

Paragon of limited government or foundation for superpowerdom? A new look at the
American constitution

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The federal Constitution of the United States is the world's oldest effective written Constitution (well, actually, the second oldest, but never mind that). It dates from 1787 and has only been amended twenty-seven times in two-hundred and twenty-two years. Because it has remained virtually unchanged over two centuries the Constitution has acquired a special and exalted place in American political culture. It is among the most prominent symbols of American nationalism and it serves as a bench-mark against which all political action is judged. Because the Constitution has been so important to American politics and American nationalism the document itself and its origins have been endlessly studied. Just about each and every clause of the Constitution has given rise to conflicting interpretations of meaning. Today there are even conflicting methods of constitutional interpretation. Among historians specializing on the founding the primary interest has been in why the Constitution was drafted and adopted in the first place, and why it looks the way it does.

As my title suggests, two alternative interpretations of the rationale behind the Constitution can be contrasted against each other. The idea that the Constitution was intended to place *limits on government action* is familiar to most people. Most American historians would claim that this was the primary purpose of the Constitution. The prevalent attitude among historians has long been quite critical of the Constitution, however, and most historians find little to celebrate about it. The second interpretation—that the Constitution was intended not to restrict government action but to create a government that *could act*—is a new

way to look at the Constitution. In the mind of this author is a perspective that better conforms to the actual intentions of the American founders.

I

For almost a century a majority of U.S. historians have viewed the Constitution as an elite project: a reaction to political developments in the thirteen states that made up the original American union. In simplified form, the dominant account can be summarized in the following manner: After the American Revolution the state legislatures were filled with men from the lower orders. They used their newfound power to legislate in their own interest and paid scant regard to the rights and liberties of minorities. Using a contemporary phrase, post-revolutionary politics have been said to suffer from an “excess of democracy.” The major support that historians have found for this interpretation is in the famous tenth essay of *The Federalist*, written by James Madison.

According to the mainstream interpretation, the Constitution was meant to rectify this. Above all the elite were concerned to counter legislation that disregarded property rights and they began to cast about for ways to restrict the power of the state legislators. If power could be transferred from the states to the national government and if the national government could be insulated from the will of the majority, then the power of the people could be broken and property and minority rights be secured. For this reason, the principal institutional innovations of the American Constitution all aimed to limit the ability of the state legislatures to realize the popular will. The bill of rights, the separation of powers, and the extended sphere of the republic were all mechanisms intended to restrict the government’s freedom of action.¹

There are two things about the mainstream account of the framing and adoption of the Constitution that are worth special attention. First, it claims that the problems that the Constitution was meant to rectify originated in *domestic politics*. Second, it claims that the

Constitution tried to solve these problems by placing *limits on government action* in order to protect minority rights from democratic majorities.

II

In the following I will approach the question of the reasons behind the framing and adoption of the Constitution somewhat differently from the mainstream account, taking as my starting point the mandate of the Constitutional convention, i.e. the body that drafted the Constitution in Philadelphia in the summer of 1787. This mandate actually contains nothing at all about the need to restrict the “excesses of democracy” in the states. Rather, the convention was called to amend the existing treaty of union between the thirteen original states, for the simple reason that this treaty was believed to be dysfunctional. This existing treaty of union was known as the Articles of Confederation. They had been written in 1777 but only adopted in 1781 and were regarded as problematic from the start. In fact, the ink had hardly dried before politicians began to call for amendments.

