Next Two Topics:
Slavery in Post-Revolutionary Years
The Constitutional Convention

A. Slavery:
1. Runaways, refugees, and black veterans

2. Boston King's memories of the evacuation from New York, 1798

“[P]eace was restored between America and Great Britain, which diffused universal joy among all parties, except us, who had escaped from slavery, and taken refuge in the English army; for a report prevailed at New-York, that all the slaves, in number 2000, were to be delivered up to their masters, altho' some of them had been three or four years among the English. This dreadful rumour filled us all with inexpressible anguish and terror, especially when we saw our old masters coming from Virginia, North-Carolina, and other parts, and seizing upon their slaves in the streets of New-York, or even dragging them out of their beds. Many of the slaves had very cruel masters, so that the thoughts of returning home with them embittered life to us. For some days we lost our appetite for food, and sleep departed from our eyes. “

Background:
Boston King was one of the many enslaved African Americans -- perhaps as many as 100,000 -- who risked punishment and even death in order to reach the British lines and a chance at freedom.

King was born around 1760 near Charles Town (Charleston), South Carolina. His father, who had been
kidnapped from Africa as child, was a driver on the plantation and knew how to read and write. His mother was a nurse and seamstress.

When he was sixteen, King was apprenticed to a carpenter, who treated him cruelly and once punished him so harshly that he was unable to work for three weeks. As the war moved closer to Charles Town, his master moved further inland. One day, King borrowed the master's horse to visit his parents, but another servant took the horse and stayed several days longer than permitted. King knew that he would be punished severely, and so he decided to join the British in Charles Town.

Soon after his arrival, a smallpox epidemic swept the region. The fugitive slaves, consigned to crowded and unsanitary living conditions, were especially vulnerable. King was stricken with smallpox; he and the other sick African Americans were carried away from the camp and abandoned by the British. Unlike most, King recovered.

Twice again King had to escape captivity, once from a British deserter, and later when the pilot boat on which he served was captured by an American whaleboat. King made his way up to New York, where he and thousands of other Loyalist refugees sought safety behind British lines at the close of the war, and where he met and married Violet, who had been a slave in North Carolina.

New York was the last American port to be evacuated by the British. While Washington negotiated with the British-commander-in-chief over the fate of the Loyalist fugitive slave refugees, the rumor that they would be returned to their former masters filled them with "inexpressible anguish and terror." Boston King recalled that "For days, we lost our appetite for food and sleep departed from our eyes."

Within a year, the British had compiled a register of 3,000 former slaves who had joined them prior to the signing of the 1782 provisional treaty; all others were to be returned. Boston and Violet King were among those listed in the "Book of Negroes;" they were issued certificates of freedom, which "dispelled all our fears, and filled us with joy and gratitude." Most important, it allowed them to board the military transport ships bound for the free black settlement in Nova Scotia where most of the black Loyalists were to be relocated.

Violet and Boston, along with other passengers aboard the L'Abondance, formed a black community in Burch Town (Birchtown, named for the British commander of New York City), six miles outside of Shelburne, Nova Scotia.

The provisions supplied by the British were inadequate, housing was nonexistent, and the land was barren and rocky. When delivery of supplies ended in 1786, free blacks were reduced to starvation, forcing them to sell their possessions or to indenture themselves to whites. King worked as a carpenter, making and selling chests and taking whatever jobs he could find to support himself and Violet through the ensuing famine.

After his conversion to Methodism in 1786, Boston began to preach in Birchtown and Shelburne, eventually moving to Preston at the request of Bishop William Black. There he met Lieutenant John Clarkson, the Halifax agent for the Sierra Leone Company. Boston and Violet were among the nearly twelve hundred blacks who sailed for Sierra Leone, West Africa, in January, 1792. After a difficult voyage in which sixty settlers died en route, rainy weather, malaria, and plagues of insects killed many of the new arrivals, including Violet.
At first Boston was employed by the company to preach to the native Africans in Sierra Leone, despite the fact that he could not understand their language. Soon he opened a school, later traveling to England to be schooled himself as a teacher.

In England, Boston preached to a white congregation, writing, "I found a more cordial love to the White People than I had ever experienced before. In the former part of my life I had suffered greatly from the cruelty and injustice of the Whites, which induced me to look upon them, in general, as our enmies: And even after the Lord had manifested his forgiving mercy to me, I still felt at times an uneasy distrust and shyness toward them; but on that day the Lord removed all my prejudices."

After two years of study at the Kingswood School, Boston returned to Sierra Leone and his work as a schoolmaster, determined to teach his African-born students the English language and "some knowledge of the way of salvation thro' faith in the Lord Jesus Christ." In 1798, he published his memoirs, one of the few first-hand accounts of the lives of Black Loyalist emigrés.

