

THE CONSTITUTION AS A COUP AGAINST THE PUBLIC OPINION*

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My recently published book, *The Framers' Coup: The Making of the United States Constitution*, seeks to make three principal contributions to what is already a rich and vast literature on the origins of the United States Constitution. First, my book tries to tell the entire story of the Founding between two covers: from the flaws in the Articles of Confederation (the document under which the United States was governed before the Constitution was enacted), through the conflict in the states over fiscal and monetary policy in the mid-1780s, through the Philadelphia convention which wrote the Constitution, the ratifying contest in the states, the political debate between Federalists and the Antifederalists (supporters and opponents of ratification, respectively), and the enactment of the Bill of Rights, which was added to the Constitution a couple of years later. There are many books telling parts of this story—some of which are quite wonderful—but there is nothing comprehensive. Thus, I hope I have managed to fill a gap in the literature. Second, I have relied a great deal on primary sources, which has enabled me to tell the story mostly in the words of the participants. I hope this makes the book more vibrant and also readers to decide for themselves how persuasive my interpretations are. Third and finally, I have sought to provide a sharper edge to the “conservative counterrevolution” story

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that many historians have already told about the Founding—that is, viewing the Constitution as a conservative counter-revolution to the egalitarian and redistributive tendencies set in motion or accelerated by the Revolutionary War.

In this short article, I shall discuss three of the themes that underpin *The Framers' Coup*. First, I shall describe two ways in which the Constitution was very different from what most Americans wanted and expected of the Philadelphia convention: the degree to which it shifted power from the state and local levels to the national level (call these the “nationalizing” aspects of the Constitution) and the degree to which it sought to constrain direct popular influence on the national government (call these the “antipopulist” or “democracy-constraining” aspects of the Constitution). Second, I shall try to explain why the Philadelphia convention wrote such a document. Third, I shall explore how the Framers managed to convince the American people to ratify a constitution—through a process that was reasonably democratic for its time (acknowledging the obvious qualification that women, blacks, Native Americans, and people without property were not permitted to participate)—that substantially curbed the influence of ordinary people upon the national government.



To begin, then, the Constitution contained several strikingly nationalist features. First, it gave Congress virtually unlimited taxing power—a stark contrast with the Articles of Confederation, under which Congress exercised no coercive taxing power whatsoever but had only a power to requisition funds from the states, which they frequently declined to pay. Twice under the Articles, Congress had proposed amendments that would have empowered it to impose import duties, but on each occasion one state (first Rhode Island, later New York), rejected the amendment, blocking the unanimity required for the approval of amendments under the Articles. The Constitution, by contrast, empowered Congress to raise any sort of taxes—including controversial land and head taxes—virtually without limit.

Second, the Constitution gave Congress virtually unlimited military powers—to raise an army and a navy, and to call state militias into federal service. Even in time of peace, Congress was empowered to raise an army—without limit as to size and without any requirement for supermajority approval in Congress. By contrast, under the Articles,

Congress could only requisition troops from the states.

Third, the Constitution granted Congress unlimited power to regulate interstate and foreign commerce. No such power existed under the Articles.

Fourth, the Constitution vested Congress with implied powers. Specifically, the Necessary and Proper Clause provides that Congress may exercise, in addition to its many expressly enumerated powers, those powers that are “necessary and proper” to executing its enumerated ones. By contrast, under the Articles of Confederation, Congress was explicitly limited to exercising only its “expressly delegated” powers. While the Necessary and Proper Clause proved intensely controversial during the ratifying contest, it was unanimously approved by the Philadelphia convention.

Fifth and finally, the Constitution supplied both a strong theoretical statement of federal supremacy and a practical means of enforcing it—both of which had been lacking under the Articles. For example, the Articles clearly empowered the Confederation Congress to negotiate treaties, yet that body had no means of enforcing treaty provisions against recalcitrant states that ignored disadvantageous provisions.

At the Philadelphia convention, Madison proposed one mechanism for enforcing federal supremacy—Congress would be vested with the authority to veto any state law whatsoever. Nothing remotely like this had ever been publicly proposed before, and this idea proved too nationalist even for a very nationalist group of delegates.

In place of Madison’s proposed national veto, the convention adopted a tripartite mechanism for the enforcement of federal supremacy. The Supremacy Clause of Article VI clarified that federal law of any sort—the Constitution, federal statutes, and federal treaties—trumped state law to the contrary. Article III created a Supreme Court and authorized—but did not require—Congress to create lower federal courts. By contrast, there had been no federal courts of general jurisdiction under the Articles. Finally, Article I, Section 10 established a substantive rule of federal law to prevent states from enacting the sort of paper money laws and debtor relief measures that had horrified many elite American statesmen in the mid-1780s and had played a critical role in producing the Philadelphia convention in the first place.

