

A HUNDRED AND TEN YEARS OF THE CONSTITUTION.—PART V.

The "Constitutional Convention" and its work are deserving of the closest attention and study in our present inquiry. We have seen that the avowed object for which the convention assembled was the amendment or alteration of the articles of confederation which experience had shown to be impossible to live under. The direction in which the alterations were to tend was toward the closer binding of the various states—not their separation. It was not the purpose of any of the delegations to weaken the already weak tie which bound them—it is possible that a good deal of the confusion arising under the articles might have been got rid of by this method; but such was not the thought of the statesmen who gathered together at Philadelphia. It is proposed to consider the formation and work of this convention very carefully; for the result of its work was of far-reaching importance, and for it to be correctly understood the causes which led to it must all be traced out. It is not necessary to go into the various defects of the confederation in this connection—but we must try to ascertain why and how the constitution recommended by the convention was so unlike the articles of confederation *fundamentally*.

The Committee of Congress appointed to consider the proposition of the delegates assembled at Annapolis, reported on February 21, 1787, the following resolution: "Congress having under consideration the letter of John Dickinson, Esq., Chairman of the Commissioners, who assembled at Annapolis during the last year; also the proceedings of the said Commissioners, and entirely coinciding with them as to the inefficiency of the federal government, and the necessity of devising such further provisions as shall render the same adequate to the exigencies of the Union, do strongly recommend to the different legislatures to send forward delegates, to meet the proposed convention, on the second Monday in

May next, at the City of Philadelphia." It was immediately moved by the delegates from New York to postpone the report, and take up the following—a resolution which they offered as a substitute: "That it be recommended to the states comprising the Union, that a convention of representatives from the said states, respectively, be held at
 on for the purpose of revising the articles of confederation and perpetual union between the United States of America, and reporting to the United States in Congress assembled, and to the states respectively, such alterations and amendments of the said articles of confederation, as the representatives met in such convention shall judge proper and necessary to render them adequate to the preservation and support of the Union." This resolution was defeated on a "yea and nay" vote by six to three—two states, Connecticut and Georgia, being "divided," and Rhode Island and New Hampshire being absent. The "ayes" were Massachusetts, New York and Virginia. Immediately it was moved by Massachusetts to postpone the report once more and consider a resolution offered by her, which was amended and passed as follows:

"Whereas, there is provision in the articles of confederation and perpetual union, for making alterations therein, by the assent of the Congress of the United States and the legislatures of the several states; and, whereas, experience hath evinced, that there are defects in the present confederation, as a mean to remedy which, several of the states, and particularly the State of New York, by express instructions to their delegates in Congress, have suggested a convention for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these states a firm national government:

"Resolved, That in the opinion of Congress it is expedient that, on the second Monday in May next, a convention of delegates who shall have been appointed by the several states, be held at Philadelphia, for the sole and express purpose of revising the articles of confederation, and reporting to Congress and the several legislatures such alterations and provisions

therein, as shall, when agreed to in Congress, and confirmed by the states, under the federal constitution adequate to the exigencies of government, and the preservation of the Union."

Now, here were three different resolutions amounting, when first looked at, to practically the same thing. But it is another instance of the jealous care with which men acted in those days, that neither the resolution of the Congressional Committee nor that of New York was satisfactory, but the amended Massachusetts resolution was passed, Connecticut alone *contradicente*. The committee resolution, we are told by Mr. Madison, only passed the committee by one vote. And New York had shown so "unfederal" a disposition that the delegates were suspicious of the resolution introduced by her—apparently on the "*Timeo Danaos et dona ferentes*" principle—needless in this case, as the resolutions were drawn by Hamilton.

The resolution of the committee was not voted down—but the Massachusetts resolution having passed, its consideration became unnecessary. The most contradictory objections were made to the recommending of a convention by Congress; by some it was thought to weaken the federal authority by sanctioning an extra-constitutional method of revising the articles; by others, as likely to arouse suspicion that Congress was seeking to increase its power.

The New York resolution and the Massachusetts resolution were voted for by some, for the reason that, in their opinion, it would be better for Congress to act at the instance of a state than of its own motion.

