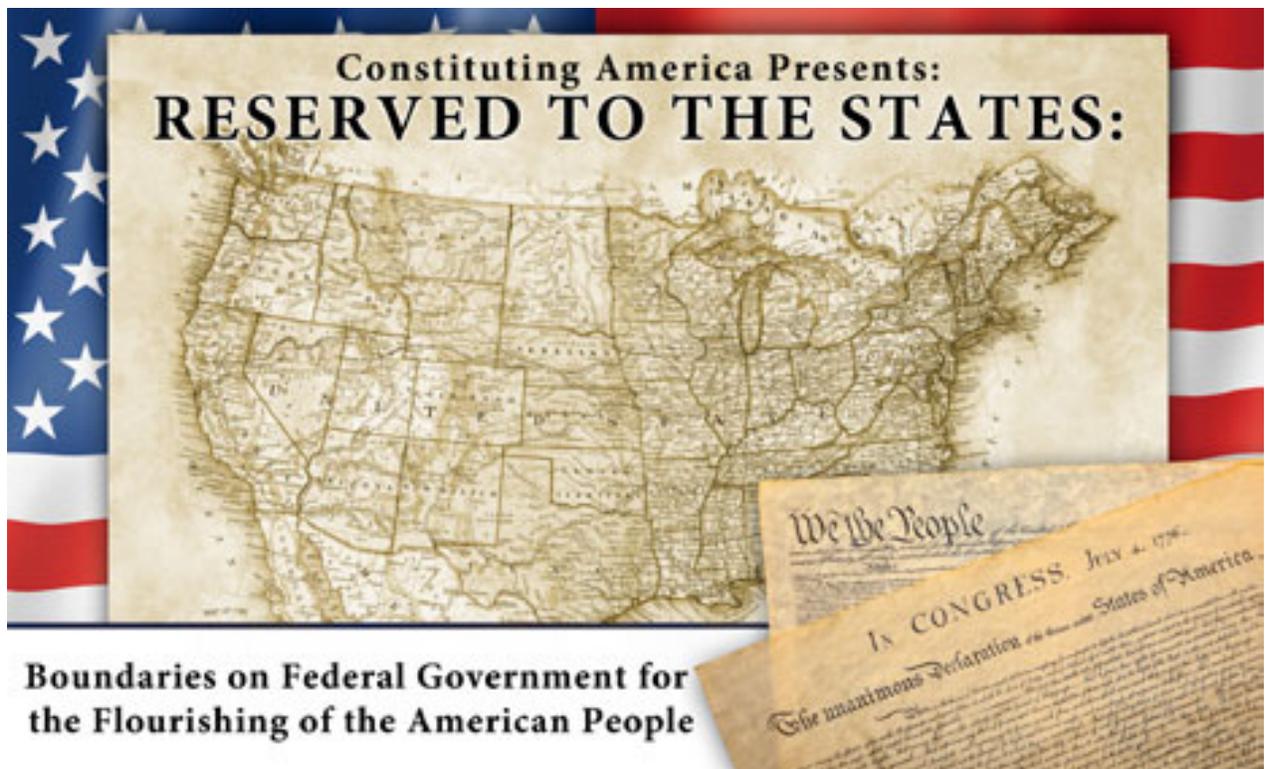


Constituting America's 9th Ninety Day Study

Reserved To The States: Boundaries on The Federal Government For The Flourishing Of The American People



**Boundaries on Federal Government for
the Flourishing of the American People**

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The Honorable Michael Warren, Oakland County Circuit Court Judge; Professor, Constitutional Law, Western Michigan University Cooley Law School; Author,

America's Survival Guide: How to Stop America's Impending Suicide by Reclaiming Our First Principles and History, Lansing, Michigan

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Constituting America's Ninth 90 Day Study on State and Local Government

Reserved To The States: Boundaries On Federal Government For The Flourishing Of The American People

Preface: The Tenth Amendment to the United States Constitution reads, “*The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.*” The amendment’s purpose is intended to strengthen the Founders’ resolve that each American maintains ownership of the United States government on every level, and to which each entrusts a position of leadership among its elected. In this way, the American people remain free to govern themselves through leaders they choose. The U.S. Constitution, Federalist Papers among other founding discussions, displays how the smaller governing bodies magnify local control each American citizen must keep. This control within agreed upon, respective state constitutions ensures governing remains surrendered *to* the American people and not surrendered *by* the American people to an unreachable federal level that cannot be checked or replaced by each citizen who put it there. The 2019 Constituting America 90 Day Study on State and Local Government expounds upon the gravity of that which makes America thrive due to strict limits of its federal governing powers, directing attention to the true holders of America’s power, her people, and consent of the governed that results in a flourishing United States.

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Introduction – History and constitutional background of American Founders’ and Framers’ views on local governments for a strong, free, prosperous United States

- [Federalism: New Horizons For A Time-Honored Governing Principle](#) by Lisa B. Nelson, Chief Executive Officer, American Legislative Exchange Council and Karla Jones, Director, Center to Restore the Balance of Government, American Legislative Exchange Council Center on Federalism

Tenth Amendment to the United States Constitution – Purpose for limited federal powers and what the amendment means for state and local government; Bill of Rights as “a Line drawn as clearly as may be between the federal Powers vested in Congress and the distinct Sovereignty of the several States upon which the private and personal Rights of the Citizens depend.” – Samuel Adams

- [Tenth Amendment to the United States Constitution: Purpose for Limited Federal Powers, Meaning for State and Local Government](#) by Patrick Garry, Professor of Law, University of South Dakota
- [Federalism and the Tenth Amendment: The Buttress of Our Republic](#) by Andrew Langer, President of the Institute for Liberty and Host of the Andrew Langer Show on WBAL in Baltimore
- [Tenth Amendment to the United States Constitution: A Firm and Clear Boundary Between the States and the Congress](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow

Federalist 45 on Connection of the States to the Federal Level – “...each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.” – James Madison

- [Relation of the Federal Government to the State Governments: What Does Publius Say?](#) by William Morrisey, William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War*; and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*

States and Their Constitutions: History Surrounding Admission of Each New State to the Union

- [American Revolution and Expanding the States](#) – How the American Revolution and nationhood voided the Proclamation Line of 1763, allowing expansion for American settlement of the Western frontier by Craig Bruce Smith, Ph.D., Assistant Professor of History, William Woods University

- [Free, Independent and Sovereign?](#) – The Declaration of Independence on free, independent, sovereign states as the original 13 colonies came together to form the United States; what this meant for state powers and the growing nation as a whole by William Morrissey, William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War*; and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*
- [Free and Independent: The States' Declaration and the Articles of Confederation](#) – The Declaration of Independence on free, independent, sovereign states as the original 13 colonies came together to form the United States; what this meant for state powers and the growing nation as a whole by Jennie Jones, Assistant Professor, American Government and History, Weatherford College
- [Greatest Power: Each State's Obligation to Keep Its Creation of National Government in Check \(Part 1\)](#) by KrisAnne Hall, U.S. Army Veteran; Former Prosecutor and First Amendment Law Attorney; Founder of LibertyFirstUniversity.com; Author
- [Greatest Power: Each State's Obligation to Keep Its Creation of National Government in Check \(Part 2\)](#) by KrisAnne Hall, U.S. Army Veteran; Former Prosecutor and First Amendment Law Attorney; Founder of LibertyFirstUniversity.com; Author

Religious Freedom and Early State Constitutions – Meaning of, and how early state constitutions worked regarding religious freedom and the First Amendment

- [Religious Freedom and Role of the States in Their Own Early Constitutions, Part 1](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow
- [Religious Freedom and Role of the States in Their Own Early Constitutions, Part 2](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow
- [Fundamental Law and Natural Rights: The Virginia Statute for Religious Freedom](#) by Tony Williams, Author of five books including *Washington and Hamilton: The Alliance that Forged America*; Senior Teaching Fellow, Bill of Rights Institute; Constituting America Fellow
- [Disestablishment, Christianity, and Religious Liberty in Virginia](#) by Archie P. Jones, Teacher, Librarian, Author of *The Gateway to Liberty: The Constitutional Power of the Tenth Amendment*
- [Religious Freedom and Disestablishment in North Carolina, New York, Connecticut, Massachusetts, New Hampshire](#) by Archie P. Jones, Teacher, Librarian, Author of *The Gateway to Liberty: The Constitutional Power of the Tenth Amendment*
- [Remaining Early States' History of Religious Freedom and Disestablishment: South Carolina, New Jersey, Delaware, Pennsylvania, Maryland, Georgia, Rhode Island](#) by Archie P. Jones, Teacher, Librarian, Author of *The Gateway to Liberty: The Constitutional Power of the Tenth Amendment*
- [Religious Freedom Since the First Amendment and Early State Constitutions](#) by Marc Clauson, Professor of History and Political Economy, Professor in Honors, Cedarville University

State Constitutions? – Why would each state need a constitution when we have the United States Constitution? What it would mean for the states to be run by their citizens rather than royal rule

- [The Peoples of our Early States: Not "One People"](#) by Archie P. Jones, Teacher, Librarian, Author of *The Gateway to Liberty: The Constitutional Power of the Tenth Amendment*
- [Our First States' Constitutions, Declarations of Rights and Bills of Rights vs. The Liberal History Lesson](#) by Archie P. Jones, Teacher, Librarian, Author of *The Gateway to Liberty: The Constitutional Power of the Tenth Amendment*
- [State Constitutions? Why Would Each State Need Its Own Constitution? Part 1](#) by Marc Clauson, Professor of History and Political Economy, Professor in Honors, Cedarville University
- [State Constitutions? Why Would Each State Need Its Own Constitution? Part 2](#) by Gary Porter, Executive Director, Constitution Leadership Initiative
- [Words Have Consequences: Amending the United States Constitution and State Constitutions](#) by Amanda Hughes, Outreach Director, 90 Day Study Director, Constituting America; Author of *Who Wants to Be Free?*

First States – The Thirteen Original Colonies After the American Revolutionary War and Constitutional Convention (1787)

1 – Delaware – December 7, 1787

As the Constitutional Convention came to a close in Philadelphia, America’s founding representatives signed the United States Constitution on September 17, 1787. Then, the first of the thirteen original states to ratify (approve, endorse, accept, formally confirm, validate, sign) the new U.S. Constitution, which replaced the Articles of Confederation, was Delaware, signing on December 7, 1787. This signing admitted (entered, received statehood) Delaware, known as “The First State,” to the United States December 7, 1787. The current Delaware State Constitution in use was adopted in 1897

- [Delaware: Admitted as "The First State" December 7, 1787](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association

2 – Pennsylvania – December 12, 1787

Birthplace of independence and the United States Constitution. “The Keystone State,” Pennsylvania is second of the thirteen original states to ratify the U.S. Constitution and enter the United States. The Pennsylvania State Constitution currently in use was adopted in 1968

- [Pennsylvania and Our Form of Government](#) by Andrew Hohns, Board Chair USA 250

3 – New Jersey – December 18, 1787

Third of the thirteen original states to ratify the U.S. Constitution and join the United States, “The Garden State” of New Jersey entered the United States December 18, 1787. The New Jersey State Constitution in use today was adopted in 1948

- [New Jersey: Third of the Original Thirteen to Join the United States](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association

4 – Georgia – January 2, 1788

Georgia is fourth of the thirteen original states to ratify the U.S. Constitution to join the United States of America January 2, 1788. Georgia joined the Confederacy January 19, 1861. The Georgia State Constitution that is the latest version and currently in use was adopted in 1983. Georgia is known as “The Peach State” or “Empire State of the South.”

- [Georgia on My Mind](#) by Martha Zoller, Policy Advisor, Office of the Governor, Brian Kemp; Political Pundit; Former Congressional Candidate, Georgia

5 – Connecticut – January 9, 1788

Fifth of the thirteen original states to ratify the U.S. Constitution, Connecticut was admitted to the United States January 9, 1788. The Connecticut State Constitution currently in use was adopted in 1965, and is known as “The Constitution State.”

- [The Constitutional Roots of Connecticut](#) by Steve Armstrong, Connecticut Board of Education's Social Studies, Consultant; Past President, National Council for the Social Studies

6 – Massachusetts – February 6, 1788

“The Bay State,” Massachusetts, is sixth of the thirteen original states to ratify the U.S. Constitution and thus be admitted to the Union of the United States. The Massachusetts State Constitution adopted its current one in use was adopted in 1780

- [The Massachusetts Constitution of 1780, John Adams & The Fundamental Liberties of the People](#) by Tony Williams, Author of five books including *Washington and Hamilton: The Alliance that Forged America*; Senior Teaching Fellow, Bill of Rights Institute; Constituting America Fellow

7 – Maryland – April 28, 1788

Maryland is the seventh state admitted to the United States, ratifying the U.S. Constitution April 28, 1788. The current Maryland State Constitution in use was adopted in 1867. Maryland is known as the “Old Line State.”

- [Maryland's 1867 State Constitution, Among the Oldest in Use Today](#) by Gary Porter, Executive Director, Constitution Leadership Initiative

Secession – Reasons and consequences for states seceding from the Union; strength of America and why states do not secede today

- [Secession? America's Founding and Why States Seceded From the Union](#) by Kyle Scott, Ph.D., Board of Trustees, Lone Star College System; Professor of Political Science, University of Houston; Author of *The Limits of Politics: Making the Case for Literature in Political Analysis*, and *The Federalist Papers: A Reader's Guide*

8 – South Carolina – May 23, 1788

The eighth state to ratify the U.S. Constitution, South Carolina, was admitted to the United States May 23, 1788. It was also the first state to secede from the Union. The current South Carolina State Constitution was adopted in 1896. South Carolina is known as “The Palmetto State.”

- [South Carolina, Admitted 1788 and Eighth State to Ratify the U.S. Constitution](#) by Charles F. Vaughan, National Board Certified Social Studies Teacher; World Geography Teacher and Teacher Cadet, A.C. Flora High School, Columbia, South Carolina

9 – New Hampshire – June 21, 1788

Known as “The Granite State,” New Hampshire was ninth of the thirteen original states to ratify the U.S. Constitution, admitting it to the Union June 21, 1788. The New Hampshire State Constitution in use today was adopted in 1783. Article VII of the U.S. Constitution says nine states would be sufficient to ratify and officially make the U.S. Constitution law of the land. New Hampshire was the ninth and final state needed to accomplish this official ratification which ended government under the Articles of Confederation

- [New Hampshire: The First in the Nation](#) by The Honorable Bill O'Brien, Former Speaker, New Hampshire House of Representatives

10 – Virginia – June 25, 1788

“Old Dominion” as Virginia is known, was tenth of the thirteen original states to ratify the U.S. Constitution, admitting it to the Union June 25, 1788. The Virginia State Constitution in current use was adopted in 1971; the Virginia Constitution of 1776 compared to the MA Constitution of 1780

- [How Virginia's State Constitution Would Impact Construction of the United States Constitution](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association
- [Republican Principles of the 1776 Virginia Constitution](#) by Tony Williams, Author of five books including *Washington and Hamilton: The Alliance that Forged America*; Senior Teaching Fellow, Bill of Rights Institute; Constituting America Fellow

11 – New York – July 26, 1788

Eleventh of the thirteen original states to ratify the U.S. Constitution, New York was admitted to the Union July 26, 1788 and is known as “The Empire State.” The current New York State Constitution was adopted in 1895

- [New York: Eleventh of the Original Thirteen to Become a State in the Union](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association

12 – North Carolina – November 21, 1789

Twelfth of the thirteen original states to ratify the U.S. Constitution, North Carolina, “The Tar Heel State,” was admitted to the United States November 21, 1789. The North Carolina State Constitution currently in use was adopted in 1971

- [North Carolina's Vital Role in Ensuring the People Had a Bill of Rights](#) by NorthCarolinaHistory.org, a project of the John Locke Foundation; and Anna Manning, Marketing and Operations Specialist, the John Locke Foundation.

13 – Rhode Island – May 29, 1790

Last of the thirteen original states to ratify the U.S. Constitution, Rhode Island was admitted to the Union May 29, 1790. The Rhode Island State Constitution in current use was adopted in 1986. Rhode Island is known as “The Ocean State.”

- [Rhode Island: The Small Colony That Solidified the United States](#) by Kyle Scott, Ph.D., Board of Trustees, Lone Star College System; Professor of Political Science, University of Houston; Author of *The Limits of Politics: Making the Case for Literature in Political Analysis*, and *The Federalist Papers: A Reader's Guide*

Admitting States to the Union – Article IV, Section 3 on entry of new states to the Union, and how the U.S. Constitution protects each state individually and as a whole nation; all of the original thirteen states except Rhode Island sent delegates to the 1787 Constitutional Convention to complete the new U.S. Constitution that includes Article IV; the Northwest Ordinance

- [Equality of States: The National Union and the Republican Principles](#) by Tony Williams, Author of five books including *Washington and Hamilton: The Alliance that Forged America*; Senior Teaching Fellow, Bill of Rights Institute; Constituting America Fellow

New States and the American Industrial Revolution (1791)

14 – Vermont – March 4, 1791

On March 4, 1791, Vermont, known as “The Green Mountain State” was the first admitted to the Union after the U.S. Constitution was ratified by the original thirteen colonies. The current Vermont State Constitution in use was adopted in 1793

- [Vermont, 1791: First State Admitted After the Original Thirteen Colonies](#) by William J. Federer, Nationally Known Speaker, Best-selling Author of many books including *America's God and Country Encyclopedia of Quotations*; President, Amerisearch.net

15 – Kentucky – June 1, 1792

Known as “The Bluegrass State,” Kentucky is the fifteenth state to enter the Union, having ratified the U.S. Constitution June 1, 1792. The current Kentucky State Constitution in use was adopted in 1891

- [Crafting Constitutions in the Commonwealth of Kentucky](#) by James C. Clinger, Professor of Political Science; Director, Master of Public Administration Program, Department of Political Science and Sociology, Murray State University, Kentucky, and Michael W. Hail, Professor of Government, School of Public Affairs; Assistant Dean and Director of the Statesmanship Center, Morehead State University, Kentucky

16 – Tennessee – June 1, 1796

Tennessee entered the Union as the sixteenth state, having ratified the U.S. Constitution June 1, 1796. “The Volunteer State” currently uses its latest version of the Tennessee State Constitution adopted in 1870

- [Tennessee, 1796: The Volunteer State](#) by The Honorable Robin Smith, representing the 26th State House District of Tennessee

Westward Expansion (1803)

17 – Ohio – March 1, 1803

The seventeenth state to enter the Union, known as “The Buckeye State,” Ohio ratified the U.S. Constitution on March 1, 1803. The current Ohio State Constitution in use was adopted in 1851

- [How Ohio Crafted Its State Constitution to Uphold the Will of the People](#) by Samuel Postell, Ph.D. Student, University of Dallas; Former Literature Teacher

18 – Louisiana – April 30, 1812

Known as “The Pelican State,” Louisiana was the eighteenth admitted to the United States, ratifying the U.S. Constitution April 30, 1812 just before the start of the War of 1812. The current Louisiana State Constitution in use was adopted in 1975; Louisiana Purchase, territory history prior to the statehood

- [Louisiana and the Clash of Empires](#) by Tony Williams, Author of five books including *Washington and Hamilton: The Alliance that Forged America*; Senior Teaching Fellow, Bill of Rights Institute; Constituting America Fellow

19 – Indiana – December 11, 1816

The U.S. Constitution ratification date of December 11, 1816 marks Indiana as the nineteenth state to enter the Union. The Indiana State Constitution currently in use was adopted in 1851. Indiana is known as “The Hoosier State.”

- [Indiana: Long an Example of Robust Statehood](#) by The Honorable Randall T. Shepard, Former Chief Justice, Indiana Supreme Court

20 – Mississippi – December 10, 1817

“The Magnolia State” of Mississippi is the twentieth admitted to the Union, having ratified the U.S. Constitution December 10, 1817. The current Mississippi State Constitution in use was adopted in 1890

- [Mississippi's Road to Statehood](#) by Clay Williams, Sites Administrator, Mississippi Department of Archives & History

21 – Illinois – December 3, 1818

Admitted to the Union December 3, 1818, Illinois is the twenty-first state to ratify the U.S. Constitution. Known as “The Prairie State,” the Illinois State Constitution adopted in 1970 is the version currently used

- [Illinois, Admitted December 3, 1818 as the Twenty-First State](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association

22 – Alabama – December 14, 1819

The December 3, 1818 ratification of the U.S. Constitution by Alabama brought the twenty-second state into the Union. “The Heart of Dixie” currently uses the Alabama State Constitution adopted in 1901

- [Alabama Statehood and Its State Constitution History](#) by Jeremy Ward, Development Officer, American Village Citizenship Trust

23 – Maine – March 15, 1820

Known as “The Pine Tree State,” Maine is the twenty-third to enter the Union, doing so by ratifying the U.S. Constitution on March 15, 1820. The current Maine State Constitution in use was adopted in 1820

- [A Fire Bell in the Night: The Story of Maine Statehood \(Part 1\)](#) by Jeff Hollingsworth, Director of Foundation Relations, The Fund for American Studies
- [A Fire Bell in the Night: The Story of Maine Statehood \(Part 2\)](#) by Jeff Hollingsworth, Director of Foundation Relations, The Fund for American Studies

24 – Missouri – August 10, 1821

“The Show-Me State” of Missouri ratified the U.S. Constitution August 10, 1821 making it the twenty-fourth state to join the United States. The Missouri State Constitution currently in use was adopted in 1945

- [Missouri Statehood and the First Sirens of Civil War](#) by Samuel Postell, Ph.D. Student, University of Dallas; former Literature Teacher

Founders’ Vision for Keeping the States Strong, United, and Free – Thomas Jefferson's 1798 Nullification in the Kentucky Resolution, how it contributed to John Calhoun's 1830s Nullification, acts showing how each state has a duty and right to question and determine if federal laws exceed constitutional limits on federal powers, obstructing state sovereignty

- [Founders’ Vision for Keeping the States Strong, United, and Free \(Part 1\)](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow
- [Founders' Vision for Keeping the States Strong, United, and Free \(Part 2\)](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow

25 – Arkansas – June 15, 1836

Twenty-Fifth of the growing United States to be added was Arkansas, known as “The Natural State.” The current Arkansas State Constitution in use today was adopted in 1874

- [Arkansas: A Brief History of Statehood](#) by The Honorable Tim Griffin, Lieutenant Governor, Arkansas

26 – Michigan – January 26, 1837

Michigan, known as “The Wolverine State,” was admitted to the United States January 26, 1837 making it the twenty-sixth to ratify the U.S. Constitution. The current Michigan State Constitution in use was adopted in 1963

- [Not Double Vision, Double Constitutions: Michigan History and Statehood \(Part 1\)](#) by The Honorable Michael Warren, Presiding Judge, General Civil/Criminal Division of the 6th Circuit Court, Oakland County, Michigan
- [Not Double Vision, Double Constitutions: Michigan History and Statehood \(Part 2\)](#) by The Honorable Michael Warren, Presiding Judge, General Civil/Criminal Division of the 6th Circuit Court, Oakland County, Michigan

27 – Florida – March 3, 1845

On March 3, 1845, Florida, “The Sunshine State,” ratified the U.S. Constitution admitting it to the Union as the twenty-seventh state. The adopted 1968 Michigan State Constitution is the version in use today

- [A Brief History of Florida and Its Constitutions](#) by Ben DiBiase, Director of Educational Resources, Florida Historical Society

28 – Texas – December 29, 1845

The “Lone Star State” of Texas ratified the U.S. Constitution on December 29, 1845 making it the twenty-eighth to enter the Union. The Texas State Constitution currently in use was adopted in 1876

- [Texas: A Unique History Which Impacted Its Constitutional Future](#) by Sam Houston, Playwright, Author, Actor, Public Speaker; Former Board Member, National Reining Horse Association; Star of "The Lion of Texas-An Evening with Sam Houston"; General Manager, Granbury Live Theater

29 – Iowa – December 28, 1846

The U.S. Constitution ratified by Iowa on December 28, 1846 admitted “The Hawkeye State” as the twenty-ninth to enter the Union. The 1857 Iowa State Constitution is the adopted version currently in use

- [The Path to Iowa Statehood](#) by Tom Morain, Director of Government Relations, and Former Professor of History, Graceland University; Past Administrator, The State Historical Society of Iowa; Author and Award-Winning Historian

30 – Wisconsin – May 29, 1848

Thirtieth to join the United States, Wisconsin, known as “The Badger State,” ratified the U.S. Constitution May 29, 1848. The Wisconsin State Constitution currently in use was adopted in 1848

- ["On Wisconsin!"](#) by Val Crofts, Social Studies Teacher, Wisconsin; Member, U.S. Semiquincentennial Commission

31 – California – September 9, 1850

Ratifying the U.S. Constitution September 9, 1850, California, known as “The Golden State,” was the thirty-first admitted to the United States. The California State Constitution adopted in 1879 is the version currently in use; the Mexican War and Compromise of 1850

- [California, September 9, 1850: Thirty-First Admitted to the United States \(Part 1\)](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow
- [California, September 9, 1850: Thirty-First Admitted to the United States \(Part 2\)](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow

32 – Minnesota – May 11, 1858

Minnesota ratified the U.S. Constitution May 11, 1858 making it the thirty-second to join the United States. The current Minnesota State Constitution in use today was adopted in 1857. Minnesota is known as “The North Star State.”

- [Divided by a River and a Convention: Minnesota's Constitutional Heritage](#) by Anthony Sanders, Senior Attorney, Institute for Justice

33 – Oregon – February 14, 1859

Joining the Union February 14, 1859 by ratifying the U.S. Constitution, Oregon became the thirty-third state. Currently in use is the Oregon State Constitution ratified in 1857, and adopted in 1859 once Oregon became a state

- [Oregon: Alis Volat Propriis "She Flies With Her Own Wings"](#) by Brad Bergford, Chief Executive Officer, Colorado Family Action and Colorado Family Action Foundation

Admission of States, and the Civil War (1861-1865)

34 – Kansas – January 29, 1861

“The Sunflower State,” as Kansas is known, ratified the U.S. Constitution January 29, 1861 as the thirty-fourth admitted to the United States. Prior to the start of the Civil War and eight states having just seceded, Kansas was admitted as a free state; Bleeding Kansas; The Kansas State Constitution currently in use was adopted in 1861

- [Bleeding Kansas and Four Constitutions](#) by Tony Williams, Author of five books including *Washington and Hamilton: The Alliance that Forged America*; Senior Teaching Fellow, Bill of Rights Institute; Constituting America Fellow

35 – West Virginia – June 20, 1863

Admitted June 20, 1863 by ratifying the U.S. Constitution, West Virginia became the thirty-fifth state. It is known as “The Mountain State” with the West Virginia State Constitution in current use adopted in 1872

- [The Constitutional Intrigue of West Virginia Statehood](#) by Gary Porter, Executive Director, Constitution Leadership Initiative
- [West Virginia: The Thirty-Fifth State](#) by Scot Faulkner, Served as Chief Administrative Officer, U.S. House of Representatives and as a Member of the Reagan White House Staff; Financial Adviser; President, Friends of Harpers Ferry National Historical Park

36 – Nevada – October 31, 1864

The thirty-sixth state admitted to the Union was Nevada, having ratified the U.S. Constitution October 31, 1864. “The Silver State,” as it is known, currently uses the Nevada State Constitution adopted in 1864

- [Lands Forming Nevada as America's Thirty-Sixth State at the Height of the Civil War](#) by Andrew Langer, President, Institute for Liberty; Host, The LangerCast, RELMNetwork.com; Constituting America Fellow

37 – Nebraska – March 1, 1867

March 1, 1867 ushered in the thirty-seventh state, Nebraska, to ratify the U.S. Constitution and join the United States. The Nebraska State Constitution in use today was adopted in 1875. Nebraska is known as “The Cornhusker State.”

- [Nebraska's State Constitution and One-Of-A-Kind Unicameral Legislature](#) by James D. Best, Author, *Tempest at Dawn*, a novel about the 1787 Constitutional Convention; and *Principled Action, Lessons from the Origins of the American Republic*

Bill of Rights, State and Local Government – How the Bill of Rights was aimed at the federal government because states had their own bills of rights; Barron v. Baltimore (1833) supports this until the Fourteenth Amendment, ratified in 1868

- [The Bill of Rights and the States](#) by Gary Porter, Executive Director, Constitution Leadership Initiative
- [Role of State and Local Government and the Bill of Rights](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow

38 – Colorado – August 1, 1876

Colorado, “The Centennial State,” ratified the U.S. Constitution August 1, 1876, making it the thirty-eighth state to enter the Union. The year 1876 also marks adoption of the Colorado State Constitution in use today

- [The Sovereignty of a Free and Radically Independent People: Colorado's Enduring Constitutional Heritage](#) by David Kopel, Research Director at the Independence Institute, and Adjunct Professor of Advanced Constitutional Law at Denver University, Sturm College of Law

39 – North Dakota – November 2, 1889

Ratifying the U.S. Constitution November 2, 1889, North Dakota was admitted to the Union as the thirty-ninth state. Known as “The Peace Garden State,” it uses the North Dakota State Constitution adopted in 1889

- [North Dakota: Constitution to Statehood](#) by Kimberly K. Porter, Professor of History, University of North Dakota; and Dr. Donna K. Pearson, Associate Dean of Student Services and Assessment, Professor, College of Education and Human Development, University of North Dakota

40 – South Dakota – November 2, 1889

The “Mount Rushmore State” of South Dakota, on the same day as its northern counterpart, ratified the U.S. Constitution November 2, 1889 making it the fortieth to enter the United States. Plus, in the same year of 1889, the South Dakota State Constitution in use today was adopted

- [South Dakota: Admission as a New State and Its 1889 Constitution](#) by Patrick Garry, Professor of Law, University of South Dakota

41 – Montana – November 8, 1889

Entering the Union as the forty-first state, Montana ratified the U.S. Constitution November 8, 1889 and is known as “The Treasure State.” The current Montana State Constitution in use was adopted in 1973

- [Big Sky Country of Montana: History and Statehood](#) by Brad Bergford, Chief Executive Officer, Colorado Family Action and Colorado Family Action Foundation

42 – Washington – November 11, 1889

Washington, known as “The Evergreen State,” became the forty-second to ratify the U.S. Constitution, admitted to the Union November 11, 1889. The Washington State Constitution was adopted in 1889 and is the version in use today

- [History of Washington State and Its Constitution](#) by Mary Salamon, Author, The Government and Its People; Former Publisher, Marysville Tulalip Life Magazine; Former Washington State Leader, Governors Prayer Team

Modern State and the Capacity for Political Liberty of Citizens to Participate in Civil Governance –Debate on ‘overseas empire’ and its implications for federalism as structured within the U.S. Constitution

- [The Frontier Closes: Foreign Policy and the Status of the States \(Part 1\)](#) by William Morrisey, William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War*; and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*
- [The Frontier Closes: Foreign Policy and the Status of the States \(Part 2\)](#) by William Morrisey, William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War*; and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*

43 – Idaho – July 3, 1890

Known as “The Gem State,” Idaho ratified the U.S. Constitution July 3, 1890 admitting the forty-third state to the Union. The Idaho State Constitution currently use today was adopted on the same day as the state’s admission to the Union, July 3, 1890

- [July 3, 1890: “We, the People of the State of Idaho”](#) by Gary Porter, Executive Director, Constitution Leadership Initiative

44 – Wyoming – July 10, 1890

July 10, 1890 marks the admission of Wyoming as the forty-fourth state to ratify the U.S. Constitution and join the United States. Known as “The Equality State,” it currently uses the Wyoming State Constitution adopted in 1889

- [Wyoming: First State to Grant Voting Rights to Women](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association

45 – Utah – January 4, 1896

Utah makes the forty-fifth state to ratify the U.S. Constitution, admitting it to the Union January 4, 1896. Utah became known as “The Beehive State” and currently uses the Utah State Constitution adopted in 1896

- [Utah: Unique Among States](#) by Brad Bergford, Chief Executive Officer, Colorado Family Action and Colorado Family Action Foundation

46 – Oklahoma – November 16, 1907

Forty-sixth to ratify the U.S. Constitution was “The Sooner State,” Oklahoma, thus admitting it to the United States. The Oklahoma State Constitution adopted in 1907 is the current version used today

- [Oklahoma, November 16, 1907: Forty-Sixth Admitted to the United States](#) by Wilfred M. McClay, G.T. & Libby Blankenship Chair in the History of Liberty; Director of the Center for the History of Liberty, The University of Oklahoma

47 – New Mexico – January 6, 1912

Admitted to the United States January 6, 1912, New Mexico became the forty-seventh state to ratify the U.S. Constitution. The New Mexico State Constitution used today is the version adopted on the same day as its statehood, January 6, 1912. New Mexico is known as “The Enchanted State.”

- [New Mexico Constitutional History](#) by The Honorable David L. Robbins, Education Commissioner, District 2, New Mexico

48 – Arizona – February 14, 1912

“The Grand Canyon State” of Arizona became the forty-eighth and last of the contiguous states to enter the Union, ratifying the U.S. Constitution February 14, 1912. The Arizona State Constitution in use today was adopted in 1912

- [Arizona: Born Angry](#) by Sean Beienburg, Assistant Professor, School of Civic & Economic Thought and Leadership; Project Director, Living Repository of the Arizona Constitution, Arizona State University

A Growing United States to World War I (1914-1918), the Great Depression and New Deal to the Gulf War (1990-1991)

49 – Alaska – January 3, 1959

Known as “The Last Frontier,” Alaska was the forty-ninth to ratify the U.S. Constitution and be admitted to the United States. The Alaska State Constitution currently in use was actually ratified in 1956 before Alaska entered the Union, and went into effect upon statehood January 3, 1959

- [Alaska: The Last Frontier](#) by Bethany L. Marcum, Executive Director, Alaska Policy Forum

50 – Hawaii – August 21, 1959

The last and fiftieth state to enter the Union, “The Aloha State” of Hawaii, ratified the U.S. Constitution August 21, 1959. The Hawaii State Constitution adopted in 1959 is the version in use today

- [The History of Hawaii: From Fire, Tears and Blood, A Tree of Liberty Blooms](#) by Danny de Gracia, News Contributor, Political Scientist, Novelist, Internationally Published Author

Territories of the United States – Major territories of the U.S. include American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands; history surrounding types of territories or commonwealths connected to the United States; how the Organic Act establishes a U.S. territory and its governance; purpose and difference between remaining a territory or obtaining statehood

- [Territories of the United States](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association

State Capitals and State Capitols – Importance of state capital cities and their respective state capitol buildings where legislatures meet; significances even in design and construction offering symbols of America’s history with separate places for the house, senate, governor and state judiciaries as reminders of the separation of powers in every level of government from federal to local as envisioned by America’s Founders and Constitution Framers

- [Capital Cities and Capitol Buildings: Seats of State Government Across America \(Part 1\)](#) by Greg Davidson, Executive Clerk to the Governor, Office of the Governor, Texas
- [Capital Cities and Capitol Buildings: Seats of State Government Across America \(Part 2\)](#) by Greg Davidson, Executive Clerk to the Governor, Office of the Governor, Texas

Washington, D.C. – February 21, 1871

While not a state in the Union, Washington, D.C. was founded July 16, 1790 and serves as the nation’s capital. The name is derived from America’s first president, George Washington, who selected the location. The federal district is named for Christopher Columbus, and officially the nation’s capital became the District of Columbia on February 21, 1871; the Twenty-Third Amendment to the United States Constitution provides D.C. ability to participate in the Electoral College

- [The Nation's Capital: The District of Columbia](#) by Peter Roff, Senior Fellow, Frontiers of Freedom; Former U.S. News and World Report Contributing Editor; Regular Commentator, One America News Network

Statewide Leadership and Representation

Form of Government – Purpose and impact of Article IV, Section 4 of the U.S. Constitution in that “The United States Shall guarantee to every state in the Union a Republican Form of Government” – How the republican (representative) styles such as Commission Form, County Administrator, Elected Executive, City-County Consolidation, Constitutional Row Offices or Home Rule Authority ensures power remains in the hands of each American, preventing a monarchy or aristocracy in each state and local government

- [The States and America's Republican Form of Government](#) by Gary Porter, Executive Director, Constitution Leadership Initiative
- [Founders' Purpose: America's State and Local Form of Government as Guaranteed by the U.S. Constitution](#) by Marc Clauson, Professor of History and Political Economy, and Professor in Honors, Cedarville University

Governor – Role and purpose of a state governor

- [The Unique Role of American State Governors](#) by Greg Davidson, Executive Clerk to the Governor, Office of the Governor, Texas

State Representatives and Their House Speakers, and State Senators – Purpose and functions of house and senate chambers on the state level of representation; how the senate (upper chamber) is smaller than a state house of representatives (lower chamber), yet each senator represents more people than the representatives; role of state house speakers versus the lieutenant governor as president of the senate on the state level.

- [Role of State Representatives and Their House Speakers, and State Senators](#) by Mary Salamon, Author, The Government and Its People; Former Publisher, Marysville Tulalip Life Magazine; Former Washington State Leader, Governors Prayer Team

State Legislatures – History and purpose of state legislatures, and in relation to Congress regarding legislative sessions

- [How State Legislatures Work in American Government \(Part 1\)](#) by James C. Clinger, Professor of Political Science; Director, Master of Public Administration Program, Department of Political Science and Sociology, Murray State University, Kentucky, and J. Drew Seib, Professor of American Politics and Research Methods at Murray State University, Kentucky.
- [How State Legislatures Work in American Government \(Part 2\)](#) by James C. Clinger, Professor of Political Science; Director, Master of Public Administration Program, Department of Political Science and Sociology, Murray State University, and J. Drew Seib, Professor of American Politics and Research Methods at Murray State University.

Secretary of State – Role and purpose for the secretary of state or commonwealth of the states; history, and as compared to the Secretary of State of the United States

- [Secretary of State: Role and Purpose on the State Level](#) by The Honorable John H. Merrill, Secretary of State, Alabama

Attorney General – Role and purpose for attorneys general of the states; history, and as compared to the Attorney General of the United States

- [The Role of the State Attorney General](#) by The Honorable Ken Paxton, Attorney General, Texas

County and City Leadership, and Representation

“All Politics is Local” – The view that “all politics is local” and why; purpose for the amount of local governments that exist such as counties, municipalities, towns and townships, special districts and school districts within the United States; effects of sparse versus dense geographic areas represented, urban versus rural for effective, constitutional representation

- ["All Politics is Local"](#) by Scot Faulkner, Served as Chief Administrative Officer, U.S. House of Representatives and as a Member of the Reagan White House Staff; Financial Adviser; President, Friends of Harpers Ferry National Historical Park

County Leadership – Elected and appointed county roles; purpose and impact of county boards, county executives, county managers, assessor, treasurer, supervisor, commissioners; history and development of counties and their governance, functions of the county seat; how some are airport hubs, for example, and maintain other significant functions different from city government; relationship to state level leadership for local management of statewide issues

- [Counties: Backbone of Local Government, Core of Our Civic Culture](#) by Scot Faulkner, Served as Chief Administrative Officer, U.S. House of Representatives and as a Member of the Reagan White House Staff; Financial Adviser; President, Friends of Harpers Ferry National Historical Park

City Leadership – Elected and appointed city roles; purpose of city council and impact of local city councils, city managers, administrators and other municipal, legislative bodies; role of a mayor, and significance in how states differ regarding the mayoral role as compared to other elected seats; how in some states a city mayor may carry significant power as compared to that of the governor; examples such as Mayors Robert Moses or Rudy Giuliani of New York City and how each, in his service, affected not only the city but the entire state

- [City Leadership: Two Case Studies](#) by J. Eric Wise, Partner, Gibson Dunn & Crutcher LLP in New York City

Home Rule or Dillon Rule? – Meaning, purpose and impact of “Home Rule” or “Dillon Rule” authority, how each works for local government in comparison to state; initiative and referendum, delegation and management to make and implement local policy decisions as made by voters and local leadership

- [Home Rule or Dillon Rule?](#) by Gary Porter, Executive Director, Constitution Leadership Initiative
- [Home Rule or Dillon Rule? Meaning and Purpose for Effective Local Government](#) by Marc Clauson, Professor of History and Political Economy, and Professor in Honors, Cedarville University

Judges: State, County and City Judiciary

Lower Courts – How local judiciary systems work; lower courts from state supreme to municipal that sit below the United States Supreme Court

- [Lower Courts: How Local Judiciary Systems Work](#) by Gary Porter, Executive Director, Constitution Leadership Initiative

State Supreme Courts – How state supreme courts work in relation to the United States Supreme Court; how America’s Founders intended the nation’s judiciary would serve as lower than, and not superior to, the legislative branch in order only to function as interpreter and not maker of law; Alexander Hamilton in Federalist 78, “The interpretation of the laws is the proper and peculiar province of the courts.”

- [State Supreme Courts](#) by Daniel A. Cotter, Adjunct Professor, The John Marshall Law School; Past President, The Chicago Bar Association
- [Role of State Courts and the American Judicial System \(Part 1\)](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow
- [Role of State Courts and the American Judicial System \(Part 2\)](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow

Judicial Finality and Effects on State and Local Government – Reconsidering Judicial Finality, an essay by Louis Fisher from his book on Reconsidering Judicial Finality and the Supreme Court, with an emphasis on state and local effects

- [Judicial Finality: Is There a Final Word on Constitutional Issues?](#) by Louis Fisher, Scholar in Residence, Constitution Project; Former Senior Specialist in Separation of Powers, Congressional Research Service and Specialist in Constitutional Law with the Law Library of Congress. Author, including the forthcoming, *Reconsidering Judicial Finality: Why the Supreme Court is Not the Last Word on the Constitution* (University Press of Kansas, spring of 2019)
- [Judicial Finality: Protecting Individual Rights](#) by Louis Fisher, Scholar in Residence, Constitution Project; Former Senior Specialist in Separation of Powers, Congressional Research Service and Specialist in Constitutional Law with the Law Library of Congress. Author, including the forthcoming, *Reconsidering Judicial Finality: Why the Supreme Court is Not the Last Word on the Constitution* (University Press of Kansas, spring of 2019)
- [Judicial Finality: Correcting Errors](#) by Louis Fisher, Scholar in Residence, Constitution Project; Former Senior Specialist in Separation of Powers, Congressional Research Service and Specialist in Constitutional Law with the Law Library of Congress. Author,

including the forthcoming, *Reconsidering Judicial Finality: Why the Supreme Court is Not the Last Word on the Constitution* (University Press of Kansas, spring of 2019)

Funding State and Local Government

Taxation and the States – Concerns that the Constitution did not explicitly restrain elected officials by specific limitations on the taxing power, then they will use the taxation power to extend the reach of federal government

- [Their Common Defense: Alliance Between the Sovereign States](#) by Gordon Lloyd, Professor of Public Policy, Pepperdine University; National Advisory Council, Walter and Leonore Annenberg Presidential Learning Center, Ronald Reagan Presidential Foundation; Co-author: *The Two Narratives of Political Economy*

Funding States and Cities: How Dollars Work – Connection to Congress regarding funding of states and municipalities; how taxes, which is how governments have money, work for the United States as a whole and individual states down to the most local levels; what and how from federal, to state, to county, to city gets funded

- [Funding States and Cities: How Dollars Work \(Part 1\)](#) by Nicholas Jacobs, Faculty Research Associate, School of Civic and Economic Thought and Leadership, Arizona State University; Assistant Project Director, Living Repository of the Arizona Constitution
- [Funding States and Cities: How Dollars Work \(Part 2\)](#) by Nicholas Jacobs, Faculty Research Associate, School of Civic and Economic Thought and Leadership, Arizona State University; Assistant Project Director, Living Repository of the Arizona Constitution

Funding States and Cities: The Arguments – Why America’s founders wanted limited government; what this means in relation to the ongoing arguments presented by America’s voters and their elected representatives for and against raising and lowering taxes

- [Funding States and Cities: The Arguments \(Part 1\)](#) by Nicholas Jacobs, Faculty Research Associate, School of Civic and Economic Thought and Leadership, Arizona State University; Assistant Project Director, Living Repository of the Arizona Constitution
- [Funding States and Cities: The Arguments \(Part 2\)](#) by Nicholas Jacobs, Faculty Research Associate, School of Civic and Economic Thought and Leadership, Arizona State University; Assistant Project Director, Living Repository of the Arizona Constitution

Elections: State, County and City

Apportionment – Population and how it works to affect development of not only congressional representation, but also city, county and state governing bodies, and districts

- [Apportionment, Voting and Representation](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow

- [Apportionment and State Constitutions](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow
- [Apportionment and State Judiciaries](#) by Joerg Knipprath, Professor of Law, Southwestern Law School; Constituting America Fellow

Down-Ballot – How local elections differ from statewide elections; role and importance of local elections though they tend to receive lower voter turnout

- [Down-Ballot Elections](#) by Scot Faulkner, Served as Chief Administrative Officer, U.S. House of Representatives and as a Member of the Reagan White House Staff; Financial Adviser; President, Friends of Harpers Ferry National Historical Park

Contemporary Issues in State and Local Government

Renewal of American Federalism –An essay on the roots of our nation's debt and dysfunction today

- [Renewal of American Federalism](#) by Michael Maibach, Managing Director and Board of Trustees, James Wilson Institute on Natural Rights and the American Founding

The Importance of "Clearing Title" to Public Lands – An aspect of protecting property rights and encouraging settlement of western lands

- [Clearing Title: How Simple Legal Acts Have Great Societal Consequences](#) by Andrew Langer, President, Institute for Liberty; Host, The LangerCast, RELMNetwork.com; Constituting America Fellow

The Federal Government's "Duty to Dispose" of Public Lands – When states became states, and the federal government's failure to make good on the agreement

Guest Essayist:

Andrew Langer, President, Institute for Liberty; Host, The LangerCast, RELMNetwork.com; Constituting America Fellow

Land and the States – How the massive ownership of federal lands in western states negatively impacts state and local governance

Guest Essayist:

Andrew Langer, President, Institute for Liberty; Host, The LangerCast, RELMNetwork.com; Constituting America Fellow

Would the United States Exist Without Borders? – Significance of borders between cities, counties, each state in the Union, and the entire United States

- [The Essential Nature of Borders in Ensuring Sovereignty](#) by Andrew Langer, President, Institute for Liberty; Host, The LangerCast, RELMNetwork.com; Constituting America Fellow

Civil Society and Local Government – Meaning, importance and how free and independent states of America maintain it; civil as related to citizens and their concerns; polite, courteous, well-mannered approach; consequences for failure in relation to solving political concerns and issues today

- [Civil Society and Local Government \(Part 1\)](#) by William Morrisey, William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War*; and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*
- [Civil Society and Local Government \(Part 2\)](#) by William Morrisey, William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War*; and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*

Right of the States to Oppose Tyranny – History and importance of the right to petition for a redress of grievances in American government as written in the United States Constitution, First Amendment, "and to petition the government for a redress of grievances"

- [Right of the States to Oppose Tyranny](#) by Jennie Jones, Assistant Professor, American Government and History, Weatherford College

Battle for Power Between Congress and the States – How to keep the Founders’ intentions for “we the people” who are in charge of their own governing

- [Battle for Power Between the National Government and the States](#) by J. Eric Wise, Partner, Gibson Dunn & Crutcher LLP in New York City

Conclusion

- [Conclusion: The States and the Union](#) by William Morrisey, William and Patricia LaMothe Chair in the United States Constitution, Hillsdale College; Constituting America Fellow; Author, *Self-Government, The American Theme: Presidents of the Founding Civil War*; and *The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government*

Introduction: Federalism – New Horizons For A Time-Honored Governing Principle – Guest Essayists: Lisa B. Nelson And Karla Jones

Federalism is an intrinsically American governing principle whose relevance has increased with the nation's geographical expansion. It sprang from our Founding Fathers' unwavering commitment to liberty and their sober conviction that without strong safeguards, power would inevitably migrate to the national government and inexorably erode the rights of the governed. With the goal of preserving freedom by preventing the consolidation of control in any one political structure, the Founders came together to draft the U.S. Constitution. Mindful and somewhat humbled by the failure of the Articles of Confederation, they understood that a central authority was necessary to provide for the common defense and general welfare – and most important of all – to protect the liberty for which they had fought so hard. However, they also recognized that giving the federal government unchecked power would likely lead to a tyranny not so very different than the one they had just overthrown.

The Founding Fathers also recognized that government closest to the people being governed was the most just and effective. Compared to the original 13 states, the country has become remarkably vast and diverse lending even greater credence to this ideal. Local authorities understand conditions in their states better than a federal agency that might be located three time zones away. State governments are nimble enough to implement good policies more rapidly than a federal bureaucracy, and it is easier to hold local law and policy makers accountable for poor decisions. As Alexander Hamilton explained in *Federalist no. 17*, "It is a known fact in human nature that its affections are commonly weak in proportion to the distance or diffusiveness of the object. Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State are apt to feel a stronger bias towards their local governments than towards the government of the Union."

And whether the Founders foresaw it or not, federalism created a fertile environment for policy innovation to flourish. The states have the freedom to craft solutions to problems unique to their locale without having to petition the federal government for permission to address an issue that might only have resonance in one part of the country. Federalism empowers states to develop policies that, if effective, can be shared to solve common problems. Damaging ideas can be discarded before being widely implemented. More than 130 years after the Founding Fathers drafted the U.S. Constitution, Justice Louis Brandeis in *New State Ice Co. v. Liebmann* observed that a "state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments ***without risk to the rest of the country.***" The freedom to innovate also serves as a crucial political safety valve for Americans who feel powerless in the face of federal dysfunction or a federal government that they believe fails to address their concerns. Federalism helped shape the nation we have become and continues to exert a strong influence on American society today.

For the Constitutional Framers, success in Philadelphia would require striking just the right balance of power between competing governing entities. Their solution was an ingenious design that gave the federal government the authority that it needed to unite the nation while devising a system of internal and external checks to diffuse power so that the national government would ultimately be subject to the will of the states and the people. Internal checks and balances were incorporated giving the three branches of the federal government the ability to check each other so that none of them could consolidate too much power. Then the Constitutional Framers established that the states would be co-equal and as such could act as an external check on the national government. This external check, referred to by Alexander Hamilton as the “double security” heralded the arrival of the “compound republic.” Their constitutional equality empowered and even compelled the states to rein in a federal government that overstepped its bounds.

America’s Founders envisioned the states as co-equal partners with the federal government and included constitutional provisions devised to undergird the states’ sovereignty and ensure that no state would be rendered powerless due to population or geographical size. Every state is represented in the U.S. Senate by two senators giving each an equal voice irrespective of population or geographical size. Before the adoption of the 17th Amendment which provided for direct election of U.S. Senators, they were selected by state legislatures underscoring the significance of state legislative bodies to the Constitutional Framers. The Founding Fathers also put the states on equal footing in proposing amendments to the newly-drafted Constitution. Either two-thirds of both houses of Congress or applications from two-thirds of the state legislatures is required to propose a constitutional amendment. Ratification authority over proposed amendments devolves to the states. The Constitution enumerates what governing responsibilities fall to the federal government and in which branch of government authority resides. And as if to ensure that there would be no misunderstanding that the states would serve as its partners, not its subjects, the Tenth Amendment explicitly states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people.” James Madison sums the concept up perfectly in *Federalist 45* – “The powers delegated to the Federal Government are few and defined. Those which are to remain in the state governments are numerous and indefinite.”

Almost from the beginning, federalism faced strains which intensified during the 20th and first years of the 21st century as it became associated with restrictions on the very liberties it was created to protect. This led progressives to abandon state sovereignty. During the same period, the United States’ focus turned increasingly global with more policies legitimately decided at the federal level. Further erosion occurred due to a decline in civic literacy resulting in many Americans mistaking federalism for its opposite – concentration of power in the national government – as well as to the states’ failure to heed Founding Father John Dickinson’s warning, “It will be their own faults, if the several states suffer the federal sovereignty to interfere in the things of their respective jurisdictions.” These are the factors that caused a great governing principle to gain a reputation for being a relic of a bygone era. The states started accepting laws, regulations and executive orders without challenging their constitutionality. The reward for the states’ obeisance was federal dollars coopting them in order to solidify their dependence on the federal government. Without protest, the states exchanged their co-equal status with the national government for one of subservience. It happened just as James Madison foresaw when he

observed, “There are more instances of abridgement of freedom of the people by gradual and silent encroachment of those in power than by violent and sudden usurpations.”

Federalism is experiencing a renaissance! This rebirth began quietly in the 1980s when then President Ronald Reagan issued Executive Order 12612 to restore the division of governmental responsibilities between national and state governments. The Order was ultimately rescinded by Clinton in the following decade. However, the conviction that federalism might hold the keys to address dysfunction in federal institutions continued to grow in popularity. Americans noticed the sharp contrast between state functionality and federal dysfunction and distrust of Washington, DC reached historically high levels. According to the Pew Research Center, only 18 percent of Americans trust the federal government to do what is right “just about always” (3%) or “most of the time” (15%).

Contributing to federalism’s resurgence is its “rediscovery” by Americans on the Left who view federalism as a tool to advance progressive policies – especially on environmental and immigration issues. State sovereignty is once again being recognized for what it is and always has been – a governing principle that transcends political affiliation and was endowed by the Founders to future Americans as a mechanism to preserve freedom.

Federalism is a founding and defining principle of my organization – the American Legislative Exchange Council (ALEC). ALEC is America’s largest, nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism, and state lawmaker members of ALEC have been leaders in pushing back against federal encroachment into matters better handled by the states. Several state legislatures have established Commissions on Federalism to evaluate and review any federal law that could potentially violate the state’s sovereignty. ALEC has adopted model policy to create such commissions as well as model policy that encourages the states to unite to evaluate examples of federal overreach. The model policy can be accessed [here](#). However, state lawmakers need education in federalism in order to recognize federal infringement of state sovereignty. To help solve this problem, ALEC has adopted model policy calling for the continuing education for state lawmakers in federalism. Because it is imperative that attorneys who represent separate and independent sovereign states and their subdivisions have a clear understanding of the jurisdiction and authority of the states as well as the fundamental principles of federalism, ALEC has adopted model policy calling for federalism education for public attorneys. These model policies can be accessed [here](#) and [here](#). Prioritizing the teaching of constitutional principles, including federalism, in schools would improve America’s civic literacy and engagement. Thomas Jefferson, recognizing the future need to protect the United States’ political heritage, prescribed a general education for all Americans, “to instruct the mass of our citizens in these their rights, interests, and duties, as men and citizens.” ALEC model policy to put Jefferson’s words into action can be accessed [here](#).

When understood and practiced, federalism gives rise to dynamic political activity. Regulatory reform, an excellent example of federalism in action, is entering a critical juncture at the federal and state level. Federalism plays a unique role in regulatory reform especially with technology, financial regulation, and affordable housing issue areas. The emphasis is placed on accountability, problem solving and economic theory to reduce risk and increase freedom rather

than compounding risk and imposing regressive effects on families and small businesses. While *Executive Order 13771 Reducing Regulation and Controlling Regulatory Costs* has reduced the rate of regulatory accumulation, progress is uneven across agencies. Regulatory reform legislation remains stalled in the Senate, and the policy focus in the U.S. House of Representatives is likely to shift to oversight activities to undermine efforts to reduce regulatory complexity with the introduction of legislation that emphasizes additive rulemaking.

There has been a growing trend for states to pursue some form of regulatory reform, and states with a few years of experience of regulatory review are near the end of picking the “low hanging fruit.” Those states are grappling with questions on how to make regulatory fixes permanent and how to improve complex and engrained regulatory programs more effectively.

Canada has much to share with the states on effective regulatory reform which is proceeding rapidly at the provincial level. There is a unique opportunity to inform the eight states and two provinces in the Great Lakes region about the effectiveness of a regulatory reform effort based on the British Columbia model and economic analysis and to demonstrate the benefits for economic development and trade with a regional analysis. If successful, this model can be replicated in other regions.

Although Article V of the U.S. Constitution describes pathways to propose amendments to the U.S. Constitution for both Congress *and* the states, only Congress has exercised this power. The Founding Fathers included an amendment process for the states anticipating a time when Congress might become the problem rather than a source of solutions to the country’s problems. When two-thirds of state legislatures submit applications to Congress, Congress is compelled to call a convention of states to consider and potentially propose a constitutional amendment. The convention has the same power that Congress does to introduce an amendment, and like a Congressionally-proposed amendment, one that results from a convention of states, would still require ratification by three-fourths of the states before being incorporated into the U.S. Constitution. Current applications address a wide array of topics, including a federal balanced budget amendment, Congressional term limits, campaign finance and regulatory reform, and some applications are open calls for a convention of states without a specific topic to be considered. Although none of the state-driven Article V initiatives have breached the 34-state threshold, some are closing in on this benchmark. Proposing amendments is a potent tool that states can use to rein in federal overreach. More information about the Article V process can be found [here](#).

We are entering an era of renewed appreciation for federalism. National priorities that were once seen as universally held are now characterized by partisan bickering, and while Congress is trapped in an endless loop of gridlock, our nation’s challenges, including our national debt, are quickly becoming existential threats. As distrust in the federal government grows and policies advanced in Washington, DC with little or no input from outside the Beltway fail, more and more Americans are looking to the states for solutions to their most intractable problems. People on both sides of the aisle are acknowledging the states’ potential for policy leadership and innovation, just as our Founding Fathers intended. However, in order to retain the power granted them in the Constitution, the states must steadfastly assert their authority. In a 1791 letter to former Virginia State Senator Archibald Stuart, Thomas Jefferson wrote, “It is important to

strengthen the State governments ... it must be done by the states themselves, erecting such barriers at the constitutional line as cannot be surmounted either by themselves or by the General Government.” It’s time for states to hold Jefferson’s “constitutional line” – the nation will be better for it.

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Tenth Amendment to the U.S. Constitution: Purpose for Limited Federal Powers, Meaning for State and Local Government – Guest Essayist: Patrick M. Garry

The Constitution establishes a dual governmental structure consisting of state and national governments. Although its purpose was to create a strong national government, the Constitution also sought to preserve the independent integrity of the states. This bifurcated system of power was codified in the Tenth Amendment, which divides sovereign power between those delegated to the federal government and those reserved to the states. The Tenth Amendment prohibits the national government from exercising undelegated powers that will infringe on the lawmaking autonomy of the states.

The framers believed that by protecting the pre-existing structure of state governments the Constitution could safely grant power to the national government, since the former would independently monitor the latter’s exercise of power. Similar to the way in which the colonial governments had mobilized opposition to oppressive acts by Parliament, the state governments would serve as vigilant watchdogs against abuses committed by the federal government.

The doctrine of federalism refers to the sharing of power between two different levels of government, each representing the same people. The founding generation was so committed to federalism that even a nationalist like Justice Marshall acknowledged in *McCulloch v. Maryland* that the national government was “one of enumerated powers” and could “exercise only the powers granted to it.” Indeed, federalism concerns were so important to the Founders that nearly all the arguments opposing the new constitution involved the threat to state sovereignty.

Although there is no single ‘federalism’ clause in the Constitution, the Tenth and Eleventh Amendments are often the focus of the Court’s federalism decisions. In the constitutional scheme, federalism provides an avenue for local self-determination, in addition to a vertical check on government oppression, with the states serving as a localized control on the centralized national government. Under the framers’ view of federalism, as expressed in the Tenth Amendment, the national government would exert supreme authority only within the limited scope of its enumerated powers; the states meanwhile would exercise the remainder of sovereign authority, subject to the restraint of interstate competition from other states.

Because the framers took for granted the sovereign powers of the states, the Constitution is somewhat one-sided in its references to governmental authority. It explicitly lists the powers of the federal government; but to the extent it defines state powers, it does so primarily through negative implication, by setting out the limited constraints on those powers. Furthermore, the Tenth Amendment, though not granting power to any governmental entity, recognizes that any and all powers not granted to the federal government have been reserved to the states.

During the nineteenth century and throughout the early twentieth, the Court adhered to a federalist vision, under which it often used the Tenth Amendment to limit federal power. But after 1937, the Court switched positions, adopting a nationalist model. In the wake of the New Deal, the expansion of federal powers increasingly eroded the Tenth Amendment protections, and the Court from 1937 to roughly the 1990s largely ignored the Tenth Amendment. During that time, only one federal law was held to violate the Tenth Amendment.

The year 1937 is seen as a transformational year in the Court's approach to the exertion of national power; in that year, President Roosevelt sent to Congress a bill that would authorize him to appoint one new Supreme Court justice for each sitting justice who had served ten years or more and had not retired within six months after his seventieth birthday. Under this 'court-packing' plan, the number of Supreme Court justices was to be raised to fifteen. Whether the Court was influenced by this bill and its likely passage cannot be known for sure; but shortly thereafter, the Court began upholding New Deal legislation of the kind that had previously been struck down. Initiating a new era of constitutional interpretation, the Supreme Court endorsed a permanent enlargement in the scope of federal power, at the expense of the states. Under this relaxed posture toward congressional power, the Court would later uphold a wide range of statutes over the next fifty years, including purely local incidents of loan sharking.

After almost sixty years of dormancy, federalism made a constitutional comeback in the 1990s. In its federalism revolution, the Rehnquist Court reinvigorated the doctrine of federalism and restored power to the states. Under the Court, there occurred a slow but steady trend towards curbing the power of the federal government and using the Tenth Amendment to safeguard the states from overreaching by the federal government.

This revival of federalism, one of the country's most basic constitutional arrangements, became the hallmark identity and achievement of the Rehnquist Court. And this federalism revolution, which fostered a new respect for the sovereignty of the states, also revived the Tenth Amendment as a limit on congressional power.

The Tenth Amendment continues to be a constitutional force and was instrumental in *National Federation of Independent Business v. Sebelius* (2012), the Supreme Court's noteworthy decision on the Affordable Care Act preserving state autonomy.

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Federalism and the Tenth Amendment: The Buttress of Our Republic – Guest Essayist: Andrew Langer

“Federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” - Justice Sandra Day O’Connor in *Coleman v. Thompson* (1991)

There is a beauty in our structure of governance—a structure as carefully engineered as a Greek temple or medieval cathedral, and likewise meant to stand for centuries. In our federalist system, the branches and levels of our government are separate yet intertwined, both opposing and relying on one another to create a system that is both strong and delicate.

But like those engineered structures of old, whose beauty and durability can be compromised by misunderstanding and neglect, the same holds true for the support beams undergirding our republic. A failure to appreciate their role, a misguided effort to subvert their role, and the whole structure, the whole republic collapses. Most importantly, undo the various institutions of federalism (either through affirmative effort or neglect), and the republic decays and ultimately dies.

The body of the Bill of Rights represents an enumeration of further constraints on federal power, starting with the phrase, “Congress shall make no law...”. Given that the Constitution itself is an accounting of the full measure of the federal government’s power—the entire breadth of that power, with nothing more left to speculation, the Founders wanted to ensure that people understood that there were further constraints within those powers granted—starting with very specific enumerated constraints and ending with two very broad declarations of the power of individuals and other levels of government: the 9th Amendment, which makes it clear that simply because some rights were discussed in the Bill of Rights that this does not mean that other rights exist (rights are innumerable. Governmental power is finite); and the 10th Amendment, which makes the broad, but essential, declaration that all that is not surrendered to the government is retained, and that individual rights are protected by the diffusion of power our federalist system operates under.

The Founders were skeptical of concentrated power—whether that power was concentrated in a central, federal government or concentrated in a particular branch of that government. Concentrated power, as history had taught them (and, for the Founders, we’re talking both classical and proximate history) was apt to be abused—tyrants from Caesar to King George V had taken root because power had been concentrated in some central body.

But as invariably happens, because what is past is prologue and those who fail to learn history are doomed to repeat it, over time these already-precariously balanced institutions become threatened by those who want to see them undone—those who care little for individual rights, but, because of their own parochial interests, wish to see the power of government increased and concentrated.

One of the surest ways to minimize government intrusion into individual rights is to make government bodies as accountable as possible and practicable—and this meant, to the Founders,

to leave as much of the day-to-day interaction between people and their government to be at a level closest to the people, with federal power constrained to dealing with issues of national defense and ensuring the free-flow of commerce between the states.

In fact, it was via this Commerce Clause power that the federal government began its expansion into spheres traditionally reserved to states and localities—with the predictably disastrous results. In 1935 and 1936, as the nation was grappling with the Great Depression, the Supreme Court issued two decisions invalidating key elements of President Franklin Delano Roosevelt's New Deal agenda as being violative of the Commerce Clause. Frustrated with the Supreme Court's adherence to basic principles of federalism, FDR then, essentially, threatened the Supreme Court with a "court packing" scheme in which he would appoint a new justice to balance any justice over the age of 70.

This would have enlarged the court to 15 members, and acquiescing to the president's pressure, the court began ruling in favor of the New Deal by using a new interpretation of the Commerce Clause that essentially left the government with limitless power, allowing legislators and government bureaucrats to use the most marginal of "interstate commerce" nexuses to justify the constitutionality of a law: things like a "glancing goose" theory to justify the federal regulations governing local wetlands (the idea being that a goose, flying from state to state, might "glance down" at a wetland and want to land, thus justifying federal control).

The effect is that citizens lose the ability to effectively hold government accountable and assert their rights, since it becomes difficult to "push back" against ever-expanding federal control. Whereas, when a county or state wants to regulate a wetland in someone's backyard, a property owner can go to a county council or to their state capitol to find a remedy. But if a citizen wants to push back against the US Environmental Protection Agency (or the US Army Corps of Engineers, which also regulates wetlands), it becomes nearly impossible—requiring legions of lawyers with federal expertise, a limitless bank account, and the patience of a saint.

But most-important, instances like this are illustrative of the interest the founders had in limiting federal government power because of the implications to individual rights. In this instance, we're talking about the right to hold and enjoy private property.

It took nearly sixty years for the Supreme Court to finally find limitations to the federal government's power under the Commerce Clause, and to re-assert the Tenth Amendment. From 1992 onward, the Supreme Court issued a series of decisions demonstrating the importance of federalism in the protection of individual rights (and the powers of states and local governments). Even the so-called "glancing goose" theory was finally rejected and the federal government's power to regulate "isolated" wetlands was struck down.

But other threats to federalism remain—and the nation must guard itself against those threats, especially those undertaken in the name of greater "democracy". We are not a "democracy"—federalism makes that manifest. Yet beyond the expansive interpretation of the Commerce Clause, other efforts have sought to undermine these republican institutions. The ratification of the 17th Amendment, which took power out of the hands of state legislators with regards to the appointment of senators to the United States Senate was an early example.

Done in the name of encouraging popular democracy, the 17th Amendment has had devastating results in terms of accountability. Senators are less accountable. Whereas before, they would have to report, regularly, to elected officials who served at a level closer to their constituents, now these senators are only accountable once every six years when they stand for election.

Despite this undermining of federalism, there are those who want to see this eroded even more! Efforts to change the *apportionment* of the Senate so that it more-closely resembles the U.S. House of Representatives would completely undo the very protections to individual rights envisioned by having two different houses of Congress in which membership is determined in different ways. The founders did not want the most-populous states to be able to dictate policy to the least-populous states (not without great protections for the citizens of those states).

Worst of all, efforts to undermine the Electoral College would essentially bring the republic to an end as we know it. The Electoral College exists as a testament to these federalist principles – acting as a check against democratic impulses that can turn a civil society into mob rule. The values and interests of rural and agrarian Americans differ greatly from the values and interests of Americans who live in cities. This has been true since before the American founding and it remains true to this day.

This is why the founders created the Electoral College as the best system for electing a President—to balance the interests between these rural and urban Americans and ensure that a President cannot be elected from the most-populated states with a view towards holding the rights of rural Americans to a second-class status.

Whether it is an effort to remove the Electoral College via amending the Constitution or side-stepping the Constitution's precepts through interstate compact, the end-result is the same: the collapse of our federalist system, and another affront to the protections of the 10th Amendment.

Our founders created a structure of government that is both delicate and complex. But that delicate complexity, like the construction of monuments of old, has a strength that can stand the test of time. We have to guard ourselves against the destruction of that system—whether through willful subversion or ignorant neglect.

Regardless, in the end, the result is the same.

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Tenth Amendment to the United States Constitution: A Firm and Clear Boundary Between the States and the Congress – Guest Essayist: Joerg Knipprath

A recurrent theme during the debates in 1787 and 1788 over adoption of the Constitution was the structural incompatibility of “confederation” with “consolidation.” The latter was the feared absorption of the states into a unitary general government, so that they ceased to be sovereign members of a “union.” As counties or districts were consolidated within a state, so states would be in the United States.

The Articles of Confederation had guarded against that. In addition to laying out a number of substantive powers and the detailed means by which those powers were to be exercised, they carefully delineated the boundary between the states and the Congress: “Each state retains its sovereignty..., and every Power [sic]..., which is not by this confederation expressly delegated to the United States, in Congress assembled.” Moreover, under the Articles, Congress acted as a true “federal head” on the corpus of the states. Not only did the states have equal voting rights, but Congress acted on the states, not on the citizens directly. The last was the constitutional role of the state legislatures. Thus, under Article VIII of the Confederation, all charges assessed by Congress were to be paid by the states in prescribed proportion, and the “taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states”

By contrast, the new Constitution allowed Congress to bypass the state legislatures and act directly on the people through the powers laid out in Article I, Section 8, including the power to control its own sources of revenue by taxation. More ominously, clause 18 of that section gave Congress the power to make all laws “necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.” If that were not enough, Article VI of that document declared that, among other types of law, the statutes of Congress would be the supreme law of the land, and thereby override any state laws that Congress might deem contrary to the exercise of its own powers.

Both the “sweeping” or “elastic” clause (the aforementioned “necessary and proper clause”) and the “supremacy clause” drew the alarm of the Constitution’s opponents. Jefferson, writing to Senator Edward Livingston in 1800, illustrated their concerns, which had not disappeared with the document’s adoption. Congress had recently chartered a mining company. Jefferson sarcastically compared this action to a popular nursery rhyme: “Congress are authorized to defend the nation. Ships are necessary for defense; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at ‘This is the House that Jack Built’?”

Even the preamble of the Constitution drew criticism. In passionate speeches to the Virginia ratifying convention in June, 1788, Patrick Henry drew a stark distinction: Had the preamble spoken of “we [sic] the States,” it would have been a confederation. Rather, it spoke of “*We, the people*,” instead of the States of America,” a clear designation of a consolidated government.

Henry saw that type of government as a grave threat to basic liberty. He specifically cited the “relinquishment of the trial by jury, and the liberty of the press” as well as threats to the states’ maintenance of their militias.

Attacking from another direction, he denounced Congress’s new power to tax the people directly, another feature of consolidated government, which replaced the Confederation’s system of assessments collected by the states for the federal head. In colorful language, he described the pathology of the new system: “In this scheme of energetic Government, the people will find two sets of tax-gatherers--the State and the Federal Sheriffs....The Federal Sheriff may...ruin you with impunity....Have you any sufficient decided means of preventing him from sucking your blood by speculations, commissions, and fees? Thus thousands of your people will be most shamefully robbed: Our State Sheriffs, those unfeeling blood-suckers, have, under the watchful eye of our Legislature, committed the most horrid and barbarous ravages on our peopleIf Sheriffs thus immediately under the eye of our State Legislature and Judiciary, have dared to commit these outrages, what would they not have done if their masters had been at Philadelphia or New York?”

Henry charged, the defenders of the Constitution also were mistaken when they asserted that the federal and state governments would exercise their respective powers as in a “parallel line,” with each confined to its proper objects. Rather, there was no clear line drawn generally in the Constitution between the two levels of government. Even when a specific line was drawn, no mechanism existed to prevent one sovereignty from encroaching on the other. Inevitably, Henry argued, the more powerful general government must necessarily subvert the state governments. Hence, the “necessity of a Bill of Rights appear [sic] to me to be greater in this Government, than ever it was in any Government before.” Indeed, Henry rhetorically preferred the English structure, with its Bill of Rights to limit the King, to the proposed American Constitution that lacked such a document.

The structure of checks and balances among the branches of government and the split sovereignty of the Constitution’s version of federalism were, as Madison and other supporters had insisted, the bulwark to constrain the general government and to protect the people’s rights against arbitrary power. Henry represented the views of many in the various state conventions and, indeed, in the Philadelphia drafting convention, that their plasticity and permeability made such political measures insufficient. Henry’s fellow-Virginian, George Mason, instrumental in forming the Constitution in Philadelphia, left that convention before the final vote, due to that body’s refusal to include a bill of rights. Several other delegates departed for similar reasons. These critics insisted that a firm and clear enumeration of limits on the general government was needed, just as Virginia and some other states had in their own constitutions.

The objections voiced by Henry and others in the several state conventions, caused many of those bodies to submit lists of proposed amendments to the Constitution along with their votes to approve the charter itself. Consistently, these proposals sought to establish a clear line between the two sovereignties’ legislative powers. However, a nuanced, but substantively essential, difference in the language emerged between submissions from states that approved the Constitution early, contrasted with actions by later conventions. Between December 12, 1787, and June 21, 1788, the proposals from Pennsylvania, Massachusetts, Maryland, South Carolina,

and New Hampshire, all contained variations on the following language: “That it be explicitly declared that all Powers not *expressly* delegated by the aforesaid Constitution are reserved to the several states to be by them exercised.” [Emphasis added.] (Massachusetts). That formulation approximated that in the Articles of Confederation. Thereafter, the three states that sent such proposals framed them without the word “expressly.”

The verbal difference illustrated a shift in the federal nature of the two sovereignties and was clearly understood. This shift was reflected in Madison’s language in what became the Tenth Amendment. His initial proposal in the First Congress read, “The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively.” When an amendment to this language was proposed on the floor of the House to insert “expressly” [delegated], Madison referred to the extensive debate in the Virginia convention. There, he had opposed such an addition as inconsistent with the structural change in the respective constitutional positions of the states and the general government in the new Constitution. He saw the proposed change to his draft as returning the government to the Articles of Confederation. Madison prevailed; the eventual Tenth Amendment did not include this critical adverb. Years later, in *McCulloch v. Maryland*, Chief Justice Marshall used this textual difference between the two charters to demonstrate the shift in sovereignty and to sustain his broad reading of the general government’s legislative powers.

Still, it would be historically incorrect to say that the principal objective of the Bill of Rights was to protect the states’ power to legislate. Rather, as reflected in the first eight amendments, the objective was to protect expressly the rights of the people from intrusion by the general government into their liberty. Even Henry spent considerable oratory emphasizing the threat the general government posed directly to the rights of the people. If it was necessary for the people’s liberty to have clear limitations against the state government in the Virginia constitution, how much more were they required against the general government?

The Bill of Rights only applied to the general government, not the states, as the Supreme Court affirmed in 1833, in *Barron v. City of Baltimore*. Protection of state authority to legislate was, to be sure, an incidental aspect of the project. For example, the First Amendment’s Establishment Clause sheltered the continued existence of established state churches. As well, the Second Amendment protected the states’ ability to sustain a militia in the event the federal government used its powers to frustrate the formal state governments’ control over that body. But that amendment did so by recognizing the right of the *people*, individually, to keep and bear arms, and to organize themselves into militias outside the corporate state governments, if needed.

Moreover, to the extent that the Bill of Rights protected the states’ legislative powers, this was not an unalloyed blessing for individuals. For example, Thomas Jefferson and other Republicans of the time denounced John Adams and the Federalist Party for passage of the Sedition Act of 1798. They claimed the statute violated the First Amendment and exceeded Congress’s legislative powers. At the same time, Jefferson encouraged his political allies in states that controlled to prosecute Federalist editors under state anti-sedition laws. It was not until the Supreme Court in the 20th century began to incorporate Bill of Rights protections into the due process clause of the Fourteenth Amendment and apply them to the states, that states were prevented from curtailing individual rights beyond what the federal government could do.

Unfortunately, the fears of Henry and other skeptics about the reach of federal power and the erosion of state sovereignty have come true. From a constitutional perspective, the Tenth Amendment is a shadow of what it represented at the time of the ratification debates. If Congress acts directly on individuals under the broad reach of the commerce power, the Tenth Amendment is no real barrier. Only if Congress, instead of legislating directly, seeks to “commandeer” the states into adopting federal policies or administering federal laws is there a violation of the states’ residual sovereignty. Even that obstacle is easily evaded, if Congress attaches the states’ compliance with prescribed federal policies as a condition of receiving federal funds. Yet, as the American people have come to experience, states and localities still legislate vigorously, much more than during the Republic’s early years despite the erosion of their constitutional sovereignty. However, their ability to do so is primarily a function of practicality. It is simply too inefficient to have most local matters administered by federal officers and bureaucrats.

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Relation of the Federal Government to the State Governments: What Does Publius Say? – Guest Essayist: Will Morrisey

Having founded republican regimes in America, regimes animated by respect for the laws of Nature and of Nature’s God as enunciated in their Declaration of Independence from the British monarchy, the Founders remained vexed at the confederal form of the American *state*—the relations among the several states in the confederation and the relationship between the weak federal government and those states, relationships framed in the Articles of Confederation. True to its title, *The Federalist* centrally addresses this question—literally so. James Madison, scribe of the Constitutional Convention and one of the principal designers of the new Constitution itself, wrote the forty-third or central number of the collection, as well as the six preceding essays and the fifteen subsequent. The core of the book belongs to him, and his topic throughout the series is the character of American federalism as the Constitution would now constitute it.

Madison begins by identifying the need to balance government energy with stability, both in defense of liberty—a natural right—and “the republican form”—the regime which emanates from that right. Liberty and the regime of liberty require energy for self-defense and for execution of the laws enacted by the regime; liberty and republicanism also require stability in order establish the “national character” and to fortify the confidence of the people in their new regime. “The task of marking the proper line of partition between the authority of the general and

that of the State governments” proved arduous, given the rightful jealousy of the citizens of each state as they guarded their right and power to govern themselves, a jealousy that nonetheless needed to be balanced by considerations of public safety and economic prosperity, threatened by factionalism within and among the states under the Articles of Confederation. Natural rights are one thing, but they can never be secured without due consideration of “the infirmities and depravities of the human character,” evils that undermine popular governments no less than monarchies and oligarchies.

Madison assures his readers that the form of the “general” or federal government remains “strictly republican.” “No other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom to rest all our political experiments on the capacity of mankind for self-government.” Such a government will derive “all its powers directly or indirectly from the great body of the people” and not “from an inconsiderable proportion or a favored class of it.” Each of the three branches of the newly-designed federal government does indeed meet that criterion; they all pass the ‘regime’ test.

But what about the ‘state’ test? Does the federal government possess the needed energy, the requisite power, truly to govern? Without a strong federal union, America will become another Europe, full of small and medium-sized states armed against one another, their liberties “crushed between standing armies and perpetual taxes,” their prosperity shackled by high tariff walls. At the same time, does its structure limit but also focus that energy in a way that does not consolidate the states into one amorphous mass, compromising the rights of citizens to govern their own lives as they really live them—in towns and counties within states? Self-governing citizens must never be reduced to spectators, gazing at the actions of ‘statesmen’ far above and beyond their control.

After reaffirming, in the central, forty-third *Federalist*, “the great principle of self preservation” and “the transcendent law of nature and of nature’s God, which declares that the safety and happiness of society are the objects at which all political institutions aim,” Madison turns to the restrictions of the authorities of the American states enunciated in the new Constitution—restrictions imposed precisely because those states had failed adequately to secure the natural rights identified in the Declaration of Independence and vindicated in the war for independence and the revolution the war advanced. Among other things, the states shall not enter into treaties, coin money, impair the obligation of contracts, or grant the titles of nobility (changing themselves into aristocracies). But would these restrictions weaken the states too much. Of particular concern to critics were the Constitution’s clauses granting the federal government the power “to make all laws which shall be necessary and proper for carrying into execution” its enumerated powers to set foreign and domestic policies for the American government as a whole, and the designation of the laws enacted by those powers as “the supreme law of the land.”

There is no way of defining one’s way out of that concern. What are “necessary and proper” laws? And if the “supreme law of the land” isn’t lodged in the general government, where would it be lodged, if not in the states, which had misused their supremacy? In *Federalist* 45, Madison writes, “Were the plan of the [Constitutional] convention adverse to the public happiness, my voice would be, Reject the plan. Were the Union itself inconsistent with the public happiness, it

would be, Abolish the Union. In like manner, as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.”

Madison then shows how the Framers solved the problem. Although the States were indeed stripped of their *sovereign* powers—treaty-making, coinage, regime change, and so on—unlike the general government they would form “constituent and essential parts” of that government. By establishing the Electoral College, the Framers required state-by-state election of presidents; each voting district for House of Representatives remained entirely within the boundaries of a state, with no interstate districts; and the United States senators would be elected by state legislatures, with each state sending two senators, regardless of its size.

Further, the administrative or bureaucratic side of government would favor the states. There would be far more state employees than federal employees. This remains true even to this day, with the vastly expanded federal bureaucracy now in place, although of course it is much less true than it was in the first 150 years of American constitutional government. The causes of *that* shift of power have everything to do with the partial abandonment of our constitutional scruples, beginning in the twentieth century, rather than to the Constitution itself.

Fundamentally, “the powers delegated by the proposed Constitution to the federal government are few and defined,” whereas “those which are to remain in the State governments are numerous and indefinite.” Moreover, the federal government’s powers largely concern external matters; the day-to-day concerns of most citizens—their “lives, liberties, and properties”—will continue to find redress from the local, county, and state governments.

As Madison tough-mindedly remarks in a subsequent paper, the new Constitution puts the states to the test. *If* the sovereign American people “should in future become more partial to the federal than to the State governments, the change can only result from such manifest and irresistible proofs of a better administration as will overcome all their antecedent propensities.” The stronger federal government set down in the new Constitution will inaugurate a kind of competition in good government, breaking the states’ monopolies.

In all this, as Madison writes in the forty-ninth *Federalist*, the Framers have structured the new federal government and the American system of governments overall in such a way as to secure natural rights while minimizing the infirmities and depravities of the human nature all persons share. Not the passions but the reason of the American public should “sit in judgment” of the government: “It is the reason, alone, of the public, that ought to control and regulate the government. The passions ought to be controlled and regulated by the government.” “As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form,” and so does federalism, rightly understood. If such were not the case, “the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.”

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American Revolution and Expanding the States – Guest Essayist: Craig Bruce Smith

American Revolution and Expanding the States – How the American Revolution and nationhood voided the Proclamation Line of 1763, allowing expansion for American settlement of the Western frontier

In 1763, with “the scratch of a pen,” North America had changed forever.^[1] After years of looming as an ever-present danger, the French threat had finally been removed from Canada and the lands east of the Mississippi. The territory had been hard won as a result of the 1763 Treaty of Paris that formally ended the French and Indian War waged on the British colonies’ western frontier since 1754. “That Enemy who hath so long stuck like a Thorn in the Sides of our Colonies is removed,” wrote Massachusetts governor Francis Bernard; now “North-America” was “[e]ntirely British.”^[2] Native American unrest followed. That same year, the newly crowned King George III, fearful of further rebellion and citing it as “essential to our Interest,” stopped western expansion with a theoretical line on a map that ran through the Appalachian Mountains (which run from modern day Canada to Alabama).^[3] The Proclamation of 1763, as it was known, barred Americans from collecting their promised spoils of war, and unknowingly became one of the American Revolution’s earliest causes.

The French and Indian War had been fought globally, but had been ignited in America over disputed lands just west of the Appalachians that the British, French, and Natives each believed to be rightfully their territory. At the center of the outbreak was a twenty-two-year-old Lt. Col. George Washington of the Virginia Militia, whose expedition and skirmish in the area around modern-day Pittsburgh had in part sparked the conflict. Washington was one of many American colonists who would fight for King and Country, but who also hoped to reap the lucrative gains of the frontier.

Peace was supposed to place the land into the waiting hands of American colonists. But as speculators laid claim to millions of acres and settlers migrated to reap the benefits of the rich farmlands of the Ohio Valley, it sparked a rebellion of unified Native American tribes.^[4] Known as Pontiac’s Rebellion, the conflagration was ultimately suppressed at great British expense and effort. Hoping to stop an unrestrained colonial rush into the west in order to prevent further Native hostility (and both to retain control over the colonies and trade and to promote settlement in Quebec and Florida), the Proclamation halted American migration and “reserve[d]” the land “under” the King’s “Sovereignty, Protection, and Dominion, for the use of the said Indians.”^[5]

Although the Proclamation was virtually unenforceable and was deemed temporary, the royal decree still triggered a sharp backlash and even outward violence from colonists who had invested in western lands, sought to settle, or been denied their promised rewards for military

service. From the Mississippi Land Company to the Ohio Company, potential fortunes had been stifled, as land could not formally change hands from the Natives without royal approval and licensing.

Still, colonial resistance to the Proclamation of 1763 went beyond personal economic interests. It was one of the first of many British failings that colonists saw as distancing them from the mother country. The British Army, which was supposed to defend all subjects yet was historically viewed with deep fear by Anglo-Americans, was potentially weaponized to avenge the King's "Displeasure."^[6] Colonists were limited in their movement, their property rights were hindered, and more substantially promises offered by the Crown had been invalidated. Furthermore, it seemingly protected Native Americans' interests over the American colonists'. It created "two distinct worlds" whereby any claims to being a subject disappeared west of the line and the military held authority.^[7] Colonists, like Washington, pressed their western claims up to and beyond the Revolution's outbreak. As he complained, regardless of whether the Proclamation was "founded in good, or ill policy," a promise of land grants had been made to French and Indian War veterans — one that was "to all Intents & purposes considered, as a mutual contract."^[8]

Although the Proclamation wasn't actively enforced and with the line pushed further west due to the Treaties of Fort Stanwix and Hard Labor in 1768 and the Treaty of Lochaber in 1770 (prompting further speculation), the Second Continental Congress meeting in Philadelphia in 1776 still considered the issue as worthy of inclusion in the Declaration of Independence. For, in the Patriot view, the King "endeavoured to prevent the population of these States," and "refus[ed]...to encourage their migrations hither, and raising the conditions of new Appropriations of Lands."^[9] In doing so, the Congress acknowledged the Proclamation as being more than just a financial issue; it was a long remembered ideological and governmental grievance.

Twenty years after the 1763 Treaty of Paris opened the frontier to American colonists, the 1783 Treaty of Paris both ended the Revolution and ceded all lands east of the Mississippi River to the United States. Under the Articles of Confederation there was further delay in western expansion by design and conflict over territorial claims between various states.^[10] It was under the new U.S. Constitution that additional disputes were resolved, existing state borders formalized and expanded westward, and the remaining lands organized into the Northwest and Southwest Territories, with statehood dependent upon population.^[11] Furthermore, Secretary of War Henry Knox attempted to spread American "civilization" to the Native Americans, as he believed it would "most probably be attended with the salutary effect of attaching them to the Interest of the United States."^[12] In 1792, Kentucky entered the United States as the fifteenth state and first in the region formerly barred by the Proclamation of 1763 (Tennessee and Ohio would follow shortly). Although the paper barrier had fallen, tension with the British (as well as the Spanish) and Natives remained, as the land, its culture, and its borders were contested through the War of 1812. Meanwhile, the issue of the expansion or restriction of slavery in the new states simmered for over half a century, before erupting in the Civil War.

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[1] Colin G. Calloway. *The Scratch of a Pen: 1763 and the Transformation of North America*. (Oxford, England: Oxford University Press, 2006), p. 14-15.

[2] Ibid.

[3] The Royal Proclamation, Oct. 7, 1763. http://avalon.law.yale.edu/18th_century/proc1763.asp

[4] For economic motivation see: Woody Holton. *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia*. (Chapel Hill: University of North Carolina Press, 1999).

[5] The Royal Proclamation, Oct. 7, 1763. http://avalon.law.yale.edu/18th_century/proc1763.asp; Jennifer Monroe McCutchen. "Proclamation Line of 1763," *Digital Encyclopedia of George Washington*. <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/proclamation-line-of-1763/>; Fred Anderson. *Crucible of War: The Seven Years' War and the Fate of Empire in British North America, 1754-1766*. (New York: Vintage, 2000), p. 580.

[6] Ibid; Calloway. *The Scratch of a Pen*, p. 92-93.

[7] Patrick Griffin. *American Leviathan: Empire, Nation, and the Revolutionary Frontier*. (New York: Hill & Wang, 2007), p. 21; Alan Taylor. *American Revolutions*. (New York: W.W. Norton and Company, 2016), p. 61; Brendan McConville. *The King's Three Faces: The Rise & Fall of Royal America, 1688-1776*. (Chapel Hill: Omohundro, 2006), p. 235.

[8] George Washington to Lord Botetourt, 8 Dec. 1769. *Founders Online*. <https://founders.archives.gov/documents/Washington/02-08-02-0188>

[9] The Declaration of Independence. 4 Jul. 1776, <https://www.archives.gov/founding-docs/declaration-transcript>

[10] Benjamin Harrison to Virginia Delegates, 19 September 1783, footnote 3. <https://founders.archives.gov/?q=%22proclamation%20of%201763%22&s=1111311111&sa=&r=65&sr=>

[11] US Constitution, 1787, <https://www.ourdocuments.gov/doc.php?flash=false&doc=9&page=transcript>; Northwest Ordinance, 1787, <https://www.ourdocuments.gov/doc.php?flash=false&doc=8&page=transcript>;

Southwest Ordinance, 1790

https://constitution.org/uslaw/southwest_ordinance.pdf

[12] Henry Knox to George Washington. 7 July. 1789. *Founders Online*.
<https://founders.archives.gov/documents/Washington/05-03-02-0067>

Free, Independent, and Sovereign? – Guest Essayist: Will Morrisey

In declaring their independence from the British Empire, “the Representatives of the united States of America” acted “in the Name, and by Authority of the good People of these Colonies.” The “United Colonies are, and of Right ought to be, Free and Independent States.” Plural, not singular. But also united: as one of Mr. Shakespeare’s characters says, there’s the rub. The American States are free and independent respecting Great Britain. But are they free and independent respecting one another? And if so, to what extent? “As Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do,” but may they do these things severally, without regard to each other, or only as a united body? What is the character of the American Union?

Notoriously, Abraham Lincoln and Jefferson Davis later would find themselves in disagreement over this matter. But in the generation between the founding and the Civil War, a slaveholding Southern democrat, and Democrat, delivered a cogent analysis of America’s constitutional Union, promising to enforce the terms of that Union as he understood them. No one doubted that he would; Andrew Jackson was not a man to be crossed.

In 1828, Congress enacted a tariff law, one so sharply resented that South Carolinians, led by John C. Calhoun, called it the “Tariff of Abominations.” Calhoun resigned from the vice presidency and entered the Senate to fight the tariff. By the early 1830s, South Carolina handed Jackson a serious constitutional crisis.

Jackson was far from an enemy of States’ rights. In his First Inaugural Address of March 1829 he had announced that “In such measures as I may be called on to pursue in regard to the rights of the separate States I hope to be animated by a proper respect for those sovereign members of our Union, taking care not to confound the power they have reserved to themselves with those they have granted to the Confederacy”—that is, the federal government. Nine months later, in his First Annual Message, he praised the Framers’ design, which consisted of a federal government with “limited and specific, not general, powers”; “it is our duty,” he continued, “to preserve for it the character intended by its framers.” “We are responsible to our country and to the glorious cause of self-government for the preservation of so great a good.” This being so, “the great mass of legislation relating to our internal affairs was intended to be left where the Federal Convention found it—in the State governments.” He warned Congress “against all encroachments upon the legitimate sphere of State sovereignty.”

Nullification of duly enacted federal laws was another matter, however. As early as the Jefferson Day Dinner in April 1830, Jackson fixed Calhoun with his formidable stare and toasted “Our Federal Union—it must be preserved.” The warning went unheeded; indeed, the nullification movement spread to other Southern states. On November 1, 1832, South Carolina solemnly

nullified the tariff law, threatening to secede from the Union if the federal government moved to enforce it. South Carolina, the state legislators intoned, “will forthwith proceed to organize a separate government and to do all other acts and things which sovereign and independent states may of right do”—thus echoing the language of the Declaration of Independence without noticing its underlying principle of unalienable natural rights.

In his Fourth Annual Message of December 1832, by which time he had been duly elected to a second term in office, Jackson reported that “in one quarter of the United States opposition to the revenue laws has arisen to a height which threatens to thwart their execution, if not to endanger the integrity of the Union.” He followed this a few days later with a proclamation refuting Southern pretensions. To claim a constitutional right to nullify federal laws as unconstitutional, “coupled with the uncontrolled right to decide what laws deserve that character, is to give the power of resisting all laws; for as by the theory there is no appeal, the reasons alleged by the State, good or bad, must prevail.” But the Constitution, the supreme law of the land, provides only two appeals from allegedly unconstitutional federal laws: judicial review and constitutional amendment. If the South Carolina doctrine “had been established at an earlier day, the Union would have been dissolved in its infancy.”

Jackson then reviewed the history of the American Union as defined and refined during the Founding period. The Union, he observed, predates not only the Constitution but the Declaration of Independence. In October 1774, the First Continental Congress met in Philadelphia in response to legislation enacted by the British parliament and king. After the Boston Tea Party, Britain aimed to punish Massachusetts by curtailing citizens’ rights—suspending the right to jury trials, among other measures. Calling these the “Intolerable Acts,” the delegates set down the Articles of Association, boycotting British imports (including slaves) and suspending American exports to England. To reinforce these proposals, Congress recommended sumptuary restrictions: no “shows, plays, and other expensive diversions and entertainments,” including horse races and cock fights. These curtailments of consumption would back the restrictions on trade. Congress further proposed the formation of local committees to expose violations of these policies—effectively enforcement by shaming. In Jackson’s words, “they agreed that they would collectively form one nation for the purpose of conducting some certain domestic concern and all foreign relations.”

The Articles of Association amounted to a treaty among the colonies, not a government. Two years later, the Declaration of Independence anticipated redefining the Union on governmental lines. Describing Americans as “one People,” the Signers announced that the United States were ready “to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them.” All independent peoples are entitled to such a “station” or status because “all Men are created equal”—“endowed by their Creator with certain unalienable Rights,” among which number “Life, Liberty, and the Pursuit of Happiness.” If a group of such equal persons consent to a government that does what governments rightly do—aiming to secure those rights—then they deserve diplomatic recognition from other peoples so organized. Conversely, governments that fail to secure those rights forfeit that consent. The long list of grievances against the British king and parliament that follows provides a sort of photographic negative of justly used governmental powers. These include the power of declaring war, settling peace, domestic legislation, and government by law with an independent judiciary.

