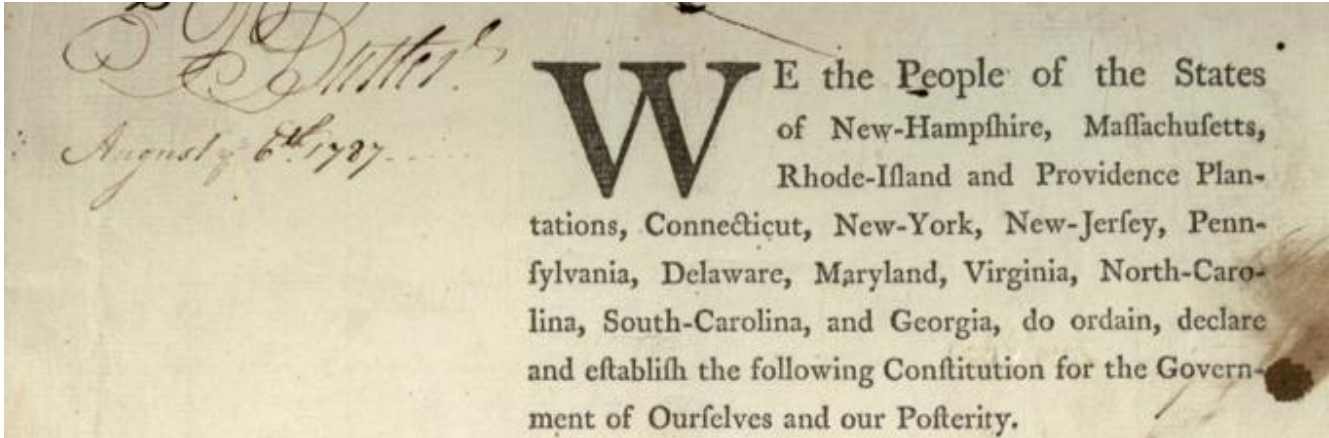


Creating a New Government

by Gordon S. Wood



The Preamble from an early draft of the US Constitution reveals the states as disparate parts of a confederation, not a unified nation. (Gilder Lehrman Collection)

When on July 4, 1776, Americans declared independence from the monarchy of Great Britain, they were faced with the formidable task of creating new republican governments. Their immediate focus was not on any central authority but on their individual state governments. Today we are apt to forget that the federal government under which we now live was a decade away in 1776. Indeed, the strong national government that was created in 1787 was beyond anyone's imagination at the time of the Declaration of Independence. Having just thrown off a far-removed and powerful central government, Americans in 1776 were in no mood to even consider the kind of strong central government framed by the Philadelphia Convention in 1787. The Declaration of Independence may have been made by the United States of America, but it actually emphasized the separate sovereignty of each of the states, proclaiming that as "Free and Independent States they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all the other things which independent States may of right do." With the separation from the British Crown in 1776, the only central authority Americans had in mind was their Continental Congress, which had been operating for nearly two years.

It was this Continental Congress that would carry Americans through the Revolutionary War and the several years following the peace. But the Congress was not really a traditional governmental body at all; it was a collection of delegates or embassies from each of the thirteen states ("a diplomatic assembly," John Adams called it) brought together by the need to resist British power. Such an assemblage of independent entities gave the United States of America a literal plural meaning that has since been lost. The single unified nation that we have now was scarcely conceivable to Americans in 1776.

Hence when Americans thought about creating new governments, their attention was almost exclusively on their separate states. In fact, drawing up new state constitutions, said Thomas Jefferson in the spring of 1776, was “the whole object of the present controversy.” The Revolution was not about simply becoming independent from British tyranny; with their new state governments Americans aimed to show the world how tyranny anywhere might be prevented.[1]

This awesome goal helps explain the Americans’ sense of exhilaration in 1776. They believed, as John Jay of New York put it, that they were “the first people whom heaven has favoured with an opportunity of deliberating upon, and choosing the forms of government under which they should live.” Once independence was declared, many delegates lost interest in the business of the Continental Congress, despite the fact that it was trying to conduct the war with Britain; like Jefferson, they returned home to take part in what most regarded as the more important task of creating new state constitutions—and, remarkably, writing them out on paper. “Constitutions employ every pen,” declared Francis Lightfoot Lee of Virginia.[2]