Many of the delegates openly stated that they considered the motion a "deadly blow" to the existing confederation. All agreed that some change was necessary; but only one, Mr. Bingham of Pennsylvania, expressed a wish for disintegration; he thought there should be several distinct confederacies, as the extent and varied interests of the states rendered a single confederacy impracticable.

Delegates to the convention had already been chosen by Virginia, North Carolina, New Jersey, Pennsylvania and Delaware, pursuant to the Annapolis recommendation, and

the others were not long in following. The convention assembled in Philadelphia on May 14, 1787, but as only a few states were represented, it adjourned until May 25th, when delegations from nine states attended.

Rhode Island took no part, from first to last, in the proceedings of the convention; the absent states on May 25th were Connecticut, New Hampshire and Maryland. Connecticut and Maryland appeared on May 28th, New Hampshire not until July 23d. As in Congress, the vote in convention was by states, the number of delegates varying from three each from Connecticut and New York to eight from Pennsylvania. Two delegates, Patrick Henry from Virginia, and William Jones from North Carolina, declined to serve. One, Richard Caswell from North Carolina, resigned. Other delegates were appointed in their places, and of sixty-two delegates in all accredited to the convention, seven only failed to attend. The credentials almost without exception simply authorize the delegations to represent the state in the convention. Delaware, however, provided against the acceptance by her delegation of any alteration of the provision in the articles of confederation entitling each state to one vote. The names of delegates were as follows, omitting those who did not attend: NEW HAMPSHIRE, John Langdon, Nicholas Gilman; MASSACHUSETTS, Elbridge Gerry, Nathaniel Gorham, Rufus King, Caleb Strong; CONNECTICUT, Wm. Sam. Johnson, Roger Sherman, Oliver Ellsworth; NEW YORK, Robert Yates, Alexander Hamilton, John Lansing. NEW JERSEY, William Livingston, David Brearley, William C. Houston, William Patterson, Jonathan Dayton; PENNSYLVANIA, Benjamin Franklin, Thomas Mifflin, Robert Morris, George Clymer, Thomas Fitzsimons, Jared Ingersoll, James Wilson, Gouverneur Morris; DELAWARE, George Read, Gunning Bedford, Jr., John Dickinson, Richard Basset, Jacob Brown; MARYLAND, James McHenry, Daniel of St. Thomas Jenifer, Daniel Carroll, John Francis Mercer, Luther Martin; VIRGINIA, George Washington, Edmund Randolph, John Blair, James Madison, Jr., George Mason, George Wythe, James McClurg; NORTH CAROLINA, Richard Caswell (resigned), Alexander

Martin, William R. Davis, William Blount, Richard R. Spaight, Hugh Williamson; SOUTH CAROLINA, John Rutledge, Charles C. Pinckney, Charles Pinckney, Pierce Butler; GEORGIA, William Few, Abraham Baldwin, William Pierce, William Houston. We recognize many distinguished names in the list, and, on the other hand, there are many that few of us have ever heard since. Of the *personnel* of the convention as a whole, Mr. Meigs, in his recent most valuable work, "The Growth of the Constitution," has this to say: "Some few of the members strike me as weak, petulant, difficult, striving to make a record and keep themselves right with the public; while others were most earnest at the work in hand and ever ready to advise and aid in perfecting the instrument they were called upon to frame." In short, like all assemblages of this character, the convention had its due proportion of ability and mediocrity and perversity! It was evident from the very beginning that the delegates, many of them, at least, came with pre-conceived ideas, and some of these ideas were far in advance of the general idea in the resolution to which the convention owed its existence, viz., the amendment and revision of the articles of confederation. Before proceeding to the actual work of the convention, let us once more glance at its *personnel*. Mr. Fiske thinks it an ideal assemblage, with its strength and its weakness. It was composed of a large proportion of university graduates, of men of all ages from Dayton to Franklin, twenty-six to eighty-one, and it is worthy of remark that there were wide divergences in the known views of members of the same delegation. And it must also not be forgotten that the same remoteness from each other of the various states and their peoples existed as at the time of the confederation. There was less unitedness; there was no common enemy against whom all were struggling together. On the contrary, antagonisms had sprung up, undreamt of during the war, and yet, as we shall see, this diverse body of men felt the necessity of union as a *people* and went steadily forward in their work to this end, retarded, of course, by the troublesome spirits always to be found in conventions, and while the result of their labors was not unanimously recommended to Congress,

it was recommended by at least one vote from every state; in fact, by more than one from every state except New York—Lansing and Yates, two known and pronounced anti-federalists, declining to sign—and leaving to Alexander Hamilton the privilege of being the sole signer from the future "Empire State."

