

1

LA CONSTITUTION DES ÉTATS-UNIS

1. En route vers la Constitution

*«If men were angels, no government would be necessary.»
James Madison (1751-1836)*

When in 1606, King James I (1566-1625) granted a charter to some merchants of London to establish a colony in the New World, they created the Virginia Company of London. Three ships carrying 120 men sailed towards Virginia, landed in Chesapeake Bay and founded Jamestown. The failure of the all-powerful local governor to enforce the rigorous laws decided by the Company in London led to the appointment of a new Governor, George Yardley, who arrived in 1619. His task was to summon every year an assembly of burgesses (two men elected in each borough). The first meeting was held during the summer of 1619 in a church in Jamestown. The structure thus created survived the collapse of the Virginia Company in 1624 and marks the first step towards a representative government.

On September 16th, 1620, the Pilgrim Fathers, who had left England on board the *Mayflower*, landed in New England where they founded the Plymouth Plantation, the first permanent European settlement. Realizing the difficulty which the lack of a charter that would have established the relationship between the newly arrived colonists and the investors who had remained in England might cause, they drafted and then ratified by majority rule a short contract, now called the *Mayflower Compact*: it "bound them together into a Civil Body Politic, for (their) better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which (they) promise all due submission and obedience". Ten years later, the Massachusetts Bay Company held the first General Court, enfranchising 118 men, giving all men the right to choose their governor. Moreover, all men participated in the town meetings which passed ordinances, and levied and collected taxes.

Little by little, the affairs of each community, especially in New-England, were decided by local councils which met on a more or less regular basis, and where each elector had one vote, thus establishing a tradition of direct democracy. Moreover, current affairs were entrusted to elected representatives who met more frequently. In each of the thirteen colonies executive power was held by a governor who was the King's representative, except in Connecticut and Rhode Island where he was chosen by the local electors. The legislative power belonged to the assemblies, composed of two houses. Judicial power was in the hands of judges appointed by the Governor; their role was to mete out justice and ensure that the laws did not contradict the English Constitution.

Each of the three branches could check the decisions made by the other two. The governors could not levy taxes without the agreement of the assemblies and could not jail anyone without a judicial decision. Laws passed by any assembly had to be

accepted by the judges as well as by the Governor who sometimes held the power of veto. Magistrates were also submitted to checks by governors who appointed them and they also had to respect the traditional laws of England such as *Habeas Corpus*, which was passed under Charles II (1630-1685) in 1679. *Habeas Corpus* guarantees individual liberty: any person who is detained must be presented to a judge who will decide on the legality of the imprisonment. It also obliges the authorities to justify the motives for detaining that person.

However, the thirteen colonies owned by England from New Hampshire in the North down to Georgia in the South met with an increasing number of difficulties in their relation with the British government. While no one from the colonies could be elected to the House of Commons, Parliament passed numerous laws concerning trade restrictions and taxation. In 1763, Parliament banned the settlers from moving further west than the Appalachian range. In 1765, it imposed the *Stamp Act*, which forced Americans to pay duty on all legal documents, mortgages, almanacs, and playing cards, as well as on books and the press. It was revoked in 1766 in view of the strong opposition of the American people who objected to the tax as long as they had no elected representatives, their slogan being "No taxation without representation". It was followed in 1767 by the *Townshend Acts*, which levied a tax on all goods and commodities imported to or exported from America. The resistance in the colonies prompted the billeting of 3,000 British troops in Bostonian families in 1768, which eventually resulted in the Boston Massacre of 1770. On March 5th, British troops that were in charge of maintaining order opened fire on the crowd and killed five Americans, one of whom was an escaped slave. Six soldiers and one officer were tried and acquitted, having been defended by John Adams (1735-1826) who was to become the second President of the United States from 1797 to 1801. In reaction to the Boston Tea Party of December 1773 when Bostonians, objecting to the *British Tea Act* of May 1773 which gave monopoly to the British East India Company on tea trade and imposed taxes on all the tea imported into the colonies, dumped the crates of tea into Boston Harbour, the British Parliament passed a series of laws sponsored by British Prime Minister Lord North (1732-1792). These punitive measures known as the *Intolerable Acts* or the *Coercive Acts*, which many considered to be in total violation of their rights, stirred the revolutionary spirit. The *Boston Port Act* closed the port of Boston until the East India Company had been repaid for the lost tea and until the king considered that order had been restored; it also moved the capital of Massachusetts to Salem. Under the terms of the *Massachusetts Government Act*, all positions in the colonial government were to be appointed by the governor or the king, and town meetings were limited to one a year, which in effect brought the government of Massachusetts under English rule. The governor was granted permission to move trials of accused royal officials to another colony or even to Great Britain if he considered that the trial might not be fair. George Washington named this act the "Murder Act" for it would allow any British official to escape justice. In all colonies, British soldiers could be billeted in private homes or in empty houses with the *Quartering Act*. The *Quebec Act*, which enlarged the boundaries of what was then the Province of Quebec, granted civil government and religious freedom to Catholics living there, leading to fears that the French Canadians were being encouraged to oppress British Americans.

