

CHAPTER ONE
Which Founding Fathers To Include
(Doubts Of American Independence)

No document occupies a more central place in the public lives of Americans than the Constitution. From time to time, though, we hear from people who wish it didn't. In 2012, a noted professor of constitutional law wrote a lengthy opinion piece in *The New York Times*, saying he was weary of the Constitution. "Our obsession with the Constitution has saddled us with a dysfunctional political system, kept us from debating the merits of divisive issues and inflamed our public discourse." This was the complaint of Louis Michael Seidman of Georgetown University. "Instead of arguing about what is to be done, we argue about what James Madison might have wanted done two hundred twenty-five years ago," Seidman went on.

Well, it is true. The Constitution is, today, the oldest, continuously operating instrument of government in the world. Since the Constitution was ratified in 1788, we have undergone a civil war and two world wars, industrialization on a scale that catapulted Americans into first place among the productive nations of the world, and the emergence of a society whose sheer diversity exceeds anything seen on the planet since the days of the Roman Empire. Yet, grouses Professor Seidman, "Whenever we encounter some unprecedented crisis or unlooked-for problem in American life, and develop a novel way of responding to it: Suddenly," he writes, "someone bursts into the room with new information: a group of white propertied men who have been dead for two centuries, knew nothing of our present situation, acted illegally under existing law and thought it was fine to own slaves might have disagreed with this course of action. Well, is it even remotely rational that the official should change his or her mind because of this divination?"

Well, the professor has a point. The men who made the Constitution were, first of all, men - I mean, exclusively, male. No women occupied places in the Constitutional Convention that wrote the document in 1787. For that matter, no women sat in the Continental Congress, or in the Congress established by the Constitution's predecessor document, the Articles of Confederation, which was the law of the land, more or less, from 1781 - 1788. Not only men, but white, Anglo, and reasonably wealthy men, who wore knee britches and buckle shoes, powdered their hair, and wrote with quill pens. So, what mysterious power should they have over a generation six times removed; a generation that eats fruit grown in Chile, wears clothes made in China, sends automated rovers to Mars, trades goods and services on the Internet, and can't live without a smartphone?

And yet, almost from the beginning, these men and the Constitution they wrote have been accorded a mystical reverence. In 1819, only thirty-one years after the Constitution's ratification, the greatest Chief Justice of the U.S. Supreme Court, John Marshall, insisted that the Constitution was intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. And Marshall ought to have known, since he was a member of the state convention in Virginia that had been called to debate whether Virginia should ratify the Constitution. Thirty-nine years after Marshall, another famous American lawyer, Abraham Lincoln, urged Americans to be: "Ever true to Liberty, the Union, and the Constitution, true to Liberty, not selfishly, but upon principle - not for special classes of men, but for all men, true to the Union and the Constitution, as the best means to advance that liberty."

And why? Well, his answer was largely the same as Marshall's: because the Constitution was so nearly perfect in design that, like the Deacon's wonderful one-hoss shay, it could run forever without wear or strain. As Lincoln stated: "No slight occasion should tempt us to touch it. Better not take the first step, which may lead to a habit of altering it. Better, rather, habituate ourselves to think of it, as unalterable.

It can scarcely be made better than it is. New provisions, would introduce new difficulties, and thus create, and increase appetite for still further change. No sir, let it stand as it is. New hands have never touched it. The men who made it, have done their work, and have passed away. Who shall improve, on what they did?"

Overall, the Constitution has been amended only twenty-seven times since ratification, and the text of the Constitution was written with formidable hurdles in the path even of those changes: two-thirds of the National Legislature must approve, and their approval must be ratified by three-quarters of the state legislatures. As it is, amendments are not incorporated into the text of the Constitution, but itemized as separate addendums at the end, like knots in the tail of a kite. Contrast that with the constitution of the German Federal Republic, which has had its provisions rewritten over fifty times in less than seventy years.

So who were these figures in the mist, these - as Lincoln put it - men who made the Constitution? Were they the offspring of the gods, like Hercules? Were they mysterious, mystical progenitors of great dynasties and states, like Aeneas; or mighty conquerors, wading to glory through seas of blood, like Alexander? Do they wait in some legendary Avalon, like King Arthur, to return and prevent the overthrow of their work? Well, the answer to all those questions is: don't be silly. Some of them were dignified beyond the usual definition of dignified, George Washington for one, but some of them were small and tending toward hypochondria, like James Madison. Some were wise beyond their years when they sat down with a pen in their hands, and none more so than Alexander Hamilton. And, some were a disaster every time they stood up and spoke off the cuff, which brings Alexander Hamilton to mind, again.

