The Art of Compromise: What Our Country's Founders Taught Us About Negotiation

by Tim Rose, Esq.

EDITOR'S NOTE: *To read the unabridged version of this article, complete with notations, please scan this QR code.*

Introduction

During the Constitutional Convention in 1787, the delegates made many compromises to get to the final product that became the Constitution of the United States of America. The chasms of differences of opinion on what would be the best form of government for the new nation were far and wide and deep. How those chasms were bridged is a lesson today's Congress, and anyone involved in negotiations should revisit and learn. These lessons in compromise can be of great benefit to attorneys in their everyday practices.

The Art of Compromise

Jack Welch said leaders are people who "inspire with clear vision of how things can be done better." The Constitutional Convention was all about how things can be done better. As a new nation, the United States was a group of sovereign independent states joined together by a voluntary pact called the Articles of Confederation. They had confederated, but they had yet to become truly united. The Constitution would be the bond that brought the thirteen independent sovereign nations together into a united front. They had been united naturally under the needs of wartime in the Revolutionary War against England, but now with peace upon them, had to find that common bond outside of necessity. As Gouverneur Morris said, "This Country must be united. If persuasion does not unite it, the sword will." But with such divergent interests among the various states, how would this solidarity be accomplished? The negotiations during the Constitutional Convention that allowed the Constitution to come forth are lessons we can use today.

Definition of Compromise

Whenever the word "compromise" is uttered, one may think of King Solomon's command to "Divide the living child in two, and give half to the one, and half to the other." Compromise is generally thought of as being a splitting of the difference. If one party is offering $50 to settle, the other party might say "I want $60." The first party would then say, "Let's compromise," and offer $55. This is the typical understanding of the term. Party A gives up (concedes) half of the difference and Party B gives up (concedes) the other half. Thus, both parties are happy and go their separate ways. However, this is not the only meaning of the term compromise, and certainly not the meaning of most of the major agreements in the formation of the Constitution.

The word has evolved over time to have various emphases on certain elements necessary to be considered compromise. Whether one uses the typical dictionary definitions of "concessions on both sides" or "blending qualities of two different things" — or the simpler notion of "each side giving up part of what it wants" — is not mandatory to create a compromise. Originally, *compromise* was simply "a mutual promise" derived from com (together) and *promittere* (to promise), giving it a meaning similar to *covenant*. The founders understood the meaning of compromise in this sense. At the time of the Convention, the usual signification of compromise was "mutual agreement; adjustment."

Tim Rose, Esq. *is the managing attorney for Rose Legal in Pleasant Grove, Utah, which focuses solely on workers' compensation claims. He is also a member of the Utah Association for Justice and serves on the UAJ Legislative Committee. Tim just celebrated his 40th anniversary this year with his beautiful wife, Melanie.*

But while concessions were given, they were not necessarily of the sort that one envisions today as being necessary for *every* compromise. The pure form of compromise in the founders' day was to make an adjustment to the mutual agreement. The adjustments they made to allow the U.S. Constitution to come forth were many and varied. Some adjustments were solved using the King Solomon method, with each side taking and giving concessions — but most were of the mutual agreement method where each participant was able to convince the other of the merits of his position. One does not need to accept one position over the other. But one also does not need to "split the baby." One should look for the mutual agreement that will allow both sides to move forward — the compromise — that will benefit both.

The Third Option

In any disagreement, both sides usually want the same thing — a victory. But a victory for one side does not have to mean a loss for the other side. Business management guru Steven Covey recommends taking a view that allows both sides a victory. "[T]hey're not on opposite sides of the problem. They're together on one side, looking at the problem, understanding the needs, and working to create a third alternative that will meet them." Rather than seek to win the argument, both sides can come together to find a third (or fourth) position that both sides agree on. Finding that alternative can sometimes be elusive, especially in political or legal matters. As James Wilson asked in the convention, "[W]hy is not some better rule pointed out. No one has yet ventured to attempt it. Congress has never been able to discover a better. No State as far as he had heard, has suggested any other." Sometimes it is harder to find that third option, but it is likely better than settling on middle ground for expediency.

