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THE RECORDS
OF THE
FEDERAL CONVENTION
OF 1787

EDITED BY
MAX FARRAND

REVISED EDITION IN FOUR VOLUMES

VOLUME II

NEW HAVEN AND LONDON · YALE UNIVERSITY PRESS

MADISON

August 8

ing wished to know what influence the vote just meant have on the succeeding part of the Report, the admission of slaves into the rule of Representation could not reconcile his mind to the article if it went objections to the latter part. The admission as a most grating circumstance to his mind, & he would be so to a great part of the people of America. It made a strenuous opposition to it heretofore had hoped that this concession would have produced which had not been manifested, to strengthen Govt. and to mark a full confidence in it. The Reconsideration had by the tenor of it, put an end to pes. In two great points the hands of the Legislature absolutely tied. The importation of slaves could be prohibited — exports could not be taxed. Is this What are the great objects of the Genl. System? 1. agst. foreign invasion. 2. agst. internal sedition. States then be bound to defend each; & shall liberty to introduce a weakness which will render it difficult? Shall one part of the U. S. be bound to other part, and that other part be at liberty not to use its own danger, but to withhold the compensation burden? If slaves are to be imported shall not be produced by their labor, supply a revenue to enable the Genl. Govt. to defend their Masters? — much inequality & unreasonableness in all this, if the N(orthern) States could never be reconciled. No candid man could undertake to justify it had hoped that some accommodation wd. have been made on this subject; that at least a time wd. have been for the importation of slaves. He never could see them be imported without limitation & then be the Natl. Legislature. Indeed he could so himself of the rectitude of such a practice, that he could assent to it under any circumstances. either slaves should not be represented, or be taxable.

an regarded the slave-trade as iniquitous; but

Wednesday

MADISON

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the point of representation having been settled after much difficulty & deliberation, he did not think himself bound to make opposition; especially as the present article as amended did not preclude any arrangement whatever on that point in another place of the Report.¹

Mr. (Madison) objected to 1 for every 40,000 inhabitants (as a perpetual rule).¹⁰ The future increase of population if the Union shd. be permanent, will render the number of Representatives excessive."

Mr. Ghorum. It is not to be supposed that the Govt will last so long as to produce this effect. Can it be supposed that this vast Country including the Western territory will 150 years hence remain one nation?

Mr. Elseworth. If the Govt. should continue so long, alterations may be made in the Constitution in the manner proposed in a subsequent article.

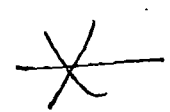
Mr Sherman & Mr. (Madison) moved to insert the words "not exceeding" before the words "1 for every 40,000, which was agreed to nem. con.

Mr Govr. Morris moved to insert "free" before the word "inhabitants." Much he said would depend on this point. He never would concur in upholding domestic slavery. It was a nefarious institution — It was the curse of heaven on the States where it prevailed. Compare the free regions of the Middle States, where a rich & noble cultivation marks the prosperity & happiness of the people, with the misery & poverty which overspread the barren wastes of Va. Maryland. & the other States having slaves. (Travel thro' ye whole Continent & you behold the prospect continually varying with the appearance & disappearance of slavery. The moment you leave ye E. Sts. & enter N. York, the effects of the institution become visible; Passing thro' the Jerseys and entering Pennsylvania every criterion of superior improvement witnesses the change. Proceed Southwdly, & every step you take thro' ye great

¹ See further upon this subject references under August 22 note 2, and August 25 note 7.

¹⁰ Probably but not certainly a later revision.

¹¹ See Appendix A, CXLIV.



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TO: DON BAER
FAX # 456-1213

FROM: WALTER DELLINGER

WLD

Don --

At the time of the adoption of the constitution, Virginia's George Mason sounded a pessimistic note when he asked "can anyone imagine that 150 years hence this vast country, including the Western lands, will still remain a single nation?." {This is from my notes; although I don't have the cite I will take responsibility for the quote.}

See also the attached (from a long forgotten speech of mine): John Adams, at the time of the Continental Congress in 1775, wrote to the remarkable Abigail describing "fifty gentlemen meeting together all strangers ... not acquainted with each others language, ideas, views, designs. There are therefore jealous of each other -- fearful, timid, skittish."