The abuse of those powers by the British government rightly led to *disunion*; union, by implication, requires their proper use within the framework of the Laws of Nature and of Nature's God by the consent of the people.

After vindicating their claim of independence on the battlefield (Jackson had been one of the militiamen, at the age of thirteen), the Americans further defined the terms of their Union with their first constitution, the Articles of Confederation. In Jackson's words, the states thereby pledged to "abide by the determinations of Congress on all questions which by that Confederation should be submitted to them," with no state entitled to "legally annul a decision of the Congress or refuse to submit in its execution," although the Articles provided no means of enforcing this provision. Inasmuch as the 1787 Constitution formed "'a more perfect Union' than that of the Confederation," how could that law permit the Union to backslide beyond even the unenforceable Union enacted under the Articles?

"I consider, then, the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed." More, "this right to secede"—which Jackson clear-sightedly perceived as inherent in the assertion of the sovereign right to annul—"is deduced [by the nullifiers] from the nature of the Constitution, which, they say, is a compact between sovereign States who have preserved their whole sovereignty and therefore are subject to no superior." But Jackson correctly identifies the American people as the sovereigns, not the state or federal governments, and under the Constitution the executive is charged with enforcing federal law. "The Constitution of the United States... forms a *government*, not a league; and whether it be formed by compact between the States or in any other manner, its character is the same." That government "operates directly on the people individually, not upon the States," as it had under the Articles.

"It is the acknowledged attribute of free institutions that under them the empire of reason and law is substituted for the power of the sword." As argued in the Declaration of Independence (and earlier by John Locke and other natural-rights philosophers), it "needs not on the present occasion be denied" that "a State or any other great portion of the people, suffering under long and intolerable oppression and having tried all constitutional remedies without the hope of redress, may have a natural right, when their happiness can be no otherwise secured, and when they can do so without greater injury to others, to absolve themselves from their obligations to the Government and appeal to the last resort," namely, the force of arms. The right to revolution under such circumstances is a right not only of Americans but "a right of mankind." "It is not the right of the State, but of the individual, and of all the individuals in the State." "Like any other revolutionary act," secession "may be morally justified by the extremity of the oppression; but to call it a constitutional right is confounding the meaning of terms," inasmuch as "a compact is an agreement or binding obligation." If that compact "contains no sanction, it may be broken with no other consequence than moral guilt," as a league among independent nations might be broken; "a government, on the contrary, always as a sanction, express or implied, and in our case it is both necessarily implied and expressly given" in the provision made "for punishing acts which obstruct the due administration of its laws." The name for "an offense against *sovereignty*" is treason. Jackson charges that the nullifiers' "object is disunion.... Disunion by armed force is

treason,” and Jackson leaves no doubt that he will use his executive power as president of the United States to punish its perpetrators accordingly. Thus Jackson clearly defines popular sovereignty not as a principle justifying the political superiority of the States over the federal government (as nullifiers and secessionists did), nor as a principle justifying might-makes-right majority rule of a nation over the states (as Stephen Douglas would later do), but as an instrument justified only by its adherence to the standard of natural rights. The sovereign people have divided their sovereignty between the States and the general government; accordingly, States’ sovereignty and States’ rights are limited to those objects the united people did not assign to the federal government; the federal government, for its part, is limited to the powers enumerated by the Constitution and ratified by the people. “It is not for territory or state power that our Revolutionary fathers took up arms; it was for individual liberty and the right of self-government.”

In a letter to Congress in January 1833, Jackson warned that “If these measures can not be defeated and overcome by the power conferred by the Constitution on the Federal Government, the Constitution must be considered as incompetent to its own defense, the supremacy of the laws is at an end, and the rights and liberties of the citizens can no longer receive protection from the Government of the Union.” With no major source of revenue other than the tariff, the federal government itself would shrivel and collapse and the states would take over the rule of the people resident within them. Citing the Constitutional obligation of the Executive to “take care that the laws be faithfully executed,” Jackson signed the “Force Bill” on March 3, 1833, the day before his Second Inaugural Address. In the words of his most recent biographer, Bradley S. Birzer, he then “called up militias, ordered three divisions of artillery to South Carolina, gave General Winfield Scott command over Charleston Harbor, ordered the reinforcement of Charleston’s federal forts, and placed naval warships just offshore.” In the Address, he wrote that “The eye of all nations is fixed on our Republic. The event of the existing crisis will be decisive in the opinion of mankind of the practicability of our federal system of government.” Taking notice, South Carolina backed down.

By the time of his Farewell Address four years later, Jackson could assert with confidence, “Our Constitution is no longer a doubtful instrument, and at the end of nearly a half century we find that it has preserved unimpaired the liberties of the people, secured the rights of property, and that our country has improved and is flourishing beyond any former example in the history of nations.” He nonetheless warned, “We behold systematic efforts publicly made to sow the seed of discord between different parts of the United States and to place party divisions directly upon geographical distinctions; to excite the *South* against the *North* and the *North* against the *South*, and to force into controversy the most delicate and exciting topics—topics upon which it is impossible that a large portion of the Union can ever speak without strong emotion.” Jackson does not deny the wrong of slavery, only that the consequences of disunion would be worse, reintroducing the likelihood of international war to North America without liberating the slaves. Recalling the Farewell Address of his most distinguished predecessor, he asked, “Has the warning voice of Washington been forgotten, or have designs already been formed to sever the Union?”

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American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

Free and Independent: The States' Declaration and the Articles of Confederation – Guest Essayist: Jennie Jones

In thinking about what the Declaration of Independence meant for state powers, perhaps the better question is what powers didn't the states have upon their independence? Consider the very first line and note what is emphasized: "The unanimous Declaration of the thirteen united States of America." This is telling. Why use "unanimous" if all the states were considered one entity? Importantly, "united" is not emphasized. This also occurs in the last paragraph of the document with the reference to the "Representatives of the united States of America, in General Congress, Assembled..." "Nation" only appears once in the Declaration, and it refers to England, not America. Rather than "nation," the reference used twice is "Free and Independent States." Indeed, during this time and up until the Constitution was ratified, the United States was cast as a plural entity. So, if we were going to war with France, the wording would not be "the United States *is* going to war", but "the United States *are* going to war..."

The Declaration clearly calls for the independence of *thirteen new nations*, not one—"a baker's dozen of new nations," as Willmoore Kendall put it, thirteen free and independent states. What the Declaration meant for the powers of the states was that the states being free and independent, each state had the powers any nation is entitled to, but since God has given man ethical laws in nature and in His laws revealed in Scripture ("the laws of nature and of nature's God"), no nation and no state is entitled to powers which violate the laws of nature and of nature's God, nor are the people of any state justified in consenting to any powers that violate the laws of nature and of nature's God. The Declaration leaves the form of civil government chosen by the people or the representatives of the people of each state up to the representatives and the people of that state. Each must choose for itself a form of government and powers of government which are consistent with preserving the laws of nature and of nature's God, and thereby preserving the people's freedom. The people of each state are justified in framing their own particular constitution, civil government institutions, and laws so long as they do not violate the laws of nature and of nature's God.

The Declaration of Independence was both produced by the states and produced the states. The colonies' (then states') representatives in the Continental Congress produced it. It is a tremendously important but often misinterpreted document. There was not a government of the thirteen united States. The Continental Congresses did not have the authority to require the states to do anything; the respective states' legislatures had to decide whether to act on the recommendations of the Continental Congress. The Continental Congress was based upon the equality of all states, not upon the will of the majority of the people who live in all those states. There was no vote of the people of the States and no attempt to determine the majority will of the people who lived in those thirteen states. The Declaration was unanimous because the representatives of the people of each state agreed upon it, not because the majority, or all of the people, of all the states agreed to it.

Colonists started talking about independence in 1774, but no original powers of legislation were granted to the Congresses of 1774 and 1775. The government was temporary only; it was permitted only for a particular and temporary object, and the States could at any time recall any and every power which it had assumed. Nothing in the powers employed by the revolutionary government, as far as can be seen from its acts, is inconsistent with the sovereignty and independence of the States. Regarding external relations, Congress seemed to have exercised every power of a supreme government. They declared war; formed alliances and made treaties; contracted debts and issued bills of credit. These powers were not “exclusive” though. The colonies raised troops, commissioned vessels of war, and conducted military operations. In conducting the war Congress had no “exclusive” power, and the States retained, and asserted, their own sovereign right and power to do that. Congress exercised no power reducing the absolute sovereignty and independence of the States. Many powers entrusted exclusively to Congress could not be effectively exercised except by the aid of the State governments. The States raised troops required by Congress. Congress was allowed to issue bills of credit, but not make them a legal tender. Nor could it require the States to redeem them, nor raise by its own authority the necessary funds for the purpose. In these and other important functions, the “sovereignty” of the Federal Government was merely nominal; its efficiency was wholly due to the co-operation of the State governments. The relation between the colonies and their Congress did not change once independence was declared. The chief difference was that the relation was now between the States and their Congress.^[1]

Although the powers actually assumed and exercised by Congress were very great, they were not always allowed by the States. Thus, the power to lay an embargo was earnestly desired by Congress, but was denied by the States.^[2] The Continental Congress was not a central government of the newly independent States.

There was no central government until the Articles of Confederation in 1781—five years after the colonies issued the Declaration. Even under the Articles of Confederation, it was clear that the states were intended to have the vast majority of civil government power. Article II (of the Articles) clearly stated that “Each 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.”

Article III *established the United States as a league of states* that emphasized the right of each state to govern its own internal affairs. It was “a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare...” The purpose of the Confederation was clearly defensive. It was deliberately left for each state to determine for itself how to order its own internal affairs.

Article VI limited the powers of the central government. Centralized power is incompatible with federalism and a confederate form of government. The power must be spread out and limited.

Article VII authorized *state* control of military ranks. The federal army was to be a very small standing army, supplied by the *state* militias.

Article VIII. Each state's taxes were to be determined by the legislature of that state—not by the central government.

Article IX declared what the rights of the central government were. It meant that each state was a sovereign nation that had to be considered in forming any common governmental system for the peoples of the states to live under. The primary powers the central government had under the Articles were to declare war against foreign powers; establish standard weights and measures; mint coins and print currency; and serve as a mediator in all disputes between the states.

The Articles of Confederation was our first national constitution. The newly independent states created it because they recognized their weakness compared to European nations—and wanted to be able to defend themselves against attempts by other nations to conquer them. They made their first constitution a confederacy because they wanted to continue to rule their own internal affairs, but still be able to join with the other states to defend against foreign aggression—based on religion or any other causes.

Although it was not ratified until March 1781, it was given to Congress in November of 1777, and it was essentially the structure of government that the United States operated under all through the War of Independence. In 1779, the Continental Congress passed a resolution acknowledging the operating status of the Articles prior to its being fully ratified by the states in 1781.^[3]

The states declared their independence in order to be and remain independent, self-governing states. Their Declaration of Independence is neither our fundamental governing document nor the controlling authority for American civil government, law, and politics. It is simply our original states' declaration of their right to fight for their respective independence from England and of their equal status as free, independent nations. They created the Articles of Confederation to maintain their individual sovereignty, but to provide their united military power. When government under the Articles proved defective, many in the states sought to create a stronger central government; many others feared that the new central government would be too strong. The new governmental system that the colonies established under the Constitution was meant to retain the great majority of governmental power in the respective *states*, not to centralize power in the new, limited national government, nor to enable future officials in that government to centralize power. Those who advocated ratifying the finished Constitution insisted that the new central government did not and would not be a threat to the powers of the states.

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^[1] Abel P. Upshur, *The Federal Government: Its True Nature and Character; Being a Review of Judge [Joseph] Story's Commentaries on the Constitution of the United States* (New York: Van Evrie, Horton & Co., 1868), Reprinted by St. Thomas Press, Houston, Texas, 1977, p. 64-65

^[2] Upshur, p. 66

^[3] Dr. George Grant, Ph.D. Lit., *King's Meadow Humanities Curriculum: American Culture, Instructor's Guide* (Franklin, Tennessee: King's Meadow, 2011). p. 202, 293

Greatest Power: Each State's Obligation to Keep Its Creation of National Government in Check (Part 1)

History and experience tell us that creating a government is not as much of a challenge as maintaining a limited and defined one. The drafters of our Constitution took that mission to heart when they created our Constitutional Republic; they not only created a limited and defined government but gave the people the best means by which to check and balance that federal power.

James Madison, Father of the Constitution and fourth president of these united States addressed the Congress in 1792 and explained,

“I sir have always conceived—I believe those who proposed the Constitution conceived—it is still more fully known and more material to observe, that those who ratified the Constitution conceived—that this not an indefinite government...but a limited government tied down to the specific powers.”

When Americans speak of “checks and balances” they generally think of the internal checks of the Congress upon the Judiciary, or perhaps the Judiciary upon the Executive. However, the form of government created by those who ratified the Constitution contains a much more powerful external check, one that James Madison called “the greatest power on earth.” Understanding that most powerful check and balance requires an understanding of three foundational facts: 1. The creation of the States, 2. The creation of the Constitution, and 3. The creation of the central government.

1. The creation of the States

The founding States of our Union were not the product of a few elite rich men sitting in a pub divining ways to consolidate power unto themselves. Our States were created when the Continental Congress debated, voted, and ratified into law the Lee Resolution on July 2, 1776. The Lee Resolution contained a three step process to declaring, establishing, and maintaining our independence from Great Britain. The first paragraph to the Lee Resolution would become, in part, the last paragraph of the Declaration of Independence. The first step to becoming independent is simply to declare that independence:

“Resolved, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.”

By RIGHT our governments are no longer colonies, but by declaration of that Right are recognized to be “free and independent States.” Simply put, we are not property of the king, but we know that all men are created equal and endowed by their Creator with certain unalienable Rights. Since we are not owned by the king, we need not ask his permission to be free, we must simply declare it. Through the Declaration of Independence we not only make this fact known to

the world, but we give clear definition to what we mean when we created, “free and independent States.”

“...and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have 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.”

Our States are defined as “free and independent,” each to be synonymous political entities with the likes of Great Britain, France, or Germany, each State bearing the same political authority as the “State of Great Britain.” In fact we created free and individual sovereign countries who, in their sovereignty, possess “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.” Although our States are politically the same as any other country in the world, our States have to recognize that their power is “derived from the consent of the government,” not from the King, and the sole purpose of that power is to “secure the Rights of the people,” not the power of those in government. (See Declaration of Independence)

2. Creation of the Constitution

The Constitution is a legal document whose intent was to create and form a legally binding contract between the States. The Constitution is a specific kind of contract called a “compact” which can be defined as a contract between sovereign governments. As the content of the Constitution was debated and ratified, the drafters and those who ratified the Constitution made it clear their intent was to form a compact to create this new Union of States. Richard Henry, in proposing Religious Liberty as a part of the Bill of Rights, made this statement:

“...but when we are making a constitution, it is to be hoped, for ages and millions yet unborn, why not establish the free exercise of religion, as a part of the national compact.” Federal Farmer IV

It is important to note, that although the Constitution’s preamble begins “We The People,” in legal terms the Constitutional Compact is not an agreement between the people, but between the States. This legal fact can be proven by one simple detail; the Constitution was not ratified by popular vote of the people, but by the vote of the Representatives of the States. Legally speaking the States are the “parties” to this compact and are therefore the creators of the federal government through the Constitution.

3. Creation of the Federal Government

The federal government is the product created by the ratification of the Constitution by the parties, the States. When the States created the federal government, they created a specifically limited and defined federal authority. James Madison explains to the Constitutional delegates in Federalist #45:

“The powers delegated by the proposed Constitution to the federal government are few and defined.”

Madison describes those powers as being primarily related to foreign affairs “as war, peace, negotiation, and foreign commerce.” He continues by describing the undelegated power as being reserved to the States and “numerous and indefinite;” extending to “all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” In this explanation, Madison is reassuring the States that in the creation of the federal government, the powers delegated to the federal government will be much fewer and more specifically limited than the powers that will remain owned by the States. Through this we learn a very important distinction in play during the creation of the federal government: federal power is *delegated* and State power is *reserved*. Since federal power is delegated, to fully understand the nature of the federal government created through the Constitution, we must identify WHO is delegating power to the federal government. Looking at the sources give us the answers we need:

1. “...that as **Free and Independent States, they have 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.” Declaration of Independence
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When power is delegated, by definition, it is a temporary trust of authority and responsibility given by a higher power to a lower power. Since we have established through our foundational documents that the States have delegated a portion of their power to the federal government we must admit that the States are the higher power and the federal government is the lower power. This is the essential truth in understanding the external check on federal power created by the formation of our Constitutional Republic.

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Greatest Power: Each State's Obligation to Keep Its Creation of National Government in Check (Part 1)

History and experience tell us that creating a government is not as much of a challenge as maintaining a limited and defined one. The drafters of our Constitution took that mission to heart when they created our Constitutional Republic; they not only created a limited and defined government but gave the people the best means by which to check and balance that federal power.

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Greatest Power: Each State's Obligation to Keep Its Creation of National Government in Check (Part 2)

“The greatest power on earth.” –James Madison

The three branches of our federal government possess a co-equal authority to apply checks and balances to protect the specific delegation of powers in order maintain separation of powers. However, to propose that the only check upon the abuse of power by the federal government is within the federal government is absurd. The drafters of our Constitution, and more relevantly those who ratified the Constitution wrote extensively about their concerns of a possibility of an expanding and consuming federal government over time. They knew from their own history that a government cannot be trusted to check itself and a government whose only check and balance is itself is kingdom regardless of the name. This is the power of the Constitutional Republic; that there exists a powerful check upon federal power *outside* the federal government.

In 1789, then Representative James Madison gave an address to the House of Representatives where he explained that the people need not fear a possible overreaching, ever expanding power originating in the federal government as long as we hold fast to the limits of the Constitution. His chief point in this declaration was that there exists a great check of federal power, one that exists *outside* the federal government that will be the greatest guardian of the people's liberties. Madison says:

“...the state legislatures will jealously and closely watch the operations of this government, and be able to resist with more effect every assumption of power than any other power on earth can do; and the greatest opponents to a federal government admit the state legislatures to be sure guardians of the people's liberty.”

Because the States were created as independent Sovereign governments; because the States created the Constitution; because the States are the delegators of the federal power, Madison is explaining that the State legislators will not only be compelled to watch the operation of the federal government very closely but they will also possess the authority to make sure that the federal government does not abuse its power or steal power from the States. Madison says, this relationship of higher power and lower power will create a duty within the State legislators to protect the rights of the people by ensuring that their creation never operates outside its limited and defined delegation of powers.

Madison repeats this principle of the external check of federal power in his Virginia Resolution of 1789 and Virginia Assembly Report of 1800:

“...in the case of deliberate, palpable, and dangerous exercise of other powers not granted...the States...have the right, and are in duty bound, to interpose...” Virginia Resolution of 1789

“...that the ultimate right of the parties to the Constitution [The States], to judge whether the compact [The Constitution] has been dangerously violated, must extend to violations by one delegated authority as well as by another--by the judiciary as well as by the executive, or the legislature.” Virginia Assembly Report of 1800

What ought to add to the State’s obligation to keep its creation, the federal government, under control, exists in the fact that the Declaration of Independence identifies the sole purpose of the creation of the States is to “secure the Rights” of the people. A federal government unlimited in its power, or limited only by its own will or whim is a totalitarian government, putting the rights of the people at risk. When the States are not keeping their creation within its limited and defined bounds, they are failing to secure the rights of the people. Thomas Jefferson articulates this danger in 1812:

“when all government, domestic and foreign, in little as in great things, shall be drawn to Washington as the centre of all power, it will render powerless the checks provided of one government on another...If the States look with apathy on this silent descent of their government into the gulf which is to swallow all, we have only to weep over the human character formed uncontrollable but by a rod of iron...”

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Religious Freedom and Role of the States in Their Own Early Constitutions, Part 1 – Guest Essayist: Joerg Knipprath

In the history of human society, religion and politics have almost inevitably been intertwined. Those in control of the organs of government seek to harness for their own legitimacy and power the natural human longing to participate in a project that transcends one's everyday life. Religious belief and participation in religious ceremonies satisfy that personal longing, while they are also useful tools to control the actions of the populace and sustain the social order. Because politics has those same objectives of control and order, the levers of religious and political power not infrequently have been held by the same hands. The normal outgrowth of this is an officially-recognized religious dogma with approved outward manifestations, along with suppression, to different extents, of those who would deviate from the true path. In similar vein, those who would dissent from religious orthodoxy often make common cause with those who would challenge the reigning political faction.

In the medieval Christian West, there was a formal separation between the religious and political spheres, represented by Pope and Emperor, which reflected Jesus's teaching about the superior domain of God and the profane (in the classic meaning) temporal world. However, there, too, the reality was different, in that those entrusted with the care of the soul often participated in power politics. The Pope and his control over the Papal States, the various warrior-bishops in the Holy Roman Empire, the English House of Lords Spiritual and Temporal, and the Archbishop/Electors that chose the Holy Roman Emperor come to mind. As well, secular rulers frequently attempted to influence, by various means, the selection of the Pope and subordinate clergy, and to secure the endorsement of the administrators of the spiritual realm for immediate political goals. The "Babylonian Captivity" of the popes at Avignon under the control of the French king is a prime example.

The end of feudalism and the emergence of the modern State were marked by increased wealth of the political rulers and by centralization of power in the person and the office of the king. In that era of royal absolutism, competing centers of power which might dilute the king's ability to lay sole claim on the subjects' loyalties had to be made to submit. Thus, the nobility, stripped of its important ancient privileges, increasingly became courtiers residing at the monarch's court, where they were more easily controlled. The clergy, too, had to be neutralized. Much is told about King Henry VIII's project to reduce the Catholic Church to the Church in England and, later, the Church of England--with the monarch as its head. Henry was not alone. With the shattering of the Universal Christian Church by the Reformation, the Holy Roman Empire's superficial political universality came under pressure. The constituent duchies, principalities, and other assorted noble enclaves aligned based on religion, often for reasons of the rulers' political ambitions. The specter of religious warfare induced the various parties to adopt the principle of *cuius regio, eius religio*, that is, the religion of the ruler (Catholicism or Lutheranism) would be the religion of the ruled. Those who did not wish to follow their rulers' lead could emigrate to a more sympathetic realm; otherwise they might be subject to persecution.

With the vessel of religious universality broken, the essentially anarchistic imperative of Protestantism (“sola scriptura”) led to the formation of various sects beyond the relatively conservative Lutherans and the even more traditional Anglicans. Despite the establishment of the Church of England, the struggle between Anglicanism and Catholicism continued during the 16th and 17th centuries, as various English monarchs favored one or the other. Calvinist Presbyterians, nominally dissenters in England, also had a brief turn in power, through the person of James I Stuart, who had become the head of the Presbyterian Church of Scotland during his tenure as King of Scotland. Excluded from political power were adherents of various dissenting sects, such as Anabaptists and Quakers, and, except during the Oliver Cromwell “Protectorate,” other Calvinists. Their radicalism was seen as subversive of the existing order. Those and other dissenters primarily belonged to the middle classes of artisans, farmers, and merchants.

The common denominator in most European polities was the formal establishment of a particular Christian denomination and the suppression of dissenting views. There were exceptions, however. For example, the 17th century United Provinces of the Netherlands established the Dutch Reformed Church as the official religious body, yet broadly tolerated free exercise of religion even by non-traditional Christians and by Jews. This policy of relative tolerance attracted many adherents of persecuted faiths to the Dutch Republic. It also presented an alternative model to that of most state churches at the time, namely, that officially established state churches need not result in suppression of dissent.

Among the English dissenters were two groups of Calvinists, the “Pilgrim Fathers” and the “Puritans.” While the former sought to separate themselves from the Church of England, the latter hoped to purify it from within by continuing to associate their congregations with the official church. They abandoned that policy after the Restoration and became the Congregational Church. Both groups established settlements in New England. Despite their geographic proximity, their theological differences--though perhaps trivial to an outsider--kept them distinct for several decades, until the Pilgrims’ Plymouth colony was absorbed by the much larger Massachusetts Bay Colony in 1690.

In popular myth, Europeans came to British North America in search of religious freedom, which they heartily extended to all who joined them. The truth is more complex. The Pilgrims and Puritans, for example, indeed came for religious freedom, but for themselves only. Conformity in community, not diversity or toleration of dissent, was the goal. God’s law controlled, and governance was put in the hands of those who could be trusted to be faithful to the ultimate objective, the realization of the City of God on Earth.

As the Pilgrims’ “Mayflower Compact” of November 11, 1620, stated, “Having undertaken for the glory of God, and advancement of the christian [sic] faith, and the honour of our King and country, voyage to plant the first colony in the northern parts of Virginia; [we] ...combine ourselves...into a civil body politick, for furtherance of the ends aforesaid” Puritan colonies in New England similarly strived for their goal to “lead the New Testament life, yet make a living,” as the historian Samuel Eliot Morison summarized it. The “Fundamental Orders” of the Connecticut River towns in 1639, a basic written constitution, set as their purpose to “enter into...confederation together, to maintain and preserve the liberty and purity of the gospel of our Lord Jesus which we now profess, as also the discipline of the Churches, which according to the

truth of the said gospel is now practiced among us . . .” As in Massachusetts Bay, justice was to be administered according to the laws established by the new government, “and for want thereof according to the rule of the word of God.” The Governor must “be always a member of some approved congregation.”

The theocratic nature of the 17th century New England societies meant that they limited new settlers to those who belonged to their approved strain of Puritanism. Those numbered many thousands, however, as the Massachusetts Bay Colony grew to 10,000 within four years. Dissenters were expelled. Those who failed to get the message of conformity were subject to punishment, such as four Quakers who were publicly executed in 1659 after they repeatedly entered the colony and challenged the ruling authorities.

The religious congregationalism that was at the core of the Puritans’ anti-episcopalism and which justified their expulsion of dissenters from their religio-political commonwealth also caused those dissenters to form communities of like-minded believers. Some of them, such as the famous dissenters Roger Williams and Anne Hutchinson, founded settlements in what became Rhode Island. Unlike Massachusetts Bay, these new settlements allowed freedom of conscience and lacked the official religion of other New England settlements.

During the English rule, at least nine colonies had formally established churches, generally the Anglican Church, and all required office holders to be at least Christians. However, other colonies’ founding had lacked the theocratic imperative of New England. While the Anglican Church enjoyed economic and political benefits from its established position, freedom of conscience and practice was extended to other Protestant denominations. Rhode Island, Pennsylvania, and South Carolina were founded with the deliberate goal of protecting peaceable religious practice. Other colonies, seeking to attract as many settlers as possible for the financial gain of investors (Virginia, New York) or proprietors (New Jersey, Maryland, Georgia) had pragmatic reasons to tread softly on the issue of religious orthodoxy.

The position of Catholics and Jews to practice their faith was more tenuous. In England, the Bill of Rights adopted in 1689 officially declared the country a “protestant” realm and prohibited the monarch from being, or being married to, a Catholic, a prohibition reinforced in the Act of Settlement of 1701. Similarly, only Protestants were guaranteed the right to bear arms. Other statutory restrictions on Catholics, Jews, and non-trinitarian Christian sects remained in place well into the 19th century.

In North America, even enlightened charters demonstrated the limits of religious tolerance. Colonial Pennsylvania rightfully has had a reputation for religious liberality. Thus, its 1701 Charter of Privileges declares that no person “who shall Confess and acknowledge one Almighty God . . . shall be in any Case molested or prejudiced in his or their person or Estate because of his or their Conscientious perswasion [sic] or Practice” or to attend any religious worship or do anything else contrary to their religious beliefs. Nevertheless, that same charter, as well as Pennsylvania’s lengthy “Frame of the Government” in 1682, contained a ubiquitous feature of such constitutions, the religious test oath or affirmation, in this case that all government officials had to “profess faith in Jesus Christ.” Maryland’s Toleration Act of 1649 recognized freedom of worship for anyone “professing to believe in Jesus Christ. However, the Act also provided for

the death penalty for blasphemy or “[denying] our Saviour Jesus Christ to be the sonne of God, or shall deny the holy Trinity the father sonne and holy Ghost.”

The formal establishments remained during the 18th century. However, the enforcement of religious conformity and suppression of dissent was undermined by the growth of the populations from many different European countries, the diversity of their religious beliefs, the relative isolation of settlements due to the large size of the colonies outside New England, and the scarcity of Anglican clergy and absence of a strong hierarchy. True, local communities might be remarkably homogeneous. In the colony at large, Quakers might be attracted to Pennsylvania for shared religious values, Catholics to Maryland, and Congregationalists to New England. Anglicans might be the majority in most colonies. Yet, the variety of sects within a colony and, even more pronounced, across the several North American colonies, combined with the general desire for material success, made tolerance a pragmatic policy. Eventually, pragmatic necessity became aspirational virtue. It must not be overlooked, however, that even the most tolerant polities had no use for skeptics, agnostics, or atheists. There was no Inquisition; the reality was more akin to “don’t ask, don’t tell.” Nevertheless, freedom of religion did not mean freedom from religion.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Religious Freedom and Role of the States in Their Own Early Constitutions, Part 2 – Guest Essayist: Joerg Knipprath

At the time of the Revolution, Americans had shown that established churches could co-exist with free exercise of religious conscience. Still, religious restrictions on holding office, requirements to attend *some* religious service and financial support of the colony’s official church through taxes remained. Of those, as might be expected, the last was the most reviled by the public and, thereby, most easily attacked by willing politicians. It is on that ground that disestablishment of most colonial churches was initiated during the Revolutionary and Early Republican periods.

The Southern colonies, especially, moved to disestablish the official status of the Anglican Episcopal Church. North Carolina began the process in 1776, followed during the war by New York, Maryland, and South Carolina. There also began a decade-long struggle in Virginia towards that end. The Virginia constitution of 1776 declared, “THAT religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free

exercise of religion, according to the dictates of conscience” Thus was protected free exercise, but the established church yet survived. After the war, demands increased to disestablish the Episcopal Church, tainted by its connection to the Church of England. In 1784, the popular governor, Patrick Henry, proposed his “Bill Establishing a Provision for Teachers of the Christian Religion.” This would have protected de facto the preferred position of the Episcopal Church even if formal disestablishment were to occur, because it had the majority of pastors. Madison helped defeat the bill with his “Memorial and Remonstrance against Religious Assessments” when it came up for a vote in 1785. Madison was motivated in part by what he perceived as continuing persecution of religious dissent, despite the state constitution’s high-sounding declaration. He fulminated in 1784, “That diabolical, Hell conceived principle of persecution rages among some and, to their eternal infamy, the clergy can furnish their quota of imps for such business.” Finally, on January 16, 1786, the legislature adopted Jefferson’s Statute of Religious Liberty, to disestablish fully the Episcopal Church.

On the other hand, the deeply engrained theocratic tradition in New England prevented complete disestablishment of the Congregational Church. The Massachusetts Constitution of 1780 had a strongly pious Preamble, and in Article II of its Declaration of Rights asserted not only the right, but the duty, of everyone “publicly, and at stated seasons, to worship the SUPREME BEING, the Great Creator and Preserver of the Universe.” To be sure, no one would be punished for worshipping God according to the dictates of his conscience. But worship, one must. Article III emphasized the classic republican connection among good government, religion, and morality. This connection could only be maintained by the “publick worship of God, and...publick instructions in piety, religion and morality.” Accordingly, the legislature was directed to require the “towns...and other bodies politick, or religious societies” to provide financial support for such public worship and for “the support and maintenance of publick protestant teachers of piety, religion and morality.” Moreover, the people, acting through their legislature, could compel attendance at these services.

These blunt commands were softened by allowing those paying the support to direct that the funds go to a religious teacher of their own denomination whose services the taxpayer attended. If there was none, the funds went to the support of teachers the parish selected. Most likely, those selected would belong to the Congregational Church, in light of its dominance among the populace. As well, the same article prohibited the formal legal subordination of one denomination to another. This partial disestablishment of the Congregational Church was largely undermined by the support provision. Adherence to proper religious doctrine was also enforced for state officials through their declaration before taking office that they “believe the christian [sic] religion, and have a firm persuasion of its truth.”

By the time the Constitution was adopted, most states had fully disestablished their churches, though Massachusetts, Connecticut, New Hampshire, Maryland, and North Carolina retained some provision for mandatory taxation for the religion of one’s choosing. At the state ratifying conventions, many delegates had expressed fear that Congress might establish a national religion. The first Congress in 1789 debated a proposed Bill of Rights. Madison included a provision that no one’s rights should be abridged by Congress on account of religion, and that no national religion shall be established. The right of conscience was also protected in another section against invasion by the states. Significantly, the draft said nothing about state religious

establishments. Elbridge Gerry of Massachusetts objected to “national” as implying that the United States was a consolidated entity, rather than a confederation. In response, the Report of the House Committee altered the language to “no religion shall be established by law.” The sections protecting the rights of conscience against infringement by Congress and the states, respectively, were unchanged. There still was no language about state religious establishments.

The amendments adopted by the House once more changed the language. Congress was disabled from establishing religion or prohibiting its free exercise. The rights of conscience were expressly protected once more against infringement by either Congress or the states. Yet again, no such language addressed state religious establishments. The clear implication of the language, then, was that states were not prohibited from having official churches, as long as the rights of conscience were maintained, but that Congress could not establish a church for the United States.

The Senate adopted its own amendments. The relevant provision prohibited Congress from “establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion.” The House’s restriction on interference with the rights of conscience by the states was dropped. A conference between House and Senate developed the language submitted to the states for approval. The Senate’s establishment language was seen as too weak, as it opened the door for Congress to fund a religious body, thereby creating an established church through the back door of preferred financial support. In turn, the House’s language that restricted state legislative power was deemed contrary to the purpose of the Bill of Rights, namely, to limit the general government. The result was, as Supreme Court justice and professor of constitutional law at Harvard, Joseph Story, wrote later in his influential *Commentaries on the Constitution of the United States*, “[The] whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.” Further, Story wrote, “The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government. . . . [The] Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.”

However, simply adopting in isolation the House’s language that merely prohibited Congress from establishing religion would suggest that Congress could disestablish existing state churches. That possibility ran counter to the federal nature of the union and endangered adoption of the amendments by undermining support in New England. That produced the awkward language that “Congress shall make no law respecting an establishment of religion.” Congress shall not establish formal religious orthodoxy through a national church, such as the overall still dominant Episcopal Church; at the same time, Congress, likely to be dominated by adherents of that church, shall not make it its business to disestablish existing state churches. The clause, one might say, incorporates a principle of antidisestablishmentarianism, too. Free exercise of religion (but not of non-religion) was fully embraced even in New England by the late 1780s, though it took several more decades of controversy to disestablish fully the Congregational Church in Connecticut (1819) and Massachusetts (1833).

Today, determining the scope and meaning of the establishment clause in controversies far removed from imprisonment for dissent, civil disabilities for attending prescribed religious services, or direct funding of specific ecclesiastical bodies has proved difficult for the Supreme Court. The clause retains both aspects of disestablishment and of its opposite. Religious test oaths are forbidden, which also means that one's position even as a leader of a religious denomination is not a disqualifier from political office. The recent questioning by Senators Kamala Harris and Maizie Hirono of a nominee to the federal bench about his fitness for office due to his membership in the Catholic Knights of Columbus at least violates the principle behind the prohibition of such oaths.

As well, the Supreme Court has frequently reminded courts and legislatures that the establishment clause prohibits laws that demonstrate hostility to religion. Indeed, government may take a position of benevolent neutrality towards religion and may (and sometimes must) accommodate the actions of religious believers in otherwise neutral laws of general applicability. Certainly, contrary to some exaggerated assertions based on a hasty metaphor in a politically-charged letter by Thomas Jefferson, the clause does not represent a strict principle of an "impenetrable wall of separation" between church and state. Rather, the establishment clause originally represented a limit on the general government to interfere with institutions that represented the sovereign authority of the people of the states, either by displacing them with a superior national church or by prohibiting them (or, even worse, just *some* of them) directly. The free exercise clause (and its ubiquitous counterparts in the state constitutions) protected the individual rights of conscience and free exercise of religion, a distinction that Justice Clarence Thomas has emphasized. Today, the establishment clause attempts to strike a balance between, on the one hand, the importance to republican government of fostering the natural human inclination to religion and association in religious communities and, on the other, the social instability that historically has occurred when the realm of Caesar is fused to a particular conception of God, as well as the inevitable corruption of religious doctrine and institutions that results from dependence on government favors.

Let the unabashedly left-wing Justice William Douglas have the last word. He wrote in 1952 in *Zorach v. Clausen*, "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.... Otherwise the state and religion would be aliens to each other---hostile, suspicious, and even unfriendly.... We are a religious people whose institutions presuppose a Supreme Being.... When the State encourages religious instruction..., it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe."

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Fundamental Law and Natural Rights: The Virginia Statute for Religious Freedom

In June 1776, George Mason wrote the Virginia Declaration of Rights. It declared natural rights, the essential liberties of the people, and republican government by consent of the people. The delegates to the Fifth Virginia Convention—the government after the royal governor had fled from Williamsburg—voted to accept the Declaration of Rights and a state constitution rooted upon revolutionary principles of rights and popular government.

When writing about religious liberties in the Declaration of Rights, Mason, influenced by the ideas of John Locke's *Letter Concerning Toleration*, wrote, "All men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience." This principle of religious toleration seemed liberal-minded during the time of the Enlightenment, or age of reason.

A young James Madison disagreed and offered an amendment that fundamentally altered the principle of toleration to a new and revolutionary one—religious liberty. The Declaration of Rights read: "All men are equally entitled to the free exercise of religion, according to the dictates of conscience."

Madison's fellow delegates accepted that freedom of religion was an inalienable right (and a duty to God), but they were unwilling to accept that Madison's amendment disestablished the official Anglican Church as part of the constitution-making. Nevertheless, Baptists, Presbyterians, and Lutherans began flooding the House of Delegates with petitions calling for disestablishment. The legislature responded to the demands of their constituents, relieving dissenters of paying taxes for the support of the Anglican Church.

In early 1777, Thomas Jefferson joined the cause of religious liberty in Virginia. Jefferson believed that the Virginia constitution had a variety of shortcomings and won appointment to the committee to revise the state laws with George Wythe and Edmund Pendleton. Jefferson's object was to eradicate "every fiber...of ancient or future aristocracy."

As an Enlightenment thinker, Jefferson believed that religion was a matter of reason and equated religious liberty with a free mind. Jefferson penned a bill for disestablishment in 1777 but did not present it to the legislature. Jefferson's Bill for Establishing Religious Freedom was introduced in the House of Delegates in June 1779.

The preamble asserted that "Almighty God hath created the mind free," and thus was free from restraint by the civil government. The bill would enact disestablishment as Jefferson affirmed, "The opinions of man are not the object of civil government."

The bill, however, was soundly defeated. Many Virginia founders including Patrick Henry, Richard Henry Lee, John Marshall, Pendleton, and initially, George Washington, supported a general assessment, or tax money, to be allocated to a denomination of a person's choice or to schools and education rather than religion. They argued that republican government depended on the virtue of the citizenry and leaders, and that virtue was primarily encouraged by religion. The general assessment bill did not establish a particular denomination or even Christianity broadly as the state religion, but rather sought to support religion to inculcate virtue for republican self-government. The House passed a resolution for the bill in 1784, and Henry chaired the committee to draft it.

Jefferson and Madison (neither of whom was especially known for his piety) formed an improbable alliance with an array of dissenting religious groups including Baptists, Methodists, Quakers, and Presbyterians to fight the general assessment. Both sides of the debate wrote petitions to the House to influence the outcome.

Madison weighed in on the debate, anonymously writing the highly influential "Memorial and Remonstrance Against Religious Assessments." He wrote: "The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right."

The Virginia Statute for Religious Freedom passed into law on January 6, 1786. The Assembly enacted the idea into law that:

No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or beliefs.... We are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind.

Jefferson and the legislature then made the law and the principle of religious liberty a fundamental right that could never be revoked by a future legislature, binding future generations to the rights of man. "If any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right."

Most states pursued religious liberty as a fundamental right and disestablished their churches, though not all did, because of principle of federalism in the U.S. Constitution. In the 1830s, Massachusetts became the last state to disestablish. But, the American Revolution and founding advanced both civil and religious liberty for the American people.

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Disestablishment, Christianity, and Religious Liberty in Virginia – Guest Essayist: Archie P. Jones

We have long been told that the American “Founding” was a product of rationalism and of secularist political thought; that the states’ struggles for “disestablishment” and “religious freedom” were driven by a desire for “neutrality” among all religions, or for secularism; and that the states’ religiously “neutral” or secularist “disestablishment” and “religious freedom” were precursors of a religiously “neutral” or secularist First Amendment to our federal Constitution. Advocates who use the Constitution’s First Amendment to establish “neutrality” among all religions, or secularism, have long used the battle for disestablishment of the Anglican Church in Virginia to advance their objective.

None of their arguments fit the evidence. Let us consider the evidence of “disestablishment” in Virginia.

Virginia was the most famous victory for disestablishment of the Anglican Church. The leaders of the debates in the Virginia legislature—Thomas Jefferson, James Madison, George Mason, and Patrick Henry—were all professing Christians: all Anglicans at that time. Jefferson was still orthodox, financially supported several Christian ministries, and would not develop significant doubts about the Christian faith for a few decades. When he did develop such doubts, he kept them secret: telling the recipients of such letters to keep their contents secret or not sending the letter. Madison and Mason were orthodox. Henry, the most influential man in the state, was a zealous Calvinist.

The main background of the struggle did not consist of any significant increase of rationalism (Deism, Unitarianism) or non-Christian thought, but of opposition to the spiritual laxity of the Anglican clergy by the numerous Baptists and Presbyterians, many Anglican laymen, and Methodists. And of opposition to Anglican Church persecution of Baptists, Presbyterians, Methodists, Lutherans, and members of other “dissenting sects.” Many Anglicans, like Madison, opposed this persecution. Furthermore, the Anglican vestries wanted to rule their own churches, not to remain under the authority of the English church hierarchy.

The famous Rev. John Leland led the Baptists, and the Rev. Samuel Davies led the Presbyterians in the struggle for religious liberty.

Jefferson’s famous *Act Establishing Religious Freedom* opposed compulsory taxation of non-Anglicans to support things they didn’t believe. Its ideas and rhetoric were clearly Christian, not rationalistic, nor religiously “neutral.” Far from beginning the movement for disestablishment of the Anglican Church, Jefferson’s famous *Act* was a product of it. Though Jefferson wrote it in 1777, it was not passed until 1786, under Madison’s, not Jefferson’s leadership. At the time of his writing the act and his work for disestablishment, Jefferson was a professing Christian, not a closet Unitarian, nor a rationalist. Jefferson’s religious views changed as he got older. He was an orthodox Christian in at least the first half of his adult years—when he wrote the first draft of the Declaration of Independence (1776), served in the Virginia legislature, served as governor, and served as President (1800-1808). The last decade or so of his life (ca. 1813-1826) he was a

closet Unitarian.^[1] He was not a rationalist during Virginia's struggle for disestablishment of the Anglican Church and for "religious liberty."

Madison's *Memorial and Remonstrance Against Religious Assessments* (1784) used Christian rhetoric and changed the Virginia public's views from state support of "religion"—Christianity—through financial aid. It was much more influential than Jefferson's *Act Establishing Religious Freedom*. That plus the removal of Patrick Henry, the most popular man in the state, its greatest orator, and the great advocate of state aid to Christianity—certainly not to "religion" in general—from the legislature by his being elected governor, enabled the bill to pass.

Anglicans were a distinct minority in the state, but were two-thirds of the legislature. Most Anglicans in the legislature had been convinced by Christian writers that all churches should be equal before the law. The dissenting ministers cleared the way for disestablishment. The legislators who voted for disestablishment were mostly members of the Established Church. The bill was not enacted to make Virginia law either "neutral" among all religions or secularist—and in fact did not do so.

Stokes credits Jefferson's statement, in his 1821 *Autobiography*, that during the debate on his bill the "great majority" of Virginia legislators rejected a proposed amendment to the bill adding the name of Christ, so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion," and that this proves that they wanted to include protection for the free exercise of every religion—including "the Mahometan, the Hindoo, and the infidel of every denomination."^[2] For several reasons, this is difficult to believe: First, This would have given legal protection to such contradictions of Virginia laws, the Christian Common Law, and Christian morality as the Mohammedan *harem*, "*honor killings*," and *jihads* against unbelievers in that religion; the Hindu *sutee* (immolation of the wife on her husband's funeral pyre), *caste* system, and parents' right to murder their children, especially newborn daughters, via child sacrifice.^[3] Not to mention other pagan religions' orgies, human sacrifice and cannibalism.

Second, this would have been contradicted by Article 16 of the Virginia Bill of Rights' statement that Virginians should practice "Christian forbearance, love, and charity towards each other." That placed Christian ethics in a position of superiority to those of all other religions: an obvious contradiction to the idea that all religions are equal. To have accepted the old Jefferson's remembrance of Virginia's legislators' intentions, Stokes would have to have believed that most of Virginia's legislators were ignoramuses or thoughtless, or that they were carried away by the passion of the moment. But Virginia's legislators were not ignorant, nor were they intellectual or moral dunces.

Third, all churches in Virginia were not on the same legal basis until 1787, a year after approval of Jefferson's bill, when the special law incorporating the Episcopal Church was repealed. Not until 1802—17 years after Jefferson's bill—did the Virginia Assembly remove control of the glebe lands from the Episcopal Church. Not until 1840—54 years after Jefferson's bill—did a state Court of Appeals decision finally sustain the 1802 act and make "separation of church and state" complete in Virginia.

Fourth, Jefferson's *Bill for Establishing Religious Freedom* did establish religious freedom in Virginia when it was enacted (1786), but it did not remove all state support for the Anglican Church. And it was not intended to make Virginia's laws "neutral" among all religions (a logical impossibility, for religions have contradictory beliefs and practices), or secular (separated from all religions' influence), or to de-Christianize Virginia's laws: far from it! Jefferson's famous Bill, #82 was part of a set of bills concerning religion apparently framed by Jefferson and approved by the committee he chaired in the Virginia General Assembly. Bill #83 was "...for Saving the Property of the Church Heretofore by Law Established" (the Church of England). Bill #84 was "...for Punishing Disturbers of Religious Worship and Sabbath Breakers". Bill #85 was "...for Appointing Days of Public Fasting and Thanksgiving". Bill #86 was "...for Annuling Marriages Prohibited by the Levitical Law" (the law of God revealed in the Old Testament book of Leviticus). This package of bills—and their enactment—make it very clear that neither Jefferson nor the Virginia legislature was trying to make Virginia laws "neutral" among all religions, or secular, much less de-Christianized.

"Disestablishment" in Virginia was only removal of all legal preference for the Episcopal Church. It was not fully achieved until 1840—54 years after Jefferson's bill. It was accomplished—overwhelmingly—by the efforts of Christians, particularly of the former "dissenting sects." It obviously was not intended to create, and did not produce "neutrality" among all religions, secularism, or de-Christianization. It therefore is not, and cannot be either a precedent or evidence for "neutrality" among all religions, secularism, or de-Christianization of American law.

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[1] The development of Jefferson's religious thought is carefully set forth in Mark A. Beliles and Jerry Newcombe, *Doubting Thomas?: The Religious Life and Legacy of Thomas Jefferson* (New York: Morgan James Publishing, 2015), 13-184.

[2] The full quotation is given in Beliles and Newcome, 222.

[3] George Grant and Gregory Wilbur, *The Christian Almanac; A Book of Days Celebrating History's Most Significant People and Events*, Second Edition (Nashville, Tennessee: Cumberland House, 2004), 541.

Religious Freedom and Disestablishment in North Carolina, New York, Connecticut, Massachusetts, New Hampshire – Guest Essayist: Archie P. Jones

“Disestablishment” and “religious freedom” in North Carolina, New York, Connecticut, Massachusetts, and New Hampshire were motivated by different intentions than we have long been taught.

North Carolina had an Anglican establishment before independence and a non-Anglican majority that disliked the Anglican Church. Dissenters were excluded from all offices of power and dignity and had to pay tithes to the Anglican Church. Independence and the new constitution of 1776 changed this by precluding the existence of any established church and establishing a Protestant civil government. Article XXXII declared:

That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.

Article XXXI prohibited any clergyman from holding any office in the Senate, House of Commons, or Council of State while he continued to be a pastor. So the North Carolina Constitution provided for the disestablishment of any one Christian denomination and the establishment of Christianity as fundamental to the law of the state.

North Carolina achieved disestablishment without the aid of any non-Christians, rationalists, or Deists—because there was a balance among the various Protestant denominations, and most “dissenting” Protestants disliked the Anglican Established Church. Scotch-Irish Presbyterians—no rationalists they!—led in the battle for disestablishment and religious liberty.

North Carolina was a clearly Protestant state until at least 1835, when it provided religious liberty for Roman Catholics, and then in 1868, when, still a Christian state, it removed religious and civil disabilities from Jews.

New York’s 1777 Constitution, the third main victory for disestablishment of the Anglican Church, provided for “free exercise and enjoyment of religious profession and worship.” But it stated that “the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.”

New York’s constitution excluded all ministers of the Gospel from office—because of the great importance of their duties as ministers, not on anti-clerical, religiously “neutral” or secularist grounds. It also abolished all parts of the Common Law and colonial statutes that might be construed as establishing “any particular denomination of Christians or their ministers.” It did not do away with the Common Law as such—with its many Christian principles and rights—so Christianity remained fundamental to the laws of New York.

In 1784 New York abolished the remaining legal privileges of the Anglican Church. It also passed a law to restrict the political power of Roman Catholics: requiring all persons naturalized by the state to take an oath renouncing all foreign allegiance and subjection in both civil and ecclesiastical matters. This test oath was not repealed until 1806.

Disestablishment in New York was achieved by Christians who wanted religious and civil liberty without abandoning Christianity.

Connecticut did not achieve disestablishment and religious freedom until 1818—for until that year the colonial charter served as the state’s constitution, and the Congregational Church remained established until the new Constitution of 1818. Disestablishment was the will of the ministers, prominent laymen, and ordinary church members. When it did come, it was supported by tolerant Congregationalists, Baptists, Methodists, most Episcopalians, Quakers, and a tiny minority of the Unitarians and Universalists. Most rationalists in Connecticut (Unitarians and Universalists) were on the side of the establishment, not disestablishment—reversing the supposed order of “separation of church and state” mythology.

The Connecticut Constitution, in the clause after it established freedom of religious profession and worship for all persons in the state, stated that this right “shall not be construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the State.” So much for the freedom of all religions! The next section said “no preference shall be given by law to any Christian sect or mode of worship,” which meant that Christianity was virtually recognized as the state’s belief. Its article on religion—drafted by a subcommittee of “Jeffersonian Republicans”—made it clear that even with “separation of church and state” this was a Christian constitution. It referred to God as “the Supreme Being, the Great Creator and Preserver of the universe,” and said that “every society or denomination of Christians in this State, shall have and enjoy the same and equal powers, rights and privileges....”

Disestablishment in Connecticut was won by various denominations of “dissenting” Christians, with little help from non-Christians. It was partly motivated by Christians’ desire to be free of domination by an established church that had been infiltrated by the false doctrines of Unitarianism.

Massachusetts had the most protracted conflict over disestablishment of any state. As early as the middle of the 18th century, “Strict Congregational” churches joined Baptists in opposing the established Congregational churches, for they considered many members of the established church to be unconverted and did not want to pay taxes to support such a church.

The War for Independence did not bring a drive for “neutrality” among religions or for secularism. As Stokes says, the new government’s constitution had “resonant and high sounding clauses concerning the sanctity of religion and liberty, immediately followed by others denying religious liberty in any adequate sense to many creeds and sects.”^[1] That is because they drew intellectual and moral distinctions that Stokes did not, because they knew some things about the world’s religions’ practices that he should have known. The new state Constitution of 1780’s Declaration of Rights stated the duty of all men to worship God, “the SUPREME BEING, the Great Creator and preserver of the universe”—not any other gods. It stated the right and

principle of individual liberty of conscience in worship and religious beliefs, but qualified this by requiring that the individual not disturb the public peace or others' religious worship. The framers of the Massachusetts Constitution were rightly concerned to protect religious worship and the public peace; and to protect their people's lives, liberty, persons and property against such religious practices as human sacrifice, cannibalism, infanticide, and "holy wars."

Article III made it clear that "liberty of conscience" was not merely individualistic:

III. As the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God, and of public instructions in piety, religion, and morality: Therefore, to promote their happiness, and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies politic, or religious societies, to make suitable provision, at their own expense, for the institution of the public worship of GOD, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily.

This article also affirmed the legislature's authority to require all subjects to attend the teachings of these Protestant ministers, if they could conscientiously do so. It stated the equality of all Christian—but no non-Christian—denominations before the law:

And every denomination of Christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall ever be established by law.

This article was not modified for 53 years (1833)—more than 40 years after the addition of the First Amendment to the U.S. Constitution.

As in Connecticut, the established Congregational Church in Massachusetts was weakened by the growth of rationalism within, and a division between the theologically orthodox and those who would later call themselves Unitarians. An 1818 legal decision said that the Unitarian "society" that owned a church, not the Christian majority of the members of that church, could control that church. This gave the Unitarians a great advantage and weakened the Congregational Church, but provided an opportunity for the growth of disestablishment thought, since orthodox Christians would not want to be legally subordinate to a church in the hands of apostates.

Not until 1831 did the legislature vote for disestablishment—but then it did so decisively. In 1833 the state's citizens voted nearly 3:1 to remove Article III from the state constitution and add an article favoring the equality of "all religious sects and denominations demeaning themselves peaceably, and as good citizens of the commonwealth..."

The growth of Unitarianism contributed to disestablishment, but disestablishment in Massachusetts was not produced by Unitarians or rationalists. It was a result of the growth and

work of the dissenting Christian denominations, especially the Baptists. Episcopalians, since their church was not the established church, supported disestablishment, as did other dissenting denominations. Probably many orthodox Congregationalists, persuaded by Baptists' "liberty of conscience" arguments and not wanting to give the growing Unitarian faction in Congregational Churches the privileges of an established church, supported disestablishment.

Once again, disestablishment and religious liberty were the work of Christians, not of non-Christians.

New Hampshire's 1778 Constitution's Bill of Rights was clearly a Protestant document. It stated that the "rights of conscience" are unalienable, and supported the individual's right of liberty of conscience in worship and belief. Its sixth article said the best security to government is "morality and piety, rightly grounded on evangelical principles", and "evangelical" meant Protestant Christian. It called for towns, parishes, and religious societies to "make adequate provision, at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality." It stated that "every denomination of Christians, demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law..."

Its Form of Government required every representative in the legislature to be "of the protestant religion," and stated that one who left the Protestant religion would automatically cease to be a representative of his town or district. Not until 1852—more than six decades after the ratification of the U.S. Constitution's First Amendment—was the required two-thirds popular vote to repeal the Christian religious test oath approved.

The state's constitutions of 1778 and 1792 did not support an established church, but by providing for local laws to support religion in effect established Protestantism. New Hampshire continued to favor Protestantism in particular and Christianity in general for more than a century and a half after the First Amendment had been ratified.

As is evident from the states we have examined, state governments' support of Christianity long after the addition of the First Amendment, Stokes's comment that New Hampshire's retention of these provisions is "inconsistent with the American tradition of impartiality of the State in matters involving the religious convictions of citizens"[\[2\]](#) is without foundation in fact and foolish.

It is without foundation in fact because the evidence of American "church and state" relations throughout the era of "disestablishment" clearly indicates that the states have not been "impartial" in regard to religion or the "religious convictions" of citizens—and by the manifest intentions of their constitutions and laws should not have been so. Neither the states' "disestablishments" nor the First Amendment set up "impartiality" as the standard for our civil governments' relationships to "religion" or to Christianity. If there was any "impartiality," it was meant to operate only among Christian denominations, or among religions whose ethics or exercise of religion did not include actions that violate others' rights. At most, it was impartiality among Christian denominations, with tolerance of other religions that at least conformed to Christian ethics.

It is foolish because impartiality or neutrality among religions is impossible: Religions differ radically in their theological and ethical doctrines and requirements. To be impartial or neutral among conflicting doctrines and requirements is to abandon logic. It is also to commit the government to permitting adherents of disparate religions to violate others' rights to life, liberty, person, and property.

“Impartiality” among all religions at first glance appears “understanding,” and “tolerant,” but upon closer inspection it is seen to be ignorance, amorality, and a lack of concern for others' wellbeing. “Impartiality” or “neutrality” neglects the horrific consequences of the free exercise of many religions that differ from Christian ethics. Thank God we did not have a tradition of “impartiality” toward all religions!

Clearly, not only in Virginia, but also in North Carolina, New York, Connecticut, Massachusetts, and New Hampshire disestablishment and religious liberty were not the results—in any state—of popular intentions to live under “religiously neutral,” secularist, or de-Christianized civil government and laws. In every state disestablishment and religious liberty were the results of Christian leadership and overwhelming support by diverse denominations of Christians, and in no state was “religious neutrality”, secularism, or de-Christianization a result of disestablishment.

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[1] Anson Phelps Stokes, *Church and State in the United States*. 3 vols. (New York: Harper and Brothers, 1950), vol I, p. 423.

[2] Stokes, Vol. I, 432.

Remaining Early States' History of Religious Freedom and Disestablishment: South Carolina, New Jersey, Delaware, Pennsylvania, Maryland, Georgia, Rhode Island – Guest

Disestablishment in the remaining states did not depart from the substance or results of “disestablishment” in the previous states.

The **South Carolina** Constitution of 1778 was the most explicitly Christian and Protestant of our first states' fundamental laws. Its “religious” provisions were more unambiguous, detailed and lengthy than those of any other state. This constitution is the best example of why secularist and “neutralist” accounts of religion and the Constitution seldom deal with the state constitutions, declarations, and bills of rights that were in force when our national Constitution and its First Amendment were framed and ratified. Among many other things, the South Carolina Constitution declared the “Christian protestant religion” the state's established religion. It required a brief, definitely Christian confession of faith to be made by churches incorporated by the state. It also contained an excellent “declaration” of duties to which ministers must subscribe (from the Anglican *Book of Common Prayer*).

Disestablishment in South Carolina came in 1778. It was not the work of non-Christians. It was mostly the work of the Rev. William Tennent, a Presbyterian minister among the predominantly Christian “dissenters” of the state’s interior. The new constitution of 1778 omitted a provision for paying ministers from parish funds: making support of “religion” voluntary and equal before the law. To promote religious liberty, the constitution extended corporate status to all Protestant religious societies that would affirm the fundamental Christian doctrines stated in the South Carolina Constitution. Protestant churches were granted equal civil and religious privileges. Tennent did not argue for “neutrality” among all religions, nor for the secularization of civil government and law, but for equal treatment before the law of every denomination of Christians. He argued for liberty of conscience and judgment in “religious matters”—but did not divorce “conscience” from Christianity:

No legislature has a right to interfere with the judgment and conscience of men, in religious matters, if their opinions and practices do not injure the state... The State may give countenance to religion, by defending and protecting all denominations of Christians, who are inoffensive and useful. The State may enact good laws for the punishment of vice, and the encouragement of virtue. The State may do anything for the support of religion, without partiality to particular societies, or imposition upon the rights of private judgment.

He did not advocate reducing Christianity to equality with all other religions, nor anti-“religious” secularizing of civil government or law.

The South Carolina Constitution of 1790 provided for religious freedom “without distinction or preference,” which meant that Roman Catholics and other non-Protestant religious groups—of which there were very few—were granted equal religious freedom with Protestants. Article VIII provided that “the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state.”

Disestablishment in South Carolina preceded disestablishment in Virginia: It did not present Virginia legislators or the framers and ratifiers of the U.S. Constitution or the First Amendment with a model of either “religious neutrality” or secularism.

The **New Jersey** Constitution of 1776 reflected a long tradition of Christian liberty in worship. Article XVIII had strong provisions against an established church and for liberty of conscience in worship. The very next article (XIV) made it clear that this was a Protestant constitution:

...no Protestant inhabitant of this Colony shall be denied the enjoyment of any civil right, merely on account of his religious principles; but that all persons, professing a belief in the faith of any Protestant sect, who shall demean themselves peaceably under the government,...shall be capable of being elected into any office of profit or trust...

Not until the New Jersey Constitution of 1844 (53 years after ratification of the First Amendment) were Roman Catholics allowed to hold office in New Jersey.

Since **Delaware** had long been part of Pennsylvania, it had a long tradition of religious toleration. The colony's first charter (1701) provided for liberty of conscience, but made it explicitly clear that Almighty God is the only Lord of conscience. It also restricted public office to those who profess to "believe in Jesus Christ, the savior of the World..."

The Delaware Constitution of 1776, like its original charter, required a Trinitarian Christian oath of office. Roman Catholics could hold office; non-Christians could not. There was no religious qualification for voters, but officeholders had to "acknowledge the holy scriptures of the Old and New Testaments to be given by divine inspiration".

The constitution prohibited the establishment of any one "religious sect" in preference to another: no Christian denomination was to be preferred to another by law. It assumed that non-Christians would not be eligible for office. Delaware's 1776 Constitution was neither "neutral" nor secularist regarding "church and state" or religious freedom.

The new Delaware Constitution of 1792 stated that no religious test would be required as a qualification for any state office. This neither secularized Delaware's civil order nor made it absolutely "neutral" among all religions, for the constitution's preamble stated that

Through divine goodness all men, have, by nature, the rights of worshipping and serving their Creator according to the dictates of their consciences...

This formulation was not "neutral" among all religions, for it excluded atheism, agnosticism, Satanism, and polytheism; nor was it consistent with Mohammedanism.

Section I of the Delaware constitution asserted the rights of conscience in religious worship, prohibited legal preference of any "religious societies, denominations, or modes of worship," and prohibited the kinds of practices associated with an established church. It also declared: "It is the duty of all men frequently to assemble together for the public worship of the Author of the universe, and piety and morality, on which the prosperity of communities depends, are thereby promoted..." This referred to the covenant-making, covenant-keeping God of the Bible. Hence it excluded, by implication, the worship of all false gods and all false religions from the legitimate protection of "the rights of worshipping and serving their Creator according to the dictates of their consciences."

The provisions of the 1792 Delaware Constitution were intended to be consistent with the religious and moral doctrines of the Bible, but not to reduce Christianity (or Christianity and Judaism) to a level with all other religions and religious-ethical systems conceived by fallen man in a fallen world. Approval of the religious actions of the false religions of the world would have nullified the covenantal protection of the prosperity of the community that the Delaware Constitution sought to continue through the worship of the Author of the universe and the piety and morality that He requires.

The **Pennsylvania** Constitution of 1776, one of the many manifestly Christian state fundamental laws created by our statesmen of the "Revolutionary" period, stated:

All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent...

Like other early American fundamental laws with similar provisions, it did not state that all men have a natural and unalienable right to worship false gods, or many gods, or to worship them in immoral ways. Nor did it level all religions down to a lowest common denominator. The “natural and unalienable right to worship” was plainly linked to Almighty God, before whom members of the Pennsylvania House of Representatives had to swear this religious test oath:

I do believe in one God, the Creator and governor of the universe, the rewarder of the good and punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testaments to be given by Divine inspiration.

This admitted Roman Catholics to full civil and religious rights, but excluded non-Christians.

Under pressure from the Jews of Philadelphia, the Pennsylvania Constitution of 1790 dropped the requirement that the divine inspiration of the New Testament be affirmed and all religious requirements for electors. This was too late for it to have influenced the framing of the First Amendment. It watered down previous provisions, but did not make Pennsylvania’s 1790 Constitution religiously “neutral” or secularist. Pennsylvania officeholders still had to affirm the being of a God and a future state of rewards and punishments. This requirement was maintained in the Pennsylvania constitutions of 1838 and 1873.

The Pennsylvania constitutions of 1790, 1838, and 1873 were neither “neutralist” nor secularist. All recognized the being of God and preserved as fundamental law a 1700 statute penalizing anyone who would “willfully, premeditatedly, and despitefully blaspheme, or speak lightly or profanely of Almighty God, Christ Jesus, and the Holy Spirit, or the Scripture of Truth.” Pennsylvania’s constitutions and laws protected Christianity until at least nine decades after the ratification of the First Amendment.

Maryland’s 1776 Constitution was definitely a Christian document. Its Declaration of Rights ended the financial privileges of the Anglican Church, stipulated that a man would no longer be compelled to attend any particular place of worship, and prohibited an established church by forbidding legal compulsion to financially support a particular ministry.

These things were achieved by the work of the dissenting denominations: Protestants (mainly Presbyterians) and Roman Catholics—and the work of outstanding individuals like Roman Catholics Charles Carroll and John Carroll. They were not the work of rationalists, Deists, or Unitarians, much less of secularists or advocates of “neutrality” among all religions.

The Maryland Bill of Rights and Constitution were not intended to “neutralize” or secularize the relationship between church and state. They did not abandon Christian ethical standards regarding religious freedom. The Maryland Declaration of Rights of 1776 allowed only “persons professing the Christian religion” to exercise religious freedom. A 1781 law required public

officials to subscribe to a declaration of belief in the Christian religion. Not until 1826—35 years after ratification of the First Amendment—were Maryland Jews allowed to hold public office. Despite their provisions against the establishment of a state church, the Maryland Declaration and Constitution of 1776 could not have been examples for a “neutral” or a secularist First Amendment.

Georgia’s colonial charter granted the free exercise of religion or freedom of conscience to “everyone except papists,” but its 1777 Constitution removed the restriction on Roman Catholics’ religious liberties.

The 1777 Constitution also stated that no one had to support a religious teacher not of his own religious profession: so Christians had to support their church’s or denomination’s pastors. Like some other states that sought to prevent the establishment of one denomination in a position of superiority in the state, Georgia’s 1777 constitution stipulated that no clergyman of any denomination would be allowed to serve in the legislature. These provisions were intended to be consistent with the fundamental Protestant Christianity of the document—which required members of the legislature to be “of the Protestant religion.”

Georgia’s new constitution of 1789 dropped the religious test for office, provided that there would be no legal infringement on a man’s civil rights because of his religious principles, and established the free exercise of religion for all persons. No one would be required to support any religious profession but his own. This did not create absolute “neutrality” among all religions or secularization of Georgia’s civil life: the state retained its Common Law foundation and its laws enforcing Christian morality.

The 1798 Georgia Constitution clarified the meaning of the free exercise of religion, stating that: “No one religious society shall ever be established in this state, in preference to another; nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.”

Neither the 1789 nor the 1798 Georgia constitution can be used to argue for a “neutral” or a secularist First Amendment: because neither was really religiously “neutral” or secularist. And because Georgia did not ratify the First Amendment.

Rhode Island used its colonial charter as its state constitution until 1842. Its charter established principles favorable to religious liberty and unfavorable to an established church, providing for the “free exercise and enjoyment” of the subjects’ “civil and religious rights.”

Roger Williams, the founder of Rhode Island, was the main influence on the charter. His intentions were certainly Christian. The original charter was brimming with Christian rhetoric and principles. A fundamental purpose of the charter was “enjoyment of all their civil and religious rights”. So was “that liberty, the true Christian faith and worship of God...” The charter also stated—as would many of the newly independent state constitutions, declarations, and bills of rights—that this liberty was not to be used “to licentiousness and profaneness, nor to the civil injury or outward disturbance of others.”

Rhode Island residents were made into a body politic to be “in the better capacity to defend themselves, in their just rights and liberties, against all the enemies of the Christian faith...” This was Rhode Island’s fundamental law until 1842: over 50 years after ratification of the First Amendment. It is misleading for secularizers to define an “establishment of religion” as any governmental support of “religion,” and to cite Rhode Island as an example of a state “which never had an establishment and opposed every sort of one,” for Rhode Island was definitely neither secularist nor “neutral” toward Christianity.

The evidence from the states previously surveyed as well as from these remaining states is clear and compelling. At the time of the Declaration of Independence:

1. Our first thirteen states all had clearly and unmistakably Christian fundamental laws in their colonial charters (Connecticut and Rhode Island), or state constitutions, declarations of rights, and bills of rights (all the rest).
2. One state, Rhode Island, had liberty of conscience within a Christian setting.
3. Four states had a single denomination as the state’s established church: In Virginia, North Carolina, and New York the Anglican Church; in Connecticut the Congregational Church.
4. Eight states had a quasi-established church, an establishment of Protestantism, or of Christianity: Massachusetts (Congregational Church), New Hampshire (Protestantism), South Carolina (Protestantism), New Jersey (Protestantism), Delaware (Christianity), Pennsylvania (Christianity), Maryland (Christianity), Georgia (Protestantism).

At the time of the framing and ratification of the U.S. Constitution (1787-1789), and of the Bill of Rights and the First Amendment (1789-1791):

1. Two states (Rhode Island and Virginia) had full “religious freedom”—without separating Christianity from their laws.
2. One state (New York) had “full religious freedom”—with two exceptions: a Protestant test oath for office (until 1806), and a requirement that all naturalized citizens renounce allegiance and subjection to all foreign princes and potentates in ecclesiastical and civil matters.
3. The other 10 states were either Christian or Protestant establishment (or quasi-establishment) states with religious freedom bounded by Christian morality.

Regarding “disestablishment” and religious liberty:

1. In *NO* state—including Virginia—was disestablishment a result of the leadership and work of non-Christians, or a significant number of non-Christians.
2. In *every* state it was overwhelmingly the leadership and work of Christians: mainly of the “dissenting” denominations and churches, chiefly Baptists, Presbyterians, and other Protestants.
3. Some tolerant members of the established church or denomination supported disestablishment: Anglicans/Episcopalians like Madison and Jefferson in Virginia; and Orthodox Congregationalists in Massachusetts—where Unitarians had taken over many Congregational churches from within.

4. The arguments in the various states' struggles for disestablishment of a state's established, or quasi-established church, were conducted as arguments between Christians, not as disputes between Christians and pagans, rationalists, agnostics or atheists.
5. In NO state was "disestablishment" intended to produce, or did it produce "neutrality" among all religions, de-Christianization or secularism.
6. Christianity remained fundamental to the laws and practices of each state.
7. "Disestablishment" in the states was *not* a precursor of a "religiously neutral" or a secularist First Amendment.

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Religious Freedom Since the First Amendment and Early State Constitutions – Guest Essayist: Marc Clauson

Meaning of, and how early state constitutions allowed religious establishments regardless of the First Amendment

The first states, as we know, were originally colonies of Great Britain. Even before that, some were not founded as British colonies, but independent endeavors. Only later, after the "period of salutary neglect," did they come under direct governance of the Crown. From the beginning then, the American colonies, though they did have their own charters and compacts (early constitutions), also could and did have established religions—though many were also tolerant of other religious sects.

Several things must be noted regarding the early colonial and state constitutions in relation to the United States Constitution. First the colonial and later state constitutions did allow for a single established church. Some of these simply followed the Anglican Church model and others adopted a different church model. But their respective constitutions did not pose any legal barriers to this. Second, the United States Constitution in the First Amendment explicitly stated that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." In the early years of the Republic that clause was applied only to the national government, leaving the states free to establish their own official churches. Many did so. But even those that did, tended to allow for different sects of Christianity—and even different non-Christian religions. Massachusetts was the last state to abolish its established Christianity in 1833, before the First Amendment was applied by the United States Supreme Court to the states as well as the national government.

Throughout the "establishment period" (until 1833) the states allowed dissenting churches even though they mandated official churches supported by tax money. It was not until 1947 in the *Everson v. Board of Education*, that the Supreme Court began to apply the Establishment Clause to the states. At that point any established churches would be unconstitutional in the states. Nevertheless, freedom of religion—toleration in effect—was already the custom of the states, and all had by then abolished established churches.

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The Peoples of Our Early States: Not “One People” – Guest Essayist: Archie P. Jones

When John Jay, in Federalist No. 2, said he had often noted with pleasure that “Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence,” he was half right. He recognized that the peoples of the states that declared their independence in 1776 were overwhelmingly Christians and Protestants. Yet he was certainly wrong about them being “one united people,” and about them having a purpose to establish “general liberty and independence,” for as the colonies’ Declaration makes clear, they fought to make each colony, under God, a free and independent state.

The Americans of those colonies had an overwhelmingly Christian background extending through English and Western history to the Old and New Testaments.^[1] Their theological background was dominantly Calvinistic, but with diverse expressions. Of the 3,000,000 Americans in 1776 about

900,000 were of Scotch or Scotch-Irish origin, 600,000 were Puritan English, and 400,000 were German or Dutch Reformed. In addition to this the Episcopalians had a Calvinistic confession in their Thirty-nine Articles; and many French Huguenots also came to this Western world. Thus...about two-thirds of the colonial population had been trained in the school of Calvin.^[2]

These colonies were the most thoroughly Protestant, Reformed, and Puritan commonwealths in the world. Puritanism provided the moral and religious background of 75 percent of the people who declared their states’ independence in 1776.^[3] Ahlstrom says that “If one were to compute such a percentage on the basis of all the German, Swiss, French, Dutch, and Scottish people whose forebears bore the ‘stamp of Geneva’ in some broader sense, 85 or 90 percent would not be an extravagant estimate.”^[4]

American culture when our early state constitutions were framed was clearly Protestant, with local variations in each state according to its ethnic, denominational and theological heritages. Education, law, legal thought and legal education were overwhelmingly Protestant—before, during, and long after our first states framed their fundamental laws.^[5] These were deeply Christian, with theological presuppositions, philosophies, histories, and precedents

reaching back through British and Western history and legal thought beyond the Reformation and the medieval period to the Bible.[\[6\]](#)

Although the peoples of the English colonies were basically one in their commitment to Christianity, the Christian basis of their ethical, political, and legal thought, and their desire to be free of England's rule, *they were not one but many in many other ways*. They were many in their theologies, ecclesiastical doctrines, and denominational affiliations. Theologically, they were Calvinists and Arminians, Protestants and Roman Catholics. Denominationally, they were Presbyterians, Congregationalists, Reformed, Episcopalians, Baptists, Methodists, Evangelicals, independents, Lutherans, German Reformed, Dutch Reformed, Huguenots, Quakers, Mennonites. Most were from England, but some were from Scotland, Ireland, Northern Ireland (Scots Irish), France (Huguenots), the Netherlands (Dutch Reformed), or Germany (Reformed, Lutheran, Mennonite). Though most were from England, they spoke different dialects. As Phillips noted in *The Cousins' Wars*, those who settled the various colonies were from different parts of England, had fought against each other in the English Civil War (1640s), and would, to some extent, fight against each other again in the colonies' War for Independence, and later in our misnamed "Civil War".[\[7\]](#) As was obvious to the colonists, the New England colonies were heirs of the Puritans, quite different from colonists of the more diverse Middle Colonies, and even more different from the more traditional Anglican, Presbyterian and Baptist colonies of the South.

Nor were they one in their economic interests and endeavors. Farming was dominant in every region. But New England's economy focused on mercantile activity, manufacturing, fishing, and whaling. The Middle Colonies' focus was on mercantile activity. The South was dominated by agriculture and an agrarian philosophy.

The cultural difference between the people of the North, particularly New England, and of the South was deep. Page characterized it as producing "(t)wo essentially diverse civilizations",[\[8\]](#) and eventually (1861-1865) our most destructive war. The differences were religious, economic, cultural, and political. Religiously, the South was more Anglican or low-church Episcopalian, Presbyterian, and traditional; the North, especially New England, was Puritan (Calvinistic Congregationalist). Culturally, the South was individualistic, traditional, and conservative; the North was more community-centered, authority-centered, and church-centered. The tyranny of the British king-in-Parliament, not cultural or political convergence, brought the two peoples together for their common defense.[\[9\]](#)

The colonies had different modes of government: in New England the township; in the South the county; in the Middle Colonies a mixture of the two. The New England township was more overtly democratic than the Southern colonies' governments, but had oligarchic aspects and exercised more power over the individual than Southerners would have tolerated. Southern government was formally more aristocratic, yet substantively much more influenced by the "plain folk" than most historians admit.

The colonies had diverse histories. Each section had been settled by somewhat different groups of people, from different places in England and Western Europe. Though slavery existed in almost all the colonies, it was more successful in the South, so the Southern colonies had larger

slave populations, and more diversity in that respect than the other two sections. Peoples of the New England states had more in common with those of the Middle states than they did with the peoples of the Southern states. Moreover, each colony had its own unique history and regional and local differences within its borders.

The relations of the colonies to each other clearly indicate that they were not one people. They were all under the authority of the British Empire, but each was connected to Britain by its own charter. They were not bound only by laws of a common sovereign to them as a whole, for each had its own government. They owed no reciprocal obligations to each other and had no common political interests or duties.[\[10\]](#) As Upshur explains:

The people of one colony owed no allegiance to the government of any other colony, and were not bound by its laws. The colonies had no common legislature, no common treasury, no common military power, no common judicatory....There was no prescribed form by which the colonies could act together, for any purpose whatever; they were not known as “one people” in any one function of government....even in the action of the parent country, in regard to them, they were recognized as separate and distinct. They were established at different times, and each under an authority from the Crown, which applied to itself alone. They were not even alike in their organization. Some were provincial, some proprietary, and some charter governments. Each derived its form of government from the particular instrument establishing it..., without any connection with, or relation to, any other.[\[11\]](#)

The nature and extent of the powers exercised by the Continental Congress did not make the people of all the colonies a “*de facto* nation” or “one people.” That Congress was not a true civil government: it could only consult, deliberate, pass resolutions, and advise, not legislate.[\[12\]](#)

The Declaration of Independence did not “bring forth a new nation”; it brought forth thirteen new independent nations. The Congress that produced that Declaration then acted only upon the authority of the consent and acquiescence of the several states—not upon any authority of a new nation consisting of all the people of the states as a collective entity. It was then a *de facto* government that, in its ordinary business, relied on the belief that its actions would be approved and confirmed by their states.[\[13\]](#)

In no Continental Congress did the states’ representatives act as representatives of one people. No wonder, for the standard estimate of the loyalties of the colonists is: one-third for independence, one-third against it, and one-third undecided. Every recommendation to send representatives to a general Congress was addressed to the colonies as such, not to “the people.” Each colony acted for itself in the choice of those deputies; none acted in the name of the whole “American people.” The colonies after their Declaration acted as equals, not as areas having a certain percentage of the whole people of a “new nation.”[\[14\]](#) However a state’s representatives were chosen, they were chosen in each particular state for itself alone, certainly not for any “nation.”

The Continental Congress exercised *de facto* a power of legislation in many cases, but never had that authority *de jure* by any grant of power from the colonies or from “the people” of “the

nation.” Congress’s acts only became valid by the states’ subsequent confirmation. During the course of the war the people

“...never lost sight of the fact that they were citizens of separate colonies, and never, even implicitly, surrendered that character, or acknowledged a different allegiance. In all the acts of Congress, reference was had to the colonies, and never to the people. [Its] measures were adopted by the votes of the colonies *as such*, and not by the rule of mere numerical majority, which prevails in every legislative assembly of an entire nation.[15]

Acts of the “revolutionary government” were consistent with the independence and sovereignty of the states.... The Continental Congress did not have “exclusive” power to wage war; the independent states used their own sovereign authority to wage their war for independence.[16]

The people of the colonies were not one people before they joined to declare the independence of their states; uniting to form the Declaration did not make them “one people.”[17] The Congress that declared their independence was appointed by each colony separately and distinctly. They deliberated and voted as separate colonies—with only one vote per colony—not in proportion to each colony’s population, as they would have if their collective vote were intended to represent the will of the “national majority.” They did not declare the independence of a new union, but of their thirteen respective states.[18] The delegates signed the Declaration not as random individual representatives of the whole people of the states, but in groups according to their respective states. Foreign countries, in treaties, recognized the distinct sovereignty of the states.[19]

The states’ framing and ratification of the Articles of Confederation did not presuppose or create one people. The Articles’ wording explicitly refutes such an idea: plainly announcing that “each 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.”[20]

Clearly, the states’ framing and ratification of the Constitution did not presuppose one people. Providence gave this geographically united country to the divided peoples of thirteen separate states. Their different colonial histories—in 1776, seven well more than a century, four more than a century, one, more than ninety years, and one, four decades—gave the people of each state a separate identity.

The Constitution did not create one people. It was framed by representatives of the states, whose legislatures chose the delegates they sent to what turned out to be the Constitutional Convention: not by “the people” of the United States as a whole. In Philadelphia each state had only one vote. The states were not allotted votes on the basis of population. They were represented as equals because they were equally free, independent states. The Constitution was ratified by elected representatives of each individual state—the state’s legislature or specially elected ratification convention—not by a popular vote of the people of the state, much less by a national plebiscite.

Each state that ratified the Constitution acted on the basis of its own debates and its own representatives' decision. In doing so, each state's representatives determined that the new Constitution and its federal government would not be a threat to its own particular Christian constitution, declaration or bill of rights, governmental system and laws.

The Christian theory of resistance to tyranny that the colonies followed in resisting the king-in-Parliament continued long after the framing and ratification of the Constitution of the United States (and its Bill of Rights). At least six states—New Hampshire, Maryland, New Jersey, Pennsylvania, Virginia, and Massachusetts—stated this right explicitly in their fundamental laws, and thereby implied the right of the people to use all the legitimate means of resistance endorsed by that tradition. Article IV of Maryland's Declaration of Rights (1776) phrased it pointedly: "The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind." Where this doctrine was not stated, it was implicit in the constitutions and declarations of all of the states—which owed their existence to the exercise of precisely such a conviction.

At least three states—Virginia, New York, and Rhode Island—made it plain in their ratification documents that to defend their people's inherited rights and liberty against central government injustice or tyranny they had the right to secede from the Union established by the Constitution, to take back the powers their people had delegated to the central government whenever it should become "necessary to their happiness." Some other states' ratification documents made it clear that each state retains all powers it had not explicitly delegated to the central government, and that these powers remain with each state—as the Tenth Amendment, voicing a common concern of the people of each state, later made explicit.^[21] Unquestionably, in God's providence, the peoples of the respective states intended to remain so.

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[1] Russell Kirk, *The Roots of American Order* (LaSalle, Illinois: Open Court, 1974), 11-392.

[2] Loraine Boettner, *The Reformed Doctrine of Predestination* (Philadelphia: Presbyterian and Reformed Publishing Co., [1932] 1972), 382-383.

[3] Sydney E. Ahlstrom, *A Religious History of the American People* (Garden City, N.Y.: Doubleday and Co., Image Books, 1975), vol. 1, 169.

[4] Ahlstrom, 169.

[5] Archie P. Jones, "Christianity in the Constitution: The intended meaning of the religion clauses of the First Amendment" (Ph.D. dissertation, University of Dallas, 1991), 79-144.

[6] Russell Kirk, *The Roots of American Order*; Harold J. Berman, *Law and Revolution; The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983); John Eidsmoe, *Historical and Theological Foundation of Law*, 3 vols., (Powder Springs, Georgia:

American Vision Press, Tolle Lege Press, 2012); and Jones, “Christianity in the Constitution,” 145-230.

[7] Phillips has in mind the Puritans who settled New England and the Anglicans who settled the South. Our War Between the States was not a “civil war” because it was not fought for control of the national government but over the right of a state to secede from the union established by the Constitution.

[8] Thomas Nelson Page, *The Old South; Essays Social and Political* (Chautauqua, New York: The Chautauqua Press, 1919), 259.

[9] Page, 260.

[10] Abel P. Upshur, *The Federal Government: Its True Nature and Character; Being a Review of Judge Story’s Commentaries on the Constitution of the United States; With an Introduction and Copious Critical and Explanatory Notes by C. Chauncey Burr* (New York: Van Evrie, Horton & Co., 1868). [Reprinted by St. Thomas Press, Houston, Texas, 1977], 35. Upshur’s 242-page point-by-point refutation of Joseph Story’s claim that the Constitution was intended to be based on the national majority will destroys the arguments of multitudes of Fourth of July orations, books, and lectures. It should be required study for any analysis of the Constitution.

[11] Upshur, 36-37.

[12] Upshur, 44-50.

[13] Upshur, 57.

[14] Upshur, 58. The states’ argument in their Declaration of Independence refutes the concept of a binding perpetual union, for the laws of nature and of nature’s God that the Declaration invokes as the standard by which one people is justified in terminating its relationship with another are prior in authority to all unions of peoples.

[15] Upshur, 61.

[16] Upshur, 64, 65.

[17] Upshur, 77, 78.

[18] Upshur, 79-81.

[19] Upshur, 90.

[20] Upshur, 94. This is an obvious forerunner of, and is better worded than the Tenth Amendment.

[21] Archie P. Jones, *The Gateway to Liberty: The Constitutional Power of the Tenth Amendment* (Powder Springs, Georgia: American Vision Press, 2010), 47-53.

Our First States' Constitutions, Declarations of Rights and Bills of Rights vs. "The Liberal History Lesson" – Guest Essayist: Archie P. Jones

M. Stanton Evans rightly complained against what he termed “the Liberal History Lesson”, the lie that Americans got our freedom by turning from Christianity.[1] That tale is supported by other fictitious claims, such as that the statesmen who gave us our independence, the U.S. Constitution, and the Bill of Rights were Deists, rationalists, and skeptics who wanted to separate Christianity from politics and establish a “religiously neutral” or secularist political order over these United States. None of that fits the evidence—when all the evidence is considered. The pertinent evidence must be summarized,[2] but the evidence from our first states’ constitutions, declarations and/or bills of rights is sufficient to make the case.[3]

Christianity, overwhelmingly Protestant Christianity, was the religious commitment of the people of every state.[4] Early American education—at all levels including college, in all colonies and areas of the colonies/states—was overwhelmingly Christian: before, during, and long after the “Revolution” and the “Founding Era.”[5] Christianity was fundamental and dominant in early American law, legal thought, and legal education during and after this time.[6] Christianity was much more influential on early American political thought than we have been told.[7] Moreover, the framers and ratifiers of the Constitution created by representatives of the several states and ratified by the respective state legislatures or specially elected state ratification conventions were not Deists, skeptics, rationalists, or secularizers, but were overwhelmingly Christians.[8]

Two states retained their manifestly Christian colonial charters as their state constitutions: Connecticut until 1818, and Rhode Island until 1842. New Hampshire and South Carolina created their constitutions in 1776, before the colonies’ Declaration of Independence, as temporary expedients in case no accommodation could be reached with England. Virginia and New Jersey crafted their constitutions before the Declaration too, but as permanent governmental devices. Pennsylvania, Maryland, Delaware, North Carolina, Georgia and New York framed their constitutions, declarations, and bills of rights after the Declaration but completed the process by early 1777.[9] The Massachusetts Constitution of 1780 was the first to be created by a constitutional convention and approved by popular vote. Thus, says McClellan, it was “the first written constitution resting on a thoroughly republican base, and in this respect set the standard for the Federal and State constitutions that were to follow.”[10] Though they had important similarities, the states had different histories, religious and ethnic compositions (in religion, overwhelmingly among Christian denominations), social orders, economic interests, and internal politics. They were thirteen peoples, not one.[11]

The new state constitutions, declarations and/or bills of rights created by the states were clearly Christian, though not flawless, and the people of each state learned from the fundamental laws created by the representatives of the peoples of other states, as well as from their own. These

documents were adaptations of the inherited forms, structures, and principles of the respective colonies' governments and laws.[\[12\]](#)

Our states' first fundamental laws featured Christian rhetoric, statements of God's—and no other god's—attributes and authority, including His providential, covenantal governance of history, and a Christian view of the Source and rightful content of law.

Concerning civil government, they set forth a covenantal, republican view that civil government must, under God, be based upon the consent of the governed. Concerning man, the rulers and the ruled, they affirmed that he is created with certain unalienable God-given rights, but rejected notions that man is either “neutral” or naturally good. They affirmed the unpleasant reality of Original Sin and designed their governments to protect liberty and justice against it. Because they knew the fallen nature of man, they designed limited republics with written constitutions and bills of rights. Those republics had both democratic and aristocratic features, designed to protect the majority and the minority against injustices. They were not egalitarian, and sought to protect property by means of graded property qualifications for government offices. To protect and promote godly laws and liberty, they had Christian qualifications for public office; in respect for Christians who believe that God forbids men to swear an “oath,” they let them make an “affirmation” instead. To promote the benefits of education in all mental, practical, and geographical areas of a state, they encouraged the towns, precincts, and voluntary associations to promote Christian instruction.

Due to the states' colonial heritage, some of them (Virginia, North Carolina, New York) had the Anglican, or Episcopal Church as the legally established church of the state. In Connecticut and Massachusetts the Congregational Church was the *de facto* established church. In South Carolina, New Jersey, and New Hampshire, Protestantism was the quasi-established not church but religion.[\[13\]](#) In Delaware, Pennsylvania, Maryland, Georgia, and Rhode Island Christianity was quasi-established.[\[14\]](#) When the states finally did away with their particular *de jure* or *de facto* established or quasi-established church, they were not motivated by rationalism, “neutrality” among all religions, or secularism, but by Christianity, Christian leadership, and a desire for religious liberty within the boundaries of Christian, or Biblical ethics (later including Jews).

Because they knew the fallen nature of man, they created systems of separation of powers with accompanying checks and balances among institutions to protect liberty and justice. For the same reason, they stated the right of the people to resist tyranny. And to protect their people against simplistic philosophies of freedom, they reminded them of the biblical connection between Christianity, virtue, and liberty: faith in God, obedience to His commandments, and God's blessings upon the people of the state. Such historical realities the “Liberal History Lesson” omits.

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[\[1\]](#) M. Stanton Evans, *The Theme Is Freedom; Religion, Politics, and the American Tradition* (Washington, D.C.: Regnery Publishing, Inc., 1994), 3-21.

[2] Benjamin F. Morris, *The Christian Life and Character of the Civil Institutions of the United States* (Powder Springs, Georgia: American Vision, [1864] 2007), provides more than 800 pages of pertinent evidence about Christianity and the states in general.

[3] Morris, 267-292, deals with the state constitutions framed during the “Revolution.”

[4] For extensive evidence on this, see Morris, *The Christian Life and Character of the Civil Institutions of the United States*, 55-138.

[5] Archie Preston Jones, “Christianity in the Constitution: The Intended Meaning of the Religion Clauses of the First Amendment,” (Ph.D. dissertation, University of Dallas, 1991), 79-144.

[6] Jones, “Christianity in the Constitution,” 145-230. See also John Eidsmoe, *Historical and Theological Foundations of Law*, 3 volumes (Powder Springs, Georgia: American Vision Press, Tolle Lege Press, 2011), especially Vol. I, pages 243-468, Vol. II, pages 582-620, 687-960, and all of Volume III.

[7] Since political sermons were often part of public affairs in early America before, during and after the War for Independence, see Ellis Sandoz, ed., *Political Sermons of the American Founding Era, 1730-1805* (Indianapolis: Liberty Press, 1991). Further evidence of the influence of Christian political thought on early America see Charles S. Hyneman and Donald S. Lutz, eds., *American Political Writing during the Founding Era, 1760-1805* (Indianapolis: Liberty Press, 1983).

[8] M.E. Bradford, *A Worthy Company; Brief Lives of the United States Constitution* (Marlborough, New Hampshire: Plymouth Rock Foundation, 1982), and M.E. Bradford, *Religion and the Framers: The Biographical Evidence* (Marlborough, New Hampshire: Plymouth Rock Foundation, 1991).

[9] James McClellan, *Liberty, Order and Justice; An Introduction to the Constitutional Principles of American Government* (Washington, D.C.: Center for Judicial Studies, 1989), 84-86.

[10] McClellan, 87.

[11] Abel P. Upshur, *The Federal Government: Its True Nature and Character; Being a Review of Judge [Joseph] Story's Commentaries on the Constitution of the United States* (New York: Van Evrie, Horton & Co., 1868), Reprinted by St. Thomas Press, Houston, Texas, 1977, provides a 242-page, point-by-point refutation of Story's unhappily influential work.

[12] On the colonial charters and states' constitutions see Conrad Henry Moehlman, *The American Constitutions and Religion; Religious References in the Charters of the Thirteen Colonies and the Constitutions of the Forty-eight States; A Sourcebook on Church and State in the United States* (Berne, Indiana, 1938); Benjamin P. Poore, ed., *Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States*, 2 volumes

(Washington, D.C.: Government Printing Office, [1877] 1888); and William J. Federer, *The Original 13; A Documentary History of Religion in America's first Thirteen States* (St. Louis, Missouri: Amerisearch, Inc., 2014).

[13] That is, Protestants' religious freedom was protected.

[14] That is, Christians' religious freedom was protected.

State Constitutions? Why Would Each State Need Its Own Constitution? Part 1 – Guest Essayist: Marc Clauson

State Constitutions? – Why would each state need a constitution when we have the United States Constitution? What would it mean for the states to be run by their citizens rather than royal rule?

The first question poses an issue of federalism and the rule of law. The United States Constitution was drafted to establish a particular form of government at the national level. Its provisions were not intended mainly to address states as states but individuals who lived in those states. Federalism as an institutional form allocated certain powers to the national government and more or less left any remaining powers to the states. If the citizens of any given state were to enjoy the benefits and protections of limited government, some sort of constitutional rules would be required. Otherwise the state governments would have unlimited authority. By definition a constitution is an enforceable set of rules, alterable by the people and unalterable by the government. A state constitution provides such a framework.

This also is one reason why state constitutions are so long, compared to the Federal Constitution. The state governments possess reserved powers, that is, all power not granted to the national government. Since this is a very large potential body of power, it is necessary to address any particular power that might be invoked by the state. In turn, that requires a much more detailed set of provisions, since whatever is not addressed is by definition granted to the state government.

The second question is one of self-governance. John Locke had argued that all legitimate government was established by a social contract founded on the “consent of the people.”^[1] For Locke this was the only effective way to limit the power of government to its ordained functions—the protection and promotion of the natural rights of life, liberty and property. Royal rule implied a centralized and removed form of government in which the citizens had only those rights that government chose to grant to them. In the Colonial period, constitutionalism did not exist in effect, though many spoke of an “Ancient Constitution” that, among other things guaranteed “the rights of Englishmen.” This was however an unenforceable hodgepodge of laws and customs, not a coherent, written document.

As a result, governance from England was exercised through the king and his colonial governors. If the states were governed by their citizens they would be able to choose their own type of institutional structure and likely (as they did) directly participate in choosing many of the

public officials. The government would in a real sense be closer to the people. Local conditions would be better known, as opposed to attempts to make policy from the mother country.

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[1] See *Second Treatise of Government* (1690).