3. Books of Negroes – New York City evacuation of slaves and servants in 1783

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4. Elizabeth Freeman (Mum Bett), 1742 – 1829

Background:

Elizabeth Freeman was probably born in 1742, to enslaved African parents in Claverack, New York. At the age of six months she was purchased, along with her sister, by John Ashley of Sheffield, Massachusetts, whom she served until she was nearly forty. By then she was known as "Mum Bett," and had a young daughter known as "Little Bett." Her husband had been killed while fighting in the Revolutionary War.

One day, the mistress angrily tried to hit Mum Bett's sister with a heated kitchen shovel. Mum Bett intervened and received the blow instead. Furious, she left the house and refused to return. When Colonel Ashley appealed to the law for her return, she called on Theodore Sedgewick, a lawyer from Stockbridge who had anti-slavery sentiments, and asked for his help to sue for her freedom.

Mum Bett had listened carefully while the wealthy men she served talked about the Bill of Rights and the new state constitution, and she decided that if all people were born free and equal, then the laws must apply to her, too. Sedgewick agreed to take the case, which was joined by another of Ashley's slaves, a man called Brom.

*Brom & Bett v. Ashley* was argued before a county court. The jury ruled in favor of Bett and Brom, making them the first enslaved African Americans to be freed under the Massachusetts constitution of 1780, and ordered Ashley to pay them thirty shillings and costs. This municipal case set a precedent that was affirmed by the state courts in the Quock Walker case and ultimately led to the abolition of slavery.
in Massachusetts.

After the ruling, despite pleas from Colonel Ashley that she return and work for him for wages, Mum Bett went to work for the Sedgewicks. She stayed with them as their housekeeper for years, eventually setting up house with her daughter. She became a much sought-after nurse and midwife.

Elizabeth Freeman died in 1829, a free woman, surrounded by her children and grandchildren in the free state of Massachusetts that she had helped to create. One of her great-grandchildren was W.E.B. DuBois, born almost forty years later in Great Barrington, the very town where her historic case was argued.

The tombstone of Elizabeth Freeman (Mum Bett), the African American woman whose suit for freedom helped bring about the end of slavery in Massachusetts, can still be seen in the old burial ground of Stockbridge. It reads: "She was born a slave and remained a slave for nearly thirty years. She could neither read nor write yet in her own sphere she had no superior or equal. She neither wasted time nor property. She never violated a trust nor failed to perform a duty. In every situation of domestic trial, she was the most efficient helper, and the tenderest friend. Good mother, farewell."

**Petition of Prince Witten, 1795**

![Image of the Petition of Prince Witten, 1795]

**Background:**
Prince Witten was one of the many enslaved blacks who sought refuge in Spanish Florida in the decade following the end of the Revolutionary War. In 1786, Witten fled Georgia "to avoid a separation from his family to which he [was] much attached," eventually settling with them in St. Augustine.

Like most fugitives who fled to Spanish Florida, Witten, his wife Judy, their daughter Polly, and son Glascoe sought religious sanctuary. The children were baptized within a year. The parents commenced religious instruction (a requirement for adults), and were baptized in 1792. They later had their marriage blessed by the Catholic church.

In 1795, Prince Witten successfully petitioned the Spanish governor of St. Augustine to grant land to him and other blacks on the basis of their citizenship. The Wittens became the leading black family in Spanish Florida, acquiring property and serving as godparents to dozens of children.

In 1821, when most of the free black population departed for Cuba, Prince Witten chose to stay in Florida. Although the cession treaties required that the rights of free blacks be respected by the incoming American government, the racial climate became increasingly restrictive, and over the years, those free blacks who had lived among the Spanish eventually left for Cuba or Mexico.

6. Slave ownership of the Constitutional Convention delegates:
B. The Constitutional Convention and its Document

1. The Constitutional Convention: A Few Observations

On May 15, 1776, the Second Continental Congress, meeting in Independence Hall, Philadelphia, issued "A Resolve" to the thirteen colonies: "Adopt such a government as shall, in the opinion of the representatives of the people, best conduce to the safety and happiness of their constituents in particular and America in general." Between 1776 and 1780 each of the thirteen colonies adopted a republican form of government. What emerged was the most extensive documentation of the powers of government and the rights of the people that the world had ever witnessed.

These state constitutions displayed a remarkable uniformity. Seven attached a prefatory Declaration of Rights, and all contained the same civil and criminal rights. Four states decided not to "prefix" a Bill of Rights to their constitutions, but, instead, incorporated the very same natural and traditional rights found in the prefatory declarations. New York incorporated the entire Declaration of Independence into its constitution.

