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The Constitution to *The Constitution*

(Excerpted from essay originally published as *The Ordeal and the Constitution* and lightly edited for coherence.)

MARY SARAH BILDER

THE *Ideological Origins* won the Bancroft and the Pulitzer prizes, but when I see Bernard Bailyn, we don't talk about that book.¹ It was, of course, brilliant, but I think of it as an artistic study for the book published seven years later, *The Ordeal of Thomas Hutchinson*.² *Ideological Origins* accomplished all sorts of things—investigating under-appreciated sources, laying out the revolutionaries' ideas, recovering the way that arguments shifted and grew—but it did not worry overly about recapturing the uncertainty of the moment. Years later, Bailyn would revisit politics and the creative imagination to emphasize that these “aspirations had no certain outcomes,” but in *Ideological Origins* there was a certain inevitability.³ Indeed, Bailyn noted that there were articulate opponents, but “the future lay not” with such men.⁴ He bluntly called them, “the losers.”⁵

Only in *The Ordeal* would Bailyn focus on these losers and, in doing so, come to articulate the historian's quest: to see “the

A shorter version appeared as an online reflection for Harvard University Press: http://harvardpress.typepad.com/hup_publicity/2017/04/bernard-bailyns-ideological-origins-at-fifty.html (April 2017).

¹Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967; enlarged edition, 1992).

²Bernard Bailyn, *The Ordeal of Thomas Hutchinson* (Cambridge, MA: Harvard University Press, 1974).

³Bernard Bailyn, “Politics and the Creative Imagination,” *To Begin the World Anew: The Genius and Ambiguities of the American Founders* (New York: Alfred Knopf, 2003), 5.

⁴Bailyn, *Ideological Origins*, xiv.

⁵Bailyn, *The Ordeal*, Appendix, 383; Bernard Bailyn, “The Losers,” *Sometimes an Art: Nine Essays on History* (New York: Alfred A. Knopf, 2015), 109.

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latent limitations within which everyone involved was obliged to act; the inescapable boundaries of action; the blindness of the actors—in a word, the tragedy of the event.”⁶ Without first writing *Ideological Origins*, Bailyn never would have written *The Ordeal*. It is *The Ordeal* that we return repeatedly to talk about and the fundamental historical problem of how to see the past in the moment in which the actors do not know what is going to happen—which arguments will win, which will lose, and which will come to be so important that they will obscure all other possibilities.

This insistence on the reality that people in the past could not see the future animated my exploration of Madison’s Notes. In *Madison’s Hand*, I explained that “Madison’s Notes recorded one man’s view of the writing of a constitution in which the politics and process of drafting the document deferred comprehension of the Constitution as a unified text.”⁷ The document that emerged out of the Convention in 1787 embodied these limitations and boundaries. Indeed, I have come to believe that the very concept of *The Constitution* postdated the Convention. In the penultimate paragraph, I wrote “The Convention could not see the Constitution until the final days.”⁸ And, over the first decade, “the Constitution survived and indeed began to become *the* Constitution.”⁹ These sentences began to take the Bailyn insight in a slightly different direction. What if we see the Constitution, not as the product of winning arguments, but still caught in this moment in which multiple possibilities could unfold.

In this brief essay, I return to Bailyn’s discussion of the idea of constitution in *Ideological Origins* and offer some thoughts on when did the Constitution become *The Constitution*.

⁶Bailyn, *The Ordeal*, ix.

⁷Mary Sarah Bilder, *Madison’s Hand: Revising the Constitutional Convention* (Cambridge, MA: Harvard University Press, 2015), 3.

⁸Bilder, *Madison’s Hand*, 240.

⁹Bilder, *Madison’s Hand*, 240.

