The Founding Fathers:  
A Reform Caucus in Action

The work of the Constitutional Convention and the motives of the Founding Fathers have been analyzed under a number of different ideological auspices. To one generation of historians, the hand of God was moving in the assembly; under a later dispensation, the dialectic (at various levels of philosophical sophistication) replaced the Deity: "relationships of production" moved into the niche previously reserved for Love of Country. . . . The Framers have undergone miraculous metamorphoses: at one time acclaimed as liberals and bold social engineers, today they appear in the guise of sound Burkean conservatives, men who in our time would subscribe to Fortune. . . .

The "Fathers" have thus been admitted to our best circles; the revolutionary ferocity which confiscated all Tory property in reach . . . has been converted . . . into a benign dedication to "consensus" and "prescriptive rights." . . . It is not my purpose here to argue that the "Fathers" were, in fact, radical revolutionaries; that proposition has been brilliantly demonstrated. . . . My concern is with the further position that not only were they revolutionaries, but also they were democrats. Indeed, in my view, there is one fundamental truth about the Founding Fathers . . . : They were first and foremost superb democratic politicians. . . . As recent research into the nature of American politics in the 1780s confirms, they were committed (perhaps willy-nilly) to working within the democratic framework, within a universe of public approval. . . . The Philadelphia Convention was not a College of Cardinals or a council of Platonic guardians working within a manipulative, pre-democratic framework; it was a nationalist reform caucus which had to operate with great delicacy and skill in a political cosmos full of enemies to achieve the one definitive goal—popular approbation. . . .

What they did was to hammer out a pragmatic compromise which would both bolster the "national interest" and be acceptable to the people. What inspiration they got came from their collective experience as professional politicians in a democratic society. As John Dickinson put it to his fellow delegates on August 13, "Experience must be our guide. Reason may mislead us."

In this context, let us examine the problems they confronted and the solutions they evolved. The Convention has been described picturesquely as a counter-revolutionary junta and the Constitution as a coup d'état, but this has been accomplished by withdrawing the whole history of the movement
for constitutional reform from its true context. No doubt the goals of the constitutional elite were “subversive” to the existing political order, but it is overlooked that their subversion could only have succeeded if the people of the United States endorsed it by regularized procedures.

I

When the Constitutionalists went forth to subvert the Confederation, they utilized the mechanisms of political legitimacy. And the roadblocks which confronted them were formidable. At the same time, they were endowed with certain potent political assets. The history of the United States from 1786 to 1790 was largely one of a masterful employment of political expertise by the Constitutionalists as against bumbling, erratic behavior by the opponents of reform. Effectively, the Constitutionalists had to induce the states, by democratic techniques of coercion, to emasculate themselves. And at the risk of becoming boring, it must be reiterated that the only weapon in the Constitutionalist arsenal was an effective mobilization of public opinion.

The group which undertook this struggle was an interesting amalgam of a few dedicated nationalists with the self-interested spokesmen of various parochial bailiwicks. The Georgians, for example, wanted a strong central authority to provide military protection for their huge, underpopulated state against the Creek Confederacy; Jerseymen and Connecticuters wanted to escape from economic bondage to New York; the Virginians hoped to establish a system which would give that great state its rightful place in the councils of the republic. The dominant figures in the politics of these states therefore cooperated in the call for the Convention. In other states, the thrust towards national reform was taken up by opposition groups who added the “national interest” to their weapons system; in Pennsylvania, for instance, the group fighting to revise the Constitution of 1776 came out four-square behind the Constitutionalists, and in New York, Alexander Hamilton and the Schuyler family took the same tack against George Clinton. There was, of course, a large element of personality in the affair: there is reason to suspect that Patrick Henry’s opposition to the Convention and the Constitution was founded on his conviction that Jefferson was behind both, and a close study of local politics elsewhere would surely reveal that others supported the Constitution for the simple (and politically quite sufficient) reason that the “wrong” people were against it.