In September 1774, a group of Americans gathered in Philadelphia to form the First Continental Congress, which petitioned King George III (1738-1820) to redress the grievances of the colonists. It also decided to organize another Congress in the likely event the king did not react. In May 1775, the Second Continental Congress convened in Philadelphia and, after raising an army under the command of George Washington

(1732-1799), decided on July 2nd, 1776 to sever all the bonds that united Great Britain and its American colonies, before publishing the Declaration of Independence on July 4th. At the same time, it was decided to put a commission in charge of writing a “plan for a confederation” in order to solve the institutional difficulties that might appear after independence.

In 1777, the commission published the *Articles of the Confederation and Perpetual Union* which became binding in March 1781 when the 13th state, Maryland, ratified it. The *Articles* reflect the wariness by the states of a strong central government. Afraid a national government with too much power would ignore the individual needs of people, the *Articles* established a «constitution» that vested the largest share of power in the individual states. They instituted a simple system with only one House, no executive power, and so no President. A committee of delegates composed of representatives from each state formed the Congress which was responsible for conducting foreign affairs, declaring war or peace, as well as maintaining an army and a navy. Each state sent between two and seven members to Congress but had only one vote, whatever its size or population. But the *Articles* contained many shortcomings: they denied Congress the power to collect taxes and enforce laws; they did not regulate commerce between the states and with foreign countries; and they also lacked the power to force states to abide by laws. As decisions had to be passed by a nine-vote majority, the five smaller states could block any bill proposed by the eight larger states.

Eventually, the Continental Congress, called for a meeting to overcome the many difficulties brought by the *Articles*. The 55 delegates who met in Philadelphia in May 1787 (among whom were Washington, Hamilton, Franklin, and Madison) completed a new constitution in September 1787, and then offered it for ratification by a minimum of 9 states. This was achieved in June 1788; by 1790, all 13 original states had ratified it.

Most of the delegates had had some form of political experience: eight were signatories of *the Declaration of Independence*; three of them had also signed *the Articles of the Confederation*. Seven had been Governors and over forty of them had sat in the assemblies of their state or been delegates to Congress.

The question of ratification quickly brought into existence two diverging trends: the Federalists in favour of a strong government and the Anti-Federalists who wanted a mere league of states. The Anti-Federalists refused to ratify the Constitution considering it gave too much power to the national government at the expense of the state governments, that there was no bill of rights, that the national government had the possibility of maintaining an army in peacetime, and that Congress had too much power. Among them were Patrick Henry (1736-1799), a Virginian who had been strongly opposed to the British, Thomas Jefferson (1743-1826), though he was Ambassador to France at the time, and George Clinton (1739-1812), who was twice Vice-President (with Jefferson and James Madison [1751-1836]).

Of these complaints, the lack of a bill of rights was the most effective element in the campaign against ratification. The American people had just fought a war to defend their rights, and did not want an intimidating national government taking those rights away again.

The Federalists considered that the separation of powers into three independent branches protected the rights of the people as each branch represented a different aspect of the people, all three branches were equal, and no one group could assume control over another. They also considered that if a list of specific rights were drawn, any right not mentioned could be violated by the government. In order to uphold their

ideas, the Federalists led by Alexander Hamilton (51 essays), James Madison (26 essays and one in collaboration with A. Hamilton) and John Jay (5 essays) published in New York the *Federalist Papers*, a series of 85 essays. They agreed that once Congress met, it would draft a bill of rights.

