

The Achievement of the Framers

Henry Steele Commager, *Amherst College*

We now commemorate the two hundredth anniversary of the Constitution. That Constitution was the product, not alone of the debates in the federal convention of 1787, or even in the twelve long years of experience with a loose confederacy, but of that dazzling complex of science and philosophy familiar to us as the Enlightenment--an enlightenment which embraced the classical world of Greece and Rome as well as the new world of Leibnitz and Immanuel Kant, and which stretched from Newton to Napoleon in the Old World and from Roger Williams to Thomas Jefferson in the new.

Nowhere was the Enlightenment more pervasive or more effective than in America, effective both philosophically and practically. In the Old World its most prodigious achievements were in the discovery of the new worlds of nature and of man, in the sciences, philosophy, literature and the fine arts; such contributions as it made to economics, politics and social well-being had few consequences. But in America the Enlightenment, though it boasted its own galaxy of natural philosophers, found expression largely in the realms of politics, law, the economy and all those interests which were designed to enhance the general welfare. Franklin was its symbol: He not only "snatched the lightning from the skies, but the scepter from the hand of tyrants." If the proudest monuments to the Old World Enlightenment were such triumphs as Newton's *Principia* and Diderot's *Grand Encyclopedie* or the palace and the gardens of Versailles or Don Giovanni, the most enduring monuments to Enlightenment in America were the Constitution and the Bill of Rights, products of both philosophy and of common sense.

In a famous letter to the scientist-theologian Dr. Joseph Priestly, written just a few weeks after his own inauguration to the presidency, Jefferson put his finger on what was most remarkable about the experiment upon which the American people were embarked. "We can no longer say there is nothing new under the sun. This whole change in the history of man is new. The great extent of our Republic is new. Its sparse habitation is new. The mighty wave of public opinion which has rolled over it is new." He might have added that the choice of the foremost political philosopher by the vote of the majority of the plain people was new too. Where else in history had a people vindicated Plato's warning that "until philosophers are kings, the human race will never have rest from its evils." Well might Jefferson confess that his election--and in a hotly disputed contest--"augurs well for the duration of the republic.

Jefferson's observation on what was "new" merely touched the surface of the American scene. Never before in history had one generation presided over so prodigious a profusion of inventions and creation in the public arena.

Americans largely have taken this for granted: it was the English and French observers who saw it most clearly. Listen to the English born Tom Paine: "The American" he wrote, "is a new Adam in a new Paradise." He elaborated on this in his Rights of Man:

The case and circumstances of America present themselves as in the beginning of the world. We have no occasion to hazard ourselves upon conjecture. We are brought at once to the Point of seeing government begin as if we had lived in the beginning of time.

Or here is the Scots-born James Wilson, speaking in the Pennsylvania ratifying convention:

ABOUT THE AUTHOR

Henry Steele Commager, is Simpson Professor Emeritus of American history at Amherst College and the author of many books, including *The Search for a Usable Past* (1967), and the editor of *Documents of American History* (1963).

The science of government seems yet to be almost in a state of infancy. Governments in general have been the result of fraud, force or accident. After a period of 6000 years have elapsed since the Creation, the United States exhibit to the world the first instance of a nation unattached by a foreign force, unconvulsed by domestic strife, assembling voluntarily on the system of government under which they wish their posterity to live.

But perhaps it was John Adams, who said it best in a letter to Hezekiah Niles a quarter-century later:

The colonies had grown up under circumstances of government so different there was so great a variety of religions, they were composed of so many different nations, their customs, manners and habits had so little resemblance, and their intercourse had been so rare and their knowledge of each other so imperfect, that to unite them in the same principles in theory and the same system of action was a very difficult enterprise. The complete accomplishment of it in so short a time and by such simple means was perhaps a singular example in the history of mankind, Thirteen clocks were made to strike together a perfection of mechanism which no artist had before effected.

Today we take unity for granted--unity over that vast territory between Atlantic and Pacific, Canada and the Gulf of Mexico. But why do we? The United States had--and continues to have--a more heterogeneous population, more religious faiths, and--as far as nature went--more and more different natural environments than any nation of the old world or of Latin America. Why did the United States not go the way of Europe, of the vast continent to the South, or of Africa once its European masters had withdrawn? Certainly that is what most European observers foresaw: "In the general union of the providences" wrote the sagacious Turgot, "I do not see a coalition . . . making but one body. It is only an aggregation of parts always too much separated . . . by the diversity of their manners, their opinions, and still more by the inequality of its actual forces.