Some of them hated each other; John Adams and Benjamin Franklin had all the fellow feeling of Sherlock Holmes and Professor Moriarty. Some of them saw friendships of many years standing break up over the Constitution - I think here of George Mason and George Washington - while others who disagreed violently over the Constitution somehow managed to keep their private worlds linked. George Washington and Patrick Henry are a good example of this, and, in later years, Thomas Jefferson and John Adams. They had both clay feet and golden minds, and it was the rare bird in this flock who was entirely one or the other.

What may be a real mystery for us is who we should actually include in this unusual company. We speak of these men as the Framers, or the Founders, or even the Founding Fathers, but the founding of the American republic was a process which involved more than writing the Constitution. It included the Continental Congress, which guided American affairs during the Revolution, negotiated with foreign allies like France, Spain, and the Netherlands, and wrote the Declaration and the peace treaty, which made us an independent nation. All of this certainly counts as founding. So perhaps we should count as the Founders the fifty-six men who signed the Declaration of Independence in 1776. Fifty-seven if you count Charles Thomson, the secretary of the Continental Congress, whose name appears on the printed broadside version of the Declaration.

This will yield us quite a prestigious crop of names: John Adams, Benjamin Franklin, Thomas Jefferson, Robert Morris, John Witherspoon. Of course, it will also omit some obviously vital names: George Washington, James Madison, and Alexander Hamilton. And it will include some peculiar ones: Matthew Thornton of New Hampshire, George Clymer of Pennsylvania, and the Marylander, Charles Carroll of Carrollton, who were not even present at the signing of the Declaration, but joined the Continental Congress thereafter and were invited to add their names to the document.

Perhaps we might do better if we looked to the men who adopted the first American constitution, the Articles of Confederation. Forty-eight men signed the Articles of Confederation, and they include a number of those whom we find signing the Declaration: Sam Adams, the fiery spirit of Massachusetts; Josiah Bartlett; Elbridge Gerry; John Hancock; Roger Sherman; John Witherspoon. Not, however, John Adams, Thomas Jefferson, or, again, George Washington, James Madison, or Alexander Hamilton.

The Constitution adds forty more names to our list of nominees. This time, we finally get Washington, Hamilton, and Madison, and we add back Benjamin Franklin and George Read from the Declaration, and Robert Morris, Daniel Carroll, John Dickinson, and Gouverneur Morris. But not Jefferson, who was in Paris as American representative to the court of Louis XVI; not John Adams, or his rabble-rousing cousin Sam; and not the nineteen delegates to the Constitutional Convention who left before the signing of the document, nor the three who outright refused to sign it. In fact, there are only two names which appear as signers of the Declaration, the Articles, and the Constitution, and those are not names which spring up to most minds as Founders: Robert Morris, the financial wizard of Pennsylvania; and Roger Sherman, the doughty old Calvinist from Connecticut.

What makes relying on the signing lists to determine who counts as a Founder even more questionable are the people whose names appear on none of these Founding documents but who yet played significant roles in the founding. For instance, Abigail Adams, always at her husband John's elbow to remind him to, "Remember the ladies and be more generous and favorable to them than your ancestors. Otherwise, if particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any laws in which we have no voice, or representation."

There's also Tom Paine, the English-born propagandist for the Revolution, who turned out some of the most successful and inflammatory tracts of the Revolution. John Quincy Adams might also be a good candidate for Founderhood. He was the son of John Adams, who, as a seven-year-old, witnessed the ascending cloud of smoke at the Battle of Bunker Hill from a knob on the Adams' farm near Braintree.

There's also Mercy Otis Warren, author of a lively pamphlet disputing the ratification of the Constitution in 1788, her *Observations on the New Constitution, and on the Federal and State Conventions*. She was also the author, and one of the earliest and foremost historians of the Revolution, in her 1805 *History of the Rise, Progress, and Termination of the American Revolution*. She never quite surrendered her suspicions that the Constitution was, "Doubtful in origin, dangerous in its aspect, and for a time very alarming to the feelings of men, who were tremblingly alive on the smallest encroachment of rights and privileges." And she was not surprised to write in 1805 that, "Soon after the organization of the new constitution of government, a struggle began to take place between monarchists and republicans, the consequences of which some future period must disclose."

