ON THE ORIGINS OF AMERICAN FEDERALISM

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Introduction

This article briefly explores the origins and nature of the Union created under the United States Constitution. The United States of America enjoys a unique form of government in which power is divided between a national "federal" government and the governments of the several states. But what exactly is the nature of this division? The Declaration of Independence severed thirteen colonies from Great Britain and created the original thirteen states. The Articles of Confederation bound them together in "Perpetual Union." The Constitution creates a "more perfect Union," but what are the attributes of this "more perfect Union?"

The Constitution must be evaluated within the context of international law at the time it was ratified, and the perspective of this writing is limited to the nature of the Union at the time of its creation. This writing does not include any analysis of the effects subsequent history, including numerous amendments, has had on the Constitution and the nature of the United States government.

The Constitution is difficult to classify in eighteenth century terms because it does not exactly fit any of the then-existing models for a national foundational document. At best, it can be compared to a few close analogies. In the end, the Constitution creates something wholly new, a nation in which actual sovereignty is divided between a national government and several distinct states governments.

1. Before the Constitution

The Stile of this Confederacy shall be "The United States of America"

-The Articles of Confederation[1]

In the beginning, the thirteen original American states declared their independence not only from Great Britain, but also from each other. On July 2, 1776 the Continental Congress passed a resolution "[t]hat these United Colonies are, and of Right ought to be Free and Independent States, …"[2] Two days later they approved the Declaration of Independence, which included the same language.[3] The use of the plural shows that each *individual* state was a "Free and Independent State." The Declaration of Independence was also titled the "unanimous Declaration of the thirteen united States of America[.]"[4] The word "united" was not capitalized, and it appears that the term "united States of America" was originally intended only as a description of the states and not as the formal name of a new country. The effect of the Declaration of Independence was therefore to establish thirteen "Free and Independent States," rather than a single independent nation.

However, declaring independence and achieving it were very different things. As the war with Britain continued, the Continental Congress realized the necessity of strengthening the bonds among the "united States." In 1777 the Continental Congress drafted the "Articles of Confederation and Perpetual Union." The Articles begin by stating that the "Stile" (name) of the "Confederacy" created under them would be "The United States of America."[5] The word "United" was now capitalized and "United States of America" became the official name for the thirteen American states when they acted together as a "Confederacy."

The Articles of Confederation continue by assuring that "[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[6] By these terms, the Articles of Confederation did not create a single new nation any more than the Declaration of Independence had. Instead, under the Articles, the thirteen independent states agreed to "severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."[7]

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[1] Articles of Confederation and Perpetual Union, art. 1, Nov. 15, 1777 (hereinafter "Articles of Confederation").

[2] Lee Resolution showing congressional vote, July 2, 1776; Papers of the Continental Congress, 1774-1783; Records of the Continental and Confederation Congresses and the Constitutional Convention, 1774-1789, Record Group 360; National Archives.

[3] The Declaration of Independence para. 6 (U.S. 1776).

[4] *Id.* at title & para. 6 (U.S. 1776).

[5] Articles of Confederation, art. 1.

[6] *Id.* art. 2.

[7] *Id.* art. 3.

The use of the term "the United States, in Congress assembled" is also indicative of the nature of the new confederacy. The new Congress was an assembly of the states themselves, as independent sovereigns, and *not* an assembly representing the people at large. Just like ambassadors, the "delegates" to Congress were "appointed in such manner as the legislatures of each State shall direct … with a power reserved to each State to recall its delegates, or any of them … and to send others in their stead …"[8] States were also allowed to choose how many delegates they sent to Congress. They could send anywhere from two to seven delegates, but each state was allowed only one vote.[9] The Congress created by the Articles of Confederation resembled an eighteenth-century version of NATO[10] or the United Nations[11] far more than it resembled the later Congress of the Constitution.

The powers of Congress under the Articles of Confederation were almost exclusively related to foreign policy. No individual state or group of states could "without the consent of the United States in Congress assembled"[12] negotiate with any foreign powers,[13] make treaties,[14] wage war,[15] or maintain standing armies or navies[16] ("but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage."[17]).

