

THE
WRITING
AND
RATIFICATION
OF THE
U. S. CONSTITUTION

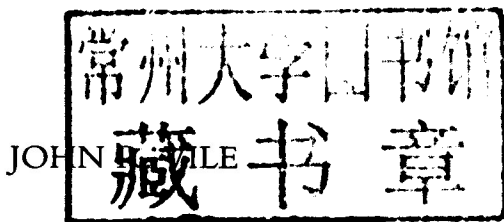
PRACTICAL VIRTUE IN ACTION



JOHN R. VILE

THE WRITING AND RATIFICATION OF THE U.S. CONSTITUTION

Practical Virtue in Action



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THE WRITING AND
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Dedicated to my students and colleagues in the University Honors
College and the Department of Political Science at Middle Tennessee
State University

PREFACE

I have examined and taught U.S. constitutional law, which largely involves teaching decisions by the Supreme Court, for more than three decades. As much as I enjoy reading court decisions, I am even more fascinated by the Constitution that the court seeks to interpret. I have presented my views of the Constitution and the major judicial decisions that have explained it in my *Companion to the United States and Its Amendments*, which is now in its fifth edition. Another work in which I take great pride is a two-volume work that ABC-CLIO published in 2005 entitled *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding*.

As the subtitle of these volumes suggest, that massive work is organized in an A-to-Z format and has hundreds of entries that relate in part or in whole to the Constitutional Convention of 1787. Although I think it can rightly claim to be one of the most comprehensive works on the subject, its A-to-Z format is designed primarily as a reference work that does not encourage lay persons, high school students, or college and university students to read straight through.

I am therefore most grateful to Rowman and Littlefield for giving me the opportunity to author this book, which should especially meet the needs of these audiences. As I worked on developing the narrative, I came to see great similarities between the way that members of the U.S. Supreme Court and other courts operate and the way that delegates to the Constitutional Convention worked. Individuals at the Convention, like members of the court, sought not simply to take votes but also to convince their colleagues, and the more general lay audience, through arguments that their reasoning was sound.

As I reread the notes that Madison and others took of the proceedings of the Constitutional Convention, which have been painstakingly

collected in Max Farrand's *The Records of the Federal Convention of 1787* (1966), I came more than ever to appreciate both the style and substance of the debates. Facing what they believed to be a major crisis under the existing government, delegates directed their efforts by drafting rules, selecting a wise and respected leader to preside, and then proceeding deliberately and, for the most part, courteously, to draft a plan of government. Despite the summer heat and their absence from family and friends, the delegates participated in intense debates, often over subjects that they had already examined many times before.

At a time when presidential debates are largely reduced to one-minute statements from which commentators can take sound bites, and radio and television talk show hosts seek to highlight conflict rather than consensus, the framers of the U.S. Constitution engaged in a long-term reasoned discussion, not unlike that which one finds in court decisions where justices outline majority, concurring, and dissenting opinions. The analogy is not perfect. Since we have records of the debates at the convention, it is almost as though we were listening in on the arguments that the delegates made before they proposed and adopted their resolutions and then began defending them (perhaps reading *The Federalist*, which retrospectively seeks to defend the Constitution, is more like reading Supreme Court decisions).

Ironically, the authenticity of the arguments that delegates advanced at the Constitutional Convention was probably enhanced by the fact that the delegates conducted their debates in secret (where they did not have to tailor arguments to an outside audience) and correctly anticipated that the proceedings would not be published during their lifetimes. They were therefore able to speak with a candor that may not be nearly as likely in other public bodies. Like Supreme Court justices meeting in conference, the delegates were immediately intent with persuading one another, rather than with persuading the public.

Students who are familiar with my *Essential Supreme Court Decisions: Summaries of Leading Cases in U.S. Constitutional Law*, which is now in its fifteenth edition, or who are otherwise acquainted with the process of briefing cases, will see that this book is in some respect a "brief" of the convention's deliberations. Like such a brief, this book explains the key facts leading up to and surrounding the convention, identifies the issues that the delegates faced, records the decisions that they reached, and sometimes reconsidered, and presents the arguments that proponents and opponents of each decision offered. Taken together, these "briefs" of delegates' arguments also highlight the similarities and differences in viewpoints among both the delegates and the states that they represented. More importantly,

many of the arguments and counterarguments that delegates raised in 1787 remain relevant to understanding not only the provisions within the original Constitution but also possible alternatives.