James Monroe, who dropped out of the College of William & Mary to join the Continental Army, might be another candidate for Founderhood. He was severely wounded at the Battle of Trenton. In fact, Monroe is the young officer depicted in Emanuel Leutze's *Washington Crossing the Delaware* standing behind Washington and holding the flag. And, as a delegate to the Virginia ratifying convention, he actually opposed James Madison over the ratification of the Constitution. No matter; he was soon enough elected as a U.S. Senator under the Constitution, and succeeded James Madison as the fifth president of the United States.

And, finally, another candidate for Founderhood whose name is not on any signing list, and that is John Marshall, whose service as a young volunteer in the Continental Army threw him together with brave men from different states who were risking life and everything valuable in a common cause. And that

convinced him to subordinate all state and local identities to the cause of the nation and confirmed him, "In the habit of considering America as my country, and congress as my government."

So what do we have at the end? Some overlapping areas with a few prominent names intermittently popping up, surrounded by a large population of, well, what should we call them? Here today, gone tomorrow mediocrities? There's an invitation to tedium. Or are we really looking at yet another dreary catalog of stiff-backed representatives of a former colonial elite, bent on suppressing the desires of ordinary people for real democracy, and clamping the chains of slavery ever more firmly on the limbs of blacks, Native Americans, and women? That's an invitation to cynicism at best and self-righteous hypocrisy at worst.

In an effort to force some focus on this lineup, Richard B. Morris, a distinguished historian of the Founding era, tried to narrow the field of the Founders to just seven of the most distinguished: John Adams, Franklin, Hamilton, Jefferson, Madison, Washington, and John Jay. Well, this is safer, but it errs on the side of inclusivity, and it raises the question of why John Jay, who signed neither the Declaration, the Articles, nor Constitution, is on the list - except that he was a co-author with Hamilton and Madison of *The Federalist Papers*, the great commentary on the Constitution. It also misses the point made by Abraham Lincoln in 1861, the American experiment in creating a republic - a Founding, if you will - involves two points: the successful establishing, and the successful administering of it. For this reason, I will cast its net ever widely over the Founders to create a chapter-by-chapter composite biography. I'll be giving the proper and due respect to the great names - to Madison, Hamilton, Franklin, Jefferson.

However there are a number of others who will emerge, sometimes only for a short time, who also proved indispensable to the Founding: William Paterson, George Mason, Elbridge Gerry. And, there will be others who illustrate some of the tensions and crises which plagued the Founding: Thomas Mifflin and his hapless Confederation Congress, Daniel Shays and his rebellion, Edmund Randolph, James McHenry and his army. Nor am I doing quite right by choosing as our Founders only the saints. Among the Founders were more than a few outstanding scoundrels, chief of which was Aaron Burr. Each chapter will be built around a single Founder and will illustrate a particular challenge, and how that individual struggled to come to terms with it.

I'll also cast my net widely in terms of a time frame as well. We'll be bracketing not just the Constitutional Convention and the ratification of the Constitution, but the overall planting time of the republic, from the ambiguities and dislocations at the end of the Revolution and the Articles of Confederation, through the Constitutional Convention, to the great tests of the successful administering of the Constitution in the presidential administrations of Washington, Adams, Jefferson, and Madison.

I'll bring down the curtain with a figure who wasn't even an American citizen, Alexis de Tocqueville, who toured the United States in 1831, to gather material for his great study, *Democracy in America*. I will let Tocqueville be, at the very end of the course, the voice who provides an answer to the question with which the course begins. Was the experiment in creating a republic, a government based on the consent of the governed rather than the authority of kings - was this really going to work? Was it even likely to survive? We'll hear first from a voice which really did pose this question, once the battle smoke of the Revolution had blown away and a treaty of peace had been signed with Britain recognizing American independence; a voice belonging to someone whose claim to be a Founder hardly even needs to be explained, much less defended - the voice of George Washington. Because George Washington had his doubts about whether the whole enterprise might turn out to have been a fool's errand.

George Washington was ordinarily not a man given to much self-searching, and he was privately embarrassed in the company of lawyers and scholars. "I have not leisure to turn my thoughts to commentaries," he sighed in a letter in 1785. "A consciousness of defective education, and a certainty of the want of time, unfit me for such an undertaking." At age fifty-three, he soared above the reputations of all of his fellow Americans as a soldier who had held off the British for seven long years and ensured American independence, then resigned it all to return to the life of a Virginia gentleman in peace. "He might," as the skeptical Mercy Warren conceded, "in his retirement on Mount Vernon, have cherished those principles of republicanism which always professed, as well as the patriotism which he exhibited in the field without ever again having to engage in the thorny path of public life."