When new states today, say in Iraq or Afghanistan, create constitutions, we know they will be written documents, but prior to the American experience in 1776 that was rarely the case. Before the American Revolution a constitution was usually not incorporated in a single written document, and it was seldom separated from the government and its operations. A constitution usually meant, as it did for the English, the way the government was put together or constituted—that is, the manner in which the government’s laws, customs, and institutions were combined with the principles they embodied. The Americans dramatically changed this traditional meaning of a constitution. It became, as we now know, a single written document outlining the powers of government and specifying the rights of citizens. A constitution became a fundamental law distinct from and superior to all the operations of the government. In American hands a constitution, said Thomas Paine, became “a thing antecedent to a government; and a government is only the creature of a constitution.” And, said Paine, it was “not a thing in name only; but in fact.” It could be picked up and cited article by article.[3]

The Revolutionaries immediately faced the difficulty of making their constitutions fundamental. They knew the constitutions were different from ordinary legislation, but how to ensure that distinction? Since the constitutions were created by the legislatures, they presumably could be changed or amended by the legislatures. Some of the constitution-makers in 1776 realized the problem and tried to deal with it. Delaware provided for a super-majority (or five-sevenths) of the legislature to change the constitution. Maryland said that its constitution could only be amended by a two-thirds vote of two successive legislatures. Most states, however, simply enacted their constitutions as if they were regular statutes. Everyone believed that the constitutions were special kinds of law, but at first no one

knew quite how to make them so.

In the several years following 1776 Americans continued to struggle with the problem. By 1780 Massachusetts, which had delayed writing its constitution, came up with the solution. It elected a convention specially designed to form a constitution and then placed that constitution before the people for ratification. As enlightened Europeans realized, the ideas of constitutional conventions and popular ratification were some of the most distinctive contributions the American Revolution made to world politics. In fact, the entire process of state constitution-making captured the imagination of intellectuals everywhere in Europe, and they translated and published the various American state constitutions and vigorously debated their merits.

Although the Revolutionaries in 1776 knew they would create republics with elected leaders in place of the hereditary leaders of monarchies, they did not know precisely what form their new governments would take. Most hoped to create in their states republicanized versions of the famous mixed or balanced constitution of England, in which the Crown, House of Lords, and House of Commons corresponded to the three simple forms of government—monarchy, aristocracy, and democracy—that Europeans had talked about since the ancient Greeks. Americans were most confident of their popular assemblies or their houses of representatives, as they called them, which were thought to exclusively embody the people, or the democracy. By contrast, the gubernatorial part of government—the monarchy—was what they most feared; it reminded them of the Crown’s colonial vice-regents, the former royal governors.

The English, including the colonists, had usually considered the threat of tyranny as originating in the monarchy; the people or their representatives, it was thought, would scarcely tyrannize themselves. So if Americans in 1776 were to root out tyranny once and for all in their new constitutions, they would have to transform the office of the governors. In English history when the Crown had violated the people’s rights, the people had compelled the king to reaffirm Magna Carta or had erected a bill of rights defining the people’s liberties; they had not eliminated the Crown’s prerogative powers that enabled the English monarchs to govern the realm. The Americans meant to do more. Unlike the English in 1215 and 1689, the American constitution-makers were no longer willing simply to erect higher barriers against encroaching power or to formulate more explicit charters of the people’s liberties. They wanted to take away the governors’ prerogative powers and effectively eliminate the chief magistracy’s traditional responsibility for ruling the society—a remarkable and abrupt departure from the English constitutional tradition. However much the English had tried periodically to circumscribe the Crown’s power, they had not generally denied the Crown’s principal responsibility for governing. Indeed, the monarch still today technically and constitutionally governs England.

Americans wanted a very different kind of chief magistrate from the English monarchy. Most agreed with William Hooper of North Carolina that “for the sake of Execution we must have a Magistrate,” but it must be a magistrate “solely executive.” The constitution-makers wanted their governors, as John Adams said, “stripped of most of those badges of domination, called prerogatives.” In the new state constitutions the governors, now elected annually usually by the legislatures, lost their authority to veto legislation, control the meetings of the legislature, declare war, raise armies, coin money, and lay embargos. They became, as Jefferson called them, mere administrators. The radical Pennsylvania constitution actually eliminated the office of the governor outright and put a twelve-man executive council in its place. The constitution-makers gave these prerogative powers to the legislatures, even in some cases the power to grant pardons. At the same time they made their legislatures the most popular in the world; they created equal electoral districts, required annual elections, enlarged the suffrage, and established the closest kinds of connections between the representatives and their constituents.[4]

Perhaps the most significant innovation in the new state constitutions was what came to be called separation of powers. The constitution-makers were convinced that the most sinister source of despotism was the executive power of appointing people to offices, especially members of the legislatures. They believed that the English kings and the royal governors had essentially bribed or corrupted members of Parliament and the colonial legislatures by appointing them to lucrative executive and judicial offices. Consequently, the framers of the Revolutionary state constitutions categorically barred all executive and judicial officeholders from simultaneously sitting in the legislatures. By this effort to prevent their popular representatives from becoming the tools of insidious gubernatorial power, the American framers prohibited the emergence of the kind of parliamentary cabinet government that was developing in England. In contrast to the American system of separation of powers, parliamentary cabinet government, such as exists today in Britain and other parliamentary democracies, actually requires that executive ministers be simultaneously members of the legislature.