It is worth emphasizing that a majority of states had enacted tax and debt relief legislation and paper money laws in the two years preceding the Philadelphia convention. That the convention delegates unanimously approved Article I, Section 10 speaks volumes as to how unrepresentative the convention was of the American population generally.

Article I, Section 10 was both a nationalizing feature of the

Constitution—it empowered the national government to block state legislation of a certain sort—and an antipopulist feature. Another of the Constitution’s principal antipopulist mechanisms was the long terms of office established for federal officeholders. Under the Articles of Confederation and most state constitutions, legislators served annual terms, and a majority of state governors did likewise. By contrast, under the Constitution, members of the House serve two years, presidents four years, and senators six years.

Indeed, many of the delegates to the Philadelphia convention would have preferred much longer terms in office for federal officeholders, had they not been constrained by the practical exigencies of ratification. The convention had provisionally established that representatives would serve three-year terms. Madison and many other delegates preferred nine-year terms for senators. Four state delegations voted for a life-tenured president. Alexander Hamilton favored life tenure for both presidents and senators on the ground that property rights could only be adequately protected with such lengthy terms in office.

Indirect election of federal officeholders was another of the democracy-constraining features of the Constitution. Federal judges would be nominated by the president and subject to Senate confirmation. State legislatures would pick U.S. senators (until the Seventeenth Amendment was ratified in 1913). Presidents would be chosen by electors who were selected in a manner specified by state legislatures (which, today, means by popular vote, but for many of the delegates to the Philadelphia convention meant something else).

Most of the Framers did not trust ordinary Americans to choose their political leaders. At the convention, George Mason, an important delegate from Virginia, declared that “it would be as unnatural to refer the choice of a proper character for chief magistrate to the people, as it would be to refer a trial of colors to a blind man.” (Try running for office sometime on that platform!)

The Framers designed even the one branch of the national government that was to be popularly elected and whose members were to serve only relatively short terms in office—the House of Representatives—to be as insulated as possible from populist political influence. The Constitution provided for a very small initial House—meaning that individual representatives would have a large number of constituents dispersed over a broad geographic area. The point of this arrangement was two-fold. First, it would ensure that the “better sort”—the relatively affluent, well educated, well-born elite—would be elected to office. Second, it would weaken the connection between constituents and their representatives, thus enabling the latter to “refine and

enlarge” —in Madison’s words— the former’s views.

The original House would contain only 65 representatives, which translated into a ratio of more than 30,000 constituents for each House member. By contrast, the lower house of the Massachusetts legislature had well over 300 members in 1787-88, each of whom represented fewer than 1500 constituents.

In addition, Article I, Section 4 of the Constitution authorized Congress to revise state regulations of the times, places, and manner of congressional elections. Many of the Framers contemplated that Congress would use such power to insist that states select their congressional representatives “at large.” For example, under this provision, Congress could require that each of Virginia’s ten congressional representatives be voted upon by all the state’s citizens and represent the entire state— rather than a geographic sliver of it. At-large elections would, of course, translate into enormous geographic constituencies, which the Framers assumed would ensure the election of the “better sort” and reduce representatives’ dependency on their constituents.

Finally, the Constitution omitted provision for the democracy-*enhancing* mechanisms of instruction, recall, and mandatory rotation in office. “Instruction” enabled constituents to instruct their representatives on how to vote on particular issues being debated in the legislature (on pain of being forced to resign for violating instructions). “Recall” enabled, for example, state legislatures under the Articles to remove from office their congressional representatives even before their term in office had expired. “Mandatory rotation” imposed term limits for legislators and governors. For example, under the Articles, congressional delegates could serve only three out of every six years. The Constitution omitted each of these democracy-enhancing mechanisms, which were featured in many state constitutions and the Articles of Confederation.

In sum, the Framers inserted into the Constitution many democracy-constraining features (and omitted several democracy-enhancing ones). Their purposes in doing were to ensure that the federal government would never acquiesce to the sort of paper emissions and debtor relief laws enacted by many state legislatures in the mid-1780s and to block state governments from approving such measures again in the future.



How did the Philadelphia convention manage to write a constitution so different from what most Americans expected and probably desired,

and how did the Federalists manage to convince the country to ratify such a document? These are the parts of the book where I have tried, as already noted, to put a sharper edge on the interpretation of the Constitution as a “conservative counter-revolution” against the egalitarian and redistributive tendencies set in motion by the Revolution.