The discussion of constitutionalism scattered throughout *Ideological Origins* may be one of the book's most important lasting influences. Bailyn centered the Revolution on "constitution": "The word 'constitution' and the concept behind it was of central importance to the colonists' political thought; their entire understanding of the crisis in Anglo-American relations rested upon it."²⁴ This idea was not our constitution but a small "c" constitution: "the constituted—that is existing—arrangement of government institutions, laws, and customs together with the principles and goals that animated them."²⁵ For Bailyn, before the 1760s, the written or unwritten characteristic did not matter, but rather the absence of a focus on a "constitution" as a marking an outer boundary for ordinary legislation. Thus, starting with the 1760s, Bailyn traced a line through James Otis and others to one of his favorite documents, *Four Letters on Important Subjects*. There, in 1776—coincidentally with independence—he found statements that explicitly recognized that the "primary function of a constitution was to mark out the boundaries of governmental power."²⁶ *Ideological Origins* traced a subtle and significant transformation in constitutionalism. It was not small "c" to big "C" constitutionalism, or unwritten to written constitutionalism; rather, it was existing embodied arrangement to boundary.

Subsequent work on transatlantic and imperial constitutionalism suggests that constitution as boundary concept articulated

²⁴Bailyn, *Ideological Origins*, 67.

²⁵Bailyn, *Ideological Origins*, 68, 175.

²⁶Bailyn, *Ideological Origins*, 182. Bailyn intended to include "Four Letters" as one of the final pamphlets in the proposed fourth volume of *Pamphlets of the American Revolution*. *Pamphlets of the American Revolution*, ed. Bernard Bailyn, (Cambridge, MA: Harvard University Press, 1965), 1:752. When I took Bailyn's "History of the Constitution" class as a third-year law student at Harvard in 1990, this letter was in the reading materials. I have long included it in my American Legal History for Lawyers reader. Mary Sarah Bilder, *American Legal History for Lawyers* (privately printed: The Bilder Press, 2017). Whether Thomas Paine was the author of *Four Letters* remains in dispute. For attribution argument, see A. Owen Aldridge, *Tom Paine's American Ideology* (Newark: University of Delaware Press, 1984); Gary Berton, Smiljana Petrovic, Lubomir Ivanov, Robert Schiaffino, "Examining the Thomas Paine Corpus: Automated Computer Authorship Attribution Methodology applied to Thomas Paine's Writings," *New Directions in Thomas Paine Studies*, ed. Scott Clear and Ivy Lindon Stabell (New York: Palgrave Macmillan, 2016), 31, 40–42.

theoretically in the pamphlets has antecedents: the structural mechanisms of Privy Council control (e.g., disallowance and the negative); the language of written charters (e.g., repugnancy, as if born in England language); and the practice of locating colonial authority in written charters and other English grants.²⁷ Bailyn suggested that the pressure of debate “forced apart, along the seam of basic ambiguity,” what he described as “two contrasting concepts of constitutionalism that have remained characteristic of England and America ever since.”²⁸

I am not sure that Bailyn meant that, there and then, the two concepts suddenly became apparent and distinguishable. Perhaps what one sees by 1776 is the recognition that, over a century, understandings of “constitution” on one side of the Atlantic had slowly and subtly shifted to be incompatible with those on the other. In retrospect, it seems implicit that the earlier idea of constitution must have included the idea of a boundary—and yet boundary was not the part that was focused on. But once “constitution” becomes articulated explicitly and theoretically explicated as boundary, particularly in a moment when the idea of boundary becomes an explanation for political legitimacy, it becomes impossible to go back.

A great gap exists between constitution as boundary and the concept that we have in the twenty-first century of our Constitution. As Lewis Namier wrote with respect to the politics of this period: “Between them and the politics of the present day[,] there is more resemblance in outer forms and denominations than in underlying realities; so that misconception is very

²⁷See, e.g., Bilder, *The Transatlantic Constitution*; Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865* (New York: Cambridge University Press, 2012); Alison LaCroix, *Ideological Origins of Federalism* (Cambridge, MA: Harvard University Press, 2010); Daniel J. Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (Chapel Hill: The University of North Carolina Press, 2005); Mary Sarah Bilder, “Colonial Constitutionalism and Constitutional Law,” *Transformations in American Legal History: Essays in Honor of Morton J. Horowitz*, ed. Alfred L. Brophy and Daniel W. Hamilton (Cambridge, MA: Harvard University Press, 2009), 28–57; Lauren Benton, “Constitutions and Empires,” *Law & Social Inquiry* 31 (2006): 177–98.