What distinguished the leaders of the Constitutional caucus from their enemies was a “Continental” approach to political, economic and military issues. To the extent that they shared an institutional base of operations, it was the Continental Congress (thirty-nine of the delegates to the Federal Convention had served in Congress), and this was hardly a locale which inspired respect for the state governments. Membership in the Congress under the Articles of Confederation worked to establish a continental frame of reference, that a Congressman from Pennsylvania and one from North Carolina would share. This was particularly true with respect to external affairs: the average state legislator was probably about as concerned with foreign policy than as he is today, but Congressmen were constantly forced to take the broad view of American prestige, were compelled to listen to the reports of Secretary John Jay and to the dispatches and pleas from their frustrated envoys in Britain, France and Spain. From considerations such as these, a “Continental” ideology developed which seems to have demanded a revision of our domestic institutions primarily on the ground that only by invigorating our general government could we assume our rightful place in the international arena.

Note that I am not endorsing the “Critical Period” thesis; on the contrary, Merrill Jensen seems to me quite sound in his view that for most Americans, engaged as they were in self-sustaining agriculture, the “Critical Period” was not particularly critical. In fact, the great achievement of the Constitutionalists was their ultimate success in convincing the elected representatives of a majority of the white male population that change was imperative. A small group of political leaders with a Continental vision and essentially a consciousness of the United States’ international impotence, provided the matrix of the movement. To their standard other leaders rallied with their own parallel ambitions. Their great assets were (1) the presence in their caucus of the one authentic American “father figure,” George Washington, whose prestige was enormous; (2) the energy and talent of their leadership (in which one must include the towering intellects of the time, John Adams and Thomas Jefferson, despite their absence abroad), and their communications “network,” which was far superior to anything on the opposition side; (3) the preemptive skill which made “their” issue The Issue and kept the locally oriented opposition permanently on the defensive; and (4) the subjective consideration that these men were spokesmen of a new and compelling credo: American nationalism, that ill-defined but nonetheless potent sense of collective purpose that emerged from the American Revolution.

The Constitutionalists got the jump on the “opposition” (a collective noun: oppositions would be more correct) at the outset with the demand for a Convention. Their opponents were caught in an old political trap: they were not being asked to approve any specific program of reform, but only to endorse a meeting to discuss and recommend needed reforms. If they took a hard line at the first stage, they were put in the position of glorifying the status quo and of denying the need for any changes. Moreover, the Constitutionalists could go to the people with a persuasive argument for “fair play”—“How can you condemn reform before you know precisely what is involved?” Since the state legislatures obviously would have the final say on any proposals that might emerge from the Convention, the Constitutionalists were merely reasonable men asking for a chance. Besides, since they did not make any concrete proposals at that stage, they were in a position to capitalize on every sort of generalized discontent with the Confederation.

Perhaps because of their poor intelligence system, perhaps because of over-confidence generated by the failure of all previous efforts to alter the Articles, the opposition awoke too late to the dangers that confronted them in 1787. Not only did the Constitutionalists manage to get every state but Rhode Island . . . to appoint delegates to Philadelphia, but when the results were in, it appeared that they dominated the delegations. Given the apathy of the opposition, this was a natural phenomenon: in an ideologically nonpolarized
political atmosphere those who get appointed to a special committee are likely to be the men who supported the movement for its creation. . . . Much has been made of the fact that the delegates to Philadelphia were not elected by the people; some have adduced this fact as evidence of the "undemocratic" character of the gathering. But put in the context of the time, this argument is wholly specious: the central government under the Articles was considered a creation of the component states and in all the states but Rhode Island, Connecticut and New Hampshire, members of the national Congress were chosen by the state legislatures. This was not a consequence of elitism or fear of the mob; it was a logical extension of states'-rights doctrine to guarantee that the national institution did not end-run the state legislatures and make direct contact with the people.

II

With delegations safely named, the focus shifted to Philadelphia. While waiting for a quorum to assemble, James Madison got busy and drafted the so-called Randolph or Virginia Plan with the aid of the Virginia delegation. This was a political master-stroke. Its consequence was that once business got under way, the framework of discussion was established on Madison’s terms. There was no ineliminable argument over agenda; instead the delegates took the Virginia Resolutions—"just for purposes of discussion"—as their point of departure. And along with Madison’s proposals, many of which were buried in the course of the summer, went his major premise: a new start on a Constitution rather than piecemeal amendment.