Immediately upon the assembling of the convention, May 25, 1787, "George Washington, Esquire, late commander-in-chief," was nominated and elected President. Credentials were read and a committee to prepare standing rules appointed. On reassembling on May 28th, the report of the Committee on Rules was received, containing nothing remarkable except, perhaps, a delightful reminder of the orderly and ceremonious way in which things were done in those days: "When the House shall adjourn, every member shall stand in his place until the President pass him." It had been intended by the delegations from some of the larger states to protest against the equal vote of all the states; but they wisely refrained from antagonizing the smaller states in this way at the threshold, and the "one vote" rule prevailed. A rather noteworthy letter from some citizens of Rhode Island, enclosed in one from General Varnum to the President, was read and laid on the table. It expresses great regret at the non-representation of the state in the convention, a result brought about by the lower house of the assembly, against the wishes of the thinking people of the state. General Varnum pays his compliments to the legislators in this fashion: "Permit me to observe, sir, that the measures of our present legislature do not exhibit the real character of the state. They are equally reprobated and abhorred by gentlemen of the learned professions, by the whole mercantile body, and by the most respectable farmers and mechanics. The majority of the administration is composed of a licentious number of men, destitute of education, and many of them void of principle. From anarchy and confusion they derive their temporary consequence," etc. Poor Rhode Island! it is at least gratifying to note that her absence from the convention was not due to the thinking and reputable citizens, but to that class which always

has been and always will be an unmitigated curse to any community it infests, and which will be found to infest any community wherein the government is ultra-democratic.

The real business of the convention was opened by Mr. Randolph on Tuesday, May 29th, when he brought forward what was known as the "Virginia plan," and advocated it. This plan had been prepared beforehand, of course, and was largely the work of Madison. Randolph, in speaking to the support of the resolution he was about to propose, declared the necessity for a government which could prevent invasion from abroad, or dissension among or sedition within the states themselves, defend itself against encroachments, and which should be paramount to the state constitutions—all of which attributes were lacking under the articles of confederation. He then presented the "Virginia plan," which was in the form of a series of resolutions, and was, therefore, strictly speaking, rather a suggestion of the lines on which a plan should be formulated than a plan in itself. It starts out with the rather obvious proposition that the character of the amendments to the articles should be such as would accomplish the ends desired; or, *verbatim*, "to accomplish the objects proposed by their (the articles') institution; namely, 'common defence, security of liberty, and general welfare.'" The second resolution begins with the words, "Resolved, *therefore*,"—and I suppose "therefore" is to be read into the balance of the resolutions, which numbered fifteen, exclusive of the first. They provide for a "National Legislature" of two branches, the first to be elected by the people of the states at various times, the members to receive liberal salaries for their services, and during service ineligible to any other state or United States office; the second branch to be elected by the members of the first from persons nominated to them by the several legislatures, likewise with liberal salaries, etc. Each branch, it is resolved, ought to have the power of originating acts. And conjointly they should possess all the powers of Congress under the confederation, and also power to legislate "in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of indi-

vidual legislation;" to have a negative upon all individual legislation which, *in their opinion*, contravenes the articles of union, or any treaty made by the Union; and, finally, to coerce forcibly states failing in their duty to the Union. They provide that a national executive be "instituted," to be chosen by the National Legislature, to be salaried, and ineligible a second time; to have authority to execute national laws and enjoy the executive rights vested in Congress under the confederation; also, with a convenient number of the national judiciary, (later provided for), to form a Council of Revision, "with authority to examine, before it shall operate, every act of the National Legislature and every act of a particular legislature before a negative thereon shall be final;" the dissent of the council to be conclusive, unless the law shall be re-passed or re-negated by members of each branch. The national judiciary, to be chosen by the National Legislature, is to consist of one or more supreme tribunals, and of inferior tribunals, the jurisdiction of the former to be purely appellate. The judges are to be chosen during good behavior, and are also to be liberally compensated.