The notion that men could come together and create a nation was all but incomprehensible to the eighteenth century, and even as Americans were launching something new under the sun, ruthless masters of Prussia and of France were absorbing their weaker neighbors. What they did, again, was nothing new--imperialism could be traced back to Alexander and Caesar, and modern imperialism was less innovative than theirs. For new concepts of nationalism, for new philosophies, institutions, and mechanism, you had to look to the new United States

How sobering to recall that in the thirty or forty years or so--from the 1770s to the first decade of the new century, a people with fewer than a million adult males, spread thin over an immense territory, with no city over forty thousand, no great centers of learning or culture, managed to create or invent every major constitutional institution which we boast today. Moreover, not one of comparable significance has been invented since that politically-mature population--roughly the size of Philadelphia's today--elected in one generation Washington, John Adams, Jefferson, Madison, Monroe and John Quincy Adams, who in turn chose for its Supreme Court three giants: John Jay, John Marshall, and Joseph Story.

Let me submit briefly that corpus of laws, institutions and inventions which we owe to the founding fathers, and on which we still rely.

First is the written constitution. That institution has some claim to be the oldest in our political history.

Second, the elementary but nevertheless revolutionary principle of democracy--I use that word in its original meaning of government by the people. As Jefferson wrote in the Declaration of Independence, governments derive "their just powers from the consent of the governed," and it is "the right of the people to alter or abolish it and to institute new governments." That concept would have been (and long remained) meaningless in any Old World country, but in the new world it was taken for granted.

A third historic contribution is the practical realization of federalism and the creation of the first effective federal union--and now the oldest. I shall return to this later.

A fourth invention is--again--so taken for granted it excites no interest and no comment: it is the formal end of colonialism, and the institution of the principle of the co-ordinate state. Because Americans revolted against a colonial status, they were not prepared to condemn any part of their own territory to colonialism. The framers' decision was political--and even moral--an historic promise that the American empire was not to be a replica of Old World empires, but something new under the sun, a commonwealth based on the equality of co-ordinate states. That principle was written into the famous Northwest Ordinance of 1787 and has survived to this day.

A fifth contribution--perhaps it cannot be called an invention for there were abundant anticipations, if not antecedents--was the creation of effective limits on government. Americans, to be sure, had never really known a government with unlimited power (for they managed to evade or confound such legislation as they disapproved, and to bribe or intimate royal governors) but it could be said that Europeans had never really known one that was limited.

The framers did not include a Bill of Rights in the Constitution of 1787. Their reasons were logical, if not sound: that as the new government had only those powers granted to it, and as no power to infringe on the liberties of men was granted, a bill of rights was superfluous. But the people did not reason that way, and they had the support of Jefferson over in Paris, who saw Hamilton's logic as too abstract for popular consumption. Said Jefferson: "A bill of rights is what the people are entitled to against every government on earth and what no just government should refuse or rest on inference."

Madison responded to that demand by drawing up, and steering through the Congress, the Bill of Rights which has ever since been regarded as an integral part of the Constitution itself. Nor were liberties limited to those specified. For the Bill contained another amendment: the Ninth, long, and still, neglected, but with unexplored potential. That "Forgotten" amendment reads quite simply: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The door, in short, is still wide open for the recognition of other rights not specified in the Bill of Rights itself.

It early became clear that the implementation of the guarantees in the Bill of Rights was the proper function of the judiciary. That was the principle later incorporated into American constitutional law by Justices Marshall and Story. There are murmurs, and even outcries, against it, but it has stood the test of time. We take that pretty much for granted, but nothing comparable to judicial review is to be found elsewhere. The practice is all the more remarkable when we recall that though democracy assumes majority rule, judges who hold office for life can veto the decisions of the two popularly elected branches, i.e. the majority. In theory this limitation on popular rule appears paradoxical. If so, it is merely one of the paradoxes of the role of the American judiciary in our federal system.

Another paradox is that a people with a long tradition of lawlessness and revolution embraced a government founded on law, and that a people irreverent to the authority of a king or a church revere a court above all other secular institutions. "Where is the king of America?" Tom Paine asked, and answered: "In America the law is king."

Judicial review is merely the most ostentatious of the limits on the legislature. There are a score of other checks and balances and limitations. It must suffice to list some of them: the tripartite division of governments; the bicameral legislature; the executive veto; and the power of the legislature to override that veto; staggered, but frequent elections ("where annual elections end, there tyranny begins" said Sam Adams); and, as a further safeguard, short terms, limitations on consecutive terms, and--in the past, at least--low pay. To these we might add (both in the states and the nation) provisions for constitutional amendments or for new constitutions, i.e., provision for legal revolution!