State Constitutions? Why Would Each State Need Its Own Constitution? Part 2 – Guest Essayist: Gary Porter

State Constitutions? – Why would each state need a constitution when we have the United States Constitution? What would it mean for the states to be run by their citizens rather than royal rule?

“Americans are the heirs of a constitutional tradition that was mature by the time of the national Constitution,” writes Donald Lutz in *The Origins of American Constitutionalism*.”[1] Beginning with “proto-constitutions” such as the Mayflower Compact, the Pilgrim Code of Law and the Fundamental Orders of Connecticut, Americans had spent more than 150 years learning and perfecting the art of constitution-writing -- and the thirteen state constitutions which were in effect when the national constitution was ratified in 1788 were an important step in that process. “It would not be putting the matter too strongly to say that the United States Constitution, as a complete foundation document, includes the state constitutions as well.”[2] Tragically, Americans, whose knowledge of their national constitution is dismal enough,[3] show even less interest in those of their own states. This is doubly tragic when you consider that American lives are arguably more affected by the laws of their state than by federal law.

As to what it would mean for the states to be run by their citizens rather than royal rule, some colonies had not known “royal rule” for quite some time. The charters of 1662 (Connecticut) and 1663 (Rhode Island) had given each of these colonies permission to elect their own governors rather than live under governors appointed by the king, as was the rule elsewhere. In fact it was the “self-rule” aspects of these charters that persuaded the two states to *not* construct new constitutions after July 4th 1776, finding instead that they could continue operating under the structure of these charters as independent states. Even in those colonies operating under royal appointees, those governors rarely interfered in the affairs of their elected legislatures, making Parliament’s “Intolerable Acts” of 1774[4] even more intolerable.

Every government, every organization for that matter, has a constitution, whether one has been purposely created for it or not; this is simply a fact of voluntary association. Until a written constitution is drafted to guide it, any organization will, over time, adopt formal or informal rules to guide the organization and its affairs. These rules comprise a constitution, often an unwritten one.

Black's Law Dictionary^[5] defines "Constitution" as "The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers."

America had a constitution in 1776, or at least so thought Jefferson when he complained in the Declaration: "[The King] has combined with [Parliament] to subject us to a jurisdiction *foreign to our constitution*, and unacknowledged by our laws." (Emphasis added). "Our *constitution*," not "our *constitutions*" (which could have pointed to the several state constitutions by then in force). While the colonies certainly lacked a common, written constitution, the last 150+ years of successful collective self-government had resulted in the informal incorporation of many features of government which combined to comprise an unwritten constitution – which Jefferson claimed was being violated.

"Reading properly and carefully, one can glean from a constitution the balance of political forces, a structure for preserving or enhancing that balance, a statement of the way people should treat each other, and the values that for the basis for the people's working relationship, as well as the serious, remaining problems in the political order."^[6]

In July 1776, when the thirteen united colonies claimed their independence and became "free and independent states," they had a long relationship with self-governance --Virginia, the oldest colony, since 1619; and the autonomy they enjoyed would not be so easily given up to a Parliament which, in 1766, had claimed for itself the right to legislate for the colonies "in all matters whatsoever."^[7]

By 1776, each colony was operating under a charter from the King of England, some royal, some proprietary, which defined its leadership/governing structure and the rights to be enjoyed by the colony's inhabitants. Virginia's 1606 charter, for instance created a thirteen-member governing council in Virginia shadowed by another thirteen-member council back in England. The colony's citizens were to enjoy "*all liberties, franchises and immunities within anie of our other dominions to all intents and purposes as if they had been abiding and borne within this our realme of Englande*"^[8]

On May 10th, 1776, the Second Continental Congress issued a resolution encouraging any of the colonies who had not already done so to "*adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general.*"^[9] Sent out on May 15th after a prologue had been added, the resolution arrived too late for several colonies. The previous January, New Hampshire had unilaterally enacted a new constitution, the first to do so. South Carolina had followed suit on April 12th. On May 4th, 1776, the legislature of Rhode Island, sensing the mood of the country, passed a bill that replaced an act of allegiance to the king with an oath of allegiance to the state – effectively declaring their independence. As previously noted, Connecticut's "Fundamental Orders," adopted in 1638 while the state was still an English colony, included no overt allegiance to England. It would not be until 1818 that Connecticut would get around to drafting a new constitution. Virginia had already issued its call for a constitutional convention, to assemble in

Williamsburg on May 5th. Their new constitution was enacted 5 days before Jefferson's Declaration was approved in Philadelphia.

Responding to Congress' resolution, the other colonies began to take action: Maryland, Delaware, Pennsylvania, North Carolina, and New Jersey all enacted new Constitutions later that year.

Georgia and New York put new constitutions in place the following year, Massachusetts in 1780.

These first state constitutions “were the most detailed and legally binding collective expression of the revolutionaries' political ideas in 1776.”^[10] Often overshadowed by the Constitution of 1787, the state constitutions are a rich treasure trove of republican and democratic principles.

Why were the state constitutions still needed after the U.S. Constitution went into effect twelve years later? Simply because the formation of a new national government did not eclipse the state governments, in fact it relied upon the states to continue to provide the vast majority of governmental services within each state, which the Tenth Amendment to the U.S. Constitution obliquely reminds us: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”^[11]

Eleven of the original thirteen state constitutions contained specific protections for individual rights. While a state document cannot deny a right secured in the national document, in some cases the states secure rights for their citizens which are not mentioned or are elucidated differently in the national document. For instance, Pennsylvania and a few other states make it clear that “the people have a right to bear arms *for the defence of themselves and the state,*” significantly clearer than the confusing wording of the U.S. Second Amendment. (Emphasis added). The North Carolina constitution secures a right for its citizens to “*instruct their representatives,*” and requires that jury decisions be unanimous (as do several other state constitutions). Maryland secures a right for its citizens of “*resistance, against arbitrary power and oppression.*” Delaware's first constitution (enacted September 10, 1776) outlawed slavery in the state.

In many cases, these first state constitutions take the opportunity to explain principles of government which the Framers of 1787 apparently thought were so “self-evident” as to not require mentioning. For example, the Virginia Declaration makes the following statements (here paraphrased) not found in the U.S. Constitution:

- That all men are by nature equally free and independent, and have inherent rights that they cannot, by any compact, deprive or divest their posterity.
- That all power is vested in, and consequently derived from, the people.
- That magistrates should be at all times amenable to the people.
- That elected officials should be returned to the body of the people to feel, once again, their burdens.
- That government is instituted for the common benefit, protection, and security of the people, nation or community.
- That a majority of the community has a right to reform, alter or abolish their government.

- That no individual or group is entitled to exclusive or separate benefits or privileges from the community.
- That citizens should evidence a permanent common interest in, and attachment to, their community before being allowed to vote.^[12]

Today, a Massachusetts legal organization cautions: “Some of the protections bestowed by the [Massachusetts] Declaration of Rights duplicate those enumerated in the Bill of Rights, while others confer greater protection of individual liberties. Too few Massachusetts criminal defense attorneys utilize the additional protections afforded to Massachusetts citizens under the Declaration of Rights in defending their clients. *A criminal defense lawyer who fails to specifically cite the Massachusetts Declaration of Rights in objections at trial or issues raised on an appeal may needlessly consign his client to a prison cell.*”^[13]

Another advantage of the state constitutions lies in their generally being easier to amend than the national constitution. As a consequence, the state constitutions are amended far more frequently. The entire constitution of a state can often be replaced more easily (Georgia and Louisiana are each currently operating under their ninth state constitution since 1776).

For those interested in further study of the 50 state constitutions, the [NBER/Maryland State Constitutions Project](#) provides searchable access to almost 150 versions of these documents. The best comparative treatment of the state constitutions, including to what extent they incorporated the leading principles of republican government, is found in Willi Paul Adams’ masterpiece: *The First American Constitutions; Republican Ideology and the Making for the State Constitutions in the Revolutionary Era*.

State constitutions perform an important role in the governance of America’s 320 Million citizens and play a critical role in making federalism work. We couldn’t get by without them.

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^[1] Donald Lutz, *The Origins of American Constitutionalism*, Louisiana State University Press, Baton Rouge, 1988, p.5.

^[2] Ibid.

^[3] https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/27/too-many-americans-know-too-little-about-the-constitution-heres-how-you-can-fix-that/?utm_term=.8715e5eb6890

[4] https://en.wikipedia.org/wiki/Intolerable_Acts

[5] Black's Law Dictionary, 4th Edition, accessed at:

[6] Lutz, p. 3

[7] The American Colonies Act 1766, aka The Declaratory Act, explained at https://en.wikipedia.org/wiki/Declaratory_Act

[8] 1686 Virginia Charter

[9] <http://startingpointsjournal.com/may-resolution-declaration-of-independence/>

[10] Willi Paul Adams, *The First American Constitutions; Republican Ideology and the Making for he State Constitutions in the Revolutionary Era*, Rowman & Littlefield, Pub, New York, 2001, Preface to the Expanded Edition.

[11] https://en.wikipedia.org/wiki/Tenth_Amendment_to_the_United_States_Constitution

[12] https://en.wikipedia.org/wiki/Virginia_Declaration_of_Rights

[13] <https://www.relentlessdefense.com/what-should-i-do/massachusetts-declaration-of-rights/>

Words Have Consequences: Amending the United States Constitution and State Constitutions— Guest Essayist: Amanda Hughes

For many Americans, when the term “amendment” is mentioned, our United States Constitution often comes to mind. Among the document’s twenty-seven, most are aware of the First Amendment, especially the part about free speech. Another popular amendment is the Second Amendment: the right to bear arms. These Amendments to our United States Constitution have even gained nicknames such as “1A” and “2A.”

Unfortunately, beyond the popular terms of our national Constitution, too little understanding exists about it, including reasons for limiting changes to the document. This is true as well for our state constitutions, though amended more often. Unless a major news story runs where a constitutional topic goes viral, little more is studied to gain a complete context especially for the true meaning and history behind the Framers’ intentions.

No doubt, words have consequences. Our Founders knew changes to the United States Constitution would be necessary, and carefully thought through how these changes should be accomplished.

For example, they understood the wording in the Declaration of Independence “We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights” foreshadowed and necessitated an eventual end to slavery.

The process the founders set up to change the Constitution is grounded in the knowledge that passions of the moment can often lead to self-destructive acts. The founders were students of history, and understood that well-intentioned appearances, as if modern or forward looking, may invite a repeat of proven failures. An obvious example of this type of repetition is found in the popular sentiment of some of today’s younger generation to “try” socialism in America, an idea only deemed positive for those who do not study socialism’s history.

There is much confusion and misunderstanding about our U.S. Constitution. Some advocate getting rid of it or overhauling it to the point of unrecognition.

Discernment From History

How much should our national, United States Constitution get amended? How often should state constitutions be amended? The answer lies in world history.

America’s Founders were so well read, so thoroughly studied in world history that they understood what worked in governments and what did not, what caused governments to rise or fall. They saw patterns, consistencies resulting from choices regardless of where attempted in the world. Each would have a positive or negative end based on natural, immutable truths. For example, they learned that power must be divided among the people. They learned why power in the hands of a few created tyrannies, but allowing for many governments would divide power broadly and let the people be their own government. This also let the people protect themselves from the government they elected.

The 27 amendments in nearly 232 years since the signing of our United States Constitution reveals few revisions. It sets up a foundation for a national government to preserve the workings of each individual state, with their own governing bodies, while uniting the states as one nation.¹

Our states, for the most part, used their early adopted constitutions to set up a basic form of government. Later state constitutions received more ability to make amendments due to amendment processes added.

The State Constitutions Project conducted with the National Bureau of Economic Research and the Economics Department of the University of Maryland through the office of Professor John Wallace cites there have been nearly 150 state constitutions, amended roughly 12,000 times, with both constitutions and amendments containing about 15,000 pages.²

Any time amendments to our national Constitution or state constitutions are suggested, serious consideration must be given. Learned history rewards its students with discernment. So what will the altering of words of our national and state constitutions truly mean and what consequences will come as a result of changes made?

States grapple over whether to amend their constitutions regardless of method. Legislatures recognize that making changes might conflict with designing appropriate laws regarding public safety or health.³ The more amendments are made, the more difficult it is constitutionally to respond with what lawmaking citizens really want. Difficulties arise in having to work around expanding changes that should be made through the legislative process with voter participation. Continual changes to a state constitution turns a framework for governing into muddled, burdensome, unnavigable waters without clear boundaries from which to design or maintain representative government.

How the amendments affect state and local governing over time, and especially impact the ability of citizens to remain involved in their own government, must carry the weight of steady caution for the states. The more changes, the more difficult it can be, more convoluted, quickly turning accountability and control *by* the governed into control *of* the governed.

When the early American governing foundation was formed, voters agreed to abide by it, doing what provides stability among the systems formed and approved by both those in leadership and those who would be governed by it. The system was formed where those in leadership would have to abide through positions of serving, by their own very laws. At least, it is supposed to be that way if we maintain it. Within these foundations the people protect their own freedom, including their own government by adopting societal, bedrock standards that work and holding to them.

Worth Preserving

Without knowing whether Americans born after our Founders would hold onto what was started for the very lives of those who would come behind them, “ourselves and our posterity,” our founders risked their own lives and fortunes to produce the United States Constitution. Believing it so crucial to accomplish, they placed in its Preamble to “secure the Blessings of Liberty” so that the words of the entire document would do so for every American. They knew some changes might be needed, but argued over, and crafted with great caution, a document that could withstand errant people. It is so good a national constitution that it is the oldest, still operating constitution in existence in the world.

Risking everything while depending on a growing nation to hold onto religion and morality, the Constitution Framers worked hard to design a document that would stand the test of time for Americans to keep their republic because it would take a moral people to maintain a country based on free will of the individual. Any other adopts a tyranny, meaning control over each individual’s choices so that people become as property, disposable, viewed with little to no value. This is what America’s Founders wanted to avoid, aiming not to repeat what they escaped. With that warning in mind, they based the Constitution upon lasting institutions, first principles which are never outdated.

Our national Constitution is not a document to be worshiped since it was crafted by fallible people. It is, however, an integral part of America’s history potent today because of the governing stability it provides. It deserves preserving as a solid foundation to protect Americans

today from falling into the public policy traps it was written to prevent. America takes this for granted at her own peril.

Our nation works because of the type of Constitution we have adopted as a country and because of the type of government it sets up for our states and especially for each, individual American. These are worth preserving and only altering with the utmost care and discretion.

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¹Jennie Drage Bowser. “Constitutions: Amend With Care” *State Legislatures Magazine*, Sept. 2015.

<http://www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx>

²John Joseph Wallis, NBER/University of Maryland State Constitution Project.

www.stateconstitutions.umd.edu

³Garner, James Wilford. “Amendment of State Constitutions.” *The American Political Science Review*, vol. 1, no. 2, 1907, pp. 213–247. *JSTOR*, www.jstor.org/stable/1944385.

Delaware: Admitted as “The First State” December 7, 1787 – Guest Essayist: Daniel A. Cotter

1 – Delaware – December 7, 1787

As the Constitutional Convention came to a close in Philadelphia, America’s founding representatives signed the United States Constitution on September 17, 1787. Then, the first of the thirteen original states to ratify and approve this document, this new U.S. Constitution, which replaced the Articles of Confederation, was Delaware, signing on December 7, 1787. This signing admitted Delaware, known as “The First State,” to the United States on December 7, 1787, subject to at least nine other colonies joining in agreeing to the U.S. Constitution. The current Delaware State Constitution in use, which is the fourth constitution in Delaware, was adopted in 1897, but its first was adopted on September 20, 1776. The first constitution referred to the state as “The Delaware State.”

Constitutional Convention

Delaware sent five delegates to the Constitutional Convention in Philadelphia- Richard Bassett, Gunning Bedford, Jr., Jacob Broom, John Dickinson, and George Read. Surprisingly, all five signed the Constitution in September 1787. (Evidence is that Dickinson was not feeling well,

and left the convention a day early, asking Read to sign his name to the document.) Of the twelve colonies who signed the Constitution, only Pennsylvania had more signers than Delaware (eight).

The delegates were sent to Philadelphia with instructions that they were okay to offer amendments to the Articles of Confederation, but only “to render the Federal Constitution adequate to the Exigencies of the Union.” These five delegates, who had attended the Annapolis Convention, were given instructions they could not change the one state, one vote framework for the Articles.

Dickinson has been credited with proposing a solution to address a proposal that the two houses of the Congress be represented according to population, offering that the Senate provide for every state to be equal and the state legislatures to pick the Senators.

Delaware was a very small state in area and in population. They had no major economic center or product, and yet despite small size, their coast line was large. The Delaware Ratifying Convention met on December 3, 1787 and, shortly after meeting, became the first state to ratify the Constitution, by a unanimous vote, 30-0, on December 7, 1787. The only other states to vote unanimously to ratify the Constitution were New Jersey and Georgia. Delaware beat Pennsylvania by five days in ratification.

Reports of the Delaware Ratifying Convention have been lost. But by accounts, other than a petition to reject delegates who had been selected by Sussex, not much debate ensued. Citizens of Delaware desired a stronger national government than the Articles provided. As part of the approvals, Delaware also recommended cession of land for the new Federal Capital to be located within its boundaries. That last offer of course did not happen.

Of the five delegates who attended the Constitutional Convention in Philadelphia, Dickinson was probably the most prominent. Known as “Penman of the Revolution,” he wrote the Liberty Song in 1768. In that same year and the next, he also wrote a series of papers known as *Letters from a Farmer in Pennsylvania*, attacking British taxing policies.

In 1788, after Delaware ratified the Constitution, Dickinson wrote nine letters as *Fabius*, answering various Antifederalist arguments, in an effort to reinvigorate ratification progress in other states.

The Delaware Constitution

Immediately following the Declaration of Independence, the Delaware General Assembly met and approved the calling of a state constitutional convention. The convention met in August 1776, naming Read President. On September 20, 1776, the convention approved the new constitution and it became effective. Delaware became the first state to have a convention write a constitution after the Declaration of Independence. The constitution had a bicameral legislature, an executive with broad authority after consulting with the Privy Council, and a judicial branch that the Executive and General Assembly selected. The constitution prohibited

the entry of anyone from Africa or other places for the purpose of holding the individuals in slavery.

The 1776 constitution was replaced by the Delaware Constitution of 1792, which remained in effect until 1831, when a convention approved a third state constitution. The current constitution, Delaware's fourth, was adopted in 1897 and remains in effect.

Conclusion

Unlike some larger, more influential states, had Delaware for some reason not ratified the Constitution, there would still have been a United States. However, its delegates contributed to the Constitutional Convention in Philadelphia, including the proposal that eventually addressed small versus large state representation, and through its leadership in being the first state to ratify the Constitution and by a unanimous vote.

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Pennsylvania and Our Form of Government– Guest Essayist: Andrew Hohns

Birthplace of independence and the United States Constitution. "The Keystone State," Pennsylvania is second of the thirteen original states to ratify the U.S. Constitution and enter the United States. The Pennsylvania State Constitution currently in use was adopted in 1968.

We have in Pennsylvania a form of government founded on principles of individual liberty and self-determination. William Penn's "Holy Experiment," as Pennsylvania was called, provided its inhabitants certain inviolable rights through our Charter of Privileges—freedom of religion, liberty of consciousness, the election of our legislative representatives, and protections from abusive government intrusion. Of Pennsylvania, William Penn wrote that it would one day be the "seed of a nation."

In 1751, on the 50th anniversary of Penn's Charter of Privileges, the people of Pennsylvania celebrated our freedoms by procuring a new bell for our state house, honoring Penn's foresight. The inscription on the bell reads: "PROCLAIM LIBERTY THROUGHOUT ALL THE LAND UNTO ALL OF THE INHABITANTS THEREOF." In 1835, 28 years before the Emancipation Proclamation, courageous abolitionists adopted the bell as a resonant symbol for their demands to end slavery—and they gave our State House Bell the name that we use today, the Liberty Bell.

Such was our form of government in Pennsylvania in 1774, when delegates from the 13 colonies began to gather here. In 1776, they declared these United States free and independent, filled with a people possessed of certain natural rights, among which are life, liberty, and the pursuit of

happiness. It is for this reason that we now call our State House, *Independence Hall*. When America's founding citizens returned to Philadelphia for our Constitutional Convention, they affirmed that solely in *We, the People*, there resides the authority to govern. Under this authority, they established a constitutional republic, providing a durable framework through which we govern, respecting individual liberty and relying on broad civic participation and engagement in public affairs. This radical notion of self-determination, clarified and strengthened through many years of debate, discourse, and consideration, is the first ray of light in a sunrise that endures still, shining the power of democracy in over 100 countries around the world today.

In Pennsylvania, the grounds we walk upon are parklands sown from potter's fields, where the remains of many a brave and fallen revolutionary soldier are often interred below. The streets we walk on are paved with the same bricks traversed by Penn, and later Franklin and Jefferson, Adams and Hamilton, Washington and Lee. The heady courage of those early days—1701, 1774, 1776, and 1787—hangs in the air in Pennsylvania. It permeates our state; it lingers within every home and around every corner.

In the earliest days of our republic, Pennsylvania was called the *Keystone State*, and this for our role in joining the 13 colonies together. When these extraordinary gatherings of delegates met in Philadelphia, they declared support for a form of government that places individual liberty and self-governance at the center of our great experiment. They committed their lives and fortunes to one another to carry forward the nation through the inevitable and heavy burden of war, aiming toward an ideal of service and cooperation, a defense of liberty, and a furtherance of the power of industry and innovation. Because in Pennsylvania we cast our lots together, we are called a *Commonwealth*.

Where Pennsylvania established our first city in 1682, so too did America in 1776, for as Robert Morris wrote, Philadelphia is to America as the heart is to the human body. Since that day, the promise of liberty and all it inspires has flowed forth from our metropolis to course through the veins of a vast and growing nation.

Today, the Keystone State continues to bring together many diverse peoples and cultures, from both the whole of America and many corners of the world—Independence Hall and the Liberty Bell last year welcomed visitors from all 50 states and 76 countries. Proud to unite our 13 original colonies in declaring Independence, the Keystone State now joins and strengthens a national archway enlarged to 50 states and 7 territories, beckoning those who yearn to be free, inspiring those who defend the cause of liberty, and providing peace to those who seek to exercise the natural rights of humankind. Pennsylvania is to democracy as fertile earth to a farmer—with care and attention, we reap the plentiful harvest sown from the seeds of life, liberty, and the pursuit of happiness.

This radical form of government endures, for as we stand here in 2019, we are merely seven years away from the Semiquincentennial anniversary of the United States, the 250th year of the people, by the people, and for the people. Many and varied are the dividends of our form of government in our first 250 years—inventing the computer, the Internet, and wireless communication; giving birth to flight, breaking the sound barrier and landing a man on the moon; animating the world with motion pictures, jazz, and hip hop; creating vast opportunity

through a global capital market, a start-up economy, and a culture of hard work; and protecting our young with vaccines for cholera, plague, and polio.

But in America, we do best to celebrate our history by making the history of the future, inspiring contributions and service from one another as citizens. We aim together toward that *more perfect union*, recognizing that much still remains to be accomplished—providing shelter for the unhoused, food for hungry, and care for the sick, defending the rights of the oppressed at home and abroad, offering aid and asylum to those in need, securing the health and well-being of our natural environment with clean air, clean water, and safe communities, teaching all of our children to read, to work, and to vote, and continuing to advance, refine, and improve our own government from town school boards to federal offices.

Our form of government relies upon our willingness to renew our high ideals in each successive generation. We aim toward universal justice, equality, and freedom, fueled by the knowledge that our work remains incomplete. The power of democracy derives from the realization that there remain injustices to combat, rights to secure and defend, and oppression and tyranny to root out. We become America in each generation by progressing toward these ambitions.

Our aspirations as a people can only be realized through the participation of each person. Our successes and our shortcomings are tied together. We rely upon each other—through volunteerism, small and uncelebrated acts of kindness, the nurturing of our children by caring teachers, the selfless bravery of men and women in our military, law enforcement, and firefighters—these common threads of personal commitment all woven together into a banner of duty to this nation and to one another. For whether we are down the street or across the country, we are all neighbors.

Now, as we approach America's 250th anniversary, we are asked to take stock of where we have been and where we are going. We honor our nation by seeing our past for what it has been—at turns inspiring, but not without flaws, aiming toward justice, but not without a history of slavery and oppression, aspirational and sincere, but not without demagoguery and disillusionment. We likewise honor our nation by seeing our present for what it is—democracies exist in reality, and today's reality, so it is sometimes said, is one of an America divided. The antipathy of red and blue, young and old, rich and poor: these "divisions," reinforced through certain beguiling echo chambers of modern technology, are said to impede our civic engagement and acts of mutuality. But another view is that we share a deeply held commitment to defend the rights that make us America—personal liberty, religious freedom, protection from unwarranted intrusion, the agency to pursue one's own hopes and goals, the ability to be whomever and whatever each of us may wish to be. When we recognize and reject the forces that would conspire against America—incivility and ignorance, intolerance and intimidation—we are then most able to honor our nation by securing for our future the promise it contains. Let us recommit to our founding principles with courage, compassion, and daring. The promise of democracy is the realization that within ordinary people swell extraordinary possibilities.

It is now for us to carry forward our nation and to deliver this more perfect union to our children and grandchildren. The path to this future is clear before us: we can volunteer, serve, and participate, engaging one another sincerely, with compassion and civility, appealing always to

the highest of human capabilities. With these principles as our guideposts, we are well equipped to reflect upon the defense of our values in the modern world. Could our founding fathers have possibly anticipated that guns would be turned upon our children in our own schools? Could they have anticipated the ubiquitous web of personal information and connectivity of the internet, and the associated challenges to personal privacy? Could they have anticipated the dislocations of vast populations and the associated crises in human rights? Many are the questions that we face today, in our generation of America, to visit and revisit. The strength of our form of government derives from the conviction that We are the People with the knowledge, patience, and determination to address and solve these problems.

As we do in America from generation to generation, let us come together again—let us return to our Keystone State, Pennsylvania—inspiring our fellow citizens through service and cooperation, strengthening our national fabric by honoring the high ideals on which our nation was founded, and supporting and defending the principles of our American Republic, at home and around the world.

In the words of General Washington, “Let us raise a standard to which the wise and honest shall repair.”

Dr. Andrew Hohns is the Chairman of the Board of the nonprofit [USA 250](#) an organization founded to spark the nation’s imagination leading into and through the United States Semiquincentennial, 2026, our Nation’s 250th birthday. He was also appointed by Congress in 2016 to the United States Semiquincentennial Commission, the Commission established by Congress to direct the celebration of our Nation’s 250th birthday. Dr. Hohns is Managing Director at Mariner Investment Group and serves as Lead Portfolio Manager for two fund strategies related to infrastructure investment. He holds a BS in Economics from the Wharton School at the University of Pennsylvania, a Masters in Liberal Arts from the School of Arts and Sciences at the University of Pennsylvania, and a PhD in Applied Economics and Managerial Sciences from the Wharton School at the University of Pennsylvania. He also serves as a board member of the United States Fund for UNICEF and has served from time to time as an Adjunct Assistant Professor at New York University’s Stern School of Business.

New Jersey: Third of the Original Thirteen to Join the United States— Guest Essayist: Daniel A. Cotter

3 – New Jersey – December 18, 1787

Third of the thirteen original states to ratify the U.S. Constitution and join the United States,

“The Garden State” of New Jersey entered the United States December 18, 1787. The New Jersey State Constitution in use today was adopted in 1947 (effective January 1, 1948) and has been amended several times since in minor ways, but its first constitution, written during the crisis of the Revolutionary War, was adopted on July 2, 1776.

Constitutional Convention

New Jersey sent five delegates to the Constitutional Convention in Philadelphia- David Brearley, Jonathan Dayton, William Livingston, William Patterson, and William Houston. Only the first four signed the Constitution in September 1787, as Houston missed most of the Convention due to illness. Livingston was the first Governor of New Jersey, holding the position from 1776 until his death in 1790. His duties in that capacity limited his participation in the Convention, but he was Chair of the Committee of Slave Trade, which developed the compromise on the slavery issue. Livingston also was an active supporter of New Jersey's quick ratification of the Constitution. Brearley's main contribution appears to be helpful in developing the Electoral College as part of the Committee of Leftovers, Dayton's appears to have been minimal, although he participated occasionally in debates, and Patterson introduced the New Jersey Plan, which protected the smaller states against the larger ones. The New Jersey Plan proposal contemplated a unicameral legislature, as the Articles of Confederation contained, with equal voting for each state. It also would have had the national legislature select the executive. Although the New Jersey Plan did not prevail, its concept of protecting smaller states was reflected in the Senate provisions. Patterson would become an Associate Justice of the Supreme Court of the United States in 1793, a position he held until his death in 1806.

The New Jersey Ratifying Convention met in Trenton from December 11 through 20, 1787, and ratified the Constitution on December 18, 38-0, becoming the third state to do so. Not much appeared to have been debated during the days the New Jersey Ratification Convention met, as the new federal Constitution addressed the major concerns and needs of the state. In addition, it appears only Federalist delegates were selected to attend the New Jersey Convention. New Jersey also had a very large debt and heavy levies would have been required, so that too provided motivation for New Jersey to ratify the U.S. Constitution.

New Jersey became the first state to ratify the Bill of Rights when they were submitted, approving eleven of the twelve proposed. Like Delaware, New Jersey in 1787 was a smaller state and with the protections of smaller states incorporated into the final Constitution, with a strong national government, New Jersey delegates were satisfied.

The New Jersey Constitution

Immediately before the approval of the Declaration of Independence, the New Jersey delegates met in haste to consider a state constitution to address the emergency and likely imminent invasion by British forces. Written as a temporary document to address the urgency of the state, it remained in place until 1844. The constitution allowed all inhabitants worth at least fifty pounds the right to vote, and contained a number of different provisions, including maintenance of the common law and a prohibition on deodand (forfeiture of objects that caused someone's death). It also included a free exercise of religion and an establishment clause.

On June 29, 1844, New Jersey adopted its second constitution, which limited suffrage to white males and separated the government into three branches. The 1844 constitution was one of the first to include a debt ceiling concept in it. The 1844 constitution was amended in 1875 to conform it to the Fourteenth and Fifteenth Amendments to the United States Constitution.

The current constitution became effective in 1947 and is similar to many state constitutions, although it also contains specific provisions addressing casinos and their regulation. The current version also includes a provision that terms such as “person” refer to both sexes.

Conclusion

Like Delaware, had New Jersey for some reason not ratified the Constitution, there would still have been a United States. Little did the four signers of the Constitution from New Jersey in 1787 foresee that their relatively small state would be the 11th most populous in present times. New Jersey’s delegates were instrumental in protecting the smaller states and although the Virginia Plan ultimately was the winner in the final Constitution, the New Jersey Plan protections were incorporated. The Garden State, along with Delaware and Georgia, were the only three of the thirteen colonies to vote unanimously at their state conventions for ratification of this new union, the United States of America.

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Georgia on My Mind– Guest Essayist: Martha Zoller

Georgia, my home state, was admitted into the Union on January 2, 1788 and was fourth of the thirteen original states to ratify the U.S. Constitution. Georgia is known as “The Peach State” or “Empire State of the South.”

When James Oglethorpe claimed Georgia (named for King George III) in 1732, he then brought settlers to Savannah in 1733, who would have thought that less than 50 years later, there would be a war for independence from England. This was one of the challenges for Georgians. Many were not that far removed from life in England and many were not sure about this new initiative called the United States of America.

That didn’t stop Lyman Hall, Button Gwinnett and George Walton from signing the Declaration of Independence in 1776. These three men would find their names on three of the 159 counties in Georgia in the fastest growing part of Georgia some 240 years later.

Georgia’s legislature chose six representatives to the Philadelphia Convention of 1787. Of those, George Walton and Nathaniel Pendleton never attended. The four who attended were William Few, Abraham Baldwin, William Pierce, and William Houstoun. William Pierce made notes on the other delegates that have become important historical documents. The two Georgia delegates who signed the finished Constitution on September 17 were Abraham Baldwin and William Few.

Neither of Georgia’s signers was a native Georgian. Abraham Baldwin had come to the state about three years before the Constitutional Convention. A native son of Connecticut with a theology degree from Yale served the Revolutionary cause as a chaplain in the Continental

Army. After the war he studied law and moved to Augusta, Georgia, to practice his new profession. He was involved in government as a member of the Georgia legislature. As one of Georgia's delegates to the convention, Baldwin cast a vote that resulted in a tie on the very controversial matter of representation in the upper house or Senate in the Congress, buying time for a compromise to be worked out. He considered this his most important contribution to the constitution. He later served in the Congress and was instrumental in founding the University of Georgia.

William Few came to Augusta as the revolutionary movement gained momentum in the mid 1770s and quickly became involved with the Patriot cause. He was a member of the committee that wrote the state constitution of 1777.

The ratification of the United States Constitution inspired Georgia to re-write their state constitution in 1789. The latest version of the Georgia Constitution was adopted in 1983 and has been amended hundreds of times through voter resolutions.

Martha Zoller is a policy advisor and has worked for Senator David Perdue and is now working for Governor Brian Kemp. Zoller spent 20 years in media. Martha is a wife, mother, Oma, lifelong Georgian, culture guru and lover of the Constitution.

The Constitutional Roots of Connecticut—Guest Essayist: Steve Armstrong

Connecticut is called the “Constitution State”, largely because of the Fundamental Orders, which were written by the Connecticut Colony Council in 1639. Some have argued that this is the first constitution (a few historians say in the entire world) that empowers the citizens of a state to govern themselves. Where other American colonies in the 1600s and early 1700s were largely governed by representatives from Great Britain, citizens of Connecticut practiced a form of self-government. The Fundamental Orders also outlined individual rights that were given to all Connecticut citizens.

Other historians maintain that the purpose of the Fundamental Orders was merely to improve on models of government that had been developed in other colonies, including Massachusetts. The Fundamental Orders limited the power of the Governor and statewide magistrates, and somewhat expanded the right of males to vote. These historians argue that the Fundamental Orders are very different from an actual governing document.

King Charles II issued an official charter to Connecticut in 1662. This charter did not have a major impact on political actions in Connecticut. Charles's successor, James II, wanted to control all of New England and in 1687 sent representatives to Connecticut to gain more political influence over the colony. The King's representatives demanded that government officials return the charter issued by Charles II. According to rumor, the charter was hidden in an oak tree so that it could not be retrieved.

Government in Connecticut was relatively stable from the seventeenth through the early nineteenth century. Governors and other leaders came from the same set of elite families called the "Standing Order." Governors were re-elected, oftentimes more than once. In addition, the Congregational Church was the "official" church of Connecticut. Any new town had to have a Congregational church and a minister; Connecticut citizens also had to pay taxes to support the operations of the Congregational Church. A General Assembly existed, but the Standing Order held the real social and political power in Connecticut. In the first years of the new nation, almost all members of the Standing Order were members of the Federalist Party.

In the first years of the nineteenth century, a level of political and social discontent developed in Connecticut. Non-Congregationalists were increasingly upset by the "official" position of the Congregational Church in Connecticut. Farmers were being pressured by high taxes and several years of poor harvests. The Republican Party of Thomas Jefferson began to gain popularity in the state; by 1807, roughly 1/3 of the members of the lower house of the General Assembly were Republicans. Federalists opposed the War of 1812 (at the Hartford Convention of 1812-1813, New England Federalists came together to discuss their opposition to the war and to discuss appropriate measures to oppose the war; Federalists were accused of being traitors as the war became more popular after Andrew Jackson's victory at the Battle of New Orleans).

A new political party developed in Connecticut called the Toleration Party. The major goals of the party were to unite all of those opposed to the status quo political, religious and social structure in Connecticut and especially to reduce the importance of the Congregational Church in the state. In 1816, the Toleration Party won control of the lower house of the general assembly and in 1817 a member of the party, Oliver Wolcott, son of a former Standing Order governor, was elected to the same position. Both the assembly and Governor Wolcott called for a constitutional convention which took place in 1818.

The new Connecticut constitution, eventually ratified by Connecticut citizens by a narrow margin, outlined in detail the rights that all Connecticut citizens should have. The constitution created a system of almost universal white male suffrage. It created a system of three branches of government with an independent judiciary (previously decisions of Connecticut's Supreme Court could be appealed to the General Assembly). Most importantly, the Congregational church ceased to be the official "state" church of Connecticut. All citizens of the state were given the right to practice the religion of their choice, and no more tax dollars would go to support the Congregational Church. According to Connecticut State Historian Walter Woodward, the real victors of the constitutional changes were the Connecticut citizens tired of the lock on political power held by the Standing Order.

Many of the provisions of the 1818 Constitution lasted through the 20th century. However, one issue that gained attention was representation in the lower house of the Connecticut assembly. Each Connecticut town or city had equal representation in this body. Connecticut's major cities had the same number of representatives as the smallest towns in the state. A constitutional convention was held in 1902 to reapportion representation in the General Assembly; the voters of the state rejected the proposal on reapportionment made by that body.

The same issue became more acute in the mid-1960s when federal courts ruled that representation in the lower house of the Connecticut General Assembly (and in other states as well) violated “one man one vote” decisions handed down by the United States Supreme Court. Federal courts mandated that Connecticut was going have to reapportion its system of representation. A constitutional convention was convened in 1965, with 42 Republican and 42 Democratic delegates.

The constitutional convention reapportioned membership in both the Connecticut Senate and House of Representatives. The previous system giving each town and city equal representation was completely abandoned. The new constitution gave Connecticut voters the opportunity to call for a constitutional convention every twenty years. Mandatory party-lever voting was also stopped. Connecticut voters approved the 1965 constitutional changes by a large margin.

Connecticut has been able to avoid the violent upheavals that have accompanied political changes in other states and regions. Major conferences were held and articles were written in Connecticut last year on the reasons for and results of the Constitution of 1818. Connecticut is often called the “Land of Steady Habits,” and the system of local control established by the Fundamental Orders of 1639 as still a fundamental feature of the belief-system in Connecticut today.

Stephen Armstrong serves as the Connecticut Board of Education's Social Studies Consultant and an adjunct instructor in the history department at Central Connecticut State University. Prior service includes that of social studies department supervisor in the West Hartford, Connecticut public schools; past president of the National Council for the Social Studies; and past president of the Connecticut Council for the Social Studies, the Connecticut Committee for the Promotion of History, and the New England History Teachers Association. A resident of lives in South Windsor, Connecticut, Armstrong has presented workshops on the use of popular music in the social studies classroom and led numerous travel trips for teachers and students. He has presented workshops at the Rock and Roll Hall of Fame and Bethel Woods Museum for the Arts located on the site of the original Woodstock Music Festival.

The Massachusetts Constitution of 1780: John Adams & the Fundamental Liberties of the People—Guest Essayist: Tony Williams

In the fall of 1779, John Adams was home in Massachusetts during a respite from his diplomatic responsibilities in Europe. While he was there, Adams drafted the state constitution that built on the constitutions and experiences of other states, using them as a model of success and failure. The resulting Massachusetts Constitution was a balanced constitution.

Royal authority had collapsed in Massachusetts in 1775, and the state was governed by a provincial congress under the 1691 colonial charter. The legislature had drafted a constitution in 1778, but the sovereign people of local townships had rejected it.

The people of Massachusetts concurred with other Americans that written constitutions were perpetual fundamental law made by the representatives of the people at popular conventions called for that purpose. The Massachusetts legislature, however, was an ordinary lawmaking body that was not invested with the authority to create such a constitution.

In early 1779, all free men over 21 were eligible to vote for delegates to a special constitutional convention which began meeting in September. The constitution would need ratification by two-thirds of those same men to become fundamental law. This was an expression of the principle of popular sovereignty, or the will of the self-governing people.

The convention called a drafting committee which then appointed a subcommittee of James Bowdoin, Samuel Adams, and John Adams to write the constitution. Bowdoin and Samuel Adams deferred to John Adams to complete the task. Adams finished his assigned work and submitted it to the convention which made revisions and submitted it to the people for ratification in March 1780. It was adopted in June.

The Massachusetts Constitution of 1780 was comprised of the familiar principles of the American Founding especially those found in the Declaration of Independence. The preamble asserted that the sovereign people formed a social compact with each other to create a republican government whose purpose was to protect the natural rights of the people. They had a right to alter that government for one that best protected their safety and happiness.

The first part of the constitution was a declaration of rights. All men were born free and equal with inalienable rights including life, liberty, and property. The constitution stated that worshipping God was a right of conscience as well as a duty. In order to promote ordered liberty, virtue, morality, and happiness, the constitution simultaneously instituted a limited establishment of the Christian religion. Public money would support the Congregationalist Church, but dissenters could allocate their taxes to their own denominations.

Other principles of the Massachusetts Constitution were popular sovereignty, free and regular elections, and no taxation without consent. Fundamental rights that were protected included the rights of the accused, property rights, and the right to bear arms.

The text of the constitution was rooted upon the principles of separation of power and checks and balances. Those principles found expression in three branches of government: legislative, executive, and judicial. The bicameral legislature was divided into two houses based upon the negative experience of Pennsylvania with only one house. The governor and lieutenant governor ruled with the advice of a nine-member council. The governor could veto laws, but the legislature could override the veto by a two-thirds vote. The third branch was an independent judiciary.

The representatives and senators of the General Court legislature and the governor were elected annually. All free men over 21 could vote if they held a certain amount of property because of the prevailing view that propertyless men were dependent upon others and could not render an independent vote. The state judges served for life and during good behavior. Although the state

constitutional convention removed a religious test for office, legislative and executive officials had to take an oath to the Christian religion.

The Massachusetts Constitution was predicated on the belief that, “wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, [was] necessary for the preservation of their rights and liberties.” Therefore, the public would support public schools, literature, seminaries, science, agriculture, arts, and trades. This public encouragement would “countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.”

The Massachusetts Constitution of 1780 was drafted and adopted with the aid of examples and experience in other states. It contained its share of paradoxes such as religious liberty coexisting with religious establishment and broad democratic principles but property requirements for voting and officeholding. The constitution, however, represented the republican principles of the American Revolution and Founding as fundamental law.

Tony Williams is a Constituting America Fellow and a Senior Teaching Fellow at the Bill of Rights Institute. He is the author of six books including the newly-published Hamilton: An American Biography.

Maryland’s 1867 State Constitution, Among the Oldest in Use Today—Guest Essayist: Gary Porter

Maryland is the seventh state admitted to the United States, ratifying the U.S. Constitution April 28, 1788. The current Maryland State Constitution in use was adopted in 1867.

Maryland was the seventh state to ratify the U.S. Constitution, on April 28, 1788. Two months later the U.S. Constitution went into effect with New Hampshire’s ratification on June 21. A study of the “Old Line State” (we’ll see where that appellation comes from in a moment) provides a convenient entry point to address several different constitutional topics; but first a little history:

It is August 27, 1776; the British have mounted their anticipated invasion of Long Island, New York. British General William Howe commits 20,000 of his best troops to the fight, including 8,000 Hessians, against approximately 6,000 ill-equipped and ill-experienced Americans (20,000 to 6,000; hardly seems a fair fight). Howe splits his forces across three fronts and executes a daring nighttime flanking maneuver that utterly surprises the American forces. The Americans are soon routed from their defensive lines and forced to retreat onto fortified Brooklyn Heights. To buy time for the withdrawal, Washington orders General William Stirling, commanding two units of the 1st Delaware Regiment as well as four companies from the 1st Maryland Regiment, to hold his line on the Gowanus Road. The 1st Maryland Regiment (part of the “Maryland Line”) is under the temporary command of Major Mordecai Gist (the unit’s commander, Colonel William Smallwood, is attending court martial duty in the city). The British attack up the Gowanus Road consists of 2,000 troops under the command of General James Grant. The

Marylanders, soon reduced to less than 400 men (The Immortal 400)[1] are ordered to hold the line near Vechte-Cortelyou house, a stone building commanding the strategic road and a bridge, the only escape route across the Gowanus Salt Marsh. Not only do Gist's men hold off the British, they make six amazing counterattacks before being finally forced to scatter and make their own escape back to American lines. Only a handful of the Maryland men are successful. Watching from Brooklyn Heights, General Washington turns to General Israel Putnam and states: 'Good God, what brave fellows I must this day lose.' The Maryland 1st Infantry will go down in history as "The Old Line," giving Maryland its claim as "The Old Line State." [2] Historian, Thomas Field, writing his 1869 book "The Battle of Long Island," called the stand of the Marylanders "an hour more precious to liberty than any other in history." [3] As we will see, Maryland will go on to make other important contributions to the establishment of the American union.

In 1632, Lord George Calvert, a convert to Catholicism, was granted a [charter](#) by King Charles I to establish "The Province of Maryland." [4] Actual settlement began two years later, first along the Chesapeake Bay and then proceeding slowly but inexorably westward. Calvert envisioned a colony where religious tolerance would prevail, especially towards his fellow Catholics. Accordingly, in 1649, the Maryland General Assembly passed an [Act Concerning Religion](#) which made it a crime to harass a fellow citizen of the colony over their religious preferences. Maryland would eventually gain the largest concentration of Catholics of any of the colonies, to include, in 1715, one John Porter, immigrant ancestor of the writer of this essay. Family legend holds that John was "asked" to leave England after composing and singing publicly a song not entirely complementary of the new reigning monarch: George I of Hanover, brought over from Germany the previous year to take the English throne.

With its moderate weather, 4,000 miles of shoreline and a fine port at Baltimore, Maryland grew to nearly 250,000 inhabitants by 1776. [5] Maryland's current boundaries were solidified following the settlement of a long-running dispute with Pennsylvania and completion, in 1767, of the Mason-Dixon Line, a project to which two sons of the aforementioned immigrant John Porter allegedly contributed as the surveying team reached the westernmost parts of the state. It would not be until 1820, however, that the term "Mason-Dixon Line" came into common usage. The Missouri Compromise used the term to define the boundary between slave territory and free territory (remember this, we encounter it again).

While no major battles of the Revolution were fought within the state (that would change with the War of 1812 and the Civil War), Maryland was an active participant in the events leading up to the Revolution. In 1776, its delegates, Charles Carroll, Samuel Chase, Thomas Stone, William Paca, signed the Declaration of Independence (with Carroll being the only Catholic to sign). "Charles Carroll of Carrollton" had been an early proponent of independence from the mother country, writing often in the *Maryland Gazette* under the pseudonym "First Citizen," and serving on various Committees of Correspondence. A devout man, in a November 4, 1800, letter to James McHenry (of Fort McHenry fame) Carroll wrote: "*Without morals a republic cannot subsist any length of time; they therefore who are decrying the Christian religion, whose morality is so sublime and pure...are undermining the solid foundation of morals, the best security for the duration of free governments.*" When he died in 1832, Carroll was the last

surviving signer of the Declaration and acquired the distinction (dying at 95 years of age) of being the oldest lived Founding Father.

Like other states, Marylanders were bitterly divided as the Revolutionary War loomed; many Loyalists in the state refused to support the Revolution, and saw their lands and estates confiscated as a result.

Responding to a resolution of Congress of May 10, 1776, Maryland's provincial congress recommended formation of a convention to form a new constitution to replace its royal charter. Fifty-three delegates assembled on August 14, and completed their work on November 8. While the new constitution kept most of the features of government intact, the state's property qualification for suffrage was lowered from thirty to five British pounds, greatly expanding the electorate. Ironically, following the example set by Virginia earlier that year, on November 8, 1776, the convention put their new constitution into effect by voice vote, without bothering to submit the document to Maryland's newly expanded electorate.

"Baltimore Town" served as the temporary capital of the confederated states from December 1776 to February 1777, while Philadelphia was occupied by the British. Towards the end of the war, from November 1783, to June 1784, Annapolis, briefly hosted the confederation government, and it was in the Old Senate Chamber of the Maryland State House in Annapolis on December 23, 1783, that General George Washington famously resigned his commission as commander-in-chief of the Continental Army. It was there also, on January 14, 1784, that the Treaty of Paris was ratified, officially ending the Revolutionary War.

Maryland was the last of the thirteen states to ratify the Articles of Confederation, on March 1, 1781, and then only when France threatened to withdraw its treaty-guaranteed protection of the Chesapeake Bay. Maryland had been insisting that the territory north of the Ohio River be ceded to the confederation government by the several states which maintained conflicting claims on it. Virginia's government agreed to cede its claim to the land but demanded that the claims of Maryland's land speculators be declared void. Maryland objected, but faced with France's threat, they ratified the Articles. The event was celebrated across the colonies with fireworks, bonfires and the ringing of church bells.

In September 1786, Maryland played host to the "Annapolis Convention" which produced the famous call for a "Grand Convention," to take place in Philadelphia the following May. On September 17, 1787, Daniel Carroll (a cousin of Charles Carroll of Carrollton), Daniel Jenifer and James McHenry (of Fort McHenry fame) would share the honor of signing the new constitution for their state.

On April 28, 1788, after a short, five day discussion, Maryland became the seventh state to ratify the U.S. Constitution, by a vote of 63–11.

According to the U.S. Constitution (Article 1, Section 8, Clause 17), the District of Columbia was to be formed from land donated by "particular States." That turned out to be both Maryland and Virginia; and each state ceded the required land in 1790. But in 1846, with the capitol by

now well established, but on only the north side of the Potomac River, Congress returned Virginia's portion, leaving the District completely within Maryland's former boundaries.

In August 1814, the state experienced, first-hand, a new war with Britain. In the Battle of Bladensburg,[\[6\]](#) which saw the first appearance on a U.S. battlefield of a sitting U.S. President (second-term-President James Madison). British troops easily pushed back a hastily formed composite force of militia and regular troops and continued their march on "Washington City." The following month, the unsuccessful British siege of Fort McHenry provided the backdrop for the composition of our National Anthem by Maryland native Francis Scott Key.

Forty-five years later, Maryland pondered whether to join the growing list of seceding states south of the now famous Mason-Dixon Line. The state had effectively legalized slavery more than one hundred years before (in 1752) when it prohibited the manumission of slaves, and many citizens were eager to join the confederacy. An early vote of the legislature, which might have gone for secession, was stifled by President Abraham Lincoln's declaration of martial law and his unconstitutional suspension of Habeas Corpus. When the Maryland legislature finally took up the matter, they voted 53-13 to remain in the Union. While many today claim that the (inaccurately named) Civil War[\[7\]](#) settled the idea of secession, the issue, as we will see later, is still very much alive.

The first fatalities of the Civil War (called in the South, more accurately, the War for Southern Independence) occurred during riots which took place in Baltimore on April 18 and 19, 1861. Union troops moving from one train station to another to continue their journey southward to protect Washington, D.C. were confronted by an angry and armed mob. The troops, set upon with "bricks, paving stones, and pistols," fired on the crowd. When the smoke cleared, four soldiers and twelve civilians had been killed. Small skirmishes between citizens and police occurred throughout the city for the next month.

Determined to keep a route through Maryland open for the transport of troops and supplies from the northern states, on April 27, President Lincoln authorized General Winfield Scott to suspend the writ of habeas corpus near any military supply line between Philadelphia and Washington "if the public safety required it."

On September 17, 1862, Confederate forces were defeated at Antietam, just west of Frederick, Maryland (hometown of the then Chief Justice Roger Taney). Remembered as the "Single Bloodiest Day of the Civil War," the Battle of Antietam (known in the South as the Battle of Sharpsburg) caused more than 23,000 casualties.

A week later, as a result of continued unrest, particularly in Maryland but elsewhere in the Union as well. Lincoln issued a proclamation stating that "all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of United States, *shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.*" Further "That *the Writ of Habeas Corpus is suspended* in respect to all persons arrested, or who are now, or hereafter during the rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any

military authority or by the sentence of any Court Martial or Military Commission.”[8]
(Emphasis added)

Lincoln later explained his actions in a letter to Albert G. Hodges on April 4, 1864, by stating: “I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.”[9]

In July 1864, the little-known Battle of Monocacy was also fought on Maryland soil, again near Frederick.

The 1864 Maryland Constitution, ratified in October, freed the state’s slaves a year before ratification of the 13th Amendment.[10] On April 14, 1865, Marylander John Wilkes Booth assassinated President Lincoln.

Today’s Maryland government is based on its [1867 Constitution](#), the last of four. The [1776 constitution](#) was followed by [a second in 1851](#), and [a third in 1864](#). At approximately 47,000 words, today’s Maryland Constitution is much longer than the average length of a U.S. state constitution (about 26,000 words). By comparison, the United States Constitution, including amendments, is only about 8,700 words long.

When compared with the U.S. Bill of Rights, Maryland’s 1776 Constitution lacked specific protections for:

- Freedom of Speech and Freedom of Assembly (U.S. 1st Amendment)
- A Right to Keep and Bear Arms (U.S. 2nd Note: Maryland is one of the few states still lacking the equivalent of the Federal Second Amendment)
- Right to a Grand Jury when Life/Limb is imperiled, protection against double jeopardy and protection of private property against government taking without compensation (all found in the U.S. 5th Amendment)
- Protection of unenumerated rights (U.S. 9th Amendment, this was added in the 1851 Constitution)
- Reservation of non-delegated powers to the states/people (U.S. 10th Amendment, this was added in the 1867 Constitution)

Conversely, Maryland’s Declaration of Rights today contains the following protections and principles not found in the U.S. Bill of Rights:

- A relief from taxation for all “paupers.” (still there!)
- Protection of the common law of England. (still there!)
- A right to trial by jury (this right is *assumed* by the Constitution but only *secured* for certain classes of citizens).
- Juries in criminal cases are declared to be judges of law as well as fact (**jury nullification, added in the 1867 Constitution**, see below).
- A statement that “all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole.”

- A statement that “the people of the State ought to have the sole and exclusive right of regulating the internal government and police thereof.”
- A statement that “all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct.”
- A statement that “every man, having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage” (whether U.S. citizen or not?).
- A statement that “the legislative, executive and judicial powers of government, ought to be forever separate and distinct from each other.”
- A statement that no power of suspending laws, or the execution of laws, unless by or derived from the Legislature, ought to be exercised or allowed.
- A statement that “no aid, charge, tax, fee, or fees, ought to be set, rated, or levied, under any presence, without consent of the Legislature.” (No taxation without representation!)
- A statement that “the levying taxes by the poll is grievous and oppressive.” (I.e. no poll taxes will be allowed)

We should take a moment here to note the uniqueness of Maryland securing a right of jury nullification in its constitution. To my knowledge it is the only U.S. state to do so. In 2002, South Dakota voters rejected a state constitutional amendment to permit criminal defendants to argue in favor of jury nullification; and in 2012, New Hampshire passed a law explicitly allowing defense attorneys to inform juries about their right of jury nullification, only to have the New Hampshire Supreme Court effectively nullify the law.[\[11\]](#)

The ability of a jury to refuse to return a guilty verdict because it feels the underlying law to be unjust has a rich history going back to at least Magna Carta (1215), if not before -- the famous trial of William Penn being the perfect example.[\[12\]](#) In this country, the practice was common from before the Revolutionary War to beyond 1850 when rampant jury nullification of the Fugitive Slave Act occurred throughout the North. The Supreme Court has never taken up the issue but Associate Justice Sonya Sotomayer apparently views it favorably.[\[13\]](#)

The primary impetus for the 1851 Constitution was a desire to reapportion the Maryland General Assembly. This constitution also changed the status of the City of Baltimore and its relationship with the surrounding Baltimore County. The city was given the status of the (soon-to-be) 23 counties of the State and a provision for "home rule." Growing criticism of the 1851 Constitution, especially relating to how the judiciary functioned, led to pressure for yet another revision.

The 1864 Constitution was written in the midst of the Civil War. Unionists controlled the Maryland government at the time and made some significant changes to the document. It was approved by a bare majority (50.31%) of the state's eligible voters, *which included Union soldiers from other states temporarily assigned to Maryland!* Perhaps its most controversial feature was the temporarily disfranchisement of the approximately 25,000 Marylanders who were at that time fighting for or supporting the Confederacy.

Only three years later, the Constitution of 1867 was approved. As noted, it still operates today. Subsequent amendments have been approved which brought changes to the wording in the main constitution and amendments to the Declaration of Rights, the last of these occurring in 2010.

In 2019, Maryland is home to slightly more than 6 Million people.^[14] Interestingly, its state government has been continuously controlled by the Democratic Party for nearly 100 years. In 2013, frustrated conservatives in the five western-most counties famously mounted an effort to secede from the remainder of the state and form a new one, called Western Maryland.^[15] This call to secede joined similar efforts in California, Arizona, Michigan and Colorado -- proving that the issue of secession lives on.

The “Old Line State” has produced many noted politicians and four Supreme Court Justices. They include:

- Spiro T. Agnew, former Governor of Maryland and Vice President of the United States
- Sargent Shriver, former Vice Presidential candidate
- John Bolton, former United States Ambassador to the United Nations
- Steny Hoyer, current House Minority Whip, U.S. House of Representatives
- Nancy Pelosi, current Speaker of the U.S. House of Representatives
- Samuel Chase, former Associate Justice of the Supreme Court
- Roger Taney, former Chief Justice of the United States
- Thurgood Marshall, former Associate Justice of the Supreme Court
- Brett Kavanaugh, current Associate Justice of the Supreme Court

The Old Line State provides both the historian and constitutional scholar much to occupy their time. With one of the oldest state constitutions still operating today, including one of the longest Declarations of Rights, a detailed study of the rights of Maryland’s citizens will be time well spent.

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^[1] Some accounts put the unit at 260 remaining men, of which only a handful survived the day.

^[2] The story of the “Maryland 400’s” heroic stand is told by Patrick K. O'Donnell in [Washington's Immortals: The Untold Story of an Elite Regiment Who Changed the Course of the Revolution](#).

[3] https://books.google.com/books/about/The_battle_of_Long_Island.html?id=TFYOAAAIAAJ.

[4] Named after the King's wife, the former French princess Henrietta Maria, aka Queen Mary.

[5] <https://plymouthcolonytourism.weebly.com/population.html>.

[6] https://en.wikipedia.org/wiki/Battle_of_Bladensburg.

[7] A "Civil War" is normally fought over who will control an existing government. The South had no interest in taking over the government of the Union.

[8] <https://www.thoughtco.com/lincoln-issues-proclamation-suspending-habeas-corpus-3321581>.

[9] <http://www.abrahamlincolnonline.org/lincoln/speeches/hodges.htm>.

[10] Ratified on December 18, 1865.

[11] https://en.wikipedia.org/wiki/Jury_nullification#State_laws.

[12] <http://constitution.org/trials/penn/penn-mead.htm>.

[13] <https://www.thenewamerican.com/usnews/constitution/item/22588-supreme-court-justice-sotomayor-supports-practice-of-jury-nullification>.

[14] <http://worldpopulationreview.com/states/maryland-population/>.

[15] <https://www.foxnews.com/politics/western-marylanders-push-to-secede-from-state>.

Secession? America's Founding and Why States Seceded From the Union—Guest Essayist: Kyle A. Scott

Thomas Jefferson, and all those who agree with and find inspiration in the *Declaration of Independence*, support secession. There is no denying that the *Declaration* was a statement of secession "When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another...". Thomas Jefferson stayed true to this point when writing in the Kentucky Resolution (1798) that "the several states who formed that instrument (the U.S. Constitution), being sovereign and independent, have the unquestionable right to judge of its infraction..." Secession is an inherent right in governing bodies and the states themselves ought to have sovereignty over the decision to secede.

The *Declaration of Independence* was a solidification of prior state action rather than a moment of instigation. Beginning in 1775 the former colonies began declaring themselves states rather than colonies and writing their own constitutions with New Hampshire becoming the first in January 1776 followed by Virginia, South Carolina, New Jersey. Rhode Island renounced its

allegiance to Britain and revised its charter a full two months before the *Declaration of Independence* was adopted. These independent states joined together in an act of secession as they were seeking to dissolve the political bands that tied them to Great Britain. Each colony that fought against the crown was a secessionist regime. Secession is a central part of this nation's founding sown at the time of its founding.

At the time of the nation's founding the states considered themselves to be sovereign entities that could compact together to address common needs, and it could reverse that decision if the common governing body no longer fulfilled its duty. Sovereignty was not relinquished. This is not only documented, but procedurally it is reinforced in that each state needed to ratify the primary governing documents before those documents took effect within that state's legal jurisdiction. For instance, the U.S. Constitution was drafted by a committee in Philadelphia, it was then sent to the states to ratify individually. And while the Constitution only required nine of the thirteen states to be put into effect, only those states that had ratified it would be part of the Union. Those who had not ratified could not take part in the new government. This is a continuation of the political practice started with the Articles of Confederation in which the Second Continental Congress drafted and approved the Articles but then sent them to each state for independent ratification. The same is true of the *Declaration of Independence*—no state was forced against its will to fight the British once a majority of states accepted the *Declaration*; rather, it required unanimous consent from each state in Congress.

Secessionist thought is often commingled with the U.S. Civil War, but one of the first moves toward secession after the formation of the United States was undertaken by the New England Federalist Party between 1814-1815 in reaction to the War of 1812 at what is known as the Hartford Convention. Lest we forget that Tennessee was formed through secession from North Carolina, Kentucky from Virginia, and Maine from Massachusetts. Secession is neither uniquely American with Sweden seceding from Norway, Belgium from the Dutch, and Eritrea from Ethiopia to name only a few. But for most Americans our understanding of secession is clouded by the war between the states and the subsequent Supreme Court decision of *Texas v White* (1869) that declared secession unconstitutional despite historical and normative claims to the contrary.

Almost without exception a discussion of secession introduces the issue of slavery. But that is a product of an undisciplined mind that cannot separate two mutually exclusive ideas rather than a fact of reality. Secession is about self-determination; it is the ultimate weapon against tyrannical government. As Jefferson writes, "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government..." A people unable to dissolve political bonds are a people who no longer have the ability to preserve the rights endowed to them by their Creator but have instead given all authority to some distant governing body. This would be antithetical to every precedent-setting document one could read at the time of the founding. To say that states gave up their right to secede when they ratified the Constitution is to not understand the founders as they

understood themselves. A people committed to freedom and liberty would not so willingly give up the very thing that allowed them to be free in the first place.

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South Carolina, Admitted 1788 and Eighth State to Ratify the U.S. Constitution—Guest Essayist: Charles F. Vaughan

The eighth state to ratify the U.S. Constitution, South Carolina, was admitted to the United States May 23, 1788. It was also the first state to secede from the Union. The current South Carolina State Constitution was adopted in 1896.

Albemarle Point, located on the Ashley River, was established in 1670 as the first permanent English settlement in South Carolina. It was under the supervision of the eight lords proprietors who had been granted "Carolana" by King Charles II. Ten years later, settlers moved across the river to the present site of Charleston.

From its very beginning, South Carolina had a constitution in the form of the Fundamental Constitutions of Carolina. Although never fully ratified by the colonists and eventually jettisoned in 1698, it did shape political power and land distribution in the colony. Co-authored by John Locke and Lord Anthony Ashley Cooper, 1st Earl of Shaftesbury, it was notable for its religious tolerance, providing right to worship to religious dissenters of Christianity, Jews, and Native Americans. It offered sanctuary for groups seeking refuge from religious persecution in Europe. The constitution promoted slavery and an aristocracy which could wield absolute power over their enslaved Africans. This set the stage for the next 200 years.

South Carolina became a Royal Colony in 1729. The colony experienced very minimal royal control, apart from the appointments of Royal Governors. A period of salutary neglect on the part of the British Crown enabled government to evolve in such a way that served the needs of the lowcountry elite. The House of Commons Assembly and Privy Council were modeled after the English Parliament.

Since the colonial period, South Carolina has had seven constitutions, dating from 1776, 1778, 1790, 1861, 1865, 1868, and 1895. The Constitution of 1776 became necessary after Governor Loyd Campbell fled the colony over tensions between the colonies and England. Approved by the Provincial Congress of South Carolina, the Constitution incorporated previous royal instructions but originated from the people of South Carolina. This plan of government was to last until the disputes with Great Britain could be settled. It established a bicameral legislative branch, the General Assembly, with members of the lower house elected by the people, and

members of the upper house elected by the lower house. In place of a governor, there was a president, selected by both houses. The president had veto power and could only serve one term in office. The upper house also elected a vice president and a chief justice. The judicial branch remained unchanged from the colonial system.

There existed an unequal distribution of power in the new government, with the upper house dominated by lowcountry elite even though the majority of the white population resided in the upcountry. Representation in the lower house was shared a little more equally between the lowcountry and upcountry.

The Constitution of 1778 created strict property requirements for the franchise. White men had to possess a significant amount of property to vote, and had to own even more property to be allowed to run for political office. In fact, these property requirements were so high that 90 percent of all white adults were prevented from running for political office. The office of president became the governor, whose election remained purview of the General Assembly. The upper house, renamed the South Carolina Senate, was popularly elected. Representation in the legislature was reapportioned so that the upcountry had forty percent of the seats. In 1786 the General Assembly relocated the capital from Charleston to Columbia as a way to express increased statewide unity. The following year the General Assembly banned the importation of new slaves.

On May 23, 1788, South Carolina ratified the United States Constitution. This necessitated a new constitution. In June 1790, a convention of elected delegates from across the state unanimously ratified the Constitution of 1790, which served the state until 1861. Lowcountry elite continued its dominance of the legislature as seats were apportioned on the basis of wealth. The governor, elected by the General Assembly, had no veto power. Voting was limited to white males who had to meet strict property requirements. The General Assembly made all laws and elected all holders of major offices, including governor, presidential electors, U.S. senators, and many local officials. The General Assembly adhered to the notion of aristocratic stability- control by white males who owned land and slaves. This cohesion of political and economic thought would eventually lead many to support secession.

Sectional tensions in the 1830s, 1840s, and 1850s finally came to a head in November, 1860 with the election of Abraham Lincoln. On December 20, 1860, a special Secession Convention approved the Ordinance of Secession. The 1790 constitution was amended to note the withdrawal from the federal Union. The Constitution of 1861 continued the election of the governor by the General Assembly and did not change much from the 1790 constitution.

At the conclusion of the Civil War, South Carolina had to adopt a new constitution to be readmitted into the Union. The Constitution of 1865 preserved many values of the planter elite. It moved closer to a balance between the lowcountry and upcountry in the Senate. The House of Representatives was apportioned based on white population and taxed land value. Legislators continued to select U.S. senators and presidential electors. The governor was popularly elected to a four-year term and was given veto power. The civil rights of former enslaved African Americans were ill defined. Passage of strict Black Codes designed to regulate former slaves

and election to Congress of former Confederate heroes resulted in Congress ordering the creation of a new constitution.

Congressional Reconstruction led to the Constitutional Convention of 1868. Many whites refused to participate as African American men were allowed to vote for the first time. This constitution is the only one to be submitted directly to the voters for approval. Congress ratified it on April 16, 1868.

It was a revolutionary constitution for South Carolina. Representation in the House was based solely on population. The governor continued to be popularly elected. For the first time, it provided for public education open to all races, granted some rights to women, and replaced districts with counties. Property ownership as a qualification to run for public office was abolished. Race as a limit on male suffrage and Black Codes in the 1865 constitution were also abolished.

Following a series of economic downturns in the state, the Constitution of 1898 was adopted by convention and not submitted to the people in referendum. It instituted Jim Crow laws aimed at disenfranchising the state's African American population while protecting the state's poor, illiterate whites. A poll tax was instituted, and men who paid property tax and were able to write and read the state constitution could vote. Local registrars determined who could vote. The poll tax was abolished in 1951 and the Voting Rights Act of 1965 terminated unregulated local voter registration.

The General Assembly maintained its supremacy over the governor and local politics. To dilute the power of the governor, the executive department was split into many local boards and state agencies. The governor was limited to a two-year term with possibility of one reelection.

By the 1960s, the constitution had been amended over 300 times. Throughout the decade, a committee studied the 1895 constitution. In 1970 voters approved changes to five articles. Work continues to reform the constitution and state government. More recent changes have made the executive and judicial branches more independent from the legislative branch and local governments that are more responsive to the people than the General Assembly.

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New Hampshire: The First in the Nation—Guest Essayist: The Honorable Bill O'Brien

New Hampshire has a glorious history of national firsts.

While the Sons of Liberty gathered around a tree in Boston before the Revolution, the glory of New Hampshire was that in 1772 we had the Pine Tree Riot. Three years before Paul Revere's midnight ride, the Pine Tree Rioters in Hillsborough County rebelled against paying the British King's taxes on trees. Then the rioters' neighbors added insult to royal injury by refusing the governor's order to come out as a militia and quell the rioters who had taken to tarring and feathering the king's agents.

In a similar fashion, before the Minutemen fought the British redcoats in Concord and Lexington in the Spring of 1775, the King's army was subject to ongoing harassment and attack in New Hampshire. As early as 1757, the early day contributors to New Hampshire's continuing libertarian tendencies opposed British troop recruitment in the town of Brentwood.

This tension grew over the years before the Revolution and finally led to what should be recognized as the first armed conflict of the Revolution. On December 14, 1774 the indefatigable Paul Revere brought alarming news north from Boston that the King's government was sending troops and was going to forbid the import of arms into America. In response, that afternoon 350 New Hampshire men attacked the royal fort of William and Mary in New Castle on the coast near Portsmouth.

Under fire from the troops defending the fort, these New Hampshire patriots captured the fort and its garrison, took down the British colors, seized most of the gunpowder and departed. When the royal governor the next day regarrisoned the fort and ordered the return of the gunpowder, the insurgents went back to Fort William and Mary and took the remaining gunpowder, plus 16 cannons and all the muskets.

But it was not only in pre-revolutionary rebellious behavior that New Hampshire set a national example. It has also come to lead the nation in many important aspects of state governance.

In 1916, clean-government New Hampshire set an example for the other states by establishing a presidential delegate selection primary over backroom choice of national convention delegates. This delegate selection primary turned into a direct presidential candidate selection primary in 1952, a move that has caused many states to now have their own primaries and voter caucuses. New Hampshire's reform has led other states to replace their own backroom deals for choosing presidents in favor of a transparent process relying on voter selection.

While this electoral reform has extended across our country, New Hampshire's primary remains an important quadrennial feature of presidential politics. In every presidential election cycle, for now almost 70 years, New Hampshire has ensured that its initial presidential primary remains the First-in-the-Nation Presidential Primary. As a result, while some states might be known for

making such things as ethanol for our cars and bacon for our breakfasts, “*New Hampshire makes presidents.*”[\[1\]](#)

New Hampshire has many other firsts of national distinction and many of those include what it has brought to the development of constitutional law in America. It could not be other for the first of the American colonies to declare its independence and have the first state constitution.

On January 5, 1776, the then provincial Congress of New Hampshire recognized that with the royal governor and British troops having been chased out of the state, the time had come to adopt a state constitution derived not from royal prerogative or British parliamentary grant, but rather from the free suffrage of the people.[\[2\]](#) In doing so and by means of that very first constitution, New Hampshire became the first of the 13 original colonies to declare its independence from the Great Britain – six months before the Declaration of Independence was signed.[\[3\]](#)

Perhaps setting the stage for constitutional brevity in the later federal, and some of other state constitutions, this first-in-the-nation state constitution was only two and a half pages long. Unlike most other state constitutions, however, and perhaps reflecting its origins in a legislative body comprised mostly of the members of a provincial assembly that the royal governor had attempted to discharge for countenancing an attack on the King’s fort and other wrongs, the 1776 New Hampshire constitution established the legislature as the superior branch of government.

Under this “First-in-the-Nation” state constitution a chief executive officer was referenced, but that office titled as “President” was merely the leader of a council chosen by a House of Representatives. This council, and therefore the President, was not only chosen by the House of Representatives, but together the House and council formed the Legislature.

This 1776 enactment of what came to be a New Hampshire wartime constitution further provided that all other government officials were to be appointed directly or indirectly by the Legislature, except for certain county officials. Otherwise only the members of the House of Representatives were directly elected by the people.

Thus, under the 1776 New Hampshire constitution, the office of the chief executive was not fundamentally separate from the Legislature. Most all elements of the state government derived their existence and office holders at the sufferance of the Legislature. In the first state constitution in America there were no co-equal branches of government. There was no balance of power. The Legislature was supreme.[\[4\]](#)

Based on this 1776 grant of state constitutional authority in New Hampshire, Meshech Weare was chosen as the first President of New Hampshire and he served in this capacity until the end of the Revolution. Further reflecting the judiciary’s junior role in the government,[\[5\]](#) Weare was also appointed to head the state's highest court, the "Superior Court of Judicature." He served there from 1776 to 1782. During that time, the executive branch and the judicial branch in New Hampshire had the same person as their chief officers. Nonetheless, the real power existed in the Legislature.[\[6\]](#)

Following our War of Independence, New Hampshire took up the task of replacing the wartime constitution. The resulting New Hampshire state constitution was adopted in 1784, five years before the federal constitution. As amended, this constitution continues as the basic law for the State of New Hampshire today and is second only to Massachusetts in being the state constitution with the longest tenure in the country.

The 1784 New Hampshire Constitution continued to name the Chief Executive as President.^[7] It did, however, make that position a separately elected office. In doing so, it established the executive administration as a separate branch of state government along with a legislature consisting of a Senate and House of Representatives.

The 1776 council that had been the senate was not lost now that there was a separately designated senate. Rather, the 1784 Constitution shifted the council from being part of the Legislature to becoming an independent body within the executive branch. There it was placed to serve as a check on the Chief Executive. In fact, each of the Chief Executive and the elected, five-member Council could veto the acts of the other.

Thus, the drafters of the 1784 Constitution overcame their pre-revolution distrust of governors, who had been royally appointed, and recognized the necessity of having a chief executive. Having done so, however, they followed what was the lead of the 1780 Massachusetts constitution and put in place a substantial check on the chief executives' authority. The check they developed was so substantial, in fact, that it could deadlock the chief executive.

Similar to this capability of the Chief Executive and the Council to stalemate each other, when establishing the Legislature (the "General Court"), the 1784 Constitution included the same type of checks and balance for the Senate and the House of Representatives each of which is to have a strong veto right over the other.^[8] Moreover, the chief executive was given an overridable veto over the Senate and House acting together. Thus, in a choice that continues to underlie our federal and state constitutions today, the drafters of New Hampshire's constitution favored liberty over efficiency.

Even as the New Hampshire constitution continues through the third century following its adoption, its essential checks and balances have not been changed. As a device to avoid executive or legislative tyranny, this approach certainly served as an example for those in other states, and the federal government, who later brought the concept of "checks and balances" to their basic laws.

One noteworthy additional provision in the New Hampshire Constitution is an article that expressly recognizes the right of revolution.^[9] Though, of course, recognition of the existence of a right of revolution is fundamental to the American national experience, ^[10] although a provision of that nature did not find its way by language or concept into the later federal constitution or, for that matter, many other state constitutions.

Nonetheless, as the New Hampshire drafters of a state constitution adopted shortly after the Revolution understood, the existence of an inalienable right of revolution underlay both the New

Hampshire and American declarations of independence. They no doubt knew that their recognition of its existence was based on ancient examples existing only in faded recollections,^[11] and therefore it was important to expressly ensure that as the Revolution faded into distant memory, government did not forget the lessons so painfully taught to the British oppressors.

So, forcefully recognizing this right in the New Hampshire constitution's bill of rights was almost unique in American constitutional law. It is one thing, however, to recognize this right as a justification when being a perpetrator of a rebellion and quite another when drafting a fundamental law that is intended to have permanence. Yet, the drafters of the New Hampshire 1784 Constitution, enacted mere months after the adoption in Congress of the Treaty of Paris, that brought the suffering and horrors of the Revolution to an official end, had the courage to do so. They wanted it preserved in the State's memory, that in the face of arbitrary governmental power and oppression, revolution is not just an option, but should be repeated.

Perhaps not with such forceful language, this courage to express the right to further conflict and rebellion was demonstrated not in many, but certainly in some subsequent state constitutional enactments. Included among those were the constitutions of Kentucky, Pennsylvania, Tennessee, North Carolina and Texas. Indeed, the North Carolina constitutional language tracked much of what is found on this concept in New Hampshire's constitution.^[12] This right of revolution has additionally found expression in the Universal Declaration of Human Rights.^[13] While limited in expression elsewhere, the right of revolution is a necessary, inescapable and, in New Hampshire, enshrined human right.

This first constitutional expression in New Hampshire of the logic that all who are oppressed have the right to revolt to regain their liberty has at least continued, if not promoted, the concept of universal freedom. In this, perhaps as much as its protection of the retail politics enabled by its presidential primary and continuing to point the way to checks and balances of governmental power, New Hampshire has been at the forefront of the states.

New Hampshire has truly been First-in-the-Nation in more ways than one.

Bill O'Brien served for five terms in the New Hampshire House of Representatives where he was

^[1] McCaughey, Betsey, Democracy at Its Best (Washington Times, April 24, 2015) (<https://www.washingtontimes.com/news/2015/apr/24/betsy-mccaughey-democracy-its-best/>; accessed March 17, 2019).

^[2] See January 5, 1776 NH Constitution at http://avalon.law.yale.edu/18th_century/nh09.asp (accessed March 15, 2019) (“*WE, the members of the Congress of New Hampshire, chosen and appointed by the free suffrages of the people of said colony, and authorized and empowered by them to meet together, and use such means and pursue such measures as we should judge best for the public good; and in particular to establish some form of government, . . .*”); See also New Hampshire General Court, Documents and Records Relating to the State of New Hampshire, pages 36 and 37 (E. A. Jenks, state printer 1874) (accessed March 15, 2019 at <https://www.library.unh.edu/find/digital/object/propapers%3A0008>).

[3] And months before the first independence declarations claimed for other of the American colonies, in particular North Carolina and Rhode Island.

[4] Thereafter, other states continued with the concept of legislative supremacy over other branches. See, e.g., 2006 article on North Carolina constitutional history by John V. Orth, accessed on March 17, 2019 at <https://www.ncpedia.org/government/nc-constitution-history>.

[5] This subservient role of the judiciary continued on in the 1784 constitution until amendments as late as 1966 were intended to make the Judiciary in some respects a co-equal branch of government. N.H. CONST. pt. 2, art. 72-a (November 16, 1966).

[6] The primacy of the Legislature was often graphically illustrated in the 19th century when the Legislature, having become dissatisfied with the then current state of Judiciary, dissolved the then existing courts and reconstituted others to serve as the judiciary. See Wines, Michael, Judges Say Throw Out the Map. Lawmakers Say Throw Out the Judges (NY Times, February 14, 2018) (<https://www.nytimes.com/2018/02/14/us/pennsylvania-gerrymandering-courts.html>; accessed March 17, 2019) (“As far back as the 1800s, New Hampshire’s legislature disbanded the state’s Supreme Court five times, said Bill Raftery, a senior analyst at the National Center for State Courts in Williamsburg, Va. . . .”).

[7] The title later became “Governor.” N.H. CONST. pt. 2, art. 41(as amended, 1792).

[8] “*The Supreme Legislative Power, within this State, shall be vested in the Senate and House of Representatives, each of which shall have a negative on the other.*” N.H. CONST. pt. I, art. 2 (June 2, 1784).

[9] “... [W]henever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.” N.H. CONST. pt. I, art. 10 (June 2, 1784).

[10] “*We hold these truths to be self-evident... –That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government,*” Quoting, The Declaration of Independence (July 4, 1776).

[11] See, e.g., Declaration of Arbroath (April 6, 1320) (“for, as long as but a hundred of us remain alive, never will we on any conditions be brought under English rule. It is in truth not for glory, nor riches, nor honours that we are fighting, but for freedom – for that alone, which no honest man gives up but with life itself”), quoting in part Sallust, The Conspiracy of Catiline (circa 50-35 BC).

[12] See generally, Wikipedia, Right of Revolution, https://en.wikipedia.org/wiki/Right_of_revolution#cite_note-37.

[13] *“Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by rule of law.”* The Universal Declaration of Human Rights, UN General Assembly resolution 217 A (December 10, 1948) (<http://www.un.org/en/universal-declaration-human-rights/index.html>; accessed March 17, 2019).

How Virginia’s State Constitution Would Impact Construction of the United States Constitution—Guest Essayist: Daniel A. Cotter

On June 25, 1788, “Old Dominion” as Virginia is known, became the tenth of the thirteen original states to ratify the U.S. Constitution, admitting it to the Union June 25, 1788. The Virginia State Constitution in current use was adopted in 1971, with the original Virginia Constitution adopted in 1776. Despite the U.S. Constitution requiring that only 9 of the 13 colonies ratify it for it to become effective, given the importance of Virginia to the new nation, had it voted down the U.S. Constitution, the future of the United States might well be in doubt.

The nickname, “Old Dominion,” likely derives from Virginia being the first of the overseas dominions of the kings and queens of England. Virginia also is known as the Mother of Presidents and the Mother of States. Eight Virginia natives have held the presidency, including four of the first five- George Washington, Thomas Jefferson, James Madison, and James Monroe.

On the third day of the fall session of the Virginia legislature in 1787, the Virginia House approved a convention to consider ratification of the proposed United States Constitution. The Virginia legislature strongly debated whether to adopt or reject the document as it was submitted, or to condition any approval upon certain amendments and revisions. John Marshall proposed a resolution that won the day, “that a Convention should be called and that the new Constitution should be laid before them for their free and ample discussion.” The Senate followed slowly, and on January 8, 1788, a law passed calling for a state convention.

The Virginia Convention of 1788 commenced on June 2, 1788. The delegates arriving in Richmond believed that the fate of the Constitution hung in the balance with how Virginia decided. Even so, upon arrival at the Convention, many members had not seen the Constitution until they arrived at the Virginia Convention. While the Virginia convention ensued, New Hampshire became the ninth state to ratify the Constitution and it became effective. At the time of the Virginia Convention, a healthy majority of Virginians were opposed to the concept of a strong national government contemplated by the Constitution and the Virginia Convention began with that view prevalent amongst the delegates. The Nation was watching closely how the important Commonwealth of Virginia decided, for “she also was the most important State in the Confederation in population and, at that time, in resources.”

Delegates included a veritable “who’s who” of delegates, including John Marshall, along with Governor Edmund Randolph, James Madison, George Mason, James Monroe, and Patrick Henry. On June 24, 1788, Delegate George Wythe moved the Virginia Convention to ratify the

Constitution. Henry arose for a final great speech of his life, arguing against ratification without amendments. The proposal to add amendments, many of which became the Bill of Rights, failed to be a condition of ratification, but would prove to be valuable guidance when Congress met in 1789. After further debate, on June 26, 1788, the Virginia Convention voted to ratify the Constitution by the slim margin of 89-79. This slim margin would not have been possible had eight members of the Convention not voted against their constituents' directives, and two ignored the instructions given them. Virginia effectively would be the only convention where both sides of the debate were fully vetted and discussed. The Virginia delegation argued both broad principles and minor details of the document approved in Philadelphia.

With that, the new nation could breathe easy, as its largest colony and most influential was on board. As noted, it would see four of the first five presidents hail from Virginia.

The Virginia Constitution

Before the Declaration of Independence was made, Virginia adopted its state Constitution on June 29, 1776, and its document would be of major impact when the new nation turned to creating a Constitution of its own. Mason, who had a large role in the drafting of the Constitution in Philadelphia, and who was one of three delegates still in Philadelphia in September who did not sign the Constitution, was one of the main drafters of the 1776 Virginia Constitution. The other was Madison, who is considered by many to be the Father of the Constitution for his work in connection with the Annapolis Convention, the Bill of Rights and the Constitutional Convention. Madison would take his learnings from Virginia a decade later when he helped design the United States Constitution.

The 1776 Virginia Constitution included a bicameral legislature, the governor was the executive and there was a judicial branch. In addition, the Virginia Constitution had an accompanying Virginia Declaration of Rights, which Mason mostly wrote, that guaranteed certain human rights and freedoms that would be the model for the Bill of Rights introduced at the first Congress of the new nation under the ratified United States Constitution.

Conclusion

While the ratification of Virginia was not required under the new Constitution for there to be a United States, had the vote gone the other way, the United States may have been for naught before they began. Old Dominion showed its leadership and ratified the U.S. Constitution and the rest is history.

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Republican Principles of the 1776 Virginia Constitution—Guest Essayist: Tony Williams

On May 15, 1776, the fifth Virginia Convention told its delegates to the Continental Congress in Philadelphia to “be instructed to propose to that respectable body to declare the United Colonies free and independent states, absolved from all allegiance to, or dependence upon, the crown or parliament of Great Britain.”

On the same day, the Congress adopted recommended to the assemblies and popular conventions in the colonies to “adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general.”

John Adams called this measure “independence itself.” Adams added a radical preamble for self-government that “every kind of authority under the said crown should be totally suppressed, and all the powers of government exerted under the authority of the people of the colonies.”

The Virginia Convention followed Congress’ exhortation to adopt a new constitution and appointed a committee to draft it, and a Declaration of Rights. The constitution was the framework of government. The declaration was, in the words of Edmund Randolph, “In all the revolutions of time, of human opinion, and of government, a perpetual standard...around which the people might rally and by a notorious record be forever admonished to be watchful, firm, and virtuous.”

The convention adopted the Virginia Declaration of Rights on June 13. George Mason was its primary draftsman. He began with a stunning assertion of natural rights.

“That all men are by nature equally free and independent and have certain inherent rights, of which...they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

The declaration was deeply influenced by the thinking of John Locke. It stated that “all power was vested in” the sovereign people, and the representative government was established to protect their rights. When it became destructive of these ends, the majority had the “indubitable, inalienable, and indefeasible” right to alter or abolish it. Its influence on the Declaration of Independence was unmistakable.

The declaration included several core principles fundamental to the American experiment in liberty: free elections, separation of powers, trial by jury, rights of the accused. The freedom of the press was called “one of the greatest bulwarks of liberty, and can never be restrained but by despotic governments.” Finally, the declaration protected freedom of conscience as a natural right. “All men are equally entitled to the free exercise of religion, according to the dictates of conscience,” it asserted.

In Philadelphia, Thomas Jefferson was busy with the work of drafting the Declaration of Independence and regretted not being part of the Virginia Convention. He drafted a constitution for the convention, but submitted it too late for it to be considered by the delegates.

On June 29, the convention adopted a constitution guided by revolutionary principles. The different branches of government were separated and consisted of a bicameral General Assembly, an executive, and judiciary. The House of Delegates was the most representative of the people and were elected annually. The two houses of the legislature voted for the governor and curtailed the power of the executive who was elected annually and could not serve more than three terms consecutively. The principles of 1776 and great suspicion of executive power because of the experience under the king and his royal governors underpinned the weakening of executive power.

The Virginia Constitution was one of the first modern constitutions and represented the republican and revolutionary principles of 1776. The state constitutions created republican governments and helped shape the experiences and principles that led to the Constitutional Convention in 1787.

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New York: Eleventh of the Original Thirteen to Become a State in the Union—Guest Essayist: Daniel A. Cotter

New York – July 26, 1788

Eleventh of the thirteen original states to ratify the U.S. Constitution, New York was admitted to the Union July 26, 1788, one month and a day after Virginia became the 10th state and is known as “The Empire State” (apparently based on its wealth and resources). The current New York State Constitution was adopted in 1894, but its first was adopted on April 20, 1777.

Constitutional Convention

New York sent only three delegates to the Constitutional Convention in Philadelphia- Alexander Hamilton, John Lansing, Jr., and Robert Yates. Only Hamilton signed the Constitution in September 1787. Like Virginia, New York was a large, well populated, wealth state, and was important to the future of the nation. At the time, New York was the fifth largest state by population but already an immensely important commercial participant. After extended debate, New York ratified by a slim three vote margin, 30-27, becoming the 11th state admitted to the Union. Upon ratification, New York sent a long, detailed ratification message, with a declaration of rights and suggested changes and modifications to the Constitution, but with approval based on an understanding “that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration.” At the New York Convention, the Anti-Federalists were led by Governor George Clinton, and the Federalists by Hamilton. Anti-

Federalists wanted a Bill of Rights and wanted states to prevail over federal encroachments feared by the new Constitution. When the New York Convention convened, Anti-Federalists had an overwhelming majority.

The New York Convention convened in mid-June 1788, and began debating, with a close eye on developments in Virginia. If Virginia had rejected the U.S. Constitution, New York might have done the same. Hamilton asked Madison to send message to New York informing the Empire State of the vote in Virginia. That dispatch arrived in Poughkeepsie, New York on July 2, 1788. That letter turned the two-thirds Anti-Federalist convention into a narrow margin of ratification, with the request and recommendation that a number of amendments be made to the Constitution. New York made such amendment recommendations similar to those of Virginia. In an unusual move, the New York Convention sent a circular letter to the states that called for a second general convention to consider such amendments.

John Jay, who wrote a handful of *The Federalist Papers*, but would have written more except for his illness, was influential at the New York Convention. While he did not attend the Constitutional Convention, Jay would become an important national leader of the infant nation, appointed by President George Washington in 1789 as the first Chief Justice of the Supreme Court of the United States. He would not remain in that position long, returning to New York to become Governor. Jay also helped to negotiate peace with England and, in 1794, was appointed special envoy to seek peace with Great Britain. Jay's Treaty, as it became known, brought temporary peace.

The New York Constitution

Immediately following the Declaration of Independence, a Convention assembled in White Plains, New York on July 10, 1776. Due to the Revolutionary War and George Washington and the Continental Army's crushing defeats in New York and New Jersey, the convention adjourned and reconvened over the next nine months, culminating in its adoption on April 20, 1777. The primary drafters of this original New York Constitution were John Jay, Robert Livingston, and Gouverneur Morris. The new constitution had a bicameral legislature and a strong executive branch.

In New York, slavery was permitted and legal until 1827. The New York Constitution has had several constitutional conventions, with the current New York Constitution having been ratified at the New York state election in 1894 in three parts. While nine Constitutional Conventions have been held in New York State, the state has had only four *de novo* constitutions- 1777, 1821, 1846, and 1894.

Conclusion

Like the 10th state, Virginia, while New York's ratification was not required under the new Constitution for there to be a United States, had the vote gone the other way, the United States may have been for naught before they began. The Empire State showed its wealth of wisdom in ratifying the United States and becoming the 11th state in a fledgling nation. Had New York insisted on its voluminous amendments to the draft U.S. Constitution or that a Bill of Rights be

passed with any ratification, and four votes had gone the other way, we might well have never moved to fifty states. Thankfully, we will never know. But New York was extremely influential in the Bill of Rights being considered, including the powerful 10th Amendment, which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” With the 9th Amendment, the intent was to limit the powers of the federal government.

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North Carolina’s Vital Role in Ensuring The People Had a Bill of Rights—Guest Essayist: NorthCarolinaHistory.org

Aside from the federal Constitution, North Carolina has had three state constitutions since separation from Great Britain. One in 1776, one in 1868, and one in 1971.

Although different, the North Carolina constitutions have similar passages, and it is evident how elements of the 1776 constitution were incorporated into the 1868 constitution and how many parts of the 1868 constitution were incorporated into the 1971 constitution. Each version has a Declaration of Rights, albeit the number of declarations is different. All three, however, include a reminder that the study of history can affect current policy: “a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.”

The 1971 State Constitution of North Carolina is the governing document of Tar Heels.

During the past several presidential elections, North Carolina has been described as a “purple” or battleground state. As more people move to The Old North State for work or retirement, pundits are often unsure if the state will lean to the left or to the right in an upcoming election.

North Carolina has been a battleground state and a determining factor in national debates many times. The 1787-89 debates over ratifying the federal Constitution offer an example of North Carolina’s longstanding role in our country’s political history.

During the debates, the state’s population was divided over the necessity of a U.S. Constitution and what became known as the Bill of Rights. North Carolina refused to ratify the constitution without the promise of a Bill of Rights, fearing that a federal government would become too powerful without it. The Bill of Rights would protect citizens’ individual liberties from government.

After the framers drafted the constitution at the 1787 Philadelphia Convention, the document was submitted to respective state ratification conventions for approval. In order for the new union to

be formed, nine states had to ratify the Constitution. Nine states did so and, soon after, two more gave approval, for a total of 11. North Carolina was *not* one of these states. North Carolina became one of only two states to hold out on ratifying the constitution and joining the union.

In North Carolina, there was much debate between the Federalists and the Anti-Federalists over whether or not the state should ratify the constitution. James Iredell, using the pseudonym Marcus, explained the Constitution's meaning and pointed out the necessity of its adoption. Tar Heel Federalists, such as Iredell and William Davie, believed the "general government" needed more "energy," such as more authority to tax and be able to have an army to defend the fledgling nation.

A strong Anti-Federalist sentiment, however, remained in North Carolina. Many from the Tar Heel state remembered the Parliamentary abuses before the Revolutionary War and questioned giving more authority to what would become the federal government. Anti-Federalists, Willie Jones and Judge Samuel Spencer, questioned handing any more power over from the individuals and the states to the general government.

Unlike other states, there were two state ratification conventions in North Carolina. One was in Hillsborough (1788) and the other in Fayetteville (1789). Many historians consider North Carolina's ratification convention minutes to be the most revealing and balanced regarding the debate between Federalists and Anti-Federalists.

In most states, Federalists paid for transcribers, and many times convention minutes give the impression of erudite Federalists engaging Anti-Federalist ignorance; the Hillsborough minutes instead reveal a sophisticated exchange among delegates with opposing beliefs. The Hillsborough Convention offered opportunities for leading Federalists and Anti-Federalists to put forth their arguments.

Iredell, a key federalist who had gained widespread respect during the American Revolution for challenging William Blackstone's ideas regarding parliamentary sovereignty, had been declaring the necessity of the document. He showcased great oratorical skill and answered many Anti-federal questions concerning the nature of the Constitution and the threat it made regarding individual liberty. He championed the document as a protector of rights because it incorporated rights into the document by limiting the central government's power.

Willie Jones led the Anti-Federalists; however, Samuel Spencer became their spokesman. Anti-Federalists distrusted the central government and believed states' rights best protected individual liberties. After debating for 11 days, it became clear the Constitution would not be ratified in North Carolina until a Bill of Rights was added. By a vote of 184 to 83, North Carolina decided not to ratify or reject the Constitution and provided a list of rights and suggested amendments for Americans. Many call the Hillsborough Convention "the great refusal."

In subsequent months, George Washington had been elected President of the United States and debate continued not only in North Carolina but also in other states regarding the necessity of the Bill of Rights. After being assured that a declaration of rights would be added to the

Constitution, in November 1789 North Carolina ratified the Constitution by a vote of 195 to 77 at the Fayetteville Convention. The Old North State finally had joined the new union.