The Articles of Confederation were approved by the Continental Congress on November 15, 1777, but did not take legal effect until ratified by every state. Maryland was the last state to ratify on March 1, 1781.[18]

The Articles of Confederation were sufficient to guide the newly independent colonies through the remaining years of the War of Independence, but shortly afterward it became apparent that they were wholly inadequate for maintaining the institutions of peace. Congress responded by calling for a constitutional convention to be held in Philadelphia for the purpose of "render[ing] the Constitution of the federal government *adequate to the exigencies of the Union*; and to report such an act for that purpose, to the United States in Congress assembled[.]"[19] Congress' motion to convene the Philadelphia convention stated that such a "convention appear[ed] to be the most probable means of establishing in these states *a firm national government*" (emphasis added)[20] and Congress therefore resolved that a convention would be held "for the sole and express purpose of revising the Articles of Confederation, and reporting to

[8] *Id.*art. 5, ¶ 1.
[9] *Id.*art. 5, ¶ 2, 4.
[10] North Atlantic Treaty Organization. *See* the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, and compare with the Articles of Confederation.
[11] *See* U.N. Charter, and compare with the Articles of Confederation.
[12] Articles of Confederation, art. 6, ¶ 1.
[13] *Id.*art. 6, ¶ 1.
[14] *Id.*art. 6, ¶ 2.
[15] *Id.*art. 5, ¶ 5.
[16] *Id.*art. 5, ¶ 4.
[17] *Id.*
[18] The Articles of Confederation were approved by the Continental Congress on November 15, 1777 and opened to signing by the delegates of ratifying states on July 9, 1778. Final ratification occurred on March 1, 1781. *See* e.g. Edmund Cody Burnett, *The Continental Congress: A Definitive History of the Continental Congress From Its Inception in 1774 to March, 1789* (1941).
[19] Motion offered by the State of Massachusetts, passed by the United States Congress, February 21, 1787. *Quoted in* George Ticknor Curtis, 1 *Constitutional History of the United States from Their Declaration of Independence to the Close of Their Civil War* 244 (New York: Harper Brothers, 1889).
[20] *Id.*

Congress and the several 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."[21]

2. We the People …

> *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*
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> -Preamble, United States Constitution[22]

The Philadelphia convention, which met in closed session, ended up offering far more than a few amendments to the Articles of Confederation. They proposed instead to replace the Articles with an entirely new framework for the governance of the people of America. After four months of deliberation, the Philadelphia convention presented to the world a proposed "Constitution for the United States of America"

The Constitution, unlike the earlier Articles of Confederation, establishes a single new sovereign state, the "United States of America;" but it accomplishes this without destroying the sovereignty of each individual state. The resulting arrangement of tiered concurrent sovereignty is today called "federalism," but the exact meaning of that word can be ambiguous in the American context. Part of the problem is that the word "federalism" had a different meaning before the United States Constitution was adopted than it did after. For example, in his 1758 *Law of Nations*, the Swiss political philosopher Emmerich de Vattel wrote "Several sovereign and independent states may unite themselves together by a perpetual confederacy, without each in particular ceasing to be a perfect state. They will form together a *federal republic*[.]" (emphasis added)[23] The new form of government created by the Constitution closely (though inexactly) resembles de Vattel's federal republic and so the word "federal" was soon co-opted to describe the government of the United States.

The United States is not, however, a true federal republic as defined by de Vattel. The bonds between the several states are far stronger than in a classical federal republic and the powers of the national government are so extensive that the Union itself acquires the mantle of sovereignty. Alexis de Tocqueville wrote in 1835 that the United States Constitution "rests on an entirely new theory, a theory that should be hailed as one of the great discoveries of political science in our age."[24] In all previous confederations, the federal authorities were entirely reliant on the governments of the member states to put their mandates into practice, and state governments often failed to do so. Lacking the power to enforce compliance, such federal governments were

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[21] *Id.*
[22] U.S. Const. pmbl.
[23] Emmerich de Vattel, 1 *The Law of Nations or the Principle of Natural Law* ch. I §10 (1758) (Joseph Chitty, Esq. trans., 1797).
[24] Alexis de Tocqueville, *Democracy in America*, 156 (George Laurence trans., J.P. Mayer ed., New York: Anchor Books, Doubleday & Company, 1969).

both weak and ineffective or became dominated by the most powerful of their member states. De Tocqueville believed that the true innovation of the American system is that the Constitution establishes "not only that the federal government should dictate the laws but that it should itself see to their execution."[25] By granting the federal government the power to establish the necessary mechanisms and institutions for carrying out its own prerogatives independently of the states, the Constitution frees the Union from the stranglehold of the states ("In America the Union's subjects are not states but private citizens."[26]).