²⁸Bailyn, *Ideological Origins*, 67.

easy.”²⁹ Our concept of the Constitution is not an easily definable thing but, if we were to analogize to chemistry, it is more like a compound—or perhaps even a creature—comprised of a large group of elements or even molecules glommed together. We know that some of these elements develop in the period between 1776 and 1786 when the states begin to write new governing documents. But even though we can find examples of documents that contain our ideas of Constitution, there are always exceptions—losers—that we should consider. The lack of concern in Connecticut and Rhode Island about state constitutions that are colonial charters serves as a caution about the completeness of transformation.

The first constitution—the Articles of Confederation—is analogous to Thomas Hutchinson. It is written but based on assumptions about the continuation of unwritten governance practices of a “firm league of friendship.”³⁰ It is drafted by a regular committee of Congress and ratified by ordinary legislative processes.³¹ It creates a government of one branch. It contains no judiciary. It explicates no interpretive mechanism. But it was called a constitution.³² In 1786, Congress asked the states to send delegates to “render the federal Constitution”—the document or perhaps even the government under it—“adequate to the exigencies of Government & the preservation of the Union.”³³ In 1787, James Madison began his notes at the Philadelphia Convention with the same phrase. May 14, 1787, was the day for the meeting for “revising the federal Constitution.”³⁴

²⁹Lewis Namier, *The Structure of Politics at the Accession of George III*, 2nd ed. (New York: St. Martin's Press, 1968), x (from the 1928 preface).

³⁰Articles of Confederation, art. III in [Act of Confederation of the United States of American], *Documentary History of the Ratification of the Constitution*, ed. John Kaminski, et al. (Madison: State Historical Society of Wisconsin, 1976–2013), 1:86 (hereafter referred to as *DHRC*).

³¹*DHRC*, 1:78.

³²Julian Boyd, “The Articles of Confederation and Perpetual Union,” *Old South Leaflets* Nos. 228–229, ed. Julian P. Boyd (Boston: Old South Association, 1960), 3–4.

³³Resolution of Congress, February 21, 1787, *DHRC*, 8:45.

³⁴*Documentary History of the Constitution, 1786–1870* (Washington, DC: Department of State, 1894–1905), 3:7–9, (hereafter referred to as *DHC*); Bilder, *Madison's Hand*, 15.

Indeed, one of the most striking revisions made by Madison, some years after the Convention, was to cross out this word “Constitution” and replace it with “system of Government.”³⁵ Madison’s original notes show that “Constitution” came, eventually, to mean the document arising in the fall of 1787 as distinguished from pre-1787 documents. But this distinction arose in hindsight and it incorporated understandings that arose after 1787 in the process of ratifying, disputing, interpreting, and living under the 1787 Constitution.

In the Convention, the focus was on stabilizing the country nationally and internationally, addressing the specific problems of the Articles, and creating a working government. The roughly two-thirds of the Convention between May and early August involved the great debates over fundamental structure: representation in Congress (entirely proportional or proportional/equal state suffrage); representation of slavery (political power based on free inhabitants only or counting numbers of enslaved people or adopting the three-fifths clause); role of the Senate (as an advisory executive council or upper house); conception of the executive (committee or individual); mechanism to enforce constitutional boundaries (council of revision, congressional negative, or judiciary). And even then, there remained profound, unresolved structural issues—for example, the process by which to select the executive or the aspiration of Madison that the congressional negative could be resurrected.

We often misread and misinterpret the last third of the Convention because we focus on the origins of the document that finally emerged. Jane Butzner—later more well known as Jane Jacobs—published a wonderful book in 1941, *Constitutional Chaff: Rejected Suggestions of the Constitutional Convention of 1787*. It is a collection of losers. It is a “compendium of ideas” that fell by the wayside or were rejected. Butzner’s book, more than any narrative account, captures the breadth of possibility in the Convention.³⁶

³⁵DHC, 3:7.