And see Gouvernor Morris: "He came here [Madison recounts Morris saying] as a Representative of America ... The country must be United. If persuasion does not unite it, the sword will ...

And see the tie to M.L. King on the last page of the attached excerpts.

-- Walter 514-2201

*Also: Terry Edmonds
456-5709*

1787: THE CONSTITUTION AND "THE CURSE OF HEAVEN"

WALTER E. DELLINGER III*

On Thursday, July 5, 1787, the Constitutional Convention, having recessed for two days in honor of Independence Day, resumed its deliberations, then nearly at deadlock over the allocation of power between large states and small. As the convention threatened to break apart, Gouverneur Morris of Pennsylvania gave voice to the hopes and fears of the delegates. "He came here," Madison recounts Morris as saying, "as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race; for the whole human race will be affected by the proceedings of this Convention." We may, in our time, seriously doubt whether Morris and his colleagues could in any meaningful sense "represent the whole human race"; we cannot doubt, however, that the whole human race was to be affected by the Convention's proceedings. "The Country," Morris went on, "must be united. If persuasion does not unite it, the sword will. . . . The scenes of horror attending civil commotion can not be described. . . . The stronger party will . . . make traitors of the weaker; and the Gallows & Halter will finish the work of the sword."²

The framers who met at Philadelphia were moved not only by such apocalyptic fears, but by hopes as well, and by visions of the grandeur and importance of America. To review the work of the Constitutional Convention of 1787, as reflected in James Madison's extensive daily notes, beginning with the first day, May 25, and continuing day by day, draft by draft, through the Philadelphia

* Professor of Law, Duke University. This article began as a comment presented in March 1987 at the Fourth Annual Bill of Rights Symposium at The College of William and Mary. It evolved in a series of lectures in the spring of 1987 delivered in New Orleans, Washington, and New York City to federal judges and members of the bar. Except for noting quotations and acknowledgments, I have left this largely in the form of those lectures.

1. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 529 (M. Farrand ed. 1911) [hereinafter Farrand].

2. *Id.* at 530.

Two aspects of the Constitutional founding that are unrelated to human freedom have made an enduring contribution: the triumph of national vision and the concept of constitutionalism itself. From the vantage point of 1776, the Constitution that emerged from the 1787 convention was a truly extraordinary creation.⁴⁶ The coming together of the American colonies into a single nation was more difficult than we can now easily imagine. None of the revolutionary leaders ever publicly contemplated erecting over all of America a truly national government with the power to operate directly on individuals.⁴⁷ John Adams, at the time of the Continental Congress in 1775, wrote to Abigail describing " '[f]ifty gentlemen meeting together all strangers . . . not acquainted with each other's language, ideas, views, designs. They are therefore jealous [suspicious] of each other—fearful, timid, skittish.' "⁴⁸ Although to us they stand at a beginning, initiating a history, "they saw themselves as defenders of a history accomplished; taking risks that might end, rather than launch, a noble experiment."⁴⁹ They came as repre-

Without fully exploring this question, let me simply suggest that the great national powers of Congress imminent in article I (as we have come to view them) would, properly read, provide ample authority for Congress to bring a virtual end to slavery. The powers to raise armies and to regulate the land and naval forces, for example, are one source of Congress' authority to take slaves away from slave states. But all the power Congress might need could be found in the commerce clause, which gives to Congress the power to regulate all the economic activity that "affects more states than one," to use the phrase from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Congress not only could have forbidden slavery in the territories and in the District of Columbia, it also could have forbidden the interstate transportation or sale of slaves. And it could have forbidden the interstate transportation or sale (or international export) of any and all products produced by slave labor, or by any farm or factory that utilized slave labor. After all, the Congress was able to preclude the interstate shipment of goods made under conditions of "wage slavery"; that is, goods produced by those paid less than a congressionally specified minimum wage. *United States v. Darby*, 312 U.S. 100 (1941). It could therefore surely use the commerce power to preclude the shipment of goods made by actual slaves. The objection to this use of the commerce power would no doubt be that Chief Justice Taney was right that an implicit constitutional commitment to slavery precluded any clause from being read to permit the curtailing of slavery. I am simply arguing against this reading. I should emphasize that I am not suggesting that a congressional abolition of slavery was even remotely a historically realistic possibility in 1858; I am only arguing that abolition by Congress would have been consistent with the text of the original Constitution as it has come to be interpreted in modern decisions.