The primary purpose of these declarations and bills was to outline the objectives of government: to secure the right to life, liberty, property, and the pursuit of happiness. The government that was chosen to secure these rights was declared universally to be "a republican form of government." All of the states, except Pennsylvania, embraced a two-chamber legislature, and all, except Massachusetts, installed a weak executive and denied the Governor the power to veto bills of the legislature. All accepted the notion that the legislative branch should be preeminent, but, at the very same time, endorsed the concept that the liberty of the people was in danger from the corruption of the representatives. And this despite the fact that the representatives were installed by the election of the people. Thus, each state constitution embraced the notion of short terms of office for elected representatives along with recall, rotation, and term limits.

The Second Continental Congress also created the first continental-wide system of governance. The Articles of Confederation created a nation of pre-existing states rather than a government over individuals. Thus, the very idea of a Bill of Rights was irrelevant because the Articles did not entail a government over individuals. The states were equally represented in the union regardless of size of population, only one branch was needed, normal political activity required the support of super majorities, the union was limited to the powers expressly enumerated, and amendment was required to endow the union with powers that weren't specifically articulated. Amendments required the unanimous approval of all thirteen state legislatures. The Articles didn't come into operation until the early 1780s because of territorial disputes between two states; all of the states were required to "sign on" before the Articles became operative on any one state.

Remember the Morris Plan for financing wartime debts, and the financial system he advocated. Remember the shaping of the West, with the national domain and Northwest Ordinances – which were produced not by the Constitution, but by the Continental Congress under the Articles of Confederation.

The Articles of Confederation produced two opposite and rival situations: an early operating, robust and healthy state and local politics and a late arriving, weak and divisive continental arrangement. Several statesmen, especially George Washington, were concerned that the
idea of an American mind that had emerged during the war with Britain was about to disappear and the Articles of Confederation were inadequate to foster the development of an American character. According to Washington, "we have errors to correct." He argued that the states refused to comply with the articles of peace, the union was unable to regulate interstate commerce, and the states met, but oh so grudgingly, just the minimum interstate standards required by the Articles. Others, especially James Madison, were concerned that the state legislatures—dominated by what he saw as oppressive, unjust, and overbearing majorities—were passing laws detrimental to the rights of individual conscience and the right to private property. And there was nothing that the union government could do about it because the Articles left matters of religion and commerce to the states. The solution, concluded Madison, was to create an extended republic, in which a variety of opinions, passions, and interests would check and balance each other, supported by a governmental framework that endorsed a separation of powers between the branches of the general government.

Between 1781 and 1785 attempts "to correct these errors" failed to secure the required unanimous consent of the state legislatures. Matters changed, however, in 1786. Following James Madison's suggestion of 21 January 1786, the Virginia Legislature invited all the States to discuss ways to reduce interstate conflicts in Annapolis, Maryland. The "commissioners" in attendance at Annapolis during September 1786, chatted about these particular concerns, but suggested that the conversation be both deepened and widened. They endorsed a motion that a "Grand Convention" of all the States meet in Philadelphia the next May 1787 to discuss how to improve the Articles of Confederation.

Remember from lectures that at Annapolis only five states came; that issues concerned commerce and the Shays Rebellion events.

Thomas Jefferson characterized the 55 men who showed up in Philadelphia as "demi-gods," who created a Constitution that would last into remote futurity. Alexis de Tocqueville marveled at the work of the American Founders: never before in the history of the world had the leaders of a country declared the existing government to be bankrupt, and the people, after debate, calmly elected delegates who proposed a solution, which, in turn, was debated up and down the country for nearly a year, and not a drop of blood was spilled. Madison, in Federalist 37, indicates the uniqueness of the Founding: never before had there been a democratic founding; all previous foundings had been the work of a single founder like Romulus. And Hamilton, in Federalist 1, suggested that this was a unique event in the history of the world; finally government was going to be established by reflection and choice rather than force and fraud. And what is also unique is the fact that the framers were relatively young, well educated, and politically experienced. Like the Declaration of Independence, the Constitution was written by delegates immersed in 1) the writings of Aristotle, Cicero, Locke, and Montesquieu, and 2) a world of political experience at both the state and continental level. Both basic documents were written in Independence Hall, Philadelphia, and thirty signers of the Declaration in 1776 played a vital part in the creation and adoption of the Constitution, 1787-1789.

Very few of the delegates selected were present at the appointed time for the meeting of the Grand Convention in Philadelphia on May 14, 1787. On May 25, a quorum of seven states was secured. The first order of business was to elect a President, and George Washington was the obvious choice. James Madison took extensive Notes of the proceedings and although some scholars have questioned their authenticity and completeness, they remain the primary source for reproducing the conversations at the Convention. Other delegates kept specific notes on certain days, there are letters back home to friends and
loved ones, there are urgent bills sent for immediate payment that augment, and there are personal diaries, some more complete than others.