The jurisdiction of the inferior tribunals is to extend to "all piracies and felonies on the high seas; captures from the enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested; or which respect the collectors of the national revenue; impeachments of any national officers; and questions which may involve the national peace and harmony." They recommend provision for the admission of new states; that the "territory" and "republican government" of each state should be guaranteed to it. They also recommend provision of the amendment of the articles of union, without the consent of the National Legislature; the binding by oath of *state* legislatures, executives and judiciaries, to support the articles of union; and, finally, the submission of the amendments proposed by the convention, they recommend should be submitted after the approbation of Congress, to assemblies, recommended by the legislatures, to be chosen by the people for the express purpose of considering them. These resolutions were referred

to the Committee of the Whole, into which the convention resolved itself next day. After the offer of these resolutions by Mr. Randolph, Mr. Charles Pinckney, of South Carolina, offered a plan for a federal constitution, which is unfortunately lost to us, all authorities agreeing that the paper printed in the "Debates" is not that which was submitted to the convention. Mr. Yates, of New York, in his notes of the debates and proceedings, says that both Randolph and Pinckney candidly confessed that their plans were not intended for a federal government, but for a "*strong, consolidated* (italics Mr. Yates's) union, in which the idea of states should be nearly annihilated." Yates was utterly opposed to "nationalism," and without impugning his sincerity, it may be said to be more than doubtful whether either Randolph or Pinckney declared themselves ready to "nearly annihilate" the states as such. Next day the convention in Committee of the Whole proceeded to take up the first of resolutions of Mr. Randolph, whereupon that gentleman, "upon the suggestion of Mr. G. Morris," as Madison puts it, moved its postponement in order to consider three other resolutions which he proceeded to read. Mr. Yates says that the "suggestion" by Mr. Morris was a remark to the effect that the resolution was unnecessary, as the other resolutions did not agree with it. The three highly significant resolutions now offered by Mr. Randolph were as follows:

1. *Resolved*, That a union of the states, merely federal, will not accomplish the objects proposed by the articles of confederation, namely, common defence, security of liberty, and general welfare.

2. *Resolved*, That no treaty or treaties among any of the states as sovereign will accomplish or secure their common defence, liberty, or welfare.

3. *Resolved*, That a national government ought to be established consisting of a supreme judicial, legislative, and executive.

As given by Mr. Madison (the above are from Yates) there are slight and unimportant verbal differences in them. With regard to the first resolution, according to Mr. Madison, some

verbal criticisms were made. Yates says that Mr. Pinckney observed that, if agreed to, the convention might as well adjourn, as its business was simply to amend or alter the articles of confederation. The second resolution being of the same character, both were passed over, and the third resolution was taken up, and provoked considerable discussion, "less, however," says Madison, "on its general merits than on the force and extent of the words 'supreme' and 'national.'" Mr. Pinckney inquired of Mr. Randolph, point blank, whether he meant to abolish the state governments, and was answered, according to Madison, that these general propositions were merely intended to introduce particular ones which would explain his proposed system; according to Yates, that such was not the intention, but merely that in case of clash between the powers to be granted to the new government with those of the states the latter were to give way.

Mr. Gouverneur Morris stated the difference between a "*federal*" and a "*national, supreme*" government to be that the former was a "mere compact resting on the good faith of the parties; the latter having a complete and *compulsive* operation." He added his conviction that in all communities there must be one supreme power and one only. He was immediately followed by Mr. Mason, who stated that coercion could not in the nature of things be executed on the states collectively, and that such a government was needed as could act against individuals, and punish only the guilty parties. Thus, at the outset, was the convention squarely told what were the ideas of those who favored the resolution and all that it implied; and they refused, though by a tie vote, to postpone this resolution for a less positive one offered by Mr. Read, that "a more effective government, consisting of a legislature, executive, and judiciary ought to be established."