All this was a verification, as it were, of that observation by the sagacious John Dickinson of Pennsylvania:

For who are a free people? Not those over whom government is reasonably and equitably exercised but those who live under a government so constitutionally checked and controlled that proper provision is made against it being otherwise exercised.

I deal briefly with three revolutionary contributions to the science and the practice of government by a generation of the founding fathers. All three are of significance not only to America but to the modern world. The first of these is the effective separation of church and state: freedom of religion. That principle, which had its roots deep, in our own history, has spread widely throughout the civilized world. But it is not yet universally accepted. Religious wars flourish and religious freedom is rejected in many parts of the globe today: Catholics and Protestants fight in Northern Ireland; Moslems and Jews in the Near East; Hindus and Moslems in India and Pakistan; Christians and Moslems in the Philippines. But the United States has never had a religious war, nor persistent religious persecution. That good fortune owes much to an early admixture of religious groups which implacably imposed religious toleration on Americans: there were some 16 religious denominations in colonial New York City alone. It owes much to the good fortune of vast territory: religious dissenters--like Mormons--could find refuge (if it were needed) in vacant land. It owes much to the total inability of Britain to impose its Established religion, the Anglican, on its American colonies. On the eve of the Revolution, the Anglican Church was the Established religion in North Carolina but there were only two Anglican churchmen to minister to the whole of that vast territory! But it owes much, too, to the far-sighted vision of men and women like Roger Williams and Anne Hutchinson who established the tradition of toleration in New England, and much to later statesmen like Jefferson whose Virginia Statute for Religious Liberty of 1786 excited greater astonishment in Europe, and greater misgivings, than had either the Declaration of Independence or the Constitution itself.

The second of these is the supremacy--John Adams wrote "an exact" supremacy--of the civil to the military authority. Washington was loyal to that principle throughout the Revolution, referring to the Congress for any initiative and disdaining the attempt to betray him into seizing command. His Newburgh Address is now part of the American heritage. "You will," he said to his officers,

give one more distinguished proof of unexampled patriotism and patient virtue, risking superior to the pressure of the most complicated sufferings. And you will by the dignity of your conduct afford occasion for posterity to say, when speaking of the glorious example you have exhibited to mankind, had this day been wanting, the world had never seen the last stage of perfection to which human nature is capable of attaining.

That tradition was not only reaffirmed, but married to farsighted statesmanship, when Lincoln wiped the slate clean, as it were, by rejecting any punishment of any kind for treason through the use of the pardoning power.

The third unprecedented contribution is the modern political party, something really new under the sun of politics--a party which grew from the bottom up, not the top down as in England; which was national, not local or regional; and which found its leaders in the common people, not in those who exploited hereditary claims to leadership, as persisted in the Old World into the nineteenth century. There was from the beginning, too, a special merit in the political party as it emerged in America: it avoided (for the most part) those ideologies which afflicted and still afflict politics in the Old World and addressed itself to practical issues which concerned the mass of people. The single time parties broke apart on ideological grounds--1854 to 1860--the Union, too, broke apart.

I turn finally to what has some claim to consideration as the most successful and enduring contribution of the Constitutional Convention. If Madison is conceded to be the "Father of the Constitution," Benjamin Franklin is the father of Federalism. As early as 1754, on the eve of the Seven Years War, he had tried to encourage cooperation between colonies and mother country by drawing up the Albany Plan of Union, a plan which anticipated in many of its features the federalism worked out in 1787. Again, at the opening of the second Continental Congress, Franklin came forward with an elaborate draft of what approached the finished Constitution of 1787. During much of the War Franklin was off in Paris; back home by 'eighty-

five, he was chosen president of Pennsylvania, and then became its first choice as delegate to the Constitutional Convention. There, like Washington, he was a symbol rather than an active participant. Though Washington said scarcely a word during the debates, and Franklin spoke only rarely, it may be said that these two men were the most influential members of that "assemblage of demigods" merely by their presence.

There is no more difficult problem in the whole of politics than that of contriving a viable federal system. Federalism is not only the basic institution of American constitutionalism. It is also the most complex, the most controversial, and perhaps the most vulnerable.