North Carolina's prominent influence over the Bill of Rights and structure of our Constitution is highlighted in Howard Chandler Christy's famous painting of the assembly at Independence Hall in Philadelphia. The painting is on a 20 x 30 foot canvas. Washington is the commanding figure, standing on the platform, behind the desk. Benjamin Franklin is a prominent figure, too, although sitting down. Alexander Hamilton is depicted, leaning forward as Franklin lends an ear to the junior statesman's opinion — something Hamilton was willing to share to whomever may listen. The South Carolina delegation, including Charles Pinckney and John Rutledge, are also prominent while standing at the back of Independence Hall, with outstretched arms, indicating they are ready to be the next to sign the document.

So, who is signing the document in that massive portrait that now hangs in the east stairway of the Capitol building? Well, it is North Carolinian Richard Dobbs Spaight. Standing behind him is another Tar Heel, William Blount. The last member of the North Carolina delegation to sign the Constitution is stepping up on the platform — Hugh Williamson.

Often overlooked in histories regarding the founding, the North Carolina delegation is front and center in Christy's portrait, showing the Old North State's vital role in the framework of our nation's Constitution. North Carolina's heated political debate and strong dissent contributed significantly to ensuring that Americans would have a Bill of Rights.

Information courtesy of www.northcarolinahistory.org, a project of the John Locke Foundation, and Anna Manning of the John Locke Foundation

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Rhode Island: The Small Colony That Solidified the United States—Guest Essayist: Kyle A. Scott

Last of the thirteen original states to ratify the U.S. Constitution, Rhode Island was admitted to the Union May 29, 1790. The Rhode Island State Constitution in current use was adopted in 1986.

Rhode Island is known to school children outside of the Ocean State only for its size. One should not be deceived by its diminutive size and think it inconsequential in the nation's history. Space does not permit a complete history of the state, but an overview of its involvement during the ratification of the U.S. Constitution is enough to justify it as being a power player in our nation's politics.

Around 1781 Rhode Island began carrying the moniker of “Rogue Island” for its opposition to commonly accepted measures in the Second Continental Congress. Under the Articles of Confederation unanimity of the former colonies was required for the Confederation to take action. Rhode Island was known for casting the lone dissenting vote in many circumstances that prevented action from being taken.

Although, as the first colony to renounce allegiance to King George III on May 4, 1776—two months before the *Declaration of Independence* was adopted by the Continental Congress—the other former colonies should not have been surprised that a state willing to lead the way in throwing off the yoke of its colonial oppressors would be willing to go against popular sentiment during and after the fight for independence.

The rebellious streak was put on full display as it once again lived up to its moniker as Rogue Island when it was the only state to boycott the Philadelphia Convention in the summer of 1787. The product of that convention was the U.S. Constitution that still governs us today. Rhode Island was so opposed to overturning the Articles of Confederation, or any move that may threaten state sovereignty, that it simply refused to take part. However, Rhode Island had—at least somewhat—overvalued its importance to the process.

Article VII of the U.S. Constitution stipulates that only 9 out of 13 states were required for ratification. On June 21, 1788 New Hampshire became the ninth state to ratify thus putting the new constitution into effect. However, three of the largest and most powerful states—Virginia, New York and North Carolina—had not yet ratified which meant the nation was still not solidified. But with Virginia ratifying on June 25 and New York on July 26 of 1788, the first Congress convened on March 4, 1789 nearly seven months before North Carolina ratified and more than a year before tiny Rhode Island would be the final state to ratify. Once a Bill of Rights was proposed it would not be long before North Carolina would agree to enter the Union as its primary opposition was based on a lack of clearly defined rights in the Constitution. Rhode Island, on the other hand, had a broad base of opposition.

Rhode Island was not motivated by a single group or ideology. It wanted guarantees that it would have control over its own monetary policy. It had pursued inflationary policy during and after the

war that entailed printing money to pay off its war debts. It feared that under a national structure its currency would be devalued and the state would be saddled with excessive war debts thus hobbling its economic and social well-being.

The fear of losing control over its monetary policy was consistent with its general concern for the growth of national power. Furthermore, the large Quaker population was appalled by the allowance of the importation of slaves within the new Constitution, even if it was for a limited time.

Eventually, however, the commercial interests of the state won out when the Senate passed a bill prohibiting trade between the member states of the Union and Rhode Island. The mercantilists in Providence and Newport were able to sustain a winning coalition in May of 1790 to ratify the constitution by a narrow margin of 34-32. This was its twelfth attempt at ratification with the first attempt losing soundly by a vote of 10-1.

By the time Rhode Island had ratified, the Bill of Rights had already been voted out of Congress and sent to the states for ratification with nine states ratifying before Rhode Island was seated in the House of Representatives. Therefore, Rhode Island's lists of eighteen human rights and twenty-one suggested amendments cannot be said to have had a profound effect over our understanding of the original Bill of Rights even though it was not until the eleventh state, Virginia, on December 15, 1791, ratified that the Bill of Rights became part of the Constitution.

What the history of Rhode Island reminds us is that the states that formed the Union understood themselves to be acting on behalf of their citizens and the state government. It was thirteen individual states who formed the Union and not the people of those states. The Union did not transform the people into a single-collective, but rather the people were citizens of their states and the states acted on behalf of their citizens at the national forum. This may seem radical in light of how most people view themselves today, but at the time they would have thought our modern construction as radical and a severe departure from the Spirit of 1776 that rebelled against a distant, centralized governing body that limited self-rule. The Spirit of 1776 also saw the former colonies declaring themselves independent individually rather than as a collective. The actions of the colonies preceded the collective *Declaration of Independence*. A righteous act of independence had begun with Rhode Island and the nation solidified only when it became the last of the original thirteen to join the union.

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Equality of States: The National Union and the Republican Principle- Guest Essayist: Tony Williams

Ratified in 1781, the Articles of Confederation had significant problems. The Congress was unicameral, and the national government did not have an independent executive or judiciary. The states were sovereign, and the national government did not have the power to tax or regulate commerce. It was essentially just a league of friendship.

Yet, the national government under the Articles did achieve some notable successes. The nation made peace with the British in 1783 and secured its independence. Moreover, the Confederation Congress established policies for the settlement of land in the West and principles for the integration of new states into the national Union, weak though it was.

Several states had claims to western lands from royal land grants as British colonies and relinquished those claims. As a result, the Confederation Congress was able to formalize the process by which territory could become states once enough Americans populated the area.

Congress passed the 1784 Ordinance written by congressman Thomas Jefferson. It would have made ten states out of the Northwest Territory, and each territory was eligible for statehood when its population reached 200,000. More importantly, it laid down important principles for the addition of new states to the Union. First, the new states would be admitted as equals to the original thirteen states. Second, the residents of the new states were also guaranteed republican self-government. Significantly, Jefferson proposed to ban slavery in all western territories, but it failed by a single vote.

The Land Ordinance of 1785 authorized the survey of the Northwest Territory and the land was to be sold at a dollar an acre to encourage settlement and raise revenue for the national government.

The Northwest Ordinance of 1787 was passed by the Confederation Congress while the Constitutional Convention was meeting. It authorized three to five states in the territory and set up a specific path to statehood in which 5,000 settlers could elect an assembly and 60,000 residents could adopt a constitution and apply for statehood.

The principles of state equality in the national Union and the guarantee of republican governments were prominent again. The purpose was “for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected.”

In addition, the Northwest Ordinance protected the rights of the accused including the right to a trial by jury. Freedom of religion was protected, and education to promote civic virtue was key to republican government. “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” Slavery was banned in the territory as the framers of this document tried to restrict it to the South and put it on the road to ultimate extinction. Primogeniture was banned and

equality in the distribution of property instituted to prevent an aristocracy from arising on American soil. The Northwest Ordinance was strongly bent toward fundamental liberties, republican government, and national Union.

The Constitution restated these principles yet again in Article IV, section 3 when it asserted that new states may be admitted into the Union and that Congress “shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. In section 4, “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion.” The Constitution added the principle of federalism to the relationship of the national government to the states.

Rapid westward expansion over the next century built a continental republic rooted in a national Union of equal republican states. However, the expansion was marred by the expansion of slavery and contention about the constitutional authority of Congress to regulate territories as in the *Dred Scott* (1857) case.

In his Farewell Address, President George Washington expressed the importance of national Union:

That you should cherish a cordial, habitual and immovable attachment to it; accustoming yourselves to think and speak of it as of the Palladium of your political safety and prosperity; watching for its preservation with jealous anxiety; discountenancing whatever may suggest even a suspicion that it can in any event be abandoned, and indignantly frowning upon the first dawning of every attempt to alienate any portion of our Country from the rest, or to enfeeble the sacred ties which now link together the various parts.

President Abraham Lincoln concurred with Washington that the national Union and the republican principle were core ideas of the American Creed: "Fourscore and seven years ago our fathers brought forth, on this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."

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Vermont, 1791: First State Admitted After the Original Thirteen Colonies- Guest Essayist: William J. Federer

On March 4, 1791, Vermont was the first state admitted to the Union after the U.S. Constitution was ratified by the original thirteen colonies. The current Vermont State Constitution in use was adopted in 1793

The French fortified Lake Champlain by building Fort Sainte Anne on Isle La Motte in 1666. It is considered the first settlement in what would later become the State of Vermont. In 1690, some Dutch Reformed Protestant settlers arrived in the area.

Colonial wars followed between the French and the British:

- King William's War, 1689;
- Queen Anne's War, 1710;
- Father Rale's War, 1722;
- King George's War, 1744;
- Father Le Loutre's War, 1749;
- French and Indian War, 1754.

The British finally expelled all French from Acadia. Many were deported back to other colonies, or back to France, or fled south to the Caribbean and French Louisiana, where the name "acadian" became pronounced "cajun."

Henry Wadsworth Longfellow wrote of this expulsion in his epic poem "Evangeline."

Britain's King granted a Royal Charter in 1679 to the fur trading company -- The Hudson Bay Company -- giving it monopoly control over such a large area that for a long period of time it was the largest landowner in the world, comprising 15 percent of North American acreage. The Hudson's Bay Company is the oldest continuously operated commercial corporation in North America.

When the British began encroaching further south, the French built Fort St. Frederic in 1734 on Lake Champlain. When the British began encroaching further south, the French built Fort St. Frederic in 1734 on Lake Champlain. In 1759, during the French and Indian War, British commander Jeffrey Amherst advanced with 11,000 soldiers, forcing the French to abandon Fort St. Frederic. The French moved 15 miles further south and built Fort Carillion at a strategic point where Lake George flows into Lake Champlain.

British commander Jeffrey Amherst captured Fort Carillion and renamed it Fort Ticonderoga. "Ticonderoga" is the Iroquois word meaning "where two waterways meet." The capture of the Fort Ticonderoga allowed the British to begin crossing into French territory west of the Appalachian Mountains. The Mohawks sided with the British, and killed many of the French survivors.

Part of the former French territory was called "Ver Mont," French for "Green Mountain." British Colonies of Massachusetts, New Hampshire and New York tried to lay claim to Vermont.

Massachusetts relinquished its claims, but New Hampshire issued land grants to proprietors, who subdivided it into lots. Some lots were set aside for a missionary organization of the Church of England by the name the Society for the Propagation of the Gospel in Foreign Parts, and some lots were for the first clergyman who would settle in each township.

In 1775, just three weeks after the Revolutionary War Battles of Lexington and Concord, Ethan Allen led 83 Green Mountain Boys of Vermont on a courageous expedition to capture Fort Ticonderoga. In the early morning of MAY 10, 1775, Ethan Allen, accompanied by Colonel Benedict Arnold, made a surprise assault on Fort Ticonderoga. The bewildered British captain asked in whose name such a request was being made. Ethan Allen reportedly shouted: "In the Name of the Great Jehovah and the Continental Congress." The British surrendered in what was one of America's first victories of the Revolutionary War.

Three weeks after the capture of Fort Ticonderoga, Harvard President Samuel Langdon told the Massachusetts Provincial Congress, May 31, 1775:

"If God be for us, who can be against us?"

..May our land be purged from all its sins!

Then the Lord will be our refuge and our strength, a very present help in trouble, and we will have no reason to be afraid, though thousands of enemies set themselves against us."

A little over seven months later, 25-year-old Colonel Henry Knox incredibly moved 59 cannons from Fort Ticonderoga over 200 miles across Vermont, New York and New Hampshire to Massachusetts. The cannons were put on a high hill overlooking Boston's Harbor - Dorchester Heights. This forced British ships to evacuate Boston.

During the Revolution, Vermont not only fought the British but also New York, resulting in Vermont becoming its own independent nation for 14 years, similar to Texas. The people of VERMONT wrote in their original Constitution, 1777:

"Whereas, all government ought to ... enable the individuals who compose it, to enjoy their natural rights, and the other blessings which the Author of Existence has bestowed upon man;

and whenever those great ends of government are not obtained, the people have a right, by common consent, to change it, and take such measures as to them may appear necessary to promote their safety and happiness ...

And whereas ... the King of Great Britain ... continues to carry on, with unabated vengeance, a most cruel and unjust war against them; employing therein, not only the troops of Great Britain, but foreign mercenaries, savages and slaves,

for the avowed purpose of reducing them to a total and abject submission to the despotic domination of the British parliament, with many other acts of tyranny ...

Therefore, it is absolutely necessary, for the welfare and safety of the inhabitants of this State, that it should be, henceforth, a free and independent State ...

We the representatives of the freemen of Vermont ... confessing the goodness of the Great Governor of the Universe, (who alone, knows to what degree of earthly happiness, mankind may attain, by perfecting the arts of government,)

in permitting the people of this State ... to form for themselves, such just rules as they shall think best for governing their future society."

VERMONT's 1786 Constitution stated:

"That the people have a right to freedom of speech, and of writing and publishing their sentiments; therefore, the freedom of the press ought not be restrained.

That the people have a right to bear arms for the defense of themselves and the State;

and, as standing armies, in the time of peace, are dangerous to liberty, they ought not to be kept up ...

And each member, before he takes his seat, shall make and subscribe the following declaration, viz.

'I ____ do believe in one God, the Creator and Governor of the Universe, the Rewarder of the good and Punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration, and own and profess the Protestant religion.'

VERMONT's 1790 Constitution stated:

"All persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God...

No authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience ...

Nevertheless, every sect or denomination of Christians ought to observe the Sabbath or Lord's Day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed Will of God."

The United States Government accepted Vermont as the 14th State of the United States in 1791, being approved by President George Washington. Denominations grew in numbers, most notably Congregationalists, Episcopalians and Baptists, followed by Methodists, Presbyterians, Free Will

Baptists and Quakers. In the early 1800's, there were also Unitarians, Universalists, and unconventional sects, such as Millerites and Perfectionists.

Beginning in 1820 with the Second Great Awakening, revivalism swept Vermont and academies with religious affiliations were founded. The anti-slavery sentiment was strong in Vermont. In the 1840's the Catholic Church increased with French Canadians and Irish immigrants. In the late 1800's, Judaism, Welsh Presbyterianism, Swedish Lutheranism and Greek Orthodoxy made a presence in Vermont. In 2006, the Pew Religious Landscape Survey listed VERMONT as:

- 11 percent Evangelical Protestant
- 23 percent Mainline Protestant
- 0.5 percent Black Protestant
- 29 percent Catholic
- <0.5 percent Orthodox
- <0.5 percent Other Christian
- 1.0 percent Mormon
- <0.5 percent Jehovah's Witnesses
- 1.0 percent Jewish
- <0.5 percent Muslim
- 1.0 percent Buddhist
- <0.5 percent Hindu
- <0.5 percent Other World Religions
- 7 percent Other Faiths
- 26 percent Unaffiliated
- <0.5 percent No Answer

The State of Vermont put a statue of Ethan Allen in the U.S. Capitol's Statuary Hall. On January 9, 1872, Senator Henry Bowen Anthony gave a speech in the U.S. Capital's Statuary Hall (Washington: F & J. Rives & Geo. A. Bailey, 1872):

"My colleague has well said that it was a happy idea to convert the old Hall of the House of Representatives into the Pantheon of America.

The idea originated with my distinguished friend who sits upon my right, (Senator Justin Smith Morrill of VERMONT,) then a leading member of the House ...

It was indeed a happy idea to assemble in the Capitol the silent effigies of the men who have made the annals of the nation illustrious ...

I anticipate ... every State shall have sent her contribution ... of heroes and patriots ...

Vermont shall send us the stalwart form of that hero (Ethan Allen) who thundered at the gates of Ticonderoga 'in the name of the Continental Congress and the Great Jehovah!"

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Allen” <https://myemail.constantcontact.com/How-America-was-almost-NEW-FRANCE--Jacques-Cartier--Champlain--Fort-Ticonderoga--Vermont--Ethan-Allen.html?soid=1108762609255&aid=ct2wE5T0eKc>

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Crafting Constitutions in the Commonwealth of Kentucky-Guest Essayists: James C. Clinger and Michael W. Hail

Constitutions can be thought of as institutional arrangements that shape the way that individual preferences will be expressed and collective decisions made within a government. The provisions of a constitution also reflect preferences, but the provisions of a constitution may have long-run impacts upon the way that individual preferences are translated into legally binding collective decisions well into the future. Some of these decisions will have implications that are unforeseen and unintended, even if the specific provisions of a constitution were intended by its framers to have different results. In particular, the constitutional framework of a state or nation shapes the path dependent development of that political community. Once the highest law of a polity has been designed, political, legal, and economic decisions are made with that framework in mind. Decisions involving sunk costs are made premised on a particular legal order. Once those decisions are made, it may be difficult to reverse them. The political and economic trajectory of a polity may be set in place, and the momentum built up over history may be hard to swerve in a different direction. Such can be seen in Kentucky’s experience with its state constitutions.

Constitutions can also be understood as covenants.^[1] The role of political theory is particularly useful in understanding constitutions and the jurisprudence interpreting them. While classical understandings of Plato and Aristotle were central to the American Founders’ constitutionalism, they were even more influenced by modern political theory from Thomas Hobbes and John Locke. “The treatment of covenant ... in [Thomas Hobbes] *Leviathan* is thoroughly Puritan, and in general should be regarded as a secularized version of the English Puritans’ theory of a commonwealth.”^[2] Ultimately, the way the founders understand a constitution is the most important foundation for constitutional interpretation and this is often referred to as original intent. The meaning of provisions in any constitution will require time for judicial processes and political governance to fully articulate, and under the English common law legal system, the

original understanding of those who found constitutions is central to the subsequent constitutional interpretation.

The Commonwealth of Kentucky has crafted four different constitutions.^[3] Each can be seen to reflect the ideas and interests of its proponents. Each was a response to particular events and circumstances. Each has been interpreted over time, not only by the courts but by agencies authorized to implement state law.

The first constitution was drafted in 1792 as a condition of Kentucky's admission to the United States.^[4] There were "four successive enabling acts passed by the legislatures of Virginia, that Kentucky was allowed to enter the Federal Union as an Independent State, on an equality with those which had established themselves as a nation."^[5] Kentucky had similar influences as the other states and scholars have generally concluded the resulting constitutions follow the model of the federal constitution of 1787.^[6] The federal constitution was an example of American exceptionalism. "The Constitutional Convention was a signal event in the history of federalism for it was there that the American style of federalism originated."^[7] The Compact With Virginia, as the fourth enabling act has come to be known as, provided the constitutional and legal road map to statehood for Kentucky. Nine pre-constitutional conventions were held as part of the process leading to the Compact With Virginia. The tenth was the actual founding constitutional convention.

Although many Kentuckians were from Virginia, and some of the easternmost counties in Kentucky were formerly counties within Virginia, much of the first constitutional structure was drawn from the 1790 state constitution of Pennsylvania. George Nicholas, often considered the primary architect of the document at the state constitutional convention, deliberately drew from the Pennsylvania charter, which was considered among the more radical of its day. The politics of admission to the union was influential in looking to Pennsylvania also, as Kentucky was competing with Vermont in the Federalist-controlled Congress for admission as the next state after the original thirteen. The political balance of power in Congress was a cloud over the admission process that affected these considerations. Kentucky endured numerous pre-constitutional conventions and the Compact With Virginia ultimately governed Kentucky's transition to statehood. Kentucky retained the constitutional offices, state and local administrative structures, local government forms of Virginia despite some influence from Pennsylvania. The Bill of Rights that the constitution included at the end of the document reappeared in virtually unchanged form in each of the following three Kentucky constitutions, although those provisions have been moved near the beginning of the document. Isaac Shelby was a central leader in the Kentucky constitutional conventions and the admission to statehood process. Shelby was elected as the first Governor of Kentucky and remains to this day the only Governor elected unanimously. Isaac Shelby would return to election as Kentucky Governor a second time as Kentucky and the nation prepared for the War of 1812.

The 1792 constitution provided for a fairly broad elective franchise, a secret ballot, and provision for a referenda for constitutional conventions but provided for no amendment process. The legislature was granted the power to regulate the slave trade. The bicameral legislature was made up of eleven members in the senate and no fewer than forty and no more than one hundred

members of a house of representatives. An electoral college would select both the governor and the members of the senate.

The second constitution was drafted in large part in response to a controversy over gubernatorial succession. The document responded to demands for more restriction on government powers, including limits on the authority of the legislature to regulate slavery. The electoral college was eliminated, providing for direct election of all constitutional offices. The secret ballot was eliminated and viva voce voting put in its place. The constitution specified that the senate would have at least twenty-four members, with no fewer than fifty-eight in the house, nor more than one hundred.

The third constitutional convention met in 1849 and the resulting document was ratified by public vote in 1850. The issue of slavery hung heavily over the constitutional deliberations. The influence of Jacksonian democracy could be seen in the document, with more offices up for election, with a long ballot being the result. The document specified that the senate would have thirty-eight members with one hundred in the house. For the first time, public education was covered at length, with the document establishing a Common School Fund to help finance schools. Slavery and education were the only policy issues to receive extensive attention.

The fourth and current constitution was ratified after a convention in 1891. The document was drafted in a time of progressive reform in much of the country. In Kentucky, there was a great deal of resentment felt toward corporations and specifically, railroads. It was widely believed that the legislature had been badly corrupted by corporate interests. As a result, the new constitution put many restrictions on local and special legislation that was believed to favor special interests. The preamble was changed to identify Kentucky as a “commonwealth” and to assert that all power is “inherent in the people.” The bill of rights was moved to the beginning of the document. The secret ballot which been absent in the last two constitutions was returned. For the first time, the constitution provided for an amendment process so the constitution could be changed in a piecemeal basis. The document was filled with policy-specific details including special provisions regarding corporations, local government, debt, and taxes. The constitution limited the governor and other constitutional officers to one four-year term, a restriction that was not removed until the 1990s. The General Assembly was to meet only every other year, although the legislature was authorized to meet in annual sessions by constitutional amendment in 2001. Judges were to be elected in non-partisan races.

Kentucky’s fourth and, thus far, last constitution placed substantial curbs on state and local governments much like other states, particularly southern state constitutions, have done. However, while Kentucky has long been a socially conservative state, the constitution--and its interpretation--have not pushed the Commonwealth as far to the right as some other southern states have gone, particularly on fiscal and regulatory matters. What is notable is that the basic political trajectory of the Commonwealth’s policies and politics can be understood in light of the Kentucky courts’ decisions which have added to and sometimes subtracted from the actual constitutional text.

Section 14 of the Constitution guaranteed that “All courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of

law, and right and justice administered without sale, denial or delay.” The court structure was completely revamped in the 1970s, but the “open courts” provisions have remained untouched. This has prevented efforts to institute tort reform or other limitations upon liability that are common in other states. Legislation that would have had medical malpractice claims pass through a medical review process before heading to court were struck down as unconstitutional.[\[8\]](#)

The constitution explicitly listed permissible tax sources for both state and local government. An income tax for local governments was not authorized, but license taxes were. In the early twentieth century, the city of Louisville imposed occupational license taxes in which the liability of each taxpayer was defined as a percentage of their earned income. This levy was quickly challenged as an unconstitutional tax. The state’s highest court ruled in the *City of Louisville v. Sebree* case that the occupational license tax—which was a flat income tax under another name—was a permissible tax under the constitution.[\[9\]](#)

Section 246 of the Constitution also limited the compensation given to state officials, with the highest sum permitted set at \$12,000. Though unamended since 1949, the constitution was construed in 1962 to permit the Commonwealth to pay officers and employees an amount equal in buying power to that of the standard set in 1949.[\[10\]](#) This application of the “rubber dollar doctrine” has probably permitted the state to recruit and retain employees who would not be willing to work for the constitutionally specified salary. Nevertheless, it is not clear that this practice is what the framers intended.

One of the most important constitutional rulings which has expanded the scope and size of government in the Commonwealth dealt with public education. Kentucky, like most states, has long had a substantial share of the financing of public education provided by local tax sources, primarily the property tax. Since tax bases are limited, and tax levies legally limited by the state, public schools had difficulty raising money and some school districts were much more limited in their revenues than others. General language in Section 183 of the Constitution stipulating that “The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State” was used by the state supreme court to invalidate the existing financing system.[\[11\]](#) Since that decision, Kentucky has risen from one of the lowest spending states on public education to one that is in the middle ranks of the states.[\[12\]](#)

Kentucky has periodically had discussion of constitutional reform but despite commissions and studies, Kentucky continues to operate under the fourth Constitution of 1891.[\[13\]](#) Amending the Kentucky Constitution requires passage in both the House and Senate by three-fifths majority in each chamber and amendments can originate in either chamber. An amendment approved by the session of the General Assembly is placed on the general election ballot for consideration by the Kentucky electorate and a simple majority is required for ratification of an amendment. There can be no more than four amendments considered by the voters in a general election. The Governor has no authority in the amendment process, other than the duty to make a proclamation regarding the amended constitution if approved by the voters in the general election.

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[1] Elazar, Daniel. *Covenant and Constitutionalism: The Covenant Tradition in Politics*. New York: Routledge, 2018.

[2] Schneider, Herbert W., ed. *Thomas Hobbes Leviathan – Parts One and Two*. New York: Macmillan Publishing Company, 1958, p.x.

[3] Clinger, James C., and Michael W. Hail. *Kentucky Government, Politics, and Public Policy*. Lexington, KY: The University Press of Kentucky, 2013.

[4] Ireland, Robert M. “The Kentucky Constitution.” Clinger, James C., and Michael W. Hail. *Kentucky Government, Politics, and Public Policy*. Lexington, KY: The University Press of Kentucky, 2013.

[5] Thorpe, Francis Newton. *The Federal and State Constitutions: Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*. Washington Government Printing Office, 1909.

[6] Taulbee, Ashley. *The Kentucky Constitutional Conventions and the Federalism of the Founding Fathers*. Master Thesis. Morehead State University, 2017. Taulbee states, “There are several aspects of influence and interconnectedness between national constitutionalism and state constitutionalism reflected in the Kentucky case. The political theory influences, as well as the structure of the institutions in the U.S. Constitution of 1787, and certainly the political thought expressed at the convention in Philadelphia, all are major influences on how state constitutional conventions are modeled. Core constitutional provisions such as separation of powers, checks and balances, and bicameral legislative bodies are among the constitutional features of the U.S. constitution that are consistently incorporated in state constitutions. The politics in Congress as well as in the territory itself play a significant role in framing the terms under which statehood and state constitutional conventions can operate.”(pp.3-4)

[7] Smith, Troy. “Constitutional Convention of 1787.” *Federalism In America*. Westport, CT: Greenwood Press, 2006, p.116.

[8] *Commonwealth v. Claycomb*, 2017-SC-000614.

[9] *City of Louisville v. Sebree*, 214 S.W.2d 248

[10] *Matthews v. Allen*, 360 S.W.2d 135 (1962)

[11] *Rose v. Council for Better Education*, 790 S.W.2d 186

[12] *Digest of Education Statistics*, Department of Education, National Center for Educational Statistics. https://nces.ed.gov/programs/digest/2017menu_tables.asp

[13] Clinger, James C., and Michael W. Hail. *Kentucky Government*, Politics, and Public Policy. Lexington, KY: The University Press of Kentucky, 2013.

Tennessee, 1796: The Volunteer State-Guest Essayist: The Honorable Robin Smith

Who knew that the land mass of Tennessee was represented at the signing of the Declaration of Independence? Who knew that the geography that has earned the moniker, the Volunteer State, was first governed by another state's constitution?

That's right. Tennessee was first part of North Carolina. Looking at the map [i], deduction proves accurate noting the "Overmountain Region" that formed western North Carolina until the area had ample population to seek statehood. America's sixteenth state at its founding was comprised of a small number of counties that formed the District of Washington in the now northeast portion of Tennessee and an area called Davidson, which included today's Sumner County, helped form the County of Tennessee in 1788 along with modern-day Montgomery, Stewart, Dickson, Robertson and Cheatham Counties. The District of Washington spawned several other counties, such as Sullivan, Greene and Hawkins. The remaining expanse of Tennessee was identified as "Indian Lands." [ii] But, the organization of inhabitants in the Appalachians credited to have the first constitutional government west of the mountains, dates back to 1772 with the Watauga Association, a frontier pact, that lasted just a few years but became the basis of the District of Washington of North Carolina. [iii]

It's now understandable why the Tennessee Historical Magazine of 1915 features a writing entitled, "The Development of the Tennessee Constitution" with the subtitle, "The North Carolina Constitution of 1776" with the first line to read: The constitutional history of Tennessee properly begins with the adoption by the revolutionary congress of North Carolina, in 1776... [iv] The appointed governor of Tennessee immediately following the acceptance of the cessation papers by the U.S. Government in 1790 was William Blount, who served from 1790 until official statehood in 1796 in what was deemed the "Southwest Territory."

During this time a 4-week convention comprised of 55 delegates was held in Knoxville to establish the first constitution of a new state. Upon completion, the governing document was sent

to Philadelphia, home to young America's seat of governance, for review by the U.S. Congress and ultimately signed by President George Washington giving Tennessee immediate statehood on its day of birth, June 1, 1796. It would be later said by Thomas Jefferson of Tennessee's Constitution, based on its North Carolina's parent and Pennsylvania's, to be "the least imperfect and most republican of the state constitutions" as it featured specifics on rights, taxes and legislative authority.[\[v\]](#)

The first Tennessee Constitution, handwritten in ink, included provisions related to suffrage that awarded the right to vote to men, without reference to color. A foreshadowing of Tennessee's stance on slavery in the Civil War to come, Article III, Section 1 enumerated that all freemen (white and black) who were twenty-one years of age and owned a freehold or who had resided in the county six months the right to vote. The document also provided that men serving in the state militia had the right to elect their own officers.[\[vi\]](#)

But, the newly formed state, led by its first elected Governor John Sevier, would not provide that same right to women at its founding. But, fear not. True to its independent spirit, the story of women's suffrage in Tennessee would prove not just important to its own citizens, but historic to all of American women.

Despite states efforts to award suffrage to females beginning in the late 1840s for local and state elections, the same right to vote had eluded them for federal elections. Finally, on May 21, 1919, the U.S. House voted 304-89 to pass an amendment to the U.S. Constitution that featured 39 words that would forever change American politics if thirty-six states, the requirement at the time to amend the U.S. Constitution, voted to support the 19th Amendment. It wasn't until June 4, a few weeks later, that the U.S. Senate finally followed suit with a 56-25 vote margin. [\[vii\]](#) The effort then ensued to reach that needed thirty-six states to reach the constitutional threshold to amend the U.S. Constitution.

While Wyoming was the first state to award women the right to vote in 1890, the first states to pass the necessary legislation to ratify the U.S. Constitution following Congressional action were Illinois, Wisconsin and Michigan in 1919. As the Woman Suffrage Movement organized, mobilized and energized state legislative leaders with their efforts to pass the needed enabling ratification proposals, the Summer of 1920 shaped up to be a made-for-the-big-screen drama.

Coming down the homestretch to obtain the threshold 36 states for ratification, Delaware's state body voted in opposition on June 2, 1920. All eyes and efforts turned to Tennessee to obtain the last needed state with hope fading. Suffragists key to the success in Tennessee who worked with their national leader Carrie Chapman Catt were Ann Dallas Dudley of Nashville, Abby Crawford Milton of Chattanooga, and Sue Shelton White of Jackson.[\[viii\]](#)

A special session was called in the summer of 1920 by then Governor Albert H. Roberts, a Democrat seeking re-election in August of the same year. Both the Suffragists and the Anti-Suffragists set up their headquarters at The Hermitage Hotel that featured a frequented watering hole that afforded women access for their lobbying efforts. Adopting roses to don the lapels of legislators to serve as emblems of support or opposition, roses – either yellow or red – became the sign of Tennessee's War of the Roses.

Quickly passing the Senate Chamber, the battleground was set in the TN House Chamber comprised of 99 members. Men wearing the yellow rose boutonniere were counted as supporters and those sporting the red rose were in the camp of the “Anti’s.” A couple of weeks of motions and parliamentary maneuvers with efforts to table the legislation since defeat was not as simple as anticipated by the majority of Democrats in the chamber, recorded the youngest member of the General Assembly, Harry T. Burn (R-Niota), elected at 22-years-young, voting with the Anti’s while wearing his red rose boutonniere. [\[ix\]](#)

On August 18, 1920, Rep. Harry Burn took the floor of the Tennessee House with a letter in his coat pocket from his mother, Phoebe Ensminger Burn – Febb to her friends. As the votes were cast, the 24-year-old stood, red rose and all, to cast his vote for the yellow rose caucus – he supported women’s suffrage. After a few moments of confusion, House Speaker Seth Walker changed his vote in support to attempt a parliamentary move that would allow subsequent debate and votes. Nevertheless, a stunned crowd watched the momentum shift with little notice.

According to varying accounts, some a bit more dramatic than others, Burn was the recipient of much anger and, tales being tall, was chased up the stairs of the Capitol to find refuge after scurrying out a window, inching along a ledge to safety. Neither historical documents nor interviews with the famed legislator prior to his death in 1977 hold these same details, but the monumental nature of the vote could certainly have generated such high drama. [\[x\]](#)

So, exactly what was written in the seven-page letter that accompanied TN Rep. Harry T. Burn to the House floor on August 18, 1920? His mom had composed a passing notation, squeezed between references to rain and a house and farm purchased by various locals: “Hurray and vote for suffrage and don’t keep them in doubt.” On page six, as the letter seems to draw to a close, Mrs. Febb, a widow declares, “Don’t forget to be a good boy and help Mrs. ‘Thomas Catt’ with her ‘Rats.’ As she [is] the one that put the rat in ‘ratification.’ Ha, no more from mama this time. With lots of love...” The postscript, as any mom will do, was a request for a music selection she wanted her city-going son to pick up to bring home. [\[xi\]](#)

Governor Roberts, formerly opposed to the suffrage amendment, signed the passed legislation into law on August 24, 1920 and transmitted the document to Washington. [\[xii\]](#)

As women look to 2020 to celebrate the Centennial of the Women’s Right to Vote on August 26, the influence of a mother’s love, grassroots activity and yellow roses prove not just a part of history, but historical. Tennessee’s slogan proves true. The Volunteer State, rich with a pioneering spirit and people who’ve been leaders across the years is certainly “America at its best.” From its founding to its future, Tennessee is home to our greatest treasure...her people.

Robin Smith represents the 26th district of Tennessee in the House of Representatives. She chairs the Life and Health Insurance Subcommittee. Before serving for the people of Tennessee, she owned her own business and was the GOP State Chair.

END NOTES

[i] Photo source:

[https://commons.wikimedia.org/wiki/File:Map_of_the_southern_states_of_America_comprehending_Maryland_Virginia_Kentucky_Territory_sth_of_the_Ohio_North_Carolina_Tennessee_Governmt._South_Carolina_%26_Georgia_\(4584052548\).jpg](https://commons.wikimedia.org/wiki/File:Map_of_the_southern_states_of_America_comprehending_Maryland_Virginia_Kentucky_Territory_sth_of_the_Ohio_North_Carolina_Tennessee_Governmt._South_Carolina_%26_Georgia_(4584052548).jpg)

[ii] <https://statelibrary.ncdcr.gov/ghl/genealogy/tn-counties>

[iii] https://en.m.wikipedia.org/wiki/Watauga_Association

[iv] https://www.jstor.org/stable/42637325?seq=10#metadata_info_tab_contents

[v] <https://sos.tn.gov/products/tennessee-state-constitution>

[vi] <https://cdm15138.contentdm.oclc.org/digital/collection/tfd/id/421>

[vii] <https://www.loc.gov/rr/program/bib/ourdocs/19thamendment.html>

[viii] <https://sos.tn.gov/products/tsla/womens-suffrage-tennessee-and-passage-19th-amendment>

[ix] <https://teva.contentdm.oclc.org/digital/collection/p15138coll27/id/75/>

[x] <https://www.nytimes.com/1995/08/17/us/tennessee-journal-one-small-vote-for-a-man-brought-one-giant-leap-for-women.html>

[xi] <http://cmdc.knoxlib.org/cdm/ref/collection/p265301coll8/id/699>

[xii] <http://suffrageandthedia.org/source/tennessee-governors-proclamation-suffrage/>

How Ohio Crafted Its State Constitution to Uphold the Will of the People- Guest Essayist: Samuel Postell

The seventeenth state to enter the Union, known as “The Buckeye State,” Ohio ratified the U.S. Constitution on March 1, 1803. The current Ohio State Constitution in use was adopted in 1851.

The study of state constitutions is perhaps the most important study that Americans can undertake, yet the most neglected. Understanding the constitution of the state within which one holds residence is important for two reasons. First, because understanding the laws closest to oneself equips one to become a citizen in the truest sense, one who participates in the city with his fellow citizens and engages in the community. And second because the state constitutions, in preserving the past while being layered by amendments of the present, reveal the history and development of the American regime.

Ohio's state constitution is paradigmatic in the latter sense. The Buckeye State was the 17th state to join the Union, and it was accepted to statehood in 1803. The year in which Ohio was accepted to statehood is important insofar as it forms the essential character of the Ohio Constitution: joining a mere 27 years after the nation declared independence, and a mere 14 years after the Federal Constitution's ratification, it preserves much of what was original to the Union itself. However, the Ohio Constitution, being ratified after the election of 1800, just after the first major shift in party control, gives Ohio an important place in the new notions of politics that developed during Jefferson's term as president. Jefferson himself referred to the election of 1800 as the "revolution of 1800", and considered it in many respects more important than the revolution of 1776 because it marked a dedication to a more democratic mode of politics.

Nevertheless, Ohio's Constitution was decidedly anti-revolutionary. For example, the original 1803 Ohio Constitution was a work of brevity; the entire 1803 Constitution is shorter than "Article VIII: Public Debt and Public Works" which was added in 1851 and amended various times throughout the 21st century. Further, the 1803 Ohio Bill of Rights mirrors the philosophy and form of the constitutions of the original 13 states. For example, the Bill of Rights begins by setting forth the ends of government, emulating the Declaration of Independence: "That all men born equally free and independent, and have certain natural, inherent and unalienable rights... every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence." Like other state constitutions, point 3 of the Ohio Bill of Rights aims to protect the "natural and indefeasible right to worship Almighty God according to the dictates of conscience" and asserts

"But religion, morality and knowledge being essentially necessary to good government and the happiness of mankind, schools and the means of instructions shall forever be encouraged by legislative provision not inconsistent with the rights of conscience."

Thus, Ohio, like other States of the Union at the time, saw establishments such as religious schools absolutely necessary and conducive to free government. Like other states of the Union, the original Ohio Constitution saw religious establishments and public schools dedicated to advancing Christianity as perfectly consistent with separation of church and state. What the state did reject as inconsistent with separation of church and state was coercion, forced attendance to a certain church, and religious tests for office.

In addition, the original Ohio Constitution embraced the republican spirit of the entire country by adopting a structure which empowered the Congress and weakened the governor. The 1803 Ohio Constitution established a bicameral House consisting of a Senate and a House, called the "General Assembly." Section 1, Article 16 reads "bills may originate in either house, but may be altered, amended or rejected by the other." Article 2, however, gives the governor of the state no power to alter, amend, or reject legislation. Additionally, the Congress has the power of impeachment. The Governor, on the other hand, only has the power to propose general elections to fill vacancies in the Congress, and he may call a special session, on the condition that he openly declare before the members of Congress the reason for convening them. In other words, the Governor had little to do with the creation of the laws of the state, he merely wielded the power of enforcement.

However, over time the Ohio Constitution has departed drastically from its original form. The most clear departure from the original constitution was the 1912 Ohio Convention. The most striking contrast between the Constitutional Convention held in 1802, and the convention held in 1912, was the national attention that each convention garnered. At the time of Ohio's original convention, it was widely held as a principle of federalism that the federal government ought to allow people of a territory to craft a constitution for their own governance. By 1912, the understanding of federalism had shifted and all eyes were on the Ohio Convention of 1912. For example, Teddy Roosevelt, William Jennings Bryant, William Howard Taft, and even California's Governor Hiram Johnson addressed the convention in order to advise it.

The convention assembled to rewrite the constitution, but after much debate they settled on proposing several amendments. In the end 41 were proposed and 33 were accepted and added to the constitution after a special election that allowed the people to vote upon the proposed amendments. Most of these amendments aimed at fixing the constitution because it was believed by many to be "outdated" and "inefficient." The most important of the amendments accepted were the "line item veto" and the "initiative and referendum." These and similar reforms were grafted onto many of the original constitutions of the states throughout the progressive era and drastically changed the way in which the people in the states, and therefore the nation, governed itself. Unlike the original constitution which left little room for the enervated governor to operate, the line item veto greatly increased his power by giving him the authority to reject certain parts of a bill passed by the legislature without vetoing the entire bill. Similar amendments providing a line item veto were adopted by 43 of the states throughout the progressive era. However, the initiative and referendum is perhaps the most pronounced change from the original constitution. The initiative and referendum gives the people of the state the power to overturn or even pass laws by popular ballot, entirely circumventing the legislative process.

In short, the changes to the Ohio Constitution mirror the changes of the nation. As Ohio has weakened the legislature and expanded the executive power while affording the power to the people through the initiative and referendum, so has the nation chipped away at the federal legislature and empowered the executive. The progressive era fostered many reforms which sought to make the people more directly participate in their government, and strengthened the executive in order that he represent the will of the people. These changes first took place in states such as Ohio, but slowly began to penetrate the nation and become the new norm. All in all, the original Ohio Constitution differs drastically from the constitution which governs Ohio today, so much so that one may conclude that the state adopted an entirely new form of government in the year 1912.

Sam Postell is a Graduate Student at the University of Dallas and a former literature teacher at a high school in Dallas Texas. He has two book chapters under publication with the University of Missouri Press, one on the Missouri Compromise, and another on Henry Clay as Speaker of the House. He is currently working on a book on Henry Clay's Political Thought

Louisiana and the Clash of Empires -Guest Essayist: Tony Williams

Louisiana, the eighteenth admitted to the United States, ratified the U.S. Constitution April 30, 1812 just before the start of the War of 1812. The current Louisiana State Constitution in use was adopted in 1975.

Louisiana was one of the flashpoints in the European struggle for empire in North America throughout the eighteenth century. It soon became one of the key points in the expansion of the United States both in terms of domestic sectional tensions and American foreign policy in the new nation.

The French owned the Louisiana Territory through the French and Indian War in the middle of the eighteenth century. The British made incursions into the Great Lakes area and erected a series of forts. The defeated French ceded the territory to the victorious British at the Treaty of Paris in 1763, and Spain gained possession of the territory around New Orleans. Carlos III wanted the territory as a base from which to safeguard treasure fleets coming from Mexican silver mines.

New Orleans was an area steeped in diversity and a rich exchange of different cultures that more or less mingled easily. The area from New Orleans to Baton Rouge grew quickly through end of the century, more than quadrupling from about 4,000 free persons and 5,000 enslaved persons to 19,000 free persons and 24,000 enslaved. Likewise, commerce expanded along the Mississippi.

Spain allowed the Americans to trade on the Mississippi during the Revolutionary War. However, after the war, Spanish officials feared that the new nation was expanding rapidly and moving westward to the Mississippi. Those fears were justified as American settlers flooded the frontier now that the old 1763 Proclamation Line that had banned their settlement beyond the Appalachian Mountains was negated by victory in the American Revolution. Kentucky became a state in 1792 followed by Tennessee four years later. Southern slaveowners brought their slaves to lands in what is now Alabama and Mississippi especially to grow cotton. As a result, Spain clamped down and restricted American trade on the Mississippi to the outrage of southern planters and statesmen.

Many of the founders such as George Washington and Thomas Jefferson envisioned a growing empire of liberty in the West. They made personal investments in western lands and schemes to build canals. One of their guiding principles was to link the original thirteen colonies to the Americans on the frontier. Washington and others were profoundly concerned that the settlers would lose their attachment to republican principles and to the United States. Instead, they would be drawn to the monarchical empires in the West and switch their allegiance.

Part of the reason for the land ordinances of the 1780s was to provide for the orderly settlement of western lands. In 1784, the Congress voted down a Jeffersonian provision for the exclusion of slavery in the entire West—a provision that would have fundamentally altered the character of

settlement in Louisiana. But, there was an even larger concern that caused sectional friction in the new nation.

In 1784, the Spanish formally closed the Mississippi to American trade again (though despite the official restrictions, the Spanish still traded with American smugglers in New Orleans). Southerners were outraged, thought northerners were more concerned about fishing rights in Newfoundland. John Jay of New York began negotiating with Spanish minister Don Diego de Gardoqui for the free navigation of the Mississippi. In August 1786, Congress erupted in fierce debates over Jay's negotiations when southerners discovered Jay was going to give up navigation rights for 25 years. Spain eventually made a few territorial concessions in modern-day Tennessee, Georgia, Mississippi, and Alabama because of the presence of American settlers but refused to budge on the question of the Mississippi.

The issue was finally settled in the fall of 1795 with Europe in flames due to the wars of the French Revolution. Thomas Pinckney of South Carolina negotiated Pinckney's Treaty which won additional territory in Spanish Florida and more importantly secured the American right of free navigation of the Mississippi and New Orleans to trade.

When Spain ceded the Louisiana Territory to France in 1800, Americans were concerned about Napoleonic designs in North America. However, the continuing wars in Europe and the French failure to suppress a slave rebellion in Saint-Domingue (Haiti) led Napoleon to consider selling the territory to the United States. President Jefferson dispatched New Yorker Robert Livingston and Virginian James Monroe to negotiate the purchase of New Orleans as a critically-important port.

The shocked diplomats discovered that Napoleon was offering the entire Louisiana Territory to the United States at a paltry \$15 million, or three cents an acre. While the purchase exceeded their instructions, they knew that it was an offer too good to be refused. Jefferson was torn because his scruples about a strict reading of the Constitution gave him pause, but he eventually decided that it was for the country and could be reasonably justified under the treaty-making power.

In 1804, the president sent the Corps of Discovery under Meriwether Lewis and William Clark to explore the lands of the purchase, map the area, record scientific observations, and establish friendly relations with the Native Americans. The purchase and exploration of the territory had hardly been completed when American settlers and their slaves moved into the area.

Louisiana quickly entered the Union as a slave state in 1812. The strategically-important port was the site of Andrew Jackson's overwhelming victory over the British in 1815 during the War of 1812. By the time of the Civil War, Louisiana joined the Confederacy, and control of the Mississippi and New Orleans became a key theater of the war. Louisiana played a very important, if often underappreciated, role in the struggle for empire in North America and the history of the early republic.

Tony Williams is a Senior Fellow for the Bill of Rights Institute and a Fellow for Constituting America. He is the author of six books including Washington and Hamilton: The Alliance that Forged America.

Indiana: Long an Example of Robust Statehood -Guest Essayist: The Honorable Randall T. Shepard

Formation of today's traditional Midwest took root in the years after the Treaty of Paris ended the conflict known to Europeans as the Seven Years War, known in America as the French and Indiana War. Signed in 1763, this resolution gave the British nominal control over the land from the Atlantic to the Mississippi.

During the Revolution, Indiana was the site of a battle for Fort Sackville, at Vincennes. As American forces took the fort, they turned toward an effort driving out the British out of places like Illinois and Michigan, the ultimate objective being Detroit.

After the war, the much-maligned Continental Congress took important steps in organizing these areas. They adopted the Northwest Ordinance of 1787, with the idea that Ohio, Indiana, Illinois, Wisconsin, and Michigan would eventually be divided into five states of the union.

From the time Ohio became a state in 1803, Indiana's leaders were hard at work on achieving this end. They soon scheduled a special census and petitioned for statehood in 1811, an initiative derailed largely by the turmoil of the War of 1812. With a new census in hand, they petitioned again in 1815 and succeeded in becoming the nineteenth state in 1816.

By the time of statehood the capital had moved from Vincennes to Corydon, both of them towns in the southernmost part of the state. It was a moment when almost all of the state's population lived within a short horse ride of the Ohio River, then the nation's superhighway for both commerce and migration.

The state's leaders recognized that much future growth would occur in the north. They settled on relocating the capital to the center of the state, and in 1820 they hired Alexander Ralston to lay out a plan for a new urban place. Ralston had assisted Pierre L'Enfant in designing a city plan for Washington in 1791. Hiring him was a sign of pioneer ambition to build a spirited society.

Over the succeeding decades, Indiana focused on three societal objectives. The first was a shared aspiration to build the bones necessary for a vigorous economy. The second was a determination to create an educational system that would provide young people with the foundation needed to thrive in that economy. The third was the struggle against slavery.

Much of published history on infrastructure focuses on the extraordinary Internal Improvements Act of 1836, which led to extensive construction of canals, but the real action was in building roads. Appropriations for road construction began as early as 1821, some of it financed by sale

of federal land given the state for development purposes. To accelerate the progress, the legislature decreed that every able-bodied man aged twenty-one to fifty must work on building roads and highways “or pay an equivalent therefor” in cash. This command was structured like a progressive tax. Persons who owned no real estate owed three days labor each year, people who owned less than eighty acres owed four days, and so on up to a maximum of ten days.

As for education, the constitution of 1816 contained a clause wholly unknown to the Constitution of the United States. Indiana’s organic document declared that it was the duty of the legislature to create a system of education extending from township schools to a state university, open to all and tuition-free.

The legislature created township schools and took advantage of congressional land donations to finance them. It created a manual labor obligation for building schools, just as it had for roads, and authorized local tax levies for education. Institutions called county seminaries, conceived as *secondary* schools, covered half the counties by the time of the Civil War. Following a territorial decision to create Vincennes University in 1806, the new state created Indiana University, which opened in 1825. County libraries were authorized in the 1820’s, as was a state library.

Indiana had been declared a place free from slavery from its earliest days. The Northwest Ordinance provided that Indiana should be free even as a territory. The constitution of 1816 seemed to make this plain enough: “There shall be neither slavery nor involuntary servitude in this state, otherwise than for the punishment of crimes....” Notwithstanding the directness of these declarations, the executive and legislative branches periodically blew hot and cold on issues such as immigration and repatriation. By contrast, the Indiana Supreme Court was almost always a place where antislavery forces prevailed.

Perhaps the most famous case in the court’s history involved an army general who asserted ownership of a young girl named Polly Strong by virtue of his having purchased Polly’s mother, legally, while Indiana was still part of Virginia. The Supreme Court ruled for Polly Strong, saying: “The framers of our constitution intended a total and entire prohibition of slavery in this State; and we can conceive of no form of words in which that intention could have been more clearly expressed.” The court took the same position a year later as respects involuntary servitude. As straightforward as this seems to the modern mind, it did not always or everywhere go down easy. Illinois courts did not put the last vestiges of slavery to the torch for another twenty-five years.

This attitude about slavery revealed itself in the state’s participation in the Civil War. Indiana contributed more troops to the Union armies than any state but New York, and when part of a southern-sympathetic legislature refused to appropriate funds to support the troops, Governor Oliver Morton undertook to borrow and spend millions in support of the cause by executive decree.

The anti-slavery rulings arising from the Indiana Constitution were an important part of the state’s constitutional history, but they hardly stood alone.

In 1854, for example, the state supreme court held that trial courts could appoint counsel for indigent criminal defendants, at state expense. “It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial.” This position was all the more remarkable inasmuch as the right to counsel in a federal criminal trial was not established until 1938. And the U.S. Supreme Court decision compelling all states to provide indigent counsel, *Gideon v. Wainwright*, was not decided until 1963.

Indiana’s constitution was also held to require exclusion of illegally seized evidence in a criminal case. The Indiana Supreme Court took this position in 1922, at a time when exclusion was widely unpopular in the national legal community.

Similar robust approaches have long been evident in other fields. For example, in 1893, the Indiana court held that the constitution authorized admission of women to the bar, notwithstanding that it did not say so (which is what most other state high courts required before acting). The court said: “If nature has endowed woman with wisdom, if our colleges have given her an education, if her energy and diligence have lead her to a knowledge of the law, and if her ambition directs her to adopt the profession, shall it be said that forgotten fiction must bar the door against her?”

In the present moment, few would mistake Indiana for a “blue state” chock full of political progressives, but its history and its present illustrate long-standing commitment to fairness, equal treatment, and opportunity.

Randall T. Shepard of Evansville was appointed to the Indiana Supreme Court by Governor Robert D. Orr in 1985 at the age of 38. He became Chief Justice of Indiana in March 1987 and retired from the Court in March 2012, at which point he was the longest-serving Chief Justice in Indiana history and the senior Chief Justice in the country’s state supreme courts.

A seventh generation Hoosier, Shepard graduated from Princeton University cum laude and from the Yale Law School. He earned a Master of Laws degree in the judicial process from the University of Virginia.

Shepard was Judge of the Vanderburgh Superior Court from 1980 until his appointment. He earlier served as executive assistant to Mayor Russell Lloyd of Evansville and as special assistant to the Under Secretary of the U.S. Department of Transportation.

Chief Justice Shepard has served as chair of the ABA Appellate Judges Conference and of the Section of Legal Education and Admissions to the Bar and as President of the National Conference of Chief Justices. Chief Justice John Roberts recently appointed him to the U.S. Judicial Conference Advisory Committee on Civil Rules. He is a trustee emeritus of the National Trust for Historic Preservation and a former chair of Indiana Landmarks, Inc.

He teaches periodically at the law schools of Indiana, NYU, and Yale.

He is married and has one daughter.

Since leaving the Court, Shepard has served as a Senior Judge in the Indiana Court of Appeals and as Executive in Residence at I.U.'s Public Policy Institute. He now chairs the ABA Task Force on the Future of Legal Education and has become a director of Old National Bancorp.

Mississippi's Road to Statehood -Guest Essayist: Clay Williams

Mississippi followed a long, winding path to reach statehood. Following thousands of years of various Native Americans inhabiting the landscape, European powers burst upon the scene in the 1500s. Between then and the late 1700s, Spain, France and England had all claimed at least portions of the area we now know of as Mississippi. When the fledgling United States acquired the area in the late eighteenth century, it took nearly twenty years before Mississippi became this nation's twentieth state.

Congress established the Mississippi Territory on April 7, 1798. Spain had claimed a large portion of the area but had given up much of its rights by 1795. Initially, this region consisted of a strip of land between the Mississippi and Chattahoochee Rivers but by 1812, it encompassed all of the present-day states of Mississippi and Alabama. The territorial government consisted of a governor, three judges and a secretary who served as a ruling council. Once the population level reached a certain number, the territory could apply for the second territorial stage which included an elected assembly and a delegate to Congress. Eventually, a territory could apply for statehood.

The new government faced a variety of difficult issues: conflicting land claims, tense relations with Native Americans, and the continuing interference of the Spanish. Severe political factionalism also dominated territorial politics which hampered the Mississippi Territory's governors as they attempted to deal with these problems. It was not until near the end of the territorial period when the area's residents became focused on the drive for statehood and the political rivalry began to subside.

The residents of the Mississippi Territory were primarily former British or Spanish citizens or natives of other parts of the United States who had migrated to the region in pursuit of land and opportunity. Following the conclusion of the Creek War in 1814, the most important event in the development of the region, a flood of immigration into the region occurred. By the time of Mississippi's statehood in 1817, the area's population had swelled to over 200,000

While the Territory remained overwhelmingly rural, it included several noteworthy towns such as Washington, Port Gibson, Mobile, and Huntsville. Natchez was by far the most important town in the Territory. Laid out by the Spanish in the late 1700s, the city became the cultural and economic center of the Territory as well as the seat of political power throughout the period.

Whether they lived in a city or in the countryside, most Mississippi Territory citizens' lives revolved around agriculture. Cotton became by far the most profitable and important crop. Just as importantly, the profitability of cotton production gave rise to the widespread growth of slavery in the Mississippi Territory. Slaves had first been brought into the region during the colonial era, but it was during the territorial period that their population grew in significant numbers. The institution exerted great influence on the Territory's economy and laid the foundation for a pattern of economic and social development that would dominate much of Mississippi's history for the next fifty years.

Arguments over whether the Mississippi Territory would enter the union as one state or two had begun almost immediately after its organization in 1798. Aware of the economic and political dominance of their portion of the Territory, many western residents, specifically those in the along the Mississippi River near Natchez favored admission as a single state so that they might maintain their influence. Many eastern residents in the Mobile region, however, initially felt that their interests were neglected due to the great distance between themselves and the territorial capital as well as other inherent differences in economy and lifestyle. After the Creek War, however, the situation reversed. The population of the eastern section of the Territory grew rapidly as settlers migrated onto former Creek lands. Realizing the potential to exert more influence on any new state of which they were to be a part, many eastern section residents now began to favor admission of the Territory as one state. Sensing the future diminishment of their influence, those in the western section now advocated division.

In the end, Congress divided the territory in large part to allow four new seats in the Senate instead of just two. President James Madison signed the enabling act that granted admission of the western section of the Territory as the state of Mississippi on March 1, 1817; the eastern section was organized as the Alabama Territory at the same time. The line of division, which still serves as the boundary between Mississippi and Alabama today, was designed to be a compromise between the wishes of western and eastern residents of the Territory although many residents of both areas remained unhappy.

In July of 1817, forty-eight delegates from Mississippi's fourteen counties met to draft the new state's constitution. The constitution established Mississippi's government and recognized Natchez as the state's capital. This charter document kept power in the hands of the few as only white men of property could vote or hold office. Many statewide elected officials were elected by the legislature and the amendment process was difficult. In keeping with its agricultural roots, slavery was expressly protected. President James Monroe on December 10, 1817, signed the resolution that admitted Mississippi as the nation's twentieth state. Territorial governor David Holmes won election as the state's first governor. Electors also chose George Poindexter as its only congressman and Walter Leake and Thomas H. Williams as its first senators.

Mississippi has since written three more constitutions over the past two hundred years. The next constitution written in 1832 mirrored the Jacksonian age by expanding those who can participate in government to all white men. After the Civil War, the 1868 constitution extended voting rights to all men, regardless of race. The state's current constitution, written in 1890, reversed these democratic gains by requiring poll taxes and literacy tests to qualify to vote. These measures

decimated the number of registered African American voters; measures that were not overturned til the modern Civil Rights Movement of the 1950s and 60s.

Clay Williams serves as Sites Administrator for the Mississippi Department of Archives and History where he oversees operations for six museum sites (Eudora Welty House and Garden, the Manship House Museum, the Old Capitol Museum, Winterville Mounds, Historic Jefferson College, and the Grand Village of the Natchez Indians.) He has been published several times in such venues as the Journal of Mississippi History, The Mississippi Encyclopedia, and Mississippi History Now. His first book, Battle for the Southern Frontier, the Creek War and the War of 1812, co-authored with Mike Bunn, was published in July 2008 from The History Press. He is currently under contract to co-write a volume with the Heritage of Mississippi Series on Frontier Mississippi (1800-1840).

Illinois, Admitted December 3, 1818 as the Twenty-First State -Guest Essayist: Daniel A. Cotter

Admitted to the Union December 3, 1818, Illinois is the twenty-first state to ratify the U.S. Constitution. Known as “The Prairie State” as well as the “Land of Lincoln,” the Illinois State Constitution adopted in 1970 is the version currently used. The first state constitution, however, was adopted on August 26, 1818.

Becoming a State

In April 1818, Congress passed a bill, contemplating admitting Illinois as a state if it could show that it had a population of at least 40,000 in the territory. As my friend, Ann Lousin, notes in an excellent *Chicago Daily Law Bulletin* column published in August 2018, that was a tall order for the territory to complete, because the territory was well short of the required number set by Congress. Nonetheless, the territorial governor and associates submitted to Congress that the population of white residents exceeded 40,000, and that part of the process was done.

The Illinois Constitution

Congress required that each new state have a constitution. Delegates were selected and they met in Kaskaskia, Illinois, thirty-three men gathered at a tavern to draft a constitution. Borrowing heavily from the Kentucky constitution, where many delegates had come to Illinois from, as well as the constitutions of Ohio and Indiana (two states that were part of the Northwest Territory), a very small group drafted the constitution. Except for one issue, there are not records of much debate over this constitution to be submitted to Congress.

The one issue that the delegates debated heavily was the question of slavery. Factions for pro-slavery and abolitionists sought compromise and while most of Illinois was “free soil” the Illinois Salines were permitted to have slavery. In addition, a compromise was agreed upon, with any slave who was currently in the state remaining a slave, though their children would become free upon reaching adulthood. With this agreed upon as well as the seat of the new

state's government, the constitution was adopted on August 26, 1818. That date is proudly displayed on the Illinois state flag in the center. The adopted constitution was submitted to Congress and, on December 3, 1818, President James Monroe signed the enabling act that admitted Illinois as the 21st state to the United States.

The initial constitution of Illinois has been amended on three occasions since 1818- in 1848, 1870 and 1970. The last constitution granted home rule powers for certain municipalities, including the City of Chicago.

The preamble to the Illinois Constitution has a flavor that is definitely familiar, stating:

We, the People of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors—in order to provide for the health, safety and welfare of the people; maintain a representative and orderly government; eliminate poverty and inequality; assure legal, social and economic justice; provide opportunity for the fullest development of the individual; insure domestic tranquility; provide for the common defense; and secure the blessings of freedom and liberty to ourselves and our posterity—do ordain and establish this Constitution for the State of Illinois.

In 1968, the question of whether to hold a constitutional convention was on the ballot, and it passed. As noted, a big feature of the new constitution that came out of that convention was home rule, which transferred power from the smaller rural communities to the more urban centers. Ratified on December 15, 1970, Illinois adopted a new, modern constitution, one of the few post-World War II constitutions among the states. The fourteen articles of the current constitution create the traditional three branches of government. The 1970 Constitution also includes an extensive Bill of Rights and Article X guarantees a free public education for all Illinois residents.

Conclusion

Illinois became the 21st state to join the United States. During the Civil War, it contributed the fourth greatest number of men who served in the Union Army. President Abraham Lincoln, who was born and raised in Kentucky, was president during the Civil War and “The Prairie State” has become known as the “Land of Lincoln” to honor the 16th President of the United States.

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Alabama Statehood and Its State Constitution History-

Guest Essayist: Jeremy Ward

Long before Alabama was recognized as the 22nd state of the United States of America, it was home to generations of Native Americans belonging to numerous and varied tribes such as the Alabama (or Alibamu), Cherokee, and Choctaw. Europeans entered what is modern day Alabama in the early part of the 16th century, with the first documented visit by Spanish explorer Hernando de Soto in 1539.

By the mid-17th century, England had laid claim to modern day Alabama and included its territory in the Province of Carolina. As early as 1687, English traders from the province frequently traveled to the Alabama River valley to trade with Native Americans. However, the French also claimed the territory as their own and the two countries engaged in fierce competition for Indian trade for several decades until the French and Indian War broke out in 1754.

After suffering defeat, the French ceded its territories east of the Mississippi River to Great Britain. Modern day Alabama's border would continue to shift – and change hands between England, Spain, and finally America – until 1817 when the eastern portion of the United States' Mississippi Territory would be divided to create the Alabama Territory. Finally, on December 14, 1819, Alabama was admitted as the 22nd state to the Union.

Just as Alabama's boundary lines changed numerous times over the years, so too did its capital. The first was the territorial capital in St. Stephens in 1817, near present-day Jackson, Alabama. Then in 1819, Huntsville served as the temporary capital while a convention assembled to prepare a State Constitution. The first "permanent" capital was established in 1820 near the convergence of the Alabama and Cahaba rivers but a flood resulted in damage to the statehouse. The capital was soon moved to Tuscaloosa in 1826 to a new three-story building designed by the same architect, William Nichols, who designed the old capitols in North Carolina and Mississippi. The capital made one final move in 1846 to its current location of Montgomery, but a disastrous fire shortly after required its rebuilding.

Alabama's early Constitutions were considered a reflection of Jacksonian popular democracy. The post-Reconstruction era produced the 1901 Constitution, which with hundreds of amendments, is the longest state constitution in America. Reform of the constitution, including repeal of impediments to participation by African Americans has been adopted through amendments and on an article-by-article basis.

The State of Alabama, which will celebrate its Bicentennial this year, has a rich and vibrant history. Over the past two centuries, its cities and towns have been the scenery of some of our Nation's most important and compelling stories; from the unshakable courage displayed at Selma's Edmund Pettus Bridge to the scientific and engineering feats performed in Huntsville that helped put men on the moon. Alabama's people have been history-makers as well. This state has given our nation and the world the Tuskegee Airmen, Helen Keller, Hank Williams, Jesse Owens, Harper Lee, Willie Mays and more names too numerous to list.

Jeremy Ward is the development officer for the American Village Citizenship Trust, a pioneering and innovative American history and civics education center located in central Alabama. Utilizing costumed historical interpreters, the American Village invites students and general public visitors to “step into the scenes” of America’s journey for freedom and independence, and to examine how the lessons that can be learned from our Nation’s revolutionary beginnings are still vitally relevant today in our roles as private citizens. For the past 15 years, Ward has held philanthropic leadership positions in the nonprofit (Boy Scouts of America) and higher education sectors (from traditional liberal arts to major urban research institutions). He can be reached at jward@americanvillage.org.

A Fire Bell in the Night: The Story of Maine Statehood (Part 1) -Guest Essayist: Jeffrey Hollingsworth

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[soundcloud]<https://soundcloud.com/constituting-america/essay-113-a-fire-bell-in-the-nightmaine-statehood-part-1-jeffrey-hollingsworth>[/soundcloud]

Barely 30 years after the contentious adoption of the U.S. Constitution in 1787, the experiment in self-government and democratic republicanism that enraptured de Tocqueville and other noted admirers of the new United States of America was at grave risk of collapse. Maine’s aspirations for statehood were at the heart of the hullabaloo. It was in a wrestling match with Missouri for admission to the Union. In fact, Members of Congress representing the District of Maine, as it was known—then belonging to Massachusetts—voted *against* legislation that would have admitted their home as a state even after longstanding agitation in Maine for statehood.

So why, when at long last statehood was within reach, did these officials and many of those they represented object to legislation that would unlock the door to statehood? Their reasons are at the heart of why we are “one nation, indivisible” and how small, remote Maine helped preserve the U. S. of A. at a grave hour in its early history.

Earliest Maine: How the Story Began

The first Mainers have been traced to approximately 3,000BC. They’re known as the “Red Paint People” due to their liberal use of red ochre in pottery and burial rituals. Native American tribes still extant in Maine are the Penobscot, Passamaquoddy, Micmac and Maliseet.

Why Maine is called “Maine” (the only one-syllable state) still isn’t clear. Some scholars say it was named after the French Province of Maine. Others suggest it’s from a maritime term for “the main” or mainland, to distinguish it from islands. Some sources claim Vikings visited Maine as early as 1000AD, but the first recorded European was Italian explorer Giovanni da Verrazzano in 1524. Others later included Capt. John Smith (yes, *the* John Smith) for England and Samuel de Champlain for France.

Champlain fostered an attempted permanent settlement in June 1604 on St. Croix Island off Robbinston, Maine, opposite Bayside, New Brunswick. The colony failed within a year, most settlers felled by “mal de la terre” (scurvy). It was home to the first known Christmas celebration in the New World. The island, though in U.S. waters, is an International Historic Site, the only one in North America, jointly administered by the U.S. and Canadian governments.

Instead of Jamestown, Virginia, the Popham Colony in present-day Phippsburg, Maine, could've been the first permanent English settlement in the U.S.A. Sir George Popham and Sir Raleigh Gilbert led 120 English settlers to landfall at the mouth of the Kennebec River in August 1607. Other English settlers had reached today's Jamestown in mid-May 1607. The Popham colonists started off strongly. They built the first commercial ship ever constructed in the New World, the pinnace *Virginia of Sagadahock*. This milestone was commemorated by a 1957 U.S. stamp officially recognizing the origin of shipbuilding in the U.S. Shipbuilding has been a mainstay (no pun intended) of Maine's economy over the succeeding four-plus centuries.

But the Popham Colony was doomed. After experiencing winter, half the surviving cold, hungry settlers grew disillusioned and fled back to England. Gilbert later received news of his father's passing and needed to address vital family matters. He left for England, never to return. Lacking leadership, the remaining colonists abandoned the settlement almost a year to the day after landing. Jamestown's settlers hung on, though barely. Today, archeological excavations at both sites keep unlocking secrets about our country's first English settlers.

Maine Grows

From Popham through the next 175 years, Maine ownership shifted from one royal grantee to another. The major promoter of Maine settlement was Sir Ferdinando Gorges, an English aristocrat later dubbed “The Father of English Colonization in [North America](#),” though he never set foot in the New World. With Captain John Mason (a principal colonizer of New Hampshire), Gorges secured a patent from King James I in 1622 for vast territory in Maine. During the next 50 years, disputes and squabbles over Gorges family holdings and competing land claims finally led Gorges's grandson to sell all the property to the Massachusetts Bay Colony in 1677.

Maine grew slowly but steadily, yet not without incident. Devastating hostilities with Native Americans erupted periodically, and colonial conflicts took their toll. France considered all the land up to the Kennebec River, which bisects Maine, to belong to New France. Its farthest outpost was the present-day town of Castine, which see-sawed between French and British control for decades. In 1674, during a war between France and The Netherlands, Dutch naval forces captured Castine and environs, part of a grandiose venture to establish Nova Hollandia (“New Holland”). Maine suffered further privations during the French & Indian War (1754-63). Then came America's War for Independence.

Mainers were distinguished soldiers, sailors and commanders in the Revolutionary War, and Maine was the scene of several battles. The most notorious was the infamous bombardment and burning of Falmouth—now Portland—on Oct. 18, 1775. The British Navy launched a far-flung campaign to punish seaports aiding the rebel forces, and Portland fell into the dragnet. The fierceness and merciless intensity of the assault was widely reported throughout all 13 colonies

and helped inflame passions against Britain. It prompted the Second Continental Congress to pass legislation authorizing what John Adams wrote led to "the true origin of the American Navy." Earlier, in the first naval battle of the Revolution, patriots in remote Machias swarmed and captured the British sloop *HMS Margaretta* in June 1775. The dead and wounded on both sides were carried to Burnham Tavern, where the plot to seize *Margaretta* was hatched. The tavern, a National Historic Site, still stands.

The worst American naval defeat until Pearl Harbor occurred near the mouth of the Penobscot River as vessels augmented by ground forces sought to oust the British from eastern Maine ("New Ireland," as Britain had declared it). A 44-ship armada, reinforced by some 1,000 marines and a 100-man artillery contingent commanded by Lt. Col. Paul Revere, left Boston for Maine in late July 1779. The colonials were no match for the Royal Navy. Most American ships not blown out of the water either were scuttled or captured, then hauled upriver to Bangor and burned. The surviving colonials fled overland with few supplies or weaponry. The "Penobscot Expedition" is among the darkest episodes in U.S. military history.

Many Maine communities were occupied by British forces. It underscored the indifference and incapacity of Massachusetts toward defending the region. Maine took years to recover, and louder rumblings for statehood began. The crippling Embargo Act of 1807 made matters worse, since Maine's economy relied heavily on seagoing commerce. Then, the War of 1812 put many Maine communities under British boot-heels yet again. Its easternmost city, Eastport, wouldn't even be liberated until 1818, three years after the war ended. Two major (and other lesser) engagements occurred in Maine: the 1814 Battle of Hampden (near present-day Bangor), a humiliating U.S. defeat; and the electrifying clash between *HMS Boxer* and *USS Enterprise* on Sept. 5, 1813, just off Pemaquid Point near the mouth of the Kennebec River. The thunderous, furious, 30-minute slugfest, witnessed by scores of residents on shore and heard by many more, resulted in the capture of *Boxer*. It was a widely reported and celebrated boost for U.S. morale, memorialized by Portland native Henry Wadsworth Longfellow in his poem "My Lost Youth." The remains of both ships' slain commanders were ferried to Portland, then reverently buried side by side with full military honors.

The war convinced most Mainers that their area was a mere stepchild of Massachusetts and the state government was nonchalant about defending it. The earlier crippling attacks by the French and native tribes hadn't been forgotten, either. Besides, travelling to distant Boston, the state capital, on official business was an arduous, time-consuming, risky and expensive venture. The push for statehood acquired new life.

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in Honolulu and Down East magazines and in the Las Vegas Review-Journal, Portland Press Herald, and other periodicals.

A Fire Bell in the Night: The Story of Maine Statehood (Part 2) -Guest Essayist: Jeffrey Hollingsworth

The Maine Event: The Crisis and Its Outcome

The young United States was expanding, and by 1819 had grown to 21 states from the original 13 with more territories lining up to get in thanks to the Louisiana Purchase. But this raised serious political problems. The thorny slavery issue darkened much of American political discourse and policy in the early post-independence years. A precarious balance of power in Congress between slave-holding and free states prevailed until December 1819, when pro-slavery Alabama was admitted to the Union as the 22nd state.

Missouri, carved from the Louisiana Purchase, came knocking next seeking statehood but its application ignited an enormous constitutional crisis which quickly involved Maine. In November 1818, the Missouri territorial legislature passed legislation requesting statehood and transmitted it to the U.S. Congress in December. What should have been a no-brainer for admission became bogged down in controversy over the precarious balance between [slave and free states](#). Missouri intended to permit slavery, which prompted free-state legislators to attach “killer” amendments to the Missouri statehood bill that stalled it. Chaos and uproar ensued in Washington.

Along came Maine, where separation sentiment was growing. Many previous efforts to permit Maine to break away died in the Massachusetts General Court (legislature). But the times were catching up. Seeking to eliminate its Revolutionary War debt to the U.S. government, Massachusetts found easy money by selling off vast swaths of public land in Maine and by granting generous acreages to war veterans. Thousands of pioneer families left the crowded Bay State and trekked to the Maine wilderness seeking elbow room and new opportunities. In less than 30 years, the population more than tripled, from 91,000 in 1791 to 300,000 by 1820.

As Maine grew, so did discontent with its political and economic dependence on Massachusetts. Prosperous coastal merchants, eager to govern themselves, were the first to complain. But with continued population growth outside the old coastal towns, frustration spread to fishermen and inland farmers and woodsmen, who had little in common with the governing gentry. By 1800, they were spearheading the quest for statehood, citing a long list of economic and political grievances. The War of 1812 was the final nail in the coffin, even for the merchant class.

At last, in the summer of 1819, Mainers voted so overwhelmingly--nearly $\frac{3}{4}$ of the electorate--for statehood that Massachusetts could no longer turn a blind eye. The legislature reluctantly adopted a statehood bill for Maine in late 1819, but with one proviso: if statehood was not

approved by Congress and signed by the President by March 4, 1820, Maine would remain tethered to Massachusetts.

The Maine statehood bill came up in Congress in December of 1819, mere weeks after Missouri's bid. Maine's application offered the possibility of a compromise. To maintain the free-state/slave-state balance, Congressional leaders pushed the two requests for statehood as a package — one new slave and one new free state. Maine suddenly found itself in the midst of a firestorm of controversy.

Abolitionists all over the Union erupted. They were firmly opposed to the admission of *any* new slave states. Pro-slavery interests were equally as upset. Many Mainers, most of them ardent abolitionists, were torn. To prevent the spread of slavery, they found themselves calling for the defeat of the very bill that would have granted them long-sought statehood. The most distinguished Maine native in the country was Rufus King. Born and raised in Scarborough, scion of a wealthy family, he had a noteworthy political career. A Signer of the U.S. Constitution, he was twice the Federalist Party candidate for President and was a U.S. Senator from New York at the time of the Maine-Missouri imbroglio. With a heavy heart, he opposed the Maine statehood measure because, as he correctly foresaw, the “compromise” didn't settle the slavery issue, but merely postponed a final day of reckoning. Meanwhile, his half-brother, William King, principal author of Maine's constitution, was elected Maine's first Governor.

At the last minute, the bill for Maine statehood passed Congress; on March 3, 1820, and signed into law, taking effect on March 15. Maine became our 23rd state. Missouri joined the Union as a slave state in 1821. The so-called Missouri Compromise had severely tested several key articles and amendments in the U.S. Constitution during tense, angry debates. In a long letter on April 22, 1820, to his friend and political associate John Holmes, who became one of Maine's first two U.S. Senators, the aging Thomas Jefferson wrote:

“... this momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed indeed for the moment. But this is a reprieve only, not a final sentence.”

Like the venerable Rufus King, Jefferson perceived that the Missouri Compromise represented “a reprieve only, not a final sentence.” That “final sentence” would come through all-out war 40 years later.

Maine's Constitution

The Maine Constitution is the fourth-oldest operating state constitution in the country. The 210 delegates to the statehood convention in October 1819 unanimously adopted the proposed state constitution, which is modeled closely on the U.S. Constitution. Notable contents:

- Article I contains 24 sections, the longest of which (Section 3) painstakingly spells out provisions regarding religious liberty.
- Thomas Jefferson authored Sections 1 and 2 of Article VIII addressing education.

- Article I, Section 6-A is one of the earliest official codifications in the U.S. of non-discrimination against all persons without exception.
- Article I, Section 16 is among the most explicit defenses of the right to keep and bear arms ever written: “Every citizen has a right to keep and bear arms and this right shall never be questioned.”
- Article II, Section 1 specifically grants Native Americans “residing on tribal reservations and otherwise qualified” the right to vote in all elections.

In 2015, controversy erupted when a Maliseet Tribe delegate to the Maine Legislature sought to overturn a 19th Century ban on printing the text of Article X, Section 5, which defines the state’s obligations to Native American tribes via carryover provisions from Massachusetts.

The Constitution of Maine is updated as necessary by the Revisor of Statutes upon ratification of amendments by the voters of the state. The Constitution of Maine is subject to recodification every 10 years by its own terms (Article X, Section 6). The last recodification was in 2013.

Additional Maine History

- Printed flat maps show Maine as extremely high north. In truth, seven U.S. states extend farther north in whole or part than Maine. True globes confirm that Maine is much more easterly than northerly. Portland is the closest key seaport to Europe by a factor of hundreds of miles, as is Bangor International Airport (a former B-52 bomber base) for air traffic. The easternmost point in the U.S. is, oddly enough, *West Quoddy Head* in Lubec, Maine.
- The legendary political axiom “As Maine goes, so goes the nation” stems from the fact that Maine once held its general elections in September rather than November, on the sensible reasoning that snow could be flying by then. In September 1840, Maine elected a Whig Party governor. That November, Whig candidate William Henry Harrison was elected President. That launched the saying of Maine as a political bellwether, which held true roughly 70% of the time up through the late 1920s. Maine amended its constitution in 1957 to conform to the rest of the country and held elections in November effective in 1960.
- The baseball term signifying the batting order--“At bat, on deck, and in the hole”—originated in Belfast, Maine, in 1872. It was confirmed personally by Paul Dickson, author of the authoritative, widely cited *Dickson Baseball Dictionary*, based on his original research in Belfast in 1987. A 1938 *Sporting News* feature published recollections of an aged member of the Belfast Pastimes, who played a traveling Boston pro team on August 7, 1872, in Belfast. Team scorekeepers back then would shout the batting order each inning. Boston’s man simply bellowed the names. But the Belfast man announced “Smith at bat, Jones on deck (or ‘on the deck’), and Doe in the hold,” reflecting Belfast’s maritime roots, the hold being the below-deck storage area on a commercial vessel. The Bostonians took a fancy to the designation and popularized it. Over time, “hold” slurred into “hole.”

The original score sheet from that game is on display at the Belfast Historical Society Museum.

- Why is Maine often referred to as “Down East?” It’s a nautical term. In warm weather, prevailing winds in New England and Maritime Canada come out of the southwest, meaning ships headed there sailed downwind. Conversely, when en route to Boston, New York, or other lower locales, sailors dealt with upwinds. To this day, many Mainers speak of going “up to Boston.” The area known as Down East is most commonly the territory east of the Penobscot River and sometimes includes Canada’s Maritime provinces.
- In mid-coast Maine, the town of Searsport, never home to more than 2,500 residents, once boasted 17 shipyards and in the 1870s was home to fully one-tenth of all American merchant sea captains.
- The first international telephone call took place July 1, 1881, between St. Stephen, New Brunswick, Canada, and Calais, Maine, USA. For generations, Calais and St. Stephen have enjoyed close relations. One example stems from the War of 1812, when the British military supplied St. Stephen with a large supply of gunpowder for protection against the Yankee enemy in Calais. Instead, St. Stephen's leaders donated much of it to Calais so it could enjoy a proper boom-and-bang Independence Day celebration.

Jeffrey Hollingsworth grew up in Belfast, Maine, and is a University of Maine alumnus. He is a past president of the Maine State Society of Washington, D.C., and principal founder of its charitable foundation. He is the author of Magnificent Mainers (Covered Bridge Press), a compendium of mini-biographies of 100 famous Maine natives. His articles have appeared in Honolulu and Down East magazines and in the Las Vegas Review-Journal, Portland Press Herald, and other periodicals.

Missouri Statehood and the First Sirens of Civil War - Guest Essayist: Samuel Postell

“The Show-Me State” of Missouri ratified the U.S. Constitution August 10, 1821 making it the twenty-fourth state to join the United States. The Missouri State Constitution currently in use was adopted in 1945.

Missouri’s application for U.S. statehood was not only an important event in the state’s history, but is among one of the most important events in our nation’s history. Before Missouri’s application for statehood, the abolitionist factions of the Union were relatively quiet and the Southern defense of slavery as a “positive good” had not yet begun. After Missouri’s application for statehood, it became clear that slavery would become a national issue that would divide the sections of the Union, perhaps to the point of civil war.

Missouri first applied for statehood in 1817, but Congress did not begin to consider enabling acts to allow the territory to create a state constitution until February of 1819. At the end of the day on February 18, 1819, James Tallmadge introduced his amendment which would spark the controversy between the Northern States and the slaveholding states. Tallmadge proposed an amendment that would free all children born of slaves after Missouri had become a state, as well

as free all slaves in the state of Missouri once they had reached the age of 25. Various Northerners, particularly from New York and Pennsylvania, began to see such an amendment as a necessary condition for Missouri to become a state.

The Southerners responded with gusto. They feared that such amendments coming from the national congress infringed on the right of a state to determine its own laws, and they feared that such legislation would upset the balance between free and slave states in Congress. The consequence of this, they believed, would be the ultimate extinction of slavery in the Union. And perhaps they were correct: Representative Livermore urged the House, just before it voted upon the Tallmadge Amendment, that “An opportunity is now presented, if not to diminish at least to prevent, the growth of a sin that sits heavy on the soul of every one of us.” The House voted to include the Tallmadge amendment in a vote of 79 to 67.

But that was not the last word on the Tallmadge Amendment. Although it had passed the House, it had to be accepted by the Senate which was composed of a majority that was principally opposed to the Federal government meddling with slavery in the territories. Thus, the Senate immediately rejected the Tallmadge amendment as part of the Missouri enabling act. Throughout the rest of the Congressional session, the two houses would deliberate upon the Missouri issue, but neither the Northerners in the House nor the Southerners in the Senate would give way. The Congressional session would end with Thomas Cobb’s admonition to Tallmadge that “the Union will be dissolved. You have kindled a fire which all the waters of the ocean cannot put out, which seas of blood only can extinguish.” Tallmadge merely responded “so be it.”

The deliberation over Missouri not only occupied the House for the months of February through May of 1819, but it took the Congress the remainder of that year and half of the next to sort out the Missouri question. While the Congress was out of session several petitions were generated in Northern states urging their representatives to deny Missouri’s statehood if that entailed the spread of slavery, and some Southern petitions were signed that threatened secession if Congress blocked Missouri. The nation was on the brink of civil war, the representatives of the people were threatening one another in the chamber, and the nation was facing the greatest economic recession that it had yet seen. What was to be done?

As the Speaker of the House, Henry Clay did something that seems counterintuitive: he delayed the Missouri question for the first half of the following Congressional session, and created a committee. He placed a New Yorker who had been involved in the debates over the Tallmadge Amendment at the head of that committee, and he placed a balance of Northerners and Southerners on that committee. Only in that committee could Missouri be spoken of. Clay attempted to stall while the Senate prepared its bill for the House. He wanted to quell the passions of the much larger body of representatives in order that they not evoke civil war throughout the debates that were to come.

Meanwhile, the House of Representatives began to speak of Maine’s admission to statehood. The first day of deliberation upon Maine, Henry Clay left the Speaker’s chair in order to set the stage for debate. He wanted to assure the Northerners that they had much to lose with the debates over Maine if they continued to give the Southerners ultimatums regarding Missouri. If Maine could

not be accepted as a state, then the Northerners would lose any opportunity of equaling the Southern representation in the Senate, and this could have long term consequences.

Eventually, the Senate decided to tie Missouri and Maine together as an enabling act, and add an additional proviso excluding slavery from all remaining lands of the Louisiana Purchase north of the 36° 30' parallel, thanks to Jesse B. Thomas of Illinois. What followed was much heated debate within the House over the bill, eventually leading Clay to organizing a joint committee of representatives in the House and the Senate to deliberate upon the bill. In order to finally pass the bill through the House, Clay had to separate the three bills and pass each individually. Each bill passed by a narrow margin, but what was most important was that the nation averted civil war in the process of accepting two new states.

Henry Clay would thenceforth be known as the “Great Pacificator” for his work in promoting compromise within the House of Representatives. At the end of that session, he would leave the house with a challenge to preserve Union and liberty. He told his colleagues,

“I shall regard (this House) as the great depository of the most important powers of our excellent constitution; as the watchful and faithful centinel of the freedom of the people; as the fairest and truest image of their deliberate will and wishes; and of that branch of government where, if our beloved country shall unhappily be destined to add another to the long list of melancholy examples of the loss of public liberty, we shall witness the last struggles and its expiring throes”

Although the Union had been threatened, and civil war had been evoked, the nation proved its fitness to brave the sirens of civil war through representative deliberation and choice led by selfless compromise.

Sam Postell is a current Graduate Student at the University of Dallas and a former literature teacher at a high school in Dallas Texas. He has two book chapters under publication with the University of Missouri Press, one on the Missouri Compromise, and another on Henry Clay as Speaker of the House. He is currently working on a book on Henry Clay's Political Thought

Founders’ Vision for Keeping the States Strong, United, and Free (Part 1)-Guest Essayist: Joerg Knipprath

A persistent controversy during the Founding Period was the nature of the union and its relationship to the states. The issue had its antecedents during the colonial period in Benjamin Franklin’s proposed Albany Plan of Union in 1754. That unsuccessful proposal for--mostly--a defensive alliance among the colonies sought to produce a federation, “by virtue of which one general government may be formed in America...within and under which government each colony may retain its present constitution, except in the particulars wherein a change may be directed by the said act.” Franklin’s proposal bore a striking resemblance to more far-reaching subsequent attempts at union, such as the unsuccessful plan by Joseph Galloway in the First

Continental Congress and the even more ambitious Articles of Confederation in the Second Continental Congress.

Common to all of these constitutional efforts was the confederal nature of the structure, with power emanating from the constituent colonies (or states) and granted to the federal “head.” Thus, the colonial assemblies or state legislatures selected the members of the union’s policy-making body, the powers of that body were limited to enumerated objectives that affected the union as a whole, and all other powers were expressly reserved to the constituent colonies or states. The Articles of Confederation--the most important effort until then, in that they created a more sophisticated and consummated plan of government--struck a delicate balance between federal power and ultimate state sovereignty. While the Congress had fairly significant powers that could be exercised either by a majority of the assembled states or, sometimes, by nine out of thirteen in the potentially delicate areas of taxation, commerce, and military mobilization, the Congress acted on the constituent states, not on the residents directly. As well, while states were authorized by the Articles to send multiple delegates to represent them in Congress, each state could cast only one vote. Finally, each state was described as having acted in its corporate capacity to create the union, and, to be part of the union, each had to approve the Articles, thereby clearly anchoring the locus of sovereignty in the independent founding states.

Debate over the Constitution of 1787 in the Philadelphia drafting convention and in the subsequent state ratifying conventions also focused significantly on the nature of the union and the relationship of the state and federal sovereignties. Opponents of the Constitution claimed that the states’ sovereignty had been destroyed. They warned, loudly, frequently, and widely, that the states’ republican essence was threatened by this new “consolidated” government, a freely-hurled epithet that threw the Constitution’s proponents on the rhetorical and political defensive.

As evidence for alarm, the Constitution’s opponents pointed to the broad new powers through which Congress acted on individuals directly and by-passed the states; the supporters pointed out that those powers were few in number. The opponents raised the availability of further implied powers, especially as embodied in the “necessary and proper” clause; the supporters (eventually) agreed in the Tenth Amendment that the states retained all powers not given to the general government; the opponents charged that this assurance fell far short of the Articles which had declared that the states retained all powers not *expressly* conferred on the Congress. Opponents claimed that the Constitution shunted aside the state sovereignty by declaring that the “People of the United States” had established the Constitution; supporters responded that the original draft had been that the “People of the States of [named 13 states]” had established it, but that there was no assurance that all thirteen states would eventually approve it, so the language was changed as a matter of form, not substance. Opponents pointed out that state conventions, not legislatures as constituent part of the state sovereignties, would approve the Constitution, and that only nine were necessary to do so; supporters rejoined that this reflected the ultimate sovereignty of the people and that, in any event, each state that wanted to be part of this new arrangement had to approve the Constitution.

James Madison in *Federalist 39* made an earnest, though not always convincing, effort to minimize the changes from the Articles, by explaining how some of the Constitution’s characteristics indeed were national but that in many fundamental ways the new system retained

its federal essence. Both sides were deeply at odds in their perceptions about the nature of the new constitutional structure. The position of Madison and other supporters of the Constitution was that there existed a dual sovereignty in this new federalism undergirded by the ultimate sovereignty of the people acting in and through the several states. Their critics dismissed this as nonsensical. Ultimately, practical sovereignty had to lie either with the state governments acting on the people or with the national government doing so. To the critics, the answer was clear, that the national government would expand its reach and destroy the state governments, consolidating all power within itself. The republic would end, and tyranny would rule.

Once the Constitution was adopted, the struggle turned to the issue of how, as a practical matter, to preserve state sovereignty and self-government within this *novus ordo seclorum*. One tool lay in the structure of the government itself. The Senate not only was a political counterweight for the small states against the larger states' general influence in the economic and political direction of the union and their numerical power in the House of Representatives. That argument had been the tool to broker the great compromise in the early summer of 1787 that prevented the looming break-up of the convention. As well, the Senate, with its equal votes for each state, and a selection process that tied the membership directly to the legislatures of their state governments, represented what remained of the constitutional idea of a federalism resting on the constituent states. At least until the fundamental constitutional change wrought by the 17th Amendment, the state governments' control of the Senate would negate or, at least, blunt efforts by the "popular" branch, the House of Representatives, to accrete power in the federal government at the expense of the states.

The extent to which the Framers' envisioned role for the Senate was realized is unclear. The emergence of organized programmatic political parties introduced a variable that might redirect the loyalty of a senator from his state to a party and its national policies. On the other hand, senators were remarkably able in matters of great national controversy to focus on their home state governments' political preferences and oppose their same-party fellows from other states who entertained contrary political positions. Senators' votes on great national issues in the first half of the 19th century on war policy, tariffs, slavery, and, indeed, the nature of the union itself typically reflected whatever benefitted those Senators' states, even at the risk of tearing apart the parties with which they were affiliated. The respective positions of Senators Daniel Webster of Massachusetts and John C. Calhoun of South Carolina on these matters are examples, even as they switched positions as their states' interests required.

Calhoun, especially, recognized the increasingly tenuous hold of Southern states on the Senate and sought to develop a systematic constitutional theory to protect particular state institutions from national control. His specific concerns were, initially, the matter of protective tariffs sought by Northern manufacturing interests and opposed by Southerners as economically ruinous and, subsequently, preservation of the "peculiar institution" of slavery. As a more fundamental objective, he sought to bolster the ability of states generally to resist the consolidation of government in an increasingly self-regarding and confident American "nation."

The constitutional case for vigorous state sovereignty to counter the dangers from a consolidated general government had been made frequently by the Constitution's critics during the ratification debates. Their claim rested on the principle that the union was a compact of States. They pointed

to the fact that the Constitution's legitimacy rested on approval by the states; that the Constitution's proponents frequently had asserted that the plan was not a revolutionary new system but an improvement of the extant one, as expressed in the Preamble's objective to "form a more perfect Union;" and that failure to adopt the new plan would not mean the creation of 13 fully independent entities, but, rather, continuation of the earlier plan that had established a "perpetual union." The shift from approval by the state legislatures under the Articles of Confederation to approval by state conventions under the proposed document merely reflected a more refined understanding of republican theory that fundamental alterations must reflect as clearly as practicable the consent of the governed.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Founders' Vision for Keeping the States Strong, United, and Free (Part 2)-Guest Essayist: Joerg Knipprath

After the adoption of the Constitution, the next significant use of this compact theory occurred in the Virginia and Kentucky Resolutions of 1798/9, authored by James Madison and Thomas Jefferson, respectively, and triggered by the Adams Administration's Sedition Act. These resolutions held that Congress had only limited and delegated powers. If Congress legislated beyond those powers, it invaded the reserved powers of the states and threatened to consolidate power in itself. Division of powers existed to protect the people's rights against tyranny. A state government could, perhaps even must, then declare the unconstitutional nature of the Congressional action. Beyond that, matters got murky. The means of redress were left to each state. For Virginia, this included interposition of state authority between its citizens and Congressional usurpation of their rights. Whether this went beyond seeking political change by pressuring Congress to repeal the law or petitioning that body to call a constitutional convention under Article V of the Constitution, to actively using state executive authority to prevent enforcement of the federal law, was not discussed. Though it was implied, there was no clear assertion that the state's action (by itself or in concurrence with others) outright nullified the offensive law. The more radical Jefferson, however, did allow that a state could nullify the offending federal law within its territory.