Here it is necessary to pause in order to ask what the Articles of Confederation were meant to accomplish and why they did not work. To Europeans accustomed to centralized nation-states, the purpose of the American union can be difficult to grasp. In Europe, federalism is often seen as the devolution of power from the center to regional and local government. But in America federalism meant the concentration of power. Sovereign states entered into union in order to achieve certain specified ends. In return they delegated some of their power to a central government. The American experience is complicated by the fact that independence and union go hand in hand as two inseparable aspects of the same process. Although the Declaration of Independence spoke of “*one people*,” the agents that declared themselves independent were *thirteen* “free and *independent states*” each in possession of “full power to levy war, conclude peace, contract alliances, establish commerce, and to do all

other acts and things which independent states may of right do.” But no sooner had these new states willed themselves into existence than they entered into “a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare.”²

This “firm league of friendship” was codified in the Articles of Confederation. The powers that the states delegated to the union were the powers over foreign relations and interstate affairs within the union. The original division of responsibility between the state governments and Congress was therefore drawn as a division between domestic and foreign policy. Early modern political writers had different names for these policy areas but they recognized them as distinct spheres of government activity. Montesquieu for example spoke of two forms of executive power, “over the things depending on the rights of nations” and “over the things depending on civil rights.” By the former, the magistrate “makes peace or war, sends or receives embassies, establishes security, and prevents invasions.” By the latter, he or she “punishes crimes or judges disputes between individuals.” John Locke instead separated “federative” from “executive” power. Federative power pertained to “the management of the *security and interest of the publick without*, with all those that it may receive benefit and damages from” and it included “the Power over War and Peace, Leagues and Alliances, and all the Transactions with all Persons and Communities without the Commonwealth.” Executive power, in contrast, pertained to “the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are part of it.”³

To Americans in the 1780s, the purpose or aim of the union was clear enough and there was a general consensus that a division of labor between the states and Congress was a good idea. The problem was that the Articles of Confederation were unable to fulfill the purpose of the union. The reason for this has to do with the structural design or organization of government in the union. The American Revolution was colored by a very strong fear of

executive power. Although the claims of the revolutionaries seem often exaggerated—if not outright bizarre—to us today, they seem to have been genuinely concerned that the distant British Parliament and King were intent on depriving them of their individual liberties. It is no surprise therefore that the revolutionaries should hesitate to delegate power to a distant central government, even if it were a distant *American* central government. When drawing up the Articles of Confederation, American statesmen were therefore careful to retain effective checks on central government action in the states. As a result, the Articles gave Congress wide formal powers but no real practical ability to execute those powers without the active support of the states. Thus, Congress had the right to declare war but it could neither raise nor support an army. All powers over mobilization belonged to the states. Congress could borrow money but not repay its debts. All power over taxation rested in the states. Congress could enter international agreements but not guarantee that they were respected by American citizens. The court system was a state system and the powers of coercion belonged to the states.

Under the Articles of Confederation, the United States was precisely what its name implies: *a union of sovereign states*. It is no coincidence that American politicians before the Civil War seldom spoke of *the* United States, but instead of *these* United States. Whatever Congress wanted done depended on the assistance of the state governments. When such assistance was not forthcoming, Congress had no sanction, no power of coercion, with which to force an uncooperative state to cooperate. In effect, compliance with Congressional demands rested on the *voluntary cooperation* of the states.

Congress's lack of administrative capacity had been problematic already during the struggle for independence. After the Peace of Paris in 1783, whereby the United States was formally recognized as an independent nation, the situation grew worse. The new nation faced a series of issues that had to do with its relations to foreign powers and with the relations

between the member-states in the union. They were issues that clearly fell under the responsibility of Congress rather than the states. Yet because Congress had so little administrative capacity it could not address them in an effective way. The issues were quite concrete and quite serious. Here it is only possible to mention a few of them.

To begin with, the United States was unable to maintain its territorial integrity or defend the life and property of its citizens. In the western regions of the country, Britain violated the peace treaty by occupying strategic forts within American territory. In the same area, Indian nations blocked settlement and development of the land. Congress could not evict the British Army or pacify the Indians for the simple reason that it lacked both money and soldiers. At one point in the mid 1780s, the U.S. Army was reduced to a mere eighty men commanded by a captain. In the six months before March 31, 1787, the union Treasury received a grand total of \$663 (which equals about \$16,000 in today's money).