The delegates also agreed that the deliberations would be kept secret. The case in favor of secrecy was that the issues at hand were so important that honest discourse needed to be encouraged and delegates ought to feel free to speak their mind, and change their mind, as they saw fit. Thus, despite the hot summer weather in Philadelphia, and delegates who, on the whole, were rather overweight and hardly "dressed down" for the occasion, the windows were closed and heavy drapes drawn. The merits and demerits of the secrecy rule have been a subject of considerable debate throughout American history.

In Act One of the Convention, Governor Randolph introduces the fifteen point Virginia Plan at the end of May to "revise the Articles of Confederation." The decisive features of this plan are 1) the complete structural exclusion of the states in terms of both election and representation; 2) the complete diminution of the powers of the states and the virtual freedom of Congress to act in those areas for which the states are incompetent; 3) the establishment of an extended national republic with institutional separation of powers and the introduction of the possibility that short terms of office and term limits—standard features of traditional republicanism—will be abandoned. Under the wholly federal Articles of Confederation, only the states are represented and the central government was restrained to the exercise of expressly delegated powers. And under the state republican constitutions, the governor had very little authority, and the elected representatives were kept under close scrutiny. Madison's Virginia Plan introduces a new understanding of federalism and republicanism. This wholly national republican plan is debated, and amended, over the next two weeks, and the main features are adopted by the delegates in mid June over two alternatives: the wholly federal, or state based, New Jersey Plan, that argues that the Virginia Plan goes too far, and the Hamilton Plan that claims the Virginia Plan does not go far enough. Hamilton, among other things, envisioned a President for life.

The Central Features of the Virginia Plan

Echoing, Madison's Vices of April 1787, Randolph itemized five reasons why the Articles of Confederation must be radically altered.

1. "It does not provide against foreign attacks."
2. "It does not secure Harmony to the States."
3. "It is incapable of producing certain blessings to the States."
4. "It cannot defend itself against encroachments."
5. "It is not superior to State constitutions."

The single most important reason why the delegates were gathered was because of what Madison referred to as the multiplicity, mutability, and injustice of legislation at the state level. To correct these deficiencies, the Virginia Plan removed the state legislatures both structurally, and in terms of powers, from any place in the new continental arrangement. Most importantly,

1. The National Legislature should consist of two branches.
2. The people of each State should elect the First Branch of the National Legislature. The Second Branch of the National Legislature should be elected by the first.
3. The National Legislature shall have power "to legislate in all cases to which the separate States are incompetent," and "to negative all laws passed by the States, contravening in the opinion of the National Legislature the articles of Union."

4. The National Legislature shall elect a National Executive.

5. The Executive and a number of National Judiciary will form a Council of Revision. This Council will review laws passed by the National Legislature and have the power to reject the laws, unless the National Legislature can pass the act again.

6. The National Legislature will create the National Judiciary. The structure will consist of one or more supreme tribunals and inferior tribunals. Judges will be appointed for life, during good behavior.

7. State Legislatures, Executives, and Judges are to be bound by oath to support the Articles.

8. The new plan for government should be ratified by the people, through assemblies of representatives chosen by the people.

The "oracle" Montesquieu had argued that for a people to remain free, they must reside in small, homogeneous communities. Public virtue was needed to secure a republic and this sentiment was endangered in large, heterogeneous communities. It is the unique contribution of Madison to challenge this traditional theory of self-government head on. In fact, he stands it on its head! His first verbal articulation of this position occurs on June 6 where he argues that majority faction is the mortal disease of popular government and traditional solutions to factional politics will no longer work. He thus directly challenges the traditional claim that people are happier in small republics. Just the opposite; unless we spread people out over an extended orbit and filter their opinions, passions, and interests through a scheme of representation, then popular government will come to a violent end. This speech is the precursor to the famous Federalist 10 essay and is part of the political theory underlying the Virginia Plan.

There is a division of opinion in the scholarly literature concerning the motivation behind the introduction of the Virginia Plan. Some scholars credit Madison for his strategic brilliance in shifting the attention away from revising the Articles of Confederation to this new and bold plan. Other interpreters point out that it was introduced by Virginia, the largest state, that would benefit in terms of representation at the expense of the smaller states who received equal representation under the Articles of Confederation. A number of political theorists portray the Virginia Plan as making the novel case for "the large republic" theory over against the traditional "small republic" theory articulated by Roger Sherman on June 6. What is clear from both Randolph's arguments on May 29 and Madison's position on June 6 is that the Virginians saw state legislatures, in both large and small states, as dangerous to liberty and justice. What is also clear is that Madison sees no principled reason for the equal representation of states qua states.

