has been used. The *Records* are so arranged as to render most of the citations easily found, and accordingly, with few exceptions, all footnote references have been omitted.

During the years that the work of editing and writing has been in progress, the author has presented this subject for study to classes, both graduate and undergraduate, at different institutions. To the members of those classes who have endured the exploitation of his pet theories and ideas, who have themselves suggested new points of view, and who have stimulated him to his best

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efforts, the author would acknowledge his grateful indebtedness.

Mr. E. Byrne Hackett, in his capacity as manager of the Yale University Press, has taken the greatest interest in the mechanical make-up of this book. In a personal and purely friendly way he also read the entire manuscript and made suggestions which resulted in its betterment. For his co-operation the author is heartily appreciative.

M. F.

New Haven, November 8, 1912.

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## CHAPTER I

### THE CALLING OF THE FEDERAL CONVENTION

Democratic government was on trial before the world. Thirteen British colonies had asserted and established their independence because they declared the form of government under which they had been living was destructive of their "unalienable rights" of "life, liberty and the pursuit of happiness." Each of those colonies had established a government of its own, and together they had formed a union of "The United States of America" by means of certain articles of confederation. The individual state governments were proving fairly satisfactory, but the union was not. Its inadequacy had become more and more evident as the war for independence had continued and the strain of the struggle had grown harder to endure. As long as the war was in progress, the states had held together through sheer necessity; but as soon as the war was over, the selfishness of the individual states was asserting itself and the union was in danger of disintegration. The thirteen united states of America had renounced their allegiance to Great Britain,

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because the latter country no longer governed them well, and it now appeared as if they were unable to govern themselves. If the people of the United States were to prove their right "to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them," they must show themselves capable of establishing and maintaining an efficient government. To justify themselves before the world and to justify themselves in their own eyes, an effective union was essential.

The articles of confederation represented the first essay in united government that the newly independent states had made. When their congress in June, 1776, appointed a committee to draft a declaration of independence, it appointed another committee to prepare a "form of confederation," and the latter committee made its report shortly after the Declaration of Independence was adopted. The difficulty of establishing a union may be inferred from the fact that the plan submitted by the committee was the subject of intermittent discussion in congress for over a year and when the amended plan was referred to the states for ratification it was over three years before the approval of all could be secured. Although the articles of confederation were thus not formally in operation until 1781, congress

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seems to have followed a procedure in accordance with them, so that the experience of the confederation extended over a longer time than the official dates indicate, and really began with the establishment of independence.

The one central organ of the newly established government was a congress, which might well have been termed a congress of states: in it all the states were upon an equal footing, each with a single vote, and the delegation from each state was composed of not less than two nor more than seven members, who were appointed annually in whatever way the legislature of each state directed, who were maintained at the expense of their respective states, and who were subject to recall at any moment. To the congress thus constituted quite extensive powers were granted, but with two important limitations: none of the more important powers could be exercised "unless nine States assent to the same," which was equivalent to requiring a two-thirds vote; and when a decision had been reached there was nothing to compel the states to obedience except the mere declaration in the articles that "every State shall abide by the determinations of the United States in Congress assembled." Executive there was none, beyond the committees which the congress might establish to work under its own direction, and the only federal courts were such as congress

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might appoint for the trial of piracy and felony on the high seas and for determining appeals in cases of prize capture.

Under such conditions the decisions of congress were little more than recommendations. This was amply shown in the all-important matter of obtaining funds. The articles provided that the national treasury should "be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person." Congress was to determine the amount of money needed and to apportion to each state its share. Congress did so, but the states honored the requisitions exactly to the extent that each saw fit, and congress had no power and no right to enforce payment. What was the result? If one may judge by the complaints that were entered, it was more profitable to disobey than to obey. In the dire straits for funds to which it found itself reduced, congress took advantage of the lack of information on land values to juggle with the estimates, so as to demand more of those states that had previously shown a willingness to pay.