Also related to the settlement of the Western lands was Spain's decision to prohibit American traders from shipping their goods through New Orleans. Because the rivers provided the only means of transportation in the American interior, the blocking of the Mississippi River meant that American settlers had no way to get their produce to market and therefore that the vast and fertile American interior was in practice worthless. Trade was also restricted elsewhere. Spain closed Havana to American traders and Britain closed the West Indies, Canada, and the home islands to British ships and goods. Because the American economy was heavily trade dependent, these hostile actions caused a deep recession, all the more devastating because the nation had for almost two centuries been used to uninterrupted economic growth. Again Congress was unable to address these issues through lack of power. What was needed was retaliatory legislation against Spain and Britain, but Congress did not have the power to legislate over commerce, much less ensure that such laws were obeyed.

A third problem was the debt that had been contracted in order to fight the War of Independence. In the post-war period this debt went largely unpaid. Even so, merely the *efforts* to pay interest on the debt led to sharply increased taxes that in turn led to protests and in one case to a full-scale tax rebellion.

American weakness invited every foreign nation to trample on American rights and interests. But weakness also led to conflict between the states within the union. One example is the closure of New Orleans. The South, with its ever-expanding agriculture, felt more threatened by the closure of Mississippi than New England did because New England was more dependent on shipping than agriculture. Another example is the union's debt. Rich states, such as New York, could assume the obligations of Congress and pay the debt that Congress owed its citizens. Other states could not. On the eve of the Convention, therefore, weakness had caused the United States to be both unable to defend the interests of its citizens against foreign powers and Indian Nations and to maintain harmony between the members of the union. Something had to be done or the new nation was in danger of falling apart either into its thirteen constituent parts or into three or four smaller, more homogenous, confederacies. The prevalence of this fear can be seen clearly in *The Federalist*. In the early numbers the adverse effects of disunion are systematically contrasted with the benefits of union.

III

When the delegates to the constitutional convention gathered in Philadelphia in May 1787, the nature of the reform that had to be undertaken was quite clear to everyone. The problem was not that the national government needed more powers (with one important exception, namely the right to pass commercial legislation). Rather, the problem was that the Articles of Confederation had created a national government that could not use the powers it formally

possessed. The records of the debates in the Constitutional convention reveal very little discussion about the powers of the new government. Instead, the debate is all about the new government's organization. The principal conflicts concerned how many votes the states should have in the lower and the upper houses and how the president should be appointed and how long his term of office should be. But it would be wrong to conclude that lack of debate meant that the powers of government were unimportant. They were not. It was rather that there was considerable agreement on this question and therefore little need for discussion. One important new power *was* added to the national government. This was the power to legislate over commerce. Although it gave rise to some disagreement there was no serious conflict over this issue. The best characterization of the nature of the constitutional reform of 1787 was provided by James Madison who wrote in *The Federalist* number 45 that

“If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes, consists much less in the addition of *New Powers* to the Union, than in the invigoration of its *Original Powers*. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.”

Yet despite the fact that the Constitution did not redefine the division of labor, or the division of responsibility, between the states and Congress—and in this sense did not add new powers to Congress—there is no question that the Constitution was a major reform of American government. Again Madison is the best guide to the essence of the reform. Before

arriving at the convention Madison had carefully analyzed the shortcomings of the union under the Articles of Confederation. He had identified the crucial defect to be the reliance on voluntary compliance of state governments to Congress's resolutions and the lack of "sanction to the laws, and of coercion in the Government of the Confederacy." Rather than providing Congress with an instrument of coercion, however, Madison suggested a reorganization of the central government. It would no longer be a confederated government that acted on the states and depended on the state governments for both its upkeep and the implementation of its decisions. Instead it would be a national government legislating for individuals and equipped with an executive and a judiciary to enforce its laws. It was a simple and ingenious solution to the critical problem of the union, namely how to make the central government exercise its powers efficiently.