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Act Two portrays the Convention in crisis, in the sense that the delegates were at a stalemate. Far from the wholly national republican Virginia Plan being accepted, as we might very well anticipate when the curtain fell at the end of Act One, the delegates from Connecticut, New Jersey, Delaware, New York, and Mr. Martin from Maryland—the defenders of the New Jersey Plan, the old style federalism of the Articles, and the old fashioned republicanism of the state constitutions—insisted on questioning the validity of the Virginia Plan. They argued that the Convention had exceeded the Congressional mandate because the Articles had in fact been scrapped rather than revised. Thus the Convention had violated the rule of law. Moreover, the Convention was about to propose a
novelty—a large country under one republican form of government—that would never be accepted by the electorate. These delegates knew their Locke and Montesquieu and they relied on their own political experience which was remarkably extensive: republican government could only exist in areas of small extent where the people kept close watch over their representatives.

**Why was the New Jersey Plan Introduced?**

On June 11, Roger Sherman proposed a compromise: rather than have proportional representation of the people in both the House and the Senate, why not agree to proportional representation in the House and equal representation for each state in the Senate? The rejection of this compromise, led the New Jersey, Connecticut, New York, and Delaware delegations, and Mr. Martin from Maryland, to propose the New Jersey Plan.

Madison's *Notes* for June 15th records the following: "Mr. Dickinson said to Mr. Madison you see the consequence of pushing things too far." The 11 Resolutions of the New Jersey Plan restored the single chamber structure of the Articles, where each state was represented equally regardless of the size of its population. As far as powers were concerned, the power to tax and the power to regulate interstate commerce were added to the powers that the union had under the Articles.

It is tempting to see the introduction of the New Jersey Plan as an attempt by the small states to fight off the impending victory of the large state supported Virginia Plan. But this is to simplify too much. There were some "large minded" men from small states—Dickenson for example—who were willing to meet the Madisonians half way, but to no avail.

What are the principles, if any, that undergird this Plan? On June 16, for example, Pinckney observed, rather cynically, that no principles were involved: "the whole comes down to this, as he conceived. Give N. Jersey an equal vote, and she will dismiss her scruple, and concur in the Natil. system." But Pinckney, to the contrary notwithstanding, there are two "scruples" involved.

The first scruple concerns the rule of law. On February 28, 1787, the Confederation Congress endorsed the meeting of a Grand Convention, "for the sole purpose of revising the articles of confederation and reporting to Congress and the several state legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the States, render the federal constitution adequate to the exigencies of government and the preservation of the Union." The defenders of the New Jersey Plan pointed to this mandate and suggested that the Virginia Plan was illegal. The second principled position was the question of prudence, namely, the improbability that the Virginia Plan will be adopted. The defenders of the New Jersey Plan argued that it would be more likely to be adopted by the electorate than the never before imagined Virginia Plan. On June 16, Lansing, in support of Patterson, stated: "The Scheme is itself totally novel. There is no parallel to it to be found."

The New Jersey Plan supporters had to contend with the question, why are states *qua* states entitled to equal representation? There are two answers. 1) The colonies became the States and the States have been equally represented in every continental scheme from the start, so why the move to alter tradition? 2) The Declaration of Independence declared the independence, equality, and sovereignty of each state. And the Treaty of Paris recognized the independence of the states as part of the principles of the peace.
A breakthrough occurs at the end of June when Oliver Ellsworth of Connecticut suggests that we are neither wholly national nor wholly federal but a mixture of both. Several delegates echo this theme and the Convention decides to move beyond the exclusively national or federal paradigms. The Gerry Committee is created to explore the ramifications of this suggestion that the people be represented in the House and the states be represented in the Senate. This recommendation—the Connecticut Compromise—is accepted over Madison's objections in mid-July.

**The Connecticut Compromise**

On June 11, the delegates overwhelmingly agreed that the lower house should be based on population and elected by the people. By a 6-5 vote, the delegates rejected a proposal by Roger Sherman that supported popular representation in the lower house and equal representation for the states in the upper branch. Thus on June 15, William Paterson submitted the New Jersey Plan, one that scrapped all the popular representation provisions of the Virginia Plan.

On 19 June, the New Jersey Plan was defeated 7-3-1. For the remainder of June, however, the delegates returned repeatedly to the compromise proposal of June 11. And on June 29, Ellsworth reintroduced the motion of June 11: equal representation for the states in the upper house with proportional representation in the lower house.

For the first time, the case for the representation of the states was elevated from one of convenience to one of principle. Ellsworth declared, "We were partly national; partly federal. He trusted that on this middle ground a compromise would take place." On June 30, the youngest delegate, Jonathan Dayton of New Jersey—until then a pretty staunch nationalist—spoke for the first time: "We were partly federal, partly national in our Union," he declared. "And he did not see why the Govt. might (not) in some respects operate on the States, in others on the people."