Middle Ground Often Leads Nowhere

As James Madison found out in the convention, the King Solomon method of compromise often leaves both sides disappointed. During the debate on the proposed compensation and eligibility for state offices of the members of the national legislature, Madison offered an amendment that he "had been led to … as a middle ground" that was — after some debate — strongly defeated by a wide margin. Roger Sherman then brought up a different amendment that he had argued for during the debate on Mr. Madison's previous proposal, and Mr. Sherman's amendment was "agreed to without opposition." This is a prime example of the wisdom expressed by John Adams when he stated, "I agree with you that in politics the middle way is none at all." This is also true with legal proceedings. On another occasion in the convention, Col. George Mason stated that he "liked the Section as it stood. It was a middle way between the two extremes." This proposal that Col. Mason liked was unanimously voted down. The middle way was disagreeable to all. A brief look at some of the major differences encountered at the convention reveals this truth: that the middle way is not true compromise.

The Convention

"John Adams characterized the convention as the 'greatest single effort of national deliberation that the world has seen.'"

Calling the Convention

After an unproductive attempt to amend the Articles of Confederation in Annapolis, Maryland, the Convention was scheduled for a year later in the spring of 1787, in Philadelphia, to discuss amending the Articles to be more effective. James Madison was instrumental in arranging for this effort to improve the union of the several states. He knew he would need to prepare all winter to succeed in bridging the gap between the various states' interests and the general interest of a united America. Before the convention began, Madison acquired a thorough understanding of all forms of government throughout the ages by studying hundreds of books on government structure.

The convention was set, and the delegates were chosen. But in order to gain legitimacy, they needed George Washington to attend. Madison made several attempts to arrange for the future President to attend — all of them unsuccessful. Fortunately, after the further imploring of others, Washington finally acceded and arrived in Philadelphia a day prior to the opening of the convention. His presence made the affair legitimate. On seconding the motion to appoint George Washington as president of the Convention, John Rutledge expressed his "confidence that the choice would be unanimous." It was.

"The final compromise that we enjoy in the Constitution is a hybrid system that in most respects is better than purely state representation or purely population representation. Giving up a good idea to get a better idea is not really a concession, but it is compromise."

The Articles needed to be amended — or replaced — but with what? The delegates looked beyond the need of the moment to create a constitution that would last. "We should consider that we are providing a Constitution for future generations, and not merely for the peculiar circumstances of the moment," said Mr. Wilson.

The Compromisers

Benjamin Franklin was often a calming influence and would step in when needed most to remind the delegates, "we are sent here to consult, not to contend, with each other; and declarations of a fixed opinion, and of determined resolution, never to change it, neither enlighten nor convince us."

The authorizations of the delegates from their home states only went so far. Some delegates had explicit restrictions on what they could and could not accomplish. However, some saw the opportunity that was presented in the form of the convention — and the compromising spirit was expressed by Mr. Wilson, who "conceived himself authorized to *conclude nothing*, but to be at liberty to *propose any thing*." Edmund Randolph in turn stated that "[w]hen the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary." He then pointed out in "strong colors, the imbecility of the existing Confederacy." The opportunity was ripe, the players were prepared, and the "adjustment" was coming in the form of "the Constitution which is … the result … of … that mutual deference and concession which the peculiarity of our political situation rendered indispensable." "Despite lack of authority, they convened themselves into a constitutional convention, scrapped the Articles and began to discuss a new plan of government. Those who composed the gathering proved to be men of remarkable fitness for their task, not the least of which was facility at constructive compromise — ability to overcome implacable differences." Compromise would come, but deference and concession did not necessarily mean splitting the difference.

Perseverance to Get It Done

The delegates had gathered with mixed ideals, various levels of optimism and pessimism, and with a certain amount of pride at being the solution to the ills of the Confederation. There was an overriding commitment to get something done to avert the crisis of the failing Articles.