Standard treatments of the Convention divide the delegates into “nationalists” and “states’-righters” with various improvised shadings (“moderate nationalists,” etc.), but these are a posteriori categories which obfuscate more than they clarify. What is striking to one who analyzes the Convention as a case-study in democratic politics is the lack of clear-cut ideological divisions in the Convention. Indeed, I submit that the evidence—Madison’s Notes, the correspondence of the delegates, and debates on ratification—indicates that this was a remarkably homogeneous body on the ideological level. [Robert] Yates and [John] Lansing [of New York], who favored the New Jersey Plan] . . . left in disgust on July 10. . . . Luther Martin, Maryland’s bibulous narcissist, left on September 4 in a huff when he discovered that others did not share his self-esteem; others went home for personal reasons. But the hard core of delegates accepted a grinding regimen throughout the attrition of a Philadelphia summer precisely because they shared the Constitutionalist goal.

Basic differences of opinion emerged, of course, but these were not ideological; they were structural. If the so-called “states’-righters” group had not accepted the fundamental purposes of the Convention, they could simply have pulled out and by doing so have aborted the whole enterprise. Instead of bolting, they returned day after day to argue and to compromise. An interesting symbol of this basic homogeneity was the initial agreement on secrecy; these professional politicians did not want to become prisoners of publicity; they wanted to retain that freedom of maneuver which is only possible when

men are not forced to take public stands in the preliminary stages of negotiation. There was no legal means of binding the tongues of the delegates: at any stage in the game a delegate with basic principled objections to the emerging project could have taken the stump (as Luther Martin did after his exit) and denounced the convention to the skies. Yet . . . the delegates generally observed the injunction. Secrecy is certainly uncharacteristic of any assembly marked by strong ideological polarization. . . .

Commentators on the Constitution who have read The Federalist in lieu of reading the actual debates have credited the Fathers with the invention of a sublime concept called “Federalism.” . . . Federalism, as the theory is generally defined, was an improvisation which was later promoted into a political theory. Experts on “federalism” should take to heart the advice of David Hume, who warned . . . “there is no subject in which we must proceed with more caution than in [history]; lest we assign causes which never existed and reduce what is merely contingent to stable and universal principles.” In any event, the final balance in the Constitution between the states and the nation must have come as a great disappointment to Madison . . . .

It is indeed astonishing how those who have glibly designated James Madison the “father” of Federalism have overlooked the solid body of fact which indicates that he shared Hamilton’s quest for a unitary central government. To be specific, they have avoided examining the clear import of the Madison-Virginia Plan, and have disregarded Madison’s dogged inch-by-inch retreat from the bastions of centralization. The Virginia Plan envisioned a unitary national government effectively freed from and dominant over the states. The lower house of the national legislature was to be elected directly by the people of the states with membership proportional to population. The upper house was to be selected by the lower and the two chambers would elect the executive and choose the judges. The national legislature was to be empowered to disallow the acts of state legislatures, and the central government was vested, in addition to the powers of the nation under which the Articles of Confederation, with plenary authority wherever . . . the separate States are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation.” Finally, just to lock the door against state intrusion, the national Congress was to be given the power to use military force on recalcitrant states. This was Madison’s “model” of an ideal national government, though it later received little publicity in The Federalist.

The interesting thing was the reaction of the Convention to this militant program for a strong autonomous central government. Some delegates were startled, some obviously leery of so comprehensive a project of reform, but nobody set off any fireworks and nobody walked out. Moreover, in the two weeks that followed, the Virginia Plan received substantial endorsement en principe; the initial temper of the gathering can be deduced from the approval “without debate or dissent,” on May 31, of the Sixth Resolution which granted Congress the authority to disallow state legislation “. . . contravening in its opinion the Articles of Union.” Indeed, an amendment was included to bar states from contravening national treaties.
The Virginia Plan may therefore be considered, in ideological terms, as the delegates’ Utopia, but as the discussions continued and became more specific, many of those present began to have second thoughts. . . . They were practical politicians in a democratic society, and no matter what their private dreams might be, they had to take home an acceptable package and defend it—and their own political futures—against predictable attack. On June 14 the breaking point between dream and reality took place. Apparently realizing that under the Virginia Plan, Massachusetts, Virginia and Pennsylvania could virtually dominate the national government—and probably appreciating that to sell this program to “the folks back home” would be impossible—the delegates from the small states dug in their heels and demanded time for a consideration of alternatives. . . .