On July 2, the Ellsworth proposal was defeated on a tie vote: 5-5-1. Nevertheless, a Committee of 11—one delegate from each state—was created to seek a compromise on the representation question. The composition of the committee reveals that Madison's attempt to exclude the states from the structure of the general government had been halted in its tracks. Gerry was chosen over King from Massachusetts, Yates over Hamilton from New York, Franklin over Wilson from Pennsylvania, Davie over Williamson from North Carolina, Rutledge over Pinckney from South Carolina, and Mason over Madison from Virginia.

From July 5 to July 7, the Gerry Committee defended equal representation for the states in the Senate and popular representation in the House. We need to put theoretical niceties to one side, Gerry said, and think about "accommodation." "We were... in a peculiar situation. We were neither the same Nation nor different Nations. If no compromise should take place what will be the consequence."? Mason concurred: "There must be some accommodation." Paterson, also on the committee, urged adoption of the report for "there was no other ground of accommodation."

The key to the Compromise was winning over such former wholly national supporters like Gerry and Mason. An often-overlooked component of the Compromise was the agreement that money bills would originate in the House and could not be amended in the Senate. This feature was vital in winning over Mason and Gerry, as well as Randolph who introduced the wholly national Virginia Plan. These three delegates were willing to buy into the partly
national (popular representation in the House), partly federal (equal representation for the states in the Senate) arrangement if the principle of no taxation without popular representation was adhered to.

On July 16, the delegates agreed (5-4-1) to the Gerry Committee Report, also known as the Connecticut Compromise. The losing delegates, Madison, Wilson, G. Morris, Pinckney, and King, decided not to challenge the outcome.

**The Necessary and Proper Clause**

Article One, Section 8 of the Constitution enumerates the powers of Congress. The eighteenth and final entry says: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." When and how did this phrase make its appearance in the convention deliberations?

The necessary and proper clause is a constitutional compromise, one somewhere between the Federalist disposition not to enumerate any Congressional powers at all—a vital part of a wholly national arrangement—and the Antifederalist concern to limit the reach of Congress to those items expressly itemized.

The Virginia Plan was wholly national in terms of powers. Of particular importance, here, is the absence of 1) an enumeration of Congressional powers whatsoever—Congress was empowered to legislate in all areas where the states were "incompetent"—and 2) a Bill of Rights on behalf of either the states or the people.

On July 17, the delegates agreed (6-4) to adhere to the "incompetent" powers provision of the Virginia Plan. This vote, however, should not be interpreted as a Madisonian victory; rather it is a prelude to his fourth serious defeat on the federal-national issue. Prior to July 17, the "incompetent" clause sailed through without more than a murmur of opposition. Now it was on its last gasp.

On August 6, the Committee of Detail presented the first draft of the Constitution and, the next day, the delegates began their deliberations of the 23 Articles. What is really significant about the report is that the powers of Congress are enumerated for the first time. On August 20, the delegates turned to the final enumerated power which had never before been part of the constitutional conversation: "And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof."

According to Madison's Notes, on August 20, the clause was read and then: "Mr. Madison and Mr. Pinckney moved to insert between "laws" and "necessary" "and establish all offices," it appearing to them liable to cavil that the latter was not included in the former."

It is unclear, however, what future "cavil" Madison and Pinckney hoped to avoid, but what is clear is that they thought that the clause, as at it stood, had the "potentiality" to undermine the ability of the nation to take care of itself. Apparently three members of the Committee of Detail thought it unnecessary to adopt the Madison-Pinckney amendment.
From September 12 to September 17, the delegates debated The Committee of Style Report; the necessary and proper clause received the most attention. One gets the impression, especially during the September 14 discussion, that the Framers were engaged in an initial "liquidation" of the meaning of the necessary and proper clause. An exchange on September 14 leaves us pondering what is included from what is excluded.

Another issue that emerged in Act Three is the slavery question. What could Congress do and not do to regulate and/or abolish slavery? This is a vital question and deserves special coverage. It is instructive to compare the clause in the Committee of Detail Report of August 6 with the Signed Constitution of September 17. The former forbids Congress from ever regulating the slave trade and prohibits Congress from discouraging the trade by means of a tax or tariff. By contrast the final Constitution, limits the prohibition on Congress until 1808 and permits Congress to discourage the slave trade. In March, 1807, President Jefferson signed into law an Act of Congress prohibiting the slave trade effective January 1, 1808, and during the 1790s Congress took specific steps to discourage the importation of Africans for the purpose of being sold into slavery.