When the delegates convened, Virginia immediately offered a plan written by James Madison proposing a strong legislative power composed of two houses, a lower house elected by the people, and an upper house elected by the members of the lower house. A strong executive power was to be chosen by the legislative power which would also appoint the judicial power. Led by the delegates from New Jersey, several smaller states opposed that proposal, but most of their suggestions were rejected. The main point at issue concerned the representation of each state: should it be based on their population or should it be the same for every state? A committee established what is known as the *Connecticut Compromise*, for that state was foremost in the negotiations. It proposed a bicameral legislature, resulting in the current United States Senate and House of Representatives. Membership in the Lower House would be allocated in proportion to the population, as in the proposal by Virginia, while membership in the Upper House favoured the proposal of New Jersey allocating two seats for each state, regardless of size. Members of the Upper House, or Senators, were elected by the state Legislature until the ratification of the Seventeenth Amendment (1913), which called for the direct election of Senators by the people. It also instituted a national census of all inhabitants that would take place every ten years. Moreover, all bills for raising taxes, spending or appropriating money, and setting the salaries of Federal officers were to originate in the Lower House, the Upper House being at first denied the right to amend.

Vocabulaire du texte

to grant	<i>accorder</i>	a mortgage	<i>une hypothèque</i>
a charter	<i>une charte, des statuts</i>	a commodity	<i>une matière première,</i> <i>une denrée</i>
to found	<i>fonder</i>	to billet	<i>loger, cantonner</i>
to enforce	<i>mettre en oeuvre,</i> <i>appliquer</i>	to dump	<i>déverser</i>
to summon	<i>convoquer</i>	a crate	<i>une caisse</i>
a burgess	<i>un bourgeois</i>	to sponsor	<i>soutenir</i> <i>(financièrement)</i>
to collapse	<i>s'effondrer</i>	to stir	<i>enflammer</i>
a settlement	<i>une colonie (de</i> <i>peuplement)</i>	to appoint	<i>nommer</i>
to draft	<i>élaborer, rédiger</i>	fair	<i>juste, équitable</i>
to bind	<i>lier</i>	to redress	<i>réparer</i>
furtherance (in ... of)	<i>pour servir quelque</i> <i>chose</i>	a grievance	<i>un grief</i>
aforesaid	<i>précité, susdit</i>	to convene	<i>se réunir</i>
a frame	<i>un cadre</i>	to sever	<i>rompre, couper</i>
submission	<i>la soumission</i>	binding	<i>obligatoire</i>
to enfranchise	<i>accorder le droit de vote</i>	wariness	<i>prudence, méfiance</i>
to levy	<i>lever (un impôt, une</i> <i>taxe)</i>	to vest	<i>confier, attribuer</i>
to entrust	<i>confier à</i>	a shortcoming	<i>un défaut</i>
to mete out	<i>rendre (la justice),</i> <i>infliger</i>	a bill	<i>un projet de loi</i>
a check	<i>un contrôle, une</i> <i>vérification</i>	to complete	<i>achever</i>
a settler	<i>un pionnier</i>	a trend	<i>une tendance</i>
a range	<i>une chaîne de</i> <i>montagne</i>	to uphold	<i>soutenir, défendre, faire</i> <i>respecter</i>
		bicameral	<i>à deux chambres</i>
		a census	<i>un recensement</i>
		to appropriate	<i>affecter (des fonds)</i>

Vocabulaire complémentaire

among	<i>parmi</i>	to hush up	<i>faire taire</i>
the appropriation	<i>la dotation, les crédits</i> <i>budgétaires</i>	a money bill	<i>un projet de loi de</i> <i>finance</i>
to backbite	<i>médire</i>	to rout	<i>mettre en déroute</i>
to bicker (about/over)	<i>se chamailler</i>	a shortcoming	<i>un défaut</i>
a boundary	<i>une limite, frontière</i>	a statesman	<i>un homme d'État</i>
a dispute	<i>une querelle</i>	to up the ante	<i>faire monter les</i> <i>enchères</i>
divine right (by)	<i>de droit divin</i>	the Ways and Means	<i>la commission du</i> <i>budget</i>
to dodge an issue	<i>éviter un sujet</i>	Committee	<i>se disputer (à propos</i> <i>de...)</i>
to enforce the law	<i>faire respecter la loi</i>	To wrangle (over...)	<i>céder à</i>
the executive	<i>l'exécutif</i>	to yield	
the grassroots	<i>la base</i>		
to hamper	<i> gêner, entraver</i>		