The Constitution thus created two parallel governments that were each assigned a separate sphere of government business. The allocation of policy areas did not change from that made by the Articles of Confederation, however. The central government would still be responsible for foreign politics and interstate relations. The state governments would still manage their own internal affairs. The difference between the Articles and the Constitution was that under the Constitution both governments would be creations of the people elected by the citizens. An equally important difference was that under the Constitution each government would be self-sufficient in the sense that it would provide for its own upkeep, legislate directly on individuals, and have its own governmental institutions to implement its laws.

The new organization made it possible for the first time to create a national government that possessed the ability to act in defense of United States' national interests and against foreign powers. But because the Constitution retained the idea that the union was principally a means to further the interests of the states as individual states and because it made the protection and promotion of state interest a legitimate goal of national politics, the

Constitution also provided an institutional framework that would allow the member states to resolve conflicts of interests in a peaceful manner and thereby to maintain their union.

IV

According to the interpretation of the genesis of the American Constitution that presented here, it was not *domestic* issues that gave rise to the need for constitutional reform. It was *international* issues, issues that arose from the pressures that the international system of states exerted on the newly created American nation. The United States was born into a world characterized by extreme competition between states and empires for political and economic advantage. Heavily trade oriented, bordering on the colonies of several European great powers, the United States had no possibility to extract itself from this world. The choices faced by the new nation were either to acquire the necessary capacity to act in defense of its own interests or to become dependent on stronger powers if not even to perish.

Nor was the aim of the constitutional reform to *restrict* government power but to create a government that could *act efficiently* to defend and promote American interests. The Constitution provided the framework that allowed a group of “administrative founding fathers” to transform the paragraphs and sections of the Constitution into the institutions and policies of an American national government. Within a few years this national government had managed to address several of the issues that had pressed so hard on the American nation in the years after the War of Independence. The debt was reformed and duly serviced. The Indian Nations in the Ohio territory were militarily defeated and made to give up vast stretches of territory. A treaty with Spain opened the Mississippi. A treaty with Britain transferred the western forts to the United States and eased trade restrictions.

And from these beginnings things have moved on. From the Louisiana Purchase in 1803, over wars against Britain in 1812, Mexico in 1846, the seceding South in 1861, and

Spain in 1898, to the two world wars that swept away old empires and left the world stage to the United States, American territory, population, wealth, and power has grown without check. From the Second World War, American power has been such that the United States has been increasingly able not only to withstand the pressure from the international system of states, but to shape this system in its own image. And interestingly, its growth to world dominion has taken place within a constitutional framework that is often regarded as the paragon of limited government.

¹ The counterrevolution argument comes in two versions: An ironic version associated above all with the work of Gordon Wood and tragic version which has been embraced by historians of the progressive tradition. According to the ironic version the counterrevolutionaries could only secure popular acceptance of the Constitution by presenting it as a democratic reform and by adopting a democratic posture. Unwittingly, therefore, the counterrevolutionaries promoted democracy and their attempted counterrevolution failed miserably. According to the tragic version the Constitution did indeed deprive the people of the power to rule themselves and introduced a form of elite rule. The Revolution's promise of creating a genuinely democratic society thereby turned to dust.

² *Documentary History of the Ratification of the Constitution* I, 86.

³ *DHRC* I, 145; Montesquieu, *Spirit of the Laws*, 156-57; Locke, *Two Treatises*, 365. Another example is the Essex Results, a commentary on the Massachusetts Constitution of 1780 by the Essex town meeting. "The executive power is sometimes divided into the external executive, and internal executive. The former comprehends war, peace, the sending and receiving ambassadors, and whatever concerns the transactions of the state with any other independent state. The confederation of the United States of America hath lopped off this branch of the executive, and placed it in Congress." Essex Results, *Founders' Constitution* vol. I, ch. IV, doc. 8