46. Wood, *supra* note 9, at 4.

47. *Id.*

48. Letter from John Adams to Abigail Adams, quoted in G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 34 (1978).

49. *Id.* at 38.

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sentatives of legislative assemblies nearly a century old that had been more trading rivals than partners and had fought the war as allies, not as a union.

From this uneasy alliance of simple state governments, the framers forged a powerful new national government, continental in scope, with the authority not only to create its own armies, but to operate directly on individuals, to regulate commerce, and for the first time to impose taxes directly on citizens. They created a constitution that unmistakably made this powerful new national government supreme, and said so in terms unmistakable and addressed directly to state court judges who would be on oath to support it: "This Constitution, and the Laws of the United States . . . made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁵⁰ The federalist vision was best expressed by John Marshall two decades later in *McCulloch v. Maryland*, in which he imagined that "[t]hroughout this vast republic, from the St. Croix to the Gulph of Mexico, revenue is to be collected and expended, armies are to be marched and supported."⁵¹ To this end "[t]he sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are entrusted to its government."⁵²

For some, the federalist vision was one of the grandeur and importance of the American nation. For Madison, the extended American republic was also a means by which the rights of individuals could gain some measure of protection from the force of majority sentiments. The proper remedy for tyranny by the majority, as Madison wrote in the familiar tenth *Federalist*, was to extend the governing republic across the entire nation.⁵³ This way, potentially vicious local majorities would be submerged in a larger nation, and their danger lessened. He wrote: "The influence of factious leaders may kindle a flame within particular States, but will be unable to spread a general conflagration through other

50. U.S. CONST. art. VI, cl. 2.

51. 17 U.S. (4 Wheat.) 316, 408 (1819).

52. *Id.* at 407.

53. THE FEDERALIST No. 10, *supra* note 12, at 63-64.

States."⁵⁴ A religious sect might control one State, but not a continental nation. "In the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government."⁵⁵ Because the framers had set us on the road to nationhood—and because they had provided a mechanism for constitutional change that permitted the notion of who counted as a person and a citizen to be expanded through the Civil War amendments—we were, far too late in our history to be a cause for unabashed celebration, able as a nation to bring national standards of justice and equality to bear on those areas where legal inequality reigned.

However unintended or unanticipated it might have been, Madison's idea of the extended republic as a source of national amelioration of the local tyranny that might be practiced by local majorities can be seen at work in the civil rights movement in the American South. The triumph of nationalism was a precedent to that movement, as was the notion of constitutionalism itself, the idea that government must be guided not by whim, preference, or raw power, but by the necessity of justifying its actions in terms of previously agreed upon principles, binding even on government itself.

All these themes come together for me in one moment of our constitutional history, in Montgomery, Alabama, in the winter of 1955. Mrs. Rosa Parks had been convicted and fined for violating the city's segregation code after refusing to give up her bus seat for a white man. The next day the historic Montgomery bus boycott was under way, and late in the afternoon, Dr. Martin Luther King, then only twenty-six years old and recently arrived in the city, accepted the presidency of the boycotting organization, the Montgomery Improvement Association. He was to address the first mass meeting of the movement that night, and he had only twenty minutes to prepare. What kind of argument does one make in that setting to show the wrongness of the "preferences" of those with majority power, and the rightness of the cause of the local minority? The best of the American constitutional tradition provided Dr. King with a kind of argument that is not available in many of the

54. *Id.* at 64.