The 1798/9 Resolutions and the earlier debates on the Constitution featured prominently in subsequent national controversies. Similar expositions of the federal structure were used to justify the actions of New England Federalist Party politicians at the Hartford Convention in 1814 and the more radical ideas--such as secession--that were proposed there for future consideration.

Calhoun proposed his doctrine of state nullification of unconstitutional federal laws in his *Exposition and Protest* against the Tariff of 1828. In subsequent writings, such as his 1831 *Fort Hill Address*, he further developed and refined the constitutional foundation for nullification. At the same time, he also undertook to provide a constitutional basis to protect the rights of political minorities through his doctrine of “concurrent majorities.” Acts of government whose burdens fell heavily on a particular (geographical) minority had to be approved both by the national majority and that minority.

While Calhoun began with the same assumptions about the “compact nature” of the Constitution and the political structure which it comprised, he added some important refinements. Each part, the Union and the States, had their assigned powers. Neither could invade the powers of the other, as delegated to the former and generally reserved to the latter. The difficulty lay in resolving conflicts that might arise over their relationship. Interposition, as accepted in the Virginia and Kentucky Resolutions, and nullification, as asserted by Jefferson in the latter, were prerogatives retained by the States against constitutional usurpations by the general government. But those tools were forms of protest, not resolution of conflict. The general government, being a creature of the Constitution, could not, through its agents, sit as judge in its own cause.

Calhoun relied on that 18th-century American contribution to political theory, the constitutional convention, to supply the remedy. Sovereignty lay in the people, as both sides agreed. As shown by the process of the Constitution’s adoption in the 1780s, an ultimate act of political association--and, by analogy, disassociation--by the people of a state required their consent. Since nullification of a federal law placed the state on a path to secession, the people must approve that initial step. It was not possible, as a practical matter, to gather the people as a whole to debate and decide the matter. Hence, the action had to be undertaken by a special body elected by them and assembled for only that purpose. Only if the convention voted to nullify the federal law might the state legislature enact an ordinance of nullification. If the proper process of nullification was completed, it was up to Congress to resolve the controversy by calling a convention under Article V of the Constitution. If that convention voted in agreement with the state, and the convention’s action was approved by three-fourths of the states, the federal law was nullified. If the nullification was not approved either by the convention or the other states, the original state might vote to rescind the nullification or move to secede.

Calhoun’s proposal was built on existing constitutional process in Article V. However, he cleverly extended its reach because Article V required two-thirds of the states to petition Congress for a convention, while Calhoun’s convention was precipitated by the action of a single state. On the other hand, Calhoun stopped well short of the most rigid states’ rights position that potentially would legitimize nullification of a federal law within a state by the action of that state alone. Enough other states still had to concur to satisfy Article V, which assured against frequent resort by states to such a destabilizing course. Calhoun struck a balance between the interests of “Liberty and Union” in a manner that sought to avoid the extreme confederalism of the unconditional nullifiers and secessionists, on the one hand, and of the biased nationalism of Congress and the Supreme Court. The former, after all, had been rejected by the language of the Articles of Confederation, in the ratifying debates on the Constitution, and in the formal rejection by many states of the Virginia and Kentucky Resolutions. At the same time, neither the Congress--despite the structure of the Senate--acting politically, nor the Supreme Court, acting

judicially to balance Congress's powers under the Constitution with the Tenth Amendment, could be relied on as fair arbiters of national-state disputes.

Today, Calhoun's approach lacks constitutional legitimacy, as do more radical theories of nullification and secession. Yet, one can detect more than a faint connection between the broad claims of earlier nullifiers and secessionists and what has sometimes been called the "neo-Confederate" position of California and other "sanctuary" cities and states regarding the harboring of aliens living in the United States in violation of immigration laws. But, as Calhoun and the earlier Antifederalists worried, the other constitutional protections against "consolidation" have proven inadequate to the task. The states can go, hat in hand, to plead their case politically to Congress or in litigation to the Supreme Court. But the Senate is, as often as not, a happy collaborator in expanding federal power at the expense of state autonomy. The Supreme Court, in turn, has declared the Tenth Amendment a mere "truism" and, excepting a few timid anomalies, appears content to strain constitutional language ever-more to extend the reach of federal power. Perhaps it was inevitable due to human nature and the inbuilt structural imperfections of the system, as the Antifederalists charged, or perhaps it is the result of the complexities of a massive modern industrial society, but today's "federalism" is patently not the Founders' declared vision.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Arkansas: A Brief History of Statehood -Guest Essayist: The Honorable Tim Griffin

The twenty-fifth state to be admitted, Arkansas formally joined the United States on June 15, 1836, and was the ninth state to secede from the Union. Its current constitution, adopted in 1874, is the fifth used in the state's history.

Arkansas's march to admission to the Union had its roots in two of the most powerful movements of the nineteenth century: the sectional crisis and the rise of Jacksonian Democracy. By 1835, a special census revealed that Arkansas, at over 52,000 residents, met the minimum population requirements (40,000) for admission to the Union.^[1] Two variables complicated this process. First, the Missouri Compromise of 1820 established the principle of slave and free states coming into the Union in pairs, in order to maintain the balance of power in the Senate. Secondly, statehood advocates sought to have Arkansas admitted in advance of the 1836 presidential election, to give the Democrats a further advantage at the polls. It was understood that Michigan, a free state, would be paired with Arkansas, but the Whig Party in Congress

sought to delay what would be the admission of two Democratic-leaning states.^[2] Also at home, many Arkansans were wary of the idea of statehood, particularly those who had questions about the still largely frontier territory's financial strength.^[3] But the proclamation by the editor of the *Arkansas Advocate* that statehood would give Arkansans "The rights and rank to which we are entitled,"^[4] carried the day, and President Andrew Jackson signed the statehood bill into law on June 15, 1836.

In the state's early years, it struggled economically because of its still predominately violent frontier image and the failure of an ill-conceived state-supported banking system that left debilitating debts and even more suspicion of government involvement in the economy.^[5] Economically, Arkansas was divided into small subsistence farms in its mountainous north and upper west and large slave-based plantation agriculture to its south and east. Politically, the state's governmental life was controlled by the Democratic Party, which was in turn controlled by a group known as "The Family," that coalesced around the Conway, Rector, and Sevier families.^[6] The Civil War and Reconstruction would lead to huge upheavals, as wartime destruction and the rise of a Republican Party led by northerners who had remained south after the war led to struggles over matters such as civil rights, education, and economic modernization. After this period, Arkansas would still remain predominately agrarian for almost another century, heavily dependent on a one-crop cotton based economy. Other products such as timber, rice, oil, and natural gas were developed in the postwar years, but were most often sent out of state for processing until World War II. After the war, Arkansas embarked on a broad program of economic diversification led by Governor Winthrop Rockefeller, and expanded by home-grown entrepreneurs such as Don Tyson, Sam Walton, and Charles Morgan.

As mentioned earlier, Arkansas is governed under its 1874 constitution, which is its fifth since statehood, and commonly known as the "Thou Shalt Not" document.^[7] It reflected the general suspicion of government power that had been prevalent in the state since entering the Union. Most of these revisions placed into the document were highly restrictive and negative in nature.^[8] County governments became more powerful as administrative units of the state, with jurisdiction over roads and bridges, local judiciary, and taxation and spending. The state's powers to tax and borrow were severely limited, the terms of elected officials were reduced from four years to two years (changed to four years by a constitutional amendment in 1984), the number of elected county officials was increased from two to ten, and the legislative sessions were biennial, limited to sixty days. The governor's power was greatly reduced, and executive power was divided between seven constitutional officers. Vetoes could be overridden by a simple majority, and much authority transferred from state to county government. Some modernization of government has taken place in the postwar era, most notably two reorganization bills in 1971 and 2019 that consolidated and reorganized state agencies, boards, and commissions into a smaller number of executive departments. Term limits for constitutional officers and the legislature were first enacted in 1992,^[9] and some of the document's more stringent provisions, such as a strict limit on interest rates and state borrowing authority, have been modified in recent years.

After the end of Republican Reconstruction, Arkansas joined its sister Southern states into the Democratic "Solid South," and the state was one of the last to transition into a two-party system in the modern era. Arkansas's reputation took a beating after the Central High desegregation

crisis of 1957, and gradually, reformers from both parties exerted more influence on state policy by the 1970s and 1980s. The Republican Party in Arkansas began to slowly gain ground beginning in the 1980s, but was slowed by the election of former Arkansas Governor Bill Clinton's election to the Presidency in 1992. By 2014, the Republican Party had arrived in full force with the first full Republican sweep in the state since 1872, and the dawning of a new era.

Tim Griffin grew up in Magnolia, a fifth-generation Arkansan and the youngest son of a minister and teacher. He was elected lieutenant governor of Arkansas on November 4, 2014, and was re-elected for his second four-year term on November 6, 2018. He is focused on growing jobs through aggressively pursuing economic development, more parental choice in education and boldly reforming state government. For 2019, he is serving as Chairman of the Republican Lieutenant Governors Association (RLGA).

From 2011-2015, Griffin served as the 24th representative of Arkansas's Second Congressional District. For the 113th Congress, he was a member of the House Committee on Ways and Means while also serving as a Deputy Whip for the Majority. In the 112th Congress, he served as a member of the House Armed Services Committee, the House Committee on Foreign Affairs, the House Committee on Ethics and the House Committee on the Judiciary. He also served as an Assistant Whip for the Majority. In Congress, he advocated for bold tax reform and entitlement reform to grow jobs and reduce the national debt.

During the Bush Administration, in 2006-2007, Griffin served as U.S. Attorney for the Eastern District of Arkansas and previously as Special Assistant to the President and Deputy Director of Political Affairs for President George W. Bush at the White House.

Griffin has served as an officer in the U.S. Army Reserve, Judge Advocate General's (JAG) Corps, for over 22 years and currently holds the rank of lieutenant colonel. He was recently selected for promotion to colonel. In 2005, Griffin was mobilized to active duty as an Army prosecutor at Fort Campbell, Kentucky, and served with the 101st Airborne Division (Air Assault) in Mosul, Iraq, for which he was awarded the Combat Action Badge. He is currently serving as a senior legislative advisor to the Under Secretary of Defense for Personnel and Readiness at the Pentagon. In July 2018, Lieutenant Governor Griffin, in his capacity as a Lieutenant Colonel in the United States Army Reserve, received his master's degree in strategic studies as a Distinguished Graduate from the United States Army War College, Carlisle Barracks, Pennsylvania.

Tim is active in the community. He currently serves on the board of Our House shelter for the working homeless and previously served on the boards of the Florence Crittenton Home for unwed mothers and Big Brothers Big Sisters of Central Arkansas.

He graduated from Magnolia High School, Hendrix College in Conway and Tulane Law School in New Orleans and attended graduate school at Oxford University in England. His wife Elizabeth is from Camden, and they currently live in Little Rock with their three children, Mary Katherine, John, and Charlotte Anne. They are members of Immanuel Baptist Church of Little Rock.

[1] Jeannie M. Whayne, Thomas A. DeBlack, George Sabo III, and Morris S. Arnold, *Arkansas: A Narrative History* (Fayetteville: University of Arkansas Press, 2013), 128.

[2] *Ibid.*, 129.

[3] Ken Bridges, “Marking the 180th anniversary of Arkansas statehood.” *Log Cabin Democrat*, June 11, 2016. <https://www.thecabin.net/opinion/2016-06-11/marking-180th-anniversary-arkansas-statehood> (Accessed May 30, 2019)

[4] Whayne, et.al., *Arkansas: A Narrative History*, 131.

[5] S. Charles Bolton, *Arkansas 1800-1860: Remote and Restless* (Fayetteville: University of Arkansas Press, 1998), 50.

[6] Thomas A. DeBlack, “The Family [Political Dynasty].” *Encyclopedia of Arkansas History and Culture*, December 21, 2015. <https://encyclopediaofarkansas.net/entries/the-family-political-dynasty-2666/> (accessed May 30, 2019)

[7] Michael B. Dougan, *Arkansas Odyssey: The Saga of Arkansas from Prehistoric Times to Present* (Little Rock: Rose Publishing Company, 1994), 268.

[8] Kay C. Goss, “Arkansas Constitutions.” *Encyclopedia of Arkansas History and Culture*, December 3, 2018. <https://encyclopediaofarkansas.net/entries/arkansas-constitutions-2246/> (Accessed May 30, 2019)

[9] Whayne, et.al., *Arkansas: A Narrative History*, 463.

Not Double Vision, Double Constitutions: Michigan History and Statehood (Part 1) -Guest Essayist: The Honorable Michael Warren

When one is tasked to write about “the constitution,” my guess is not many ponder a threshold question: “*Which* constitution?” With the anniversary of the signing of the United States Constitution occurring on September 17 (dubbed “Constitution Day” – and also an anchor date for Patriot Week), one might naturally think the U.S. Constitution must be the topic. Not necessarily so. Because each state also has a constitution, each person lives under two constitutions. Few people understand the U.S. Constitution well, and only a minute number understand their state constitution. As a former debater, I appreciate that one should understand both sides of an issue to become deeply informed. Likewise, to best understand our constitutions, the best course may be to compare and contrast them. Accordingly, this article will review the basic contours of the constitutions of the State of Michigan and the United States to discern their commonalities and yawning differences. By necessity of space and time, this article will only

address a few high-level topics such as age, origins, amendment process and the branches of government, and will not delve into the wonderful commentary that this comparison might yield.

Age

The U.S. Constitution was drafted in 1787 and ratified in 1789. The current Michigan Constitution was drafted in 1961 and adopted in 1963.

Predecessors

The U.S. Constitution was preceded by the Articles of Confederation and Perpetual Union, which was drafted by the Second Continental Congress in 1777 and effective in 1781. The current Michigan Constitution was preceded by the Michigan Constitution of 1835, the Michigan Constitution of 1850, and the Michigan Constitution of 1908.

Drafting Process

The U.S. Constitution was drafted pursuant to a constitutional convention held in Philadelphia during the summer of 1787. Each state appointed its own delegates. Although there were 55 delegates, each state's delegation counted as only one vote. The majority of each state's delegation would determine the vote of the state (*i.e.*, if a delegation of three members split 2-1 in favor of a measure, that state's single vote would be cast in favor of the measure). George Washington presided over the federal convention.

The current Michigan Constitution was also drafted pursuant to a constitutional convention held in Lansing from October 1961 to August 1962. The Michigan delegates were elected in a primary election held in July 1961. A delegate was chosen from each of the then-existing 110 state House of Representative districts and 34 state Senate districts. Each delegate voted at the Michigan convention on the principle of one man, one vote. Former American Motors Company president and future governor George Romney was the chairman of the Michigan convention.

Length

The U.S. Constitution is 4,543 words. The Michigan Constitution dwarfs the United States document with at least 31,000 words.

Ratification

The U.S. Constitution required nine of the 13 original states to ratify the document before it became effective. Each state held a ratification convention to debate the merits, and each had a separate process for selecting the delegates to the convention. Although no state rejected the Constitution, this was not a forgone conclusion and a vigorous debate ensued in several states, most especially in Massachusetts, New York and Virginia. Those supporting ratification were dubbed the "Federalists," and those opposed, the "Anti-Federalists." Both sides wrote voluminously in the papers and pamphlets of the day. The Federalist Papers (written by James Madison, Alexander Hamilton and John Jay) were a series of brilliant newspaper articles

advocating ratification. New Hampshire sealed the deal when it ratified the U.S. Constitution on June 21, 1788. The United States Constitution went into effect in March 1789. Rhode Island delayed its ratification until May 1790.

Adoption of the Michigan Constitution was even a closer call. After a robust campaign, the Michigan Constitution was submitted to a vote of the people of Michigan on April Fool's Day (April 1) 1963, and adopted by the very slim margin of 810,860 to 803,436. Unlike the U.S. Constitution, at the time of the election, the proposed draft constitution was accompanied at the ballot box with an address to the people that provided commentary about the purpose behind particular provisions of the proposed constitution. In addition, the constitutional convention produced a widely distributed 109-page booklet, "What the Proposed New State Constitution Means to You: A Report to the People of Michigan by Their Elected Delegates to the Constitutional Convention of 1961-62" for consideration by the voters.

Amendments

To amend the U.S. Constitution, two-thirds of both houses of Congress must submit a proposal to the states, and three-quarters of the states must approve the same.¹ Approximately 12,000 amendments have been proposed in Congress, and only 33 have gone to the states for consideration.² The U.S. Constitution has been amended 27 times. Such amendments include the Bill of Rights,³ the prohibition of slavery,⁴ establishing equal protection and due process for all people,⁵ voting rights for African-Americans and women,⁶ authorizing an income tax,⁷ altering United States Senate elections,⁸ and presidential elections and succession procedures.⁹

To amend the Michigan Constitution, citizens can propose an amendment via a ballot initiative when at least 10 percent of the total votes cast for all candidates for governor at the last preceding election sign a petition.¹⁰ The Legislature can also propose an amendment if two-thirds of both houses vote to do so.¹¹ In either case, an amendment is approved by a majority vote of the people in a statewide election.¹² There have been 31 proposed amendments via ballot initiatives, and 43 via legislative resolutions.¹³ Of those, 32 amendments have been approved and 42 rejected.¹⁴ Approved amendments include establishing the Judicial Tenure Commission,¹⁵ the creation of the State Officers Compensation Commission,¹⁶ addressing the filling of judicial vacancies,¹⁷ prohibiting public funds to aid nonpublic schools and students,¹⁸ and authorizing lotteries.¹⁹ Rejected amendments included attempts to lower the voting age to 18 (twice),²⁰ permitting a graduated income tax,²¹ and permitting election of members of the Legislature to another state office during their term of office.²²

Convention

A new U.S. constitutional convention can be called "on the Application of the Legislatures of two thirds of the several States," and a new constitution may be adopted when three-quarters of the states approve the new constitution (either by constitutional conventions or by the state legislatures, as determined by Congress).²³ No successful movement to call for a convention has yet occurred, although a movement dubbed the Convention of the States has obtained applications from 12 states (both houses), with partial success in 10 others (one house), calling

for a convention that would “limit the power and jurisdiction of the federal government, impose fiscal restraints, and place term limits on federal officials.”²⁴

The question of whether Michigan should hold a new constitutional convention is placed on the ballot every 16 years (beginning in 1978).²⁵ If a majority of voters concur, a constitutional convention will be held subject to certain parameters set forth in the current Constitution.²⁶ This process has yet to yield a call for a new convention since the enactment of the 1963 Constitution.

Separation of Powers

Each constitution provides for three branches of government: legislative, executive and judicial.²⁷ Article III, Section 2 of the Michigan Constitution specifically provides, “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” The U.S. Constitution has no such express provision. However, Article 1, Section 6 of the U.S. Constitution prohibits any member of Congress from being appointed to “any civil Office created under the Authority of the United States”

Legislative Branch

Each constitution provides for a House of Representatives and a Senate.²⁸ Under each, members of the House of Representatives are elected for two-year terms.²⁹ United States senators serve six-year terms and one-third of the Senate is elected during each election cycle (*i.e.*, every two years).³⁰ Michigan senators serve four-year terms and all are elected at once during the same year as the election for the governor.³¹ Michigan legislators can serve a lifetime maximum of three terms (six years total) in the House of Representatives and two terms (eight years total) in the Senate.³² No term limits exist in the U.S. Constitution.

To be a member of the U.S. House of Representatives, the representative must be at least 25 years old, a citizen of the United States for at least seven years, and an inhabitant of the state in which he is elected.³³ The U.S. Constitution does not provide a set number of representatives, only that there must be at least 30,000 citizens represented by each representative.³⁴ The total number of U.S. representatives is determined by Congress, based proportionally on population – subject to the caveat that each state must have at least one representative.³⁵ United States senators must be at least 30 years old, a citizen for nine years, and a resident of the state he or she represents. United States senators are elected on a statewide basis, with each state having two senators.³⁶

In Michigan, “Each senator and representative must be a citizen of the United States, at least 21 years of age, and an elector of the district he represents.”³⁷ Michigan Senate and House districts are both determined by population.³⁸ In addition, in Michigan “No person who has been convicted of subversion or who has within the preceding 20 years been convicted of a felony involving a breach of public trust shall be eligible for either house of the legislature.”³⁹ The U.S. Constitution has no such bar. The legislative process is hemmed in by title, object and other legislative requirements and prohibitions.⁴⁰

*Hon. Michael Warren has served on the Oakland County Circuit Court since 2002, and teaches constitutional law at Western Michigan University Cooley Law School. He is a former member of the state board of education, co-creator of Patriot Week (www.PatriotWeek.org), and author of *America's Survival Guide: How to Stop America's Impending Suicide by Reclaiming Our First Principles and History*.*

Footnotes

- 1 Article V.
- 2 Drew Desilver, "Proposed amendments to the U.S. Constitution seldom go anywhere," Pew Research Center (April 12, 2018).
- 3 Amendments I-X.
- 4 Amendment XIII.
- 5 Amendment XIV.
- 6 Amendments XV and XIX.
- 7 Amendment XVI.
- 8 Amendment XVII.
- 9 Amendments XII, XX, XXII, XXV.
- 10 Article XII, Section 2.
- 11 Article XII, Section 1.
- 12 Article XII, Section 1-2.
- 13 State of Michigan, Bureau of Elections, Initiatives and Referendums Under the Constitution of the State of Michigan of 1963.
- 14 *Id.*
- 15 Article 6, Section 30.
- 16 Article 4, Section 12.
- 17 Article VI, Sections 20, 22-24.
- 18 Article VIII, Section 2.

- 19 Article IV, Section 41.
- 20 Senate Joint Resolution “A,” P.A. 1966, p. 678; House Joint Resolution “A,” P.A. 1970, p. 690.
- 21 Senate Joint Resolution “G,” P.A. 1967, p. 672.
- 22 Senate Joint Resolution “Q,” P.A. 1968, p. 708.
- 23 Article V.
- 24 Convention of the States, <https://conventionofstates.com/#whyCallCos>.
- 25 Article XII, Section 3.
- 26 Article XII, Section 3.
- 27 United States Constitution, Articles I-III; Mich Const 1963, Articles IV-VI.
- 28 United States Constitution, Article I, Sections 1-3; Mich Const 1963, Article IV, Sections 1-3.
- 29 United States Constitution, Article I, Section 2; Mich Const 1963, Article IV, Section 3.
- 30 Article I, Section 3.
- 31 Article IV, Section 2.
- 32 Article VI, Section 54.
- 33 Article I, Section 2.
- 34 *Id.*
- 35 *Id.*
- 36 Article I, Section 3.
- 37 Article IV, Section 7.
- 38 Article IV, Sections 2-3.
- 39 Article VI, Section 7.
- 40 Article IV, Sections 24-26.

Not Double Vision, Double Constitutions: Michigan History and Statehood (Part 2) -Guest Essayist: The Honorable Michael Warren

Executive Branch

The executive power of the United States is vested in the president who is elected pursuant to the electoral college.⁴¹ The electors of each state are chosen by a method of selection determined by the state legislature. Each elector has two votes, one each for president and vice president (who run as a slate).⁴² The president and vice president each serve four-year terms, and are limited to two full terms.⁴³ The vice president also serves as the president of the Senate, and has no vote unless there is a tie.⁴⁴ No other federal executive offices are addressed in the U.S. Constitution. To be president, a person must be a natural-born citizen, at least 35 years old, and have been a resident in the United States for at least 14 years.⁴⁵ The president is, among other things, the commander in chief of the armed forces.⁴⁶ He or she has the power to grant reprieves and pardons (except for cases of impeachment), make treaties (subject to a two-thirds approval of the Senate), and appoint federal judges (subject to the advice and consent of the Senate).⁴⁷ He or she has the duty to ensure that the laws are faithfully executed.⁴⁸

The executive power of the State of Michigan is vested in the governor.⁴⁹ The governor and lieutenant governor serve four-year terms, with a maximum of two terms.⁵⁰ The governor is elected in the general election of alternate even-numbered years.⁵¹ Candidates for lieutenant governor are nominated by party conventions.⁵² “In the general election one vote shall be cast jointly for the candidates of governor and lieutenant governor nominated by the same party.”⁵³ The governor supervises each “principal department . . . unless otherwise provided by” the Constitution.⁵⁴ The governor is also to “take care that the laws be faithfully executed.”⁵⁵ Furthermore, the Michigan Constitution has a negative advice and consent clause – any gubernatorial appointments take effect unless a majority of the state Senate votes to disapprove the appointment.⁵⁶ The governor has the authority to remove or suspend “any elective or appointive state officer, except legislative or judicial,” for “gross negligence of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein”⁵⁷ Like the president, the governor is the commander in chief of the armed forces.⁵⁸ He or she also has the authority to grant “reprieves, commutations and pardons for all offenses, except in cases of impeachment,” but that power is subject to the procedures and regulations provided by law.⁵⁹ The governor has the duty to submit to the Legislature a balanced budget and appropriation bills.⁶⁰ Like the vice president, the lieutenant governor is president of the Senate, without a vote except in cases of a tie.⁶¹ To be governor or lieutenant governor, a person must be 30 years old and have been a voter in the state for the four years “next preceding his election.”⁶² The attorney general and secretary of state are likewise elected for four-year terms at the same time as the governor, with a maximum of two terms.⁶³ Like the lieutenant governor, the attorney general and secretary of state are nominated at state party conventions.⁶⁴

Unlike the U.S. Constitution, the Michigan Constitution addresses in detail the administrative state over which the governor presides. For example, there are no more than “20 principal departments. They shall be grouped as far as practicable according to major purposes.”⁶⁵ In addition, unless legislatively vetoed, the governor has plenary authority to reorganize the executive branch via executive order.⁶⁶

The Michigan Constitution also establishes a statewide elected state board of education;⁶⁷ elected statewide boards for the University of Michigan, Wayne State University, and Michigan State University;⁶⁸ an appointed civil rights commission;⁶⁹ an appointed state transportation commission;⁷⁰ a Michigan nongame fish and wildlife trust fund;⁷¹ a Michigan game and fish protection fund;⁷² a Michigan conservation and recreation legacy fund;⁷³ a Michigan veterans trust fund;⁷⁴ and a Michigan natural resources trust fund.⁷⁵

Judicial Branch

The judicial power of the United States is vested in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”⁷⁶ All federal judges have life terms, subject to being in “good Behavior.”⁷⁷ The jurisdiction of the federal courts includes all cases arising under the U.S. Constitution, federal law, treaties, foreign relations, admiralty and maritime, and controversies between the states.⁷⁸

In Michigan the “judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by two-thirds vote of the members elected to and serving in each house.”⁷⁹ The Supreme Court has seven members, serving eight-year terms with staggered elections.⁸⁰ The Supreme Court is nonpartisan, and “Nominations for justices of the supreme court shall be in a manner prescribed by law.”⁸¹ However, an incumbent may be placed on the ballot simply by filing an affidavit of candidacy.⁸² The Supreme Court chooses its own chief justice, and he or she “shall perform duties required by the court.”⁸³ The Supreme Court must appoint “an administrator of the courts and other assistants of the supreme court as may be necessary to aid in the administration of the courts of this state.”⁸⁴ The Supreme Court possesses “general superintending control over all courts . . . and appellate jurisdiction as provided by rules of the supreme court,”⁸⁵ and rulemaking authority over the “practice and procedure in all courts of this state.”⁸⁶ Although the Supreme Court “shall not have the power to remove a judge,”⁸⁷ it may do so pursuant to judicial tenure proceedings.⁸⁸ “Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. “When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.”⁸⁹ The Constitution also establishes a court of appeals, with the number of judges determined by law.⁹⁰ Court of Appeals judges serve six-year terms, elected in staggered terms.⁹¹ They are elected in nonpartisan elections “from districts drawn on county lines and as nearly as possible of equal population, as provided by law.”⁹² The jurisdiction of the court of appeals is determined by law.⁹³ Circuit courts are established along county lines, with a minimum of one judge per circuit, as provided by law.⁹⁴ Circuit courts must conduct sessions at least four times a year, and the number of judges for each circuit is also established by law.⁹⁵ Circuit court judges are nominated

and elected in staggered (by circuit) non-partisan elections for six-year terms, and must live in the circuit to which they are elected.⁹⁶ Circuit courts have “original jurisdiction in all matters not prohibited by law; appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law; power to issue, hear and determine prerogative and remedial writs; supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance with the rules of the supreme court; and jurisdiction of other cases and matters as provided by the rules of the supreme court.”⁹⁷ Probate judges are also established and follow the same elective and qualification procedures as circuit court judges.⁹⁸ To serve as a judge, an individual must have been admitted to practice law for at least five years, and cannot be elected or appointed after reaching 70 years old.⁹⁹ Judges are also ineligible to be “nominated for or elected to an elective office other than a judicial office during the period of his service and for one year thereafter.”¹⁰⁰

Additional Provisions

The Michigan Constitution takes great care to address taxes and fiscal matters,¹⁰¹ local government,¹⁰² elections¹⁰³ and many other matters. These matters are left to the states in the U.S. Constitution.¹⁰⁴ Both constitutions have extensive protection of individual rights¹⁰⁵ – a topic that could consume hundreds of pages of commentary and review.

The differences between our two constitutions are quite intense – revealing the origins and philosophies undergirding each. Understanding their differences gives us a deeper appreciation for the value they provide and any potential imperfections. Simply put, the U.S. and Michigan constitutions have a profound impact on our daily lives, significantly differ in scope and detail, and are well worth learning if we intend to preserve our liberties and freedoms.

Hon. Michael Warren has served on the Oakland County Circuit Court since 2002, and teaches constitutional law at Western Michigan University Cooley Law School. He is a former member of the state board of education, co-creator of Patriot Week (www.PatriotWeek.org), and author of [America’s Survival Guide: How to Stop America’s Impending Suicide by Reclaiming Our First Principles and History](#).

Footnotes

41 Article II, Section 1.

42 Article II, Sections 1 and Amendment XII.

43 Article II, Section 1 and Amendment XXII.

44 Article I, Section 3.

45 Article II, Section 1.

46 Article II, Section 2.

- 47 *Id.*
- 48 Article II, Section 3.
- 49 Article 5, Section 1.
- 50 Article 5, Section 21.
- 51 Article 5, Section 21.
- 52 Article 5, Section 21.
- 53 Article 5, Section 21.
- 54 Article 5, Section 8.
- 55 Article 5 Section 8.
- 56 Article 5, Section 6.
- 57 Article 5, Section 8.
- 58 Article 5, Section 12.
- 59 Article 5, Section 14.
- 60 Article V, Section 18.
- 61 Article V, Section 25.
- 62 Article V, Section 22.
- 63 Article V, Section 21.
- 64 Article V, Section 21.
- 65 Article 5, Section 2.
- 66 Article 5, Section 2.
- 67 Article VIII, Section 3.
- 68 Article VIII, Section 5.
- 69 Article V, Section 29.

- 70 Article V, Section 28.
- 71 Article IX, Section 42.
- 72 Article IX, Section 41.
- 73 Article IX, Section 40.
- 74 Article IX, Sections 37-39.
- 75 Article IX, Section 35.
- 76 Article III, Section 1.
- 77 Article III, Section 1.
- 78 Article III, Section 2.
- 79 Article VI, Section 1.
- 80 Article VI, Section 2.
- 81 Article VI, Section 2.
- 82 Article VI, Section 2.
- 83 Article VI, Section 3.
- 84 Article VI, Section 3.
- 85 Article VI, Section 4.
- 86 Article VI, Section 5.
- 87 Article VI, Section 4.
- 88 Article VI, Section 30.
- 89 Article VI, Section 6.
- 90 Article VI, Section 8.
- 91 Article VI, Section 9.
- 92 Article VI, Section 8.

- 93 Article VI, Section 10.
- 94 Article VI, Section 11.
- 95 Article VI, Section 11.
- 96 Article VI, Section 12.
- 97 Article VI, Section 13.
- 98 Article VI, Section 15.
- 99 Article VI, Section 19.
- 100 Article VI, Section 20.
- 101 *See, e.g.*, Article VII, Section 21; Article IX.
- 102 *See, e.g.*, Article VII.
- 103 *See, e.g.*, Article II.
- 104 Amendments IX-X.
- 105 *See, e.g.*, United States Constitution, Amendments I-IX; Mich Const 1963, Article I.

A Brief History of Florida and Its Constitutions- Guest Essayist: Benjamin DiBiase

Florida is the southernmost state in the contiguous United States, situated at the bottom of the Atlantic seaboard. It is a peninsula, bordered by the Atlantic to the east, Gulf to the west, Caribbean Sea to the south and the U.S. states of Georgia and Alabama form its northern border. Archaeologists believe the peninsula was first occupied by a nomadic group of hunter-gatherers around 14,000 years ago. These indigenous groups slowly adapted to a changing climate and grew crops, established large chiefdoms, and eventually numbered over 350,000 people by the end of the 15th century.[\[1\]](#)

Florida was first sighted by Europeans in 1513, when Juan Ponce de Leon traveled north from Puerto Rico in search of natural resources, slaves, and potentially a new landmass for the Spanish colonial dominion. Although probably not the first European to set eyes on Florida, his expedition was the first officially sanctioned and recorded by the Spanish. He landed somewhere on Florida's eastern Atlantic coast, but did not attempt to settle the region. In fact, much of the 16th century saw hundreds of potential settlers attempt colonization on the Florida peninsula,

only to be driven away by hostile indigenous groups, decimated by exposure and starvation, or simply left to seek resources elsewhere in the Caribbean. In 1564, a group of French Protestant Huguenots built a small community in what is now Jacksonville on Florida's northeast coast, only to be driven away by the Spanish led by Pedro Menéndez de Áviles in 1565. In driving away the French, Menéndez established what is now the oldest continuously occupied European settlement in North America, St. Augustine. The colonial settlement of St. Augustine remained a small military outpost for the next few centuries. By the end of the 18th century, a second settlement was established in west Florida's Gulf Coast, known as Pensacola. Governance of both colonial outposts was administered from Cuba.[\[2\]](#)

In 1763, as part of the Treaty of Paris ending the French and Indian War, Florida was transferred to the British in exchange for Havana. The British ruled Florida for another twenty years, remaining loyal to the British crown during the American Revolution. As a result of that conflict, and Spain's assistance in capturing Pensacola from the British, the newly formed American government handed Florida back to Spain. Now broken into two separate colonies, East and West Florida, the Spanish struggled to form a productive colony and attract settlers. However, the Spanish government promulgated the Constitution of Cádiz in St. Augustine in 1812, which was Florida's first written constitution, and governed the cities administration for almost another decade.[\[3\]](#) Several attempts to overthrow the government, the War of 1812 and increasing pressure from American colonists to the north, eventually forced Spain to relinquish control of Florida to the Americans. The Adams-Onís Treaty of 1819 was officially ratified in 1821, and Florida became a U.S. Territory.[\[4\]](#)

The U.S. Territorial Period was marked by the establishment of a southern-style plantation economy, and years of federal military efforts to remove the Seminole Indians to reservations in the Oklahoma Territory, known as the Seminole Wars. By 1838, representatives from every county met in St. Joseph, a small town outside of Tallahassee and drafted a state constitution. They relied on the Alabama Constitution of 1819 as a model, and were guided by the several hot button issues central to the lives of Floridians at the time; statehood, banks and slavery.[\[5\]](#) It was voted on later that year, and sent to the U.S. Congress. It was not until March 1845 that Congress officially voted in favor of admitting Florida into the Union as the 27th state.

By January of 1861, however, another delegation of statewide representatives met in Tallahassee and voted in favor of secession, rewriting the state Constitution, and joining the Confederate States of America a month later. Florida remained in the Confederacy until the end of the war in 1865, finally admitting defeat and beginning a years-long federal occupation of the state as Reconstruction began. Ravaged by years of war, the legislature passed a proposed constitution, but it was never adopted.[\[6\]](#) In 1868, Floridians voted on, and accepted a new state Constitution, and Governor Harrison Reid addressed the State Legislature in his inaugural address in June 1868.[\[7\]](#) By 1877, efforts to enfranchise emancipated slaves and integrate them into Florida society had largely failed. Despite tremendous strides made by African Americans to run and be elected to state offices, the efforts of former Confederates and white southerners derailed any major gains, establishing strict segregation laws and utilizing violence to intimidate minority populations.[\[8\]](#)

In 1885, Florida drafted a new state Constitution, codifying what would be generally referred to as “black codes” or “Jim Crow” policies to hinder black opportunity in the state. Nearly a century later, however, as Florida figured prominently in the Modern Civil Rights Movement of the 1950s and 1960s, the state wrote a new Constitution in 1968, reversing many of the discriminatory laws that existed in the 1885 document. It was the changing demographics of the state, coupled with the national movements toward equality and transparency that finally pushed Florida’s lawmakers to substantially revise the 1885 constitution more than eight decades after it went into effect. Unique to the 1968 constitutional rewrite was the provision to automatically introduce amendments and augment the Constitution every 20 years. The Constitutional Revision Committee (CRC) is appointed by the Governor, state officials and the chief justice of the Supreme Court, and takes input from the public concerning changes to the language of the document, which would then be voted on by the public in the next election cycle. It was this 1965 creation of the CRC that enabled the 1968 constitution to be created.^[9]

Ben DiBiase, MA, is a native Floridian. He holds a Master’s degree in History from the University of Central Florida. Ben currently works as the Head Archivist and Educational Director for the Florida Historical Society. He is the editor of French Florida (2014) and is a regular contributor to the Florida Frontiers radio and podcast program that airs around the state on NPR stations.

[1] Jerald T. Milanich, *Florida’s Indians from Ancient Times to the Present* (Gainesville: University of Florida Press, 1998) 3.

[2] James C. Clark, *A Concise History of Florida* (Charleston: The History Press, 2014) 15-22.

[3] M.C. Mirow, *Florida’s First Constitution: The Constitution of Cádiz Introduction, Translation, and Text* (Durham: Carolina Academic Press, 2012) 3-5.

[4] *Ibid.*, 25 – 31.

[5] Stephanie D. Moussalli, “Florida’s First Constitution: The Statehood, Banking and Slavery Controversies,” *Florida Historical Quarterly*, 74 no.4 (1996) 423.

[6] Mary E. Adkins, *Making Modern Florida: How the Spirit of Reform Shaped a New State Constitution* (Gainesville: University of Florida Press, 2016) 5.

[7] *Journal of the Senate for the First Session, Fifteenth Legislature of the State of Florida*, (Tallahassee: Office of the Tallahassee Sentinel, 1868) 5.

[8] Adkins, *Making Modern Florida*, 6-7.

[9] *Ibid.*, 56-57.

Texas: A Unique History Which Impacted Its Constitutional Future- Guest Essayist: Sam Houston

While the states which comprise the United States of America each have a unique story and history, the political and constitutional evolution of the great state of Texas is a compelling story in and of itself. I know, for you non-Texans your first response might be “there goes another one of those Texans who believes everything about Texas is bigger, brighter, bolder and more significant than everyplace else in the world”! Admittedly, true Texans are unabashedly proud. They hold an opinion which tends to advance the idea Texas is first in everything and the rest of the world can at best be “first runner up.” However, when one considers the fascinating history of Texas, the uniqueness of her size and the role she played in the growth and development of the United States, her role cannot be overlooked even by the most objective analysis.

Originally explored by the Spanish Conquistadors, Texas was a remote and dangerous land; vast in area and boundaries vague in definition. The aggressive nature of the Lipan Apache, as well as the Comanche and several other tribes, made ordinary settlement almost impossible. After the turn of the 18th century the Mexican government wished to establish a presence in its vast territories and set forth to establish a number of military outposts and Catholic missions, but they were wildly scattered and grew very slowly. Seeking a way to initiate colonization the Mexican authorities ultimately reached out to a gentleman who was from New England, by the name of Moses Austin. In exchange for receiving a significant land grant, Moses agreed to relocate 300 families at this own expense to this raw land called Tejas. This initial land grant to the Austin Colony which became known as San Felipe De Austin, was the beginning of mass immigration to Mexican Tejas from the United States.

At the time in the United States there was what they called an “economic panic” (a recession) and to purchase land from the U.S. Government cost \$1.25 an acre and had to be paid in cash. Quite frankly, not many people at the time had cash money and there were not banks, mortgage companies, or savings and loans and the like in which to be able to secure a loan to purchase land. However, in Mexican Tejas, the holders of these huge land grants could give a settler 4,428 acres for ranching, and 177 prime acres for farming, and it was all free! FREE! Can you just imagine? Soon citizens of the United States were pouring into Tejas like water from a bucket with a hole in the bottom!

For these Anglo immigrants coming into Mexican territory, they were accustomed to certain rights, privileges and protections which were guaranteed by the U.S. Constitution; however, in Mexican Tejas these rights simply did not exist. The newly created Mexican government had only recently gained its Independence from Spain and its legal background was based on a far different set of values and priorities than the U.S. Constitution. These differences were even more brazenly made apparent when in the fall of 1835 the President of Mexico, Santa Anna replaced the Constitution of Mexico with the Siete Leyes (Seven Laws). These changes effectively eliminated all state governments in Mexico including Tejas and made Santa Anna a military dictator in command of the entire Mexican nation.

For the Anglo Americans who had immigrated to Texas this elimination of state government and a creation of a conservative, strong, Catholic dominated, centralized government was simply too much and too foreign an idea to accept. Armed conflicts arose and soon the citizens of Texas eventually were in open revolt: declaring their independence from Mexico on March 2, 1836. Santa Anna attempted to enforce his authority by armed action against the Texans and was successful at the Battle of the Alamo. A few weeks later at Goliad, Texas Commander James Fannin surrendered his out-manned and outmaneuvered men, believing they would be treated as prisoners of war by the Mexican authorities. However, under Mexican law the Texans were nothing other than “pirates” and on Palm Sunday of 1836, all 376 men were shot and their bodies burned as a warning to all who opposed Mexico.

At the Battle of San Jacinto in April of 1836, Texas forces under the command of Sam Houston defeated Santa Anna and ended the Texas Revolution, resulting in the creation of the independent Republic of Texas. The Texas Constitution of 1836 was largely modeled after the U.S. Constitution except it expressly permitted slavery and forbid Indians or slaves to roam freely or to become Texas citizens.

Texas subsequently had revised Constitutions in 1845, 1861, 1866, 1869 and 1876. These changes largely coincide with the significant historical events of Texas joining the Union, seceding to join the Confederacy, and then rejoining the Union of the United States. The current constitution, (the 1876 Constitution), is one of the longest state constitutions in the United States and one of the oldest still in effect. Amendments have been adopted 456 times; an additional 176 have been passed by the Texas State Legislature then rejected by voters.

Most of these amendments are due to the document's highly restrictive nature. It states that the State of Texas has only those powers explicitly granted to it; there is no state equivalent of the necessary and proper clause to facilitate controversial legislation. Thus, the Texas Constitution functions as a limiting document, as opposed to the U.S. Constitution's purpose as a granting document.

Right from the very start, the citizens of Texas wanted political power to vest in its individual citizens and for their government to be unable to “expand” their power at its own whim. In Texas, the right of the individual to be free from government intrusion, to be free from an expansive government, to be free from tyranny began with the societal experience of its American immigrants and was sharpened by the authoritarian rule of Santa Anna. Forever more its founding fathers wanted Texas to be free from abuse, intrusion, and over reaching by its government. The constitution of Texas so reflects this attitude and the attitude which formulates much of the current political climate of Texas today.

Sam Houston has had the good fortune to experience a wide variety of professional endeavors. He was an award-winning trial lawyer and the 1992 recipient of the Oklahoma Bar Association's “Courageous Advocacy Award”. He has been heavily involved in the horse industry having served on the Board of Directors of the National Reining Horse Association for many years. He created and hosted a national television show “Inside Reining” which received the coveted Vaquero Award from the National Cowboy Hall of Fame for excellence in promoting the Cowboy lifestyle. He is a playwright, author, actor, public speaker, and the star of “The Lion of

Texas-An Evening with Sam Houston”; a one man play about his namesake and most iconic character in Texas history. Currently he is the General Manager of the Granbury Live Theater in Granbury Texas where he proudly lives with his wife Teresa.

The Path to Iowa Statehood - Guest Essayist: Tom Morain

Early in its history the U.S. Congress set up an orderly way for western lands to become states with status equal to the Original Thirteen. Senators and representatives in Congress remembered how unhappy the American colonists were under Great Britain’s rule, so unhappy in fact that they fought the American Revolution to become free of Great Britain. One of the most important acts that Congress passed was the Northwest Ordinance of 1787 that set up a system of government for the territory north of the Ohio River that became the states of Illinois, Indiana, Ohio, Michigan and Wisconsin. It was a model for other U.S. territories to follow when they wanted to become states.

When the American Revolution ended, the United States owned the land east of the Mississippi River and south of the Great Lakes to Spanish lands that bordered the Gulf of Mexico. Because this area was beyond the borders of the original 13 states, it became the responsibility of the federal government. The Trans-Appalachian was small but rapidly growing. It needed a way to deal with Native American populations and a defense against British threats to the north and Spanish ones from the south. Congress knew that the settlers would eventually need much more local government.

In 1803, the United States more than doubled its original size with the purchase from France of all the lands drained by the western tributaries of the Mississippi River, the Louisiana Purchase. Settlement in the region would wait until Native American titles to an area were removed and the land was surveyed in preparation for sale to private owners. Nevertheless, before pioneers crossing onto the western prairies ever decided to move west, they knew 1) they would one day have the full rights of citizens living in the East, and 2) what the steps necessary to attain full statehood were. Congress established a formula for promoting self-governance in the western land in stages. Until the population of an area reached 5,000 voters, the region was a district. (At this time, only free white males were voters.) A district was governed by a governor and three judges appointed by the President. When the population reached 5,000 the settlers could elect their own legislature. The area was called a territory. The governor, however, was still appointed, not elected by the voters. The territory could also elect a representative to Congress who could speak on issues in Congress but had no vote. When the population reached 60,000 the territory could apply for full statehood.

Iowa’s path to statehood followed the steps laid out in the Northwest Ordinance. In 1834 the land that would become Iowa was attached to the Michigan Territory. In 1836 as Michigan prepared for its own admission as a state, Iowa was transferred to the Wisconsin Territory. With more and more settlers crossing the Mississippi River, a separate Iowa Territory was formed on July 4, 1838. Its boundaries stretched far north of the current border into Minnesota and the Dakotas.

Because the population had already reached 22,859, the settlers had the right to elect their own legislature. President Martin Van Buren, a Democrat, appointed Robert Lucas as Iowa's first territorial governor. Burlington became the first capital. In 1840 William Henry Harrison, a member of the Whig Party, became president. He appointed another Whig, John Chambers, Iowa's second territorial governor. The territorial capital was moved to Iowa City.

While both Lucas and Chambers urged Iowans to push for full statehood, many settlers were in no hurry. As long as Iowa was a territory, the federal government paid the costs of much of the government. If Iowa became a state, the settlers' taxes would pick up the tab, and early settlers did not want to see their tax bills increase. Iowans in the Whig party were happy to have a Whig president appoint the governor. They feared that the Democrats would win an election for governor if Iowa became a state. In 1844 the nation elected James K. Polk president. Because Polk was a Democrat, Iowa soon got a new territorial governor, James Clarke, a Democrat. By this time the population had increased to over 75,000. There was growing interest in the statehood question. With more people to share the cost of government, fears of rising tax bills were not such an issue.

During these years the issue of slavery was deeply dividing the United States. Slavery was forbidden in the Iowa territory, but Iowans could not escape the national debate. A plan in the United States Senate had been worked out in the Missouri Compromise of 1820 that would keep the Senate balanced between sectional interests on slavery. With the exception of Missouri itself, all western lands north of the southern border of Missouri, would prohibit slavery. Those south of the line could permit it. To maintain an equal number of senators from the free states in the North and the slave states in the South, every time a new slave state was added, a new free state had to be admitted, and vice versa for the addition of free states. That meant that when Iowa entered the Union as a free state, it would need to find a slave state partner. When Florida became a state in 1845, the pressure was on Iowa. If Iowa waited too long, some other Northern state might partner with Florida, and there might not be another slave state available for some time.

Slavery shaped the debate over Iowa statehood in a second and more direct way. In the constitutional convention that drew up the required structure of the new state, delegates proposed borders for Iowa that made it larger than it is today. The northern border stretched up to include Minneapolis/St. Paul in Minnesota. However, when the proposed constitution reached Congress, representatives of northern states amended it with borders making Iowa much smaller. Iowa was the first free state west of the Mississippi, and free state Congressmen were looking ahead. A smaller Iowa would leave more land for additional "free" states in the Louisiana Purchase. They wanted a western border for Iowa about 60 miles east of the Missouri River and only slightly north of the current Minnesota border. Iowans rejected the change and voted against statehood in the required referendum. The issue went back to Congress who proposed the borders we know today as a compromise, the shape we know today, from the Mississippi on the east to the Missouri River in the west. Iowa voters and Congress approved the new boundaries. On December 28, 1846, President James K. Polk signed a bill making Iowa the 29th state.

Almost 60 years after the passage of the Northwest Ordinance of 1787, Iowa completed all the requirements for statehood. Iowa citizens could now vote for president. They could elect senators

and representatives to Congress. They had a state legislature. They could elect their own governor and judges. As with all new states added after the Original Thirteen, American settlers knew that they were not leaving their citizenship behind when they moved into the western territories.

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“On Wisconsin!” -Guest Essayist: Val Crofts

Thirtieth to join the United States, Wisconsin, known as “The Badger State,” ratified the U.S. Constitution May 29, 1848. The Wisconsin State Constitution currently in use was adopted in 1848.

“On Wisconsin!” were words exclaimed by Arthur MacArthur Jr. at the Battle of Chattanooga in 1863 urging his fellow Badgers on during an important phase of the battle for which he was awarded the Congressional Medal of Honor. The state’s official slogan is “Forward!” which embodies the spirit of LTG MacArthur and the spirit of the people who live here today. Citizens of Wisconsin are always looking to innovate, expand and advance, but they are appreciative of their past as well.

Wisconsin received its name from the river that runs through the center of the state named by the Miami Indians. The word “Wisconsin” means “river running through a red area” and may possibly refer to the beautiful red bluffs located near today’s city of Wisconsin Dells. For 10,000 years, Wisconsin has also been home to various Native American tribes including the Oneida, Chippewa, Menominee, Ho-Chunk, Sauk and Mahican.

In 1634, European explorer Jean Nicolet was the first European to have landed in Wisconsin near the present city of Green Bay. The French attempted to colonize the area and operated a very successful fur trade in Wisconsin. The French established a military and commercial presence in Wisconsin until after the French and Indian War, when the Great Britain assumed control of the area. The U.S. acquired what is today Wisconsin after the Treaty of Paris in 1783, ending the American Revolution.

In 1836, the Wisconsin Territory was organized and the first territorial legislature met in Belmont, Wisconsin. In 1848, Wisconsin was admitted to the Union as the 30th state with Madison being designated as its capital city.

The Wisconsin Constitution was written at the state's Constitutional Convention in Madison in December of 1847 and was approved by the citizens of Wisconsin Territory in 1848. This original Constitution has been amended over 100 times but is still in use today, making it the oldest state constitution outside of the New England states. At first, the Wisconsin Constitution granted suffrage to white male citizens over 21 and to Native Americans who were citizens of the United States but it did allow suffrage to change over time as the state legislature intended it to. The banking industry was very controversial in Wisconsin at this time and the idea of the state chartering a bank was voted on at the same time as the state Constitution was ratified. With this vote, the citizens of Wisconsin allowed the state to charter banks within its borders.

Today's Wisconsin Constitution consists of a Preamble, thanking Almighty God for the freedoms that citizens of the state are blessed with, and then 14 Articles. The first article is a general declaration of rights as citizens of Wisconsin. This allows Wisconsin citizens to live under the same freedoms as the United States Bill of Rights, to prohibit prison sentences for debt, place military under the control of civil authorities, and guarantees our citizens the right to fish and hunt.

The Wisconsin State Legislature is described in Article Four of the state Constitution and is a bicameral lawmaking body comprised of the Wisconsin State Assembly and Wisconsin State Senate. The 4th Article allow states how state representatives are elected and sets forth the powers and limitations of our state legislature.

Article Five establishes the Legislative Branch in Wisconsin. The state's executive branch consists of a governor and a lieutenant governor, who are each elected to serve four year terms. The powers and duties of the state executive are also outlined here as well, including the line-item veto over appropriation bills. The succession chain of governance is also outlined here, should the governor resign, be recalled or pass away.

The Judicial branch is established in Article Seven and grants the state a Supreme Court, composed of seven Justices, each holding 10-year terms. The Constitution also creates the Wisconsin Circuit Court system, as well as the Wisconsin Court of Appeals. The state may also set up courts and jurisdictions over cities, towns and villages within the state. The impeachment process of state officials is outlined here as well.

The original Wisconsin Constitution document is unfortunately missing and the copy on display in our state capitol building is a replica. The original may have been sent to a publisher and lost somewhere along the way. Fortunately for the citizens of Wisconsin, the words and ideas embodied within the document still exist and will endure far into the future. On Wisconsin!

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California, September 9, 1850: Thirty-First Admitted to the United States (Part 1) -Guest Essayist: Joerg Knipprath

California has had two constitutions during statehood, one from 1849 and the other from 1879. Although only a generation separates them, their style, operative principles, and political consequences could hardly be more different. The Constitution of 1849 represented the classic American constitutionalism of the U.S. Constitution and of the Iowa and New York state constitutions that were its direct antecedents. The Constitution of 1879 bore the imprint of the wave of political populism sweeping the country during that decade. Together with subsequent amendments adopted during the Progressive Era, it became--and remains--an instrument of that time and contributes to the state's radical politics.

The collapse, after about one month, of the quixotic Bear Flag Republic that had been proclaimed at the small town of Sonoma in June, 1846, and the ensuing declaration of American military control over California by Commodore John Sloat, resulted in a de facto military government for the next several years. The war with Mexico and the national controversy over slavery became tangled with the discovery of gold in January, 1848, at John Sutter's sawmill at Coloma, east of Sacramento, and the ensuing rush of "49ers" into the area. Ordinarily, Congress would have established a territorial government and set California on an eventual path to statehood. But the political difficulty attendant to deciding what to do with the large territory gained from Mexico in the Treaty of Guadalupe Hidalgo resulted in a stalemate in Congress that kept California's status frozen in place.

Californians had grander ideas. Why not skip territorial status and move directly to statehood? California, after all, was different from the rest of the formerly Mexican territory. California had established towns, a developing economy, good harbors for commerce, and a comparatively sizable population. Texas was different, too, and it had received statehood. Most of the rest of the new lands were wild and unoccupied.

When Congress failed to act, Californians in several towns in the northern, much more populous, part moved to organize representative governments on their own. They were encouraged by various national politicians, such as Missouri's Senator Thomas Hart Benton, President Zachary Taylor, and the new "civil" governor, General Bennett Riley. The latter two went further, urging Californians to elect delegates to a state constitutional convention.

The convention of 48 delegates met in early September, 1849, in Monterey. Three-fourths of the delegates came from the northern areas (mostly settled by Americans from the Northern states; only 11 came from the Southern California (predominantly settled by American Southerners).

The mining districts had elected a number of additional delegates who did not attend because of more pressing matters--mining for gold.

The northern delegates voted for statehood, the southerners preferred territorial status over concerns about taxation. The slavery issue was quickly settled. California would be a free state not due to humanitarian abolitionist sentimentality, but because, as one historian observed, the 49ers "were sensitive on the matter of dignity of hard manual labor, or rather of their particular form of it; they were outraged at the imputation that goldmining was work appropriate for slaves." Echoing the Northwest Ordinance of 1787, and foreshadowing the 13th Amendment to the Constitution, the convention voted that "Neither slavery nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this state." At the same time, the convention initially adopted a provision to exclude free Blacks from the state, but eventually reversed itself out of concern that Congress might reject the constitution on that ground.

The most difficult question, one that almost broke up the convention, was the question of the state's eastern boundary. One faction wanted what eventually became the boundary, another wanted to include present-day Nevada and most of Utah and Arizona. The latter group had on its side the fact that the most common maps at the time and the one used in the treaty of peace showed this version of a "Greater California." The convention eventually settled for the smaller boundary because of concerns about inability to have representative government for such an expanse, the inclusion of the Utah Mormons who were agitating for their own "State of Deseret," and Congress's likely negative reaction against such a massive state.

The constitution prohibited dueling, a restriction that proved quaintly optimistic. In a rough-and-tumble, male-dominated society that was still tinkering with formal legal structures, physical altercations would be a quick and direct way to resolve personal differences. One of California's first Senators, William Gwin, fought a duel in 1853. Another Senator, David Broderick (a political rival of Gwin), would be killed in a duel by state supreme court chief justice David Terry. Broderick was not Terry's first dueling victim. Terry was a master of several weapons, from knife to machete to pistol. Terry was shot many years later by a body guard of one of Terry's former colleagues on the court, Stephen Field, who by that time had become a justice on the U.S. Supreme Court. The body guard, U.S. deputy marshal Neagle, feared that Terry was about to draw a weapon to kill Field.

The structure of the constitution reflected the traditional separation of powers among branches of the government. It was a comparatively brief and concise document produced within six weeks by using the Iowa constitution (mostly) and the New York constitution (some) as models. There was a bicameral legislature, and a plural executive whereby the governor and various other officers were elected independently from each other by the voters. The constitution followed the emerging democratic trend of the 19th century of an elective judiciary at all levels. The state supreme court was composed of a chief justice and two associate justices, with the office of the chief rotating year-to-year. The constitution also contained an extensive declaration of rights. Aside from that list, it addressed miscellaneous issues deemed significant, including the novel concept (derived from Spanish law) that property owned by a woman before marriage or acquired by her by gift or inheritance would remain hers.

The constitution was published in English and Spanish and submitted to the voters, who approved it on November 13, 1849, by 12,061 to 811. The legislature met in San Jose in December and submitted a petition for statehood. Congress, wracked by the slavery issue, did not accept until the Compromise of 1850 was worked out. The President signed the admission of California as the thirty-first state on September 9, 1850, and the constitution formally went into effect. It was amended only three times in the next thirty years.

There matters remained until the financial, political, and ethnic convulsions of the 1870s. The financial panic of 1873 brought unemployment and business losses. The immigration of a large cohort of Chinese brought racial tensions. The general political restlessness and increasing stridency of rhetoric contributed to political instability and the rise of new political associations, particularly the Workingmen's Party, a pro-labor, anti-capitalist, anti-business, anti-Chinese party. In 1877, voters approved a call for a constitutional convention. Delegates were elected in June, 1879, and the convention gathered in Sacramento in September. The convention was three times as large as that of 1849, but it represented a non-Indian population that had grown from about 50,000 to nearly 900,000. It also took six months, rather than six weeks, to conclude.

It is not necessarily true that more time and man-hours produce a better result. The new constitution was an original work, but it was long, detailed, and prolix. A part of the problem was that the convention met during politically turbulent times and addressed "reforms" that should have been handled, if at all, through the legislative process. Another cause is that state governments exercise all legislative powers not surrendered to the general government. They are not governments of limited and delegated functions. Therefore, restrictions on state governments must be express. Today, the California constitution is even longer, due to the many amendments and the lingering effects of the Progressive Era changes described below. Even after voters in the 1960s and 1970s approved the removal of about 40,000 words by the Constitution Revision Commission, it is twelve times as long as the U.S. Constitution, making it among the most verbose state constitutions.

Representatives of the farm and labor interests, as well as of business, pushed through a common reform of the time, the creation of a state railroad commission with specified membership and powers. Labor got a maximum-hour provision for public works projects. A new state tax assessment board was created. Specific tax regulations to protect farmers were adopted. As would be expected, these regulations were easily circumvented by creditors, yet they remain part of the constitution. Corporations and banks were particular targets, with provisions passed to increase accountability of directors and shareholders. Labor law, business law, tax law, all matters that should be part of a system of codes brought into the fundamental organic law of government, the state constitution.

Finally, the Chinese. In a stark contrast to the current state government, a lengthy article of the constitution authorized the legislature to protect the state from "aliens, who are, or may become... dangerous or detrimental." Chinese could not be employed by corporations or on public projects (except as punishment for crime, e.g. road gangs). It prohibited "Asiatic coolieism" as a form of human slavery. These provisions, predictably, were found unconstitutional by federal courts as violations of equal protection or of the federal government's power over naturalization and immigration. The Constitution of 1879 was adopted by the

underwhelming popular vote margin of 54-46 percent. In amended form, it remains the state's constitution.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

California, September 9, 1850: Thirty-First Admitted to the United States (Part 2) -Guest Essayist: Joerg Knipprath

The next significant impact on the development of the California constitution came during the Progressive Era of the early 20th century. The Lincoln-Roosevelt Republican movement had seized control, first, of the Republican Party and, then, in the 1910 elections, of the state government. The movement was an upper-middle class, college-educated, young, elitist, technocratic reform movement centered in the legal profession, the press, and, to a lesser extent, the independent entrepreneurial class. These reformers had been excluded from the traditional retail politics of the urban machines with their roots in the working classes, strong partisan identity, and “spoils system” of political patronage. They professed to believe in the people and democracy, but a people led by the right kind of leader whose programs would use government to improve the lot of the masses. The people, in turn, would recognize the wisdom of those programs and voice their approval in the voting booth.

In January, 1911, the Progressives had full control of the legislature and had in the governorship perhaps the most popular politician California has produced, Hiram Johnson. That year, a special election was held to vote on, among other things, 23 measures that required amendment of the state constitution were proposed. All but one were approved by the voters.

Among the most significant and enduring, for better or worse, of those changes are the initiative and referendum procedures. Initiatives are brought by petitions signed by voters to enact statutes or constitutional amendments. For a statutory initiative, voter signatures must number at least 5% of the votes cast in the most recent gubernatorial election. For a constitutional initiative, the signature requirement is 8%. In either case, once on the ballot, the initiative requires majority approval to pass.

A referendum is a decision by voters on an action already taken by the legislature. For a statutory referendum, the same signature requirements exist as for a statutory initiative. A constitutional referendum to amend or revise the constitution is different. The proposed amendment or revision

must first be adopted by a two-thirds vote of each chamber of the legislature (27 out of 40 in the state senate; 54 out of 80 in the assembly). Then a majority of voters must approve. The legislature can also call a constitutional convention to revise the constitution, a task that, despite periodic clamor by the press, it has declined to perform. Finally, a “mandatory” referendum is required for bonds to be issued, if the bonds are repaid by taxpayer dollars. The legislature and governor must approve, after which a majority of voters must concur. All told, the California constitution has been amended over 500 times since 1879, with topics from criminal law reform, to term limits, to state pension benefits.

A third device of direct democracy is the recall of public officials. While the number of petition signatures depends on the office, for most state-wide offices, signatures equal to at least 12% of the votes cast for that office in the most recent election are required. If enough signatures are collected, two separate questions are presented to the voters. First, a majority must decide that the targeted official should be recalled. A second question decides who should take the recalled official’s place, if the recall is approved. There is no winnowing out of candidates through a primary election. Whoever gets the most votes, wins. A recent, and at the time rather shocking, demonstration occurred in 2003. Governor Gray Davis, a Democrat, was recalled by 55-45%, and Republican Arnold Schwarzenegger was elected with 49% of the vote over a plethora of other candidates.

Although these structural aspects of the Progressive Era amendments have had the most significant impact, other reforms also changed the nature of California politics. The Progressives’ hostility to political partisanship led to the abolition of straight-ticket voting, the adoption of cross-filing in primary elections (a process by which a politician could run for political office on the ballot of more than one political party), and the increase in officially non-partisan offices. Local elections cannot be contested by political parties. Thus, mayors and city councils are elected in nominally non-partisan elections.

Many academics and other reformers long have lauded this push toward meritocratic, non-partisan government. In a sense, it is faithful to the classic republican ideal of leaders dedicated to the common weal, rather than factional self-interest. But, in reality, evidence now shows that these restrictions tend to dilute voter attention and interest, which, in turn, produces more and more frantic efforts to increase voter participation. California’s latest constitutional contribution has been the introduction of the “jungle primary,” in which all candidates of the various parties for a particular office are placed on the primary election ballot. The top two vote-getters then run against each other in the general election. This was supposed to produce more “moderate” winners, rather than the more ideologically extreme candidates produced if each party had its separate primary. Instead, this process appears to increase voter confusion from the large number of names on the primary ballot, and lessen voter interest and involvement if, as often happens, the two names on general election ballot are members of the same party. This has further stultified the resiliency of political parties, especially the Republicans, in California.

California’s governmental structure differs from the federal system. The legislative branch is composed of two chambers, both elected on the basis of population. The executive branch is a “plural executive.” The governor is elected by popular vote, as is, separately, the lieutenant governor. While the President appoints federal department heads with Senate confirmation, in

California many such officials (attorney general, secretary of state, treasurer, etc.) are elected as independent constitutional officers. While most of the governor's powers are similar to those of the President, the governor also has a line-item veto over budgetary items. If the governor opposes a particular legislative budget item, he can veto it entirely or reduce it to a palatable level. That veto can then be overridden by a two-thirds vote of each house of the legislature.

Judges of the local and appellate courts can be appointed by the governor if a vacancy in the office has occurred. For appellate judges, the governor's candidate must have been approved by the Commission on Judicial Appointments. There is no participation by the legislature. Once appointed, the chief justice and the six associate justices of the state supreme court serve for 12 years, after which they must submit to a retention election. The voters choose whether or not to retain the justice subject to this plebiscite. While retention is almost a foregone conclusion, in the 1986 general election, Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso were rejected due to their perceived eagerness to overturn all death penalty verdicts that came before them.

The state's current constitution, in sum, is quite different from its predecessor. But, then, so are the people of the state. The earlier version followed the path of traditional American constitutional structure, with its basic organization of government and its "natural rights" approach. Today's constitution is a record of over a century of interest group politics. It has long since ceased to be a constitution of law and become a constitution of policy. It is easy to mock the inclusion in a constitution of an exemption from property tax for "Fruit and nut trees until 4 years after the season in which they were planted in orchard form." But one must not ignore the bigger issue. What started as a reform to get around a political structure controlled by the bosses of entrenched and organized political parties and clubs by creating a system of direct democracy to appeal to the voters directly, has become the playground of well-funded, unaccountable, politically-connected private pressure groups posing as expert technocrats solving problems. In the guise of the "public interest" are private interests achieved. This is the inevitable result of the Progressives' Platonic vision of themselves leading the masses designed to follow. It is a fit constitution for a California increasingly divided into a highly-educated, highly-compensated elite; organized interest groups of public employees, environmentalists, and ethnic affiliation; a shrinking middle class, and a mass of workers and unemployed struggling to get by.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Divided by a River and a Convention: Minnesota's Constitutional Heritage- Guest Essayist: Anthony Sanders

Minnesota has a proud constitutional tradition of protecting individual liberties. This short essay provides an overview of its constitutional history, and a few examples of the rights that the state constitution protects.

Northwest Ordinance

Minnesota's constitutional roots go all the way back to before the adoption of the U.S. Constitution.

As Minnesotans will tell you, the state is the source of the Mississippi river. The land east of the river was recognized as part of the United States in 1783, after the United States won the Revolutionary War. A few years later in 1787, Congress, acting under the Articles of Confederation, drafted the Northwest Ordinance. The Ordinance included a set of requirements for new states to be formed out of the Northwest Territory, the area which today includes Minnesota east of the Mississippi, as well as Ohio, Indiana, Illinois, Michigan, and Wisconsin. It required new states to guarantee many individual liberties, including freedom of religion, freedom of navigation on public waterways, and the prohibition of slavery.

The land west of the Mississippi was not claimed by the United States until 1803 as part of the Louisiana Purchase.

Constitutional Convention

After the rest of the old Northwest Territory and some of the Louisiana Purchase had become states, it was Minnesota's turn. The Minnesota Territory was formed by Congress in 1849. Further legislation in 1857 allowed for the formation of a state, while narrowing the territory's size in the process (shaving off the westernmost areas, which eventually became part of both North and South Dakota).

The residents of the territory then came together to form a constitution, and planned a convention for the summer of 1857. Tensions between Democrats and members of the new Republican Party were high. It did not help that this was the year of the infamous slavery case *Dred Scott v. Sandford* and the Supreme Court's ruling that blacks are not citizens, and only four years before the eventual outbreak of the Civil War. Scott himself had actually resided in Minnesota while his owner was stationed at Fort Snelling, an Army outpost at the confluence of the Minnesota and Mississippi rivers.

On the first day of the constitutional convention, July 13, 1857, all elected delegates sat together to open the proceedings. And that was the only time they did so. The bad blood between the parties boiled over and the rest of the convention was really two "conventions" where Democratic and Republican delegates held parallel sessions. In these they each drafted and debated a constitution for the state, denigrating the members in the other group in the process.

Newspapers continually published drafts of a constitution that each party created as they moved along. This created a dynamic where for several weeks each “convention” could follow and copy the other. Thus, despite their differences, when the parties published their separate final drafts, it turned out that the versions were very similar. Finally, each side appointed a five-member delegation to hammer out a final copy.

The resulting constitution contained many provisions drawn from the Northwest Ordinance, including strong protections for individual liberties. As with most other state constitutions, its bill of rights protected freedom of worship, freedom of the press, property rights, and due process. It also prohibited unreasonable searches and seizures. The constitution created a House and Senate, known as a bicameral legislative system, a governor and other elected officials (including a secretary of state and auditor), an elected judiciary, a quasi-independent state university (the University of Minnesota, later sometimes called a “constitutional agency”), and a guaranteed system of public schools.

Amendments Since 1857

Unlike many other states, Minnesota has had only the one constitution in its history, although it has been amended over one hundred times, and substantially reorganized once. The numerous amendments—which are written by the legislature but have to be voted on by the citizens—are too many to list here, but the author will note a couple.

In 1881, the state adopted a ban on “special legislation,” which is legislation that concerns a particular person or class of people. The ban’s language was then amended several times over the ensuing decades. Advocates rightfully noted that the legislature was corruptly being used to grant special favors to individuals and specific corporations.

Another amendment, unique to Minnesota, was a protection on the right to farm and peddle. Adopted in 1906, it reads “[a]ny person may sell or peddle the products of the farm or garden occupied and cultivated by him without obtaining a license therefor.” The clause has been interpreted narrowly by the state courts, but its text promises a great deal of protection to family farmers and others, such as home bakers.

Redraft in 1974

In 1974, after years of study, the legislature proposed, and the voters adopted, a large reorganization of the state constitution. About a third of it was eliminated, largely where the text was redundant. However, unless stated otherwise, the changes were not meant to alter the meaning of the constitution. After the amendments many of the old provisions were found in new articles and clauses, and anyone studying caselaw or text from before 1974 must keep this in mind.

Jurisprudence

The interpretation of its constitution in Minnesota’s courts has varied over the years, as with any state. In its first few decades the state supreme court, for example, limited the power of cities by

invalidating many protectionist local licenses. That approach, however, fell out of favor in the twentieth century.

Many provisions in the Minnesota Constitution mirror those in the U.S. Constitution. Minnesota has at times followed the jurisprudence of the U.S. Supreme Court on interpreting this parallel language, but in recent decades the state supreme court has been more willing to distinguish itself in protecting certain individual liberties. One prominent example has been in search and seizure cases, where the court at times has rejected allowing the police to conduct searches that the U.S. Supreme Court would have upheld.

Anthony Sanders is a Senior Attorney at the Institute for Justice. He is the author of several articles on constitutional law and jurisprudence, including pieces appearing in the Iowa Law Review and American University Law Review.

Oregon: Alis Volat Propriis “She Flies With Her Own Wings”- Guest Essayist: Brad Bergford

The State of Oregon has a fascinating history from the early competing claims to the land by Spain and Great Britain to the “54° 40' or Fight” slogan of the Democrat Party during the 1844 presidential campaign, whereby Democrats pledged to gain the territory one way or the other, to the naming of its largest city by a 2-3 coin toss. Lewis and Clark famously made their way to the Oregon coast in 1805 while searching for a northwest passage. In 1818, the U.S. and Great Britain agreed to jointly occupy the region, which included portions of present-day Idaho, California, Montana, British Columbia, and all of Washington state. In 1840, the U.S. gained the territory through the Oregon Treaty, and settlers began to arrive via the Oregon Trail. The state’s establishment as the 33rd state in 1859 realized many, but not all, of the founding principles of the United States. For example, European settlers forced many native peoples to relocate via a 1,500 mile march to Oklahoma.

From the beginning, Oregon placed a high value on social discourse, which may have helped it to (mostly) claw out of the deeply-entrenched racism that was a hallmark of its early history. In 1844, Oregon Country, as it was called until 1859, ordered all blacks to vacate under threat of beatings to include “not less than twenty nor more than thirty-nine stripes” every six months until the violator left.^[1] In November of 1857, the year of the Oregon Constitutional Convention, voters approved Article XVII—a clause that prohibited blacks from immigrating to the state of Oregon.^[2] And, when Oregon became a state, it specifically forbade black people to live in Oregon. In 1866, Oregon narrowly ratified the 14th Amendment but upon taking control of the legislature in 1868, Democrats promptly rescinded Oregon’s ratification of that Amendment. The move was symbolic at that point, but it provides a window to the state’s post-Reconstruction foundation.

Even amid its racism, as seen in section 31 of the Oregon state constitution’s Bill of Rights, freedom of religion was enshrined in Oregon’s constitution, and this may have been the state’s

saving grace in more ways than one. The second, third, fourth, fifth, and sixth, sections in Oregon's State Bill of Rights protect the freedom of religion in various ways, and the seventh indirectly encourages the use of the religious beliefs of court witnesses to ensure honest testimony and, thereby, protect society. Notably, the second section provides that "[a]ll men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences." The Oregon Bill of Rights officially prohibited slavery, but it also contained three exclusion laws, which voters approved by wide margins and which operated to keep non-whites out of Oregon until those laws were repealed in the early 1900s.^[3] Oregon was the only "free" state admitted to the Union with exclusion laws in its constitution.

During the 20th century, Oregon was mostly a "red" state. In fact, Republican presidential candidates carried Oregon in all but a few instances until 1984 when Oregon turned "blue" and has been so ever since. Today, Oregon is addressing many of the same issues with which other states grapple. The so-called "climate change" controversy has led to particularly coarse rancor between Oregon Democrats and Republicans, and it has provided the fodder for the vigorous debate of a cap-and-trade measure that failed in July 2019. The failed proposal was in the works for at least a decade and was premised on the controversial notions that 1) the earth is warming, 2) mankind is responsible, and 3) mankind can fix it. The cap-and-trade proposal would have placed new taxes in some instances and increased taxes in other instances on key industries that proponents believe contribute to anthropogenic global warming. The increased expenses would have caused job losses and increased consumer prices, among other effects, which would have adversely affected families across the state. On the other hand, proponents believe that the increased prices would lead to a reduction in global warming. Drug use and homelessness plague Oregon's larger cities, and those who advocate for legalized drug use, which many believe leads to homelessness, are pitted against those who seek a safe and orderly society. That Oregon has no sales tax draws purchasers from neighboring states, and Oregon voters have capped property taxes which attracts people to live there.

The state motto is *Alis Volat Propriis* (She flies with her own wings). Indeed, Oregon has much going for her, not the least of which is a willingness to do things her own way. Oregon is a beautiful state complete with beaches, mountains, agriculture, industry, and recreational opportunities. Oregon's largest industry is manufacturing, and primary among that industry are forest products, high technology, food processing, and metals.^[4] Technology-related industries are expanding rapidly. Some notable historical figures have called Oregon "home" including suffragist Abigail Scott Duniway; explorer and navigator, Robert Gray; Nez Perce leader, Chief Joseph; writer, Raymond Carver; and famed chemist, Linus Pauling.

Brad Bergford earned his BA in Political Science and Pre-Law at the University of Colorado at Colorado Springs. He earned his juris doctorate from the University of Denver, where he was active in several student bar associations, including the Student Trial Lawyers Association, the Federalist Society, and Christian Legal Society, which he served as President. After law school, Brad clerked for the Honorable Philip McNulty where he authored court opinions in a number of cases on subjects ranging from family law to constitutional law. Brad is Chief Executive Officer of Colorado Family Action/CFA Foundation, and he has his own civil litigation practice, which focuses on constitutional issues. Brad is an Alliance Defending Freedom Blackstone Fellow and Allied Attorney, and he serves as President of National Lawyers Association's Colorado chapter.

[1] *Brown, J. Henry (1892). [Brown's Political History of Oregon: Provisional Government](#). Portland: Wiley B. Allen. [LCCN rc01000356](#). [OCLC 422191413](#). Pages 132–135.*

[2] https://oregonencyclopedia.org/articles/exclusion_laws/#.XVsaeXdfzuh

[3] https://oregonencyclopedia.org/articles/exclusion_laws/#.XV3DUFb7nOQ

[4] <http://www.theus50.com/oregon/information.php>

Bleeding Kansas and Four Constitutions- Guest Essayist: Tony Williams

The state and constitution of Kansas was born amid arguably the most contentious controversy than any other state. The 1850s witnessed fierce national debates over slavery and its expansion westward with such key events as the Compromise of 1850, the furor over the Fugitive Slave Act and slavecatching, the *Dred Scott* (1857) decision, the Lincoln-Douglas debates, and the Harpers Ferry raid. These and the violent and bloody birth of Kansas helped spark the descent into the destructive Civil War.

The Kansas controversy originated in the Mexican War and the peace treaty ceding an immense tract of land to the United States in the West. Partisan and sectional arguments tore at the nation's political system as proposals such as the Wilmot Proviso offering to ban slavery in all the territory acquired from Mexico. Finally, the congressional statesmen engineered a compromise in 1850 to save the republic which included "popular sovereignty" in New Mexico and Utah, meaning that the territorial legislatures could allow slavery though no one expected slavery to take root in those areas.

In 1853 and 1854, Stephen Douglas of Illinois engineered the Kansas-Nebraska bill. Settlers in search of good agricultural land had moved to the area, and Douglas supported a transcontinental railroad running through that part of the country. Both required the area to be organized into a territory for statehood. He was agnostic on the morality of slavery and wanted to leave it up to the territorial legislatures according to "popular sovereignty" which explicitly contradicted the Missouri Compromise of 1820 for the territory.

The Congress narrowly passed the bill into law on May 30, 1854. The sectional breach in the Democratic Party damaged it for decades, while the sectional divide within the Whig Party was fatal, paving the way for the birth of the Republican Party. More immediately, abolitionist New York Senator William Seward asserted: "I accept it in behalf of the cause of freedom. We will engage in competition for the virgin soil of Kansas, and God give victory to the side which is stronger in numbers as it is in right." Southern Democrat Senator David Atchison of Missouri agreed that, "We are playing for a majority stake....The game must be played boldly."

Northerners and southerners rushed into Kansas to make it a free or slave state respectively. Pro-slavery southerners won the first round as Missourian “border ruffians” crossed into Kansas, cast thousands of illegal ballots, and elected a pro-slavery territorial legislature in Lecompton. It legalized slavery and passed a harsh slave code. President Franklin Pierce and the Democratic Senate endorsed this government. Meanwhile, the House of Representatives endorsed a rival free-state government that was established in Lawrence, called for a constitutional convention for the territory, and adopted a free constitution in Topeka in 1855.

Violence erupted in the territory. Radical abolitionist John Brown and his band murdered five pro-slavery southerners in cold blood. Southerners sacked and burned Lawrence. Other deadly incidents provoked the nickname “Bleeding Kansas” to describe the volatile situation. The violence in Kansas spread to Congress during a debate over the issue as South Carolina Representative Preston Brooks caned Massachusetts Senator Charles Sumner nearly to death.

In 1857, the Lecompton legislature called for a state constitutional convention that wrote a pro-slavery document. Both sides boycotted the other side’s referendum on the Lecompton constitution with pro-slavery voters supporting it in late 1857 and free-state voters opposed.

In 1858, the U.S. Senate voted for the Lecompton Constitution, but the House defeated it replete with an indecorous fistfight. The constitution was sent back to Kansas voters who rejected it, leaving the state’s status in limbo. At the same time, yet another constitution, the free-state Leavenworth Constitution, provided for the natural rights of African Americans but was also rejected by the Congress.

The following year, Kansans adopted the Wyandotte Constitution, which was approved by Congress in 1860 as the South seceded. Congress finally admitted Kansas as a free state and banned slavery on January 29, 1861. It was the 34th state in the Union. This constitution opened with a preamble asserting the significance of civil and religious liberty: “We, the people of Kansas, grateful to Almighty God for our civil and religious privileges, in order to insure the full enjoyment of our rights as American citizens, do ordain and establish the Constitution of the State of Kansas.” The constitution remains the constitution of Kansas though it has been amended since ratification including the addition of women’s suffrage.

The Kansas constitution was born in one of the most tumultuous periods of American history related to the causes of the Civil War. Nevertheless, it endorsed the maxims of a free society and was part of the confirmation of the principles of the Founding that occurred with the Civil War and ending of slavery in the United States.

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The Constitutional Intrigue of West Virginia

Statehood-Guest Essayist: Gary Porter

Admitted in June 20, 1863 by ratifying the U.S. Constitution, West Virginia became the thirty-fifth state. It is known as “The Mountain State” with the West Virginia State Constitution in current use adopted in 1872

The story of how West Virginia became a state is an amazing story; full of constitutional intrigue and slight-of-hand worthy of Houdini himself.

Our story begins, where else, in 1776 Virginia. Virginia’s Constitution of 1776 was a rush-job. War with Britain was eminent and Virginia would need a new government to see it through this war; time was fleeting. Anticipating that the Continental Congress then meeting in Philadelphia would consider and likely approve a call for independence,^[1] forty-five delegates assembled at Williamsburg, Virginia on May 6th. Seven weeks later, on June 29, Virginia had a new Constitution.

Virginia’s Declaration of Rights, which preceded the Constitution itself, is one of the finest written during the founding period. Largely the work of George Mason of Fairfax, VA (with some important input from a 25-year old James Madison) it elucidates several enduring principles of constitutional liberty absent even from the U.S. Constitution and its Bill of Rights.

The new Constitution was put into effect immediately upon its signing, without even so much as a nod to the people of the state. When this “non-ratification” was challenged in 1793, the Virginia Supreme Court ruled that “*This constitution is sanctioned by the consent and acquiescence of the people for seventeen years...*” Case dismissed.

The new Constitution immediately attracted critics, among them Thomas Jefferson and James Madison. Jefferson had wanted to remain in Williamsburg and work on the Virginia Constitution; instead he had been sent north to Philadelphia and on July 4th 1776, America benefited from the decision to send Jefferson north. From Philadelphia, Jefferson had sent back to Williamsburg his ideas for the state constitution. Unfortunately, they arrived too late for consideration.^[2]

Among its many features, the 1776 Constitution limited the right to vote primarily to property owners and men of wealth. This coupled with malapportionment of voting districts, concentrated power in the hands of the landowners and aristocracy of Southeastern Virginia. In the only book he ever wrote, “Notes on the State of Virginia” (1785), Jefferson listed several “capital defects” of the Virginia Constitution, including the unequal representation in the legislature.

Year after year, petitioners, largely from the western counties, called on the Virginia Assembly to initiate a constitutional convention to correct this and other deficiencies; to no avail. The House of Delegates twice passed a bill calling for a convention only to have it fail in the more conservative Senate. Western counties in the state continued to experience continued growth and increasing irritation at their lack of representation in the Assembly.

Finally, from October 5, 1829 to January 15, 1830, a convention met to “fix” the defects in the Constitution. It has been termed the last "gathering of giants." Present were two former U.S. Presidents (James Madison and James Monroe) and the sitting Chief Justice of the Supreme Court, John Marshall (the Court’s case load was apparently not as pressing as it is today). This august group of 96 men would eventually supply three presidents, seven U.S. Senators, fifteen U.S. Representatives and four governors.[\[3\]](#)

Despite the pleading of James Madison and others, the convention failed to fully rectify the Constitution’s malapportionment problem. They loosened the requirements for suffrage, but kept representation by county, which failed to solve the basic problem facing the western counties, and their residents would continue to feel under-represented and disenfranchised for the next 30 years. The 1829 constitution was put to a popular vote and passed, even while many residents in the west voted against it.

Over the next 20 years the western half of Virginia experienced a flood of new settlers. Attracted by cheap plentiful land, these hardy souls set up much smaller farms than those in the east -- farms manageable without resorting to slave labor. Calls for emancipation of the slaves and more equitable representation in Virginia’s government continued to be heard from the west.

Another constitutional convention in 1850-1851 eliminated the property requirement for voting, established popular election for the Governor and all Virginia judges, and created the office of Lieutenant Governor, also elected. Delegates took note of the rising tension between the slave-owning east and the emancipation-interested western counties.[\[4\]](#)

Rising tensions in the United States between the manufacturing North and the agrarian South, exacerbated by the issues of slavery, tariffs, nullification and state’s rights reached a breaking point on December 20th, 1860 when South Carolina seceded from the Union. In response, the Virginia General Assembly called for a convention, to meet in Richmond on February 13, 1861,[\[5\]](#) to consider whether Virginia should join South Carolina. By the end of January, six additional southern states had seceded.

On April 12, Fort Sumter was attacked and taken over by the South. Three days later President Lincoln issued a call for the states to provide 75,000 Union troops, including three regiments of 2,340 men from Virginia. Although a previous resolution to secede had been defeated in the convention, on April 17, 1861, Lincoln’s call for troops became too much: the convention approved an “Ordinance of Secession,” by an 88-85 vote. All of the western and several of the northern counties objected to the Legislature’s decision to secede, but Virginia voters overall approved the ordinance by a wide margin and the convention formally ratified the Constitution of the Confederate States of America on June 19, 1861.

Virginia’s western counties conducted “anti-secession” conventions in Wheeling, Virginia on May 11, and June 11, 1861. The Second Wheeling Convention declared the offices of all government officials in Richmond who had voted for secession to be vacant and promptly filled them with their own people. Viewed from another perspective, the Restored Government seceded from the state of Virginia. The “Restored Government of Virginia,” with Francis H.

Pierpont as their Governor, next appointed two Senators and two Representatives, who were immediately recognized by the U.S. Congress (Lincoln welcomed the votes).

Once that was complete, the “Restored Government of Virginia” moved itself to Alexandria, where it operated until 1865, while the “Secession Government of Virginia” continued to meet in Richmond.

At this point, there were two Virginia governments in existence, one meeting in Richmond and considering itself part of the Confederacy and one meeting in Alexandria considering itself part of the Union. Each claimed the entirety of the land mass of Virginia as its own. Was any of this legal? The plot thickens.

The “Restored Government,” acting in accordance with Article IV, Section 3 of the U.S. Constitution, passed a resolution allowing the counties of northwest Virginia to split off and form their own state called West Virginia. Before West Virginia is admitted to the Union as a distinct state (in 1863) there were actually three separate governments operating within the confines of the state of Virginia: one part of the confederacy, one part of the Union and one hopeful of becoming a separate state. The “Restored Government” approved a new constitution in 1864. Since this constitution was enacted under wartime conditions and the “Restored Government” stood on rather shaky ground to begin with, the 1864 constitution is not recognized as part of the constitutional history of Virginia.

The Virginia Declaration of Rights contains a statement that *“all [political] power is ... derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.”* When “the people” delegate their sovereign power to a government, is that a one-way trip, is the power forever surrendered? No, no, a thousand times no! Virginia’s Ratification Convention of the U.S. Constitution in 1788 made this crystal clear by writing: *“WE the Delegates of the people of Virginia..., DO in the name and in behalf of the people of Virginia, declare and make known that the powers granted under the Constitution, being derived from the people of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression.”* [\[6\]](#)

How much political power did the “Restored Government of Virginia” actually enjoy? That’s certainly debatable; same for the government of West Virginia, and the Secession government for that matter. Certainly possessed some legitimate political power resulting from the people each government represented.

But wait, there’s more!

There is also a provision in the Virginia Declaration of Rights of 1776 (Section 14) that reads: *“...the people have a right to uniform government, ... therefore, ... no government separate from, or independent of the government of Virginia, ought to be erected or established within the limits thereof.”* How was the “Restored Government” not in violation of the 1776 constitution? The “Restored Government” saw no problem, they considered the secessionist government officials to have vacated their offices, which the “restorers” gladly “filled.” Problem solved.

On December 5, 1865, however, the Virginia Assembly in Richmond passed legislation repealing all the acts of the “Restored Government” regarding secession of the 39 counties and the admission of Berkeley and Jefferson counties to the state of West Virginia.

In response, on March 10, 1866, Congress passed a resolution acknowledging the transfer of Berkeley and Jefferson counties from Virginia to West Virginia.

The Virginia Assembly in Richmond sued. With not a single Justice from any of the southern states on the bench, the odds were stacked against Virginia. In *Virginia v. West Virginia* (1871), the Court avoided the question of whether West Virginia’s existence as a state was constitutional and instead focused on the specific counties referred to in the trial. They quickly dispensed with a challenge by West Virginia that they lacked jurisdiction to hear the case and then sided with the “Restored Government of Virginia” that what had occurred was all right and proper, that Congress had properly approved West Virginia’s proposed Constitution and that the polling of the citizens that had been conducted during this process was legitimate. [\[7\]](#)

After the war concluded in favor of the Union, the “Restored Government of Virginia” moved its operations to Richmond and operated under the Constitution of 1864 until Virginia was placed under the military rule of Lieutenant General John M. Schofield. Schofield called for a new constitutional convention, which met in Richmond in December 1867. They enacted a constitution containing a provision that prevented Virginia from ever again leaving the Union.

On October 8, 1869, Virginia voted to ratify the Fourteenth and Fifteenth Amendments, and by doing so began the process of re-admittance to the Union, which concluded on January 26, 1870 when President Ulysses S. Grant signed an act culminating the process (But wait, wasn’t the restored “Virginia” back in the Union as of April 1861?).

The present West Virginia Constitution, enacted in 1872, begins: *“Since through Divine Providence we enjoy the blessings of civil, political and religious liberty, we, the people of West Virginia, in and through the provisions of this Constitution, reaffirm our faith in and constant reliance upon God and seek diligently to promote, preserve and perpetuate good government in the State of West Virginia for the common welfare, freedom and security of ourselves and our posterity.”*

The Bill of Rights, which comprises Article 3, not surprisingly borrows heavily from the Virginia Declaration of Rights. It is not without its unique elements, however.

Section 11 states: *“Political tests, requiring persons, as a prerequisite to the enjoyment of their civil and political rights, to purge themselves by their own oaths, of past alleged offences, are repugnant to the principles of free government, and are cruel and oppressive. No religious or political test oath shall be required as a prerequisite or qualification to vote, serve as a juror, sue, plead, appeal, or pursue any profession or employment. Nor shall any person be deprived by law, of any right, or privilege, because of any act done prior to the passage of such law.”* The first clause is a reaction to the state government passing imposing loyalty oaths in the aftermath of the Civil War. The repugnancy of such oaths, in fact, provided much of the impetus for the 1872 Constitution.

Section 15a is also unique. It reads: *“Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation or prayer. No student of a public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.”*

Section 22 makes it clear that *“A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.”* No confusing militia clause here.

Some other interesting provisions include a prohibition against duels, but only on the part of those who might later seek public office (Article 4 §10).

Since 1872, West Virginians have added more than fifty amendments to their Constitution and the rate of amendment gradually accelerated (there were only three amendments in the 19th century). There have been occasional calls for a new constitution. In 1964, the legislature passed a law that authorized the election of delegates to a constitutional convention. The movement then stalled after the state Supreme Court invalidated the law because it improperly apportioned delegate selection.

One is hard pressed to find any of the fifty United States with a more convoluted tale of statehood. Welcome to “The Mountain State.”

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[1] Delegate to the Continental Congress Richard Henry Lee had in fact been provided a resolution for independence to introduce in the Congress. He did so on June 7, 1776.

[2] The Virginians did adopt much of the Declaration’s “grievances” section (from Jefferson’s initial draft) as the preamble to their new Constitution.

[3]

https://en.wikipedia.org/wiki/Virginia_Constitutional_Convention_of_1829%E2%80%931830

[4] https://en.wikipedia.org/wiki/Virginia_Constitutional_Convention_of_1850

[5] https://www.encyclopediavirginia.org/Virginia_Constitutional_Convention_of_1861

[6] http://avalon.law.yale.edu/18th_century/ratva.asp

[7] *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39 (1871)

West Virginia: The Thirty-Fifth State- Guest Essayist: Scot Faulkner

Admitted June 20, 1863 by ratifying the U.S. Constitution, West Virginia became the thirty-fifth state. The West Virginia State Constitution in current use was adopted in 1872.

The origins of West Virginia, its current challenges, and its political dynamics are all embodied in a unique case decided by the U.S. Supreme Court in 1870.

In **Virginia v. West Virginia, 78 U.S. 11 Wall. 39 39 (1870) 78 U.S. (11 Wall.) 39** two counties demanded to be reinstated into Virginia. The Court ultimately prevented Berkeley and Jefferson Counties from returning to Virginia. In the process, the Civil War and the battlefield origins of West Virginia were reviewed in detail. Three Justices dissented, asserting that the birth of West Virginia was chaotic and violated the rights of local citizens in the Eastern Panhandle.

The three judge dissent reveals origins of the state's current political tensions. Citizens in the Eastern Panhandle continue to agitate against the highly centralized state government.

Virginian political leaders initiated a process to secede from the Union in January 1861. As a Commonwealth, Virginia gave deference to county representation. Initially, the 152 delegates were solidly pro-Union. However, old regional rivalries surfaced.

Delegates from the western counties of Virginia raised the issue of unequal political power with the eastern sections of the state. This east-west divide had been simmering since the Virginia Constitutional Convention of 1829. That State Constitution required a property qualification for voting. This disenfranchised many yeoman farmers in the more mountainous western counties. It also embraced counting slaves on a three-fifths basis for apportioning representation. Every county beyond the Alleghenies, except one, rejected the 1829 constitution, which still passed with overwhelming eastern support. The issue of regional inequality erupted again during the Virginia Constitutional Convention of 1850-1851.

On the morning of April 12, 1861, Confederate cannons opened fire on Fort Sumter in Charleston, South Carolina. After the Fort's surrender on April 13, President Abraham Lincoln issued a call for 75,000 volunteers to forcibly return the rebellious states to the Union. This was enough for the secession proponents in the Virginia Convention to prevail on April 17, 1861.