Mr. Madison "begged them to consider the situation in which they would remain in case their pertinacious adherence to an inadmissible plan, should prevent the adoption of any plan." He knew this was their best, and perhaps last, chance to correct the flaws in the coalition of states as now constituted. Even with this perseverance to get things done, the delegates still needed to overcome their regional and political differences. The art of compromise was a learned experience through the course of the convention.

Not Without Disagreement

There were many times when the convention looked as though it would come to an abrupt end, with no agreement.

Oliver Ellsworth noted, "… if no compromise should take place, our meeting would not only be in vain but worse than in vain." He also cautioned, "Let not too much be attempted; by which all may be lost." He was not in general a half-way man, yet he preferred doing half the good we could, rather than do nothing at all. The other half may be added in due time. Gouverneur Morris echoed these sentiments, "… instead of attempting to blend incompatible things, let us at once take a friendly leave of each other. There can be no end of demands for security if every particular interest is to be entitled to it." The common cry for the delegates to abandon their preconceived notions of what would be most beneficial to his particular state, and not the nation as a whole, was a difficult hurdle to overcome. The delegates needed to come to an agreement that would not only be palatable to themselves, but to the states and the people. As Mr. Madison put it, "It was in vain to purchase concord in the Convention on terms which would perpetuate discord among their Constituents. The Convention ought to pursue a plan which would bear the test of examination, which would be espoused and supported by the enlightened and impartial part of America, and which they could themselves vindicate and urge." Similarly, we need to look at all parties involved in a negotiation to come to a place where all are considered in the solution.

On this note, the delegates often encouraged participation from all in order to get the best sense of the direction to pursue in order to find the mutual agreement. Gouverneur Morris reminded the delegates that "it is in vain for the Eastern States to insist on what the Southern States will never agree to. It is equally vain for the latter to require what the other States can never admit …" William Patterson emphasized the big picture of needing to accomplish something that could be ratified: "I came here not to speak my own sentiments, but the sentiments of those who sent me. Our object is not such a Governm[en]t as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve."

The delegates had seen similar entrenched ideologies softened and overcome years earlier in the Continental Congress during the debates over the Declaration of Independence. Thomas Jefferson recalls how those objections were overcome by the speech given by John Adams. Some of the delegation at this convention had witnessed this transformation of opinion when;

Adams, on July 1, laid out the facts in measured terms and offered the Declaration of Independence as the only suitable response. Resistance, which had been prolonged, skillful and often emotional, suddenly crumbled under the force of Adams' words and logic. No record of the talk was kept and Adams later could not reconstruct it except for the introduction: "Every honest person with an open mind and senses alert can hear the moment strike for action, knows when the path turns beneath his feet…." Jefferson, years after, was to write, "He came out with a power of thought and expression that moved us from our seats."

The stubbornness could be overcome, but it would take time, persuasion, and a willingness to compromise in order to find that mutual agreement the delegates sought.

Willingness to Compromise

The delegates openly expressed their willingness to understand all sides in the various points of contention. There were many who voiced their opinion, yet with the carrot of a willingness to hear the other positions. Some examples of this vocal openness to options: Mr. Ellsworth (speaking of the length of residency for elector in states) stated that "he thought one year would be sufficient but seemed to have no objection to three years." Luther Martin said "he did not like many parts of [the proposed constitution]. He did not like having

two branches, nor the inequality of votes in the 1st branch. He was willing however to make trial of the plan, rather than do nothing." George Read (discussing the length of the senate term) said he would prefer they continue to hold their offices "'during good behavior,' but being little supported in that idea, he was willing to take the longest term that could be obtained." Roger Sherman (discussing the length of the senate term) said "he wished to have provision made for steadiness [and] wisdom in the system to be adopted; but he thought six or four years would be sufficient. He sh[oul]d be content with either." James Wilson added that if the unpopularity of the proposal would "occasion a rejection of the plan of which it should form a part, though the part was an important one, yet he would give it up rather than lose the whole." The delegates had shown a willingness to compromise, and they were dedicated to the cause of leaving the convention with something — some change to be an improvement on the Articles of Confederation, however big or small — some measure of mutual agreement, a compromise, a new constitution.