Now the process of accommodation was put into action smoothly—and wisely, given the character and strength of the doubters. Madison had the votes, but this was one of those situations where the enforcement of mechanical majoritarianism could easily have destroyed the objectives of the majority: the Constitutionalists were in quest of a qualitative as well as a quantitative consensus; . . . it was a political imperative if they were to attain ratification.

III

According to the standard script, at this point the “states’-rights” group intervened in force behind the New Jersey Plan, which has been characteristically portrayed as a revision to the status quo under the Articles of Confederation with but minor modifications. A careful examination of the evidence indicates that only in a marginal sense is this an accurate description. It is true that the New Jersey Plan put the states back into the institutional picture, but one could argue that to do so was a recognition of political reality rather than an affirmation of states’-rights. A serious case can be made that the advocates of the New Jersey Plan, far from being ideological addicts of states’-rights, intended to substitute for the Virginia Plan a system which would both retain strong national power and have a chance of adoption in the states. The leading spokesman for the project asserted quite clearly that his views were based more on counsels of expediency than on principle. . . . In his preliminary speech on June 9, Paterson had stated “. . . to the public mind we must accommodate ourselves,” and in his notes for this and his later effort as well, the emphasis is the same. The structure of government under the Articles should be retained:

2. Because it accords with the Sentiments of the People

[Proof: 1. Comms. [Commissions from state legislatures defining the jurisdiction of the delegates]
2. News-papers—Political Barometer. Jersey never would have sent Delegates under the first Virginia Plan—


This was a defense of political acumen, not of states’-rights. . . .

In other words, the advocates of the New Jersey Plan concentrated their fire on what they held to be the political liabilities of the Virginia Plan—which were matters of institutional structure—rather than on the proposed scope of national authority. Indeed, the Supremacy Clause of the Constitution first saw the light of day in Paterson’s Sixth Resolution; the New Jersey Plan contemplated the use of military force to secure compliance with national law; and finally Paterson made clear his view that under either the Virginia or the New Jersey systems, the general government would “. . . act on individuals and not on states.” From the states’-rights viewpoint, this was heresy: the fundament of that doctrine was the proposition that any central government had as its constituents the states, not the people, and could only reach the people through the agency of the state government.

Paterson then reopened the agenda of the Convention, but he did so within a distinctly naturalist framework. Paterson’s position was one of favoring a strong central government in principle, but opposing one which in fact put the big states in the saddle.

How attached would the Virginians have been to their reform principles if Virginia were to disappear as a component geographical unit (the largest for representational purposes)? Up to this point, the Virginians had been in the happy position of supporting high ideals with that inner confidence born of knowledge that the “public interest” they endorsed would nourish their private interest. Worse, they had shown little willingness to compromise. Now the delegates from the small states announced that they were unprepared to offer up as sacrificial victims to a “national interest” which reflected Virginia’s parochial ambition. Caustic Charles Pinckney was not far off when he remarked sardonically that “. . . the whole [conflict] comes to this: Give N. Jersey an equal vote, and she will dismiss her scruples, and concur in the Natl. system.” What he rather unfairly did not add was that the Jersey delegates were not free agents who could adhere to their private convictions; they had to take back, sponsor and risk their reputations on the reforms approved by the Convention—and in New Jersey, not in Virginia. . . .

IV

On Tuesday morning, June 19, . . . James Madison led off with a long, carefully reasoned speech analyzing the New Jersey Plan which, while intellectually vigorous in its criticisms, was quite conciliatory in mood. “The great difficulty,” he observed, “lies in the affair of Representation; and if this could be adjusted, all others would be surmountable.” (As events were to demonstrate, this diagnosis was correct.) When he finished, a vote was taken on whether to continue with the Virginia Plan as the nucleus for a new constitution: seven states voted “Yes”; New York, New Jersey, and Delaware voted “No”; and Maryland, whose position often depended on which delegates happened to be on the floor, divided. Paterson, it seems, lost decisively; yet in a fundamental sense he and his allies had achieved their purpose: from that day onward, it could never be forgotten that the state governments loomed ominously in the background. . . . Moreover, nobody bolted the convention: Paterson and his colleagues took
their defeat in stride and set to work to modify the Virginia Plan, particularly with respect to its provisions on representation in the national legislature. Indeed, they won an immediate rhetorical bonus; when Oliver Ellsworth of Connecticut rose to move that the word “national” be expunged from the Third Virginia Resolution (“Resolved that a national Government ought to be established consisting of a supreme Legislative, Executive and Judiciary”), Randolph agreed and the motion passed unanimously. The process of compromise had begun.