As a balancing force between the governors and the houses of representatives, upper houses or senates (the term taken from ancient Rome) were created in all the states except Pennsylvania and Georgia; these senates were presumably to embody the aristocratic element of the mixed constitution. Although the senators were elected, they were not yet considered to be representatives of the people. They had no constituents; they were simply considered the wisest and most established members of the society. Within a few years, however, reformers seeking to create an upper house in Pennsylvania found it politically impossible to justify a senate on the grounds that an aristocratic element was needed for a mixed constitution; instead, they contended that the senate would simply be “a double representation of the

people.”[5]

This argument opened up a whole new way of thinking about representation and government. If the people could be represented twice, then why could they not be represented in multiple institutions? Before long, many Americans began arguing that all parts of America’s governments, including the governors, were actually different kinds of representatives of the people. Thus most Americans (but not John Adams) gradually abandoned their original idea of balancing and mixing the simple forms of monarchy, aristocracy, and democracy in their constitutions, and began referring to their governments as representative democracies, even though they contained governors and senates.

Although Americans concentrated on erecting their new state governments, they also knew they would have to bolster the legal authority of the Continental Congress if they were to succeed in the war against greatest power in the world. Hence the Congress drew up what was in effect a treaty among the thirteen states creating a confederation that authorized the powers it was already exercising. These were essentially the powers earlier exercised by the British Crown—controlling diplomatic relations, requisitioning soldiers and money from the states, coining and borrowing money, regulating Indian affairs, and settling disputes between the states. In the Congress each state had one vote.

In contrast to the rapid creation of the state constitutions in 1776, the Articles of Confederation, as this “firm league of friendship” was called, were not ready to be sent to the states for ratification until November 1777. It took nearly four years, until March 1781, for all the states to legalize this union.

The weakness of the Confederation became apparent even before the Articles were finally ratified. That weakness together with second thoughts that many Americans began to have over the extraordinary amount of power they had given to the popular state legislatures in 1776 led to efforts to reform both the Articles and the Revolutionary state constitutions. The Massachusetts constitution of 1780 embodied much of the new thinking about the state governments, and it influenced the structure of the federal Constitution framed in 1787. The Massachusetts constitution greatly strengthened the governor at the expense of the legislature, especially the lower house. The governor was to be elected directly by the people and was granted the powers to appoint officers and to veto legislation, subject to a two-thirds override by the legislature. The senate was small and formidable, and the judiciary was more independent than most.

These mounting concerns with the weaknesses of the Articles and the fears of excessive democracy in the states came together in 1787 to justify the formation of the new federal Constitution. During the decade between 1776 and 1787 Americans

experienced one of the most creative moments in the history of politics.

[1] Thomas Jefferson to Thomas Nelson, May 16, 1776, in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd, et al. (Princeton: Princeton University Press, 1950), 1:292.

[2] John Jay, Charge to the Grand Jury, Kingston, NY, Sept. 9, 1777, in Hezekiah Niles, ed., *Principles and Acts of the Revolution in America* (New York: A. S. Barnes, 1876), 181; Francis Lightfoot Lee to Landon Carter, Nov. 9, 1776. Papers of the Lee Family, Washington and Lee University. Available at the Lee Family Digital Archive, leearchive.wlu.edu.

[3] Thomas Paine, *Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution* (London: Holyoake and Co., 1856), 27.

[4] William Hooper to North Carolina Congress, Oct. 26, 1776, William L. Saunders, ed., *Colonial Records of North Carolina, 1662–1776* (Raleigh: Nash Brothers, 1886–1890) 1:867; John Adams, Thoughts on Government, in *The Works of John Adams, Second President of the United States*, ed. Charles F. Adams (Boston, 1850–1856), 4:196.

[5] [Benjamin Rush], *Observations upon the Present Government of Pennsylvania in Four Letters* (Philadelphia, 1777), in Dagobert D. Runes, ed., *The Selected Writings of Benjamin Rush* (New York: Philosophical Library, 1947), 68.

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