The Slave Trade

No issue is more in need of careful consideration than the slavery question, because no issue is more likely to impeach the entire Founding enterprise than the slavery issue. We need to ask a prior question: how did Article I, Section 9 get to be the way it is? Was there unanimity among the delegates, was there even a discussion, and if, so, was there anybody who put up the slightest resistance to the continuation of slavery? On August 6, the Committee of Detail Report was presented to the delegates. Article VII, Section 1 itemized the powers of Congress and sections two through seven placed limitations on the powers of Congress. Section 4 stated that:

No tax or duty shall be laid by the Legislature... on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.

This is clearly a slaveholder's document: Congress is forbidden forever from prohibiting the slave trade and any incentive through taxation is also prohibited. This section is the result of a demand from the North Carolina, South Carolina and Georgia delegations to think practically rather than in terms of humanity and religion. On August 6, the Committee of Detail Report was presented to the delegates. Article VII, Section 1 itemized the powers of Congress and sections two through seven placed limitations on the powers of Congress. Section 4 stated that:

The Migration or Importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a Tax or duty may be imposed on such importation.

Note that the final version permits Congress to eliminate the slave trade in 1808—which it did effective January 1, 1808—and permits Congress in the meantime to discourage the trade by taxation. Also the final version limits the Congressional prohibition to the existing States thus inviting the future restriction of slavery in the territories. In this regard, it is important to note that the Confederation Congress restricted slavery in the Northwest Territories in exchange for the return of fugitive slaves. The delegates adopt this Ordinance solution as part of Article IV.
What took place between August 6 and September 17? Rutledge of South Carolina argued on August 21, "Interest alone is the governing principle with Nations. The true question at present is whether the Southern States shall or not be parties of the Union." Sherman and Ellsworth, moreover, recommended not making the slave trade a divisive issue: "Slavery in time will not be a speck in our Country." Luther Martin disagreed: slavery "was inconsistent with the principles of the revolution." On August 22, Mason supported Martin's position: "Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a Country." Dickinson, from Delaware, considered slavery "as inadmissible on every principle of honor & safety." And Randolph stated, "he could never agree to the clause as it stands."

On August 25, the delegates received a Committee compromise recommendation to permit Congress to prohibit the slave trade in 1800. Pinckney moved to alter this to 1808. Madison's response was prophetic: "twenty years will produce all the mischief that can be apprehended from the liberty to import slaves." The first time the slavery issue was raised in the convention is by Madison on June 6. There in his itemization of the causes of faction, or the unjust use of power, he says "that we have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man." G. Morris from Pennsylvania, on August 25, was rather blunt: why not say that this part of the Constitution was a compliance with... North Carolina, South Carolina & Georgia."

The delegates agreed to the 1808 prohibition by a vote of Ayes 7, Noes 4. The 4 noes were New Jersey, Pennsylvania, Delaware, and Virginia and they voted "no" because they thought that 1808 was too compromising. Lincoln, and not Taney, has the weight of the Founders on his side of the argument.

**Judicial Review and Judicial Powers**

The Virginia Plan, introduced on May 29, called for the creation of a National Judiciary with judges holding office during good behavior. Another feature of the Virginia Plan proposed that before a bill becomes a law it must be reviewed by the Executive branch and "a convenient number of the National Judiciary." This "Council of Revision" would "have the authority to examine every act of the of the national Legislature before it shall operate, & every act of a particular Legislature before a negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National legislature be again passed, or that of a particular Legislature be again negatived by_of the members of each branch."

In his Vices, Madison had indicated that two of the vices of the American system were the ability of state legislatures to pass multiple and mutable laws. The Council is his answer to these vices at both the state and national level. It is important to note that the Council gives the Executive and Judiciary joint prior review before a bill becomes a law.

On three separate occasions— June 4, July 21, and August 15— the delegates considered this novel Council of Revision proposal. Although the idea was abandoned, the reasons for doing so are vital for understanding the Framers's position on the role of the Judiciary. At the heart of the objection to the Council was that the Executive alone should have the power to review legislation before it became law. And in doing so, the Framers excluded the Judiciary from having the power of policy review or what we might call prior review. That was a political function to be performed by the Executive alone. But the Framers
simultaneously bestowed on the judiciary the power of subsequent review or to exercise a
judicial review after policy has been jointly made by the Legislature and the Executive.

On June 4, Gerry opposed giving the judges the power of prior review because they have
the power of "exposition of the laws, which involved a power of deciding on their
constitutionality. In some of the States the Judges had (actually) set aside laws as being
agt. The Constitution. This was done too with general approbation." King concurred: "the
Judges ought to be able to expound the law as it should come before them, free of the bias
of having participated in its formation." On July 21, Gerry repeated his objection to the
Council: " It was making the Expositors of the Laws, the Legislators which ought never to be
done. " Strong agreed that the distinction between making laws ought to be distinguished
"from that of expounding the laws." Gorham thought, "the judges ought to carry into the
exposition of the laws no prepossessions with regard to them." Mr. G. Morris argued
similarly: "Expositors of laws ought to have no hand in making them." And Luther Martin
stated that the judges ought not to "have a double negative." And finally, Rutledge thought
"the Judges ought never to give their opinion on a law until it comes before them." On
August 15, Pinckney reiterated the same theme: he "opposed the interference of the judges
in the legislative business; it will involve them in parties, and give a previous tincture
to their opposition." Sherman "disapproved of judges meddling in politics and parties," and
Williamson objected to "admitting the judges into the business of legislation."