One leading contemporary critic of the Constitution stated—accurately, I think—that “the democratic and aristocratic parts of the community were disproportionately represented in Philadelphia.” Here are several discrete points that may, in combination, amount to an explanation of why this was the case.

First, in every state but one that chose to send delegates to the Philadelphia convention—only Rhode Island did not attend—state legislatures selected those delegates. (The one exception was South Carolina, where the governor chose them.) Most legislatures seem simply to have selected their states’ most eminent citizens. For example, Virginia appointed as delegates—among others—George Washington, Patrick Henry, George Mason, and James Madison. States’ most eminent citizens, in turn, tended to have served in either or both the Confederation Congress and the Revolutionary Army. Service of either sort was a profoundly nationalizing experience. Representatives in a national legislature often tend to think nationally rather than parochially. Service in an army struggling to create a nation—and facing severe impediments from not only British redcoats but also uncooperative *state* legislatures—is a nationalizing experience. Similarly, the eminent citizens likely to be chosen by legislatures to represent their states at an important national convention were likely to be reasonably affluent and well educated—characteristics that correlated in 1787 with hostility toward populist influence on government.

Second, opponents of the nationalizing and antipopulist project had little reason to mobilize against the Philadelphia convention because they had no way of knowing what would transpire there. The convention’s agenda, it turned out, mainly existed in the head of one man—James Madison. The young Virginian was not the most illustrious of the delegates to the convention—from far it. But he was the only delegate who, before the convention assembled, had systematically studied the history of confederacies and the flaws in the Articles and state constitutions, and had proposed remedies for those flaws. Madison then encouraged the Virginia delegates to arrive early in Philadelphia, where they could coordinate among themselves and with the Pennsylvania delegates, who, conveniently, all resided in Philadelphia. The offshoot of these efforts was the nationalist and democracy-constraining Virginia Plan, which became the convention’s working blueprint. Though

Madison was disappointed with many of the decisions made at the Philadelphia convention, it mattered greatly to the final product that the convention began its deliberations with the resolutions of the Virginia Plan.

A third factor helping to explain the convention's unrepresentative nature was the decision of eight or ten delegates who had been appointed by their legislatures to decline their appointments. Some of these men—including Patrick Henry and Richard Henry Lee of Virginia, and Samuel Chase of Maryland, became leading Antifederalists during the ratifying contest.

It is hard to know for certain why these men declined their appointments to the convention. Some of them offered no explanation for their decisions and, for others, their stated grounds may not have been their actual reasons for not attending. One possibility—albeit, admittedly, a speculative one—is that these individuals were not interested in the mildly nationalizing project they probably assumed was underway in Philadelphia, and they failed to suspect that a movement for radical reform was in the works. Had they been aware of what Madison and others had in mind for the convention, perhaps they would have been inclined to attend in order to fight against this project.

Fourth, a few delegates who attended the Philadelphia convention but did not support its nationalizing and antipopulist agenda made the momentous decision to depart early. Among these delegates were Luther Martin of Maryland, and Robert Yates and John Lansing, Jr., of New York (whose early departure from Philadelphia had the effect of nullifying the vote of the New York delegation, thus prompting its third member, Alexander Hamilton, also to leave Philadelphia early). The delegates who prematurely departed made the plausible calculation that remaining in Philadelphia would help to legitimize an enterprise that was not authorized by the Articles of Confederation and that had exceeded its limiting instructions from the outset. Yet, of course, by leaving early, these delegates essentially ensured that the convention's eventual handiwork would deviate even further from their preferences.

Fifth, the delegates in Philadelphia made the critical decision to close the doors of the convention to the press and public, and to take a strict oath of confidentiality. The delegates had good reasons for this decision: As Madison later explained, there probably would not have been any Constitution had they opened the convention to the public. Yet one important effect of closing the doors of the Pennsylvania Statehouse was to liberate the delegates to voice extremely nationalist and anti-populist views—positions that would have jeopardized their political careers had they been publicly stated. Perhaps of equal importance, by cloaking the

convention's deliberations from public view, the delegates denied the Antifederalists a headstart of several months in mobilizing opposition to the Constitution.