However in the two years which had passed since his resignation as the commanding general of the Continental Army, and since the disbanding of that army, the principles of republicanism were not wearing well. It had been one of the cardinal tenets of the new political thought formed by the great revolution in European ideas known as the Enlightenment that republics, however much they be the most natural form of human society, are also the most vulnerable. For one thing, republics, unlike monarchies, are held together by the virtue, public-spiritedness, and self-denial of the people.

Sovereignty, after all, rests in a republic with the people, rather than with kings or nobles, and if the people prove to be corrupt, selfish, and indolent, they will bring the roof of their republic down on their heads far faster than any hostile emperor could. For another thing, republics were supposed to work only on a relatively small scale, like the city-state republics of Renaissance Italy, the cantons of Switzerland, or the ancient Roman republic. Size dissipated the energies and fellow feeling of republican citizens, and left large-scale republics open to internal tumult and dissolution. It didn't help, either, that the history of past republics was a history of failure, tainted by the persistence of hierarchy.

What Washington saw in post-revolutionary America made him afraid on all these counts. With the end of the Revolution, Americans found themselves released from the economic constraints placed upon them by the former British colonial overlords, and they went on a binge of speculation and consumption. The bubble, as bubbles always do, burst in the spring of 1784. Five banking houses in London, which had allowed Americans to buy on credit, went bust because Americans ran out of specie - hard coin - with which to pay their debts, and suddenly American merchants could buy nothing further, and closed their doors.

"The importation of foreign merchandise into this State since the peace has so much exceeded the value of our exports, that our Cash has of necessity been exported in great quantities," complained the Massachusetts banker and merchant Stephen Higginson. "And though we are now from that cause almost drained of Money, we have yet a very great Balance against us without any means of discharging it." Credit collapsed, land values fell, mortgages defaulted, and, worst of all, the people behaved like savages instead of republican citizens. "Patriotism is ridiculed; integrity and ability are of little consequence," wailed Mercy Warren's husband, James. "Money is the only object attended to, and the only acquisition that commands respect."

Nor did the Articles of Confederation, which had been ratified as a governing instrument by the new United States in 1781, have much power to deal with this sudden evaporation of virtue. Based on the distaste for imperial rule they had experienced under the British, the members of the Continental Congress had deliberately created a minuscule government, which might have been acceptable in a small Florentine republic in the 15TH century, but which did not promise much as a government for a nation that included 3.5 million people and close to 900,000 square miles, and where news emanating

from New York City would take a week to reach Pittsburgh or Richmond, three weeks to reach the new frontier settlements in Kentucky, and five weeks to reach the far boundary of American territory on the Mississippi river.

The Congress created by the Articles of Confederation had no power to levy taxes on the states, which meant that the United States had no reliable way of repaying its wartime debts to bankers in Paris and Amsterdam. Without this authority, no one would lend the American government a farthing. Nor did the Confederation government have much sway even closer to home, since the thirteen colonies which had thrown off British allegiance in 1776, retained significant powers for themselves even as they became member states in the new Confederation, power which they did not hesitate to use against each other in economic disputes; powers which they did not hesitate to use in printing worthless paper money to pay debts and enacting stay laws which prevented sellers and lenders from collecting what they were owed. This lethal combination of increased taxes and a deflated currency produced misery, but debt relief laws passed by the state legislatures only jeopardized the future of capital borrowing.

This was not the kind of republicanism which Washington had fought for. "Our independence, our respectability and consequence in Europe, our greatness as a nation hereafter, depend upon giving sufficient powers to Congress," he warned in 1781. "Otherwise, each Assembly under its present Constitution will be annihilated, and we must once more return to the Government of Great Britain." Even after the peace treaty was signed in 1783, he wondered whether: "The want of energy in the Federal government, and the pulling of one State and party of States against another and the commotion amongst the Eastern people have sunk our national character much below par; and brought our politics and credit to the brink of a precipice."

The British government, incensed at American defaults, was threatening to retain control over forts on the frontier, which it was supposed to have surrendered under the peace treaty. "Notwithstanding the boasted virtue of America," Washington wrote in dismay to John Jay, "it is more than probable that we shall exhibit the last melancholy proof that mankind are not competent to their own government, without the means of coercion, in the sovereign."

What Washington was looking at was not just a catastrophe for America but for the entire principle of government by a people competent to administer their own affairs. But if reason and virtue were not sufficient to guide the affairs of the American people, what was? By 1786, the need to answer this question had become the single greatest vexation of Washington's life.