³⁶Jane Butzner, *Constitutional Chaff: Rejected Suggestions of the Constitutional Convention of 1787* (New York: Columbia University Press, 1941), 4.

When did the draft even look substantially like the Constitution? Not in August: the twenty-three articles could have been merged—or not—to form all sorts of different constitutional arrangements.³⁷ In fact, the Convention proceeded sequentially in debating them, a reality that is more obvious in the way Madison arranged his Notes than in modern compilations.³⁸ As they debated the August 6 printed draft, Madison at least recorded himself arguing repeatedly for the constitution to be broad in its language, open to legislative discretion.³⁹ Moreover, the August 6 draft contained structures that went to the core of our understanding of basic constitutional concepts like separation of powers. Congress elected the President. The Senate alone appointed the Supreme Court and made treaties. Congressional powers—to pay debts, provide for defense and general welfare—had not been specified. There was no Vice President. Six committees between August 18 and September 8 resolved critical issues. The most important—the Committee on postponed matters—did not finish reporting until September 5.⁴⁰

The extant paper record provides glimpses of this broader struggle to solve problems. A group of delegates tried to track some of the changes on their printed August 6 drafts but few took extensive notes. Madison sustained for a while his practice of rewriting his contemporaneous rough notes but the Notes became rough by August 21. And stopped completely on August 22—the date to which Madison would later return to complete using his copy of the Convention journal. The decisions that mattered increasingly occurred in committees.⁴¹

³⁷Draft Constitution by the Committee of Detail, August 6, 1787, *DHRC*, 1:260–69.

³⁸Bilder, *Madison's Hand*, 122.

³⁹Bilder, *Madison's Hand*, 127–30.

⁴⁰*DHRC*, 270–84 (reconstructed revisions of draft); Bilder, *Madison's Hand*, 142–45; John R. Vile, “The Critical Role of Committees at the U.S. Constitutional Convention of 1787,” *American Journal of Legal History* 48 (2006): 147–76.

⁴¹Bilder, *Madison's Hand*, pp. 141–153. For a list of the seventeen extant copies of the August 6 draft, see Mary Sarah Bilder, “How Bad were the Original Records of the Federal Convention?” *George Washington Law Review* 80, (2012): 1620, 1656.

Until Wednesday, September 12, when the Convention saw the new printed draft, the Constitution did not resemble the document we know. The committee's report was described as "the Constitution as revised and arranged."⁴² Only with this draft—read over and agreed to by Saturday—did the Constitution have the seven articles that thematically emphasize an interpretive framework in which separation of powers and federalism can loom large. The fundamental structure of the Constitution we know emerged only at the last possible moment. How deeply did anyone other than lead drafter Gouverneur Morris and perhaps the other committee members (Alexander Hamilton, William Samuel Johnson, Rufus King, and James Madison) grasp the interpretive shift that would arise from reducing the draft to seven articles? Indeed, could Morris himself even have glimpsed the rhetoric and ideology that would arise from the rearrangement?

Conversely, regardless of how they understood the Constitution, they voted unanimously—to reject a committee to prepare a bill of rights. A multitude of explanations likely underpinned this decision ranging from pragmatic exhaustion to theoretical incoherence. The draft already incorporated two of the rights associated with Magna Carta (trial by jury in criminal cases and habeas corpus) as well as rights associated with due process (no bills of attainder or ex post facto laws) and religious liberty (no religious test for office).⁴³ Indeed, if one adds the bar on corruption of the blood for treason and the ban on titles on nobility, the draft contained a strikingly robust list of rights, albeit not in the form of a "bill." And yet the embrace of a Constitution without a list of individual protections from government emphasizes the distance from our modern concept.

The Convention in September 1787 was focused on an arrangement designed to stabilize the Union. The same "committee of revision" that prepared the September 12 draft

⁴²DHC, 1:194; DHRC, 1:284–85.