2

LA CONSTITUTION DES ÉTATS-UNIS

2. Origine et texte. La Constitution des États

La trop grande souplesse des « Articles de la Confédération et de l'Union Perpétuelle » adoptés à l'issue de la Guerre d'Indépendance (1775-1781), leur manque de précision amenèrent en mai 1787 la réunion d'une convention nationale à Philadelphie au cours de laquelle les « Pères Fondateurs », influencés par les courants philosophiques de l'époque, vont non pas modifier les Articles, mais rédiger une Constitution. Courte (4 559 mots), elle comporte un bref préambule et 7 articles et ne sera modifiée par la suite que par 27 amendements. Outre cette Constitution fédérale, chaque État a la sienne propre.

The War of Independence between the thirteen British Colonies and Great Britain lasted from 1775 to 1781. While just at war, the colonies, which now called themselves The United States of America, drafted the “Articles of Confederation and Perpetual Union”, a compact adopted in 1777 which became binding in 1781 when the 13th State, Maryland, ratified it. The weakness of the central government was dramatized by events like Shays’ Rebellion (1786-87) that occurred in Massachusetts to protest against taxes on land, the cost of tribunals and the economic depression after the War of Independence.

The works of Thomas Hobbes (1588-1679) and John Locke (1632-1704), as well as the theory of the separation of powers advocated by Montesquieu in 1748 influenced the framers of the new constitution who had diverging opinions on key issues. For Hobbes, equality for all breeds insecurity, disorder, then misery, as “Man is a Wolf to Man”; protecting one’s individual life hampers the development of arts, science or justice. It is thus necessary to entrust one’s individual power into the hands of a single man. For Locke, to escape the anarchy of the natural state and to enjoy the natural rights of life, liberty and property, men must form a government based on a “social contract”. The ultimate source of a legitimate government stems from the consent of the people themselves, who retain the right to overthrow it if it breaks that contract. Some like Washington, Hamilton and Adams advocated a strong central government as “the people are turbulent and changing; they seldom judge or determine right”; others like Franklin, suspicious of central authority, defended the cause of a liberal government. Another source of difference divided those advocating that each state should keep its independence within the newly united nation from others, like Madison, who favored a powerful national regime, a compromise between monarchy and democracy. The dissent between large states that wanted representation by population and small ones that wanted representation by state was partially resolved by giving each state equal representation in the Senate but apportioned representation according to population in the House of Representatives. It was necessary to give in to southern demands as regards slavery, which was tolerated until 1808, and slaves were counted as three-fifths of all other persons, Indians excluded, for the purpose of determining representation and apportioning direct taxes.

Fearing the concentration of power in one person’s hand, the framers incorporated ways of circumscribing it: each of the 3 branches of government can check and balance¹ each other’s power. Presidential power is limited to a four-year term, and the

President is liable to impeachment by the House of Representatives and the Senate; he nominates justices, federal judges and top executives, but the Senate must confirm their nomination. He has the right of veto over congressional decisions, but Congress can overrule his veto by a two-thirds vote.

The new 4559-word-long constitution departed from the Articles by establishing a strong central or federal government, with the power to intervene in the relations between the states and sole powers in terms of foreign affairs and defense.

The 52-word-long foreword defines the main goals that the government should pursue, justifies the writing of the Constitution and states its purpose in 6 points: "to form a more perfect union", an obvious issue for the 13 states in 1787, "to establish justice", a phrase which recalls the Declaration of Independence and the "unalienable rights" men have received from their Creator, "to insure domestic stability" and "provide for the common defense", allusions to the presence of British troops in Canada, of French ones in the Louisiana Territory, and of Spain in the South. The last two points are "to promote the general welfare" and "secure the blessings of liberty to ourselves and our posterity".