De Tocqueville goes on to note that in America "the central power acts without intermediary on the governed, administering and judging them itself, as do national governments, but it only acts thus within a restricted circle. Clearly here we have not a federal government but an incomplete national government. Hence a form of government has been found which is neither precisely national nor federal; but things have halted there, and the new word to express this new thing does not yet exist."[27] Unfortunately for us, De Tocqueville's "new word" never arrived. Instead, common usage has simply expanded the meaning of the old word "federalism" to encompass the American example.

We can see the process by which the Union was raised to a level of sovereign parity with the states in the language of the Constitution's Preamble. The Preamble is a general statement of purpose explaining the reasons for the Constitution, but it is also a statement of "independent legal significance." In the Preamble, we see *who* is speaking through the Constitution and *what* they are doing. The Constitution begins with the words "We the People;" it does *not* being with the words "We the *States*," or any equivalent thereof. It goes on to state that "the People" are ordaining and establishing the Constitution "for the United States of America." This is not the type of language used in a treaty or international compact. Unlike the Articles of Confederation, this is the language of a People creating a new sovereign state by establishing a framework for its governance.

In 1830, Daniel Webster would famously observe that:

> [The Constitution] declares that it is ordained and established by the People of the United States. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the several States. But it pronounces that it is established by the people of the United States in the aggregate. Doubtless the people of the several States taken collectively constitute the people of the United States, but it is in this their collective capacity, it is as all the people of the United States that they establish the Constitution.[28]

Some historians have argued that the words "We the People of the United States" should actually be ignored; that these words are a mere stylistic flourish in a document that is really little more than a multilateral compact like the Articles of Confederation. This claim is based on

[25] *Id.*at 156.
[26] *Id.*
[27] *Id.*at 157.
[28] Daniel Webster's reply to Sen. Hayne on the floor of the Senate. Edwin P. Whipple, *The Great Speeches and Orations of Daniel Webster: With an Essay on Daniel Webster as a Master of English Style*, 271 (Boston: Little Brown & Co., 1879).

some of the circumstances under which these words were added to the Constitution. Dr. Thomas E. Woods, for example, makes the following argument:

> [T]he Constitution as originally drafted did say "We, the States." This wording was removed for practical reasons by the committee on style. Since no one could know in advance which states would ratify the Constitution and which would not, it made little sense to list all the states by name before each had made its decision. The substitute phrase "We, the People of the united [sic][29] States" referred not to a single American people taken in the aggregate, but to the people of Massachusetts, the people of Virginia, the people of Georgia--in other words, the people of the several states.
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> The fact that this textual change was unanimously accepted proves it could not have been intended to alter the nature of the Union. Had the new text really meant what Webster later claimed it did, vocal and lengthy debate would have ensued. It certainly would not have been unanimously approved.[30]

Dr. Woods' argument fails under close analysis. During the Philadelphia convention, the first draft of the Preamble actually read "*We the People* of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, [et al.], do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity." (emphasis added)[31] Contrary to Dr. Woods' assertion, the change in wording was *not* from "We, the States" to "We the People;" the change was only from an enumeration of the several states to simply "the United States" (which was already the recognized proper name of the Union under the Articles of Confederation). The earlier draft had indeed used the words "We the People" and recognized that the Constitution would be ordained and established directly by "the People," and not by the states. Dr. Woods is correct that one of the reasons for the change appears to have been uncertainty over which states would ratify the Constitution, but he is wrong in assigning so much significance to that fact and to the lack of debate.

The significance of the language "We the People" is that it demonstrates that the Constitution was (in the words of John Lothrop Motley) "'ordained and established' over the States by a power superior to the States--by the people of the whole land in their aggregate capacity, acting ... independently of the State governments"[32] After all, *before* ratification each state *was* a separate and independent body politic. Up until that time, each state retained the right to go its own separate way. It was only by actually ratifying the Constitution that the people of each state became part of the new whole. Obviously, if the people of any state had failed to ratify the Constitution, they would not have been a part of the "People of the United States" identified in the Preamble. Therefore, the change in language did *not* functionally alter the meaning of the document because the decision to create a Union ordained directly by the "People" had already

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[29] "[Sic]" added by this author. Dr. Woods incorrectly quotes the word "united" from the Preamble in the lower case. U.S. Const. pmbl. See discussion of the terms "thirteen united States of America" (Declaration of Independence) and "United States of America" (Articles of Confederation), *supra*.