55. *Id.* at 65.

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world's political cultures. This is what he said to thousands packed inside and outside the Holt Street Baptist Church on that November night:

If we are wrong, the Supreme Court of this nation is wrong.

If we are wrong, the Constitution of the United States is wrong.

If we are wrong, God Almighty is wrong.⁵⁶

My whole point comes down to this: the drafting of the Constitution in the Grand Federal Convention in Philadelphia in the summer of 1787 did not mark the creation of a just and democratic society, but only the beginning of a quest not yet complete.

56. Address by Dr. Martin Luther King, Jr., Montgomery, Alabama (Dec. 5, 1955), quoted in S. OATES, *LET THE TRUMPET SOUND* 71 (1982).

TUESDAY, JUNE 21, 1988

The New York Times

Pledge Allegiance to the Law

By Walter Dellinger

Vice President Bush seems determined to make an issue of Governor Dukakis's veto of a bill that would require Massachusetts teachers to lead their classes in the Pledge of Allegiance in school every day. As a Bush aide told *Newsweek*, "We can't wait to do an ad on that one."

They should wait, and if they want to avoid embarrassing themselves, they shouldn't do one at all.

The bill in question was passed by the Massachusetts legislature in 1977. The measure applied to all teachers, including those whose religious beliefs would be violated if they participated. The Supreme Judicial Court of Massachusetts, in an advisory opinion, declared that the bill was unconstitutional.

The opinion was based on a 1943 decision of the United States Supreme Court regarding a West Virginia rule that compelled every student to salute and pledge allegiance to the flag. The Court's opinion, written by Justice Robert Jackson, who later served as the United States prosecutor at the

Walter Dellinger is professor of law at Duke University.

Nuremberg Trials, concludes with a memorable affirmation of American constitutionalism: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The Massachusetts court held that the bill clearly violated the principles spelled out in the 1943 case. Thus did Governor Dukakis decline to sign the measure, stating in his veto message that "My oath of office requires me to uphold the Constitution of the United States. I cannot sign any bill that violates the Constitution, as this bill has been declared to do."

Whatever the political consequences may be, Governor Dukakis's decision was the only correct position for anyone with even a minimal attachment to the rule of law. What would Mr. Bush have done? Would he have forced teachers to bear the needless expense of pursuing appeals to a state Supreme Court that had already and emphatically pronounced the legislation invalid?

No one committed to the rule of law should countenance such a cavalier disregard for the judicial process and the rights of individuals. Perhaps unwittingly, Vice President Bush has effectively endorsed Attorney General Edwin Meese's reckless view that

Government officials are under no obligation to comply with decisions of the United States Supreme Court and their state's highest court. By criticizing Governor Dukakis for vetoing a bill that the courts had found to violate the constitution, the Vice President calls into question his own understanding of the rule of law.

Attorney General Meese was right in noting that, in some circumstances, officials other than judges are entitled to interpret the Constitution. A President, for example, may properly decline to sign a bill that he believes conflicts with the Constitution, even if it appears that the courts would hold it constitutional.

The issue is quite different, however, when the courts have declared an act unconstitutional. In such a case, it is simply lawless for government officials to disregard the judicial decision.

The silly suggestion that Governor Dukakis's veto was based upon personal opposition to the Pledge of Allegiance is utterly unworthy of the Vice President. When we pledge allegiance to the flag of the United States "and to the Republic for which it stands," we are pledging allegiance to a system of constitutional government in which no official — high or petty — is above the law. Vice President Bush and Attorney General Meese should join Governor Dukakis in that pledge.

(Section A; Page 25)



U. S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

**TO: DON BAER
TERRY MORAN
FAX # 456-1213**

GOT IT !

**ITS NATHANIEL GORHAM OF MASSACHUSETTS, NOT GEORGE MASON, BUT
THE QUOTE IS RIGHT. SEE ATTACHED FROM FARRAND'S RECORDS OF THE
CONSTITUTIONAL CONVENTION.**

GOOD LUCK.

Walter Dellinger