It is often remarked by judicial scholars that Article III of the Constitution makes no
mention of judicial review. This is true. So, the presumption is that the Framers didn't
intend to establish judicial review otherwise they would have put it in the Constitution. Thus
the question, where and when did judicial review make its appearance in our constitutional
heritage? The conventional answer is that John Marshall, in Marbury v Madison, 1803,
established judicial review. But if we need to find the exact words "judicial review," to
establish judicial review, then the Marbury case isn't good enough because the phrase
doesn't occur there either. The phrase "judicial review" does not make its appearance until
the 1880s and then in a law review article by Edwin Corwin.

The evidence suggests that the Framers recognized what we now call judicial review, but
were serious about the distinction between policy and constitutional review. On August 27,
Johnson moved to "insert the words 'this Constitution and the' before the word 'laws.'" Mr.
Madison doubted whether it was not going too far to extend the jurisdiction of the Court
generally to cases arising Under the Constitution, & whether it ought not to be limited to
cases of a Judiciary Nature. The right of expounding the cases not of this nature ought not
to be given to that Department.

The motion of Docr. Johnson was agreed to nem:con: it being generally supposed that the
jurisdiction given was constructively limited to cases of a Judiciary nature.

The Committee of Style wrote the final draft of the Constitution. It included a Preamble and
an obligation of contracts clause, both written by Gouverneur Morris, and an enumeration
of the powers of Congress in Article I, Section 8. During the last week of the Convention the
deleagtes added a few refinements, raised some serious concerns, and discussed what they
agreed to over the four months of deliberations. Mason expressed the wish that "the plan
had been prefaced by a Bill of Rights." Elbridge Gerry supported Mason's unsuccessful
attempt to attach a Bill of Rights. Randolph joined Mason and Gerry and declared that he
too wouldn't sign the Constitution. And the delegates wondered whether or not the power
to create a national university was implied within the meaning of the necessary and proper
clause.
Why Three Delegates Did Not Sign

Mason and Gerry were members of the Gerry Committee that proposed the Connecticut Compromise. A generally overlooked component of the Compromise was the agreement that money bills would originate in the House and could not be amended in the Senate. This feature was vital in winning over Mason and Gerry, as well as Randolph who introduced the wholly national Virginia Plan. These three delegates were willing to buy into the partly national, partly federal arrangement if the principle of no taxation without popular representation was followed.

On August 6, the Committee of Detail Report was presented and Article IV, Section 5 honored this agreement. On August 8, however, the delegates agreed to drop this provision. On August 13, Dickinson attempted to reassure Randolph et al that as far as money bills are be concerned," Experience should be our only guide. Reason may mislead us." The defeat of the money bills provision marks the critical moment for the three dissenters. By early September, all three delegates had become concerned that Constitution had given far too much authority to the Senate and that the executive contained the seeds of monarchy.

By September 10, Randolph was convinced that Congress now possessed sufficient powers to turn the Philadelphia Constitution into a wholly national document. He decided to withhold his signature because he thought the Constitution contained the potentiality to shift rapidly from the republican foundation insisted upon in the Virginia Plan that Randolph introduced.

Randolph listed 12 objections among which were: "on the necessity of 3/4 instead of 2/3 of each house to overrule the negative of the President (&) on the smallness of the number of the representative branch." The delegates reached out to Randolph during the last week and responded to each of these objections, but to no avail. He was particularly concerned about "the general clause concerning necessary and proper laws," as a major source of future tyranny.

On September 15, Gerry concurred: "the rights of the citizens were... rendered insecure" by 1. The general power of the Legislature to make what laws they may please to call necessary and proper. 2. To raise armies and money without limit. 3. To establish a tribunal without juries, which will be a Star-Chamber as to Civil Cases. "He could... get over" his eight other objections if these three were overcome.

On September 15, Mason listed sixteen objections among which were the absence of a declaration of rights, the 1808 compromise on the slave trade, and the general power of the Senate in the system, the "shadow of representation" in the House, and the powers of the President. He too criticized the presence of the necessary and proper clause in the Constitution:

Under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they think proper; so that the State legislatures have no security for the powers not presumed to remain to them, or the people for their rights.
2. Ratification parades

Ship of State, 1788