For the next two weeks, the delegates circled around the problem of legislative representation. The Connecticut delegation appears to have evolved a possible compromise quite early in the debates, but the Virginians and particularly Madison (unaware that he would later be acclaimed as the prophet of “federalism”) fought obdurately against providing for equal representation of states in the second chamber. . . . On July 2, the ice began to break when through a number of fortuitous events—and one that seems deliberate—the majority against equality of representation was converted into a dead tie. The Convention had reached the stage where it was “ripe” for a solution (presumably all the therapeutic speeches had been made), and the South Carolinians proposed a committee. Madison and James Wilson wanted none of it, but with only Pennsylvania dissenting, the body voted to establish a working party on the problem of representation.

The members of this committee, one from each state, were elected by the delegates—and a very interesting committee it was. Despite the fact that the Virginia Plan had held majority support up to that date, neither Madison nor Randolph was selected (Mason was the Virginian) and Baldwin of Georgia, whose shift in position had resulted in the tie, was chosen. From the composition, it was clear that this was not to be a “fighting” committee: the emphasis in membership was on what might be described as “second-level political entrepreneurs.” On the basis of the discussions up to that time, only Luther Martin of Maryland could be described as a “bitter-ender.” Admittedly, some divination enters into this sort of analysis, but one does get a sense of the mood of the delegates from these choices—including the interesting selection of Benjamin Franklin, despite his age and intellectual wobbiness, over the brilliant and incisive Wilson or the sharp, polemical Gouverneur Morris, to represent Pennsylvania. His passion for conciliation was more valuable at this juncture than Wilson’s logical genius, or Morris’ acerbic wit. . . .

It would be tedious to continue a blow-by-blow analysis of the work of the delegates; the critical fight was over representation of the states and once the Connecticut Compromise was adopted on July 17, the Convention was over the hump. Madison, James Wilson, and Gouverneur Morris of New York (who was there representing Pennsylvania) fought the compromise all the way in a last-ditch effort to get a unitary state with parliamentary supremacy. But their allies deserted them. . . . Moreover, once the compromise had carried (by five states to four, with one state divided), its advocates threw themselves vigorously into the job of strengthening the general government’s substantive powers—as might have been predicted, indeed, from Paterson’s early statements. It nourishes an increased respect for Madison’s devotion to the art of politics, to realize that this dogged fighter could sit down six months later and prepare essays for The Federalist in contradiction to his basic convictions about the true course the Convention should have taken.

V

Two tricky issues will serve to illustrate the later process of accommodation. The first was the institutional position of the Executive. Madison argued for an executive chosen by the National Legislature and on May 29 this had been accepted with a provision that after his seven-year term was concluded, the chief magistrate should not be eligible for reelection. In late July this was reopened and for a week the matter was argued from several different points of view. . . . One group felt that the states should have a hand in the process; another small but influential circle urged direct election by the people. There were a number of proposals: election by the people, election by state governors, by electors chosen by state legislatures, by the National legislature, . . . and there was some resemblance to three-dimensional chess in the dispute because of the presence of two other variables, length of tenure and reeligibility. Finally, after opening, reopening, and re-opening the debate, the thorny problem was consigned to a committee for resolution.