⁴³DHC, 1:194 (journal entry describes motion for a "Committee to prepare a Bill of rights"). For summary of the standard explanation, see Richard Beeman, *Plain Honest Men: The Making of the American Constitution* (New York: Random House, 2009), 341–44.

(conventionally called the committee of style) also prepared a letter to Congress.⁴⁴ The Convention approved the letter paragraph by paragraph before turning to the final draft of the Constitution. The letter to Congress was a statement of the intent of the Convention. It is arguably the only official explanation—perhaps statement of original intention—left by the Convention. It echoes and parallels the Preamble of the Constitution and describes a Constitution to “promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness.” The preamble similarly states: “promote the general welfare, and secure the blessings of liberty to ourselves and our posterity.”⁴⁵

Although the letter is usually relegated to at most a brief mention, its brevity meant that it was likely read widely when it appeared published alongside the text in newspapers in September and October 1787. Official publications reprinted it with the Constitution.⁴⁶ It emphasized the fundamental divergence from the world under the Articles of Confederation. The letter explained that in “all our deliberations” it had kept “steadily in our view” one thing: “the consolidation of our Union.” To achieve this end of consolidation, “rights of independent sovereignty” had to be surrendered. The Convention insisted on the imperfection of the document in this respect: “[i]t is at all times difficult to draw with precision the line.” But “it is liable to as few exceptions as could reasonably have been expected.”⁴⁷

But even in this letter, the word Constitution is slightly ambiguous and carries the older meaning. The Convention submits “that Constitution which has appeared to us the most advisable.” The Constitution here is still as much an arrangement as it is a specific document or boundary. It is still as much

⁴⁴*DHRC*, 1:305–306; see Daniel A. Farber, “The Constitution’s Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding,” *Michigan Law Review* 94 (1995): 615–50.

⁴⁵*DHRC*, 1:306.

⁴⁶See Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788* (New York: Simon & Schuster, 2010), 70.

⁴⁷*DHRC*, 1:305–306.

a constitution of a “general government of the Union” as it is the Constitution of the United States. In the letter, the Constitution is a particular institutional arrangement to “promote the lasting welfare.”⁴⁸ Indeed, even in the Preamble, the closing words—“do ordain and establish this Constitution for the United States of America”—describe Constitution as something to be established, not drafted or written. Even here, in the most familiar section of our Constitution, we can hear that the modern meaning of Constitution has not yet triumphed.

And why should it have? We can retell the history of the Constitution from 1787 to 1789 not as fulfillment of the process of the Constitution’s creation but as the creation of the very idea of a large-C *Constitution*. Each moment in which the Constitution triumphs is a moment in which there was a loser. Not a loser of political ideology but a loser of a certain concept of what the Constitution was.

They did not know that the Convention would be followed by public ratification. They thought it plausible—possibly even likely—that Congress would view the Constitution as a report; debate it; revise it—and then decide what to do. James Madison and others raced from Philadelphia to New York to be in Congress to debate what to do next with the Constitution.⁴⁹ A Constitution altered by Congress or even approved by Congress is conceptually different from a Constitution written by an independent Convention ratified at popular conventions.

They did not know that the Constitution would be ratified *and* ratified without amendments—in essence, they did not know that the Constitution would remain the document that they drafted. Pauline Maier’s *Ratification* emphasized the repeated contingencies on which ratification depended. Massachusetts and, in particular, John Hancock played pivotal roles. As Bailyn explained, “Convinced that ratification without amendments of some kind is impossible, Federalist leaders reach agreement with Hancock on a compromise proposal.”⁵⁰

⁴⁸DHRC, 1:305–306.

⁴⁹See Maier, *Ratification*, 52–59; Bilder, *Madison’s Hand*, 155.

⁵⁰Bailyn, *The Debate on the Constitution*, 1:1095–1096.