There were, in fact, three American experiments in federalism. Two of them failed--The Confederation of 1783, whose inadequacy was speedily remedied by the Federal Convention of 1787, and the Confederate States of America, created in 1861, and modeled closely on that of the United States except in one crucially important matter: it asserted and guaranteed the sovereignty of the states! States' rights, which broke up the Union, killed the Confederacy, but the Union survived and was triumphantly reconstructed.

Why did the Federal Union of 1787 survive when others failed?

There are four essential ingredients to effective federalism; all rise to the dignity of principles. First is a recognition that the source of all political authority is in the people and that it is the duty and the right of the people to distribute that authority among governments as they choose. Second is a realistic distribution of powers, with those of a general or national character assigned to the central government, and those of a local nature to state or local governments, while those that are common to both, such as the power to tax or to provide justice, are left to both. A third essential is that the division between national and state or local authority must rest on some legal distinction and be indicated in broad but flexible terms, adapted to the exigencies of an ever-changing society and economy. A fourth is the establishment of some formal mechanism or institution for clarifying and endorsing a proper distribution of the exercise of national and local powers. This, in turn, called for what proved to be one of the most remarkable of modern political contrivances: dual citizenship--a notion taken for granted in the original Constitution and formalized in the opening words of the Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

But, as the Constitution left the hands of its framers and of the framers of the Bill of Rights, there was one omission which, with the passing years, took on a threatening character: that was the assurance that all persons in the nation would be assured of equal rights. That omission was inevitable, to be sure in the circumstances of the 1790s; it took the Civil War to repair it. It was settled in 1865 by the verdict of Appomattox, and in 1868 by the Fourteenth Amendment to the Constitution. The Amendment provided, in words which have proved to be the most important in the history of liberty and equality, that

No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

That settled the principle constitutionally, to be sure, but not yet politically, practically, or socially.

President Reagan asserted in his Inaugural Address that "the nation did not make the states, the states made the nation." It is a conclusion that might well astonish citizens of all states west of Pennsylvania, for all of these (except perhaps Texas which annexed the United States) were created by Congress, governed by Congress in their territorial stage, and admitted to the Union by presidential approval after the Congress passed on their credentials! But that misunderstanding is trivial compared to a deeper misunderstanding, one which misreads both history and law. In our constitutional system it is "We the people" who made and still make both nation and states, each forming part of the "more perfect union."

The national federalism of Washington and Madison, Hamilton and John Marshall, was not a method of destroying local self-government, it was a product of the war for independence and

of the struggle for national survival. Its character was best described by John Marshall (himself an ardent supporter of the new Constitution in the Virginia ratifying convention) in a decision which challenged his own state of Virginia:

In war we are one people, in all commercial regulations we are one and the same people. The government which alone is capable of controlling and managing their interests in all respects is the government of the Union. America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete: to all these objects, it is competent. (The Cohens v. Virginia, 1821)

The Bicentennial of the Constitution should inspire us with a renewed respect for its character and its principles. Our experience with nullification in South Carolina, with the Civil War and its aftermath, with great depressions like those of 1873, 1893, and the 1930s, with two great World Wars, dramatizes the primary role of the national government in preserving the harmony of the Union and the necessity of national authority to achieve the purposes set forth in the preamble, particularly justice and the general welfare.

Justice Story concluded his classic *Commentaries on the Constitution* (1833) with a tribute to the nation at once logical and eloquent, and a verdict which is as valid today as it was 150 years ago:

No man will pretend to say that the affection for the state governments has been sensibly diminished by the operation of the general government. If the latter has become more deeply an object of regard and reverence, of attachment and pride, it is because it is the parental guardian of our public and private rights, and the natural ally of all the state governments in the administration of justice and the promotion of the general prosperity. It is beloved not for its power, but for its beneficence; not because it controls but because it sustains the common interests and the common liberties and the common rights of the people. (Commentaries:515)

Notes

Commager's essay is excerpted from a talk he gave as the keynote address for a conference entitled "Unus Ex Multis: Maryland and the Ratification of the U.S. Constitution," on June 25, 1986 at Washington College, Chestertown, Maryland. The conference was sponsored by Washington College and Celebrate Maryland, Inc.

Copyright 1985 by the American Political Science Association and American Historical Association. This essay may be photocopied if attributed as follows: "Reprinted from this Constitution: A Bicentennial Chronicle, Fall 1985, published by Project '87 of the American Political Science Association and American Historical Association. For further information on APSA copyrights contact APSA at apsa@apsanet.org, by phone at (202) 483-2512 or Fax (202) 483-2657.