Finally, the delegates made the momentous choice to seize the moment and pursue far-reaching reform. In correspondence they exchanged before the convention, Madison and George Washington had been pleased to discover that they shared the view that the Philadelphia convention should avoid "temporizing expedients." Similarly, when Governor Edmund Randolph of Virginia introduced the Virginia Plan early in the convention, he declared—according to Madison's notes—that he "would not as far as depended on him [Randolph] leave anything that seemed necessary undone. The present moment is favorable, and is probably the last that will offer." In sum, the Framers decided to go for broke; they might not have another chance to pursue the sort of drastic reform they believed necessary to secure a good national government.



Moving onto my last topic, how did the Framers manage to convince the nation to approve—in a reasonably democratic ratifying process—a constitution that was designed, in part, to deprive ordinary people of significant influence on their own national government?

Before seeking to explain that conundrum, let me first emphasize that ratification of the Constitution was by no means inevitable. This was a closely fought context. Rhode Island and North Carolina initially rejected ratification, and New Hampshire would likely have done so as well had Federalists not deftly adjourned the initial session of that state's ratifying convention before a final vote could be taken. Moreover, the votes of conventions in three of the nation's five most populous states were so narrowly in favor of ratification—89 to 79 in Virginia, 187 to 168 in Massachusetts, and 30 to 27 in New York—that an opposite outcome was obviously possible in those states. Had just one or two of these large states declined to join the new union, its success would have been very much in doubt.

Federalists had a number of advantages in the ratifying contest; it was not entirely a fair fight. First, a few ratifying conventions were malapportioned in ways that helped the Federalist cause. This was especially true of South Carolina, where the 20 percent of the white population that lived in coastal districts, where support for the Constitution was very strong, elected 60 percent of the delegates to the

state's ratifying convention. Most historians believe that a majority of South Carolina's voting-eligible population would have opposed ratification in a referendum, yet the severely malapportioned state ratifying convention approved the Constitution by a margin of two to one.

Second, the press strongly favored ratification. While 90 percent of Americans lived outside of cities in 1787, newspapers were published pretty much exclusively in cities, where their economic engines—advertisers and subscribers—overwhelmingly supported the Constitution. In many states, Antifederalists had a hard time even getting their side of the argument published. In the words of Aedanus Burke, a leading Antifederalist in South Carolina, “the whole weight and influence of the press was on the side of the Constitution.” Only about twelve of the roughly ninety newspapers then in circulation published any significant amount of Antifederalist literature.

Third, several state ratifying conventions were held in eastern cities—for example, Massachusetts's convention was in Boston, Pennsylvania's in Philadelphia, and South Carolina's in Charleston—where support for the Constitution was almost universal, even across class lines. For example, in New York City, nineteen out of every twenty voters participating in the selection of delegates to the state ratifying convention (which met in Poughkeepsie) voted for Federalist candidates.

Situating these conventions in eastern cities had an effect both inside and outside of the conventions. All state ratifying conventions were open to the public, and spectators in the galleries were not shy about voicing their opinions. For example, in Connecticut, the Federalists who dominated the crowd whistled, hooted, and stomped their feet when Antifederalist delegates rose to make speeches. At the South Carolina convention, where delegates adjourned in the evenings to open houses hosted by the Charleston planter elite, they surely heard nothing but kind words about the Constitution being whispered into their ears.

A fourth Federalist advantage in the ratifying contest was the relative ease with which Federalists were able to organize their supporters, who lived disproportionately in cities and along the eastern seaboard. By contrast, Antifederalists incurred great difficulty—in an era of relatively primitive transportation and communication—in organizing their supporters, who lived mostly in the West and in backcountry districts that were disconnected from commercial networks. Even if the two sides in the contest had similar numbers of supporters—which is roughly what most historians have estimated to have been the case—Federalists enjoyed a clear organizational advantage.

Fifth, the “better sort”—the relatively affluent, well educated, well

born elite—overwhelmingly supported ratification everywhere but in Virginia, where the elite was more evenly divided. This disparity in elite support gave the Federalists a real oratorical advantage—to the extent that any delegates arrived at ratifying conventions with open minds (which, in some states at least, they clearly did). Backwoods farmers could not quote Cicero in the original Latin and often were intimidated out of speaking before their better educated and more oratorically gifted opponents. Thus, for example, at the Massachusetts ratifying convention, Antifederalist Amos Singletary complained of “these lawyers and men of learning and moneyed men that talk so finely, and gloss over matters so smoothly, to make us poor illiterate people swallow down the pill.”

Sixth and finally, Article VII of the Constitution was an enormous advantage for the Federalists, who, of course, had designed this feature themselves. Whereas the Articles of Confederation required unanimous state approval for the enactment of amendments—which, in practice, had proved impossible to obtain—Article VII provided that the ratification of nine states would put the Constitution into operation (though no state could be bound to the new union without its own consent).