[30] Thomas E. Woods, Jr., *The Politically Incorrect Guide To American History*, 36 (Washington: Regnery Publishing, Inc., 2004).

[31] As reported by the Committee on Detail; Jonathan Elliot ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 376-77 (Washington, published under the sanction of Congress, 1836, 2nd edition) (herinafter "*Elliot's Debates*").

[32] John Lothrop Motley, *The Causes of the American Civil War: A Letter to the London Times*, 9 (New York: James G. Gregory, 1861).

been made, but up until the moment when the People "ordained and established" the Constitution they were still only the people of the several states.

It should also be remembered that the Constitution became law not through the approbation of the Philadelphia Convention, but through the approval of the state ratification conventions. As James Madison reminded his readers in the Federalist No. 40, the Philadelphia convention had merely "proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed."[33] The new Constitution "was to be submitted *to the people themselves*, the disapprobation of this supreme authority would destroy it forever; its approbation blot out antecedent errors and irregularities."[34] The meaning of the Constitution's terms as viewed by the ratification conventions is therefore at least as important, if not more important, than the views of the Philadelphia drafters.

The opponents of the Constitution, the "anti-federalists," certainly recognized the importance of the words "We the People." Patrick Henry, for example, was a vehement opponent of ratification because he opposed any division of sovereignty between his native Virginia and the Union as a whole. Patrick Henry pointed to the Preamble and complained to Virginia's ratification convention: "If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all the States."[35] Henry concluded that "[t]he question turns ... on that poor little thing — the expression, We, the people, instead of the states, of America."[36]

3. A more perfect Union …

> *An entire and perfect union will be the solid foundation of lasting peace: It will secure your religion, liberty, and property; remove the animosities amongst yourselves, and the jealousies and differences betwixt our two kingdoms. It must increase your strength, riches, and trade; and by this union the whole island, being joined in affection and free from all apprehensions of different interest, will be enabled to resist all its enemies.*
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> -Queen Anne to the Scottish Parliament (1706)[37]

The very first objective listed in the Constitution is "to form a more perfect Union[.]" This is a very different objective than to "severally enter into a firm league of friendship with each other," as stated in the Articles of Confederation. But what is this "more perfect Union" and in what ways is it "more perfect" than the one that preceded it?

To better understand the Union of the Constitution, the best example to explore is the earlier British Union. The generation of Americans who drafted and ratified the Constitution had a close historical precedent for the creation of an indissoluble "union" of states that were bound by stronger ties than one of de Vattel's federal republics. The 1707 Act of Union between England

[33] The Federalist No. 40 (James Madison).
[34] *Id.*
[35] *Elliot's Debates* 3:22.
[36] *Id.* at 3:44.
[37] Queen Anne's letter to the Scottish Parliament, July 1, 1706.

and Scotland, the founding document of the United Kingdom, was signed only eighty years before the American Constitution was drafted.[38] The 1707 Act of Union merged England and Scotland into a single kingdom with a single parliament under a single sovereign.[39] In 1706 Queen Anne encouraged the Scottish Parliament to pass the Act of Union by declaring "An entire and *perfect union* will be the solid foundation of lasting peace[.]" (emphasis added)[40] Blackstone differentiated the British form of Union from a "foederate alliance" by pointing out that in such a union the "contracting states are totally annihilated, without any power of revival; and a [new state] arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside."[41]

To the founding generation of Americans, who after all were former British subjects, the 1707 Act of Union must have been a familiar and comfortable example.[42] Gouverneur Morris, the principle draftsman of the Preamble, even borrowed Queen Anne's phrase "perfect union" to describe the new form of government.

Although the British Act of Union clearly transferred far more power to the new common government than does the American Constitution,[43] it shows that the Founding Fathers had a very prominent example of previously separate states merging together to create a new sovereign state, and this arrangement was also called a "perfect union." The United States can therefore be viewed as a philosophical compromise between de Vattel's "federal republic" and Queen Anne's "perfect union." The best description so far is de Tocqueville's "incomplete national government" which "is neither precisely national nor federal" but for which "the new word to express this new thing does not yet exist."