Although contemporary politicians sometimes substitute assertion for argument and speak of compromise as though it were a sign of either weakness or inconsistency, the delegates who met in Philadelphia in 1787 attempted to meet argument with argument and were not ashamed to engage in compromise. They recognized that they had assembled not as a group of political philosophers who were concerned about the fate of an abstract nation, but as representatives of individual states seeking to advance the common good. It is doubtful that any delegate emerged from the Pennsylvania State House on September 17, 1787 thinking that he had signed a perfect document, but 39 of 42 remaining delegates left the convention confident that the Constitution they had hammered out through arguments and compromises was far better than the existing government, which they and their fellow countrymen had weighed in the balance of experience and found wanting. The delegates were wise enough to recognize that unattainable perfection was the enemy of an attainable good, and they drafted and proposed a Constitution that they thought would be accountable to the people and that would avoid either anarchy or despotism. Although they debated in secret, the document the delegates produced was available for every citizen to review. Delegates were further willing to take these arguments on the hustings as they sought ratification of state conventions for their handiwork.

Congress now mandates publicly funded schools throughout America to celebrate the Constitution in order to be eligible for certain federal funds. I doubt that many of the framers would have approved of such a meddlesome federal mandate (indeed Antifederalist opponents of the document might view this as a confirmation of their worst fears), but I am confident that they would be pleased if they knew that students and other citizens were not only examining what the Constitution says, but seeking to understand why it does so. It is my profound hope that this volume will further these goals.

A NOTE ABOUT THE SUBTITLE

Although the title of this work is fairly straightforward, the subtitle requires some explanation. Given my particular admiration for James Madison, I initially sought a subtitle that would highlight his role at the convention,

but taking a cue from Madison's own reluctance to accept sole paternity of the Constitution, I worked instead from a phrase that I found within the notes of a speech by William Paterson, who introduced the New Jersey Plan as an alternative to Madison's Virginia Plan. Although I would not advise elected officials to heed Paterson's observation that "we must follow the People; the People will not follow us," I agree with his observation that legislation and constitution-making must be accommodated to what he describes as "the Genius, the Temper, the Habits, [and, indeed, sometimes] the Prejudices of the People." He followed this by saying that "A little practicable Virtue is to be preferred to Theory" (Farrand 1966, 1:186). This is very similar to what I believe John Dickinson meant when he proclaimed that "Experience must be our only guide. Reason may mislead us" (2:278). Both Paterson and Dickinson appear to have been summarizing the ideas of Aristotelian philosophy. This Greek philosopher had thus written both about *phronesis*, or practical wisdom, and of *arête*, or virtue, which he believe to be the means between excess and deficiency.

I think the most remarkable aspect of the Constitutional Convention of 1787 is that while not kowtowing to public opinion, delegates looked to experience to guide their actions between extremes and to create the best document that they thought was attainable at the time. I think the pursuit of such "practicable virtue" is far to be preferred to the utopian quests that have too often dominated modern politics, and I believe that it has opened plenty of space for the nation to continue to keep its feet on the ground as it pursued noble ideals. Because I have modernized the term "practicable" to "practical," I have not put the two words in quotation marks, but I nonetheless want to credit Paterson as the inspiration for them.

A FURTHER NOTE ABOUT SOURCES

I have listed numerous sources about the Constitutional Convention and related events in a bibliography at the back of this volume. I have tried to minimize references within the text largely to enhance readability, but I decided to maintain references to the volume and page number of Max Farrand's four-volume *The Records of the Federal Convention of 1787* so that readers who chose to do so could readily look them up and examine their wider context. I have identified speakers within the texts. My references to quotations within these indispensable volumes typically consist only of a volume number and page number within parentheses.

SOURCES CITED IN THIS PREFACE

- Farrand, Max, ed. 1966. *The Records of the Federal Convention*. 4 vols. New Haven, CT: Yale University Press. First published in 1911; revised edition published in 1937 and reissued in 1966.
- Vile, John R. 2005. *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding*. 2 vols. Santa Barbara, CA: ABC-CLIO.
- . 2010. *Essential Supreme Court Decisions: Summaries of Leading Cases in U.S. Constitutional Law*, 15th ed. Lanham, MD: Rowman & Littlefield.
- . 2011. *A Companion to the United States Constitution and Its Amendments*, 5th ed. Lanham, MD: Rowman & Littlefield.