Mr. Randolph's resolution was then passed by a vote of six "ayes" to one "no"—Connecticut. New York was divided—Hamilton, of course, "aye," Yates equally of course, "no." The second resolution of the "Virginia plan," viz., "That the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number

of free inhabitants, as the one or the other rule may seem best in different cases," was then taken up. But upon the objection of Mr. Read, of Delaware, owing to the clause in the Delaware credentials forbidding an agreement to proportionate representation, the resolution was postponed, with, however, a general understanding that it would certainly be agreed to in substance later. Mr. Madison had pointed out that "whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign states, it must cease when a national government should be put in place." The convention then, in Committee of the Whole, agreed to the third resolution, that the legislature should consist of two branches—Yates remarking in a note in his "minutes" that as a supreme legislature had been agreed upon, he saw no objection to its being in two branches; or in twenty, I presume—the whole proceeding was directly opposed to his views. Now came a most important resolution, a radical departure from the articles of confederation, the fourth in the plan, which provided for the election of the first branch of the National Legislature "by the people of the several states."

This was debated at some length, Mr. Gerry objecting strongly on the ground that the mass of the people were too ill-informed, too easily misled, to be trusted with such important powers. He said that the country was suffering from an excess of democracy—true enough before and since!—but hardly a reason for refusing a properly regulated franchise to the people. Messrs. Mason, Wilson and Madison all argued strenuously for the resolution, urging that the sympathy between the government and the people so essential to its permanence and efficacy could only be secured in this way.

This clause of the resolution passed by a vote of five yeas to two noes—two states, Connecticut and Delaware, being divided. The subject of the qualifications of the members of the National Legislature was postponed; the convention was now engaged with general propositions. They now proceeded to the fifth resolution, which provided for the election of the second "or senatorial" branch of the National Legislature by

the first branch, etc. The debate upon this resolution when first taken up showed, on the whole, an unwillingness to entrust such a power to the first branch, the majority of those who spoke appearing to think that the state legislatures ought to be entrusted with it. However, no affirmative action was taken; the resolution was simply negatived by a decisive vote, and a day or two later a motion to elect by the people of the states divided into districts was defeated. About a week afterwards, on June 7th, the subject was again taken up. Mr. Dickinson moved that the second branch be chosen by the legislature of the individual states, and proceeded to support his motion. In the debate which followed, participated in by several of the ablest men in the convention, it is not easy to see what was the reason for the unanimous vote with which the resolution finally passed. One suggestion, by Mr. Read, that this branch be appointed by the *executive* from persons nominated by the state legislatures was not even seconded, and was passed over in silent contempt. The real point at issue, however, was the question of proportionate representation. If this principle were carried out, it would have made the body too numerous, each state being allowed at least one. And there seems also to have been a feeling that it would not do to ignore too completely the states as political organisms in forming the new national government. And also, that a better class of men would be secured to the new senate, if the legislature and not the easily led people at large should elect its members. In the meantime, after failing to dispose of this question on May 31st, they proceeded to pass the sixth resolution (practically without debate, although Mr. Butler remarked that he feared they were going too far in taking away the powers of the states), except the clause authorizing the employment of force against a delinquent state. This was postponed after a few remarks by Madison, who said he doubted the wisdom or justice of the use of force against a people collectively. He thought that a union of states with such a provision would provide for its own destruction, and would probably be considered by the party attacked as "a dissolution of all previous compacts by which it might be

bound"—a very extraordinary position, it seems to me, for Mr. Madison to take. It is true, he did not ask for a rejection of the resolution, but merely a postponement of it in the hope that a "system would be framed which would render this resource unnecessary." Still, one of the capital defects in "confederation" system had been the powerlessness of Congress to enforce obedience to its behests. And how a *delinquent* state could regard the use of force against it as releasing it from any compact by which it might be bound, it is not easy to see. Mr. Madison says it would probably be regarded by the particular state as a declaration of war rather than an infliction of punishment, a point of view only comprehensible upon the theory that they were after all only engaged in the formation of a new league or close alliance between sovereign states, a position hardly reconcilable with the general tenor of the resolutions under consideration, or with the express words of the distinguished Virginian in the debate on proportionate representation before quoted, viz.: "Whatever reason might have existed for the equality of suffrage when the Union was a federal one among sovereign states, it must cease when a national government should be put into the place."

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(To be Continued.)