A formal vote, by county, was scheduled for May 23, 1861. Secessionists took matters into their own hands and attacked the Federal Arsenal in Harpers Ferry on the evening of April 18.

The Eastern Panhandle became the site for over 60 Civil War Battles. Local communities descended into chaos as Union and Confederate armies competed for control of this critical north-south gateway. Some towns changed hands dozens of times.

Pro-Union forces in western Virginia formed a separate state in June 1861. Former Virginia Governor, and Confederate General, Henry Wise reported that, "The Kanawha Valley is wholly traitorous... You cannot persuade these people that Virginia can or ever will reconquer the northwest."

Early in the Civil War, Union forces solidified control of northern Virginia (Arlington, Alexandria, and Fairfax). President Lincoln and the U.S. Congress merged this Unionist beachhead with the western counties as the "free" state of Virginia.

On August 20, 1861, President Lincoln empowered this military-backed civilian entity to establish the separate state of West Virginia from the pro-Union western counties that opted-out of the Secession Convention.

A "free" state convention met in Wheeling, November 26, 1861, and drafted the "Constitution of West Virginia." It designated forty-four counties, "formerly part of the State of Virginia," to be "included in and form part of the State of West Virginia." The Counties of Pendleton, Hardy, Hampshire, Morgan, Frederick, Berkeley, or Jefferson were not named as part of the state.

The new West Virginia constitution left open the possibility of adding additional counties:

"if a majority of the votes cast at the election or elections held as provided in the schedule hereof, in the district composed of the Counties of Pendleton, Hardy, Hampshire, and Morgan, shall be in favor of the adoption of this constitution, the said four counties shall be included in and form part of the State of West Virginia, and if the same shall be so included, and a majority of the votes cast at the said election or elections, in the district composed of Berkeley, Jefferson, and Frederick, shall be in favor of the adoption of this constitution, then the three last-named counties shall also be included in and form part of the State of West Virginia."

Under the terms of this Constitution, an inclusion vote was held on the first Thursday in April 1862 for citizens in the original forty-four counties, and those living in Pendleton, Hardy, Hampshire, and Morgan.

Significantly, no one in the counties of Berkeley, Jefferson, or Frederick voted on the matter, because:

"from the 1st of June, 1861, to the 1st of March, 1862, during which time these proceedings for the formation of a new state were held, those counties were in the possession and under the absolute control of the forces of the Confederate States, and that an attempt to hold meetings in them to promote the formation of the new state would have been followed by immediate arrest and imprisonment."

A series of laws were passed within the “free” state of Virginia authorizing the military-backed State Legislature to certify popular support for counties being added to the new state of “West Virginia.” On January 31, 1863, the “free” state of Virginia gave consent for the counties of Berkeley and Jefferson to be transferred to the State of West Virginia. Frederick County, still under Confederate control, remained in the old Virginia.

At the national level, an enabling act was approved by President Lincoln on December 31, 1862 for admitting West Virginia, on the condition that a provision for the gradual abolition of slavery be inserted in the state constitution.

The West Virginia state convention reconvened on February 12, 1863, and passed a new constitution including the abolition provision. The revised constitution was adopted on March 26, 1863. On April 20, 1863, President Lincoln issued a proclamation admitting West Virginia as the 35th state effective on June 20, 1863.

West Virginians in the eastern panhandle bridled under being forcibly included in a Union state. Rumors were rampant that the owners of the B&O Railroad engineered their inclusion because they did not want their rail line going through a southern state. This led to the 1870 Supreme Court decision. As recently as the 1990s, the Mayor of Charles Town, the county seat of Jefferson County, explored reopening the case.

Unlike its origins, West Virginia chose not to be a Commonwealth. It remains one of the most centralized state governments in America, possibly for maintaining unity among entrenched regional interests. Only recently did the West Virginia legislature authorize limited home rule for certain municipalities. The power of counties to control growth and levy impact fees is less than 20 years old.

West Virginia’s turbulent genesis, and its Charleston-centric political power, has led to the state earning a reputation for corruption and incompetence. “Democrats are controlled by the coal mining unions; Republicans are controlled by the coal mining executives” observed a Republican legislator.

The state is challenged in finding its economic bearings as coal use declines. It lacks internet access (West Virginia has the worst connectivity of the fifty states, while neighboring Virginia has the best). Teacher unions and a bloated state bureaucracy make West Virginia one of the most expensive per-student school systems in the country, while consistently placing 49 or 50 in academic achievement. The state steadily loses population, except for the eastern panhandle and the state Capitol of Charleston.

Except for recent Presidential elections, Democrats dominate the state. In 2016, Republicans won control of both the House of Delegates and the State Senate for the first time in 82 years. In Jefferson County, formed in 1803, it took until 2004 for the first Republican Clerk to be elected. The first Republican Jefferson County Prosecuting Attorney was elected in 2018.

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excellence. He was the Chief Administrative Officer of the U.S. House of Representatives. He started his Congressional career as an intern for Rep. Don Young (R-AK), then served on the legislative staffs of Rep. Arlan Stangeland (R-MN) and Rep. John Ashbrook (R-OH). Faulkner later served on the White House Staff and as an Executive Branch Appointee.

The Lands Forming Nevada as America's Thirty-Sixth State at the Height of the Civil War-Guest Essayist: Andrew Langer

The thirty-sixth state admitted to the Union was Nevada, having ratified the U.S. Constitution October 31, 1864, and currently uses the Nevada State Constitution adopted in 1864.

The relationship between Nevada and the federal government is as much a matter of the history of how Nevada became a state as it is the conditions under which it was granted statehood. Like many western states, states whose territories were carved out of the lands gained by the United States as a result of the Treaty of Guadalupe Hidalgo of 1848.

Until that point, states entering the union retained title to “unappropriated public lands” within their boundaries. But states entering the Union after 1848, by and large, ceded all title to these unappropriated public lands—i.e., lands that were neither privately owned, nor were they dedicated to some official public purpose—to the federal government as an incident of their becoming a state. As a result, these states, which were also much, much larger than their eastern counterparts, came into the Union with massive amounts of federal land within their midst.

There were a number of reasons for this. Keeping in mind that Nevada was admitted to the Union during the height of the civil war—the state was also rushed to admission because Republicans wanted to ensure President Abraham Lincoln’s re-election in 1864 (it turned out that Lincoln won handily, but the party politicians at the time wanted to make certain of it).

But the transfer of title of unappropriated public lands from the territories to the federal government upon statehood had a lesser-known (and from an academic perspective, really not understood at the time) benefit.

In his book, *The Mystery of Capital*, the Peruvian economist and political scientist Hernando DeSoto talks about the importance of “clearing title” to real property (i.e., land) in order to facilitate its purchase and development. The concept is simple and straightforward: people will invest in real property only when they have certainty that they have clear legal title to that land, and that this title will be protected under the rule of law.

In order to make certain that these newly-born states would be settled, it was essential that prospective residents be assured that the land they were settling would actually be theirs—that nobody else would lay claim to them down the road.

But part and parcel of this conversion of state territorial lands to federal ownership was a secondary agreement—that the federal government would “dispose” of these lands (with the exception of lands that would be used for governmental or educational purposes). In Section 10 of the Enabling Act for Nevada, passed by Congress in 1864, Congress agreed that the state would be paid a percentage of the sale of all public lands, “which shall be sold.” It was an agreement which essentially admits that Congress didn’t envision, at the time, that the federal government wouldn’t retain these lands in perpetuity.

It’s the same agreement, incidentally, that the Federal Government agreed to in essentially every enabling act after the Treaty of Guadalupe Hidalgo was ratified... and yet these states still contain tremendous federal land ownership.

The reason for this is straightforward. For many years, these lands were remote, inaccessible, and in many cases inhospitable. While much of it is used for ranching and timber production, it was many years before some of the more desolate public lands were seen as possibilities for mineral, petrochemical or recreational usage. So there was no demand for many of these lands.

But as that demand began to grow, push-back against this longstanding contractual agreement to dispose of these lands began as well—especially from recreation enthusiasts, who saw no distinction between National Park lands (clearly managed for recreational use) and lands managed by the U.S. Forest Service (which, as an agency under the U.S. Department of Agriculture are managed for timber production), the Bureau of Land Management (which manages lands used by ranchers) and a host of other agencies which lease lands out for private use.

It was out of this attitude that the Federal Land Policy and Management Act of 1976 was created. FLPMA, as it is better known, “flips” the duty to dispose on its head—and for nearly the last half-century there is instead a “duty to retain” these public lands, but the onus on localities, states, or private parties to make a heavy case for why a parcel of property ought to be disposed.

As a result, states like Nevada have huge parcels of federal land in their midst—more than 4/5 of Nevada is federally-owned. This has huge impacts on the ability of the state government and local governments to effectively exercise their authorities.

Take Nye County, NV—Nye is the third-largest county in the United States, the size of Vermont and New Hampshire combined. It is more than 90% federally-owned. When the county makes land-use decisions, in many case, these decisions have to be reviewed by a host of federal agencies, by personnel thousands of miles away working within enormous bureaucracies. At many points, there has been conflict—for instance, in the mid-1990s, a road was washed out connecting two Nye towns. Because the road crossed US Forest Service lands, the county had to work with the USFS to try and get the road reopened since, absent the road, Nye residents would have to go, literally, hundreds of miles out of the way to get from City A to City B.

The County Commissioners felt that the USFS was dragging its feet and, in fact, the forest service was reluctant to reopen the road. It came to a head when a frustrated county commissioner got on a county-owned bulldozer and opened up the closed road himself.

The federal government sued Nye County, and despite state law saying that the counties had some powers with regards to utilization of these lands, when the Nevada Attorney General refused to defend that law, the federal government won that lawsuit—leaving counties like Nye powerless in the face of massive government retention of public lands.

We continue to see flare-ups in the tension between local landowners and federal land management authorities. Despite the fact that obligations exist since states like Nevada became members of the Union, existing federal law will make it hard for land management and ownership to devolve to the states. Which means that state and local governments will still have to contend with the federal government as a massive partner in non-federal decision-making.

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Nebraska’s State Constitution and One-Of-A-Kind Unicameral Legislature- Guest Essayist: James D. Best

“Governments are instituted among Men, deriving their just powers from the consent of the governed.” —Declaration of Independence

In 1776, the world was ruled by royalty. Then some upstart colonialists penned the most revolutionary document in the history of man. The Declaration of Independence flipped the world upside down. The Divine Right of Kings became the consent of the governed. The individual was now “endowed by their Creator with certain unalienable Rights.” This was a world-shattering concept.

The people were now in charge. Our national heritage is a written constitution that sets the rules for governance between the people and their elected representatives. When Pilgrims landed at Plymouth, they almost immediately sat down and wrote a constitution called the Mayflower Compact. When our forefathers wanted independence, they felt a need to express their grievances and philosophy of government in a written Declaration of Independence. At the time of the Constitutional Convention, all thirteen states had written constitutions.

Prior to the United States Constitution, monarchies wielded general power, and since the Founders had just escaped a monarchy, they would give their national government only defined powers. If a specific power was not expressly listed in the Constitution, then that power remained with the people who could further delegate powers to the state through a state constitution.

[Nebraska Constitution](#)

Nebraska was admitted to the union after the Civil War, on March 1, 1867, based on the organic law of 1866. Nebraska adopted their constitution on June 12, 1875, eight years after becoming a state.

The preamble reads, “We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska.”

The Nebraska preamble diverts from the United States Constitution preface by calling out “Almighty God” and putting rights ahead of the “frame of government.” Nebraskans gave priority to rights, both in the preamble and organization of the document. The United States Constitution did not initially include a bill of rights and never directly referenced God. (Ratification, however, depended on a promise to immediately amend the Constitution with a list of rights.)

After amendments, the Nebraska State Constitution has the following characteristics:

- Nebraska legislature is unicameral and nonpartisan. (Unique in the United States)
- Limited to 49 seats. (Smallest legislature in United States.)
- The legislature is part-time and pays \$12,000 per year. Some contend that this makes it difficult to find good candidates. Many must drive long distances in bad weather or find temporary lodging in Lincoln. As a result, legislators tend to be wealthy or retired.
- Nebraska allows a split in the state's allocation of electoral votes in presidential elections. (Maine is the only other state.) Since 1991, two of Nebraska's five votes are awarded to the winner of the statewide popular vote and three go to the candidate with the highest vote in each congressional district.
- The Nebraska Legislature can override the governor's veto with a three-fifths majority. (36 states require a two-thirds vote)
- Nebraska has amended their Constitution to provide for an initiative and referendum process. Nebraska's initiative and referendum process can add or change law or amend the state constitution. Twenty-six states allow for initiatives or referendums and only sixteen states allow for constitutional initiatives.

The Nebraska Constitution has been amended 228 times. On November 6, 1934, an amendment converted the legislature to unicameral. Georgia, Pennsylvania, and Vermont were originally unicameral, but all three switched to bicameral in the early nineteenth century. There were no unicameral legislatures in the United States until Nebraska switched. The amendment also reduced the number of legislators from 133 to 43 (since increased to 49).

What are the ramifications?

According to Patrick J. O'Donnell, long-time clerk of the Unicameral Legislature, the nonpartisan nature of the state's legislative body remains apparent in several meaningful ways.

Legislative officers and committee chairs are elected by members themselves instead of appointed by partisan caucus leaders, and minority party members still do get elected to serve as committee chairs.

O'Donnell says that policy debates frequently tend to be less partisan in tone because of the unique nature of the Nebraska Unicameral and that final decisions are usually made on the merits of an issue rather than on the basis of political considerations alone.

Seventy-four years after its inception, the Nebraska Unicameral remains one-of-a-kind among U.S. state legislatures. O'Donnell says that other states have frequently visited Nebraska over the years to study the workings of the Unicameral, but so far at least, no other state has followed Nebraska's lead. *

The Nebraska legislature generally has more power than other state legislatures. The unicameral nature removes an internal legislative check and the small size gives each member more authority than their counterparts in other states. Additionally, to override a governor veto requires only 60% of the legislature, rather than the 67% required for a two thirds majority.

The Nebraska Constitution is not controversial and state residents seem content with it. The only current issue deals with the wording of Section I-1, which reads, "There shall be neither slavery nor involuntary servitude in this state, otherwise than for punishment of crime, whereof the party shall have been duly convicted." A 2020 ballot measure will eliminate the potential of slavery as punishment for crime. Nebraska does not use chain-gangs, so the change will have no practical effect.

The United States Constitution 10th Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Many believe that powers not defined in the Constitution are reserved to the states. They forget the last two words of the amendment. State power, like national power, is delegated by the people to the respective governments within our federal system.

Politicians may need occasional reminders that all governmental power resides with the people.

* Council of State Governments, [A legislative branch like no other](#)

[James D. Best](#), author of [Tempest at Dawn](#), a novel about the 1787 Constitutional Convention, [Principled Action](#), [Lessons From the Origins of the American Republic](#), and the [Steve Dancy Tales](#).

The Bill Of Rights and the States- Guest Essayist: Gary Porter

How the Bill of Rights Was Aimed at the Federal Government Because States Had Their Own Bills of Rights

James Madison was suspicious of a Declaration of Rights at the national level. In a letter to his friend Thomas Jefferson, then serving as Minister to France, Madison confessed that his “own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration.”^[1] He was particularly concerned “that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition would be narrowed much more than they are likely ever to be by an assumed power.”^[2] But Madison had seen, first-hand, the obstinacy of the states under the Articles of Confederation towards the rights of their citizens. In his “*Vices of the Political System of the United States*,” Madison decried the “*Injustice of the laws of States*.” While the “multiplicity” and “mutability” of state laws showed a “want of wisdom,” their “injustice” was “still more alarming: more alarming not merely because it is a greater evil in itself, but because it brings more into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights.”^[3]

Madison told Jefferson that in their home state he had “seen the bill of rights violated in every instance where it [was] opposed to a popular current.” His precious “rights of conscience” were particularly vulnerable. Madison was livid over the jailing of Baptist preachers in the neighboring Culpeper County, calling it “that diabolical Hell conceived principle of persecution” in a letter to his College of New Jersey classmate William Bradford.

In 1776, Madison had the opportunity to strike a blow for liberty of conscience by successfully arguing, as Virginia’s Declaration of Rights was being drafted, that the principle of “toleration” towards other Christian denominations, even if it was *fullest toleration*, was simply not enough. Citizens would not enjoy complete liberty of conscience until “all men are equally entitled to the free exercise of religion.”

It comes as no surprise then to see Madison try once again to protect liberty of conscience in 1789 when drafting his proposed amendments to the new Constitution. One proposed article read: “No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” In the ensuing floor debate it was argued that this amendment was improper; the Constitution gave the federal government no authority to alter the state constitutions, and such an amendment would certainly amount to such an alteration, at least in the state constitutions where a right of conscience was not already secured. Madison, however, viewed this as the most important amendment in the whole list, his reason being, “If there were any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against State Governments.” Madison was eventually outvoted and the “infringement” on the states was “left on the cutting room floor.”

The Constitution already contained some specific words concerning state powers; Article 1 Section 10 enumerated several tightly targeted prohibitions, and the 10th Amendment made clear that any power not specifically granted to Congress was reserved to the states and/or the people.

Congressmen in the summer of 1789 were well aware that the constitution of nearly every state predated the new U.S. Constitution and that they had been working well. Almost all of them contained either Declarations of Rights or specific protections in the body of the constitution; some of these protections were more elaborate even than those which ended up in the U.S. Bill of Rights.[\[4\]](#)

That's the way things would stand for the next 136 years; but I'm getting ahead of myself.

In the early 1830s, the city of Baltimore, Maryland, began a public works project that required the modification of several streams that emptied into Baltimore Harbor. Construction resulted in large amounts of sediment entering the streams, which flowed into the harbor near a wharf owned and operated by one John Barron. The sediment eventually reached the point where it became nearly impossible for ships to approach Mr. Barron's wharf and his business dropped precipitously. Barron sued the City of Baltimore for his financial loss, arguing that the city's action "took" his property without the due process promised him by the Fifth Amendment. He was awarded \$4,500 in damages by the trial court, but a state appellate court reversed the decision. Barron appealed to the Supreme Court, which ruled[\[5\]](#) that the Fifth Amendment's guarantee of just compensation when private property is taken for public use is a restriction on *the federal government alone*. The opinion in *Barron v. Baltimore* by Chief Justice John Marshall held that the Constitution's first ten amendments[\[6\]](#) "*contain no expression indicating an intention to apply them to the State governments.*"

This made perfect sense. The first five words of what became known as the Bill of Rights: "Congress shall make no law..." make clear the target of the amendments – Congress (and by implication, the rest of the federal government), not the states.

On February 26, 1866, in debate over what became the 14th Amendment, the amendment's principal author, Rep. John Bingham, was asked whether he intended the amendment to apply, as some perceived, "only to the eleven states lately in rebellion." Bingham replied: "It is to apply to other States also that have in their constitutions and laws to-day provisions in direct violation of every principle of our Constitution."[\[7\]](#)

The following day, Rep. Bingham rose to elaborate upon the preceding day's debate.

"Excuse me. Mr. Speaker, we have had some most extraordinary arguments against the adoption of the proposed amendment..."

"Mr. Speaker, I speak in behalf of this amendment in no party spirit, in no spirit of resentment toward any State or the people of any State, in no spirit of innovation, but for the sake of a violated Constitution and a wronged and wounded country whose heart is now smitten with a strange, great sorrow. I urge the amendment for the enforcement of these essential provisions of

your Constitution, divine in their justice, sublime in their humanity, which declare that all men are equal in the rights of life and liberty before the majesty of American law.

“Representatives, to you I appeal, that hereafter, by your act and the approval of the loyal people of this country, every man in every State of the Union, in accordance with the written words of your Constitution, may, by the national law, be secured in the equal protection of his personal rights. Your Constitution provides that no man, no matter what his color, no matter beneath what sky he may have been born, no matter in what disastrous conflict or by what tyrannical hand his liberty may have been cloven down, no matter how poor, no matter how friendless, no matter how ignorant, shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice; that justice which requires that every man shall have his right: that justice which is the highest duty of nations as it is the imperishable attribute of the God of nations.”

Representative Robert Hale of New York rose to ask whether he might be allowed “to ask a single question pertinent to this subject?” Bingham accepted.

(Hale) “I desire ... to ask [Mr. Bingham], as an able constitutional lawyer, which he has proved himself to be, whether in his opinion this proposed amendment to the Constitution does not confer upon Congress a general power of legislation for the purpose of securing to all persons in the several States protection of life, liberty, and property, subject only to the qualification that that protection shall be equal...”

(Bingham) “It certainly does this: it confers upon Congress power to see to it that the protection given by the laws of the United States shall be equal in respect to life and liberty and property to all persons.”

(Hale) “Then will the gentleman point me to that clause or part of this resolution which contains the doctrine he here announces?”

(Bingham) “The words ‘equal protection’ contain it, and nothing else.”

It would take the Supreme Court 39 years to come around to Bingham’s thinking on the 14th Amendment.

Eight years after the 14th Amendment was ratified, in fact, in *United States v. Cruikshank*, the Court affirmed, once again, that the Bill of Rights *did not* apply to the states. In *Cruikshank*, it meant that the First Amendment’s right to assembly “was not intended to limit the powers of the State governments in respect to their own citizens, but to operate upon the National Government alone.”^[8]

We skip forward to July 1919. Benjamin Gitlow, a member of the Socialist Party of America, who had served in the New York State Assembly, published a document called “Left Wing Manifesto” in *The Revolutionary Age*, a newspaper for which he also served as business manager. The State of New York charged Gitlow with criminal anarchy under New York’s Criminal Anarchy Law of 1902.

At trial, Gitlow insisted that his “Manifesto” consisted of historical analysis and did not advocate anarchy. Nevertheless, he was convicted and sentenced to five to ten years in prison. He appealed, and the case eventually reached the Supreme Court.

The question presented to the court was: “*Does the First Amendment prevent a state from punishing political speech that directly advocates the government's violent overthrow?*” The Supreme Court said “No,” finding that “*Freedom of speech and of the press, as secured by the Constitution, is not an absolute right to speak or publish without responsibility whatever one may choose or an immunity for every possible use of language.*” They upheld Gitlow’s conviction with the explanation that the government may suppress or punish speech that directly advocates the unlawful overthrow of the government, but the Court took the unprecedented step in announcing that, “*for the purposes of the case, that freedom of speech and of the press are among the personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.*”[\[9\]](#) (Emphasis added) This became what is now called the “Incorporation Doctrine.”

After Gitlow, the Court began the tedious process of clause by clause incorporation as specific cases allowed. Not every clause of the Bill of Rights was deemed worthy of incorporation; in *Palko v. Connecticut*, the Court ruled that only those rights that were “*of the very essence of a scheme of ordered liberty*” should be incorporated.[\[10\]](#) We should note that the phrase “scheme of ordered liberty” appears nowhere in the Constitution. To mold a court-invented doctrine so that it aligns with a syrupy but entirely unconstitutional phrase would seem the height of judicial hubris.

Some notable exceptions to incorporation thus far include the entire Third Amendment (outside the jurisdiction of the Second Circuit Court of Appeals), indictment of a Grand Jury (Fifth Amendment) and the right to a jury selected from residents of the state and district where the crime occurred (Sixth Amendment).

A list of those clauses incorporated can be found on Wikipedia.[\[11\]](#) The most recent addition to the list is the “Excessive fines” clause of the Eighth Amendment in February 2019 (in *Timbs v. Indiana*)

The incorporation Doctrine is not without its critics,[\[12\]](#) this writer being one of them. While it may be appropriate for the states to be held responsible for protecting the rights specified in the Bill of Rights, having the Supreme Court invent the doctrine of incorporation without input from We the People is blatantly unconstitutional. The American people should have been allowed to conduct a national conversation over the idea, an appropriate Constitutional amendment should have been proposed and, if ratified, the feat would have been accomplished, constitutionally. Instead, the court, never intended by the Framers to be representative of the people, took it upon itself to act. This is certainly in line with the view of Chief Justice Charles Evan Hughes that “[w]e are under a Constitution, but the Constitution is what the judges say it is....”[\[13\]](#) The acquiescence of the American people since 1925 has been perceived as their acceptance.

Bryan Keith Morris, in *The Incorporation Doctrine: A Legal and Historical Fallacy*, takes a *textualist* instead of *original intent* position (as taken by the Court) in arguing that the Incorporation Doctrine should be discarded. John P. Frank obliterates the originalist position in “*The Original Understanding of “Equal Protection of the Laws.”*”^[14] Both essays should be read before someone comes to a conclusion on the matter.

Today, Associate Justice Clarence Thomas and others maintain that the privileges and immunities clause of the Fourteenth Amendment and not the due process clause should provide the anchor for the Incorporation Doctrine. Thomas recently reiterated this view in his concurring opinion in *Timbs v. Indiana*.

No matter what your position of the rectitude of the Incorporation Doctrine today, it is indisputable that those who approved and ratified the Bill of Rights had no intention of infringing on the powers of the several states.

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^[1] James Madison to Thomas Jefferson, 17 Oct. 1788.

^[2] Ibid.

^[3] <https://founders.archives.gov/documents/Madison/01-09-02-0187>.

^[4] See https://www.americanthinker.com/articles/2018/12/state_bills_of_rights_have_the_real_protections.html

^[5] *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

^[6] The Constitution had 12 amendments by then.

^[7] <https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/congress-debates-fourteenth-amendment-1866>.

^[8] <https://caselaw.findlaw.com/us-supreme-court/92/542.html>.

^[9] <https://supreme.justia.com/cases/federal/us/268/652/>.

^[10] https://en.wikipedia.org/wiki/Palko_v._Connecticut.

[11] https://en.wikipedia.org/wiki/Incorporation_of_the_Bill_of_Rights.

[12] <https://lonang.com/wp-content/download/TheIncorporationDoctrine.pdf>.

[13] Speech before the Chamber of Commerce, Elmira, New York (3 May 1907); published in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906–1908* (1908), p. 139.

[14] https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2738&context=law_lawreview.

Role of State and Local Government and the Bill of Rights- Guest Essayist: Joerg Knipprath

When the Constitution was submitted to the American people in conventions in the several states, many objected that the lack of a bill of rights made the general government a dangerous tool of oppression. They looked to English antecedents, such as the English Bill of Rights of 1689, their historical colonial charters, many of which had contained express reservations of rights, and their existing state constitutions, many of which--but not all--had bills of rights. Some supporters of the Constitution, such as Alexander Hamilton, considered bills of rights empty verbiage at best, and dangerous implications of general governmental powers at worst. Moreover, Hamilton pointed out--in some tension with his previous argument-- that the Constitution already contained limitations on the general government, for example, in the important provision in Article I, Section 9, against *ex post facto* laws. However, the need to get favorable outcomes in some closely-divided conventions persuaded the Constitution's supporters to agree to promote a bill of rights once the new government was successfully established.

The First Congress set to that task. The initial set of amendments drafted by Representative James Madison were distilled from those submitted by the various state ratifying conventions, with the author declaring to Congress "I shall not propose a single alteration but is likely to meet the concurrence required by the constitution." While most of those changes dealt with the powers of the general government or with limits to be imposed on that body, one group did not. Hamilton had also criticized the fact that the New York constitution, like that of some other states, lacked an explicit bill of rights. If anything, he noted, states needed bills of rights more than the federal government did, because they were governments of general and inherent legislative power, while the federal government was one of limited and delegated powers. For the former, then, *any* restriction on its powers had to be express.

Madison proposed to amend Article I, Section 10, of the Constitution (which dealt with restrictions on state governments), to add, "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The House Committee of Eleven, to whom Madison's proposal was referred, modified his language somewhat and added a protection of the freedom of speech. The House of Representatives made several changes. First, it changed the basic approach. Rather than revise the text of the original Constitution by

interlineation of these changes, the original text would remain, and the changes would be separated and formally styled “Amendments.” Second, it rephrased the proposal as “ARTICLE the FOURTEENTH,” which declared, “No State shall infringe the right of trial by Jury in criminal cases, nor the rights of conscience, nor the freedom of speech, or of the press.”

Two weeks later, the Senate passed its own version, which omitted all references to limitations on state governments. The Senate’s version of the proposed amendments was, in essence, what was finally submitted to the states for approval. It is not entirely clear why the Senate dropped the restriction on state governments, though their selection by the state legislatures may have made Senators reluctant to impose express limits on those bodies. As a result, the Bill of Rights (and the 27th Amendment, which was proposed then, but failed to get the requisite state support until 1992) is concerned entirely with powers of the general government and with limits thereon.

In 1833, Chief Justice John Marshall, in *Barron v. Mayor of Baltimore*, confirmed that neither the Takings Clause of the Fifth Amendment at issue there, nor any other provision of the Bill of Rights, applied to the states. Referring to the constitutional settlement of 1789 that resulted in the adoption of the Bill of Rights, Marshall noted that the amendments “demanded security against the apprehended encroachments of the general government--not against those of the local governments.” There matters remained, formally, for nearly a century. Any restrictions on state governments, other than those in Article I, Section 10, had to come from the respective states’ constitutions.

In a society as locally-focused as Jefferson’s “Yeoman Republic” of artisans and farmers, such an arrangement made sense. But with the growing industrialization and its accompanying commercial intercourse shaping stronger regional and--more gradually, national--bonds, a new constitutional settlement was needed. The social dislocations caused by the “Industrial Revolution” were increasingly the targets of state law. Direct federal regulation of peacetime commerce did not occur until near the end of the 19th century with the Interstate Commerce Act, directed at the railroads, and the Sherman Antitrust Act, directed at John D. Rockefeller’s Standard Oil Trust and similar “malefactors of wealth.” The new entrepreneurial class that opposed state interference in their economic activities was frustrated by the variability of protections offered by the state constitutions and, if they were interstate companies, by the inconvenience and potential contradictions of state-by-state litigation to protect their interests.

There was the germ of another constitutional approach during this time, in the form of *Corfield v. Coryell*, a case in 1823 from the federal circuit court. Supreme Court Justice Bushrod Washington (George Washington’s nephew), as circuit judge, declared that the Privileges and Immunities Clause of Article IV, Section 2, protected a citizen of one state travelling to another state against discriminatory legislation by the latter, at least as to the exercise of certain fundamental rights. The “P & I Clause” had its antecedent in the Articles of Confederation. Washington wrote, “We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.” Washington’s opinion reflected the “higher law” reasoning, based on theories of natural law,

natural rights, and broad principles of freedom reflected in the social contract, to which the courts of that time had frequent recourse to limit the actions of state governments.

The drawback of *Corfield* was that Washington correctly held that the P & I Clause only applied to state laws that targeted out-of-state visitors. It was an anti-discrimination protection, not a guarantee of basic rights to anyone. Since state laws typically restricted in-state businesses as well as interstate enterprises, *Corfield* was of limited use initially.

Further change came through the adoption of the Fourteenth Amendment in 1868. That amendment contains protections against laws by state and local governments that infringe the privileges or immunities of citizens, that deprive persons of life, liberty or property without due process of law or that deny a person the equal protection of the law. The first Supreme Court decision to address the application of the Fourteenth Amendment to safeguard property and economic liberty against state regulation came in the *Slaughterhouse Cases* in 1873. An association of butchers in New Orleans challenged a state-created slaughterhouse monopoly. The Court rejected their claims and held that the privileges and immunities clause only protected rights of national citizenship, that is, rights that arise directly from a citizen's connection to the federal government, such as the right of access to federal instrumentalities, and certain rights protected in the Constitution itself, such as the right of assembly and petition. As to due process, that clause only protected rights of fair trial. The equal protection clause only protected Blacks against racially discriminatory state laws.

The dissent in the *Slaughterhouse Cases* envisioned much greater protections. Using remarks made during the congressional debates on the amendment, Justice Stephen Field claimed that the privileges and immunities protected were those listed in the Bill of Rights, as well as those that would be within Justice Washington's expansive description in *Corfield*. This would include the right to pursue any lawful trade or profession without the restriction posed by a state-licensed monopoly. Justice Joseph Bradley proposed an alternate theory, that the Louisiana law's substance was an unconstitutional deprivation of property and liberty without due process.

The *Slaughterhouse* justices generally agreed that the Fourteenth Amendment applied some or all of the Bill of Rights to the states. Moreover, the dissenters argued that broad conceptions of privileges and immunities, and of property and liberty also restricted the states. Both approaches subsequently were used by the Supreme Court to overturn state laws. While Justice Field's broad reading of privileges and immunities did not catch on, Justice Bradley's views became the majority's in *Allgeyer v. Louisiana* in 1897 and *Lochner v. New York* in 1905. There, the Court overturned economic regulations as a violation of the "liberty of contract" protected under the Due Process Clause. This doctrine of "substantive due process" is no longer used to invalidate federal laws (under the Fifth Amendment's Due Process Clause) or state laws (under the Fourteenth Amendment's) that regulate economic liberty, but has been used to strike down laws that violate various ill-defined aspects of the "right of privacy," including long-standing laws that defined traditional marriage, prohibited certain forms of sexual conduct, and restricted access to contraception and abortion.

In addition to such "unenumerated" rights, the Supreme Court gradually applied the specific guarantees of the Bill of Rights to the states. Scholars debate about which case first

“incorporated” specific provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. At the turn of the 20th Century, the Supreme Court began to acknowledge that some rights protected by that clause were similar to those in the Bill of Rights. In any event, beginning in the 1930s, the Court over the next three decades clearly moved to incorporate, first, the Free Speech and Free Press Clauses and, second, various criminal procedure protections.

Three factions developed among the Supreme Court justices. One group, led by Justice Benjamin Cardozo, argued that only certain “preferred freedoms” within the Bill of Rights are incorporated into the Due Process Clause. Under this process of “selective incorporation,” only those freedoms that are “implicit in the concept of ordered liberty” would be applied against the states in the same manner that they applied to the federal government. Writing in *Palko v. Connecticut* in 1938, Cardozo defined these as the “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” a vague and flexible formulation reminiscent of that by Bushrod Washington in *Corfield* a century earlier.

Justice Felix Frankfurter leaned towards Cardozo’s approach, but argued that the federal government and the states had different roles in our federal system. Particularly in the traditional state law domain of criminal law and procedure, the interests of the states must be balanced against the right at issue. As a result, the scope of the Bill of Rights protections when incorporated against the states should be similar to, but not necessarily identical with, those protections when they directly limit the federal government.

Justice Hugo Black urged “wholesale incorporation” of all of the first eight amendments of the Constitution. Black relied on his reading of the congressional debates over the Fourteenth Amendment, and on what he saw as the main purpose of that Amendment. The Court rejected Black’s approach as unsupported by the historical record. However, even though Black lost that battle, he effectively won the war. On recognition of the increased mobility and homogenization of our population across the country, the Court has come to incorporate almost all provisions of the first eight amendments. Only the Third, Seventh, and small parts of the Fifth and Eighth Amendments so far have avoided the process of the nationalizing of rights through their incorporation into the Due Process Clause of the Fourteenth Amendment.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

The Sovereignty of a Free and Radically Independent People: Colorado's Enduring Constitutional Heritage-

Guest Essayist: David Kopel

The 1876 Colorado Constitution contains the strongest declaration of state's rights of any American constitution: "The people of this state have the sole and exclusive right of governing themselves, as a free, sovereign and independent state." (Colo. Const., art. II, § 2). The powerful affirmation of the people's right to govern themselves arose from the conditions of early Colorado and has shaped Colorado ever since.

In modern times, Coloradoan's right of self-governance has been vigorously exercised, such as by the 1992 citizen initiative adding the Taxpayer's Bill of Rights (TABOR) to the Colorado Constitution. The strictest tax and expenditure limit in the nation, TABOR requires voter approval for all increases in taxes, and all government spending increases greater than inflation plus population growth.

Back in 1972, big business and big government teamed up to procure the 1976 Winter Olympics for Colorado. But Coloradoans were leery of anything that would promote the state's already rapid growth. And they did not want their money being used to fund the already-rich International Olympic Committee. So Coloradoans passed a constitutional amendment by voter initiative, forbidding all taxpayer funding for the 1976 Olympics. As a result, the 1976 Winter Olympics were instead held in Innsbruck, Austria, which already had the necessary facilities, having hosted the 1964 Winter Olympics.

In the twenty-first century, the voters of Colorado adopted constitutional amendments for the regulated sale of medical marijuana (2000) and adult use marijuana (2012). In essence, the voters ordered state government officials to conspire to violate the federal Controlled Substances Act by setting up government-supervised systems for the distribution of marijuana. Given total quantities involved in this "conspiracy" (tons of marijuana, and many millions of dollars), the Colorado government officials have, arguably, been committing federal felonies that qualify them as drug "kingpins," subject to very severe mandatory sentences.

Yet consistent with the "sole and exclusive right" of Coloradans to govern themselves, state executive branch officials and the Colorado General Assembly have obeyed the Colorado Constitution, and created a carefully controlled, highly taxed, government-supervised system for the production and retail sale of marijuana. "Sole and exclusive" indeed.

As a practical matter, Coloradoans in the State's founding era had no choice but to be their own "sole and exclusive" governors. While there had been mountain men and a few trading posts in Colorado since the early 19th century, substantial American settlement of Colorado did not begin until the discovery of gold in 1858. By 1859, a rush of settlers had created the towns of Denver and Colorado City (today, Colorado Springs), as well as mining camps in the nearby mountains.

Formally, the land that would become the State of Colorado was part of four territories: Kansas (whose population center was in eastern Kansas), Utah (Salt Lake City), New Mexico (Santa Fe),

and Nebraska (Omaha). The Colorado settlements were in the far west of the Kansas Territory, near or in the Front Range of the Rocky Mountains.

But the territorial government of Kansas had little influence in Colorado. It was busy with conflict in eastern Kansas between pro-slavery and anti-slavery forces. There was a Kansas judge for Colorado, but he never went to Colorado. None of the territorial governments could do much to assist remote Colorado. The settlers were on their own.

The first Colorado governments were created by the people themselves, as “miner’s districts” in the mining regions, as “claims clubs” in farming areas, and as “town companies.” These voluntary associations recorded and certified property ownership, provided courts for settling disputes, and organized vigilance committees for law enforcement. Some towns elected their own legislatures. They created “people’s courts” for criminal prosecutions. The decisions of the miner’s districts were later ratified in the first session of the territorial legislature. They were also approved by the Colorado Territorial Supreme Court. By accepting and integrating the decisions of the *ad hoc* miners’ courts and other early bodies, the developing territorial courts provided continuity of law.

Early Colorado never devolved into the anarchy that had characterized California in its own early gold rush years. Because about thirty percent of Colorado’s miners had experience in California, they understood the importance of creating effective local self-government immediately. Thus, the miners’ districts were quickly established. Experienced code writers traveled from town to town, helping to create local law.

Defying the nominal authority of the Kansas territorial government, the settlers in September and October 1859 created their own ad hoc government for what they called the “Territory of Jefferson.” Provisional Governor Robert Steele addressed the opening of the Jefferson legislature on November 7, 1859. He explained that the people had been denied protection of life and property; being sovereign, they had taken measures for their security.

As of 1860, Denver had five competing court systems. Meanwhile, “the mountain counties stood by their Miner’s courts, and as much of the Provisional Government as suited them.” W.B. Vickers, “Territorial Organization,” in *Legislative, Historical and Biographical Compendium of Colorado* (Denver, C.F. Coleman’s Publ’g House 1887), p. 145. Other Coloradans created judicial districts for what they called “Idaho Territory.”

In short, there were multiple governments in Colorado with alleged jurisdiction, and in fact the people of Colorado entirely governed themselves:

“Side by side sat the Idaho “central judicial” officers, the provisional government of Jefferson, the Kansas county officials, the Denver people’s government, scores of miners’ courts, and local governments and vigilante committees. Never had frontier democracy blossomed so vigorously. With popular sovereignty in the saddle, the northern part of Bent’s old empire was already a far cry from the tradition-bound and caste-conscious territory of New Mexico. A new kind of democratic, middle-class, commercial-minded frontier had arrived on the borders of the Spanish Southwest.”

Howard Roberts Lamar, *The Far Southwest 1846–1912: A Territorial History* (rev. ed. 2000), pp. 187–88.

As Territorial Secretary Frank Hall later wrote, they were “a free and radically independent people.” 1 *Frank Hall, History of the State of Colorado* (vol. 1, 1889), p. 369.

The survival of the Colorado Territory was in constant peril. In 1861, as the Civil War began, a Confederate invasion launched from Texas and swept far into New Mexico. The Texans were turned back by Colorado volunteer militia at the Battle of Glorieta Pass, near Santa Fe, in February 1862, a battle known as “the Gettysburg of the West.”

Not long after, and for years to come, Indian wars threatened to wipe out the Colorado settlers.

Three trails led to the Colorado settlements: in the southeast, a branch of the Santa Fe Trail; in the center, the Smoky Hill Trail, from Fort Leavenworth, Kansas, to Denver; and in the north, the South Platte Trail, which traversed Nebraska and then dropped down to Denver. Goods were transported in wagons drawn by oxen or mules.

The white settlers, clustered along the Front Range and in mining towns, could not survive a cutoff of their trade routes with the States. The territory was not self-sufficient in food, and imports were essential for survival. Not long after the Civil War began, the Smoky Hill Trail and the Santa Fe Trail became too dangerous to use. Federal troops there were sent east, leaving travelers vulnerable to Confederate guerillas and to Indians in the river valleys. The South Platte Trail was the only lifeline connecting Colorado to the States.

The Colorado War began in April 1864, led by the Cheyenne Dog Soldiers—the tribe’s leading military society. In alliance with the Arapahoe, Sioux, Kiowa, Comanche, and Apache, they shut down the South Platte Trail and all other trails. Food prices soared, mail and telegraph communication were cut off, and starvation threatened. When the Governors of Kansas and Colorado asked for federal troops, they were told by the federal commander of the Trans-Mississippi Theater, General Samuel R. Curtis, “We have none to spare, you must protect yourselves.” Hall, p. 328. For the remainder of the decade, Colorado’s survival was precarious.

In 1861 and 1864, Coloradoans had voted against seeking statehood. Since the federal government bore the cost of administering the territory, Coloradoans would not have to tax themselves to pay for government. Although the thrifty attitude has endured to the present, by the early 1870s the territorial governors appointed from Washington, D.C., had become so corrupt as to be unbearable to the people of Colorado. So they began to seek statehood.

Congress passed the Colorado Enabling Act on March 3, 1875, the final day of the congressional session. President Grant immediately signed it, having called for Colorado’s admission in his December 1873 written message to Congress.

The Colorado Constitutional Convention convened on December 20, 1875. The Convention finished its work by unanimously adopting a proposed constitution on March 14, 1876.

On most issues, including the Bill of Rights, partisan divisions were not important. On issues where there was controversy—such as votes for women or whether to acknowledge the deity in the preamble—the divisions did not break down along party lines.

The fundamental problem for the Convention to solve was not a partisan one. Rather, it was the inherent tension in what the delegates wanted. They knew they did not want a “do nothing” government. To the contrary, their constitution ordered the creation of state institutions for higher education, for care for the insane, and for the blind, deaf, and mute. The delegates required the establishment of “a thorough and uniform system of free public schools,” and that such schools not be racially segregated. The Framers created a commissioner of mines, and ordered the general assembly to enact laws prohibiting child labor in mines, and to enact laws for safe working conditions in the state’s most important industry. The Convention wrote the first American constitution to mention forests, instructing the general assembly to “enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state.” This was an early manifestation of the Colorado ethos of conservation.

The new constitution further provided that the general assembly “shall” enact “liberal homestead and exemption laws,” “shall” pass arbitration laws, and “shall” enact laws against “spurious, poisonous or drugged spirituous liquors.”

Yet while the Convention had a list of things it mandated the legislature to do, at the same time, the Convention profoundly distrusted the legislature. In the words of one scholar, “The delegates created a legislature and then, as though they regretted their work, they took most discretionary authority from it.” Donald Wayne Hensel, *A History of the Colorado Constitution in the Nineteenth Century* (Aug. 9, 1957) (unpublished Ph.D. dissertation, University of Colorado), p. 133.

The 1876 Convention was meeting in “the post-Civil War era, when popular distrust of legislatures was at its height.” G. Alan Tarr, *Understanding State Constitutions* (1998), p. 199. The Colorado Constitution went especially far to hem in the government, with the longest state constitution up to that point in American history. As amended, the Colorado Constitution remains the one of the longest, reflective to Coloradans’ inclination to instruct their government exactly what it should do and cannot do.

Article V, creating the Colorado House of Representatives and Senate, is much longer than Article I of the U.S. Constitution, which creates the Congress. Article V contains many procedural restrictions on the process of enacting legislation. In addition, legislative sessions were limited to forty days, with no legislative sessions in even-numbered years. A variety of constitutional provisions outlaw taxing, spending, or borrowing on behalf of corporations or other private interests. Later, the first constraints on the legislature would be bolstered by amendments, adopted by the people.

The people of the Colorado Territory adopted the Colorado Constitution on July 1, 1876: 15,443 in favor and 4,052 opposed.

Colorado's Fourth of July celebrations in 1876 may have been the most exuberant in the nation. A large parade in Denver was led by the Colorado militia, with officers on white horses and the troops on black ones. Each of the thirty-eight states was honored with its own float. On August 1, 1876, President Ulysses Grant issued the proclamation making Colorado the thirty-eighth state.

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North Dakota: Constitution to Statehood -Guest Essayists: Kimberly Porter and Donna Pearson

The Constitution of North Dakota provided the final step on the road to statehood; however, it was not the only step on the pathway. The process required the acquisition of the Great Plains from France in 1804, as well as the subordination of Native Americans who had called the region home for centuries.

Assorted fur traders, trappers, missionaries and explorers, including Meriwether Lewis and William Clark, traveled the lands seeking to discover its riches: furs, minerals, a passageway to the Pacific Ocean, etc. Large numbers of European-Americans did not settle the region until the 1860s with greater numbers arriving in the 1870s and 1880s.

Beyond the purchase of the Louisiana Territory, the first major move towards statehood and the need for a constitution in North Dakota came with one of President James Buchanan's last acts as president of the United States. On March 2, 1861, just two days before Abraham Lincoln took the oath of office, Buchanan signed a bill creating Dakota Territory. This territory would later be divided into the states of North and South Dakota, as well as portions of Wyoming and Montana. At the same time, the Nebraska Territory was modified to appear much like the state it would become.

Individuals did not flock to the lands which would become North Dakota. Not only did the Civil War rage elsewhere, but so did Indian uprisings, particularly one in Minnesota and Dakota Territory later referred to as the Great Dakota Uprising. Railroads had not yet crossed the region as they did in areas more centrally located, i.e., Kansas and Nebraska. Even the offer of free lands via the Homestead Act (1862) did not populate the land necessary to apply for statehood.

By 1870, the future state had a European-American population of approximately 2400, but within the next ten years, the European-American population grew to 37,000. For those who dreamed for statehood, the number of settlers rose dramatically in the decade of the 1880s. Taken shortly after statehood was achieved, the census of 1890 recorded a population of 190,000. Forever after known as the Great Dakota Boom, the explosion in population can be ascribed to an increasing influx of population from Europe, the presence of two railways across the entirety of the state, the end of incursions with Native Americans, and the claims made on

more southern regions for free homestead land. The lands that became South Dakota had experienced many of these pressures a generation beforehand and commenced the pathway to statehood earlier. (See entry on South Dakota for details of that state's path to membership in the federal union.)

Residents of the future South Dakota did not seek to join with their northern twin. There was a distinct feeling in the southern half that the northern portion was controlled by the railroads, was more strongly attached to Canada than the United States, and that its inhabitants were somewhat less desirable than those immigrants in the south. Hence, Dakota Territory did its utmost to attract homesteaders and businessmen to the northern half by positively publicizing the region throughout the United States and western Europe. Free pamphlets and even a 500-page book were dispatched upon request.

Also encouraging the movement towards statehood and a Constitution was the sense that young men in the state were overlooked in the political processes. Most governmental positions were appointed from Washington, D.C., leaving unknown westerners out of the bidding.

At this time, the Democratic Party held the movement to statehood in check. Knowing that any new state in the northern reaches of the nation would most likely vote for the Republican Party, President Grover Cleveland, a Democrat, did nothing to encourage the addition of northern states to the Union. The partisan debate concluded with the election of Republican Benjamin Harrison to the White House in 1888. Just before leaving office, Cleveland signed the Omnibus Bill, allowing North and South Dakota, Washington, and Montana the privilege of calling Constitutional Conventions as a precursor to statehood.

On July 4, 1889, 75 delegates descended on Bismarck, the territorial capital. Elected in units of three from twenty-five districts representing the extant population of North Dakota, the conventioners heavily claimed the eastern third of the state home. This would prove a continuing force upon the state of North Dakota to the current day.

No member of the constitutional convention had been born in North Dakota, all were European-American, male, and under forty-five years of age. They were comparatively well-educated, with considerable representation from the legal and publishing professions. Also present in significant numbers were farmers, many of whom felt an allegiance to the Farmers' Alliance and leaned towards the Republican party.

Forces upon the convention were plentiful. The federal government set the stage, initially denying the Dakotas the right of convening a Constitutional session, but also by requiring the future state to adhere to the Constitution of the United States, to be republican in form, and to provide land grants to support education. Railroads, often simply referred to as "corporations", held sway as well. The Northern Pacific Railway as well as grain dealers, implement manufacturers, and banks could control the territory from a distance by acquiring political appointments. They were fully aware that controlling a state from within would be somewhat more difficult. A relatively weak government would be in their interests.

Farmers, a considerable portion of the convention delegates, could also claim relative power in Bismarck. Due to economic woes of the 1870s and 1880s, many had joined the Farmers' Alliance, hoping to gain power in the marketplace as well as in the halls of government. The farmers presented the largest organized force at the convention. Control of the terminal market for wheat, the railroads and sources of credit were vital if their dreams were to become reality.

The farmers, businessmen, newspaper owners, attorneys and other assorted delegates gathered exemplar states' constitutions for discussion and edification. All were from eastern locales, making a pattern for the over-creation of institutions. Only Major John Wesley Powell's argument for the state to maintain possession of the waters usable for irrigation made the cut.

Advice for the construction of the state's constitution did not only come from Powell of United States Geological Survey, it also came from the Northern Pacific Railway. Henry Villard, chairman of the Northern Pacific's board of directors, asked Harvard Law Professor James Bradley Thayer to prepare a draft constitution for North Dakota. Submitted by a delegate from Bismarck, the document brought with it considerable debate.

Thayer's draft shaped, but did not control, the Constitution that came out of the convention. Lively debate ensued on woman suffrage, jury reform, a unicameral legislature, the prohibition of railroad passes for public officials and union. None of the above were adopted. However, what did come from the discussions was a relatively moderate document with reformist ideas. Based in considerable distrust of corporations, the conventioners determined to limit the power of the governor and the legislature by placing the power for decision-making in those realms into the hands of independent boards, as well as putting considerable legislation into the actual constitution. Citizens themselves carried considerable responsibility. Covering the vital issues took time and ink. The constitution of North Dakota is six times longer than the federal constitution.

As an example of legislating, the state constitution of North Dakota includes fourteen institutions and their geographical placement. Grand Forks, for example, is the mandated site for the state university, while Bismarck is delegated the capital, and Valley City and Mayville normal (teaching) schools. Not only were the vast number of institutions placed in the eastern portion of North Dakota, as befits the homes of the conventioners, but their mention in the constitution ensures closing or moving any state institution to be exceptionally problematic.

An issue of considerable importance at the time of statehood was whether the manufacturing, sales and consumption of alcohol should be prohibited. After contentious debate, it was determined that the future-state's citizens would have the opportunity to vote on the constitution, and whether to ban alcohol from the state. After 45 days, the assembly adjourned on August 17, 1889.

On October 1, voters ratified the constitution, 27,441 to 8,107. Opposition to the constitution came primarily from those areas of North Dakota that felt cheated by the distribution of governmental institutions. The ban on alcohol was close. Prohibition came to North Dakota by a vote of 18,552 to 17,393. North Dakota was the first state to enter the Union as a "dry" state.

On November 2, 1889, President Benjamin Harrison had before him the constitutions of North and South Dakota. In a rare moment of levity for the president, he declared that neither state should have the pride of being the first or the last of the Dakotas to become a part of the Union. Accordingly, he stirred them a bit and signed his name, twice. The luck of the alphabet has given North Dakota the rank of 39th state and South Dakota 40th.

The constitution created in Bismarck, Dakota Territory, is essentially the one that the residents of North Dakota are called upon to abide to this very day. The Constitution lays forth the powers of the judicial, legislative, and executive branches, as well as the checks upon those branches. The legislature is permitted to meet only 60 days each biennium, unless an emergency calls them together. This check is to limit the development of a professional class of politicians in the state, and to ensure that the officials elected to the legislature maintain a connection with their electors.

The governor is specifically prohibited from influencing the vote of any member of the legislature via promises to sign or veto legislation, or to provide or deny an appointive office. The numerous independent boards of control, as well as a listing of 35 subjects on which the legislature is expressly forbidden to interest itself, keeps the state's electoral structure somewhat weak.

The weaknesses of North Dakota's constitution are deliberate as they reflect a population fearful of outside control, excessive debt, and professional politicians.

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South Dakota: Admission as a New State and Its 1889 Constitution-Guest Essayist: Patrick M. Garry

South Dakota was admitted to the United States November 2, 1889 as the fortieth state. In the same year of 1889, the South Dakota State Constitution in use today was adopted.

On March 2, 1861, President Buchanan signed the bill that created the Dakota Territory. Within this territory were included the present states of North and South Dakota, Montana and Wyoming. After creating the Dakota Territory, the federal government paid relatively little attention to it, given the preoccupation with the war. But as soon as there was sufficient population in the territory, the settlers in the Dakota Territory began taking steps to achieve statehood. Starting in 1868, efforts intensified toward the admission of Dakota, either as a single state or two different states.

Even though the Dakota Territory was being settled during the Civil War, South Dakota did not become a state until 1889. This long delay in the pursuit of statehood stemmed from political conflicts at the national level. During the 1880s, for instance, the Democratic Congress opposed statehood for South Dakota, which was seen as a strongly Republican-leaning state. The Democratic Congress resisted admitting a state that was certain to send two more Republicans to the United States Senate. Consequently, the congressional debate on the issue of South Dakota statehood rested largely on a partisan basis.

However, the obstacles to statehood for South Dakota largely disappeared when Benjamin Harrison won the presidential election of 1888, beating Grover Cleveland. President Harrison had been a strong supporter of statehood for South Dakota during his time as senator from Indiana. At the same time, the Republican Party won control of Congress, and the national Republican Party platform of 1888 had stated that South Dakota should be immediately admitted as a new state.

The statehood bill was passed in February of 1889 and authorized the state constitutional convention of 1889, which was to be the first constitutional convention in South Dakota legally recognized by Congress. The resulting constitution was approved by the people at an election held in October. And on November 2, 1889, President Harrison issued his proclamation admitting South Dakota as a state.

Although the 1889 convention produced the Constitution in effect today, it was not the first constitutional convention convened by statehood advocates. The first constitutional convention for South Dakota took place in 1883, even though that convention was not authorized by Congress.

The 1883 constitution reflected the political concerns of the times. South Dakotans sought statehood at a time when railroads and corporate conglomerates played powerful roles on both the state and national scene. Although the railroads greatly contributed to South Dakota's development and population, they also threatened to corrupt state legal and political processes.

At the 1883 convention, there were concerns that corporations should pay the same rate of taxes as private individuals, should not be allowed to consolidate, and should receive no aid that is not given private parties. The Convention also required the legislature to regulate railroad rates and prohibit unjust rate discrimination. The convention delegates feared that railroads or other large corporations could exercise excessive influence over the legislature.

A second constitutional convention convened on September 8, 1885. This convention has been called the most important ever held in South Dakota, insofar as the constitution produced by that convention, with a few minor changes, became the constitution authorized by Congress and ratified by the voters in 1889.

The South Dakota statehood bill passed by Congress in February of 1889 necessitated a third constitutional convention so as to make the 1885 constitution conform to federal law. By the time the 1889 convention occurred, the Farmers' Alliance of Dakota Territory was playing a major political role. With declining prices for farm crops and higher production costs, many farmers had fallen deep in debt. For political relief, they turned to the Alliance, which played an influential role in securing the Initiative and Referendum provisions in the Constitution.

Perhaps the most unique feature of the South Dakota Constitution was its provisions on the Initiative and Referendum. South Dakota was the first state in the Union to adopt the Initiative and Referendum, which was later adopted by dozens of other states.

Whereas the Initiative allows the public to bypass the legislature and directly pass new laws in a general election, the Referendum allows the public to repeal a law previously enacted by the legislature. Initiative and Referendum was one of the hallmark causes of the Populist movement of the late nineteenth century.

The Populist movement promoted the Initiative and Referendum as an essential means of achieving economic reforms aimed at controlling the political power of railroads and eastern banks. South Dakota was the first state in the nation to have an active Populist Party, which in 1892 made the Initiative and Referendum a central part of its platform.

The campaign to bring Initiative and Referendum to the Dakota Territory was fueled by the economic events of the time, with Dakota farmers attributing declining commodity prices to the manipulations of railroads and eastern banks, and believing that rural interests would be better able to control those outside entities through the Initiative and Referendum process.

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Big Sky Country of Montana: History and Statehood-

Guest Essayist: Brad Bergford

Native American peoples lived in the area of present-day Montana for an unknown period of time before the arrival of the first Europeans in the 18th century. Most of present-day Montana was included in the Louisiana Purchase, which President Jefferson completed in 1803. The next year, President Jefferson commissioned the Lewis and Clark Expedition. Soon after, Catholic missionaries entered Montana. Beaver trappers followed shortly thereafter. Through the first twenty years of the 19th Century, the Salish people learned about Christianity because of their contact with the Iroquois people and with Jesuit priests. In the 1830s, the Salish people began sending emissaries to Jesuits in St. Louis, Missouri to request that a “blackrobe” (Jesuit priest) be sent to them in present-day Montana. The blackrobes were finally able to send a priest to minister to the Salish people in 1841.

Between 1848 and 1864, parts of present-day Montana were included in several U.S. territories, including the Oregon, Washington, Dakota, and the Idaho Territories. Montana was the site of the battle between the Sioux people and the U.S. Army, which we often refer to as “Custer’s Last Stand,” and it carries a lively history typical of the Old West.

Like many western states, the discovery of gold had a lot to do with Montana’s early days and its admission to the Union as a state. Congress designated Montana a territory after gold was discovered in 1862 by a fur trapper who, it is rumored, attempted to keep his discovery a secret to preserve the area for fur trapping. Two decades later, railroads made their way across Montana, and, if it wasn’t already, the state fully entered the throes of western expansion. Nicknamed the “Treasure State,” Montana became the 41st state in 1889. The state motto, “Oro y Plata,” translates “Gold and Silver.”

Montana’s Constitution was re-written in 1972 and contains a Declaration of Rights which reads much like the federal Bill of Rights. It contains protections for religion, speech, and the press, as well as prohibitions on ex post facto laws and on unreasonable searches and seizures, to name a few. The freedom of religion provision, for instance, closely follows the U.S. Constitution’s First Amendment Establishment and Free Exercise Clauses: “The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.”

In 1916, Montana suffragist, Jeanette Rankin, became the first female member of U.S. Congress. During the Great Depression, President Franklin D. Roosevelt’s New Deal brought new projects and agencies to Montana and ushered in Montana’s first reliance on federal spending—a reliance that continues to this day. In its early days, natural resources were the state’s primary economic boon.

Montana, known to many as the “Big Sky” state, is the fourth-largest U.S. state by area and boasts many scenic areas. Flathead Lake is the largest freshwater lake between the Pacific Ocean and the Mississippi River. The Rocky Mountains run right through the state, although the average elevation of Montana is only 3,400 feet. Nearly 500 bison live in National Bison Range, which was established for their preservation. Montana’s seven Indian reservations host eleven

tribal nations. Established in 1872, Yellowstone National Park is the first National Park in the United States.

Recently, agriculture and tourism have risen to prominence in Montana's economy. In June 2019, a Montana court case brought new attention to the state when the U.S. Supreme Court granted certiorari to a religious liberty case called *Espinoza v. Montana*. There, the state of Montana is being sued for refusing, based on its Blaine Amendment, to allow religious schools to participate in a scholarship program. (Blaine Amendments prohibit the expenditure of public funds directly to educational institutions with religious affiliations.) The case is highly anticipated in light of *Trinity Lutheran v. Comer*, which ruled on narrow grounds that religious groups cannot be barred from participation in widely available public programs simply because they are religious. *Espinoza v. Montana* will test whether Blaine Amendments will survive and, if so, in what form.

Montana has a rich heritage that began long before it became a state. From Native American cultures to the gold rush to its mountainous beauty and expansive plains, it has been a land filled with excitement and wonder. Today's Montana carries the echoes of the past in its vibrant western roots, and it offers anticipation of a dynamic future as new industries establish leading roles for the future.

Brad Bergford earned his BA in Political Science and Pre-Law at the University of Colorado at Colorado Springs. He earned his juris doctorate from the University of Denver, where he was active in several student bar associations, including the Student Trial Lawyers Association, the Federalist Society, and Christian Legal Society, which he served as President. After law school, Brad clerked for the Honorable Philip McNulty where he authored court opinions in a number of cases on subjects ranging from family law to constitutional law. Brad is Chief Executive Officer of Colorado Family Action/CFA Foundation, and he has his own civil litigation practice, which focuses on constitutional issues. Brad is an Alliance Defending Freedom Blackstone Fellow and Allied Attorney, and he serves as President of National Lawyers Association's Colorado chapter.

History of Washington State and Its Constitution-Guest Essayist: Mary Salamon

The individual states in the United States didn't form all at once. With each state, there was a process to their creation, and yet they share similar beginnings. The first beginnings of each state start with the Native American tribes, explorers, missionaries and then settlers. This process laid a foundation for new territories that would eventually separate into individual states.

Washington State's famous explorers are George Vancouver, Robert Gray and the American explorers Lewis and Clark. George Vancouver came to the Pacific Northwest with two ships, the Discovery and the Chatham. Vancouver named everything in sight, which included islands, mountains and waters. Puget Sound is named after **Peter Puget**, a lieutenant accompanying him on the expedition. To this day, we still have the names Whidbey Island, Mount Baker, [Mount](#)

[Rainier](#), and Hood Canal are all key geographical features in the state of Washington named by Vancouver.

Robert Gray was the first American explorer to circumnavigate the globe. The Columbia River is named after his ship the Columbia and Grays Harbor County is named for **Grays Harbor** the bay in the southwest corner of the county that Robert Gray discovered.

The Lewis and Clark expedition open the United States to several new finds. According to Historylink.org, “In May 1803, the United States purchased Louisiana from France. The doubling of U.S. territory caused President Thomas Jefferson (1743-1826) to send Meriwether Lewis (1774-1809) on a westward expedition to explore the nation's new piece of real estate. The Corps of Discovery was a party of 33 people, including Sacagawea, a Shohone [*sic*] Indian, and York, an African slave. The Corps, under the leadership of Captain Lewis and Captain William Clark (1770-1838), traveled by foot, horse, and watercraft across North America and back again beginning in Wood River, Illinois, in May 1804, and returning to St. Louis, Missouri, in August 1806. The period the Corps spent along the Columbia and Snake rivers and at the mouth of the Columbia -- from October 1805 to May 1806 -- was principally within what is now the State of Washington.”

<https://www.historylink.org/File/5556>

Lewis and Clark Expedition is credited with discovering 178 plants species. Two Plants, *Lewisia rediviva* (also known as bitterroot) and *Clarkia pulchella* (elkhorn clarkia) – were named after the explorers.

In the Pacific Northwest, there were Native American tribes all over the region. There were the Chinook, Makah, Lummi, along with Nooksack, Nez Perce, Salish, and the Tlingit. On the other side of the mountain in Washington were Yakima, and Spokane tribes. The Cayuse and Okanogan tribes were further south in the region. Every story is different, but in general, the beginning relationships between the Indians and the Settlers were friendly and cordial at first, then disputes over trade and land erupted, and then war ensued.

One particular event that is well known in Washington History is the “Whitman Massacre.” In 1836 the Whitmans established a Protestant mission next to the Walla Walla river, but at the time it was on the Cayuse Tribe’s land. In a similar fashion with Squanto and the Pilgrims, the Cayuse Indians showed the missionaries how to plant and cultivate crops and fed them food till the missionaries were able to harvest their own. Of course, the goal of Marcus Whitman was to covert many Indians to Christianity, and the Cayuse Indians were hoping for a prosperous relationship of trade and goods. Tensions rose higher and higher as more settlers came into their land taking portions without compensation.

It finally came to a murderous head when more than 4,000 settlers arrived in the region in 1847. They brought an epidemic of measles. The epidemic brought death to almost half of the Cayuse Indians living near Whitman’s Mission. The anger peaked because only a few of the white settlers died. The Cayuse Indians attacked the Mission killing Whitman’s and eight other people.

It was a brutal attack that led to five of the Indians being hung, but also bringing more division and the creation of the Oregon Territory.

In 1848 Oregon Territory was created. This included the future states of Oregon, Washington, and Idaho and a portion of Montana. Only a few years later, the people north of the Columbia river wanted to branch off and become a separate territory. According to Historylink.org, "On February 8, 1853, a federal bill was introduced to separate "Columbia Territory" from Oregon. Representative Richard H. Stanton of Kentucky, believing that the first president should be honored with the name of a state or territory, and noting that the federal capital already recognized the name "Columbia," amended the bill to read "Washington Territory." On March 2, 1853, President Millard Fillmore (1800-1874) signed the act. He dispatched Isaac Stevens (1818-1862) to govern the new territory, which until 1863 included Idaho.

President Grover Cleveland (1837-1908) selected the anniversary of George Washington's birthday, February 22, 1889, to sign the act creating the state of Washington, but his proclamation of admission was not issued until November 11, 1889. The Great Event was celebrated with cannon fire, public and private meetings, parades, and endless oratory."

<https://www.historylink.org/File/5661>

According to Ballotpedia, "The Washington State Constitution describes the fundamental structure and function of the state's government. It consists of a preamble and 32 articles. This constitution is the second in Washington's history. The first one was ratified in 1878, and the current version on October 1, 1889.^[3]

The territory of Washington voted to apply for statehood in 1876. They sent Orange Jacobs, the territory's delegate, to Congress to enable an act that would allow statehood after a constitution was ratified. The first constitutional convention met in Walla Walla, Washington to draft the constitution in 1878. When it was presented to voters in November, it was overwhelmingly approved.

This did not allow Washington statehood as Congress failed to act on the proposed constitution. The 1876 constitution was then used during the drafting of Washington State's 1889 Constitution. A second constitutional convention met in Olympia, Washington from July 4 to August 22, 1889. This time, 75 delegates helped draft the constitution which was ratified on October 1, 1889. President Harrison issued a proclamation admitting Washington to the Union on November 11, 1889."

https://ballotpedia.org/Washington_State_Constitution

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The Frontier Closes: Foreign Policy and the Status of the States (Part 1)- Guest Essayist: Will Morrisey

For one hundred years—roughly between the ratification of the United States Constitution and 1890—the “extended republic” James Madison described in *The Federalist* did indeed extend, from sea to shining sea. As Americans settled each new swath of territory they sought and received recognition as states of the Union, equal to all states that preceded them, including the original thirteen. This great period of American empire-building far exceeded anything done subsequently (for example, the acquisition of territories from Spain in the late 1890s) and proved far more lasting than the ‘scramble for empire’ undertaken by the European states during that time. America became what Jefferson wanted it to be: an “empire of liberty,” that is, a union of free and equal states, with republican regimes securing the natural rights of all its citizens in principle and of most if not all in practice.

The question of the exact terms and conditions of American federalism, especially the status of the states within it, was answered in principle by Abraham Lincoln in his speeches and in practice by the Union armies in the Civil War. The pseudo-republican oligarchies of the states that formed the Confederacy were defeated, although they reconstituted themselves to a substantial degree, in different form, after Reconstruction ended. States’ rights could no longer serve as a carapace for slavery, although it would so serve for legal racial segregation for much of the next century. But the Union had survived.

The year 1890 saw another, less stark but still unsettling crisis. For the past century, the migrations of Americans to the West had relieved the older states of the need to address the worst economic and social tensions modern industrial societies had faced. Now, however, the United States effectively had become an island, bordered by oceans on each side, the Caribbean in the south, and to some extent the Great Lakes in the north. It was a giant island, but an island nonetheless. With immigrants still coming in from Europe, with industrialism and urbanization intensifying in the East and Midwest, what would become of the country? Could the regime of commercial republicanism sustain itself against populist and socialist ideologues who sought to exploit these pressures? Could federalism withstand pressures to ‘nationalize’ everything—that is, bring it under the rule of the central government to the diminution of the state governments?

The historian Frederick Jackson Turner framed perhaps the most high-level expression of this anxiety. In his 1893 paper presented to the American Historical Association’s annual meeting in Chicago, “The Significance of the Frontier in American History,” Turner argued that it was the settlement of the frontier, fostering the character of Americans as independent, self-governing yeoman farmers, which had (to coin a phrase) made America great. Not so much Christianity, not the principles of the Declaration of Independence, not the Constitution, and surely not any biologically-based racial superiority over the American Indians, but the frontier itself, the virtues the cultivators cultivated along with their crops, gave Americans the moral fiber needed to make them a strong, free, and united people. With the closing of the frontier, the elimination of the conditions of this character-building way of life, would Americans not succumb to moral decline, and ultimately lose both their empire and their republicanism? The ‘Turner thesis,’ as it came to be called, galvanized academic and even journalistic discussion for decades thereafter.

Not only professors and pundits saw this problem, however. As it happened, an ambitious young politician named Theodore Roosevelt had already published two volumes of his book *The Winning of the West*, in the years immediately preceding Turner's study. The young civil service reformer from New York City, who had 'gone West' himself, to the Dakotas, after his beloved wife's death in 1884, also argued for the importance of the frontier in forming the American *ethos* through its rugged way of life. Roosevelt understood the West not so much as a land for peaceful if rugged farming as an arena for warfare pitting semi-civilized Americans against uncivilized Indians. The West built not only the steady, yeoman virtues of Jeffersonian agrarianism but also and above all the martial virtues of George Washington. Whereas Europeans (so long as they stayed in Europe) could only exercise those virtues against other civilized nations, with all the moral hazards attendant—most spectacularly—in Napoleonic despotism; and whereas if Europeans abandoned such ambitions, as proposed in projects for "perpetual peace" such as that proposed by the philosopher Immanuel Kant, only to risk a softening of spirit, moral decay, Americans had solved the problem by advancing civilization *without colonization*—that is, without keeping newly-won territories in political subservience to the 'Mother Country.'

Whether one argued for Turner's yeomanry or Roosevelt's militias and posses, or some combination of them, as the inspiring conditions of American courage and self-government, the dilemma of the 1890s remained the same: How will Americans perpetuate their republican regime and empire, now that the frontier has closed?

Roosevelt also saw another danger, outlined in the 1890s by the British naval strategist, Alfred Thayer Mahan. As far back as 1787, in *The Federalist*, Alexander Hamilton had argued that oceans are as much highways as they are barriers; as a Caribbean-born transplant to New York, he needed no book to teach him that. By 1890, technology had made this obvious to everyone, as steam-powered vessels having replaced the old sailing ships and telegraphs making 'messaging' nearly instantaneous. These improved means of transportation and of communications had strengthened European empires; by Queen Victoria's Diamond Jubilee in 1897, Britannia not only ruled the waves but about one-fourth of the land on earth and about one-fifth of its population, while France, Germany, Russia, Austria-Hungary, Turkey, and even Belgium had substantial holdings as well.

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The Frontier Closes: Foreign Policy and the Status of the States (Part 2)- Guest Essayist: Will Morrisey

Such radically changed circumstances, which would lead to the *world* wars of the next century, presented American strategists with a set of problems noticeably different from those seen by Washington and his successors. Would the strengthening empires block American trade? Would they again threaten American shores, as they had not done since 1812? Further, having fought a devastating civil war, we were less likely than ever to invite the prospect of another war on our own territory—especially given the increasingly devastating power of modern weapon wielded by the well-organized and trained mass armies raised by modern states. We needed to re-think the question of strategic depth, a question we thought we'd answered by turning the middle part of North America into an empire of liberty. And we also needed to re-think our policies regarding international commerce. All without eradicating the constitutionally legitimate powers of the state governments.

American strategists proposed several policy choices. The first, advocated by German immigrant and old Republican Party ally of Abraham Lincoln, Carl Schurz, was simply to continue Washington's policy: to eschew not only empire beyond our own continent ("overseas empire," as he called it) but even to eschew any major strengthening of the military—this, on the traditional grounds that big military establishments threaten republican regimes. By far the most distinguished American statesman to advocate this policy in the next century was Herbert Hoover, whose "magnum opus" (as he called it), *Freedom Betrayed*, lays out an argument for staying out of the Second World War, and for what critics called 'isolationism' generally. Whatever one thinks of this as a realistic foreign policy for the modern world, it would surely have kept American federalism intact.

The second, opposite, policy was advocated by the young Indiana Republican Senator Albert J. Beveridge, who called for a vast imperial project based upon the alleged superiority of the white race, a notion itself based upon the 'race science' that formed part of early Progressivism. The most famous of Beveridge's speeches remains "The March of the Flag," delivered at a Republican Party convention in Indiana. In it, Beveridge called for American conquest of the rest of the Americas and their incorporation into the United States—not, to be sure, as equal states, but as colonial territories. At the time, theories of racial superiority were very much a part of the Progressive movement, and Beveridge might be described as the most vocal representative of the militarist wing of Progressivism, which ranged from the militarism of Beveridge to the pacifism of Jane Addams. This policy would have ended the American practice of considering newly-acquired territories as future states, instead turning the New World into a facsimile of European empires.

It took President Theodore Roosevelt to find a more realistic solution to the problem, the one that has prevailed for more than a century. Theodore Roosevelt advocated the use of a greatly-expanded navy, which he eventually succeeded in obtaining, and peacetime military conscription for the army, which he hinted at but never formally proposed. These forces, but especially the navy would be used not so much for imperial expansion but for obtaining naval bases throughout the world, usually but not always with the consent of foreign governments. These bases would

counterbalance the much more expensive (and, as it turned out, untenable) imperialism of the Europeans. While happy to seize Cuba and the Philippines from the Spanish, he had no interest in retaining them, but he very much liked the idea of establishing naval bases at Guantanamo and Subic Bay. As for permanent acquisitions, he intended to hold on to Hawaii and Puerto Rico as outposts complicating foreign naval attack on the Pacific and Atlantic coasts.

To reinforce America's opposition to European imperialism in the New World, and to answer Beveridge, Roosevelt also propounded his well-known "Corollary" to the Monroe Doctrine, stipulating an American right to intervene in Latin American countries if they fell down on their debt payments to European nations. Such refusal to repay loans, if it became "chronic" (as Theodore Roosevelt put it), would invite European military intervention into the Western Hemisphere—exactly the thing the original Monroe Doctrine was intended to discourage. This policy soon provoked anger from the people it was intended to protect, and President Franklin Roosevelt replaced it with his "Good Neighbor" policy in the 1930s.

From this perspective, Theodore Roosevelt's foreign policy becomes quite coherent: Drive the weakened Spanish imperialists out of the Caribbean and the Philippines while blocking other empires (especially the Brits and the Germans) from seizing them; then spur the peoples of the newly-acquired countries to govern themselves. This meant recurring to the old American policy of regime change (first used by the Washington Administration in the southeastern states in its dealings with the Cherokee and other nations in that area), while obviating the need to (quite implausibly) make them into U.S. states and avoiding their (un-American) use as permanent colonies of our own. Add the Panama Canal, linking the Atlantic and Pacific oceans for both trading and military purposes, and you see that Theodore Roosevelt aimed at recovering America's strategic depth under the circumstances caused by the new technologies of war.

Such a policy held out the prospect of retaining American federalism while avoiding 'containment' strategies Great Britain and other regimes, then and in the future, would deploy against us. American federalism was compromised in any event, by Presidents Wilson, FDR, Lyndon Johnson and their allies, but this was done for domestic reasons, although sometimes under the cover of the quite different policy of liberal internationalism, which looks forward to the weakening not only of American federalism but of American sovereignty altogether.

Will Morrisey is William and Patricia LaMothe Professor Emeritus of Politics at Hillsdale College, and is a Constituting America Fellow; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

July 3, 1890: “We, the People of the State of Idaho”- Guest Essayist: Gary Porter

Known as “The Gem State,” Idaho ratified the U.S. Constitution July 3, 1890 admitting the forty-third state to the Union. The Idaho State Constitution currently in use today was adopted on the same day as the state’s admission to the Union, July 3, 1890.

“We, the people of the State of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.” So begins the Idaho Constitution.

I’ve been to Idaho, many times. I’ve fished its waters, hiked its trails, hunted its elk (successfully), eaten its potatoes and golfed its links; it’s a beautiful state which also gave birth to a beautiful woman who would eventually become my wife. You should visit.

You may recall that, thanks to President Thomas Jefferson’s foresight and his Secretary of State, James Madison’s constitutional interpretation, the United States gained title to what was commonly called the Louisiana Territory from France in 1803, extending the United States of America all the way to the Pacific Ocean. Two years later, on their way to that ocean, Lewis and Clark entered present-day Idaho on August 12, 1805, at Lemhi Pass, bringing with them the first black man to also enter the land. In 1819, a treaty with Spain removed that country’s claim to the same land. One would think these two actions, with France and Spain, would settle the question of who owned the land that would one day become Idaho. One would be wrong; one more treaty would be required. In the 1820s, the British-owned Hudson’s Bay Company moved in and soon controlled the fur trade in the Snake River area. They encountered competition from French fur trading companies, and before too long, additional Americans. British claims to the land were settled in 1846 by the Oregon Treaty and the area became undisputed U.S. territory for the first time. Under U.S. jurisdiction over the next few years, the land mass of what would become Idaho was alternately made part of the Oregon Territory and Washington Territory.

Idaho’s gold rush began in 1860 when placer gold was discovered at Pierce, Idaho, and the industry continues to this day, 3 million troy ounces (more than 90 tons) later. Three years after the gold rush began, a silver rush followed that has produced 1 million troy ounces to date.[\[1\]](#)

Captivated by the thought of siphoning off some of the newfound wealth, Congress began encouraging the land be recognized as a distinct territory.

On December 15th, 1862, in the midst of the Civil War, Congressman William Kellogg of Illinois, introduced the following resolution in the House of Representatives: "Resolved, That the Committee on Territories be instructed to inquire into the propriety of establishing a Territorial government for that region of country in which are situated the Salmon river gold mines; and that they report by bill or otherwise." Two months later, the “Organic Act of the Territory of Idaho,” passed by both Houses and signed by the President on March 3, 1863, provided a temporary government for the territory.

As created by Congress, the Territory extended across an area one-quarter larger than Texas. Today's state is much smaller but still as large as all six of the New England states combined, with New Jersey, Maryland, and Delaware thrown in for good measure. Traveling from Bonner's Ferry in the north of the state to Montpelier in the extreme southeast requires a trip of nearly 800 miles, only slightly shorter than a trip from New York City to Chicago.[\[ii\]](#)

Idaho's Constitution,[\[iii\]](#) which forms the basic governing document of the state, was adopted on August 6, 1889 by a constitutional convention. After the convention concluded its work, the proposed constitution was submitted to a vote of the people with this caution:

"You will bear in mind that there has, never will be, nor is it in the power of men to frame, a constitution that will meet the views of all. The framers of the constitution fully realizing this fact, labored earnestly to harmonize all conflicting interests. If twenty conventions were held it is not probable one of them would frame a constitution with as few defects as the one now submitted for your examination, and upon which you are to vote."

These words bring to mind similar remarks of Benjamin Franklin on September 17, 1787:

"I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others... I doubt ... whether any other Convention we can obtain, may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opinion, their local interests, and their selfish views. From such an assembly can a perfect production be expected?"

Constitution-making can indeed be messy.

Back in Idaho Territory, the convention approved the proposed constitution by a hefty margin and it was ratified in a statewide vote in November, 1889. Congress approved the ratified constitution on July 3, 1890 and President William Henry Harrison signed the bill creating the state the same day, making Idaho our 43rd state, with, at that time, a population of 88,548.

The "Idaho Admission Bill" reads: "Therefore, Be it enacted by the Senate and House of Representative of the United States of America, in Congress assembled, That the State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the Constitution which the people of Idaho have formed for themselves be and the same is hereby, accepted, ratified and confirmed."

Idaho's Declaration of Rights, forming the Constitution's Article 1, borrows heavily from that of Virginia, which, as a Virginian, I find flattering. There are also many features copied from the U.S. Bill of Rights.

Some unique and interesting features of the Declaration include:

In Section 7, dealing with juries, only three-fourths of the jury is needed to render a verdict in civil actions, and in misdemeanors cases five-sixths of the jury can render a verdict.

Section 9 holds citizens responsible for abusing their right of free speech.

Section 11 prohibits any confiscation of firearms except when they are used in the commission of a felony.

Section 15 provides that there will be no imprisonment for debt in the state except in cases of fraud (i.e., no debtors prisons needed!).

In Section 19, the right of suffrage is guaranteed. “No power, civil or military, shall at any time interfere with or prevent [its] free and lawful exercise.”

Section 20 prevents any property qualification from being imposed on the citizens in order to vote “except in school elections, or elections creating indebtedness, or in irrigation district elections, as to which last-named elections the legislature may restrict the voters to land owners.

Section 22, added in 1994, contains an extensive list of the rights of crime victims. I couldn’t determine when this was added to the Constitution.

Finally, Section 23 of the Declaration of Rights, its final section, guarantees Idaho citizens the right to hunt fish and trap. “Public hunting, fishing and trapping of wildlife shall be a preferred means of managing wildlife.”

In the main body of the Constitution we find a few unique features.

Article 3, Section 20 prohibits gambling in the state, it being “contrary to public policy.” This prohibition does not extend to Indian tribal lands.

Section 24, entitled “Promotion of Temperance and Morality,” is interesting. It reads: “The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.” Wouldn’t it be nice if all states did this?

And in Section 28 we find the now ineffective statement: “A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”

The Governor, Lieutenant Governor, Secretary of State, State Controller, State Treasurer, Attorney General and Superintendent of Public Instruction all hold their offices for a four year term. The Governor enjoys a line-item veto on appropriations bills, joining 43 other U.S. governors with similar powers.

Interestingly, the legislature must maintain a balanced budget and is prohibited from incurring any debt unless they do so by law and provide, in the authorizing legislation, a plan to pay off such debt within 20 years.

Article 9, dealing with education and school lands, begins with the declaration: “The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.” (Emphasis added)

Idaho was early settled by Mormons, especially in its southeast sections. We may detect a bit of Mormon backlash in Section 6 of Article 9, when we read: “No sectarian or religious tenets or doctrines shall ever be taught in the public schools, nor shall any distinction or classification of pupils be made on account of race or color. No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.” Compulsory attendance is mandate between the ages of 6 and 18.

Article 10 provides that Boise shall be the state’s capitol, at least for the first 20 years, after which the state legislature can vote to move it elsewhere, something they have yet to get around to do. Incidentally, ever mindful of their natural resources, Idaho’s State Capitol building is the only one in the nation to be heated by geothermal water from a source 3,000 feet below the ground.[\[iv\]](#)

Article 14, dealing with the Militia makes “all able-bodied male persons, residents of this state, between the ages of eighteen and forty-five years,” a member of the militia, and requires that they “perform such military duty as may be required by law;” unless they have “conscientious scruples against bearing arms.”

Idaho has abundant streams and rivers, but getting precious water to arable lands takes an extensive network of irrigation canals. Not surprisingly, there is an extensive section of the Constitution devoted to “Water Rights.” (Article 15)

Taken in the whole, Idaho’s is a well-constructed Constitution, perhaps explaining why it has remained in force (albeit extensively amended) since 1890.

On March 25, 2016, the state carried on its tradition of being a gun-friendly state by legalizing the carry of concealed firearms without a permit.[\[v\]](#)

Oh, and Idaho’s Great Seal was designed through a contest won by Emma Edwards Green, apparently the only woman to design the official seal of a U.S. state.[\[vi\]](#)

Idaho’s current 1,754,208 residents[\[vii\]](#) wait to welcome you.

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[i] <https://www.goldmapsonline.com/idaho-gold-rush-history-and-districts.html>.

[ii] <https://www.idaho.gov/about-idaho/history/>.

[iii] <https://sos.idaho.gov/elect/stcon/index.html>.

[iv] <https://www.history.com/topics/us-states/idaho>.

[v] <http://concealednation.org/2016/03/permitless-concealed-carry-in-idaho-passes-takes-effect-july-1st-2016/>.

[vi] https://en.wikipedia.org/wiki/Flag_and_seal_of_Idaho.

[vii] <https://en.wikipedia.org/wiki/Idaho>.

Wyoming: The First State To Grant Voting Rights To Women- Guest Essayist: Daniel A. Cotter

Admitted to Union July 10, 1890, Wyoming became the forty-fourth state to ratify the U.S. Constitution. Known as “The Equality State,” it currently uses the Wyoming State Constitution adopted in 1889. While amended many times, it is the only state constitution Wyoming has had in its history, last amended in 2008.

Becoming a State

In 1869, the Wyoming Territory organized after Congress passed an act creating the territory in July 1868, with the territory seeking statehood from the beginning. Despite statehood being more than thirty years in the territory’s future, Wyoming’s first territorial governor, John A. Campbell, signed the “Female Suffrage” in 1869 and Wyoming became the first territory, then when admitted as a state, to grant voting rights to women.

In addition to that act, Wyoming has been a leader in equal rights from its organization as a territory. Women served on juries beginning in 1870, the first female court bailiff was in Wyoming in 1870, and the first female governor in the nation, Nellie Tayloe Ross, was sworn into office in January 1925.

In 1888, the Territorial Assembly petitioned Congress for statehood, but that effort was not successful. Despite not being approved for statehood in 1888, Wyoming Territory Governor Francis E. Warren and other territorial leadership decided to hold an election for delegates to a constitutional convention. On September 30, 1889, the Constitutional Convention was held and a state constitution was drafted that was submitted to voters. A short time later, on November 5, 1889, the constitution was approved by an overwhelming majority of Wyoming voters, 6,272 to 1,923.

With a new constitution, the Wyoming Territory pushed for statehood again, and after President Benjamin Harrison signed Wyoming's statehood bill, Wyoming became the 44th state on July 10, 1890.

The Wyoming Constitution

The state has been known as “The Equality State” from its early days, with the Suffrage Act passed and also the state constitution, which provides at Article 1, Declaration of Rights, Sections 2 and 3 the strong belief in equality, stating:

Sec. 2. Equality of all. In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.

Sec. 3. Equal political rights. Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

Forty-six delegates assembled in Cheyenne, Wyoming, in September 1889, and on September 30, 1889, the delegates signed the constitution. Although amended on numerous occasions (the changes can be seen in the document at <https://sos.wy.state.wy.us/Forms/Publications/09WYConstitution.pdf>), the bulk of the Wyoming Constitution has remained unchanged since its origins almost 130 years ago.

The Wyoming Constitution has other rights that are consistent with the United States Constitution Bill of Rights, and its right to bear arms provision makes it clear it is a right to defend oneself and the state, providing:

Sec. 24. Right to bear arms. The right of citizens to bear arms in defense of themselves and of the state shall not be denied.

In addition to the extensive Declaration of Rights, the Wyoming Constitution is very detailed in terms of limitations on the state's public indebtedness.

Conclusion

Wyoming became the 44th state to join the United States, but in equal rights, stands out as the first, earning its nickname as “The Equality State.” Wyoming is also known as the “Cowboy State” in homage to its use of the bucking bronco as its symbol.

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Utah: Unique Among States-Guest Essayist: Brad Bergford

Utah has a fascinating history from the days before it was a United States territory to today. The first Europeans arrived in the area in 1765. In 1821, Mexico won its independence from Spain and claimed Utah for itself. In 1832, Antoine Robidoux built the first trading post in Utah, and in 1841, John Bartleson led the first wagon train across Utah to California. During the 1800s, Utah bore the indicia of western expansion. Many regard the completion of the transcontinental railroad at Promontory Summit, Utah, on May 10, 1869 as not only one of the most important historical events in Utah, but also one of the most momentous in U.S. history.

Utah stands unique in its history and traditions, and it cannot be understood apart from the influence of Church of Jesus Christ of Latter-Day Saints (the “LDS church”) and its adherents, the Mormons. Utah’s path to statehood began principally because of precipitous settlement by Mormons, who moved west after failed settlement attempts in New York, Illinois, and, most notably, in Jackson County, Missouri, where they had intended to establish an everlasting temple. In 1847, Brigham Young, by then the leader of the main branch of the LDS church, entered the Salt Lake Valley with 148 comrades and founded Salt Lake City. At the time, the area was part of Mexico, but early in 1848 through the Treaty of Guadalupe Hidalgo, Mexico ceded 525,000 square miles, including present-day Utah, to the United States.

In 1849, Brigham Young took a delegation to Washington, D.C. to propose a massive new state called “Deseret” that would have included all of present-day Utah, virtually all of present-day Nevada, and parts of Colorado, California, Arizona, New Mexico, Oregon, Wyoming, and Idaho. Congress established Utah territory, which was much larger than present-day Utah but smaller than “Deseret” as part of the Compromise of 1850, which also allowed the territories of Utah and New Mexico to each decide whether to permit slavery. Utah approved slave ownership only by white people but not by Mexicans. Many residents purchased “Indian” slaves with the encouragement of the LDS church, and some settlers brought African slaves with them to Salt Lake City. In that same year, President Fillmore named Brigham Young the territorial governor. Over the next two decades, settlers—primarily Mormons—traveled to Utah by wagon train. Some reports are that settlers encountered hostility from native peoples. Other reports are that native peoples assisted settlers. In any case, Utah’s new settlers wished to enjoy the benefits of statehood, including federal government protection.

American sentiment outside of Utah was decidedly against the practice of polygamy, which the LDS church regarded as a central aspect of religious life. Several times the United States Congress passed laws aimed at abolishing the practice, which some compared to slavery. Republican opposition to LDS control and practices in Utah—chiefly slavery and polygamy—delayed Utah’s statehood by 46 years. In 1879, the Supreme Court unanimously held in *Reynolds v. United States* (98 US 145), that Congress could outlaw polygamy and that the Constitution does not protect that practice. Over the next decade, many men were convicted under federal anti-polygamy laws. In 1890, and apparently in direct response to another loss at the Supreme Court, this one involving a constitutional challenge to the Edmunds-Tucker Act, which responded to the practice of polygamy by allowing the disincorporation of the LDS Church and the federal seizure of LDS property, the LDS president issued what Mormons call the Manifesto. It indicated that for the good of the LDS church, Mormons must abandon the practice of polygamy. In 1896, Utah was granted statehood.

Utah makes the forty-fifth state to ratify the U.S. Constitution, admitting it to the Union January 4, 1896. Utah became known as “The Beehive State” and currently uses the Utah State Constitution adopted in 1896.

Utah offers much in the way of outdoor adventure and cultural attraction. It offers five national parks: Zion (1919), Arches (1971), Bryce (1928), Capital Reef (1971) and Canyonlands (1974), and it boasts other outdoor attractions, including Moab, the Colorado River, and Lake Powell. Important cultural attractions include skiing and visiting the Mormon Tabernacle (not to be confused with the Mormon Temple, which bars non-LDS visitors). In the early 20th century, auto racing in the Bonneville Salt Flats became popular, and car manufacturers have frequently used the site for commercials. Park City hosted the 2002 Winter Olympic Games and hosts the annual Sundance Film Festival. Brigham Young University is widely renowned for its academic excellence in many areas. The Utah Jazz is the state’s only major professional sports team and many Utahans are rabid Jazz fans.

The Utah Governor’s Office of Economic Development lists aerospace and defense, life sciences, financial services, energy, outdoor products and recreation, and software as key industries. Today, a third of the world’s Mormons live in Utah, but demographics in Utah are changing. The population of Salt Lake City is now only 48% Mormon, although Utah’s total population is still about 61% Mormon. Some of the trend is due to population influx because of Utah’s hot economy (4th fastest growing economy in the U.S.), and some is attributed to Mormons intentionally spreading their influence by moving away from Utah. The state legislature features overwhelming Republican representation, although almost all of Salt Lake City’s elected representatives are Democrats. It appears that Utah will continue to provide a unique picture of cultural development to go along with its stunning landscape.

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Oklahoma, November 16, 1907: Forty-Sixth Admitted to the United States- Guest Essayist: Wilfred M. McClay

The area of North America that we now call Oklahoma had a lengthy prehistory. Its aboriginal inhabitants, known collectively as the First People, probably came to the Western Hemisphere from Asia some twenty to forty thousand years ago, crossing over into the unsettled continent over a land bridge between Russia and Alaska. They went on to establish themselves on the land thousands of years before the arrival of Europeans, settling in villages along the Arkansas, Canadian, Washita, and Red rivers, and engaging in farming, hunting, and trade. After Columbus's voyages the region drew the interest of Europeans, particularly wandering Spanish explorers who were driven by the hope of discovering fabulous gold wealth comparable to what had been found by the Spanish soldier Hernán Cortés in his conquest of the Aztec Empire in Mexico. These adventurers merely passed through quickly, though, and did not stay and settle. Neither did the French, who were primarily interested in the riches to be derived from fur trading with the native inhabitants, and had little interest in establishing permanent settlements.

Matters changed dramatically with the Louisiana Purchase in 1803, when Oklahoma became a possession of the newly independent and rapidly growing United States, under the leadership of its third President, Thomas Jefferson. Jefferson and other leaders hoped the Purchase could provide room for an "Indian colonization zone" to solve the endemic problem of conflicts between the Native populations and the pressures exerted by expansion-minded European settlers. The concept of such a zone gradually gained favor, and a region thought of as "the Indian country" was specified in 1825 as all the land lying west of the Mississippi. Eventually, the Indian country or Indian Territory would encompass the present states of Oklahoma, Kansas, Nebraska, and part of Iowa.

In the meantime, the process of removing the Native population from the eastern woodland areas began, and accelerated with the passage in 1830 of the Indian Removal Act. A European traveler, the great French writer Alexis de Tocqueville witnessed the effects of the removal firsthand, as he happened by chance upon a westward-bound group of Choctaws crossing the Mississippi River at Memphis in December 1831. "One cannot imagine the frightful evils that accompany these forced migrations," he remarked, and he went on to describe in compelling detail the frigid winter scene, the ground hardened with snow and enormous pieces of ice drifting down the river, as the Indian families gathered in silent and sorrowful resignation on the east bank of the river, proceeding without tears or complaints to cross over into what they knew to be an erasure of their past. It was, Tocqueville said, a "solemn spectacle that will never leave my memory." Most of these migrants in that "Trail of Tears," those who survived, would end up living in Oklahoma.