The Brearley Committee on Postponed Matters was a superb aggregation of talent and its compromise on the Executive was a masterpiece of political improvisation. (The Electoral College, its creation, however, had little in its favor as an institution—as the delegates well appreciated.) The point of departure for all discussion about the presidency in the Convention was that in immediate terms, the problem was non-existent; in other words, everybody present knew that under any system devised, George Washington would be President. Thus they were dealing in the future tense and to a body of working politicians the merits of the Brearley proposal were obvious: everybody got a piece of cake. (Or to put it more academically, each viewpoint could leave the Convention and argue to its constituents that it had really won the day.) First, the state legislatures had the right to determine the mode of selection of the electors; second, the small states received a bonus in the Electoral College in the form of a guaranteed minimum of three votes while the big states got acceptance of the principle of proportional power; third, if the state legislatures agreed (as six did in the first presidential election), the people could be involved directly in the choice of electors; and finally, if no candidate received a majority in the College, the right of decision passed to the National Legislature with each state exercising equal strength. (In the Brearley recommendation, the election went to the Senate, but a motion from the floor substituted the House; this was accepted on the ground that the Senate already had enough authority over the executive in its treaty and appointment powers.)

This compromise was almost too good to be true, and the Framers snapped it up with little debate or controversy. No one seemed to think well of the College as an institution; indeed, what evidence there is suggests that there was an assumption that once Washington had finished his tenure as President, the electors would cease to produce majorities and the chief executive would
usually be chosen in the House. George Mason observed casually that the selection would be made in the House nineteen times in twenty and no one seriously disputed this point. The vital aspect of the Electoral College was that it got the Convention over the hurdle and protected everybody's interests. . . .

In short, the Framers did not in their wisdom endow the United States with a College of Cardinals—the Electoral College was neither an exercise in applied Platonism nor an experiment in indirect government based on elitist distrust of the masses. It was merely a jerry-rigged improvisation which has subsequently been endowed with a high theoretical content. . . .

The second issue on which some substantial practical bargaining took place was slavery. The morality of slavery was, by design, not at issue; but in its other concrete aspects, slavery colored the arguments over taxation, commerce, and representation. The “Three-Fifths Compromise,” that three-fifths of the slaves would be counted both for representation and for purposes of direct taxation (which was drawn from the past—it was a formula of Madison’s utilized by Congress in 1783 to establish the basis of state contributions to the Confederation treasury) had allayed some Northern fears about Southern over-representation. . . . The Southerners, on the other hand, were afraid that Congressional control over commerce would lead to the exclusion of slaves or to their excessive taxation as imports. Moreover, the Southerners were disturbed over “navigation acts,” i.e., tariffs or special legislation providing, for example, that exports be carried only in American ships; as a section depending upon exports, they wanted protection from the potential voracity of their commercial brethren of the Eastern states. To achieve this end, Mason and others urged that the Constitution include a proviso that navigation and commercial laws should require a two-thirds vote in Congress.

These problems came to a head in a late August and, as usual were handed to a committee in the hope that, in Gouverneur Morris’ words, “. . . these things may form a bargain among the Northern and Southern states.” The Committee reported its measures of reconciliation on August 25, and on August 29 the package was wrapped up and delivered. What occurred can best be described in George Mason’s dour version (he anticipated Calhoun in his conviction that permitting navigation acts to pass by majority vote would put the South in economic bondage to the North—it was mainly on this ground that he refused to sign the Constitution):

The Constitution as agreed to till a fortnight before the Convention rose was such a one as he would have set his hand and heart to. . . . [Until that time] The 3 New England States were constantly with us in all questions . . . so that it was these three States with the 5 Southern ones against Pennsylvania, Jersey and Delaware. With respect to the importation of slaves, [decision-making] was left to Congress. This disturbed the two Southernmost States who knew that Congress would immediately suppress the importation of slaves. Those two States therefore struck up a bargain with the three New England States. If they would join to admit slaves for some years, the two Southernmost States would join in changing the clause which required the 2/3 of the Legislature in any vote [on navigation acts]. It was done.

On the floor of the Convention there was a virtual love-feast on this happy occasion. Charles Pinckney of South Carolina attempted to overturn the committee’s decision, when the compromise was reported to the Convention, by insisting that the South needed protection from the imperialism of the Northern states. But his Southern colleagues were not prepared to rock the boat and General C. C. Pinckney arose to spread oil on the suddenly ruffled waters; he admitted that:

It was in the true interest of the Southern States to have no regulation of commerce; but considering the loss brought on the commerce of the Eastern States by the Revolution, their liberal conduct towards the views of South Carolina [on the regulation of the slave trade] and the interests the weak South. States had in being united with the strong Eastern states, he thought it proper that no fetters should be imposed on the power of making commercial regulations; and that his constituents, though prejudiced against the Eastern States, would be reconciled to this liberality. He had himself prejudices against the Eastern States before he came here, but would acknowledge that he had found them as liberal and candid as any men whatever.