4. Advantages of American Federalism

> *"The Union is free and happy like a small nation, glorious and strong like a great one."*
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> -Alexis de Tocqueville[44]

The American system of government is philosophically complex, but offers some very prominent advantages that compensate for its complexity. The greatest strength of the American system is that it allows the people of the entire nation to act in unison on issues of common concern, but also lets the people, as citizens of the several states, customize their laws to particular local needs. De Tocqueville warns, "In large centralized nations the lawgiver is bound

[38] Union with Scotland Act, 1706, 5 Ann, c. 11. The Union became effective on May 1, 1707, establishing the "United Kingdom."

[39] Prior to the Act of Union, Scotland and England each recognized the same monarch, but were otherwise independent kingdoms with their own laws and parliaments.

[40] Queen Anne's letter to the Scottish Parliament, July 1, 1706.

[41] William Blackstone, 1 Commentaries *97 n. e (added in 1766 ed.).

[42] "The history of Great Britain is the one with which we are in general the best acquainted[.]" The Federalist No. 5 (John Jay).

[43] Unlike the British Union, the United States Constitution creates a new national "Union" with sovereign authority over matters of national concern without destroying the separate sovereignty of the states. Far from being "totally annihilated," the states are preserved as at least partial sovereigns. *E.g.* Madison asks his readers in the Federalist No. 40, "should [the States] be regarded as distinct and independent sovereigns?" and answers, "They are so regarded by the Constitution proposed."

[44] De Tocqueville at 163.

to give the laws a uniform character which does not fit the diversity of places and of mores; having never studies particular cases, he can only proceed by general rules; so men must bend to the needs of legislation, for the legislation has no skill to adapt itself to the needs and mores of men; and from this, much trouble and unhappiness results."[45] A system of tiered sovereignty allows for uniform laws where uniformity is needed and locally tailored laws where regional differences make uniformity undesirable.

De Vattel's federal republics share this advantage in theory, but only when the states themselves cooperate fully with the national government. The great improvement of the American federal system over earlier federal governments, in the words of de Tocqueville, is that "[in] America each state has comparatively few opportunities or temptations to resist [the federal government]; if it does think of doing so, it cannot carry this out without openly violating the laws of the Union, interrupting the ordinary course of justice, and raising the standard of revolt; in a word, it would have directly to take up an extreme position, and men hesitate for a long time before doing that."[46]

This division of power between the state and national governments not only suppresses the temptation of states to thwart or interfere with national policies, but also frees the states from federal interference in their own local matters, and lets them focus their efforts on the happiness and well-being of their own people. De Tocqueville observed, "One can hardly imagine how this division of sovereignty contributes to the well-being of each of the states of the Union. In these little societies, unpreoccupied with cares of defense or aggrandizement, all the strength of society and all individual efforts are turned toward internal improvements."[47]

The American federal system also makes it easier for a nation to remain both strong and free by creating an additional bulwark against tyranny. The combined strength and wealth of a union of small states makes it easier to defend against external threats, but also creates a far more tempting target to those who seek excessive power over their fellow men. By limiting the authority of the central government primarily to external matters, and leaving the states sovereign over their own internal affairs, federalism discourages the overly ambitious from using the strength of the central government as a vehicle against the liberty of the people. De Tocqueville writes, "The Union is a great republic in extent, but it can in some fashion be likened to a small one because there are so few matters with which the government is concerned. … it does not arouse that inordinate craving for power and renown which are so fatal to great republics."[48]

"The Union is free and happy like a small nation, glorious and strong like a great one."[49]

Conclusion

The United States of America thus enjoys a unique and effective form of government for which there is no direct antecedent example, and only a few imperfect analogies. The People of the United States used the Constitution to erect a new sovereign national government, but did so

[45] *Id.*at 161.
[46] *Id.*at 157.
[47] *Id.*at 161.
[48] *Id.*at 162.
[49] *Id.*at 163.

without dissolving the several states or stripping them of their own sovereignty. This system combines the unity of the British model with the local autonomy of de Vattel's model, and makes it possible for the United States to be both strong and free. The national government created by the Constitution is strong enough to unite all of the country's resources to protect the peoples' common interests, but not strong enough to irresistibly oppress the people *as* people of the several states.