TIMELINE OF EVENTS

- 1215 The Signing of the Magna Carta
- 1619 Creation of the Virginia House of Burgesses
- 1620 The Signing of the Mayflower Compact
- 1754 Beginning of the French and Indian War
- 1763 End of the French and Indian War
- 1765 Imposition of the Stamp Act and meeting of the Stamp Act Congress
- 1773 Boston Tea Party signals continuing colonial opposition to British taxes
- 1774 First Continental Congress meets in Philadelphia
- 1775 Battles of Lexington and Concord
Meeting of the First Continental Congress
- 1776 States (led by New Hampshire and South Carolina) begin writing new constitutions
Meeting of the Second Continental Congress
Issuance of the Declaration of Independence
- 1777 Second Continental Congress Drafts Articles of Confederation
- 1781 The last state adopts the Articles of Confederation
The Colonists and their French allies defeat the British at Yorktown
- 1783 The Treaty of Paris marks an end to the Revolutionary War
- 1785 Virginia and Maryland delegates meet at Mt. Vernon to discuss common problems
- 1786 Annapolis Convention Issues a Call for a Convention
- 1786-87 Shays's Rebellion breaks out in Massachusetts

- 1787 The Meeting of the Constitutional Convention
- 1788 Ratification of the U.S. Constitution
- 1789 Inauguration of Washington
- 1789 Congressional proposal of the Bill of Rights
- 1790 Rhode Island is last state to ratify new Constitution
- 1791 State ratification of the Bill of Rights is completed
- 1836 James Madison, last attendee at the Constitutional Convention, dies
- 1840 Madison's notes of the Constitutional Convention are first published

DAY-BY-DAY TIMELINE OF THE CONSTITUTIONAL CONVENTION, 1787

- Wednesday, May 3 James Madison arrives in Philadelphia.
- Monday, May 14 This is the day the Convention had been slated to begin.
- Friday May 25 A quorum of states is present, and the Constitutional Convention begins.
The Convention selects George Washington as president.
The Convention appoints a committee to draw up rules.
- Monday, May 28 Convention modifies and adopts the report of the Rules Committee.
- Tuesday, May 29 Randolph introduces the Virginia Plan, which proposes three branches of government.
- Wednesday, May 30 The Convention meets as a Committee of the Whole with Nathaniel Gorham as Chairman.
Committee of the Whole votes for a government of three branches.
Committee of the Whole votes for a new method of apportioning congress to replace equal representation under the Articles of Confederation.
- Thursday, May 31 Committee of the Whole agrees to a bicameral Congress.
Committee of the Whole agrees that the people shall select members of the first house of Congress.

- Committee agrees that Congress should legislate in cases in which individual states were incompetent.
- Committee agrees that Congress shall have a negative of state laws that are contrary to the new constitution.
- Friday, June 1 Committee of the Whole votes to create a national executive who would serve a seven-year term.
- Saturday, June 2 Wilson proposes a mechanism for selecting the president that resembles today's electoral college.
- Monday, June 4 Committee of the Whole proposes a single executive with a veto power, which two-thirds majorities of Congress could override.
- Tuesday, June 5 Committee of the Whole proposes the establishment of federal courts.
- Wednesday June 6 Committee of the Whole discusses possibility of allowing state legislatures to choose members of the first house of Congress. Madison gives his first major speech at the Convention.
Madison argues for allying the President and Judges in a Council of Revision but Convention disagrees.
- Thursday, June 7 Committee of the Whole considers election and size of second house and decides to allow state legislatures to select its members.
- Friday, June 8 Committee of the Whole discusses possible congressional veto of state laws but decides against it.
- Saturday, June 9 Committee of the Whole votes against a plan introduced by Elbridge Gerry to vest election of the national executive in state governors.
- Monday, June 11 Committee of the Whole agrees to "some equitable ratio of representation" for both houses of Congress.
- Tuesday, June 12 Committee of the Whole votes for three-year term for members of the first house, for pay from the national treasury, and for making members ineligible for other national offices for one year after leaving office.

- Wednesday, June 13 Committee of the Whole resolves remaining issues and presents its report to the Convention of the progress on the document to date in a series of 19 resolutions.
- Thursday, June 14 William Paterson asks for time to contemplate the report of the Committee of the Whole and suggest an alternate plan.
- Friday, June 15 William Paterson introduces the New Jersey Plan, which was closer in intent and structure to the Articles of Confederation than to the Virginia Plan.
- Saturday, June 16 Delegates discuss merits and demerits of the New Jersey Plan.
- Monday, June 18 Alexander Hamilton delivers one of the longest speeches at the Convention and proposes his own plan featuring an executive and a senate serving during good behavior.
- Tuesday, June 19 James Madison gives a lengthy speech defending the Virginia Plan.
Committee of the Whole votes 7-3-1 to resume discussion of the Virginia Plan.
- Wednesday, June 20 Convention replaces word “national” for the new government with “Government of the United States.”
Sherman proposes proportional representation in one house of Congress and equal state representation in the other.
- Thursday, June 21 In discussing bicameral Congress, the Convention renews discussion of federalism.
Convention decides on two-year term for members of the first house.
- Friday, June 22 Convention sets minimum age of members of the first house at 25.
- Saturday, June 23 Convention votes to prevent members of Congress from accepting other offices during their terms.
- Monday, June 25 Charles Pinckney gives a long speech commenting on the lack of class distinctions among Americans.