Pierce Butler took the same tack, essentially arguing that he was not too happy about the possible consequences, but that a deal was a deal. . . .

VI

Drawing on their vast collective political experience, utilizing every weapon in the politician’s arsenal, looking constantly over their shoulders at their constituents, the delegates put together a Constitution. It was a makeshift affair; some sticky issues (for example, the qualification of voters) they ducked entirely; others they mastered with that ancient instrument of political sagacity, studied ambiguity (for example, citizenship), and some they just overlooked. In this last category, I suspect, fell the matter of the power of the federal courts to determine the constitutionality of acts of Congress. When the judicial article was formulated (Article III of the Constitution), deliberations were still in the stage where the legislature was endowed with broad power under the Randolph formulation, authority which by its own terms was scarcely amenable to judicial review. In essence, courts could hardly determine when “...the separate States are incompetent or... the harmony of the United States may be interrupted”; the National Legislature, as critics pointed out, was free to define its own jurisdiction. Later the definition of legislative authority was changed into the form we know, a series of stipulated powers, but the delegates never seriously reexamined the jurisdiction of the judiciary under this new limited formulation. All arguments on the intention of the Framers in this matter are thus deductive and a posteriori, though some obviously make more sense than others.

The Framers were busy and distinguished men, anxious to get back to their families, their positions, and their constituents. . . . They were trying to do an important job, and do it in such a fashion that their handiwork would be acceptable to very diverse constituencies. No one was rhapsodic about the
final document, but it was a beginning, a move in the right direction, and one they had reason to believe the people would endorse. In addition, since they had modified the impossible amendment provisions of the Articles . . . to one demanding approval by only three-quarters of the states, they seemed confident that gaps in the fabric which experience would reveal could be rewoven without undue difficulty.

So with a neat phrase introduced by Benjamin Franklin (but devised by Gouverneur Morris) which made their decision sound unanimous, and an inspired benediction by the Old Doctor urging doubters to doubt their own infallibility, the Constitution was accepted and signed. Curiously, Edmund Randolph, who had played so vital a role throughout, refused to sign, as did his fellow Virginian George Mason and Elbridge Gerry of Massachusetts. Randolph's behavior was eccentric; . . . the best explanation seems to be that he was afraid that the Constitution would prove to be a liability in Virginia politics, where Patrick Henry was burning up the countryside with impassioned denunciations. Presumably, Randolph wanted to check the temper of the populace before he risked his reputation, and perhaps his job, in a fight with both Henry and Richard Henry Lee. Events lend some justification to this speculation: after much temporizing . . . Randolph endorsed ratification in Virginia and ended up getting the best of both worlds. . . .

The Constitution, then, was an apotheosis of “constitutionalism,” a triumph of architectonic genius; it was a patchwork sewn together under the pressure of both time and events by a group of extremely talented democratic politicians. They refused to attempt the establishment of a strong, centralized sovereignty on the principle of legislative supremacy for the excellent reason that the people would not accept it. They risked their political fortunes by opposing the established doctrines of state sovereignty because they were convinced that the existing system was leading to national impotence and probably foreign domination. For two years, they worked to get a convention established. For over three months, in what must have seemed to the faithful participants an endless process of give-and-take, they reasoned, cajoled, threatened, and bargained amongst themselves. The result was a Constitution which the people, in fact, by democratic processes, did accept, and a new and far better national government was established. . . .

To conclude, the Constitution was neither a victory for abstract theory nor a great practical success. Well over half a million men had to die on the battlefields of the Civil War before certain constitutional principles could be defined—a baleful consideration which is somehow overlooked in our customary tributes to the farsighted genius of the Framers and to the supposed American talent for “constitutionalism.” The Constitution was, however, a vivid demonstration of effective democratic political action, and of the forging of a national elite which literally persuaded its countrymen to hoist themselves by their own boot straps.