Eventually even this designated Indian "zone" could not withstand the pressures of land-hungry expansionists. Area after area was opened to non-Native settlement, the territory moved

inexorably toward statehood. There was considerable sentiment favoring the creation of a separate “Indian” state of Sequoyah, but in the end that effort would fail, and a single state would be formed in 1907, combining Native and non-Native elements.

Even so, as the forty-sixth state in the Union, Oklahoma possesses a name that is derived from the Choctaw words *okla* and *humma*, meaning "red people," and that name fittingly signifies the uniquely enduring importance of the Native population to the state’s identity. In no other state of the Union is the Native presence more important, more indelible, more enduring—and arguably, more honored in the state’s politics and culture. Yet the achievement of that relatively harmonious state of affairs was bitter and difficult, particularly for the Native population, which had to accept betrayals and abrogation of agreements at every step of the way.

Once a state, though, Oklahoma quickly took its place as an important center of the burgeoning petroleum industry, with the city of Tulsa being labeled “The Oil Capital of the World,” and the oil industry serving as a primary driver of the entire state’s booming economy. From the moment that Oklahoma had become part of the United States in 1803, growth had become its byword. It had gone in just a few years from being a raw and forbidding frontier to being a leading force in the growth of the world’s economy, a force now moving into higher and higher gear.

For better or worse, and despite the state’s deep commitment to agriculture as a component of its economy, the state’s general economic fortunes have generally turned upon the rising and falling fortunes of the oil industry. That is its strength, and its weakness. Its well-being in the future, particular that phases out or dramatically deemphasizes the use of fossil fuels, will hinge on its ability to develop a more diversified economy.

One factor that many observers believe holds Oklahoma back in the quest for self-improvement is its massive and antiquated state constitution. At the time of its adoption in 1907, it was the lengthiest state constitution ever written, over 250,000 words long. Strongly influenced in its drafting by the leadership of fiery populist William “Alfalfa Bill” Murray, the document went into obsessive detail, spelling out regulations, safeguards, rights, obligations, and precise instructions in ways that were more appropriate to statutory law than the freer generalities of constitutional law.

Such specificity is a sure path to obsolescence. A great many of the Oklahoma constitution’s provisions are the product of a bygone era, the Progressivism of a hundred years ago encased in constitutional amber, relevant to the past but no longer relevant to the present day. Such a hidebound constitution stands in ironic contrast to the wide-open and pioneering spirit of the state whose political life it seeks to organize. Accordingly, some of the state’s most far-sighted individuals have argued for the necessity of adopting a new state constitution. But that is easier said than done, and the chances are very good that the current constitution will remain in place for the foreseeable future.

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the Humanities, the advisory board for the National Endowment for the Humanities, and is currently serving on the U.S. Semiquincentennial Commission, which is planning for the 250th anniversary of the United States, to be observed in 2026. He has been the recipient of fellowships from the Woodrow Wilson International Center for Scholars, the National Endowment for the Humanities, and the National Academy of Education, among others. His book The Masterless: Self and Society in Modern America won the 1995 Merle Curti Award of the Organization of American Historians for the best book in American intellectual history. Among his other books are The Student's Guide to U.S. History, Religion Returns to the Public Square: Faith and Policy in America, Figures in the Carpet: Finding the Human Person in the American Past, Why Place Matters: Geography, Identity, and Public Life in Modern America, and most recently Land of Hope: An Invitation to the Great American Story. He was educated at St. John's College (Annapolis) and received his Ph.D. from Johns Hopkins University in 1987.

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New Mexico Constitutional History- Guest Essayist: The Honorable David L. Robbins

New Mexico became the 47th state to join the union on January 6, 1912. This was shortly before Arizona was admitted on February 14, 1912. The New Mexico Constitution became effective on the day Congress admitted New Mexico to the union. The original document was ratified by the New Mexico Constitutional Convention on November 21, 1910. The voters of the State ratified the constitution on November 5, 1911.

The ratified constitution and eventual boundaries varied widely from what was originally proposed in the mid 1800's. The New Mexico territory was formed following the end of the Spanish American War in 1848 through the treaty of Guadalupe Hidalgo. The territory initially consisted of parts of west Texas (which claimed the territory east of the Rio Grande river), most of present-day Arizona, and part of southern Colorado.

In the 1850's the country was in a deep debate on slavery. Although slavery was not common in the territory, the Missouri Compromise of 1820 was used as an argument that New Mexico could be a slave state, but the argument wasn't persuasive. The lack of statehood for the area prior to the Civil War and disagreement on its boundaries delayed its admission for decades. The original territory excluded the south western part of present-day New Mexico (the Boot Heel)

and southern Arizona. This nearly 30,000 square miles of land was purchased from Mexico in 1854 which permitted the construction of a rail line across the southern-western part of the country.

The Constitution for the State has 24 Articles and has been amended more than 170 times in 107 years. Conversely, the U.S. Constitution has seven Articles and has been amended only 27 times in 230 years, including the first ten amendments included as the Bill of Rights. Many amendments to the State Constitution are minor, and several have been related to voting changes. In most states, these minor changes are usually handled by State statutes, but are enshrined in the New Mexico Constitution.

New Mexico has a long and colorful past spanning several millennia and a rich and diverse culture. The Constitution incorporates much of that historical culture. Native Americans have been present in New Mexico for over eight thousand years. After Spain conquered Mexico, it included all the area of present-day New Mexico. During Spanish control, hundreds of land-grants were issued to individuals. Many of these land grants still exist today. The heirs to those land-grants share in that rich history but have often had to fight for their legal right to those land-grants.

Due to the strong Spanish history and historical Spanish legal system, New Mexico's constitution declares the State as a bi-lingual State. This was intended to protect educational access of Spanish speakers and those of Spanish descent.

Despite the acknowledgement of the strong Spanish history, approval by the Constitutional Convention in 1910 wasn't assured by Congress, as provisions restricted the ability to be amended. These restrictions included;

- the requirement of a two-thirds vote of the legislature to propose amendments,
- in addition to a bare majority, all amendments would be ratified by at least 40% of those voting in the election, with a 40%+ vote in at least half of the State's counties, and
- a limitation on the total number of amendments submitted to the people in a given election cycle.

Congress did not approve of these anti-populist provisions. As a prerequisite to admission as a state, Congress required that the people of the State ratify an amendment that would:

- provide for a simple majority vote in the legislature,
- ratify by a simple majority vote of the people, and
- do away with the limitation on the total number of amendments.

The prerequisites were proposed by Henry De La Warr Flood from Virginia and came to be known as the "Flood amendment."

Article XII of the Constitution addresses education and requires that the State provide public education "sufficient" for all children. While "sufficient" isn't defined, poor educational outcomes for minority and at-risk students prompted a challenge in 2014 via several

lawsuits. Two of the largest suits were combined and officially became known as the Martinez-Yazzie lawsuit. In December 2018 Judge Sarah Singleton sided with the plaintiffs ruling the State had failed to meet its constitutional requirement for at-risk students and gave the State until April 2019 to resolve the deficiencies. Many of the at-risk students are English language learners, primarily of Spanish heritage.

Funding for education is addressed in Section 2 of the Constitution that established the Land Grant Permanent Fund for education. This was intended to provide a sustainable source of income to fund the public schools in the State. New Mexico is a geographically large State, fifth largest in the country, with over 126,000 square miles and is sparsely populated (a bit over 2 million). Along with a small economic base, the Land Grant Permanent Fund is insufficient to totally support the educational mandates of the Constitution, so the State Legislature also appropriates funds directly to supplement other funding sources.

Partly in response to the Martinez-Yazzie lawsuit, the 2019 NM Legislature increased public school funding by over \$700 million, a 13% increase over last year. Despite this increase, many continue to feel the State is failing to meet this constitutional mandate. Currently the State contributes approximately 47 percent of a \$7 billion State budget to elementary and secondary. This puts New Mexico around 35th in the country on spending per student, but the State is near the bottom in educational outcomes.

In 2003, the State Constitution was amended with the goal of improving educational outcomes in a State that has ranked at or near the bottom of the 50 States. This created a Public Education Department (PED) with a Secretary appointed by the Governor and confirmed by the New Mexico Senate. The amendment also renamed the State Board of Education to Public Education Commission (PEC), and the elected Board members became Commissioners. Prior to this amendment, the PED was directed by a Superintendent, appointed and accountable to the State Board of Education. According to the Constitution and statute, the PEC is advisory to the PED on education matters and the sole authorizer and overseer of State authorized Charter Schools.

The New Mexico Constitution has many unique features including how public education is addressed. Time will tell if the education amendment and recent judicial interpretations of the Constitution will enable the State to move up in national rankings.

David L. Robbins has over 13 years' experience in state government, and more than 30 years in the private sector. He holds a bachelor's degree in Economics and an MBA in Finance, both from UNM. His experience has included management, wholesale and retail sales, insurance, banking, utilities, education, consulting, public service, and construction.

David has been an adjunct professor of finance at the Anderson School of Management at the University of New Mexico. He was elected to the Albuquerque Public Schools' Board of Education in 2009 and served from 2009-2013, including Chairman of the Finance and Audit Committees and the Capital and Technology Outlay Committee.

Until December 31, David was the Director of Administrative Services and CFO for the NM Department of Workforce Solutions. He previously held the same positions at the NM Taxation

and Revenue Department, where he oversaw the annual distribution of approximately \$7 billion in state revenues and taxes to New Mexico cities, counties, and various state funds.

In 2017, Governor Susana Martinez appointed David to vacancy on the Public Education Commission, District 2, created in the passing of Millie Pogna. He ran unopposed for election this past November and started serving a four year term, running through 2022.

David and his wife of over 43 years, Jan, are the proud parents of three grown children, including one with disabilities. They have five grandchildren (two granddaughters and three grandsons); all live in the Albuquerque area. David and his wife are active members of their church, where he serves as a Deacon and teaches a senior men's Bible study class.

Arizona: Born Angry – Guest Essayist: Sean Beienburg- Guest Essayist: Sean Beienburg

Not all states can say that their first public act was defying the president of the United States. Arizona, the last state admitted to the Union from the contiguous United States, can.

Like many westerners then and now, Arizonans were anxious about and skeptical of concentrations of power, especially power wielded from afar, and, in writing their constitution, they sought to see it widely dispersed. (In this, Arizona's Founders were not unlike the American Founders, increasingly distressed at their local government affairs being directed from the metropole, in violation of what they understood their English liberties to guarantee.)^[1] This meant not only that the state government would be carefully limited and easily checked by the people, but also that its constitution would ensure private actors could not wield undue influence in the state. In short, the Arizona Constitution was against *both* Big Government *and* Big Business—and it used controversial populist innovations to achieve these goals.

Worries about western populism run amok—even by the progressive Senator Albert Beveridge, an Indiana Republican who chaired the committee on territories-- meant Congress planned to admit Arizona and New Mexico jointly in 1906, but only if both territories agreed. New Mexico approved of the joint admission in a referendum, but Arizona rejected it overwhelmingly. Congress agreed to separate the two but, unusually, to require the territories to have their proposed constitutions approved by both Congress and the president before admission could take place, thus ensuring a check on the radicals of the West.

In October 1910, residents from across the Arizona territory convened in Phoenix to draft a new constitution, and the charter they drafted mixed both old values and new ideas.

The early parts of the Declaration of Rights include standard statements of political philosophy once common in state constitutions, alongside explicit gratitude to and acknowledgement of divine providence. The brief preamble observes that “we, the people of the state of Arizona,

grateful to almighty God for our liberties, do ordain this constitution.” (The state’s motto, *Ditat Deus*, meaning God Enriches, echoes this preamble).

As sections 1 and 2 of the Declaration of Rights explain, writing a constitution allows the “frequent recurrence to fundamental principles [that] is essential to the security of individual rights and the perpetuity of free government” (section 1). It also allows for the clear recognition that “governments derive their just powers from the consent of the governed” who establish them to “protect and maintain individual rights” (section 2). The substance of the individual rights that followed, largely taken from other state constitutions (and substantively if not stylistically familiar to a reader of the federal Bill of Rights and Article I, Section 10), similarly followed well-worn paths.

But while the types of rights included in the Arizona Constitution’s equivalent to the Bill of Rights are fairly standard, its latter parts, both its protections of labor and especially its structural provisions, are far more unconventional.

The Arizona constitution bristles with a skepticism of big business and a related strong commitment to the dignity of labor, incorporating and expanding on provisions being added to contemporary constitutions and legislative codes of other states like Oregon and Wisconsin.

This is perhaps most obvious in two full articles aiming to check the power of business. The first is the Corporation Commission, effectively a fourth branch of government whose obligations and powers are spelled out with great attention in Article XV. Its basic purpose: carefully regulating corporations that operated as utilities (such as railroads), which lent themselves to monopolies rather than normal market competition.

The second is Article 18, explicitly titled Labor, which offers a variety of worker protections that now seem commonplace. Often repealing old doctrines from common law, Article 18 provides, among other guarantees, for employer liability for on-the-job injury, worker’s compensation provisions, and the elimination of the fellow-servant rule (in which an employee, not the employer, was liable for worksite injuries inflicted on another worker due to the actions of the coworker).

But beyond these policy provisions--often updates to common law, which even many constitutionally conservative politicians found little to object to--worries about the concentration of economic power led to institutional innovations which did unsettle defenders of American constitutionalism.^[2] Because of concerns that special interests could all too easily capture the complicated separation of powers of the Madisonian system and thwart the will of the people, Progressive Era reformers sought to change not just what the policies were but the very structure of government itself.

Arizona’s founders imbibed these intellectual waters, and thus the charter they created is a populist constitution, with a focus on direct, rather than mediated, democracy.

The initiative and referendum processes are the most obvious example of this. The equivalent of the U.S. Constitution’s vesting clause (Article I, Section 1), in which legislative power is vested

in Congress, in Arizona explicitly reserves the right of the people to override the legislature by referendums or initiatives.^[3] (In fact, for emphasis, this reservation appears in the first paragraph.) The initiative and referendum was championed by convention president and first governor George Hunt, who himself had picked up the idea from Bucky O'Neill, an Arizona soldier killed with Theodore Roosevelt's Rough Riders in the charge up San Juan Hill.^[4]

A second, related instance of constitutional populism is the simple initiative process by which amendments are made to Arizona's Constitution. While perhaps an extreme example, Arizona's theory of direct constitutional democracy both illustrates and attempts to take advantage of constitutional federalism.

The U.S. Constitution, which establishes a strong but substantively limited federal government and imposes a floor of basic rights on all the states, is difficult to amend, requiring a supermajoritarian, cross-regional consensus to do so—thus ensuring a narrow majority cannot impose its wishes on the diverse citizens of the country more broadly.

But Arizona's state constitution, by way of contrast, is extremely easy to amend, requiring the gathering of signatures and a bare majority vote at the following general election. This ensures that the state government can thus directly respond to the local preferences of the people in exercising the police powers for the common good, but that even when being a "laboratory of democracy" the state government remains checked within the core constraints of the U.S. Constitution.^[5]

A third instance of the constitution's populism is its distrust of appointed politicians. Unlike in many states which model the U.S. government, in which one elects the chief executive, who in turn brings an attorney general and other executive branch officials, almost every Arizona position is separately elected and after a direct popular primary.

Part of the concern for concentrated power was the fear of judges run amok (and especially when in cahoots with business, as they were often charged with being). The early 1910s were a tough time for judicial independence, with Progressive Era critiques of the separation of powers leading to consideration of a wide range of attacks on judicial review. Some wanted supermajority judicial votes to declare legislation unconstitutional, others, to allow Congress to overturn judicial decisions.^[6] Future Supreme Court justices Felix Frankfurter and Louis Brandeis proposed eliminating part of the 14th Amendment altogether in order to stop judges from, in their mind, imposing their policy views on states that wanted to build more protective regulatory regimes.^[7]

This debate was largely what the 1912 election would be about: Theodore Roosevelt wanted to be able to recall individual judicial decisions, part of why William Howard Taft and Roosevelt's two closest political allies Elihu Root—who had been Roosevelt's chosen successor—and Henry Cabot Lodge all turned on TR in the election, fearing their old friend had turned against American constitutionalism itself.^[8]

This was the climate in which Arizona sought statehood, and it reflected the wild western populism common to the time, which led even progressives like Albert Beveridge to fear statehood and arrange, uncommonly, for a presidential signature to be required for admission.

Thus, the single clearest and best-known example of the militant populism that so worried these Republicans is in the constitution's judicial recall provision. Article VIII of the Constitution established protocols for recalling officials-- "all elective officials", making Arizona the second state to have a recall provision (after the progressive laboratory of Oregon).

But because Arizona judges, like in many states, gained their seats by election, the expansive language meant that judges themselves would be vulnerable to recall—a far more radical curb on judicial power than any of the other alternatives raised in the Progressive Era.

For President Taft, a former and future judge, this was unacceptable. Arizona's provision would intimidate judges from making unpopular decisions when the law required them to do so. As such, he vetoed the state's admission- thus ensuring Arizona, not New Mexico, would be the 48th state.

By a 9 to 1 vote Arizona voters added a clause to their recall section insisting that it was for all elective officials "except members of the judiciary." A mollified Taft thus approved statehood.^[9] What one historian has termed "the longest sustained admission fight in American territorial history" seemed over.^[10] But there was one more skirmish to be fought.

As Oklahoma's recent move of its state capitol from Guthrie to Oklahoma City in violation of its own statehood enabling act had proved the year before,^[11] there was nothing that could be done to ensure compliance—what could Taft do if Arizona resisted? Cite breach of contract and take statehood away from a now sovereign entity? Invade it as in revolt? As a result, then-Governor Hunt and the legislature moved to restore judicial recall immediately, with the first senate bill a constitutional amendment restoring it, openly provoking the president and members of Congress.

And that proposed amendment was approved at the next election by an almost 50 to 1 ratio—with Taft, the sitting president running in *fourth* in Arizona, losing not only to Wilson and Roosevelt but even the Socialist candidate Eugene Debs.^[12] You could say then that the Arizona Constitution, like Arizona more broadly, was born angry- we warned them.

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^[1] For the clearest encapsulation of the importance of federalism to revolutionary thought, see the underappreciated predecessor to the Declaration of Independence, the Declaration and Resolves of the First Continental Congress, October 14, 1774 https://avalon.law.yale.edu/18th_century/resolves.asp; on the subsequent development of the American understanding of federalism more broadly see Sean Beienburg, *Prohibition, the Constitution, and States' Rights* (Chicago: University of Chicago Press, 2019), 18-24.

[2] See for example, Elihu Root, “How to Preserve the Local Government of the States: A Brief Study of National Tendencies.” Speech to the Pennsylvania Society in New York, Wednesday, December 12, 1906, printed as *How to Preserve the Local Government of the States* (New York: Brentano’s, 1907); Beienburg, *Prohibition, the Constitution, and States’ Rights*, 44-50.

[3] Article IV, Section 1, Part 1.

[4] John D. Leshy, *The Arizona State Constitution*, 2nd ed. (New York: Oxford University Press, 2013), 15.

[5] *New State Ice Co. v. Liebmann* 285 U.S. 311 (1932) (J. Brandeis, dissenting)

[6] Kenneth P. Miller, *Direct Democracy and the Courts* (Cambridge: Cambridge University Press, 2009); William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton, NJ: Princeton University Press, 1994); Stephen Engel, *American Politicians Confront the Court: Opposition Politics and Changing Responses to Judicial Power* (Cambridge: Cambridge University Press, 2011).

[7] Sean Beienburg, "Progressivism and States' Rights: Constitutional Dialogue between the States and Federal Courts on Minimum Wages and Liberty of Contract." *American Political Thought* 8 (2019): 34.

[8] William Schambra, “The Saviors of the Constitution,” *National Affairs* 10 (Winter 2012), reprinted as “The Election of 1912 and the Origins of Constitutional Conservatism,” *Toward an American Conservatism: Constitutional Conservatism During the Progressive Era*, eds. Joseph Postell and Jonathan O’Neill (New York: Palgrave MacMillan 2013), 95-121

[9] Leshy, *The Arizona State Constitution*, 22.

[10] Howard Roberts Lamar, *The Far Southwest, 1846-1912: A Territorial History* (Albuquerque: University of New Mexico Press, (2000) [1970]), 423.

[11] See *Coyle v. Smith*, 221 U.S. 559 (1911), upholding the move on grounds enabling act conditions ceased to be binding once a state was admitted to the union, insofar as it became an equally free state.

[12] Leshy, *The Arizona State Constitution*, 22-23.

Alaska: The Last Frontier- Guest Essayist: Bethany Marcum

Known as "The Last Frontier," Alaska was the forty-ninth to ratify the U.S. Constitution and be admitted to the United States. The Alaska State Constitution currently in use was actually ratified in 1956 before Alaska entered the Union, and went into effect upon statehood January 3, 1959

While there are in theory strict limits on federal governing powers as laid out in the Tenth Amendment to our U.S. Constitution, in the real world of at least one state, Alaska, the federal government wields enormous power and control. To understand how this came to be, one must look at Alaska's history.

The area now designated as the state of Alaska was originally inhabited by indigenous people. Russians and European explorers visited and settled in the 1700s. Expeditions found the region rich in natural resources, with particular interest to the fur traders of that day. Russian settlement grew, but in 1867, the area was purchased from Russia, and became a department of the U.S. government.

The military was the most obvious presence in Alaska until the 1890s when gold was discovered. That brought a rush of miners and other settlers, causing much activity, and reorganizing the region into a federal government district.

In 1912, another reorganization designated the area as the Territory of Alaska. As airplanes became more prominent, settlement continued away from the road system, and the population increased.

Due to its strategic location, Alaska was very important during the war years and as it grew, so did a movement for statehood. The issue caused fierce debates. The state's small population relative to the rest of the country made it obvious that residents couldn't produce the revenue needed to develop the immense land mass and to create a viable economy. The rest of the country feared Alaska could not even take on the responsibility of creating a formal state government.

Eventually, however, statehood proponents prevailed and on January 3, 1959, Alaska entered the union as a full-fledged state. But it came at a high price: the federal government retained title to the majority of lands. In fact, even today, over 60% of the land in Alaska is owned by the federal government.

Contentious deliberations over land and resource ownership and control continued for decades, resulting in two landmark federal laws, the Alaska Native Claims Settlement Act in 1971 and the Alaska National Interest Lands Conservation Act in 1980. Even so the problems were not resolved; today, management of the resources on lands in Alaska continues to create friction between D.C. agencies and the state. The most recent example of this was the case of *Sturgeon v. Frost*, heard twice by the U.S. Supreme Court. The decision was a victory for Mr. Sturgeon and

the State of Alaska, over the National Park Service. Still, overzealous federal agencies continue to lock up Alaska's land and resources as political winds blow first one direction, then the other.

The population of Alaska is small even today, and just as feared during the statehood debates, the 49th state remains heavily dependent on the federal government. This dependency comes in many forms, from federally subsidized bypass mail for sparsely populated Alaskan villages (essentially an air freight service), to federal obligations to the state's indigenous people through special health care and other programs.

Due to the large amount of federal land, and as a result of the federal government's role in funding so many programs and projects in Alaska, it is often the federal government which makes the rules—not the state.

This has led to great difficulty for Alaska in developing its resources. In the area of natural resource development, federal overreach is particularly devastating. Resource development is the predominant driver of Alaska's private economy. Lack of infrastructure, a harsh climate and distance from markets and populations have resulted in Alaska having very few industries. Most of its non-governmental economy is based in resources: oil and gas, mining, and commercial fishing. As the federal bureaucracy grows and with it, the number of regulations on these industries, the ability for Alaska to move toward less federal dependency is reduced even further.

If Alaska is ever to take its rightful place as a strong and independent state, it must be freed from the constraints of federal overreach, and from the lures of federal funding. It must be allowed to develop and manage the land and resources within its borders so that it can create the revenue needed to support its residents. Only then will Alaskans be truly free to govern themselves.

Bethany Marcum has made Alaska her home for over 20 years. She currently works as Executive Director of the Alaska Policy Forum. She also serves as a citizen airman in the Alaska Air National Guard. She worked as legislative staff for State Senator Mike Dunleavy from 2013 to 2017. She is currently the Alaska Republican Party Region V Representative and has held a variety of other positions at the district and state level. She is a former president, long-time board member and life member of the Alaska Chapter of Safari Club International and is a life member of the NRA. She serves in her church with the children's ministry and is a volunteer "big" with Big Brother Big Sisters of Alaska. She and her husband Conley enjoy hunting together.

The History of Hawaii: From Fire, Tears and Blood, A Tree of Liberty Blooms-Guest Essayist: Danny de Gracia

Born of ancient volcanoes in Earth's prehistory and baptized by fire into the modern era by the bombs of the Imperial Japanese attack on Pearl Harbor, the history of the Fiftieth State is nothing short of legendary.

First discovered and populated by seafaring Polynesian peoples perhaps around the 12th century or even earlier, Hawaii would be thrust into global destiny by European contact when British

Captain James Cook discovered and sailed past the island of Oahu on January 18, 1778. As a midpoint in the Pacific, the Hawaiian Islands would soon become a key strategic shipping hub that attracted merchants, missionaries, and militaries alike from around the world.

The relevance of Hawaii would endure long beyond the Age of Sail, as the United States by the end of the 19th century had overtaken all the European powers as an industrial powerhouse. Protection of American shipping routes, defense of the West Coast, and access to Asia necessitated a forward naval presence in Hawaii, and in 1887, the U.S. military began leasing Pearl Harbor.

American influence had already been growing in Hawaii since the end of the Civil War due to the need for sugar cane amidst economic devastation in the South, and the Reciprocity Treaty of 1875 cemented the Islands as a leading driver of the growing U.S. economy when it created a free trade agreement for agricultural products from the Kingdom of Hawaii.

Having already seen European military rivals make power plays for control of Hawaii, American business interests maneuvered for decisive U.S. control of the islands. In 1893, Hawaii's monarchy dissolved and Queen Liliuokalani was pressured by local militias to abdicate her throne. Ultimately, it would be the Spanish-American War which put the U.S. in conflict on distant shores as far away as the Philippines and Guam, that would give the U.S. justification to annex Hawaii.

On July 4, 1898, just four months after the sinking of the Battleship Maine in Havana Harbor, the U.S. Congress adopted Senate Joint Resolution 55 – nicknamed the "Newlands Resolution" after its introducer, Democratic Rep. Francis G. Newlands of Nevada – which set the framework for annexation of Hawaii. On August 12, 1898, a small ceremony on the steps of Hawaii's Iolani Palace marked the formal annexation of Hawaii and its transfer of sovereignty to the United States.

Pearl Harbor and the Road to Statehood

At the dawn of the 20th century, political shifts in Asia, not Washington D.C., would set the stage for Hawaii's most significant moment in American and world history. Japan, having dashed the Russian Navy's hopes for a Pacific warm water port in the spectacular 1905 Battle of the Tsushima Strait, saw herself as an emerging world military power, even on-par with the great European nations.

As a participant in the First World War, Japan's seizure of Germany's Pacific territories led the Imperial government to believe it had an important seat at the table as part of the victorious Allies at the Paris Peace Conference of 1919.

Much to the Japanese dismay, the U.S. and European powers treated members of the Imperial delegation as bit players in the Treaty of Versailles. The tense peace that followed was only underlined further by the Washington Naval Treaty of 1922 which limited the construction of battleships and prevented the construction of any new Pacific Ocean military bases – making

Hawaii, as an existing U.S. naval and army forward base, perhaps the most strategically relevant island in the entire world.

As Japan, the U.S., and the Europeans all sought to expand in a world that the machines of the Industrial Revolution made even smaller, a perfect storm of interests, politics, and geography was brewing that would one day rain bombs over Hawaii.

This confluence of international politics and geography could lead only to Japanese fighter planes over Oahu on the fateful morning of December 7, 1941. Colliding over the azure blue waters and exotic green jungles of Hawaii were more than just Japanese and American forces, but two competing destinies of fascism or freedom.

The attack on Pearl Harbor would not only steel the U.S. resolve to defeat the Axis Powers, but the terrible east wind rain of Imperial Japanese bombs had a more dynamic effect in that they aroused many Hawaiians to see themselves as a vital part of the American experience. Fighting not only for the safety of their islands but also for the freedom of their way of life, when America triumphed in World War II, Hawaiians felt a special place as part of the victory that liberated the world.

Hawaii's Statehood and Constitution: A Model for the Future

The immediate post-WWII era saw intense enthusiasm among many locals to petition for Hawaii statehood, bringing together religious, cultural, academic, labor, political, and business leaders in calls to make Hawaii part of the Union. America had become the world's first superpower, and Hawaii had been the pivot point for the dawn of an American century.

In 1950, Hawaii's Constitutional Convention was a key step towards statehood for the Territory of Hawaii, as many delegates felt that it showed for the first time in history that Hawaii was ready for statehood.

Though Democrats in Congress had staunchly resisted Republican-leaning Hawaii from entering the Union, unresolved postwar tensions with the Soviet Union and the Cold War could not afford a lingering question mark in the Pacific Ocean. Hawaii, which had been so essential to winning WWII, would be crucial for containment of the Soviet Union and access to Asia in a nuclear world.

On March 18, 1959, Congress passed the Hawaii Admission Act, which at last provided for Hawaii's ascension to full statehood. Section 3 of the Act would proudly declare, "The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

On June 27, 1959, Hawaii voted for statehood, a leap of faith which helped mollify the political and cultural divisions of the past, as locals finally had the chance to determine Hawaii's place in the world for themselves. No longer under the supervision of a monarch or held at bayonet point, the people of Hawaii were given the chance to choose for themselves the future.

They voted "yes."

In a landslide victory for statehood, 132,773 voters, or 94.3 percent of the vote, cast their ballots to become the Fiftieth State.

As the most recent state to enter the Union, Hawaii's constitution represents the most modern, elegant, and in many instances, poetic social compacts among the States. Hawaii is especially unique in that every decade, voters are given the option to vote for a recurring Constitutional Convention question, which continues to place the future of Hawaii in the hands of Hawaiians.



The most recent revision to the Hawaii Constitution's Preamble reminds the world, "We reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire. We reaffirm our belief in a government of the people, by the people, and for the people, and with an understanding and compassionate heart toward all peoples of the earth, do hereby ordain and establish this constitution for the State of Hawaii."

In the annals of history, the story of mankind is one of mistakes and injustices, but also triumphs and great honors. History has not always been right or kind, but history in America is our story, which we have the freedom to change. In the volcanic soil of Hawaii, scarred by war and upheaval, and watered by the blood and tears of so many, a tree of liberty has grown in the Pacific whose fruits give us hope for the future of our planet.

In 1993, Congress and President Bill Clinton issued the Apology Resolution which acknowledged the overthrow of the Kingdom of Hawaii. While some Native Hawaiians continue to feel grieved over the loss of their sovereignty, the 1993 Apology Resolution was a helpful part of Hawaii's healing and progress. Today, the majority of Hawaiians and Hawaii residents continue to proudly and patriotically support the State of Hawaii and their place as American citizens.

Though today's Hawaii struggles with many economic, political, and cultural issues, the sons and daughters of Hawaii represent the blossoming of a great generation of Americans who will continue to further the relevance of our United States of America for centuries to come. As someone whose family was among the very first Filipino plantation immigrants to come to

Hawaii, my experience is particularly special, because my family has had the joy of becoming citizens of Hawaii and citizens of these United States.

May God forever bless the State of Hawaii, and all those who live in it.

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Territories of the United States-Guest Essayist: Daniel A. Cotter

To date, fifty states have been admitted to the United States, with the last one, Hawaii, having been admitted on August 21, 1959. However, in addition to the states, the United States has a number of major territories, including American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

The Establishment of a United States Territory and Its Governance

As many of the essays after the first states' ratification of the Constitution have described, the way to statehood has typically been through first being a territory or part of a territory, and then seeking statehood. A territory is established by the passage of an organic act to organize it. Many have been enacted by Congress over the nation's history, with the first being the Northwest Ordinance, passed in 1787 by the Continental Congress.

Current Major Territories and History

Currently, the United States has five major U.S. territories: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Each such territory is partially self-governing that exists under the authority of the U.S. government.

Pursuant to the Organic Act of 1900, or Foraker Act, Puerto Rico became a territory of the United States. Puerto Rico became a possession pursuant to the Spanish-American War. It has been a territory since that act passed. It has often been mentioned as a new state, but no serious effort has been made by Congress.

Pursuant to the Organic Act of the Virgin Islands of the United States of 1936, the United States added the U.S. Virgin Islands to its territories. In 1950, Guam became a territory pursuant to the Guam Organic Act of 1950. In 1954, the Revised Organic Act of the Virgin Islands replaced the original 1936 act.

The Northern Mariana Islands have been administered by the United States since Japan surrendered in World War II, pursuant to Security Council Resolution 21. The people of the Islands have by referendum voted to join with Guam, but in 1969, Guam rejected the proposal. American Samoa has no organic act, and as such is considered unorganized. Despite that, American Samoa has remained connected to the United States. In addition to the five major territories, the United States has a number of other territories that are uninhabited.

Limitations of Territories

Territories are not states and do not have full recognition that states enjoy. Notwithstanding not being states, each territory can send a delegate to the House of Representatives. With the exception of American Samoa, whose residents are U.S. nationals, those in the other four territories are U.S. citizens. Citizens of the territories can vote in primary elections for president, but they cannot vote in the general elections for president.

In 2016, the Supreme Court of the United States held, in *Puerto Rico v. Sanchez Valle*, 579 U.S. ___ (2016), that territories do not have sovereignty. In the aftermath of Hurricane Maria, the Puerto Rico governor and others argued that the territories were powerless and had little understanding or support. As noted, they send delegates to the House, but have no vote, and cannot vote in the general election for president, despite being citizens in four of the five territories. While they have some self-governance, they do not have sovereignty, and the reality is that there are significant limitations when a land is a territory rather than a state.

Conclusion

In our nation's history, many of the states that today constitute the fifty were originally territories or parts of larger territories. Thirty-one territories or parts have eventually become states. For example, from the Missouri Territory, we have Missouri, and then from the unorganized territory once Missouri became a state, we later had Iowa, Nebraska, South Dakota and North Dakota, most of Kansas, Wyoming, and Montana, and parts of Colorado and Minnesota become states.

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Capital Cities and Capitol Buildings: Seats of State Government Across America (Part 1)-Guest Essayist: Greg Davidson

American state capital cities are an organic part of the American landscape. Capital cities sprung up along the natural waterways and pathways of American travel and commerce. Some grew next to the mighty rivers and others at the junction of major trade routes. Some are in the foothills while others are on the plains, some on the coastal bays and others far inland. Some emerged from the bareness of the great plains while others emerged from the small neighborhoods, burghs and towns that dotted the landscape. Some are located in major urban centers while others snuggle into smaller, rural communities. The fifty American state capital cities provide a unique study in the diversity and richness of the American experience.

The oldest American capital cities grew on opposite sides of the continent. Santa Fe was founded in 1610 as the first colonial American capital city followed by Boston in 1630. Santa Fe was designated as capital of the new Spanish colony of Santa Fe de Nuevo México and was situated in the foothills of the Sangre de Cristo mountains. Thirty years later the British Massachusetts Bay Colony established its capital on what was then known as Trimountaine, or Three Mountains, later to be renamed Boston after Lincolnshire, England previous home of some of the prominent colonists.

The newest state capital cities are also the largest in size. The Alaskan capital of Juneau dates back to 1881 and covers a total area of over 4,800 square miles, almost half of which is water. Oklahoma City grew out of the land rush of 1889 and now covers just over 600 square miles. Phoenix is a not too far distant third in size covering 516 square miles, but Phoenix ranks first in population with over 2 million people. The smallest state capital cities tend to be older and back east. The smallest state capital in population is Montpelier with around 8,000 people and the smallest capital city by geographic size is Hartford with just over 17 square miles.

Some capital cities grew at the junction of major trade routes. Nashville was planted as a port on the shores of the Cumberland River, a major tributary of the Ohio River, and it later became a railway hub linking together southern and northern commerce. Kansas City was founded as a port on the Missouri River at the confluence with the Kansas River and then grew into a major launching point for westward expansion as the trailhead of the Santa Fe, Oregon and California Trails.

Many state capitals have moved from several cities before arriving at their present location. Chillicothe was the first capital city of Ohio before it was moved Zanesville in an attempt to establish more development in the eastern part of the state along Zane's Trace. But political powers pulled the capital back to Chillicothe for two years before finally landing in Columbus. The capital of Texas has moved several times. During the Texas War for Independence, the revolutionary government established capitals at Washington-on-the-Brazos, Harrisburg, Galveston, Velasco, and Columbia before General Sam Houston finally moved it to Houston. As an independent nation, President Mirabeau B. Lamar envisioned a Texas growing west and moved the capital to a more central location in the small town of Waterloo, later to

become Austin. Houston was elected President and feared the new location was too remote and too difficult to defend from Mexican and native American threats, so he moved the capital first back to Houston and then to Washington-on-the-Brazos. In an incident known as the Texas Archive War, President Houston sent troops to seize the General Land Office records in Austin and take them to the city of Houston. A band of Austin citizens engaged the troops on the outskirts of town, preventing the records from being removed and taken to Houston and Austin was thereby firmly established as the capital of Texas.

While many state capital cities grew up organically from the geology and geography of the land, some were planned from the beginning. Upon his arrival in the Salt Lake Valley, pioneer and president of the Mormon Church, Brigham Young, envisioned a master-planned city built around a new Salt Lake Temple. Every inch of the city was measured from Temple Square as the meridian of reference for street addresses forming a grid of the streets that were sufficiently wide enough so a wagon team could turn around without “resorting to profanity.” The capital of Indiana was also a planned community, springing out from Monument Circle in a grid crisscrossed by diagonals reminiscent of the national capital.

Finally, it is important to note that many state capital cities predate the ratification of the national constitution and the subsequent construction of the national capital of Washington, D.C. While Frenchman Pierre Charles L'Enfant looked to the great cities of the world for his design, especially his hometown of Paris, his design for the tidelands and the marshy swamps of the Potomac worked in the basic constitutional commitments to a federal form of government. His design provided the national government with a shape and design while incorporating specific centers, streets and areas devoted to the particular states. So, even the shape and design of the District of Columbia anticipates a truly federal form of government for the United States, one in which the balance of power resides in both spheres of American government, state and national. The designations of special spaces in the District of Columbia and even the street names and places anticipate a truly diverse political state, one where the balance of power between state and nation is shared, in stark contrast to the modern notion of centralized governmental control emanating only from within the Beltway.

Regardless of size, shape, design or location, state capital cities bear one common trait: they form the context in which their individual state capitol buildings sit. At times small and cloistered, at times big and wide open, the community of the capital city forms the foundation on which each state capitol is built.

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law. They have one daughter, a senior at Regents School of Austin, who intends to go to college, study engineering or law, and play competitive golf.

Capital Cities and Capitol Buildings: Seats of State Government Across America (Part 2)-Guest Essayist: Greg Davidson

State capitol buildings in the United States embody the constitutional commitments found within the text of each state constitution, buildings that some have called the very temples of democracy. Each state capitol building in the United States presents the basic, fundamental attentiveness of the state government to the people it serves. Some of the capitols are small, domed buildings with expansive wings, while others are tall, executive-style towers reaching upward toward the heavens. Some are cloistered in urban areas. Most are set in rural settings. Some harken back to classical Rome, while others celebrate the preeminence of modern man. One thing they all have in common: each embodies the values of their respective constitutions while continuously serving as the seats of governance for the states and their citizens.

In general, the shape and design of state capitol buildings can be understood in three common categories: the statehouse, the domed capitol, and the executive tower. The statehouse form generally has a flat or slightly pitched roof with some type of spire or lantern capping off the building. Some statehouses are built with flat fronts and square windows in a federal style while others incorporated columns and wide porticos. Many early American capitols have slightly pitched or flat roofs and small areas for assembly and the conduct of business. The first capitol was a flat, adobe structure in Santa Fe, while later colonial capitol buildings in the northeast generally had pitched roofs to allow snow and precipitation to roll off.

The domed capitol emerged during the post-war period of the nineteenth century and reflected a classical or neo-classical philosophical adherence to design. The domes in some cases were supported by massive Greco-Roman columns with colonnades raising the whole structure sometimes hundreds of feet into the sky. The whole design, of course, was capped with some emblem or symbol taken from state mythology, something like Nebraska's sower, Oregon's Pioneer Man, or Texas' Goddess of Liberty. Finally, the tower form of state capitols was introduced in the twentieth century. The tower portrays a slender and sometimes sterile devotion to the bureaucratic state, a place where workers are stacked one on top of another in the name of efficiency and equality, a not-so-subtle nod to the Soviet influence of mid-century American labor movements.

Why are statehouses and capitols important to the modern American state? The style and form of the building also embodies the basic values and faithfulness of the political culture that gave it birth. State capitols built in the nineteenth century possess a dedication to Greco-Roman architecture and philosophy, a neo-classical look back to the ideals of a republic. Capitols built in the twentieth century reveal a focus on the achievement of the modern man through art deco

murals, frescos and friezes that celebrate humanity, ingenuity, and conquest over nature and the land.

Regardless of the style or form, each capitol building or statehouse reflects the shapes and contours of the constitution that gave it life. When most capitols were built to house the entirety of a state government, and as a state grew in population, its state capitol grew along with it. Some older and smaller capitols were replaced by newer, more modern buildings. Many were replaced after fire ravaged the original structures. Prior to the expansion of the welfare state, state capitols usually housed all of the basic fundamentals of government: legislative, executive and judicial branches. This basic separation of powers was displayed in the spatial organization of the building; the legislature occupied the most prominent part of most state capitols, taking two wings to house the bicameral bodies that balance representative powers, while the executive and courts were housed in other places around the building.

In most capitol buildings, the legislative chambers occupy the largest space and reach the heights of two to three floors. These grandiose chambers reflect the priority and resolve to representative government contained in most state constitutional documents. Most legislative chambers were built prior to *Reynolds v. Sims* in 1964, a United States Supreme Court decision that dismissed the differences between the two chambers and essentially made no difference between state senators and state representatives except for the size of the population each represented. The house of representatives is generally the larger of the two chambers to accommodate the larger number of state representatives. The senate chamber is generally smaller and houses a more elite body, considered the upper chamber. Gallery space is almost always provided for citizens to observe the debate and interactions of the legislative bodies.

The governor and the executive agencies were generally provided smaller spaces on the ground floors to provide direct services to the people. Placing state agencies that provided direct services to the people such as the treasury or comptroller or the attorney general on the first floor gave citizens the most direct access to the offices they needed to visit to conduct state business. Finally, the judiciary was fit in where space allowed. In some state capitols the courts were placed on the upper floors out of the main pathways of power while in other capitols the courts were either in the basement or moved out of the capitol altogether, yet again portraying the basic founding principles of their state constitutions.

There are, of course, many outliers to this general description. The unicameral legislature in Nebraska is a departure from the bicameral model of most states, and so the Nebraska capitol reflects that difference in the size and shape of its legislative chamber. And growth throughout the life of each state capitol has dictated changes, modifications and expansions to the basic shape of each capitol. The oldest state capitol building, in Massachusetts, has grown and expanded as the needs of the state grew and expanded. Some states have retained the old capitol building as a museum, and built modern chambers and offices. Some states have resisted the urge to expand at all and still live within the walls of their original building. Others have built auxiliary chambers or even vast underground complexes to keep from obscuring the grand view of these wonderful monuments to American government.

Finally, while the basic shape and form of state capitols reveals the basic shape of the government, many of the buildings embody the shared values and experiences of the people who gave their government birth. The Idaho capitol was built to be heated by streaming geothermal springs while the rotunda of the capitol in Honolulu resembles the shape of a volcano. The Oklahoma capitol sits among oil well derricks that fueled the state's growth while the Missouri capitol sits on the banks of the mighty Missouri River. Many capitol buildings, especially domed capitols, represent the basic religious commitments of the people who formed the government. The domed capitol is loosely patterned after the beautifully domed St. Paul's Cathedral in London. The cruciform shape with a transept bisecting the nave is more than a tip of the cap to Christianity, it is a solid affirmation that the separation of church and state is much more complicated than it is portrayed in modern thought. Each state capitol building links the identity of the people and their values with the powers they have placed in the hands of their state governments.

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The Nation's Capital: The District of Columbia-Guest Essayist: Peter Roff

During the Second Continental Congress' debate over whether to sever ties with Great Britain, Benjamin Franklin is alleged to have said that revolutions "come into the world half improvised, half compromised."

It may be that he never said it yet if he had he might have just as easily been talking about just how the United States of America came to locate its permanent seat of government on a plot of land, ten miles square on the banks of the Potomac River.

Officially it all came about as the result of the Residence Act of 1790 – officially "An Act for Establishing the Temporary and Permanent Seat of the Government of the United States," signed into law by President George Washington on July 16, 1790 at a time when the federal government, such as it was, operated out of New York City.

The act transferred the capital, temporarily, back to Philadelphia, the city where independence from Great Britain had famously been declared and in which the new Constitution had been written, in secret, by many of the nation's greatest minds. Those men, by and large, now occupied positions of prominence, either in the new federal government or in their states and almost all had opinions about where the permanent capital should be located.

The machinations behind the scenes that resulted in the Residence Act are perhaps the first great compromise of the new Republic. The northern states did not want the capital in the South. The southern states did not want it in the North. And no state wanted it located within the confines of any other, thinking it would give that state an unfair advantage in the affairs of the new nation.

The logjam was broken by an agreement brokered by James Madison and Thomas Jefferson, who wanted the capital in the South, and New York's Alexander Hamilton, who wanted the federal government to assume the remaining debt incurred by the states during the War for Independence. The compromise, they reached, presumably blessed by President Washington, placed the permanent capital just a few miles upriver from his Mt. Vernon estate.

In the original configuration, the land which made up the capital was ceded to the federal government by Virginia and Maryland and formed a diamond, ten miles square. In 1846 the area given by Virginia was returned. This includes the independent city of Alexandria, which existed before the district was assembled, as well as the area now called Arlington County.

What makes the District of Columbia truly unique, though, is not that it was formed from land belonging to other states. The Constitution provides for that possibility so long as the legislature or legislatures of the state or states affected consents. Maine, for example, comes from territory once a part of Massachusetts and was admitted as an independent state when a free state was needed to balance the admission of one where slavery would be legal. No, what makes Washington D.C., different from the other states and territories is that the founders intended it would always be run by the federal government.

In Federalist 43, Madison writes:

"The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy."

"This consideration has the more weight," he goes on to say

"as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and

would create so many obstacles to a removal of the government, as still further to abridge its necessary independence.”

As they saw it, the independence of the capital city from the governments of the other states was an additional safeguard of our liberties and of the new system of government created by the U.S. Constitution based on checks and balances of power not just between the three branches of the federal government but between the federal government and the states.

That system held well into the 20th century. The protests of what has become known as the civil rights era gave impetus to the viewpoint the structure of governance within the District of Columbia was antiquated and discriminatory. In 1961 the 23rd Amendment to the Constitution was ratified, giving the District three votes in the Electoral College for the election of the president and vice president. In 1973, Congress enacted the District of Columbia Home Rule Act, giving the city an independently elected mayor (to replace the city’s chief executive officer who, under different titles had been an appointee of the President of the United States) and a 13-member city council.

Home rule, however, is not complete. The actions of the mayor and the city council are still subject to congressional review and can be overturned by an act of Congress. Additionally the District lacks representation in the United States Senate (it does elect to “shadow senators” whose purpose is to lobby for statehood) its residents to elect a delegate to the U.S. House of Representatives who, at different times, has been both a voting and non-voting member of the body.

There are some who believe the District should be granted statehood. They’ve adopted and, in a nod to the chief slogan of the War for Independence managed to get onto the city’s vehicle plates the unofficial motto, “No Taxation without Representation.” There are others who believe the original constitutional construct of having the capital city run by the federal government to, for various reasons, be a good one that should be returned to as originally envisioned. It is not an issue that will be settled easily or, one must believe, soon.

Peter Roff is a Washington, D.C.--based journalist and commentator who serves on the Constituting America advisory board.

The States and America’s Republican Form of Government- Guest Essayist: Gary Porter

What is the purpose and impact of Article IV, Section 4 of the U.S. Constitution in that “The United States shall guarantee to every State in this Union a Republican Form of Government”? How does this form relate to the republican (representative) styles such as Commission Form, County Administrator, Elected Executive, City-County Consolidation, Constitutional Row Offices or Home Rule Authority to ensure power remains in the hands of each American, preventing a monarchy or aristocracy in each state and local government?

Further, what is a republic, why must Congress guarantee each state has and maintains a “Republican Form of Government” and how does it do this?

To the Framers of the Constitution, democracy was a hideous form of government. The colorful Fisher Ames, in one of his more measured criticisms, wrote: "*Democracy, in its best state, is but the politics of Bedlam; while kept chained, its thoughts are frantic, but when it breaks loose, it kills the keeper, fires the building, and perishes.*" Monarchy was obviously unacceptable; a confederation had been tried and found wanting; this left a republic. But a republic which, according to Dr. Benjamin Franklin, must be “kept.” The Constitution’s Article 4 Section 4 contributes to the “keeping.”

The first difficulty Congress faces in guaranteeing each of the fifty States has and maintains a “republican form of government” involves the lack of a consensus over what signifies this “republican form of government.” There never has been a consensus and likely never will be.

James Madison, writing as “Publius,” took a stab at the definition of a republic in 1787/88. Across several of the Federalist essays he identifies seven “republican” attributes. These are neatly summarized by Scott T. Whiteman in his short essay *What is a Republic Anyway?* [\[i\]](#)

They include:

1. A government operating under separation of powers; *Federalists Nos. 9, 47, 28, 76*
2. Representatives governing during a limited term and/or during good behavior; *Nos. 9, 39*
3. Representatives elected by the people; *Nos. 9, 39*
4. Power residing in the People; *No. 39*
5. A government that is deliberative in action; *No. 71*
6. Acknowledging the right of the people to alter or abolish their government; *No. 78*
7. A government that prohibits grants of entitlement or nobility; *No. 84*

Contemporary authors believe additional attributes should be included, such as the Rule of Law and absence of a Monarchy. [\[ii\]](#)

It is easy of course to distinguish a republic from direct democracy, but must all of Madison’s seven features be present before a political entity can be declared “republican?”

When a U.S. territory applies for statehood, Congress first passes an Enabling Act which gives the applying territory the authority to draft a proposed constitution, which is then approved by the state’s citizens and submitted for review by Congress to ensure it reflects the “republican form.” Beyond allowing Congress to ensure the basic requirements of republicanism are met, this also provides Congress the opportunity to identify anything else it objects to in the way the state intends to conduct its affairs. On rare occasions Congress has insisted upon changes to the proposed state constitution before admission, such as when Congress insisted that Utah (the 45th state) first prohibit polygamy. [\[iii\]](#) Similar polygamy prohibitions were required of Oklahoma (46th state), New Mexico (47th state), and Arizona (48th state).

How does Congress ensure a state maintains its republican form? Here is where it gets sticky.

In 1841, Rhode Island was still operating under a government established by their royal charter of 1663. The charter strictly limited suffrage and made no provision for amendment. Groups protesting these restrictions in the charter held a popular convention to draft a new constitution and to elect a governor. In response, the existing charter government declared martial law and set out to “put down the rebellion” (called the Dorr Rebellion, after ringleader Thomas Dorr). One of the “rebels,” Martin Luther (no relation to the 1517 reformer), whose house was damaged during a search by law officers, brought suit claiming the old state government was not “a republican form of government” and all its acts, including its declaration of martial law, were thereby invalid. In *Luther v. Borden*. (1849)^[iv], the Supreme Court declared in dictum that interpretation of the Guarantee Clause is a political, not a judicial question. Said another way: a “Republican Form of Government,” like “High Crimes and Misdemeanors,” is whatever Congress says it is. As noted in the Heritage Guide to the Constitution, “Citizens of a state who believe their state government has departed from the “republican form” should apply to Congress for relief rather than to the courts.”^[v]

More modern charges of departure from a “republican form” involve the issue of popular referendums, which critics say embrace direct democracy. By way of review, in a referendum, the voters decide a policy issue outside the purview of their elected representatives. A referendum obtaining a majority vote generally goes into effect without further action by the legislature. The use of initiatives and referendums is written into the constitutions of twenty-six states, particularly those in the west, and these states contain over fifty percent of the U.S. population so many Americans encounter them. Popular initiatives, referendums, or popular recall of elected representatives are admittedly all forms of direct democracy, but does the use of one mean the government is no longer republican? Every state except Delaware ratifies state constitutional amendments through a vote of their citizens rather than by their elected representatives. This is similar to one of the two methods of ratifying a U.S. Constitutional amendment, does this depart from “republicanism.” No one has complained of this to the courts. Ironically, as morbid proof that we don’t have a democracy in America, in the thirty-one states where voters popularly- approved constitutions prohibitions of same-sex marriage, all it took was one Supreme Court decision (*Obergefell v. Hodges*) to overturn them all.

Turning to local government and the question of republicanism, we find that local government can take many forms.

In the **Commission** form of government, often encountered in cities or counties, voters elect a small commission, typically of five to seven members who comprise the *legislative* body of the city or county and, as a group, are responsible for taxation, appropriations, ordinances, and other general functions. Individual commissioners are also usually assigned specific *executive* responsibilities such as public works, finance, or public safety. This form of government thus combines *legislative* and *executive* functions in the same body.

In the **County Administrator** form, an Administrator is usually appointed by an elected council/commission. The Administrator then is responsible for administration of all governmental departments, subject to the council's control.

The **Elected Executive** form is similar except that the Executive is *elected* by the polity instead of being *appointed* by the council or commission.

Constitutional Row Officers derive their name from the fact that the departments were first listed in a row on election ballots. In the Commonwealth of Pennsylvania, for example, row officers include: Clerk of Court, Controller, Coroner, District Attorney, Prothonotary, Recorder of Deeds, Register of Wills, Sheriff and Treasurer.

Home Rule Authority describes the power of a local city or county to set up its own system of self-government without requiring a charter from the state. Full home rule is allowed in thirty state constitutions and limited home rule in another nine.[\[vi\]](#) A city or county that adopts a home rule charter has the ability to amend its governmental organization and powers to suit its needs; in essence, they establish a local constitution.

As you can see, each of these forms embraces a republican form of government, at least in that elected representatives are used for day-to-day governing rather than involving the people themselves.

According to the U.S. Census Bureau, in 2012, there were 89,004 local governments in the United States.[\[vii\]](#) This included such things as school boards and regional planning authorities.[\[viii\]](#) Compare this with the fact that there are only 50 state governments and one (albeit ginormous) national government and you can see where the bulk of governing takes place in these united States: at the local level. Americans interested in serving their fellow citizens are advised to set their sights on local government. However, a brief and certainly not statistically significant analysis of current U.S. Representatives found only three in ten first served in local government. Twice as many held their first elective office in one of the 7,383 state legislature seats (nationwide).[\[ix\]](#)

While many Americans seem to give little attention to their national government, even fewer are interested in their local governments, particularly who is to represent them in those governments and how they actually govern. Voter turnout in national elections is alarmingly low, but turnout in state and local elections even worse;[\[x\]](#) some school board and city council members have reportedly been elected by only 10-15 percent of the eligible voters. And elections at the state and local level are often decided by amazingly small margins, even by a single vote.[\[xi\]](#) Our citizens' lack of interest in local government can be confirmed by attending or viewing any televised city council or county board of supervisors meeting. There, with few exceptions, you'll find a nearly empty room with the council members speaking, if to anyone but themselves, to a small handful of citizens. This is ironic since the day-to-day lives of Americans are arguably more influenced by local laws, codes and ordinances than those of their state or nation, local zoning laws being a prime example. On the other hand, polls show more Americans (71%) trust their local governments than their state governments (62%).[\[xii\]](#)

The cry of: "take back our democracy" is often heard these days, particularly from many on the political left. It is a silly notion, considering that our republican form of government is what is really at stake. But the phrase is useful; it brings in donations, lots of donations. Instead of

waving “take back our democracy” signs , might I instead suggest we form a line and register as candidates for every elected office, from dog-catcher on up?

Next time you see your Congressman or Congresswoman, ask them how Congress guarantees to each state a republican form of government and see what response you get.

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[i] <https://www.theamericanview.com/constitution-course-supplemental-assignments/what-is-a-republic-anyway/>.

[ii] *Heritage Guide to the Constitution*, David F. Forte and Matthew Spalding, ed., Washington, D.C. 2014, Guarantee Clause, p. 369.

[iii] [https://en.wikipedia.org/wiki/Utah#Utah_Territory_\(1850%E2%80%931896\)](https://en.wikipedia.org/wiki/Utah#Utah_Territory_(1850%E2%80%931896)).

[iv] *Luther v. Borden*. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

[v] *Heritage Guide*, p. 370.

[vi] https://en.wikipedia.org/wiki/Home_rule_in_the_United_States.

[vii] <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>.

[viii] The 89,004 includes 3,031 counties, 19,522 municipalities, 16,364 townships, 37,203 special districts and 12,884 independent school districts.

[ix] https://en.wikipedia.org/wiki/List_of_United_States_state_legislatures.

[x] <https://www.governing.com/topics/politics/gov-voter-turnout-municipal-elections.html>.

[xi] <https://www.npr.org/2018/11/03/663709392/why-every-vote-matters-the-elections-decided-by-a-single-vote-or-a-little-more>.

[xii] <https://news.gallup.com/poll/195656/americans-trusting-local-state-government.aspx>.

Founders' Purpose: America's State and Local Form of Government as Guaranteed by the U.S. Constitution-

Guest Essayist: Marc Clauson

What is the purpose and impact of Article IV, Section 4 of the U.S. Constitution in that “The United States shall guarantee to every State in this Union a Republican Form of Government”? How does this form relate to the republican (representative) styles such as Commission Form, County Administrator, Elected Executive, City-County Consolidation, Constitutional Row Offices or Home Rule Authority to ensure power remains in the hands of each American, preventing a monarchy or aristocracy in each state and local government?

The idea of a republican government was raised at the Constitutional Convention in the atmosphere of the just-ended War for Independence. The primary target of the signers of the Declaration has been the English king, who was designated a tyrant. This same target lies in the background in discussions of the governmental form. In addition, the Founders had read widely in ancient and recent history and had studied many forms of government labeled as republics. Their conclusions were ambiguous. They were not agreed as to what a republic was, but they did agree on what it was not. The meaning of Article IV, Section 4, then has to be understood in this light. For the Founders, it meant simply that government was not a monarchy. So to guarantee a monarchy was to eliminate monarchy as legitimate, but then to “fill in details” as to what it was by drawing on many diverse sources in order to design the best constitutional form. In a positive sense, therefore, a republic contained elements of democracy, aristocracy and some executive function, though never only a monarchy. It was also viewed as a form in which all power was limited and checked in various ways.

It is then the task of architects of governmental forms to design governmental structures to discover those institutional structures that promote republican government. Obviously this means no monarchy (or one-man rule), but that itself does not tell us what forms are best or whether we may have “sneaked” in one-man rule in other guises. It was in the late nineteenth century, during the Progressive Era, that unique forms of government began to be proposed at state and local levels.

The motives behind the Progressive Movement treated the Constitution as an outmoded document in the light of a complex and changing society. But one aspect of that movement was a desire for more democracy at all levels of government. By itself, that desire could be beneficial insofar as it marked a return to consent as the basis for governments. This democratizing trend then was consistent with the spirit of Article IV, Section 4. However, its weakness would be a failure to maximize the use of checks and balances at state and local levels, leaving the elected bodies themselves with virtually sole power with no limits except those imposed by state and Federal constitutions.

In particular, institutions like Home Rule government do bring the people closer to those who govern them, but at the same time, can increase centralization of government. So even though the officials of those urban areas might be elected, the number of officials elected might be

smaller and there might be no enforceable constitutional limits. It is necessary therefore to carefully design institutions, even though we might construct more democratic processes.

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The Unique Role of American State Governors-Guest Essayist: Greg Davidson

To many, the position of state governor is a faint echo of the president of the United States. The president is in charge of a vast empire stretching coast to coast with global implications while governors are seen as mere presiders, not much more than little men running little fiefdoms perpetuating their own schemes for self-interest and self-aggrandizement.

That view, of course, is blatantly false. The position of governor in the American political system far predates the concept of a president, though the role of the American president is a noble position of service as first exemplified by George Washington who refused a crown to rule as king and instead chose to serve through a presidency. Governors in the American colonies maintained relations with overseas powers and oversaw the vast expansion of the American state. Governors oversaw massive political changes as state constitutional systems were created. Governors laid the foundation for the modern American state through their vision, leadership, and administration.

And if the concept of governor is broadened even more to recognize them as presiding officers in the vast array of North American political systems, it is clear that these governors have led the way for centuries. Governors governed by Spanish, French or Mexican rule, that are now part of the United States, reach back to the 1500s before most of the northeastern states were even organized as colonies. This is not to mention the presiding governors of ancient tribes and native peoples in Hawaii, Alaska and all across the American continent. By this, it is also clear that the American constitutional role of the president established by the Constitution of 1789 is a latecomer to the game of governing in America.

Given this rich and varied background, present day state governors are as diverse as their history. At present, 27 of the 50 governors are Republican and 23 are Democrat or Independent. Thirty states have elected women as governors at sometime in their history, while 20 states including progressive states such as California, Colorado, New York and Wisconsin have never elected a woman governor.

Current governors self-identify their religious beliefs along a wide line of religious beliefs: 18 as Roman Catholic, five as Presbyterian, four as Christian, four as Baptist, three as Jewish, two as

Congregationalist, two as Evangelical, and one each as Buddhist, Quaker, Lutheran, Protestant, Methodist, Mormon, and Episcopalian. Five do not list any religious affiliation – a diverse lot.

States have been governed by a wide number of ethnic-minorities as well. Ten have been governed by Mexican Americans, five by African Americans, two by Indian Americans, two by Salvadoran Americans, and one each by a Spanish American, Native Hawaiian, Chinese American, Filipino American, Japanese American, Okinawan American, and Native American governor from the Cherokee Nation.

The average age of American governors at their first inauguration is just over 56 years. Governor Kay Ivey of Alabama was the oldest serving governor upon her inauguration at 72 and Ron DeSantis of Florida is currently the youngest at 40. By contrast, the American president has been exclusively male and white with one exception, generally educated in the northeast, and mostly Protestant.

Current American governors have come to their offices by many different pathways immediately prior to their election. Eleven were lieutenant governors, eight were United States Congressmen, five were state attorney generals, four were state senators, three were state representatives, three were state treasurers, two were secretaries of state, one was a county official, one was a United States ambassador, and four were assorted executive branch officials at the state level. Seven governors currently serving had no experience as elected officials prior to their election.

And finally, the position of state governor has served as a launch pad for future presidents of the United States more than the U.S. House or Senate or any federal executive branch office. Governors are elected president more than any other elected official. Nine governors were elected directly from the statehouse to the White House while only six U.S. Senators and only three U.S. Representatives were elected directly from their respective offices. Seventeen presidents were previously elected as either state governors or territorial governors. And a total of five presidents were elected with no prior elective office experience.

Bottom line is the position of governor in the American political system is unique and powerful. Whereas the national political system creates uniformity and demands conformity, American states present diversity both in the breadth of the institutional constructs creating the office of governor, and through a variety of political, ethnic and socioeconomic backgrounds. Further, innovation, economic development, educational expansion, and the extension of constitutional guarantees are at the helm of the role in which governors serve by leading the way in our American states.

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Role of State Representatives and Their House Speakers, and State Senators- Guest Essayist: Mary Salamon

State government is designed almost exactly like the Federal government. In every state except Nebraska, state governments govern with a two-chamber legislature. The smaller, upper chamber, is called the State Senate and the larger, lower chamber, is called the House of Representatives, Assembly or House of Delegates.

There are three branches of government in every state: legislative, executive, and judicial. The balance of powers spread among three branches ensures a just and fair system. Most states have a governor, lieutenant governor, senators and representatives, most of whom serve in what is called a State Legislature. Other names used are General Assembly, General Court, or Legislative Assembly.

The Nebraska legislature only has only one chamber called unicameral because it consists of only one house. Although generally referred to as the "Legislature" or the "Unicameral," the senate is the legislative body that was retained following the 1937 reorganization. Consequently, members of the Nebraska legislature are only referred to as "senators."

At the state level, representatives are elected according to districts and population determines how many representatives are elected. In general, each district receives two state representatives and one state senator. For example, Washington State has 49 senators, one for every district, and 98 representatives, two for every district. Term length for the Washington State senate is four years, and two years for representatives. In Washington State, like the Vice President of the United States, the Lieutenant Governor serves as President of the Senate, only casting a vote in case of a tie.

Largely populated states have legislatures that function similar to Congress regarding legislative sessions. Some states have full-time legislatures, others part-time affecting length of months spent in session. State legislators vote on hundreds of bills a year while they are in session and decide tax laws, state spending, and other public policies to represent the people in each of their specific districts.

Each State House of Representatives elects a Speaker of the House at the beginning of their respective legislative sessions. According to Ballotpedia.org,

The speaker is the principal leader of the lower legislative chamber. Though specific duties of the position vary in state legislatures across the country, the speaker may assume any or all of the following duties:

- Presides over the chamber to ensure that members abide by the rules and procedures
- Acts as a leader of the majority party
- Serves the constituency of their district
- Administers oaths of office
- Communicates with state executives and Senate leadership
- Rules on procedural questions
- Appoints committee chairs and/or members
- Signs legislation and official documents

Depending on the state, the speaker of the House may vote on all questions before the chamber or may only cast tie-breaking votes. In some states, the speaker may vote on all questions, but is only required to vote in the event of a tie.

State legislators are voted into office by the people of their respective states, and for the people of those states. They are elected to represent the needs and concerns of the people who gave them their votes. Understanding what constituents need is a complex task, so communication with constituents is a vital key to doing the best job possible while legislators serve in office.

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How State Legislatures Work in American Government (Part 1)-Guest Essayists: James C. Clinger and J. Drew Seib

The legislatures in American state governments developed alongside and even prior to the more famous and well-studied Congress of the federal government. Their origins can be found in the colonial assemblies that existed before the American Revolution. Those institutions developed structures, procedures, and qualifications for office-holding that influenced the development of the national legislature. This essay will briefly describe the development of the state legislatures and their relationship to the federal government.

Legislatures in the American colonies developed very quickly, largely at the request of local interests, not at the behest of the British government. These assemblies varied greatly from one another, although most, but not all, were bicameral, with different qualifications for office-holding and for voting for different chambers.^[1] These assemblies were not modeled after the British parliament, which in its modern form did not exist. In fact, the first legislatures in the American colonies were created long before the Glorious Revolution of 1688, which established the principle of parliamentary supremacy over the monarch.

During the American Revolution, royal governors often dismissed or at least attempted to suspend the colonial assemblies. Most of the newly declared states established legislatures that have come to be known as provincial congresses, which lasted until the end of hostilities. At that time, formally recognized state legislatures were created, and were allowed great authority under the Articles of Confederation. Once the new federal constitution was drafted, the state legislatures exercised new roles within the newly created union as well as within their respective states. Under the new constitution, the electorate choosing the members of the United States House of Representatives were to have the same qualifications “requisite for the Electors of the most numerous Branch of the State Legislature.”^[2] At that time, states frequently had more stringent voter qualifications to vote for the upper chamber of the legislature (i.e., the senate) than they had for the more numerous, lower chamber (e.g., the house of representatives, although many states use a variety of names for their lower chambers). By setting higher voter qualifications (usually regarding age, sex, property ownership, “freemen” status) for their own legislatures, the state could affect the electorate choosing its delegation to the United States House of Representatives.

Originally, the state legislatures directly selected the United States senators from each state, although that practice was ended by the ratification of the 17th Amendment, which established direct election of U.S. senators.^[3] In the early years of the constitutional republic, the state legislatures regularly sent instructions to their senate delegations, describing how they should vote on issues in Congress. Earlier, under the Articles of Confederation, the state legislatures not only chose their state’s delegates to congress but also had the authority to recall them from office if the legislatures were displeased with their performance.^[4]

The federal constitution also assigned a role for the state legislatures in determining the “Times, Places, and Manner” of federal house members and senators, subject to the proviso that “the

Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.”[5] Years later, the discretion of state legislatures was constrained further by the ratification of the 15th, 19th, and 26th amendments (creating a right to vote for people of all races, for women, and for eighteen year olds), and by the passage of the Voting Rights Act and other pieces of legislation.

The Constitution also provided a role for state legislatures in amending the federal charter, by either proposing a convention for proposing amendments (by a vote of two-thirds of the states) and by ratifying constitutional amendment proposals (by a vote of three-fourths of the states).[6] All successful constitutional amendment proposals have been proposed, not by a convention called by the state legislatures, but by two-thirds votes of each chamber in Congress. All but one successful amendment—the exception being the 21st, which repealed prohibition--were ratified by the state legislatures. The repeal of prohibition was ratified by special conventions in the states.

The Constitution also stipulated that certain powers were forbidden for the states. Although state legislatures were not explicitly mentioned, legislatures would have been the body enacting such prohibited laws (e.g., regarding titles of nobility, currency, interstate taxation).[7] The constitution also stipulates that federal laws, including the constitution, laws, and treaties, constitute the “supreme Law of the Land,” and state officers, including members of the state legislatures, must be bound by oath or affirmation to uphold the constitution.[8] The national supremacy clause was included in the constitution only after the defeat of a proposal by James Madison to authorize Congress to negate any state law that it opposed.[9]

The early state legislatures varied in structure but had some common structural elements. Most, but not all (i.e., Georgia and Pennsylvania had only one legislative chamber and today Nebraska is the only unicameral legislature in the U.S.), were bicameral. A small number chose their senators through an electoral college, as was sometimes done for governors and as is still done for the federal president. That practice was not common and was ended completely well before the civil war. Most state legislatures developed standing committees early in their histories, often well before the federal Congress had established that practice. State legislators generally controlled the internal rules of their chambers and selected their own leadership. Once political parties were well-established, the organization of each chamber (leadership selection, committee assignment, and committee chair selection) became largely a matter for the party organizations to decide. Today, even Nebraska’s non-partisan legislature organizes along partisan lines.[10] Most legislatures met in annual sessions and most legislators served terms of office of one year, although some members of the upper chamber served two or three years. Later in the nineteenth century, biennial sessions became standard practice, but in the late 20th century annual sessions became the norm again.[11] The size of each chamber differed widely among the states. Originally, South Carolina’s lower chamber had 199 members, while its upper chamber had only 13. Delaware, on the other hand, had only 21 in its lower chamber and nine in its upper.[12] Most legislators represented single member districts. The number of legislators was and still is significant because as the size of the legislative chamber increases, the average size of each district or constituency diminishes. Usually the demographic diversity of the constituency diminishes as the size of the district goes down. This changes the task of representation of constituency interests dramatically.[13] The number of seats in the lower chamber compared to

the number in the upper chamber affects the difficulty that an ambitious, career-minded legislator may have to move from the lower to upper chamber. [\[14\]](#)

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[\[1\]](#) Squire, Peverill. *The Evolution of American Legislatures: Colonies, Territories, and States, 1619-2009*. Ann Arbor: University of Michigan Press, 2012.

[\[2\]](#) United States Constitution, Article 1, Section 2, Clause 1.

[\[3\]](#) United States Constitution, Article 1, Section 3, Clause 1, and United States Constitution, 17th Amendment, Section 1.

[\[4\]](#) United States Articles of Confederation, Article 5.

[\[5\]](#) United States Constitution, Article 1, Section 4, Clause 1.

[\[6\]](#) United States Constitution, Article 5.

[\[7\]](#) United States Constitution, Article 1, Section 10.

[\[8\]](#) United States Constitution, Article 6, Sections 2-3.

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How State Legislatures Work in American Government (Part 2)-Guest Essayists: James C. Clinger and J. Drew Seib

State legislatures normally have had only very few, basic constitutional procedural requirements regarding the passage of legislation. Most state constitutions stipulate that laws can be enacted only after bicameral passage of identical measures, followed by presentment to the chief executive. There may also be requirements that bills receive "readings" on three or more legislative days before passage. Practically speaking, most legislative procedure is determined by internal rules of each chamber. These rules refer to bill referral to committees, methods of bringing bills to the chamber floor, procedures for disciplining members, etc.

Many of the early state constitutions did not provide a means by which the governor could block legislation through a veto. This reflected an anti-executive power bias that carried over from the opposition to the king in colonial times. Gradually, however, the powers of governors increased, and among the most important powers of the governor was the power to veto. In the 1990s, North Carolina's governor was the last to gain the veto power. The veto power varies dramatically among the states, particularly regarding which measures are subject to veto and the ease with which the legislatures can override the veto. Many states now permit an item veto for appropriation bills, but not for other legislation. Proposed constitutional amendments approved as joint resolutions by the legislature cannot be vetoed by the governor, but instead in most states today go to the electorate for approval. In several states vetoes can be overridden by margins much smaller than the two-thirds requirement necessary for overriding presidential vetoes. In some states, only a simple majority of those elected to serve in each chamber is needed to override the governor's veto.^[1]

In the early 20th century, many states began to adopt direct democracy mechanisms, such as the initiative, that permitted citizens and interest groups to propose new statutory laws or new constitutional amendments without going through the legislature. This has led to the adoption of

new laws that would have not gained legislative approval and new institutional changes that dramatically changed legislative careers.[\[2\]](#)

One of the notable changes associated with the initiative process is the adoption of legislative term limits placed within state constitutions. The limits prevent elected officials, often legislators, from serving beyond a specified number of terms in office. Gubernatorial term limits have been more common for years, but only more recently have term limits on state legislators become common. These limits have generally been opposed by state legislators whose careers would be altered by the constraints. Opponents of term limits have also said that the restrictions reduce the professionalism of their elected office and shift the balance of power from legislators to the governor and legislative staff.[\[3\]](#)

For much of American history, state legislatures could be characterized as “amateur” public institutions. Legislators were not well-paid, had few resources for legislative research, constituency service, or administrative agency oversight. They worked as part-time volunteers who did not expect to remain in office for an extended period of time. During the 1960s and 70s in particular, most but not all state legislatures increased legislative salaries (or legislator per diem payments), adopted longer legislative sessions, increased legislative staffing, and created legislative research bureaus to help with bill drafting and analysis of proposed bills or policy problems. This seems to have led to more member stability and longer legislative tenure. It may have also motivated activists in the term limits movement, who distrusted professional, career politicians. Scholarly research on this topic has found that professionalization of state legislatures has led to more African-Americans and fewer women entering the chambers.[\[4\]](#) It may have also increased the size of the Democratic Party share of the legislature, at least outside the South,[\[5\]](#) though the effects of professionalization appear to vary by party.[\[6\]](#) The imposition of term limits does not have appeared to have ended political careerism, since many term limited state legislators pursue other offices, including congressional seats.[\[7\]](#) Legislative professionalism as well as one party dominance has also been found to particularistic, such as local legislation and special bills, which are apparently aimed at boosting chances for re-election.[\[8\]](#)

Finally, it should be noted that the role of state legislatures has changed because of actions of the federal government. Under the national supremacy clause, discussed above, federal law prevails when it is in conflict with state law. This practice, known as preemption, has been used throughout much of American history.[\[9\]](#) More recently, however, state laws have been invalidated through preemption not only when laws enacted by Congress conflict with laws enacted by state legislatures but also when federal agency interpretations of how or whether to enforce laws may conflict with laws enacted by state legislatures.[\[10\]](#) Intergovernmental grant programs may also lead to a “work around” the state legislatures. For example, the Patient Protection and Affordable Care Act provided that state chief executives, not legislatures, would approve the creation of state health insurance exchanges.[\[11\]](#)

While very influential in national politics early on in U.S. history, the addition of particularly the 17th Amendment, but also the 16th, 19th and 26th Amendments have weakened the role of state legislatures in national politics. What is more, federal preemption by not only laws enacted but

also federal agency interpretation of laws has weakened the role of state legislatures in national politics.

Since their inception, the state legislatures have served as the proverbial “lab of democracy” both across states and for the federal government. The variation in design, rules, and procedures has served as an opportunity to study institutional arrangements and their effects. Many of the features in the U.S. Congress were taken from practices in state legislature and states often adopt successful reforms from other states.^[12] Their variation in designs is an opportunity to learn and strengthen political institutions in the United States.

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Dr. J. Drew Seib joined the faculty at Murray State University in the Fall of 2012. He teaches courses in American politics and research methods. Dr. Seib is the advisor for the Murray State Chapter of Pi Sigma Alpha, the National Political Science Honor Society. Dr. Seib received his Ph.D. and M.A. from Southern Illinois University with an emphasis in American political behavior. His dissertation, Frantic Voters: How Context Affects Information Searches, was awarded a prestigious National Science Foundation Dissertation Improvement Grant. Dr. Seib received his B.A. from Westminster College in Fulton, MO, triple majoring in political science, Spanish, and international studies, and minoring in European studies.

[1] https://ballotpedia.org/Veto_overrides_in_state_legislatures

[2] See Gerber, Elisabeth R., Lupia, Arthur, McCubbins, Mathew D., and Kiewiet, D. Roderick. *Stealing the Initiative: How State Government Responds to Direct Democracy*. Upper Saddle River, NJ: Prentice Hall. 2001.

[3] Carey, John M., Richard G. Niemi, and Lynda W. Powell. 1998. “The Effects of Term Limits on State Legislatures.” *Legislative Studies Quarterly*, 23(2): 271-300.

[4] Squire, Peverill. “Legislative Professionalization and Membership Diversity in State Legislatures.” *Legislative Studies Quarterly*. Vol. 17, No. 1. (1992): 69-79 .

[5] Meinke, Scott R., and Edward B. Hasecke. "Term Limits, Professionalization, and Partisan Control in U.S. State Legislatures." *The Journal of Politics* 65, no. 3 (2003): 898-908.

[6] Sanbonmatsu, Kira. 2002. “Political Parties and the Recruitment of Women to State Legislatures.” *The Journal of Politics*, 64(3):791-809.

[7] Carey, John M., Niemi, Richard G., and Powell, Lynda. *Term Limits in the State Legislatures*. Ann Arbor: University of Michigan Press. (2000).

[8] Gamm, Gerald, and Kousser, Thad. "Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures." *The American Political Science Review* 104, no. 1 (2010): 151-70.

[9] For an early example, see *Gibbons v. Ogden*. 22 U.S. 1. (1824).

[10] See, for example, *Arizona v. United States*, 567 U.S. 387 (2012)

[11] Fahey, Bridget A.. "Consent Procedures and American Federalism." *Harvard Law Review* Vol. 128,(2014): 1564-1629.

[12] see Berry, Frances Stokes, and William D. Berry. 1990. "State Lottery Adoptions as Policy Innovations: An Event History Analysis." *American Political Science Review* 84(2): 395–415.

Secretary of State: Role and Purpose on the State Level- Guest Essayist: The Honorable John Merrill

The Alabama Secretary of State's Office

Alabama has a long history that dates back to the 1800s. As the 22nd state to join the Union on December 14, 1819, Alabama had established a Secretary of State's Office the year before officially becoming a state. Henry Hitchcock served as Secretary of State for the Alabama Territory from 1818 to 1819 and then became the state's first Attorney General from 1819 to 1823. The Secretary of State served a two-year term from the time Alabama became a state in 1819 until the Constitution of 1901 set the term at four years. Up until 1868, the Secretary of State was elected by the legislature, but since that time has been selected by popular vote. Over the course of nearly 200 years, Alabama has had 53 Secretaries of State, with John H. Merrill serving as the 53rd. Since taking office in 2015 and gaining re-election in 2018, Secretary Merrill and his staff have worked tirelessly to ensure that the office is doing all that it can to assist the people of Alabama.

State law gives the Alabama Secretary of State more than 1,000 different duties, and virtually all of them involve processing and filing documents that are public records. Many of the documents must have the Great Seal of Alabama affixed in order to make them official. The Secretary of State is the sole custodian of the Great Seal of Alabama, and use of the Great Seal is controlled by state law. Only a few staff members within the Secretary of State's Office have permission to affix the seal to documents. Custody of the Great Seal was officially transferred from the Governor to the Secretary of State in 1852. Approximately 500,000 Executive, Legislative, Elections, and Business documents are stored in the Secretary of State's Office, but the office also offers a number of other services through its various divisions. In order to keep up with the public demand for access to these records, the office uses extensive computer and information technology. The Alabama Secretary of State's Office was one of the first in the nation to successfully store and retrieve the records on an optical disk, but today, many of the corporate and Uniform Commercial Code (UCC) records are available to businesses via the Internet.

Many of the executive records have both the signatures of the Secretary of State and the Governor because the Secretary of State serves as the Governor's personal notary public. When the Secretary of State is witnessing the Governor's signature, the Great Seal of Alabama is used as the "notary" seal. The executive records are composed of writs of arrest, contracts, deeds, and leases, as well as listings of abandoned vehicles found in the state, information on municipal incorporations, and the names of all the notaries publicly registered in Alabama.

In 2015, to help the state's fiscal issues, Secretary Merrill asked the Legislature to remove the Secretary of State's Office primary General Fund Appropriation for Administrative Services from the state budget. The office currently operates with revenues generated by the services provided by the office. The Secretary of State is the custodian of the original legislative bills that become law and is responsible for assigning an act number to each. The office ensures that the acts and minutes from the Legislative Sessions are distributed through bound volumes called the *Acts of Alabama*, the *House Journal*, and the *Senate Journal*. The Secretary of State also distributes the state law books called the *Code of Alabama, 1975* to government agencies.

The Secretary of State is Alabama's "Chief Election Official," and the office is given many different election duties under state law. Election records include vote totals, certified ballots, and records showing how much money candidates and political committees raised and spent during an election. Copies of certificates of election, commissions, and oaths of office are also on file for many elected officials. The Secretary of State's Office has developed a new system that allows Alabamians to register to vote electronically by visiting sos.alabama.gov/alabama-votes or by downloading the Vote for Alabama app from the Apple App Store or Google Play Store. With the implementation of the electronic ballot project, Alabama became one of the first states to employ an entirely secure, electronic voting system for the state's military and civilian voters who are outside the territorial limits of the United States. Furthermore, due to the promotion of voter registration and free photo voter ID through various initiatives, such as the mobile units that travel across Alabama's 67 counties, the unveiling of the new mobile app, and using the likeness of well-known Alabamians on promotional posters and commercials, the state's voter registration numbers are at a historic 3.4 million, as of June 2019.

Business records are divided into three categories: Lands & Trademarks, Business Entities, and Uniform Commercial Code (UCC). The Lands and Trademarks section has the original state land records dating back to the days when Alabama first achieved statehood. All of the trademarks registered in the state are also found here. Business Entity staff members reserve names of businesses, index domestic filings, and file foreign filings for businesses that register to do business in Alabama. The state has about 500,000 business entity filings, and staff members usually get about 150-650 requests each day for information in those files. Since the summer of 2016, all business corporations filings have been filed on the same day they are received by the Business Services Division and no later than the next business day for nearly three consecutive years. Secretary Merrill's instruction to deposit funds in one day caused all new domestic entities filing for the first time to be issued within one day of their Business Entity Number, which is available on the website. This process is a tremendous help to a new business, where banks, lenders, and others can verify the existence of a new domestic entity. Upon being informed that the state law provision on the payment of an "expedite" fee related to certain business filings was being processed in three business days, the expedition of the filings to be accomplished in less

than 24 hours was immediately ordered, as the state law requires. Secretary Merrill also instructs the Uniform Commercial Code (UCC) sub-division of the Business Services Division to accomplish its recordation and filing activities in the time period required by state law, which is to be fulfilled in two days. After a period of adjustment, the UCC sub-division is consistently accomplishing its public duties the same day but no later than the next business day, as well.

The Authentications Division is responsible for providing authentication services for Alabama public documents that will be used in foreign countries. These documents include birth certificates, marriage certificates, statements of marital status, articles of incorporation, corporate bylaws, certificates of merger, powers of attorney, diplomas, school transcripts, deeds, and ABI background checks. Depending on the country of usage, an Apostille or Certification is affixed to the document(s). The Secretary of State's website now offers an online listing of all the countries that are and are not part of the Hague Convention, along with each country's required type of authentication. The division is also responsible for authenticating paperwork for international adoptions, and the Secretary of State's Office hosts an International Adoption Day Celebration program each year to honor and congratulate the families who've adopted children on the international level.

The Alabama Athlete Agents Commission was established by the Alabama Legislature in 1988 through the Alabama Athlete Agents Regulatory Act. In 1994, the administrative functions for the commission were transferred to the Secretary of State's Office. Any individual who operates as an athlete agent in Alabama is required by the Revised Uniform Athlete Agents Act to be licensed by the commission.

For more information on these and other services provided by the Alabama Secretary of State's Office, visit www.sos.alabama.gov or call 334-242-7200.

John Harold Merrill is the son of Mary Merrill and the late Judge Horace Merrill of Heflin, Ala., in Cleburne County. He was born on November 12, 1963, in Wedowee, Ala., in Randolph County. He grew up in Heflin and is an Eagle Scout from Heflin Troop 206. He is a graduate of Cleburne County High School and The University of Alabama, where he served as President of the Student Government Association in 1986-1987.

While attending The University, John served as a Congressional Intern for Congressman Bill Nichols in 1983 and Sen. Howell Heflin in 1984. After college, John worked as a governmental affairs intern at the Chamber of Commerce of West Alabama in 1987-88; National Advertising Account Executive and Manager for Randall (now Randall-Reilly) Publishing Company from 1988-90; Assistant Director for the Tuscaloosa County Industrial Development Authority from 1990-93 where he assisted in the recruitment of Mercedes-Benz; Director of Business Development for the Chamber of Commerce of West Alabama in 1993-94; Director of Community Relations and Community Education for the Tuscaloosa County Board of Education from 1994-2010; and served as Business Development Officer for 1st Federal Bank in Tuscaloosa from 2011-2015.

On Nov. 2, 2010, John was elected to represent the people of District 62 in the State House of Representatives with 87 percent of the vote, which was the highest percentage garnered by a

candidate in any contested House race that year. He served as the Secretary/Treasurer of the House Republican Caucus and was a member of the powerful Rules Committee, Economic Development and Tourism, and Constitution, Campaigns, and Elections Committees.

In 2011, he was presented the "Axe Award" by the Alabama Association of Volunteer Fire Departments and became the only freshman ever to be recognized as their Legislator of the Year. John was a member of the inaugural class of NCSL Early Learning Fellows in 2011, one of 30 Legislators selected nationwide and the only one from Alabama. In 2012, he was named the Alabama House Legislator of the Year by the Children's Trust Fund, he was recognized by the Alabama Republican Party as a Rising Republican Star, and he was presented with the Tuscaloosa All-Star Award for Excellence in Caring for Veterans. In 2013, he was selected as the Soil and Water Conservation District Area III Outstanding Elected Official, Outstanding Legislator by the Alabama Association of Rescue Squads, and he was named as the Child Advocate of the Year at the Early Intervention and Preschool Conference. In 2014, John was awarded the Silver Beaver by the Black Warrior Council of the Boy Scouts of America for outstanding volunteer service in Scouting. John was identified by the Sunlight Foundation as the Most Effective Republican Member of the Alabama House of Representatives from 2011-14, and he was named Legislator of the Year by the Tuscaloosa County Young Republicans in 2014. In 2015, he was selected as one of 48 leaders from around the nation to attend and graduate from the Council of State Government's prestigious Henry Toll Fellowship Leadership Program.

On Nov. 4, 2014, John was elected as Alabama's Secretary of State with 65 percent of the vote, winning in 53 of Alabama's 67 counties. He was inaugurated as Alabama's 53rd Secretary of State on Jan. 19, 2015.

John is very active in his community and has served in many leadership capacities. He is a Deacon at Calvary Baptist Church, where he has served as a Sunday School teacher and a member of the Sanctuary Choir. He was on Emmaus Walk No. 68 and has assisted with several Emmaus Walks and Chrysalis Flights. He is a member of the National Association of Secretaries of State and the Republican Association of Secretaries of State. He is the Co-Chair of the NASS Voter Participation Committee and serves as the NASS Representative to the Steering Committee of the National Voter Registration Day. He is also a member of the United States Election Assistance Commission Standards Board. He is or has been a member of numerous community organizations, including the Alabama Sports Hall of Fame Selection Committee, Children First Board of Directors, Friends of the Alabama Archives Board of Directors, Alabama YMCA Youth in Government Board of Directors, State Republican Executive Committee, National Rifle Association, Leadership Tuscaloosa, Chamber of Commerce of West Alabama, United Way of West Alabama, YMCA, Boys and Girls Club, Big Brothers / Big Sisters, Boy Scouts of America, March of Dimes, Hillcrest High School Athletic Boosters Club, West Alabama Literacy Council and the Alabama Constables Association.

He has also served as Southeastern Regional Vice President for the National School Public Relations Association and has served as President or Chairman of many other groups, including the Alabama Children's Trust Fund, Alabama School Communicators Association, Alabama Community Education Association, American Red Cross, Leadership Tuscaloosa Alumni Association, United Cerebral Palsy of West Alabama, Youth for Christ, Druid Civitan Club and

the Tuscaloosa City School's Vocational Advisory Council. He is a past Chairman of the Tuscaloosa County Republican Executive Committee.

John has traveled internationally and represented our state and nation in Canada, China, Germany, Russia and Taiwan.

John has been married to the former Cindy Benford of Phil Campbell for 33 years. She is a career educator and the former principal at Westwood Elementary School in Coker. The couple has two children, Brooks, 28, who lives in New York and works with the Chick-fil-A corporation, and Allie Grace, 25, who is an International Flight Attendant with American Airlines.

Special thanks to the staff members of the Alabama Secretary of State's office for their assistance in the research and drafting of this essay.

The Role of the State Attorney General-Guest Essayist: The Honorable Ken Paxton

State Attorneys General (AG) serve as the chief lawyers for their respective states and work to defend state sovereignty in a variety of contexts. They represent the interests of their states in court proceedings by defending state laws against legal challenges and, in many cases, enforcing state laws in both civil and criminal actions. They frequently are called upon to provide legal advice to state officials and to issue legal opinions on a range of issues. They also may oversee critical government programs, such as (in Texas) the state's child support function.

While similar to their federal counterpart—the U.S. Attorney General—these state officers perform functions that vary greatly from the federal context, specifically in three ways.

First, the state AG is a constitutional officer of a sovereign state. The U.S. Constitution recognizes the independent states' sovereignty^[1] and limits the duties of the federal government while reserving the remaining power to the states.^[2] Unlike the U.S. Attorney General, the majority of state AGs are constitutional officers: the AG is an elected executive officer in 43 states with the remaining states appointing the position.^[3]

Texas is unique because it was a sovereign nation before joining the union. Between 1836 and 1846, the President of the Republic of Texas appointed the AG to serve a two-year term. Texas joined the Union as the 28th state on December 29, 1845, and, in 1850, the Texas Constitution was amended to provide for the election of the AG.

Second, state AGs swear an oath to uphold and defend the laws of their state in addition to the U.S. Constitution.^[4] By contrast, the U.S. Attorney General is only charged with upholding and defending the U.S. Constitution and federal law.

This role for the state AG is appropriate: it supports the sovereignty of the state and the Constitution's federalism, which allows states to hold the federal government accountable. The states, and their officers, were meant to be safeguards of a limited federal Constitution, not the front-line champions of federal power.^[5]

Texas requires^[6] the AG to protect the state's interest broadly to defend state sovereignty.^[7] Between 2010 and 2016, the Texas AG sued the federal government 48 times for exceeding its authority on issues ranging from environmental protection regulations to the Affordable Care Act.^[8] These lawsuits are important to preserve state rights and stand as a bulwark against unconstitutional federal encroachment.

Third, the role of state AGs is broader than the U.S. Attorney General because, as state officers, they must advise, protect, and enforce the laws of each of their states. Many state AGs serve as the chief legal advisor and chief law enforcement officer for their state.

In Texas, the AG issues legal opinions on a variety of topics and defends state agencies in litigation. The AG litigates antitrust and environmental violations and prosecutes human traffickers and child abusers. Texas has been a national leader in bringing cases defending states' rights and continues to be at the forefront of litigation to restrain the federal government to its enumerated powers.

In summary, state AGs have complex roles, which differ from the U.S. Attorney General, primarily because of the powers rightly reserved to the states under the Constitution and the innumerable ways in which each state wields that responsibility.

Ken Paxton is the 51st Attorney General of Texas. Attorney General Paxton is focused on protecting Texans and upholding Texas laws and the Constitution.

Fighting federal overreach, he filed 22 lawsuits against the Obama administration during a two-year stretch, of which six cases were heard in the U.S. Supreme Court. Most recently, a U.S. District Court agreed with his 20-state coalition lawsuit holding Obamacare unconstitutional. Attorney General Paxton obtained an injunction or other winning ruling in over 75 percent of the cases he has brought against the federal government.

Attorney General Paxton has won major cases for Texas on immigration, school rights, voter ID, sanctuary cities, redistricting, EPA rules and religious freedom. He created a human trafficking unit in his office that helped shut down Backpage.com, the largest online sex-trafficking marketplace in the United States. Attorney General Paxton's office has also obtained a record number of successful election fraud convictions.

Prior to becoming attorney general in January 2015, he served as a state Senator and a member of the Texas House of Representatives. A graduate of Baylor University, Attorney General Paxton earned his law degree from the University of Virginia School of Law.

A special thanks to Lesley French, Assistant Attorney General, for assistance in researching and drafting the essay.

[1] *See, e.g.*, U.S. CONST. amend. X; *id.* art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or

Confederation”); *id.* art. I, § 10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports”). A few constitutional provisions are exceptional. *See id.* art. I, § 4, cl. 1 (instructing states to prescribe the time, place, and manner of elections for senators and representatives); *id.* art. II, § 1, cl. 2 (empowering states to decide the manner in which presidential electors are selected).

[2] THE FEDERALIST NO. 46 (James Madison).

[3] Maine’s state legislature appoints the attorney general and the Tennessee Supreme Court appoints the attorney general.