- Convention votes that state legislatures would choose members of the second house of Congress.
- Tuesday, June 26 Convention votes for 9-year terms for Senators and for the power of both houses to originate bills.
- Wednesday, June 27 Luther Martin gives a long speech arguing for the need to preserve state governments.
- Thursday, June 28 Benjamin Franklin proposes that the Convention should begin each session with prayer.
- Friday, June 29 As discussions of representation continue, Ellsworth describes the government the Convention is seeking as “partly national; partly federal.”
- Saturday, June 30 Saying “*I do not, gentlemen, trust you,*” Delaware’s Gunning Bedford suggests that if the large states dissolved the Confederation, smaller states might seek foreign allies.
- Monday, July 2 Convention divides equally (5-5-1) as to whether to give states equal representation within the Senate.
- Convention votes for a Grand Committee of Eleven delegates to examine representation in Congress.
- Tuesday, July 3 Grand Committee meets.
- Wednesday, July 4 Convention takes day off for Independence Day Holiday.
- Thursday, July 5 Grand Committee proposes proportional representation in first house, which alone could initiate money bills, and equality in the second.
- Friday, July 6 Convention sets up another committee of five to review Grand Committee proposals relative to size of Congress.
- Saturday, July 7 Convention votes to leave equal representation in the second house as part of the report of the Grand Committee.
- Monday, July 9 Committee of Five recommends 56 members in first house of Congress.

- Convention decides to create a Committee of Eleven to consider this.
- Tuesday, July 10 New Committee proposes increasing number of members of the first house to 65, and Convention rejects Madison's proposal to double that number.
- Wednesday, July 11 Convention agrees to periodic census of free whites but rejects idea of counting each slave as three-fifths of a person.
- Thursday, July 12 Convention agrees to link representation within Congress to direct taxation.
- Friday, July 13 Convention splits evenly on giving each state an equal vote in the Senate.
- Saturday, July 14 Convention rejects proposal that would limit the admission of new states to keep them from outnumbering the original.
- Monday, July 16 Convention votes 5-4-1 to accept Committee report for proportional representation in one house and equal state representation in the other.
After Randolph suggests an adjournment, Paterson suggests disbanding and seeking instructions from constituents.
- Tuesday, July 17 Delegates from large states meet informally before convention and agreed that they would have to accept Great Compromise.
Convention rejects congressional negative of state laws.
Convention votes for a single executive to be selected by Congress for a single seven-year term.
- Wednesday, July 18 Convention approves of a judicial branch headed by a Supreme Court whose members would serve during good behavior and for allowing the establishment of inferior tribunals.
Guarantees states a republican form of government and protection against foreign or domestic violence.
- Thursday, July 19 Convention votes to give each state from one to three electors to choose the president for a six-year term.

- Friday, July 20 Convention votes to apportion electors for president based on state representation in the first house of Congress and to make president removable by impeachment.
- Saturday, July 21 Convention gives executive a qualified veto but decides not to ally him with a Council of Revision.
- Monday, July 23 Two delegates from New Hampshire finally arrive at the Convention.
Convention votes to send Constitution to state conventions for ratification.
- Tuesday, July 24 Convention settles on two senators per state.
Convention chooses five delegates to the Committee of Detail.
- Wednesday, July 25 Convention rejects motion to allow executive eligibility for only six of every twelve years.
- Thursday, July 26 Convention votes to restore single seven-year executive term but rejects proposal that legislators should have a property qualification.
Convention adjourns until August 6 to give Committee of Detail time to do its work.
- Monday, August 6 Committee of Detail reports a document with 23 articles to the Convention, which delegates begin to debate article by article.
- Tuesday, August 7 Convention debates congressional meeting times.
- Wednesday, Aug. 8 Convention agrees to leave Committee's suggestion that state voting qualifications for members of first house of Congress align with those for most numerous branch of state legislatures but votes to require citizenship for House members for seven years rather than three.
Convention votes to apportion house counting slaves as three-fifths of a person prompting discussions of slavery.
Convention votes to delete origination of money bills in first house.
- Thursday, August 9 Convention rejected 14-year citizenship requirement for Senators and retains proposal for congressional oversight of federal elections.