Major Negotiations

While not solving all of the problems facing the new young nation, the delegates to the Constitutional Convention in 1787 came to some major agreements that allowed the Constitution to come forth. There are some obvious exclusions that were not "fixed" by the convention — slavery and equality for races and gender not the least among them — but even these inequities were allowed to come forth via the amendment process that the delegates placed into the Constitution in Article V. With the addition of the Bill of Rights, the Civil War Amendments (XIII, XIV, & XV), and the XIXth amendment, even these inequities have progressed toward a more perfect enactment of everyday society.

Federalism — State Sovereignty

Open discussion is a first step toward compromise. John Dickinson "considered the business as so important that no man ought to be silent or reserved." The delegates stressed that ALL should speak. One cannot make a mutual agreement without knowledge of the other parties' needs and desires.

One of the unique constructions of the American nation is the concept of federalism, the division of power between the governments of the states and the nation as a whole. The balance between state and federal power would be the crux of the negotiations concerning representation in the two branches of the legislature as well.

Representation

The argument over representation in the Legislative branch was one that was fought over several times during the Convention. It was the "Great Compromise" that finally resolved the issue. But not until after it had been voted down and altered and rejected and altered again. Equal representation was debated heatedly for weeks and the "Convention would almost be destroyed by this dispute … [But] rather than risk a defection so early, the question of representation was set aside until later." As on many occasions, the issue was put off only to be brought up again after settling other related matters. The issue could then be rehashed "on mature reflection" as stated by Madison.

This thread of postponement of important issues allowed the convention to continue and not fall apart prematurely. Mr. Wilson requested, "That time might be given for further deliberation he would move that the present question be postponed till tomorrow." This is a fantastic way to allow any negotiation to continue and succeed, for if there are major sticking points, settling the issues that can be agreed upon may make the larger issues more manageable. This was the case for the convention as the founders repeatedly went back to representation and then put it off again until other parts were settled. This stumbling block existed partly because of the baggage that some states' delegations brought with them.

For instance, the credentials of the delegation from Delaware "forbade her deputies to change Article V of the Confederation, giving to each state one vote in Congress and one [vote] only. Proportional representation was no part of Delaware's scheme … Delaware had come prepared to oppose it." Ironically, Delaware was the first state to ratify the Constitution — with proportional representation included. This is but one of many examples of the mutual agreements made during the convention.

The Great Compromise was not the only option discussed. For example, David Brearly suggested the only fair solution for representation would be "that a map of the U. S. be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts." Thus there would be no more small state versus large state argument. Mr. Wilson added, "A new partition of the States is desirable, but evidently [and] totally impracticable." Fortunately, this angle was not pursued further.

In 1790, Thomas Jefferson said, "It is necessary to give as well as take in a government like ours." The final compromise that we enjoy in the Constitution is a hybrid system that in most respects is better than purely state representation or purely population representation. Giving up a good idea to get a better idea is not really a concession, but it is compromise.

Illustration of the infamous duel between Alexander Hamilton and Aaron Burr which took place in Weehawken, New Jersey on July 11, 1804.

It was finally agreed upon to have the Senate with equal representation among the states and the House with proportional representation based on population. Concerning the compromise over representation in the House and Senate, Alexander Hamilton wrote that when confronted with two possibilities at odds with each other, "the advice of prudence must be to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice." Of course, the "lesser evil" was in the eye of the beholder — small states allowing big states to control the House, and big states allowing small states to control the Senate. The "greater evil" would have been to do nothing and fail at amending the Articles, which was the default position. As with most of the compromises by the delegates, it was not a choice between "two evils", but a choice between "three evils," with the status quo nearly always being the worst choice. The positive spin suggested by Hamilton would bear out with his actions after the Convention when he, along with James Madison and John Jay, would vigorously argue for ratification by publishing what became known as *The Federalist Papers*.