This alteration in the rules for changing the American system of government, which the Framers in Philadelphia simply stipulated (and hoped they could get away with), dramatically shifted the balance of power away from prospective hold-out states. For example, under the Articles, when New York in 1786 had been the last state to resist ratification of the proposed amendment to empower Congress to levy import duties, its legislature had sought to extract concessions from Congress (such as accepting payment of New York’s share of those duties in the state’s own paper money) in exchange for New York’s support of the amendment. By contrast, under the Constitution, once nine states had ratified, the remaining four states would have little choice, as a practical matter, but to fall in line. Hold-out states might be denied the protection of the U.S. military, subjected to discriminatory trade sanctions, and denied the opportunity to participate in crucial decisions to be made by the first Congress, such as where to locate the nation’s permanent capital and whether to amend the Constitution with a bill of rights.

In addition to benefitting from a lopsided playing field, the Federalists also benefitted from some Antifederalist miscalculations, especially in New York and Virginia. In both states, many Antifederalists had supported late dates for ratifying conventions; both state’s conventions assembled in June 1788, nine months after the Constitutional Convention had ended. Antifederalists in these states probably had calculated that they would benefit from additional time to organize their supporters, and perhaps they also believed that their states would play a weightier role in

determining the outcome of the national ratifying contest by delaying their decisions.

Instead, these delays rendered their states irrelevant to the contest's outcome. By the time Virginia approved the Constitution in late June and New York did so in late July, nine states had already ratified, thus putting the Constitution into operation (although news traveled so slowly in those days that the Virginia delegates did not know of the ratification of New Hampshire—the ninth state to approve the Constitution—until after the Richmond convention had ended). Had either New York or Virginia held its convention earlier and rejected unconditional ratification—which would have been likely—this would have disrupted the momentum toward ratification and possibly influenced the decisions of other states.

A final factor in the Federalists' success was their determination and ability to keep intermediate options off the table, thus forcing the nation to choose between the obviously flawed Articles and the much-criticized Constitution. Most Americans probably would have favored something in between had that choice been made available to them. The two procedural devices that would have been most likely to produce an intermediate option were state ratification conditional upon the enactment of antecedent amendments and the calling of a second constitutional convention.

Antifederalists made a strong case for conditional ratification, arguing that their opponents would have little incentive to deliver upon their promises to support amendments once the Constitution had been unconditionally ratified. For example, Patrick Henry told the Virginia ratifying convention that "I should be led to take that man to be a lunatic, who should tell me to run into the adoption of a government avowedly defective, in hopes of having it amended afterwards." A second convention was desirable, according to one South Carolina Antifederalist, because "the general sense of America appeared well understood," and "every objection [to the Constitution] could be met on fair grounds, and adequate remedies applied where necessary."

Federalists made legal and practical arguments against conditional ratification and a second convention, but these may not have been their real reasons for opposing these procedural mechanisms. The Federalists appreciated that they probably could not duplicate the circumstances of the Philadelphia convention now that the cat was out of the bag. Their goal was to secure ratification of the constitution written in Philadelphia, not to arrive at a compromise that reflected the preferences of most Americans.

In this regard, consider the proposal that Governor Edmund Randolph made to James Madison in a letter written before the

Philadelphia convention assembled. The constitution about to be drafted, Randolph argued, should be presented to the nation in a fashion allowing its provisions to be “detached from each other [so] as to permit a state to reject one part without mutilating the whole.” Madison was dismayed by this proposal because he doubted—as did most of the nation’s elite statesmen—that the American people were sufficiently dispassionate, wise, or well-informed to play a responsible role in devising their own system of national governance. As Madison told Jefferson late in 1787, “In Virginia, where the mass of people have been so accustomed to be guided by their rulers on all new and intricate questions,” the matter of whether to ratify the Constitution “certainly surpasses the judgment of the greater part of them.”

To sum up, then, the Constitution was much more nationalist and antipopulist than most Americans probably anticipated or desired. The Framers took advantage of the element of surprise to get it drafted, and the Federalists then barely managed to persuade the country to ratify it, benefitting from some advantageous circumstances, some miscalculations by their adversaries, and some luck (which they partly created for themselves). Whether or not one agrees with what they did or considers it legitimate or illegitimate, one cannot help but admire their skill at executing what can only be described as a coup against public opinion.

The Constitution as a coup against public opinion
A Constituição: um golpe contra a opinião pública
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