Its 7 articles deal with a specific section of the workings of a democracy:

Article 1 describes the legislative power. Section 1 specifies that "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Section 2 focuses on the House of Representatives, the duration of their mandate (2 years), the conditions of age (25) and nationality (a representative must have been a US citizen for 7 years), their number and apportionment according to the population of each State – hence the establishment of a decennial census still held every year ending in zero –, and gives the House the sole power of bringing charges of misconduct which can lead to impeachment. Today, the House is composed of 435 members, about one for 640,000 persons in the USA. Section 3 states how the Senate will be constituted: each state is entitled to 2 Senators, thus establishing parity among the States, the conditions of age (30) and nationality (a senator must have been a US citizen for 9 years). The senatorial term is of 6 years, and every 2 years, one-third of the Senators runs for election: there are therefore always two-thirds of the Senators with legislative experience. The Senate holds the sole right to try impeachments decided by the Representatives. While Sections 4 to 6 deal with the election of Representatives and Senators, the individual rules for their proceedings and their privileges (freedom from arrest, freedom of speech or debate), Section 7 is devoted to the passing of bills and to the powers of Congress. Each House may introduce legislation, except revenue bills which can only originate in the House of Representatives. Once passed in identical terms in both Houses, the bill is then presented to the President, who can sign or veto it. However, a vote of two-thirds of the members of each House can override his right of veto. Sections 8 and 9 spell out the broad powers and "limitations upon powers of Congress". The framers, aware that slavery was morally wrong, gave in to southern demands; avoiding the word "slave", they stated the "importation of such persons as any of the states now existing shall think proper to admit" would not be prohibited prior to 1808. In article 4, the Constitution obliged free states to return runaway slaves to their masters. The last section indicates the limitations of the powers of each individual state, which cannot suspend *habeas corpus*², enter into any treaty, alliance or confederation, coin money or lay custom duties on imports and exports.

Article 2 concerns the President, the mode of his election and duration of his mandate, the conditions of age (35 years old minimum), of nationality ("No Person except a

natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President”), and states he must have been “fourteen Years a Resident within the United States”. Section 2 and 3 concern his duties: he is Commander-in-Chief of the armed forces, makes treaties, (provided two-thirds of the Senators present concur), appoints ambassadors, public Ministers and Consuls, Judges of the Supreme Court. He must also give Congress information on the state of the Union. Section 4 evokes the possible destitution for “treason, bribery, or other crimes or misdemeanors”.

Article 3 concerns the judicial powers vested in one Supreme Court whose members, appointed for life, cannot see their salaries “diminished during their continuance in office”. The court’s role is resolving disputes, trying ambassadors and public Ministers, and settling controversies to which the United States shall be a Party. It also institutes the notion of trial by jury.

Article 4 deals with the balance of power between the federal administration and each state, the relations between the various States, their reciprocal obligations, the admission of new states into the union and the federal guarantee of a republican form of government and protection against any form of invasion. Article 5 is about amendments to the Constitution and how they will be proposed and passed, Article 6 about national supremacy and Article 7 about the ratification of the Constitution.

The State Constitutions

Aside from the Federal Constitution, each individual state has its own Constitution. In accordance with the tenth Amendment to the Federal Constitution which states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people,” and with the clause of Article 4 which says that “The United States shall guarantee to every state in this Union a Republican Form of Government”, each of the fifty states has adopted a Constitution which represents the fundamental documents of the law of the state. They vary in length: the shortest one is the Constitution of Vermont, adopted in 1793 and currently 8,295 words long. The longest is Alabama’s sixth and current constitution, ratified in 1901, at 357,157 words long.

Numerous issues are addressed and outline the structure of the state government. The executive is in the hands of a governor, often assisted by a lieutenant-governor. The state legislature is composed of two houses in all states but one (Nebraska). The judiciary branch includes a state supreme court. Changing the constitution of an individual state is easier than changing the federal one. Amendments can originate from the Houses or from the electors themselves: they can come from the legislature itself which may put a proposed legislation up for popular vote; they can also proceed from popular initiative, in which any citizen or organization may gather a predetermined number of signatures to qualify a measure for the ballot. A popular referendum is also possible: a predetermined number of signatures (lower than the number required for a popular initiative) qualifies a ballot measure repealing a specific act of the legislature.

Those ballot initiatives cover a very wide range of topics. In California, Proposition 19, which would have legalized marijuana was defeated at the same time as people voted Yes to end gerrymandering, i.e. the designing of congressional districts for political advantage. Californians also voted to let their state legislature pass budgets with a simple majority, instead of a two-thirds majority, while keeping a two-thirds requirement for any tax increase. Arizona and South Dakota voted No to legalizing even medical marijuana while Arkansas, South Carolina and Tennessee amended their