Ratification

Sam Adams showed how a master politician operates when he worked behind the scenes to ensure passage in Massachusetts. The Commonwealth was "considered predominately Antifederalist" and so was Adams. However, after a month of debates, he was ready to support the Constitution. Adams knew he needed to create an adjustment, a compromise.

And what Adams also knew was that little could be accomplished at this juncture without the support of Governor John Hancock. "By flattery and bargain the governor was brought round," and "on January 30th, Hancock permitted himself a dramatic entry into the Convention," where he read a prepared speech on the "Conciliatory Proposition" as if he had written it himself. The proposed amendments therein would at last go on to be accepted, thanks in part to the sway Hancock held at the time.

The sentiment of begrudging but hopeful acceptance was common among the so-called Federalists. George Washington himself stated, "I wish the Constitution which is offered, had been made more perfect; but I sincerely believe it is the best that could be obtained at this time. And … the adoption of it, under the present circumstances of the Union, is in my opinion desirable."

In the end, the delegates to the Constitutional Convention succeeded in what they set out to do. They improved the Articles of Confederation by replacing them with a better plan that resolved the weaknesses of the Articles, while allowing a more reasonable way to amend for future considerations — or those items not addressed

in the convention. Pierce Butler said, "we must follow the example of Solon who gave the Athenians not the best [government] he could devise; but the best they [would] receive."

The Lessons of Compromise in Negotiations

As time has shown, the delegates to the Constitutional Convention came in with varying ideas of what would come of it. Expectations were low for most, demands were high for most. But what came out of these debates was arguably the best document possible for representative government — and more precisely, the best document possible, to be enacted at the time, under the circumstances. The lessons learned from the Founding Fathers — lessons that they learned from each other — can and should be taught to every aspiring politician, lawyer, counselor, teacher, spouse, and parent. Ten of these lessons are summarized as follows:

1. Show Up.

In any negotiation, the first step must be to recognize the need and the potential benefit of negotiation. No solution or improvement ever comes from avoiding the issue. No history books will ever speak of the great compromise offered by the noble representative from Rhode Island, because Rhode Island refused to show up. How much better might the plan have been if the added input were available from that delegation? How much better will any negotiation be when all parties are at the table?

2. Know Your Stuff — Come Prepared.

Madison did not simply arrive at the convention and hope for a stimulating conversation. He asked for books, studied different governments, called on friends, sent letters asking for advice, and wrote out a draft of the Constitution prior to arriving. He also arranged for George Washington to be there in order to provide the needed credibility. Just as a football team studies the opposing team and comes in with a gameplan to ensure success, Madison came in with a constitutional gameplan — the Virginia Plan — that became the focus of the convention. From day one, the attention of the delegates was not on making amendments to the Articles of Confederation, but on how to best apply the plan that Madison had presented to replace the Articles.

3. Do Not Come in with a Non-Negotiable.

Delaware and other states had come in with express instructions not to agree to anything that would alter the equality of votes in the legislature. This was a major sticking point throughout the long summer of discourse that nearly derailed the convention on several occasions. The fight over representation was one of the biggest sources of contention. And yet, it became arguably the greatest solution to the balance of states' rights versus national rights in the federal scheme. The balance of powers in the House and Senate representation was only possible once these states softened their position on their non-negotiables. Had they remained obstinate, the convention would most assuredly have failed. Only through the persuasion and reasoned implementation of the other lessons in the art of compromise contained herein, was the Constitution able to see the light of day.

4. Allow Flexibility: Change of Opinion.

Right from the start the delegates set rules that allowed for the free flow of discourse and ideas without the stigma of being painted with any one opinion or position by previous utterances or votes. The system set up to argue and present under the *Committee of the Whole* concept allowed for non-binding votes to see where the consensus of the room was on any subject. These items could then be revisited as other elements changed without holding any one delegate to a previous position.