The financial situation was so serious that early in 1781, before the articles had been finally ratified, congress had already proposed to the states an amendment authorizing the levy of a five per cent duty upon imports and upon goods

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condemned in prize cases. The amendment was agreed to by twelve states. But another weakness of the confederation was here revealed, in that the articles could only be amended with the consent of all of the thirteen states. The refusal of Rhode Island was sufficient to block a measure that was approved of by the twelve others. In 1783 congress made another attempt to obtain a revenue by requesting authority for twenty-five years to levy certain duties, and by recommending for the same term of twenty-five years that the states should contribute in proportion \$1,500,000 annually, the basis of apportionment being changed from land values to numbers of population, in which three-fifths of the slaves should be counted. In three years only nine of the states had given their consent and some of those had consented in such a way as would have hampered the effectiveness of the plan. It was, however, the only relief in sight and in 1786 congress made a special appeal to the remaining states to act. Before the end of the year, all of the states had responded with the exception of New York. Again the inaction of a single state effectually blocked the will of all the others.

Matters of commerce were inseparably associated with those of finance and were at this time of equal moment. In 1784 congress made an appeal to the states in which it was said: "The

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situation of Commerce at this time claims the attention of the several states, and few objects of greater importance can present themselves to their Notice. The fortune of every Citizen is interested in the success thereof; for it is the constant source of wealth and incentive to industry; and the value of our produce and our land must ever rise or fall in proportion to the prosperity or adverse state of trade." The people of the United States seemed to be surprised and even resentful that their political independence had resulted in placing them outside of the British colonial system. As British colonists they had protested against the restrictions of the navigation acts, but they found those acts still more obnoxious when enforced against themselves as foreigners. Trade was adjusting itself to the new conditions and seeking new outlets, but until this had developed to a sufficient extent to make itself felt, the only possible policy, according to the prevailing conceptions of the time, was that of retaliation. The purpose of retaliation was to force other countries, and Great Britain in particular, to make concessions in favor of the United States. It was for this purpose that congress appealed to the states in 1784. It was virtually a navigation act for which power was requested and only for the term of fifteen years. All of the states responded, but

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with so many conflicting qualifications and conditions that the attempt was again a failure.

Pending a grant of power to congress over matters of commerce, the states acted individually. A uniform policy was necessary, and while a pretense was made of acting in unison to achieve a much desired end, it is evident that selfish motives frequently dictated what was done. Any state which enjoyed superior conditions to a neighboring state was only too apt to take advantage of that fact. Some of the states, as James Madison described it, "having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, through whose ports their commerce was carried on. New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms." The Americans were an agricultural and a trading people. Interference with the arteries of commerce was cutting off the very life-blood of the nation, and something had to be done. The articles of confederation provided no remedy, and it was evident that amendments to that document, if presented in the ordinary way, were not likely to succeed. Some other method of procedure was necessary, and a promising way had already opened.

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Virginia and Maryland had come to a working agreement regarding the navigation of Chesapeake Bay and some of its tributary waters, and those two states had requested the co-operation of Pennsylvania and Delaware. This whole proceeding was distinctly unconstitutional, for the articles of confederation specified that all such agreements must receive the consent of congress and that had not been obtained. But whether illegal or not it seemed to be an effective way of working, and in 1786 it was tried on a larger scale. Early in that year Virginia appointed commissioners "to meet such commissioners as may be appointed in the other states of the Union, at a time and place to be agreed on, to take into consideration the trade of the United States." This proposal for a general trade convention seemed to meet with approval, and the Virginia commissioners, two of whom were James Madison and Edmund Randolph, then named Annapolis and the first Monday in September, 1786, as the place and the time.

In spite of the apparently favorable attitude towards it, when the time for the convention arrived only five states were represented. At least four other states had appointed commissioners, but the individuals had not hastened their attendance. With so small a number present it was impossible for the convention to accom-



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plish the purpose of its meeting; but with the advance in public opinion, the commissioners did not hesitate to recommend another convention of wider scope. The French representative in this country wrote home to his government, what was evidently whispered among the elect, that there was no expectation and no intention that anything should be done by the convention beyond preparing the way for another meeting, and that the report was hurried through before sufficient states were represented to be embarrassing.

Alexander Hamilton was greatly interested in this whole movement for the betterment of conditions; he took a leading part in the Annapolis trade convention, and is supposed to have drafted its report. Whether or not there is any truth in the assertion above, that Hamilton thought it advisable to conceal his purposes, there is no doubt that the Annapolis convention was an all-important step in the progress of reform. Its recommendation was the direct occasion of the gathering of the convention that framed the constitution of the United States.

The recommendation, which the Annapolis delegates made, took the form of a report to the legislatures of their respective states, in which they referred to but did not enumerate "important defects in the System of the Fœderal Government," which were "of a nature so serious as,