Hancock had arisen from his sick bed—likely due to a combination of flattery and political promises of support in future gubernatorial elections. With the support of Samuel Adams, Hancock argued for ratification with recommended amendments. But the amendments were to be proposed in Congress *after* the Constitution was technically ratified and the new government began to operate. Hancock's appearance successfully shifted the dynamic in the Massachusetts Convention. The precedent would become the example followed by other states.⁵¹

They did not know that the Constitution would be amended with the original text left intact. In 1789, Madison proposed amendments; they became what we know today as the Bill of Rights. Madison wanted the amendments interwoven with the original text. He thought the amendments should literally revise the Constitution. After an “ingenious and interesting” debate, Congress decided amendments should be supplemental.⁵² Only at this moment, two years after the convention, did it become apparent that the 1787 text would remain visually intact. If the Constitution had been amended by internal revision—Madison's preference—a different interpretive tradition would have developed.

They did not know that the judiciary would be the exclusive interpreter. They knew the judiciary would interpret the Constitution. They expected it to have the judicial power to void legislation.⁵³ But the judiciary's approach to the constitutional interpretation was itself the product of a series of decisions, some established by the Judiciary Act (1789) and others by the early justices as in the refusal to hear pension claims.⁵⁴ Indeed, perhaps not until *Chisolm v. Georgia* (1793)—perhaps not even

⁵¹See Maier, *Ratification*, 155–213. Maier speculates on motives at 192–98.

⁵²See Bilder, *Madison's Hand*, 175–76; *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*, ed. Helen E. Veit et al. (Baltimore: Johns Hopkins Press, 1991), xv.

⁵³Mary Sarah Bilder, “The Corporate Origins of Judicial Review,” *Yale Law Journal* 116, (2006): 502, 546–55.

⁵⁴Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789); see William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995); Saul Cornell and

then—is it entirely apparent that the Court would read the text of the Constitution so closely.⁵⁵

When does the Constitution become *The Constitution*? I don't know. Certainly by the later 1790s, the written document seems to be increasingly emphasized. So famously in *Marbury v. Madison*, Chief Justice John Marshall could repeatedly refer to the “written constitution.”⁵⁶ And yet the old meanings were not entirely lost. Connecticut kept its colonial charter as its constitution until 1818. Rhode Island likewise retained its colonial charter until 1843. For nearly seventy years after the Revolution, Rhode Island survived with a constitution granted by a king in 1663. The Constitution of 1787 as it actually was in 1787 remains slightly outside of our vision.

It is this quest to which Bailyn has repeatedly returned. As he wrote in *Sometimes an Art*, “The past is a different world, and we seek to understand it as it actually was.” The problem, however, is that “[k]nowing the outcome, we feel it to be our obligation to show the process by which the known eventuality came about.”⁵⁷ It is impossible to recapture the past precisely: the extant historical record favors the paths that won because those records are saved; the historical profession favors histories that are relevant in explaining how our world came to be; the general public prefers popular histories in which people in corsets and breeches struggle with recognizable versions of modern problems. But as the historian ages, the central quest becomes ever more interesting. The historian realizes that the world changes in ways that are unpredictable. And yet, moments after unexpected events, people are already revising their memories to persuade themselves that they knew the outcome.

Gerald Leonard, “The Consolidation of the Early Federal System, 1791–1812,” in *The Cambridge History of Law in America*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 1:518–54.

⁵⁵See Maeva Marcus, “The Constitution’s Court,” *William and Mary Quarterly*, 3rd ser., 69 (2012): 373–76, and “The Effect (or Non-Effect) of Founders on the Supreme Court Bench,” *George Washington Law Review* 80 (2012): 1794.

⁵⁶*Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803); Bilder, *The Transatlantic Constitution*, 195.

⁵⁷Bailyn, *Sometimes an Art*, 22, 24.

The Ordeal stands as a critical reminder of the historian's need to strive to see the different past. Hutchinson was a loser—and a rather unsympathetic one at that—but in the grand arc of history, we all are likely losers on one matter or other. And in those moments of loss, of confusion, of bewilderment, of sensing ourselves standing on the losers' side, we glimpse the historian's grail. We are reminded to see the past by studying carefully the losing shadows.

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