5. Allow ALL to Speak.

Several delegates expressed the desire to hear from all present. Indeed, one's preconceived notions of what might be best or most effective can often blind one to the possibilities that may be presented when all are able to speak their mind freely.

6. Secrecy of Negotiations.

This was a decidedly shrewd move. The assurance that no half-baked idea would leave the room allowed for a tremendous amount of new and varied solutions to be presented and discussed. From realigning the states to having a monarchy, the extent and the range of ideas would never have been presented for fear of having those delegates exposed to ridicule and mockery. Allowing for the secrecy of negotiations while debate was ongoing, allowed for the most judicious compromises to be effected.

7. Look for the Third Option.

Many times, there were discussions that involved more than two options. The discussions continued for days and months on some subjects until there were three, four, five, or more solutions offered. The delegates always seemed to find room to expand their thoughts when solutions seemed to be out of grasp. Thomas Jefferson touched on this spirit of perseverance by writing, "It is part of the American character to consider nothing as desperate, to surmount every difficulty by resolution and contrivance."

"By looking closer at the actions taken by our Founding Fathers, one can gain an appreciation for the finer points of deliberation, the nuances of negotiations, and the art of compromise."

8. Allow Time for Mature Reflection.

Time can be an enemy to any negotiation. In order to allow for compromise, time must be allotted to be able to study the strong points of each argument and be able to make an informed decision. Sometimes it is best to move on to a different subject and come back to a point of contention after time has passed to allow better understanding and cooler tempers. As Rufus King put it, "As nobody seemed to be satisfied, he wished the matter to be postponed."

Sometimes allowing more time can have an unforeseen benefit as when the convention delegates took time off to allow for committee work and the hot humid weather broke to cool pleasantness for a few days. It was during this time that some of the major compromises were agreed to — because they allowed the time for mature reflection.

9. Allow for Amendment.

The Framers included Article V of the Constitution which allowed for amendment. This assuaged much of the opposition to allow it to move forward, knowing that a Bill of Rights could be added. Massachusetts and Sam Adams were instrumental in getting it secured by attaching it to that state's ratification. Mr. Madison stated, "We should run every risk in trusting to future amendments." A very appropriate observation since Madison was instrumental in securing the Bill of Rights in the first Congress after ratification by the states.

Nathaniel Gorham stated, "Can it be supposed that this vast Country including the Western territory will 150 years hence remain one nation?" Mr. Ellsworth replied, "If the [Government] should continue so long, alterations may be made in the Constitution in the manner proposed in a subsequent article." The country has lasted that long — and it has had alterations.

10. Support Decision Afterwards.

During the convention, Madison and Hamilton were often at odds. After the convention, Madison, Hamilton, and John Jay (the future First Chief Justice to the Supreme Court) formed a *Triumvirate* that would secure ratification. The arguments put forth by these three in the form of *The Federalist Papers* were effective, well-thought out, and written to the people in a convincing manner. John Marshall once observed "that [Patrick] Henry might be the all-time champion in his capacity to persuade; but that [James] Madison was his superior in his capacity to convince." It was this capacity to convince that Madison utilized fully before the convention, during the convention, and after the convention during ratification to secure the Constitution.

Conclusion

The Constitution was and is a great document, its benefits to mankind immeasurable. But the founders showed us something more than a document. They taught us how to negotiate. They taught us the art of compromise. Above all, the founders taught us to be open to compromise. Compromise does not have to be viewed as weak. Compromise can be viewed as valiant, courageous, and noble. Those who thrust their finger into the wind to gather their position on the subject *de jure* are likely to fail, for "it [is] difficult to know precisely what [the sentiments of the people] are. Those [sentiments] of a particular circle in which one moved, were commonly mistaken for the general voice." 'Tis better to strive forward and use the lessons taught by our founders so many years ago. By looking closer at the actions taken by our Founding Fathers, one can gain an appreciation for the finer points of deliberation, the nuances of negotiations, and the art of compromise.