[4] *See, e.g.*, CAL. CONST. art. 20, § 3 (“I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that

I will well and faithfully discharge the duties upon which I am about to enter.”); N.Y. CONST. art. 13, § 1 (“I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of [attorney general], according to the best of my ability”); TEX.

CONST. art. 16, § 1(a) (“I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of [attorney general] of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State, so help me God.”); VA. CONST. art. II, § 7 (“I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all the

duties incumbent upon me as [attorney general], according to the best of my ability (so help me God.)”); 15 ILL. COMP. STAT. ANN. § 205/1 (West 1990) (“I do solemnly swear (or affirm, as the case may be), that I will support the constitution of the United States and the constitution of the state of Illinois, and that I will faithfully discharge the duties of the office of attorney general, according to the best of my ability.”).

[5] THE FEDERALIST NO. 46 (James Madison) (discussing the ability of states to check claims of federal authority).

[6] Tex. Const. art. IV, § 22.

[7] *Id.* Those powers generally include but are not limited to: (1) bringing suit on behalf of the state or a governmental entity, *i.e.* Tex. Civ. Prac. & Rem. Code § 125.070; (2) seeking injunctive relief; (3) recovering civil penalties; (4) defending agencies and state officials, *i.e.*, Tex. Civ. Prac. & Rem. Code §§ 101.103, 104.004; Tex. Gov’t Code § 74.141 (defend state

district court judges) (5) investigatory *i.e.* Tex. Bus. & Comm. Code § 15.10 (may issue civil investigatory in monopoly/anti-trust cases); (5) enforcement of specific statutes *i.e.* Tex. Bus. & Comm. Code § 17.47 (may enforce the DTPA), Tex. Hum. Res. Code §§ 36.051-.053 (investigate, seek penalty and injunction for Medicaid Fraud); (6) seeking mandamus against certain entities, *i.e.* Tex. Election Code § 123.065; Tex. Gov't Code § 552.321 (compel gov't entity to make information public), (7) assist in prosecutions, *i.e.* Tex. Gov't Code § 41.102; and (8) approving bonds issued by state and local governmental entities as well as various utility districts and institutions of higher education, Tex. Gov't Code Ch. 1202; *Staples v. State*, 245 S.W. 639 (Tex. 1922); *Agey v. Am. Liberty Pipeline Co.*, 172 S.W.2d 972 (1943) (“The Attorney General is the chief law officer of the State, and it is incumbent upon him to institute in the proper courts proceedings to enforce or protect any right of the public that is violated. He has the right to investigate the facts and exercise his judgment and discretion regarding the filing of a suit.” (internal citations omitted)).

[8] Neena Satija et. al., *Texas v. the Feds – A Look at the Lawsuits*, Texas Tribune (Jan.17, 2017); available at: <https://www.texastribune.org/2017/01/17/texas-federal-government-lawsuits/>

“All Politics is Local”-Guest Essayist: Scot Faulkner

America is built on local government. The future of our nation depends on local communities remaining at the core of representative democracy.

In 1831, the Frenchman, Alexis Clerel, the Vicount de Tocqueville, along with his colleague Gustave de Beaumont, was sent by the French government to study America. While their mission was officially to review prisons, their nine-month journey produced one of the great classics on America’s civic culture.

“Democracy in America” was published in two volumes (1835 and 1840). It remains a foundational document describing American exceptionalism.

At its core is de Tocqueville’s description of local government:

The village or township is the only association which is so perfectly natural that wherever a number of men are collected it seems to constitute itself. The town, or tithing, as the smallest division of a community, must necessarily exist in all nations....

...local assemblies of citizens constitute the strength of free nations. Town-meetings are to liberty what primary schools are to science; they bring it within the people’s reach, they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.

America has always been a nation of communities. Its pattern of settlement, through Royal Charters, gave wide latitude for establishing local governance. Being over 5,500 miles from

London, made detailed oversight of colonies impossible. By necessity, and by desire, colonists embraced local authority over distant rule from a capitol or nation. When distant rulers attempted to increase their control, colonists ignited a Revolution.

As de Tocqueville explains:

The revolution of the United States was the result of a mature and dignified taste for freedom, and not of a vague or ill-defined craving for independence.

The first form of government was the Articles of Confederation, which created a very weak national government. External threats and internal dysfunction led to the U.S. Constitution, with extensive safeguards for local sovereignty.

America established a federal government, which means power is shared between national and state government, and the majority of governmental actions take place at the local level. This is institutionalized in the Tenth Amendment of the U.S. Constitution:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Today, America is governed by 87,576 local units. This includes 3,034 counties, 19,429 municipalities (cities, towns, villages), 16,504 townships, 13,506 school districts, and 35,052 special districts (such as water & sewer, fire, and conservation).

These independent, and interdependent, local governments reflect the diversity that is unique to America. In America, the preferred government is one closest to those it serves.

de Tocqueville links local government to being fundamental to a free people:

In the township, as well as everywhere else, the people are the only source of power; but in no stage of government does the body of citizens exercise a more immediate influence. In America 'the people' is a master whose exigencies demand obedience to the utmost limits of possibility.

Municipal independence is therefore a natural consequence of the principle of the sovereignty of the people in the United States: all the American republics recognize it more or less;

de Tocqueville uses the townships of New England as his primary example of the effectiveness of local government and their role in establishing America's unique democracy:

The native of New England is attached to his township because it is independent and free: his cooperation in its affairs ensures his attachment to its interest; the well-being it affords him secures his affection; and its welfare is the aim of his ambition and of his future exertions: he takes a part in every occurrence in the place; he practices the art of government in the small sphere within his reach; he accustoms himself to those forms which can alone ensure the steady progress of liberty; he imbibes their spirit; he acquires a taste for order, comprehends the union

or the balance of powers, and collects clear practical notions on the nature of his duties and the extent of his rights.

While discourse over major national and global issues attract the most attention, it is local government that most directly affects our daily lives. The quality of the school children attend, the condition of roads driven, the safety of neighborhoods, the taste and pressure of water coming from the tap, saving lives and property from fire or accident, are locally governed and provided.

de Tocqueville noted the benefits of locally focused government in America:

In no country in the world do the citizens make such exertions for the common weal; and I am acquainted with no people which has established schools as numerous and as efficacious, places of public worship better suited to the wants of the inhabitants, or roads kept in better repair.

He saw local government promoting individual initiative while restraining growth of a centralized state:

As the administrative authority is within the reach of the citizens, whom it in some degree represents, it excites neither their jealousy nor their hatred; as its resources are limited, everyone feels that he must not rely solely on its assistance... This action of individual exertions, joined to that of the public authorities, frequently performs what the most energetic central administration would be unable to execute.

Thanks to the strength of local government, America remains an inspiration for all those who seek free and open societies.

While chronicling America in its early years, de Tocqueville recognized how the United States' embrace of local governance already served as a model for a better world:

I believe that provincial [local] institutions are useful to all nations, but nowhere do they appear to me to be more indispensable than amongst a democratic people.

The only nations which deny the utility of provincial [local] liberties are those which have fewest of them; in other words, those who are unacquainted with the institution are the only persons who pass a censure upon it.

Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He was the Chief Administrative Officer of the U.S. House of Representatives. He started his Congressional career as an intern for Rep. Don Young (R-AK), then served on the legislative staffs of Rep. Arlan Stangeland (R-MN) and Rep. John Ashbrook (R-OH). Faulkner later served on the White House Staff and as an Executive Branch Appointee.

Counties: Backbone of Local Government, Core of Our Civic Culture- Guest Essayist: Scot Faulkner

America's 3,034 counties are the backbone of local government and form the core of our civic culture.

Counties are embedded in each state's constitution and given explicit governing roles and responsibilities. They arose during the Middle Ages as the domain of a Count or vassal serving a monarch, thus the name. When the Normans conquered England, they supplanted the local Saxon shires, governed by chieftains, with "contés", governed by agents of the Crown.

The core activities of counties have seen little change since Counts were given responsibility for maintaining law and order, providing for local roads, and arbitrating disputes, in their domain.

In his timeless masterpiece on American culture, "Democracy in America", Alexis Clereh, Viscount de Tocqueville, described the functions of county government and the selection of local officials:

The town-meeting chooses at the same time a number of other municipal magistrates, who are entrusted with important administrative functions. The assessors rate the township; the collectors receive the rate. A constable is appointed to keep the peace, to watch the streets, and to forward the execution of the laws; the town-clerk records all the town votes, orders, grants, births, deaths, and marriages; the treasurer keeps the funds; the overseer of the poor performs the difficult task of superintending the action of the poor-laws; committee-men are appointed to attend to the schools and to public instruction; and the road-surveyors, who take care of the greater and lesser thoroughfares of the township, complete the list of the principal functionaries.

The United States currently has approximately 88,000 local governments, districts, and commissions comprised of approximately 500,000 elected officials. This is 20 times as many officials as exist at the federal and state levels. Local governments collectively spend over \$1 trillion annually.

As de Tocqueville outlined in 1835, today counties provide the basic services we require in our daily lives:

- Police, fire and public safety services
- Sewage, water treatment and waste management
- Schools, libraries, and other education resources
- Roads, paths, and bridges
- Public transportation
- Planning, permitting, and enforcement
- Public health services, including mental health, and services to the disabled
- Tax collection and disbursement

The provision of these services requires close cooperation with “sister” jurisdictions, which may include the state, municipalities and townships embedded within the county, and adjoining counties. Sometimes regional commissions or authorities are established to formalize this cooperation.

County Commissioners or Supervisors act as a “board of directors” to establish policies and oversee these services. In most cases, there are only 3-9 who are elected and serve in this capacity in each county. These are part-time positions, except in the most populated counties.

The Clerk is a fulltime elected official who is the keeper of all public records, from land ownership to births, deaths, and weddings. Clerks, and their full staff, administer the settling of estates, or probate, when deaths occur. Most importantly, Clerks manage voter registration, candidate filings and reports, creating the ballot, holding the election, and counting and reporting the vote.

The elected Sheriff is more than the chief law enforcement official. Just like in “Robin Hood,” the Sheriff is the tax collector and manages the county’s finances.

Depending on the population of a county there are an array of other public officials, either elected or appointed, who handle assessing property for tax purposes, certifying the health and viability of water systems and food service establishments, coordinating emergency response, and providing parks and recreation.

Public Schools are governed by a separate and independently elected School Board of 5-9 members. While schools are funded from the property taxes assessed by the Assessor, and collected by the Sheriff, the Board administers and disburses the funds themselves.

The detailed work of counties is conducted through boards and commissions. These include land-use regulation, building permits, water & sewer, and economic development. Those serving on these boards are part-time volunteers appointed to the County Commission.

This is where local communities face a fundamental challenge.

Most Americans have poor awareness and understanding of local government. The decisions and activities of the diverse array of elected and appointed officials go unreported, or under-reported. Holding local power accountable is one of the greatest problems in America today.

In his groundbreaking book, “Bowling Alone”, Robert Putnam described the deterioration of communities in 21st Century America. This is borne out in how few people volunteer to serve on local boards and commissions, how few attend local public meetings, and how few take actions when incompetence or corruption arise.

Corruption and incompetence are more prevalent than ever. Land use can make or break fortunes, and help or harm a community, especially in the wrong hands. Unfortunately, conflicts of interest are predictable around land speculation. Misuse of public funds, especially directing contracts to friends and family, or for unrecorded payments, is always possible.

Prior to the digital age, local newspapers were the bulwark against corruption and malfeasance. Unfortunately, many of these newspapers are vanishing. Recently, Dean Baquet, Executive Editor of the New York Times, told the World Congress of News Media that “The greatest crisis in American journalism is the death of local news”. He predicted most local newspapers “are going to die in the next five years”.

Digital media remains more interested in national issues and popular culture. The journalistic capacity for demanding accountability, or reporting basic information on county government, is vanishing.

It is up to local citizens to demand accountability. This means demanding transparency, including all public documents being public and all public meetings being public.

Few local officials, especially on appointed boards, support full accountability. Countless citizen lawsuits have forced public notices to be on websites instead of posted on index cards on courthouse bulletin boards. This is vital in “bedroom communities” where most citizens commute out of the county for work.

The citizen-led victories for accountability and transparency are based upon state laws that mandate public access. These laws are called “sunshine” laws and “freedom of information acts.” It is important for those concerned about their communities to learn these laws and fully understand the importance of “adequate public notice” for public hearings and decisions.

America will remain a beacon of hope for freedom loving people everywhere only if Americans take their citizen responsibility seriously and actively participate in their local government.

Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He was the Chief Administrative Officer of the U.S. House of Representatives. He started his Congressional career as an intern for Rep. Don Young (R-AK), then served on the legislative staffs of Rep. Arlan Stangeland (R-MN) and Rep. John Ashbrook (R-OH). Faulkner later served on the White House Staff and as an Executive Branch Appointee.

City Leadership: Two Case Studies-Guest Essayist: J. Eric Wise

According to Aristotle, “the first society to be formed is the village. And the most natural form of the village appears to be that of a colony from the family...” The town of my childhood, Detroit, was a colony founded by the French in 1701. One of my forebears by the name of Parent was among the first of 40 families to settle there in 1707. My grandmother, Blanche Parent Wise, was also the first – and last – Republican woman to sit on the Detroit city council from 1952 to 1960. Greenwich, Connecticut, where I live today, began as a colony founded in 1640 by a group of Englishmen that included daughter-in-law of John Winthrop, the founder of the Massachusetts Bay Colony and author of the famous “city on a hill” sermon.

While the Town of Greenwich, population 61,000, is old, its modern charter arrived in 1975. The charter is filled with provisions for budgets, elections, flood control, health, home rule, ordinances, parks and recreation, zoning, parking, public works, sewers, a board of estimation and taxes, a town council, selectmen (think mayors and deputy mayors), and a town clerk.

As this litany of charter provisions shows, a town or city touches almost every aspect of the daily life of its people. Whether you are driving on a road, visiting a park, waving to a policeman directing traffic, taking in the bustle of your local commercial district, or simply parking your car, you are working with your city government and your city government is working for you.

A city government is always busy making a great many households into one community, into its own little “city on a hill” as John Winthrop would have said. A city government not only must do all these things – imagine a world without police or firemen, or in the case of Greenwich, public beaches! – it must also pay for them.

Thus the first article of the charter of the Town of Greenwich provides for the Board of Estimate and Taxation (or BET), which is responsible for the “proper administration for the financial affairs of the town.” The BET consists of 12 members elected at large, who serve without pay for a term of two years. The Town of Greenwich may not borrow without the approval of the BET.

The AAA rated Town of Greenwich has a highly successful financial record. The Town of Greenwich 2019-2020 Budget reflects operating costs of \$389,620,369 (about \$6,400 per capita), authorized general debt of \$39,981,000 and authorized sewer debt of \$7,250,000 (altogether about \$800 per capita). The debt represents general obligations of the Town of Greenwich backed by its “full faith and credit.” This means the Town of Greenwich has made a commitment to use its future taxing power to pay for bonds issued to meet current expenditures.

In the Town of Greenwich, executive power is held by the First Selectman. All administrative functions – police, fire, highways, sewers and other public works, building inspection, parks, recreation, law, human resources, parking services, fleet management, information technology and purchasing for such purposes, fall under the direct supervision and control of the First Selectman. A Board of Selectmen consisting of the First Selectman and two other Selectmen appoints the various heads of department on the recommendation of the First Selectman.

But there are important duties of a First Selectman that are not found in the charter. Fred Camillo, a Republican candidate for First Selectman in the Town of Greenwich, when asked about the responsibilities of a First Selectman, said “The First Selectman is the voice and face of the town, and is the person who sees to it that the public welfare is protected, its finances secure, with its future road map charted.”

Camillo, who currently represents the 151st District of Connecticut in the Capitol in Hartford, added, “The First Selectman also has to keep an eye on Hartford, and have a solid working relationship with the governor and a good rapport with the various state departments and agencies as well as legislature.”

In addition to an executive, the Town of Greenwich has a deliberative body called the Representative Town Meeting, or RTM for short. Like a city council, the RTM exercises the ordinance making powers on behalf of the people of Greenwich. A highly democratic body, the RTM consists of over 200 members, and meets regularly to conduct town business.

In addition to the First Selectman and the Board of Estimate and Taxation, the Town of Greenwich elects two Selectmen, five members of the Board of Tax Review, a Tax Collector, seven Constables.

Not to be forgotten are the volunteers. According to Camillo, “Volunteers are extremely important. They reduce the tax burden and foster a spirit of pride, which is very helpful. Greenwich is unique in that people take their civic duty seriously. In fact, the civic involvement is second to none. I travel all over the state, and I have never seen the level of civic involvement that I have seen in Greenwich. As long as I can remember, it has always been there.”

This apparatus of leaders, departments, appointees, employees, and volunteers works to deliver the essential services needed for living well. It requires the hard work and dedication of a great body of people, many of whom perform their jobs for no compensation, out of a sense that a town is a kind of family.

When city government does not work, when a town ceases to be a family, the results can be catastrophic. In 2013, Detroit, once one of the largest and wealthiest cities in the United States, filed for bankruptcy. More than ten times the size of the Town of Greenwich, Detroit had saddled itself with more than 400 times the debt. Years of overtaxing and underservicing had driven the population down to less than half of its peak. Detroit had gone from being a “city on a hill” to a city in a very deep hole. Just how deep? A suspension of representative government occurred in Detroit; an unelected Emergency Manager took over power to operate the city as the city marched into a Chapter 9 bankruptcy.

Eric Wise is an attorney practicing in New York.

Home Rule or Dillon Rule?- Guest Essayist: Gary Porter

“All politics is local”^[i]

Black’s Law Dictionary, 4th Edition defines “Constitution” as *“The organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.”* (Emphasis added)

What if a government represents not a “nation or state” but a city or county full of people; does that government also require a constitution? What if a state, which has a constitution, incorporates a city or county as a political subdivision of the state, is that city or county bound only by the limits of the state constitution, or must it operate from a more narrow set of powers? There being 89,004 local governments in the United States, this is a significant question.^[ii]

It is a question politicians have wrestled with since the first elective government was set in place in 1619 Virginia: what are the limits of authority to be exercised by a state’s lower-tiered governments?

John Forrest Dillon (1831-1914) was an American jurist who served on both federal and Iowa state courts during his lengthy career.^[iii] In 1872, while sitting on what would later become the Court of Appeals for the Eighth Circuit, he published an influential extended essay or treatise on the power of states over municipal governments, entitled “Municipal Corporations,” or, later, “The Law of Municipal Corporations.” Dillon argued, quite persuasively it seems, that municipal governments can operate only within the *express powers* given them by their state governments. Dillon’s idea can be summarized this way:

“A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words (from the state); second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation-not simply convenient, but indispensable; and fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation.”^[iv]

In essence, since they are created by the state, local governments exist to perform the tasks of the state at the local level. This makes perfect sense. If it were otherwise, an additional constitution would seem to be required; no government should be allowed to operate without clearly specified limits to its power, or tyranny would soon commence. And if a city, for instance, were to operate with only the bounds provided by the state constitution, conflicts would quickly arise over the boundary between the city’s and state’s jurisdiction. Confusion would reign supreme.

“The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse,” said James Madison on the floor of the Virginia Ratifying Convention in 1788. A hundred years later, America’s cities were growing by leaps and bounds. Tax revenues were increasing exponentially and corruption soon followed. *“Grafting, which is the*

unscrupulous use of a politician's authority for personal gain, was a common practice in utility franchising and public works projects. To make matters worse, local governments borrowed outrageous sums of money in order to attract big businesses and railroad companies. Unable to pay businesses back, local officials dissolved their cities and left the debt to the state. Lord Bryce of England observed in 1888: 'There is no denying that the government of cities is one conspicuous failure of the United States.'"[\[v\]](#)

In *Hunter v. Pittsburgh* (1907), the Supreme Court cited Dillon's *Municipal Corporations* and fully adopted his view of state power over municipalities. Note, this was while Dillon was yet alive – what an honor to have your work cited by the highest court in the land!

Today, the municipalities of forty states operate under some form of Dillon Rule, my home state of Virginia being one of them. There are different versions; some states apply Dillon's Rule only to cities, some only to counties (Alabama) some only to townships (Indiana).

Louisiana applies the rule only to “pre-1974 charter municipalities.”

The alternative to Dillon's Rule is called Home Rule,[\[vi\]](#) the principle that local government can exert broad-based power, only restrained by the state and national constitutions. We should realize that before Dillon published his ideas in 1872, there was only home rule or its un-named equivalent for the nearly one hundred years that came before Dillon under the Constitution. Whether a local government is governed by the Dillon Rule or Home Rule, the ultimate decision regarding what power they do possess resides with the state government.

But Dillon's Rule is increasingly coming under attack. Many elected officials of localities controlled by Dillon's Rule today contend they are “handcuffed” by its restrictions.[\[vii\]](#) They argue that Dillon's Rule provides them little to no power to deal with certain problems, particularly growth within their jurisdiction or technologically complex issues such as fracking, which may extend across jurisdictional boundaries. The proponents of Home Rule argue that there are areas where state power should not infringe on that of local government and many are pushing to have their state either change completely to Home Rule or at least loosen the restrictions of Dillon's Rule. Many states only apply Home Rule to certain municipalities. Arizona, for example, only applies Home Rule to cities with a population of at least 3,500 people. Thirty-one states apply either straight Dillon's Rule or a combination of Dillon's Rule and Home Rule to local jurisdictions.

One problem with Home Rule is uniformity. City governments operating under Home Rule may vary significantly in the quality and effects of their governance due to the way various administrations over the years have exerted their more loosely defined power. Under Dillon's Rule municipalities generally operate from a standard set of powers and/or restrictions.

The states of the United States were intended to be, essentially, laboratories within which “experiments” in government could be tried. The Tenth Amendment supports this view, stating that whatever political power was not delegated to the national government remained with the states and their people. Whether Home Rule or Dillon's Rule or some combination of both will

win out remains to be seen. In any case, the idea of a self-ruling people demands that the decision not be left to the politicians.

Gary Porter is Executive Director of the [Constitution Leadership Initiative](#) (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing “Our Constitution Rocks” as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: “We the People, the Constitution Matters” on [WFYL AM1140](#). Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison’s role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on [Facebook](#) or Twitter (@constitutionled).

[i] Variously attributed to Associated Press Washington bureau chief Byron Price (1932) and to Chicago writer Finley Peter Dunne (1867-1936), but most famously used by former Speaker of the House Tip O’Neil.

[ii] <https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>.

[iii] https://en.wikipedia.org/wiki/John_Forrest_Dillon.

[iv] *City of Clinton v Cedar Rapids and the Missouri River Rail Road Company*, accessed at: <https://supreme.justia.com/cases/federal/us/110/27/>.

[v] ACCE-White-Paper-Dillon-House-Rule-Final, accessed at: <https://www.acce.us/app/uploads/2016/06/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf>.

[vi] https://en.wikipedia.org/wiki/Home_rule_in_the_United_States.

[vii] Is Home Rule the Answer? Accessed at <https://www.brookings.edu/research/is-home-rule-the-answer-clarifying-the-influence-of-dillons-rule-on-growth-management/>

Home Rule or Dillon Rule? Meaning and Purpose for Effective Local Government- Guest Essayist: Marc Clauson

Home Rule or Dillon Rule? What is the meaning, purpose and impact for American citizens to choose “Home Rule” or “Dillon Rule” authority to govern their cities? How does each work for local as compared to state government?

John Dillon, a Federal judge in the nineteenth century, wrote a famous treatise, *Municipal Corporations* (1872), in which the legal doctrine of the power of municipal governments was expressed. The rule that emerged from his book and court cases was that local governments were “creatures of the state” and only had power to do what was expressly authorized by the state legislature or in the state constitution or what was implied in those laws or what was necessary to carry out those powers granted. The opposite rule, the “Cooley Doctrine,” is derived from the work of the judge Thomas Cooley, and expressed the idea of the inherent right of self-government for local entities. The idea of Home Rule for cities arose out of the Cooley Doctrine.

Neither of these legal theories is inherently better than the other, though some might think (with some support) that the Dillon Rule prevents cities from straying too far from legitimate authority. The key is what a legislature or state constitution allows a city to do. If under the Dillon Rule the city is granted expansive authority, then the rule does not effectively limit governmental power. The Cooley Doctrine already tends to allow a greater range of independent authority to a city, which may amount to an inappropriate scope of power. If the American political experiment was predicated on limited government, as was the case of the United States Constitution, then local governments should also fall under the umbrella of that political theory. There is no inherent reason why they should be treated differently than state and national governments.

The implications of the Dillon Rule are that a check on inappropriate power of a city can exist if a legislature exercises its political will. On the other hand, the Cooley Doctrine might allow a larger scope of power than would be beneficial to citizens, unless the particular city government form adopted (strong mayor, weak mayor, council, strong charter, etc.) can provide a check. In the end, what one wants to see is a city/local government that possesses powers that are similar in nature to those possessed by the national government under the Constitution, adjusting of course for the differing functions. My point has to do with the scope and nature of powers. If a particular power is allowed (under whichever rule), it still should not be an unlimited power. Moreover, not all powers are legitimate for any given local government or for any such government. Under current law of local government, it is incumbent on the state legislatures to create institutional arrangements that do limit power, or that appropriate state constitutional limits be in place.

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MA, ThM (Liberty University, New Testament Studies and Church History); MA (Marshall University, Political Science); BS (Marshall University, Physics); and PhD work (West Virginia University, Economic Theory).

Lower Courts: How Local Judiciary Systems Work- **Guest Essayist: Gary Porter**

Once upon a time in America, before the Constitution was ratified, the state courts were the only game in town (and in each state). But there was also a time in America when there were no courts whatsoever.

In early May 1607, stepping off the ship *Susan Constant*, in chains, was none other than Captain John Smith. Smith was one of 105 men and boys, plus 39 sailors who had made the perilous 144 day voyage from England.

Smith was among the most enterprising and useful members of the colony, traits that served to make others of the company jealous of his influence. Midway through the voyage Smith had been absurdly charged with plotting to murder the thirteen member ruling council, usurp the government, and make himself King of Virginia. He was confined for the remainder of the voyage. The charge was absurd in the extreme since no one on the three ships making up the small expedition even knew the names of the council members; they were sealed -- to be revealed only upon arrival in America.

On their arrival at what would be called Jamestown, Smith was liberated and the roster of councilmen's names opened, only to reveal that Smith had been assigned as one of the thirteen members. Smith complained of his unjust imprisonment and demanded a trial but could not obtain one: there was no court! The settlers quickly realized they had other pressing matters: namely, survival! Half the settlers would die in the first six months; all the while, Smith proclaimed his innocence but was not allowed to take his seat on the council.

When Smith's enemies could postpone it no longer, a hearing of the case was held and Smith was acquitted of all the charges against him; soon after, he took his rightful council seat.[\[1\]](#)

Shifting to the north, one of the first acts of the Pilgrims of Plymouth after establishing themselves as a "civil body politic" by means of the Mayflower Compact was to establish *The General Court of Plymouth Colony*, the first to establish a complete legal code in America.[\[2\]](#)

Eventually, as each of the American colonies was settled, courts were established to handle the inevitable squabbles between settlers.

Fast forward to 1781. One of the chief defects in the Articles of Confederation was that it provided no court system above the state level. With no supervision from above, state courts ruled pretty much as they pleased, not always to the satisfaction of all concerned. The consistent

rulings of the Massachusetts court system in favor of creditors and against poor farmers sparked the infamous Shays Rebellion[3] in which, not long after they had fought side by side, Massachusetts farmers and Massachusetts militiamen formed opposing lines and opened fire on each other outside Springfield Arsenal.

Then came the Constitution.

“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” so says Article 3, Section One of the U.S. Constitution. This clause obviously enables creation of the federal court system but the Constitution has little to say about the state court systems: The Judges in every State “shall be bound” to view the Constitution as the “the supreme Law of the Land” (Article VI), and the “[t]rial of all Crimes, except in Cases of Impeachment, shall be ... held in the State where the said Crimes shall have been committed” (Article III, Section 2). That’s pretty much all the Constitution has to say!

About one million cases are filed in the U.S. federal court system each year, while more than 30 million are filed in state courts.[4]

Today, state courts are considered courts of "**general**" **jurisdiction**. They hear all the various types of cases not specifically reserved to federal courts. Just as the federal courts interpret federal laws, state courts interpret state laws (although federal courts also get to interpret state laws).

Examples of cases typically heard in state courts include:

- Violations of state law. Most criminal activity falls in this category, such as robbery, assault, murder, and many drug-related crimes.
- Controversies arising out of the state constitution or other state laws.
- Cases in which the state is a party, such as state tax violations.
- Most real estate cases, malpractice, personal injury cases, and contract disputes.
- All family, divorce, custody, inheritance and probate cases.
- Nearly all traffic and juvenile cases

The structure of state court systems varies considerably but there are similarities. To get an idea of what the structure of state courts look like some example states, click on the links below:

- [Arizona State Court Structure](#)
- [New York State Court Structure](#)
- [Texas State Court Structure](#)
- [Wisconsin State Court Structure](#)

The “workhorse” of any state court system is the trial court. This is the lowest level of court and usually where a case or lawsuit will originate. It may be a court of general jurisdiction, such as a circuit court, or it may be a court of special or limited jurisdiction, such as a probate, juvenile, traffic, or family court.

- Probate courts handle the administration of estates and probating of wills.
- Family courts focus on cases involving custody and child support, neglect and abuse, and, sometimes, juvenile crime or truancy.
- Traffic courts handle alleged violations of traffic laws.
- In some states, special housing courts, or landlord-tenant courts, have been established.
- Small-claims courts handle civil matters in which the dollar amount at issue is below a certain amount.
- Juvenile courts generally handle truancy and criminal offenses committed by minors.

Each state has a Supreme Court which is generally considered the court “of last resort” unless and until the matter qualifies for a hearing in the federal court system.

While most federal judges are appointed to their positions, the majority of state trial court judges are elected by the citizens. In some states, supreme court justices are appointed by state governors or legislatures, while in others, justices are elected.

Throughout Virginia’s history (my state), the selection and term of state judges has varied. In 1776, the state legislature selected state judges to serve a life term. Between 1850 and 1864, the citizenry elected state judges. Between 1864 and 1870, state judges were nominated by the governor and confirmed by the state legislature. After 1870, the General Assembly assumed full responsibility for the selection of state judges in Virginia.

State courts play a vital role in our nation’s legal system. If you are ever a party to a lawsuit or are called as a trial witness, it will likely be in a state court. Without the fifty state court systems the federal court system would be overwhelmed. State courts are usually easy to locate and provide a great opportunity to introduce school children to the U.S. legal system.

Gary Porter is Executive Director of the Constitution Leadership Initiative (CLI), a project to promote a better understanding of the U.S. Constitution by the American people. CLI provides seminars on the Constitution, including one for young people utilizing “Our Constitution Rocks” as the text. Gary presents talks on various Constitutional topics, writes a weekly essay: Constitutional Corner which is published on multiple websites, and hosts a weekly radio show: “We the People, the Constitution Matters” on [WFYL AM1140](#). Gary has also begun performing reenactments of James Madison and speaking with public and private school students about Madison’s role in the creation of the Bill of Rights and Constitution. Gary can be reached at gary@constitutionleadership.org, on [Facebook](#) or Twitter (@constitutionled).

[1] A famous mural depicting the trial sits in the [Cuyahoga County Courthouse](#).

[2] <https://worldhistoryproject.org/1636/10/4/the-general-court-of-the-plymouth-colony-instituted-a-legal-code>

[3] https://en.wikipedia.org/wiki/Shays%27_Rebellion

[4] <https://www.bjs.gov/index.cfm?ty=tp&tid=30>

State Supreme Courts- Guest Essayist: Daniel A. Cotter

This year's Constituting America's 90 Day Study has focused on state and local government and, for each state, has discussed the constitution that each state has adopted. In every instance, the state constitution specifies the branches of government, including a judicial branch. How state supreme courts work in relation to the United States Supreme Court is mostly a matter of jurisdiction, with the United States Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish" created by the United States Constitution.

The Founding Fathers of our nation did not spend as much time debating and did not spend as much time drafting and discussing Article III, which created the federal courts and gave Congress extensive power to determine the structure of the judiciary.

Alexander Hamilton, expressing his views in the *Federalist Papers*, had a clear view of what powers the judiciary had and how they fit in the three branches of the new national structure.

In Federalist No. 78, Hamilton noted that the judiciary would be the weakest of the three branches because it had "no influence over either the sword or the purse, ...It may truly be said to have neither FORCE nor WILL, but merely judgment." With only the power of the word, and no enforcement powers, the Founders considered the judicial branch as dependent to some extent on the political branches to uphold its judgments.

The Federalist 78 also supported the notion that the nation's judiciary would serve as lower than, and not superior to, the legislative branch in order only to function as interpreter and not maker of law; Alexander Hamilton in Federalist 78, "The interpretation of the laws is the proper and peculiar province of the courts." However, this is not to say that when the John Marshall Supreme Court announced its decision in *Marbury v. Madison* in 1803, that their finding that "It is emphatically the province and duty of the judicial department to say what the law is" should have been a surprise to the nation. Hamilton in Federalist 78 stated clearly how the Constitution and other lower laws were to be assessed:

A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

State Courts

The state and local courts generally address and rule on cases and controversies that involve law and the constitution of that state. However, in some instances, those state court rulings can be appealed and challenged in the federal courts. If the issue is whether a state law violates the

Constitution, then federal courts may hear the dispute. In addition, in some instances, if the jurisdictional thresholds are met, then there might be dual jurisdiction.

An Early Clash

When John Marshall became Chief Justice of the Supreme Court in 1801, his former schoolmate, Spencer Roane, had already served as a member of the Virginia Supreme Court of Appeals for six years. Marshall was a nationalist, his views developed at least in part from his service in the Revolutionary War and the deprivations he witnessed. Roane, who was aligned with Thomas Jefferson, was a strong states' rights advocate. The two clashed a number of times over the years, with Roane ruling in a case that Marshall had been an advocate, *Pleasants v. Pleasants*. However, Roane would engage in some nullification after Marshall became chief justice. Roane refused to follow the decision handed down by the Marshall Court in 1815, *Martin v Hunter's Lessee*. Later, after the Court issued *McCulloch v. Maryland*, which addressed the United States Congressional powers vis-à-vis the state legislative powers in a controversy over the legality of the national bank, Roane wrote several editorials under pseudonyms attacking the Marshall Court's decision. Roane also wrote a number of articles that were precursors to the Nullification Crisis.

Andrew Jackson

President Andrew Jackson did not care for the Marshall Court 1832 decision, *Worcester v. Georgia*, which addressed Native Americans rights and tribal sovereignty. Jackson reportedly stated, "John Marshall has made his decision; now let him enforce it!" While there is no direct evidence he uttered those exact words, he did write in a letter to John Coffee that "the decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate."

Conclusion

The federal and state courts are separate entities with different jurisdictional limits and powers. While state issues might be litigated in federal courts if jurisdictional requirements are satisfied, United States Constitutional issues are ultimately the federal courts to decide. The Founders at the national and state levels expected the third branch, while co-equal to the other branches, to be the least powerful branch and interpreters only of laws.

Dan Cotter is a partner at Latimer LeVay Fyock LLC and an adjunct professor at The John Marshall Law School, where he teaches SCOTUS Judicial Biographies. His book, "The Chief Justices," (April 2019, Twelve Tables Press), is available now. He is also a past president of The Chicago Bar Association. The article contains his opinions and is not to be attributed to anyone else.

Role of State Courts and the American Judicial System (Part 1)- Guest Essayist: Joerg Knipprath

Under the Constitution, the only required court is the U.S. Supreme Court. The creation of lower federal courts has always been entirely at the discretion of Congress. Even if federal courts have jurisdiction, they can only hear cases specified in Article III, Section 2, of the Constitution. They are “limited jurisdiction” courts. However, the Constitution does anticipate the existence of state courts, which, in addition to their duties under state law, would perform the functions of federal jurisdiction if Congress chose not to establish lower federal courts. Even today, state courts can hear cases that involve federal jurisdiction, such as claims that arise under federal statutes or the U.S. Constitution, unless Congress has expressly made hearing that type of case exclusive in the federal courts. Congress has done that in regard to claims where the United States is a party, for example.

State courts, therefore, form the backbone of the American judicial system. Most laws are state or local laws, and most cases, civil and criminal, are heard in state courts. There may be state courts of limited jurisdiction, such as the Small Claims Court, but there is at least one level of “general jurisdiction” trial courts. In California, this court is called the Superior Court, organized by county. In other states, this may be called county court, district court or circuit court. In New York, this is called, rather bizarrely, the Supreme Court. These general jurisdiction courts may have separate departments, such as the probate division or the family law division. There may also be entirely separate specialized courts, such as juvenile courts or, in Delaware, the Chancery Court for business law cases.

In addition, many states have an intermediate appellate court system analogous to the federal circuit courts. These are typically organized by larger geographical areas. They, too, vary in names. In California, this is called the Court of Appeal for the 1st [etc.] District. In some states, this may be called the Appellate Department of the [insert name of general jurisdiction trial court]. All states have a final court of appeal. Usually, this is called [the state’s] supreme court. In New York, it is called the Court of Appeals, since, as noted above, New York calls its general trial court the supreme court.

In many states, as well as in the federal system, the role of intermediate appellate courts and the supreme court differ. Intermediate courts exist substantially to correct errors of law made by trial courts, so there is generally a right to appeal cases from the lower court. Supreme courts, on the other hand, are “courts of law, not of error,” where protecting litigants from the errors of trial courts is merely incidental to resolving significant legal issues for the broader public good. Thus, supreme courts are usually given great discretion by the legislature as to which cases they will review. The U.S. Supreme Court, for example, hears almost no cases on appeal. Rather, review is exercised by granting a writ of certiorari that orders the lower court to certify the record of the case to the Supreme Court for review. Many states follow the same approach. In California, only death penalty cases have mandatory appeal. Everything else is within the state supreme court’s discretion.

Federal judges are appointed by the President, with confirmation by a majority vote of Senators. With some exceptions for specialized, administrative law-type judges, such as the Tax Court, they serve during “good behavior,” i.e. potentially for life, subject to impeachment for constitutionally defined causes. At the state level, selection procedures for judges are so varied as to be incapable of complete description in a brief essay. A general overview must suffice. At the beginning of the country, a common model was to have legislative bodies appoint judges. Thus, the Virginia’s constitution of 1776 declared, “The two Houses of Assembly shall, by joint ballot, appoint judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty...[to] continue in office during good behavior.” This “popular control” was, at least in part a response to the distrust that many Revolutionary War-era Americans had towards the king’s appointed judges as officers of the Crown. Virginia is one of two states that retain legislative appointment in some form.

By the 1780s, a reaction had set in against legislative dominance under the first wave of state constitutions. Many states revised their constitutions over the next couple of decades. The new mode of selection of judges often replicated the U.S. Constitution. Thus, the Massachusetts constitution of 1780 stated that “All judicial officers...shall be nominated by the Governour, by and with the advice and consent of the Council [a body of nine members chosen by the two houses of the legislature jointly with a mostly advisory role to the governor]...” On the other hand, while judges in Massachusetts ostensibly served during good behavior, “the Governour, with consent of the Council, may remove them upon the address of both houses of the Legislature.” This easy removal maintained indirect popular control over the judiciary without having to resort to accusations of bad conduct needed for impeachment. Today, three states, not including Massachusetts, select appellate courts by gubernatorial appointment with legislative confirmation.

One odd characteristic of that Massachusetts constitution was that it permitted the legislative chambers, as well as the governor, to compel the Supreme Judicial Court to render formal opinions on “important questions of law, and upon solemn occasions.” This provision still applies in Massachusetts and a dozen other states. It calls upon that court to issue an “advisory opinion” even in the absence of a concrete dispute. This approach is used in various foreign systems, as well, typically those that follow the German model of having one specialized constitutional court that exercises judicial review. It is rejected under the U.S. Constitution for federal courts and in most state constitutions, which require that the judicial power only functions in concrete “cases or controversies” brought by a plaintiff who has suffered an actual injury and, thus, has standing to sue.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Role of State Courts and the American Judicial System (Part 2)- Guest Essayist: Joerg Knipprath

A wave of state constitutional conventions during the middle of the 19th century reflected the increased “democratization” of American politics that resulted in the election of President Andrew Jackson and the emergence of two modern national programmatic parties, the Democrats and the Whigs. In established and newly-formed states, the growing movement for popular control over government led to reforms of judicial systems by having judges run for political office under partisan aegis and denomination. Today, eight states retain some form of partisan election for their appellate courts, and more do so for their general trial courts.

By the late nineteenth century, the tide turned again, with partisan politics becoming identified with political corruption, urban political “machines,” and party bosses controlling the process from “smoke-filled back rooms.” Over the next several decades, reformers, often working under the label of “Progressivism,” pushed broadly for nonpartisan elections, including for judicial offices. Most new states, as well as some established states, adopted this system in the several decades beginning in the 1880s. About one-third of the states still have nonpartisan elections for their appellate courts; still more do so for their general trial courts.

There were also dissenters to the very idea of elected judges, at least above the level of local trial courts. Legal elites claimed that elections undermined judicial independence and gave short shrift to legal knowledge, experience, and temperament. One alternative would have been to follow the path of European systems that make judges civil servants, with a professional career path focused on passing examinations and embarking on the judicial analog to the old Roman *cursus honorum* to be selected to higher courts. While such a system makes sense for administrative courts or for courts that address technical issues of contract, property, or even criminal law, American courts address constitutional law controversies, as well. Those questions often overlap with controversial political issues, so that a more complex and difficult balancing act arises between judicial knowledge and independence, on the one hand, and political accountability, on the other.

One reform proposed early in the 20th century by the American Judicature Society was so-called merit selection. A non-partisan commission chooses a list of nominees, from which the governor appoints the judge, with no involvement by the state legislature. Thereafter, the people will vote at the next general election in a plebiscitary “yes-or-no” choice to retain or reject the appointee. Each judge so selected will have to stand in further periodic retention elections. This model was first enacted in 1940 in Missouri. Variants of the “Missouri Plan,” as it was dubbed colloquially, were adopted in about half of the states during the middle of the 20th century for intermediate appellate courts and supreme courts, though in fewer states for general trial courts. Since 1934, California has an inverted variation of the Missouri Plan, for courts above the Superior Court (trial court). The governor selects a nominee who must then be reviewed and confirmed by the state’s Commission on Judicial Appointments, which is composed of the chief justice of the California Supreme Court, the state attorney general, and a specified justice of the intermediate court of appeal. Again, the legislature does not participate.

While the Missouri Plan is still a popular reform proposal, it has come under fire by others who see it, with some justification, as an attempt by an unelected legal elite to entrench itself further in an isolated and unaccountable judicial bureaucracy. That opposition has manifested itself in increasingly divisive judicial retention elections and in some states, rejection of concrete efforts to institute the Missouri system. As to the former, while judges still overwhelmingly win retention elections, in California the vote in these elections has become closer. In the 1986 election, the chief justice and two associate justices of the California Supreme Court were rejected due to the public's fury with the jurists' perceived categorical hostility to application of the death penalty. Other critics complain that merit systems are a mirage, in that it is impossible to take partisan politics out of the process. They assert that political influence manifests itself in many ways through the structure of the system and the influence that the governor exerts through "citizen appointees" on the selection commission.

State courts generally have the same powers of judicial review regarding state constitutional law as federal courts have as to matters of federal constitutional law. If a state supreme court strikes down a state law as violating the state constitution, there usually is no review by the U.S. Supreme Court. The state court has acted under "adequate and independent state grounds," which means that no federal constitutional interest is involved for further review. In addition, state courts can review state laws for their conformance to the U.S. Constitution, statutes, or treaties. Such decisions, whether for or against the state law, are usually subject to review by the U.S. Supreme Court.

In addition to their role in shaping ordinary civil and criminal law, much constitutional law is made through the state courts. One reason is because the U.S. Constitution provides only a "floor" of protection for individual rights. Moreover, the U.S. Supreme Court reviews a relatively small percentage of cases decided by all lower courts, including the 12 federal circuit courts, the 50 state supreme courts, and assorted other courts. State legislatures (and Congress) can expand those rights by statute, and state courts can do so through interpretation of their state's constitution. While it is not always clear when or whose rights are expanded, rather than contracted, some state courts have been quite active in striking down state laws. For example, in abortion, school financing, same-sex marriage, and criminal procedure, among other topics, state courts have often gone further or, at least, been ahead of federal courts in defining constitutional rights. Compared to the last half of the 20th century, the U.S. Supreme Court has become more reluctant to lead constitutional change during the last couple of decades. This has refocused litigants' attention on the state supreme courts, a trend that is likely to continue.

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Judicial Finality: Is There a Final Word on Constitutional Issues?-Guest Essayist: Louis Fisher

According to the doctrine of judicial finality, the Supreme Court has the last word in interpreting the Constitution unless it changes its mind or the Constitution is amended. This doctrine, widely accepted, has no basis in the historical record. In part, that is because the Court, as with the other political branches, makes mistakes. Chief Justice William Rehnquist expressed the reason quite crisply in *Herrera v. Brown* (1993): “It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.” As this article will explain, when the Court errs it can take six or more decades to recognize a judicial error and announce a correction.

Claims of Judicial Finality

Scholars at times attribute to Chief Justice John Marshall a position he did not promote. According to Joel Richard Paul in his book *Without Precedent: John Marshall and His Times* (2018), Marshall “elevated the dignity of the Supreme Court as the final arbiter of the Constitution’s meaning.” In another study published that same year, *The Most Dangerous Branch*, David Kaplan states that Chief Justice Marshall in *Marbury v. Madison* “established that it was the Court that had the last word on what the Constitution meant” and it “has been accepted wisdom since.”

In *Marbury*, Marshall stated it is “emphatically the province and duty of the judicial department to say what the law is.” Nothing in that phrase makes any claim of judicial finality. It merely states that courts decide cases. One can also say that it is emphatically the province and duty of the elected branches to say what the law is. Nothing in Marshall’s judicial service supports the belief that he regarded the Supreme Court as supreme on constitutional issues. His behavior during the impeachment hearings of Judge John Pickering and Justice Samuel Chase demonstrates that he understood the value of sharing that responsibility with Congress and the President. Marshall wrote to Chase on January 23, 1805, suggesting that members of Congress did not have to impeach judges whenever they disagreed with their legal opinions. Congress could simply reverse objectionable rulings through the regular legislative process. The Court could say “what the law is” but so could Congress.

Consider what he wrote to Chase: “I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.” Those are not the words of someone devoted to judicial superiority or finality.

During Marshall’s lifetime, he was well aware that constitutional decisions by the Supreme Court could be reversed by the other branches. In *McCulloch v. Maryland* (1819), the Court upheld the authority of Congress to create a national bank. That decision did not prevent Congress or the President from reaching a different position at a later date. That is what happened on July 10, 1832, when President Andrew Jackson vetoed a bill to incorporate the bank. He acknowledged that those who supported the bank maintained that “its constitutionality

in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court.” He rejected that position. Congress did not override his veto. Aware of Jackson’s action, Marshall had full appreciation of the degree to which the elected branches could reverse constitutional decisions by the Supreme Court. He passed away on July 6, 1835.

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Judicial Finality: Protecting Individual Rights-Guest Essayist: Louis Fisher

Although there is a general belief that courts are reliable guardians of individual rights, the pattern of litigation does not support that position. Congress and state legislatures have often been more reliable protectors of minority rights and civil liberties than the Supreme Court. The doctrine of judicial finality has been thrust aside in many broad areas, including the rights of blacks, women, and religious minorities.

In *Dred Scott v. Sandford* (1857), the Court concluded that Congress had no authority to prohibit a citizen from owning slaves north of the dividing line in the western territories. In his inaugural address in 1861, President Lincoln addressed the issue of judicial finality, stating that “the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” In legislation enacted in 1862, Congress asserted its independent constitutional authority by prohibiting slavery in the territories. What the Supreme Court said in *Dred Scott* Congress could not do, it did.

In 1875, Congress passed legislation to provide blacks equal access to public accommodations, including theaters, restaurants, inns, and public transportation. In the *Civil Rights Cases* of 1883, the Supreme Court declared the statute unconstitutional. Not until 1964 did Congress again pass legislation providing for equal access to public accommodations. What could have been accomplished in 1875 had to wait nearly a century because of judicial obstruction.

As with blacks, women learned that their constitutional interests were better protected by legislative bodies, at both the state and national level. A good example is the experience of Myra Bradwell. After studying law, she applied for admission to the Illinois bar in 1869. A panel of four male judges denied her application solely on the ground that she was a woman. They did suggest that action by the state legislature was an option. In 1872, it passed legislation stating

that no person “shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex.”

Bradwell then took the issue to the Supreme Court, hoping to establish a national right of women to practice law. A unanimous Court in *Bradwell v. State* (1883) held against her. A concurrence by Justice Joseph P. Bradley insisted that the civil law, “as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.” He insisted that man “is, or should be, woman’s protector and defender.” The “natural and proper timidity and delicacy” of women made them “unfit” for many occupations, including law. Reaching to a higher level, he argued that a “divine ordinance” commanded that a woman’s primary mission in life is centered in the home. While some women do not marry, he nonetheless decided that a general rule imposed upon women the “paramount destiny and mission” to fulfill the roles of wife and mother.” To Bradley: “This is the law of the Creator.”

Not until 1971 did the Supreme Court issue an opinion striking down sex discrimination. A unanimous Court in *Reed v. Reed* declared invalid an Idaho law that preferred men over women in administering estates. A study by John Johnson and Charles Knapp, published in the NYU Law Review in 1971, denounced the failure of courts to defend the constitutional rights of women. They concluded that “by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable.”

Consider the recent case of Lilly Ledbetter. In 2007, the Supreme Court split 5-4 in deciding that her claim against Goodyear Tire for pay discrimination had been filed too late. She had worked there from 1979 to 1998, aware only toward the end of her service that she was paid less than men doing the same work. The Court held that she had to file within 180 days. A dissent by Justice Ruth Bader Ginsburg recalled that the Civil Rights Act of 1991 overturned in whole or in part nine decisions of the Supreme Court. She remarked: “Once again, the ball is in Congress’ court.” In one of the first bills signed by President Barack Obama, Congress passed legislation in early 2009 stating that discriminatory actions by an employer carry forward in each paycheck, allowing women to file a complaint in a timely manner for relief.

Consider other judicial reversals. In 1916, Congress passed legislation to regulate child labor in interstate commerce. Two years later, in *Hammer v. Dagenhart*, a 5-4 Supreme Court struck down the statute as unconstitutional. Congress did not accept judicial finality. It passed legislation to regulate child labor, relying this time on the taxing power. In *Bailey v. Drexel Furniture Co.* (1922), an 8-1 decision struck down that legislative effort. Congress passed a constitutional amendment in 1924 to provide authority under the commerce power to regulate child labor, but by 1937 only 28 of the necessary 36 states had ratified it.

Instead of accepting judicial finality, Congress passed legislation in 1938 to regulate child labor through the commerce power. In 1941, the Supreme Court unanimously upheld the statute. As to its decision in 1918, the Court remarked that it “was novel when made and unsupported by any provision in the Constitution.” A remarkable statement. Not a shred of constitutional support. The Court in 1941 repudiated not only the doctrine of judicial finality but the assumption of judicial infallibility. The motive and purpose of a regulation of interstate

commerce are matters, said the Court, “for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”

In *City of Boerne v. Flores* (1997), Justice Anthony Kennedy stated that when the Supreme Court “has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177.” Reference to *Marbury* lacks any substance. Nothing in that decision gave the Supreme Court the final word on legal and constitutional matters. Kennedy made no mention of *Goldman v. Weinberger* (1986), in which the Court upheld the military’s authority to prohibit Captain Goldman from wearing his yarmulke indoors while on duty. The following year, Congress passed legislation to permit members of the military to wear religious apparel unless it interferes with military duties. Congress acted pursuant to its express Article I power to “make Rules for the Government and Regulation of the land and naval Forces.” The decision in *Goldman* was little more than an advisory ruling, deferring to whatever Congress later decided to enact.

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Judicial Finality: Correcting Errors-Guest Essayist: Louis Fisher

Consider some recent examples of the Court admitting errors on constitutional issues. In *United States v. Curtiss-Wright* (1936), the Court upheld a statute that delegated to President Franklin D. Roosevelt authority to prohibit the sale of arms in the Chaco region in South America whenever he found “it may contribute to the reestablishment of peace” between belligerents. The Court then added extraneous language (judicial dicta), claiming that the President possesses “plenary and exclusive” power over foreign affairs and serves as the “sole organ” in external affairs. Anyone reading the text of the Constitution would understand that the Framers did not place all power over external affairs in the President. Clearly that power is allocated to both Congress and the President.

For the phrase “sole organ,” the Court relied on a speech given by John Marshall in 1800 when he served in the House of Representatives. The year marked an election contest between President John Adams and Thomas Jefferson. Supporters of Jefferson in the House wanted to either impeach or censure Adams for turning over to England an individual charged with murder. During his defense of Adams, Marshall used this language: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”

The phrase “sole organ” requires close examination. “Sole” means exclusive but what did he mean by “organ”? Simply the President’s duty to communicate to other nations U.S. policy after

it had been decided jointly by the elected branches? Anyone reading the entire speech would understand that Marshall was not investing the President with plenary and exclusive power over external affairs. Instead, he merely defended Adams for carrying out a provision in the Jay Treaty that allowed each country to deliver up to each other “all persons” charged with murder or forgery. The person that Adams turned over to the British, Thomas Nash, was charged with murder. Adams was not making foreign policy singlehandedly. He was carrying out a treaty. By the time Marshall completed his defense of Adams, Jeffersonians considered his argument so tightly reasoned that they dropped plans for impeachment or a censure vote. It is evident that the Supreme Court in *Curtiss-Wright* merely relied on a sentence by Marshall and failed to read his entire speech to put that sentence in proper context.

Scholars immediately faulted the Supreme Court for the erroneous use of Marshall’s sole-organ speech. However, from one decade to the next, executive agencies and federal courts relied on the sole-organ doctrine to promote independent presidential power in external affairs. As noted by Harold Koh in his book, *The National Security Constitution* (1990), “lavish description of the president’s power is so often quoted that it has come to be known as the ‘Curtiss-Wright so I’m right’ cite—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief.”

Litigation in the George W. Bush administration led to second thoughts about the sole-organ dicta. In signing legislation in 2002, President Bush objected that several provisions “impermissibly interfere with the constitutional functions of the presidency in foreign affairs, referring to the President’s authority to “speak for the Nation in international affairs.” Implicitly, if not explicitly, he relied on *Curtiss-Wright* dicta. Litigation remained in the federal courts for a number of years, with the D.C. Circuit at one point holding that the case was a political question unfit for the courts, a position the Supreme Court rejected in 2012.

Turning to the merits, the D.C. Circuit on July 23, 2013 upheld independent presidential power in foreign affairs by relying five times on the sole-organ dicta. It acknowledged that the language was dicta, but emphasized it was Supreme Court dicta. It demonstrated no understanding that the sole-organ doctrine was erroneous. The opinion by the D.C. Circuit prompted me to file an amicus brief with the Supreme Court on July 1, 2014, explaining that the purpose of Marshall’s speech in 1800 was to defend President Adams for carrying out a treaty provision and that nothing in the speech promoted independent presidential authority in external affairs. I urged the Court to correct the error in *Curtiss-Wright*. When the Court is in session, the National Law Journal each week selects a brief that merits attention. On November 3, 2014, it selected mine, featuring this heading: “Can the Supreme Court Correct Erroneous Dicta?”

On June 8, 2015, in *Zivotofsky v. Kerry*, the Supreme Court rejected the sole-organ doctrine that had magnified presidential power in external affairs for 79 years. In doing so, it proceeded to create a substitute model that promotes independent presidential power in external affairs. It did that by first attributing to the President the quality “of unity at all times.” Anyone who studies the presidency recognizes that administrations regularly display inconsistency, conflict, disorder, and confusion. Memoirs written by top officials after their retirement highlight the infighting and disagreements prevalent within an administration.

To the quality of unity the Court added four other characteristics of the President: decision, activity, secrecy, and dispatch, borrowing those words from Alexander Hamilton's Federalist No. 70. Why would the Court assume that unity plus those four qualities are inherently positive in nature and consistent with constitutional government? The five qualities could easily describe a monarchy or dictatorship. Moreover, anyone familiar with the record of Presidents, particularly after World War II, would understand the costly record of Truman in Korea, Johnson in Vietnam, Reagan in Iran-Contra, Bush II in Iraq, and Obama's decision to order military force against Libya, leaving behind a country broken legally, economically, and politically, providing a breeding-ground for terrorism. For further details on the sole-organ doctrine, see my article "The Staying Power of Erroneous Dicta: From *Curtiss-Wright* to *Zivotofsky*," 31 Constitutional Commentary 149 (Summer 2016).

For another recent action by the Supreme Court to correct an earlier decision, one can review the Japanese-American cases of *Hirabayashi* (1943) and *Korematsu* (1944). On February 19, 1942, President Roosevelt issued Executive Order 9066, leading to various actions against Japanese Americans. A month later, Congress passed legislation to ratify the executive order. In the first case, the Court upheld a curfew placed on Japanese Americans on the west coast. In the second case, the Court supported the relocation of Japanese Americans (two-thirds of them U.S. citizens) to detention camps. With no evidence of disloyalty or subversive activity, the United States imprisoned Japanese Americans solely on account of race. General John L. DeWitt, who established the curfew, believed that all Japanese Americans, by race alone, are disloyal. He believed that individuals of Japanese descent belong to "an enemy race" whose "racial strains are undiluted."

Aided by scholars, *Hirabayashi* and *Korematsu* returned to court in the 1980s after newly discovered documents revealed the extent to which executive officials had deceived federal courts and the general public. A report prepared by the War Department contained erroneous claims about alleged espionage efforts by Japanese Americans. With abundant evidence of executive branch efforts to deceive the judiciary, *Hirabayashi* and *Korematsu* filed a writ of coram nobis, charging the government with committing fraud against the court. Through those actions, in the lower courts, their convictions were reversed.

Also in the 1980s, Congress created a commission to gather facts and determine the wrong done by Roosevelt's order. Released in December 1982, the commission's report stated that the order "was not justified by military necessity" and that the principal factors shaping those decisions were "race prejudice, war hysteria, and a failure of political leadership." To the commission, the decision in *Korematsu* "lies overruled in the court of history." In 1988, Congress passed legislation to acknowledge "the fundamental injustice of the evacuation, relocation, and internment" of Japanese Americans. At that point the Supreme Court had sufficient evidence that its decisions in 1943 and 1944 were defective and needed to be repudiated. It chose not to do that.

Not until June 26, 2018, did the Supreme Court admit error in *Korematsu*. Writing for the Court in *Trump v. Hawaii*, Chief Justice John Roberts stated that *Korematsu* "was gravely wrong the day it was decided." If that is so, why did the Court take 74 years to make that

admission? Given the Court's acknowledgment that *Korematsu* was defective, what about *Hirabayashi*? Is that still good law? Why didn't the Court repudiate both decisions?

Conclusions

In an article published in 1962 in the NYU Law Review, Chief Justice Earl Warren discussed the Court's role in safeguarding individual rights. As to the Japanese-American cases in 1943 and 1944, he offered this explanation: "To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is." Clearly that is a repudiation of judicial finality. Expecting courts to regularly protect constitutional liberties is ill-advised. Warren believed that the American political system requires the judiciary to play a restricted role: "In our democracy it is still the Legislature and the elected Executive who have the primary responsibility for fashioning and executing policy consistent with the Constitution.

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Their Common Defense: Alliance Between the Sovereign States- Guest Essayist: Gordon Lloyd

How did three critical clauses of Article I, Section 8 of the Constitution come into being? The clauses read: "The Congress shall have the power 1) to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for 2) the common defense and 3) general welfare of the United States."

The general welfare and common defense clauses made their first appearance in Article III of the Articles of Confederation of 1781. Thus these two clauses have been linked together from the very beginning of the country as part of the undisputed and expressly stated role of the federal government. They also made their way into the Preamble of the Constitution of 1787.

The union under the Articles of Confederation LIMITED THE REACH OF THE FEDERAL GOVERNMENT to the powers "expressly delegated to the United States." (Article II.) The "alliance" between the "sovereign states" was on behalf of their "common defense, the securities 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 the them...." (Article III.) One power not expressly stated in the Articles was the power to lay and collect taxes.

A major problem under the Articles was agreeing on a formula for raising revenue to fund the limited objectives of the union. Since Congress did not have the power to lay and collect taxes, requisitions to each of the states had to be filed. Accordingly, one reason for the Constitutional Convention in Philadelphia in 1787 was to secure a reliable source of revenue for the federal government.

The Virginia Plan, introduced by Edmund Randolph and James Madison on May 29, 1787, at the Constitutional Convention, contains 15 Resolutions to “correct and enlarge” the Articles of Confederation. The first Resolution reminds us that the problem, as far as the Virginia delegates were concerned, lay with the limited powers and not so much the objectives of the Articles. The goals of the Articles are reaffirmed by the first Resolution: “common defense, security of liberty and general welfare.” And to secure these ends, the Virginia Plan recommended a radical alteration of the structure and powers of the federal government. True, nothing was explicitly stated in the Virginia Plan about the power of taxation, but this power was added once the delegates got down to working out the details.

The Framers went through the first draft of the Constitution presented by the Committee on Detail on August 6. There is a specific reference to the power of Congress to lay and collect taxes. Congress was also given the power in this first draft "to lay and collect taxes, duties, imposts and excises" thus providing a constitutional source of revenue for the new government. Congress was also given power on behalf of the general welfare clause, and the common defense.

As it emerged from the Committee on Detail, these three powers of Congress had the potentiality to be very broad reaching indeed. Particularly unsettling was the unfamiliar power to lay and collect taxes clause designed to cover the "necessary expenses of the United States." On August 25, Roger Sherman moved that taxes be limited to "defraying the expenses that shall be incurred for the common defense and general welfare." So, according to Sherman, the "necessary expenses of the United States" are those expenses that are incurred on behalf of the common defense and general welfare. The delegates initially dismissed Sherman's proposal as so obvious it was “unnecessary.”

But Sherman persisted. He was concerned that if the Constitution did not explicitly restrain elected officials by specific limitations on the taxing power, then they will use the taxation power to extend the reach of federal government. On September 4, the delegates agreed with Sherman that “The Legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." This was unanimously agreed to. Thus, Sherman got his way in LIMITING the power to lay and collect taxes to items that fell under the common defense and general welfare clauses.

So we can mark September 4 as the date securing the specific linkage between the lay and collect tax clause, the common defense clause, and the general welfare clause. On September 12 Report the Committee of Style substituted “Congress” for the “Legislature.”

A related question is how did the common defense clause and the general welfare clause make their way into the Preamble of the United States? We have seen how the Articles of

Confederation had a Preamble in which the purposes of the union were “common defense, the securities of their liberties, and their mutual and general welfare.” The Constitutional Convention followed this precedent.

All through the ratifying debates, opponents of the Constitution, such as Brutus, wondered whether the taxation, common defense and general welfare clauses, instead of being restrictions on the reach of the taxing power of the federal government, as intended, were actually potential invitations for the expansion of the powers of the federal government. What activities of the federal government, said Brutus, could not be included under the taxation, common defense, and general welfare clauses? The answer, said the authors of the Constitution, was that the power to tax must be clearly associated with items that manifestly concern the common defense and the general welfare.

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Funding States and Cities: How Dollars Work (Part 1)- Guest Essayist: Nicholas Jacobs

If, "in this world nothing can be said to be certain, except death and taxes," in the United States, taxes are a little more certain than death. Americans, after all, pay taxes to not just one national government, but to at least two additional ones as well: their state and locality. Paradoxically though, the framers of the U.S. Constitution believed that by establishing a system of multiple governments with independent taxing authority, the total tax burden placed on citizens would be *less* than it would be if one gargantuan government existed.[\[1\]](#)

For anyone that has ever filed your own taxes, you know that it is highly technical and subject to precise calculations, lengthy procedure, and numerous exemptions. Yet, at its most basic level, the methods by which governments acquire money are political determinations -- reflective of each community's unique history, size, political culture, and available resources.[\[2\]](#) The variation across different levels of government and between governments of similar scale reflects the political diversity American federalism nourishes. Understanding that variation in all of its complexity is the first step towards evaluating how federalism, despite creating many governments, can actually reduce the total tax burden placed on the American taxpayer.



Financing Local Governments

Local governments receive about 17.6 percent of every dollar that Americans pay to government each year, totaling just over \$1-trillion.^[3] Historically, the revenue decisions reached at the local level had the largest influence on Americans' day-to-day lives. Municipal corporations were the leading provider of government services, establishing school systems, transportation networks, and welfare assistance before the states and national government. Much of this system remains and over time, additional types of local government emerged, each with their own taxing and spending authority; unincorporated county-governments, consolidated government units, and independent school districts -- like towns and cities -- all collect revenues to operate.

Remarkably, taxes account for just two-thirds of all revenues local governments raise. Localities amass considerable sums by charging fees on the use of hospitals, sewers, harbors, and airports. Some even rake in a small amount through the sale of school lunches. These "user fees" are like taxes, but they are non-compulsory and are only paid by those who use the service (sometimes provided by a private entity). Like usage fees, most local governments also raise revenue from utilities, such as a city's water supply or transit system. Many Americans might also live in local, special-purpose districts, which are established for specific functions, and which have separate budgetary powers.

When considering taxes -- compulsory, generalizable, and unavoidable legal obligations to pay the government money -- local governments have a more limited "base" on which to rely. By far, the largest source of tax revenue for local governments, nationwide, is the property tax, which accounts for nearly half of all money local governments raise. But some local governments also take in money by taxing personal income and through localized sales taxes, especially on food and alcohol sold in restaurants.

Local governments derive such a significantly high percentage of their revenues from property taxes largely because of historical circumstance (they were the easiest to assess and collect), but also because they are pegged to the relative cost of living in any one, localized political jurisdiction. For instance, the rate set by the city of Boston might make sense for a densely populated, urban community where people make high incomes, property values are high, and citizens expect expensive government services. That same rate, however, might bankrupt the

small family farmer in Western, Massachusetts, who owns considerably more land, and expects much less from government.

Financing State Government

State governments rely on all the same techniques as do local governments, including property taxes on possessions such as automobiles, and usage fees on services, such as parks and highways (tolls). However, there is much more variation between the states in how government finances itself.

Most states (46/50) have a general sales tax - a percentage added to each commercial transaction in the state, which retailers and merchants deliver to the state government. Sales taxes account for nearly half of all tax revenue raised by states. However, that percentage varies drastically. Some states, such as New Hampshire and Montana, do not have a general sales tax (although both states charge sales tax on specific goods such as food and lodging). Other states, such as Tennessee and Arkansas, impose sales taxes that approach 10% on all goods purchased within the state.

Most states (43/50) also levy a state-wide income tax, which accounts for about 37% of all tax revenue at the state-level. Like the sales tax, these rates vary, and often move in relation to the state sales tax. For instance, Maine levies a 7.15% tax on the highest levels of income, which is one of the highest rates in the country; however, it charges just 5.5% on goods and services, one of the lower sales tax rates in the U.S.

This variation is important, and represents a healthy federal system. Decisions over what type of revenue source to tap generally reflect a state's particular economy and the livelihoods within them. Taxpayers generally want to limit the amount of burden placed on themselves, so most governments try to "export" their state's tax base. Property taxes paid on vacation homes, gasoline taxes paid by visiting motorists, and purchases made by tourists are all examples of how state governments get money from non-residents. In Nevada, nearly 80 percent of state taxes come from sales taxes, where in Illinois, state governments rely on a broader base of economic activities, including a 7% tax on corporate income, which brings in the state \$3.3-billion each year.

The difference between taxing property, sales, and income is also reflective of underlying political beliefs. Most states that rely more on income tax revenues use a "progressive" rate, so that individuals who earn higher annual incomes pay more tax. In contrast, most budgeters consider sales tax to be a "regressive" measure. Although not pegged to income, individuals with lower incomes, on average, pay a higher proportion of their annual income in sales taxes than do individuals with higher incomes. Importantly, the determination to impose one type of tax over another is not a technical or objective calculation: it is the result of competing ideas about fairness, and varied expectations for government spending, which federalism encourages.

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scholarly articles on intergovernmental politics, American political history, and the American presidency.

[1] Vincent Ostrom. 1987. *The Political Theory of a Compound Republic: Designing the American Experiment*, Second Edition. Lincoln, NE: University of Nebraska Press.

[2] Otto A. Davis,, M.A.H. Dempster, and Aaron Wildavsky, "A Theory of the Budgetary Process," *The American Political Science Review* 60 (1966): 529-547.

[3] All figures, referenced in the following two sections on state and local finance, including the data graphed in Figure 1 are drawn from the U.S. Census Bureau's 2016 State & Local Government Finance Historical Dataset, which is publicly available at <https://www.census.gov/data/datasets/2016/econ/local/public-use-datasets.html>

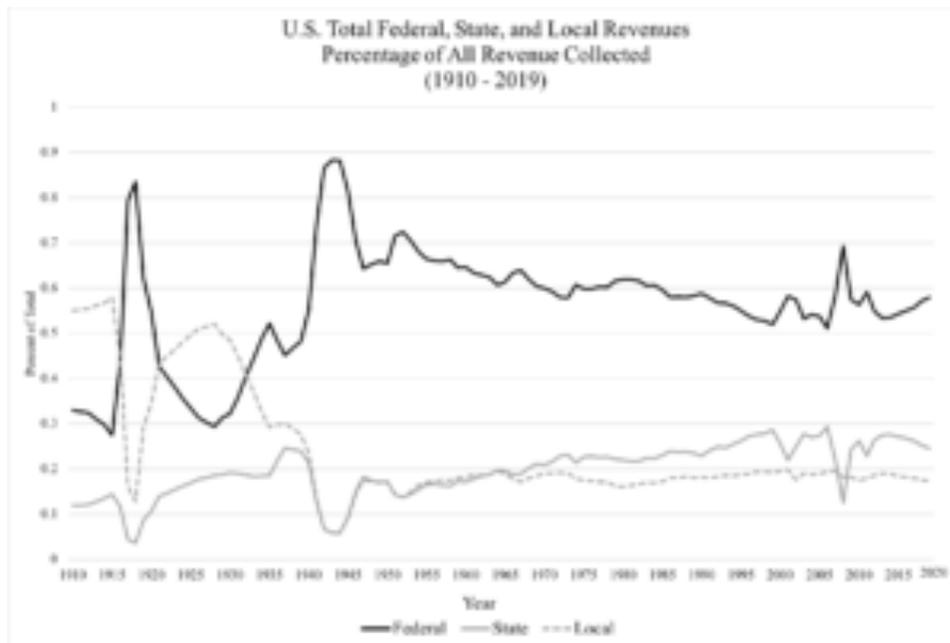
Funding States and Cities: How Dollars Work (Part 2)- Guest Essayist: Nicholas Jacobs

Intergovernmental Finance

Every nickel spent by a state or local government ultimately comes from the pockets of some private entity, but often public monies are exchanged between governments. Intergovernmental transfer payments account for 23 percent of all money spent by state and local governments.

Most intergovernmental transfer payments point "downwards" in the federal system, moving from larger governments to ones of smaller size. The federal government delivered \$621-billion to the various states in 2016, and state governments sent \$524-billion to various localities in that same year.[1] Overtime, intergovernmental payments have grown as a share of state and local government revenues -- a trend we will evaluate in the next essay -- and the federal government has even come to make direct payments to localities in some specific instances.

Most forms of intergovernmental revenue take the form of grants -- direct payments to a state or local government agency, with a specific purpose outlined by the grantee. The federal government, for example, sends billions of dollars it collects to the states for the purpose of constructing and maintaining highways. Likewise, state governments send some tax revenue it collects to localities for funding public health programs. The federal government even sends money to the states that the states then divide up and send to the localities.



Intergovernmental payments can be rigidly formulaic -- a set number of dollars for a set number of persons -- that treat governments of similar size equally. Payments can also be re-distributive, taking tax dollars from one political community and giving it to another. Most local school systems, for instance, fund their expenses through property taxes raised in the local community they serve. Increasingly, however, state governments re-distribute some of those monies, taking local revenues from towns, counties, and cities with higher property values, and sending it to communities with lower property values, and, consequently, lower revenues.

Beyond its redistributive effects, larger governments tend to send revenues to governments of smaller size out of recognition that money can be spent more effectively at the local level than a state-wide or national level. In fact, grants and other types of intergovernmental spending account for over 17% of all federal monies that the Congress appropriates each year.^[2] As such, much of what the federal government does is, in fact, done by governments of smaller size. But in exchanging monies, intergovernmental transfers are one way in which larger governments set new restrictions on smaller governments, sometimes with little relevance to the funding purpose. For example, in 1984, Congress passed a law requiring states to raise the minimum drinking age as a condition for receiving its share of federal highway funds. More recently, the federal government imposed requirements on local public schools to develop and administer specific tests for all enrolled students: The 2001 law, No Child Left Behind. As a result, if local governments fail to follow federal guidelines, they risk losing all federal grant payments for education, which account for just 10% of all local education expenditures.

Public Finance in a Federal System

The revenue decisions reached by representatives within each government set hard constraints on the other powers and actions of governing officials, but taxing decisions also affect how people behave, even when there is no specific government program.

For example, many cities have recently imposed a tax on plastic bags, like the type often used at convenience stores and supermarkets. The stated goal is not so much to raise money (although most of the time these taxes fund specific environmental programs) as to discourage the use of plastic bags. States also experiment with other types of "excise" taxes -- fees placed on specific goods -- to discourage tobacco, liquor, and even soda consumption; these often have the more politically-palatable name, "sin tax." However, in a federal system where one government's rates differ from a nearby government's, such taxes might simply distort behaviors, rather than end them. New York State, for example, has the highest excise tax on cigarettes: \$4.35 on every pack sold in its borders. Half a day's drive away in Virginia, the state levies just 30-cents per pack. It is not a coincidence that an estimated 56% of all cigarettes smoked in New York are currently smuggled in from out-of-state.[\[3\]](#)

As previously mentioned, when governments of smaller scale levy certain types of taxes, the economic incidence paid by taxpayers might better reflect the actual economic circumstance of that community. This is not always the case. The United States is a very large country, and when the national government levies taxes, particularly on income, it treats each citizen in the country equally, regardless of where they live. A person making \$40,000 in Alabama pays the same marginal tax-rate as a Californian who makes the same amount, but who pays more in state and local taxes, and spends a proportionately higher amount of that \$40,000 on rent, food, and transportation, due to variation in cost-of-living. Consequently, citizens in some states pay more to the federal government than they get back in government goods and services -- an issue known as a state's relative balance of payments. Residents of New Jersey have the worst balance of payments -- receiving just 74-cents back from the federal government for every dollar they send -- while residents of New Mexico get back \$2.21 for every dollar they pay in taxes.[\[4\]](#)

As a closing note: one of the most consequential political developments in American history has been the legal restrictions citizens have placed on state and local governments for amassing public debt. It was routine in the 1800s for cities, in particular, to go bankrupt. At the turn of the 20th century, state governments limited the ability of municipalities to run annual deficits, but, with time, states began to spend more than they took in. Through ballot initiatives and legislative action, citizens enacted state-constitutional amendments that required balanced budgets for their governments. As such, the U.S. federal government is the only government that can formally spend more money than it raises.

These restrictions further complicate the way states and localities fund themselves, especially during hard times. For instance, property and sales taxes are highly "elastic," which means that when the overall economy slows down, revenues can quickly fall. Debt restrictions and high elasticity create a peculiar circumstance, and often increase state and local demand for intergovernmental transfers. Following the 2007-2008 recession, which depressed home prices (decreasing local property tax revenues) and slowed consumer spending (decreasing state sales tax revenues), the federal government had to increase its own debt levels in order to finance state and local government services. Of the \$787 billion Congress authorized as a part of the American Recovery and Reinvestment Act, or "stimulus," more than a third was sent directly to state and local governments.[\[5\]](#)

States and cities can also sidestep legal prohibitions and gather additional funds by issuing bonds for "capital improvements" or by dipping into reserved funds, such as a state employee pension fund. State and local governments, collectively, hold about \$3-trillion in public debt. Many pension funds have remained unbalanced for decades and the solvency of these accounts is one of the largest financing hurdles state and local governments will have to overcome as the American population grows older, and the "Baby Boomer" generation retires.

All of these developments notwithstanding, the constitutional foundation for America's system of public finance is largely unchanged. The complex arrangement of varying tax sources, rates, and redistribution is the hallmark of a federal system that empowers multiple governments to act simultaneously within the same political jurisdiction. In the next essay, we will look more closely at the argument for why federalism -- and independent budgetary authority -- creates a more robust system of public finance, even if it appears to be more complicated and unwieldy. This is not to say that the modern system is perfect, and so we will also evaluate several leading proposals to fix the country's federated financial system.

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[1] Data on intergovernmental transfers, including the data graphed in Figure 2, was retrieved from FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/>. All dollar amounts are pegged to their corresponding calendar year, and are not seasonally adjusted. Last accessed, April 11, 2017.

[2] Congressional Budget Office. 2013. "Federal Grants to State and Local Governments." *Government Printing Office*, 5 March. Retrieved on March 14, 2018 (<https://www.cbo.gov/publication/43967>).

[3] Scott Drenkard. 2017. "Cigarette Taxes and Cigarette Smuggling by State, 2015." *Tax Foundation*. URL: <https://taxfoundation.org/cigarette-tax-cigarette-smuggling-2015/>

[4] Rockefeller Institute of Government. 2017. *Giving or Getting? New York's Balance of Payments with the Federal Government*. State University of New York. URL: <https://rockinst.org/issue-area/giving-getting-new-yorks-balance-payments-federal-government-2/>

[5] Timothy Conlan and Paul Posner. 2016. "American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama's 'New Nationalism.'" *Publius: The Journal of Federalism* 46 (3): 281-307.

Funding States and Cities: The Arguments (Part 1) – Guest Essayist: Nicholas Jacobs-Guest Essayist: Nicholas Jacobs

Although written more than 230 years ago, the United States Constitution contains a highly sophisticated -- some might even say, modern -- theory of public finance.^[1] Other regimes had tried federated or confederated government (including the United States from 1781 to 1789 under the Articles of Confederation). But, the type of federalism outlined by the Constitution was an unprecedented experiment, because it gave the general government and each of its smaller, constituent governments independent taxing authority -- a system known as concurrent taxation.

Hamilton's Argument

In establishing an arrangement for concurrent taxation, the Constitution increases the likelihood that budgetary decisions reflect the needs and wishes of the country's diverse political community, and decreases the likelihood that government spending is wasteful, obscure, and overly burdensome on specific groups of taxpayers. In short, by creating more government, Americans should pay fewer taxes.

This logic is explored -- as much of the Constitution is -- in *The Federalist Papers*. Essays number 10 and 51 might get all the fanfare, but at least a dozen individual essays, primarily written by Alexander Hamilton, deal exclusively with the logic of taxing authority. And, while Hamilton's persuasive and innovative theories of concurrent taxation might not make for an exciting Broadway musical, these essays are among the most enduring and consequential arguments for designing government here in the U.S., and throughout the 19th and 20th centuries.

First, the Constitution is an arrangement that gives each government independent authority for raising revenue. Arguably, this is the single most consequential revision to the Articles of Confederation, which had made the national government dependent on state governments for all its revenues. It is the proximate cause of nearly all objections levied by the Anti-Federalists, because, independent taxing authority is an unambiguous method for creating a more powerful federal government.

As Hamilton describes, the new federal government needed financial independence from the state governments because "a complete power...to procure a regular and adequate supply of revenue, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution."^[2] During the American Revolution, and in its immediate aftermath, the general government struggled to finance its most basic obligations, including the maintenance of an Army during war. In giving the federal government taxing powers, the framers gave the federal government independence.

However, the Constitution not only establishes independent taxing authority, it also *underspecifies* the various sources of tax revenue each government can levy.^[3] The 1787 Constitution prohibits taxation on just one type of revenue: taxes on exports. And, it reserves

only one type of tax to the general government: taxes on imports, or tariffs. It is silent on every other conceivable form of taxation. That silence, though, is not an omission, but a deliberate design principle. First, it ensures that all governments within the constitutional order have access to funding sources in the event of some unforeseen exigency. Drawing on the experience of Great Britain's Parliament, Hamilton was especially concerned with how the new federal government would raise money during times of war or insurrection. Limiting the federal government to just one type of revenue, say, tariffs, would handicap needed revenues, and potentially cause adverse economic effects domestically and abroad.

The under-specification in revenue sourcing also has important implications for the states. For one, they maintain the same guarantees for exigent expenses as does the federal government. They possess access to resources in order to respond to citizen demands, and they are not constitutionally prohibited to raise monies from new sources as needed. Not only that, but, as Hamilton makes clear, the new Constitution provides plenty of opportunity for the states and federal government to cooperate in the collection and distribution of revenues. As he writes in *Federalist 36*, if the general government begins to tax a revenue source already occupied by the states, "the United States [federal government] will either wholly abstain from the projects preoccupied for local purposes, or will make use of the State officers and State regulations for collecting the additional imposition. This will best answer the views of revenue, because it will save expense in the collection and will best avoid any occasion of disgust to the State governments and to the people."

Therefore, concurrent taxation encourages intergovernmental cooperation. It is a cooperation defined first and foremost by efficient tax collection -- the reduction of government expense by the sharing of administrative processes -- as well as transparency. In the above passage, the guardians of the public revenues are the state legislatures, who have an interest in maintaining their own fiscal authority and independence, and, most importantly, the people themselves, who have little desire to give away their hard-earned dollars to a wasteful government. Governmental cooperation -- land grants, targeted appropriations, administrative assistance -- had to be "substantially mutual and reciprocal."^[4] If states and the federal government wanted it, and if both benefited from the intergovernmental scheme, nothing in the Constitution prohibits such arrangements. In fact, the Constitution seems to demand it if it is in the people's best interest.

Moreover, as John Kincaid notes, such under-specification of tax authority gives special power to the House of Representatives as a "regulator" of federalism. While most constitutional analyses emphasize the Senate and the Electoral College as the safeguards of American federalism, Hamilton's analysis reminds us that it is ultimately the people who get to decide what type of federalism they want. All revenue bills must, after all, first be introduced in the House of Representatives, which is, as Madison writes, the "most complete and effective weapon with which any constitution can arm the immediate representatives of the people." And since revenues are the lifeblood of any government, the institution with the greatest influence on that relationship occupies a prominent place not only at the national level, but within the states and localities as well.

Intergovernmental Concurrency: Was Hamilton Right?

Just because Hamilton ordained fiscal-federalism to be so, does not mean that the United States developed according to plan. In certain important respects, the current system of intergovernmental finance (including the independent revenue authority of the states and localities) fails to meet Hamilton's lofty predictions for how the new Constitution would operate.

Since most of the federal government's cooperation with states and localities takes place through the use of grants (as described in the last essay), it makes sense to consider whether this fiscal instrument fulfills the constitutional spirit outlined in *The Federalist*. To be sure, the U.S. Supreme Court has clearly ruled that grants are constitutional,^[5] but asking whether the system of grants-in-aid maintains financial concurrency is not a legal question. Do grants satisfy the institutional principle of mutual and reciprocal cooperation?

There are more than 200 individual federal grants to the states and localities, administered across 30 different federal agencies. There are some, to be sure, that meet the rigorous standard of mutuality -- equal benefit for state and national goals -- and reciprocity -- equal influence by the states and federal government. But changes to the American political system and the expansion of federal spending authority has limited the extent to which the grant system meets these standards.

First, it would be a mistake to neglect the significant amount of mutual and reciprocal cooperation that did take place throughout the 19th century and early 20th century. These demonstrate that such type of cooperation can, and has, existed in the U.S. For instance, the national government in 1862 passed the Morrill Land Grant Act, which provided states tracts of federal land to fund state colleges with a specific focus on agricultural and mechanical sciences. States were not compelled to participate, but could choose to if it advanced the community's interest. Given the extraordinary broad discretion granted to state legislators for selecting the location, choosing the courses of study, and the establishing the governing body of the college, every state participated.

Few grant programs today operate in this way. For one, most states are compelled into participation because failure to participate in one negates participation in another. Rather than forfeiting a small sum of money tied to one particular program, a state risks losing all federal funding for a large area of government services. Additionally, as discussed in the previous essay, grant funding is also used to impose mandates on states and localities, which means that federal grants only fund a portion of the true cost of any one federal program. States must make up the revenue elsewhere either by raising taxes, or cutting state governing expenses.

Grant programs vary in the amount of discretion given to states and cities for setting program goals, eligibility criteria, and benefits paid. Yet, even among the most flexible grant programs -- often called "block grants" -- goals are set by federal departments and agencies with minimal state involvement. The 1978 revision to the Community Development Block Grant, for instance, mandates that states spend 30-percent of all granted funds in rural areas, regardless of the states' demonstrated need or preference. But even when goals are left undefined, grants might have perverse political effects that conflict with state-level goals (or even national ones). For example, the 1968 Safe Streets Act and its successor, the 1996 Local Law Enforcement Block Grant, was a testament to intergovernmental cooperation. In providing millions of dollars to localities to

modernize police forces, states and cities eagerly pursued these grants to help fund police services. Yet, as scholars have recently identified, these programs created demand for government services -- namely, prisons and policing -- when little demand existed before. Moreover, following the terrorist attacks on September 11th, localities used these grants to purchase military-grade weapons from the federal government -- lest they lose available money - - with little knowledge from the policed community.[6] If a hallmark of liberal democracy is that government policy reflects the will of the governed community, police militarization and mass incarceration raise important questions about how decisions to finance the expansion of local, state, and federal governments were reached and sustained. It is a question about taxes and spending.

Hamilton likely under-estimated the political potency that federal grant programs have. When states refuse to participate and risk losing federal funds, citizens accuse government officials of leaving money on the table -- and not without cause. Federal transfers to the states are funded, after all, by citizen tax dollars. In recognition of this fact, for almost fifteen-years, the states and federal government experimented with general revenue sharing (GRS) agreements, which took the place of narrower grant programs. States were provided an incentive to spend money, thereby reducing some of the negative pressures from turning down funds for grant programs. State and local officials celebrated GRS for its consistency and flexibility; officials could use the funds without restriction. Congress, with the support of the Reagan administration, abolished GRS in 1986, and re-converted many of the programs to categorical grants more susceptible to political control. In the end, GRS demonstrated that budgets are political tools, and politicians are not likely to give up the control that comes with taxing and spending authority.[7]

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[1] Vincent Ostrom has made this connection most explicit in a rich and detailed exploration of *The Federalist*: Vincent Ostrom. 1987. *The Political Theory of a Compound Republic: Designing the American Experiment*, Second Edition. Lincoln, NE: University of Nebraska Press.

[2] *Federalist 30*.

[3] This is the primary subject of *Federalist 35*.

[4] John Kincaid. 2017. "The Eclipse of Dual Federalism by One-Way Cooperative Federalism." *Arizona State Law Journal* 49: 1062.

[5] While the Supreme Court dismissed Massachusetts's claims against the 1921 Shephard-Towner Act, which provided \$1-million in grant assistance to states for prenatal and newborn care, Justice Sutherland's unanimously supported *obiter dicta* demonstrated that the court did not view voluntary grants as unconstitutional infringements on state sovereignty: *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

[6] Christopher J. Coyne and Abigail R. Hall. 2018. *Tyranny Comes Home: The Domestic Fate of U.S. Militarism*. Stanford, CA: Stanford University Press.

[7] Timothy J. Conlan. 1998. *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform*. Washington, D.C.: Brookings Institution Press.

Funding States and Cities: The Arguments (Part 2) – Guest Essayist: Nicholas Jacobs- Guest Essayist: Nicholas Jacobs

Intergovernmental Competition: Are we in a "Race to the Bottom"?

Grants are just one way of transferring money and there are alternative financial arrangements that better meet the standards of joint-influence and joint-benefit, such as GRS. Rarely is it the case that the specific goals outlined by narrow grant programs perfectly meet the needs or desires of a state community. And, the costs of administering a grant seldom justify the federal government's insistence that states participate. It is often overlooked that states could simply fund the government program themselves, without federal oversight or administrative duplication, if enough political will existed within the state community for that service.

Nevertheless, we should first recognize that the federal government might have certain advantages when it comes to taxing and spending, which helps to justify the need for any intergovernmental cooperation at all. The states do not exist independent of one another, and an important principle outlined in the last essay was that the taxing and spending decisions reached by one state government necessarily affect the fiscal capabilities of all the other states.

In the best case scenario, this has huge advantages for a diverse national community. People get to choose what their states look like, and they can exercise an important check on state governments that tax and spend the peoples' money unjustly: they can leave!

States, therefore, compete with one another for residents, for business, and ultimately, for tax dollars. And those competitive pressures incentivize state and local governing officials to provide the best government for the lowest cost.

Yet, sometimes that competition has negative effects -- what political economists might label a "negative externality." When the savings created by one state's actions impose costs on other political communities, competition produces inefficiencies. This is best illustrated by state variation in how much is spent on environmental regulation and clean-up. States that are literally "up-river" can exact exorbitant costs on other states through their inaction. Likewise, in trying to attract business to their state, one state might dismantle regulations placed on corporations; neighboring states might follow suit in order to keep business from leaving. State-level variation and competition might, in other words, work against certain national goals, creating a "race to

the bottom" where states undercut one another to create advantages in the short-term, but impose long-term costs on the national political community.

Such is the rationale for the single largest intergovernmental program in the United States: Medicaid. The provisioning of Medicaid reflects a national goal (healthcare for the poor) and is structured so as to reduce the degree of competition between states in administering benefits. Almost a third of all state spending goes towards Medicaid payments, and that number is increasing; 20 percent of funding is raised solely by the states, up from just 9-percent in 1990. The federal government dictates minimum eligibility requirements, but each state is left free to fund the program to desired levels and set additional requirements on recipients and providers of Medicaid services. The 2010 Affordable Care Act -- "Obamacare" -- would have required states to enroll citizens who made up to 133% of the federal poverty line, but the Supreme Court struck down mandatory expansion, which reinforced the joint-nature of the program.^[1] As of early 2019, only 36 states have expanded Medicaid as a result. Moreover, under the Trump administration, a number of states have experimented with requiring work requirements for eligible participants. The federal courts have struck down three states' efforts, but it is an open legal battle over just how flexible Medicaid will remain, as it consumes a larger portion of state budgets.^[2]

Fiscal Independence: Should we Blame the States?

No doubt some readers, in thinking through the examples about the "race to the bottom" might view such competition as a healthy impulse: it has the high potential to limit environmental regulation and corporate taxation, for instance. One man's race to the bottom is another man's dream of limited government.

However, American political history suggests that, in the long run, rather than maintaining a de-regulated system of limited government, excessive competition between the states has provided the federal government an enduring rationale to step in and impose requirements on a national level, with little involvement from the states or cities. Hamilton warned of this possibility in 1789, writing that while "the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union," this would only be the case "unless the force of that principle should be destroyed by a much better administration of the latter [federal government]."^[3]

The logic of concurrent taxation and the promise of intergovernmental competition should make us reconsider one of the dominant strategies promoted by proponents of limited government in the 20th century: tax restrictions within state constitutions.

As discussed in the previous essay, citizens of the various states have long turned to their own state constitutions to regulate the public coffers, often saving future generations from unmanageable levels of government debt. In 1978, voters in California continued this tradition and passed Proposition 13 -- a citizen-led ballot initiative that placed hard restrictions on the ability to increase property tax rates and reassess the value of commercial and residential real estate.

On the one hand, such restrictions have forced government officials to scrimp, save, and justify every expense, particularly at the local level, and often to the benefit of the taxpayer. In this regard, the "tax revolt" unearthed by Proposition 13 worked. In 1976, Californians had the sixth-highest "tax burden" in the country, at 12.2-percent -- a measure of how much annual income each resident pays in state and local tax. In 2019, they rank 11th, with an individual's burden down to 9.47-percent of annual income.[\[4\]](#)

On the other hand, it is not so clear that constitutional prohibitions -- in California or in other states -- always produce a system of public finance that allows Hamilton's paradoxical logic to function properly. In restricting a state government's taxing powers, it loses the ability to check the federal government, thereby reducing the amount of fiscal competition (and cooperation), the framers of the Constitution favored. Competition among the states, in other words, must be balanced out by competition between the states and the federal government. While it is also fair to critique the redistributive effects of the constitutional prohibitions -- Proposition 13 overwhelmingly favors long-term residents over new arrivals, decreases the financial incentive for selling a home, and inflates property values -- it is this intergovernmental consequence that is most problematic. Local governments, dependent on property tax, responded not by curtailing services that citizens still desired, but by requesting assistance from the state. State governments grew in power, but then faced financial hardship of their own as they competed with localities over a diminished tax base. The state government then turned to the federal government. Overall spending, when considering intergovernmental transfers, has climbed, as have debt levels. And, since those restrictions are protected by high constitutional thresholds, they limit the ability of residents to take back authority from the general government.

In closing, I emphasize that if we are to understand what state and local governments do-- and what they are capable of doing -- we need to follow their money. Budgeters and politicians can devise any number of complicated schemes for regulating the public purse, but, as Hamilton, again, forewarns, the entire constitutional system is "left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped will always take care to preserve the constitutional equilibrium between the general and the State governments."[\[5\]](#)

Public finance is ultimately a decision about what type of government people want. And such confusion and discord in state and local finances is the clearest indication that few Americans actually know what type of government they want. They want low taxes and lots of services. The types of trade-offs -- between revenues that can go to the public purse, and services provided by multiple governments -- are seldom discussed, and increasingly, fail to meet the standards of constitutional federalism as a result.

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[\[1\]](#) *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012)

[2] Nicholas F. Jacobs and Connor M. Ewing. 2018. “The Promises and Pathologies of Presidential Federalism.” *Presidential Studies Quarterly* 48 (3): 552-569.

[3] *Federalist 17*

[4] Tax Foundation. *State and Local Tax Burdens*. URL: <https://taxfoundation.org/state-and-local-tax-burdens-historic-data/>

[5] *Federalist 31*

Apportionment, Voting and Representation- Guest Essayist: Joerg Knipprath

In a republic, two distinct principles are essential to political influence, voting and representation. Although there is no logical connection between any particular systems of voting and representation, there is a practical overlap. It is not astonishing, therefore, that allocation of voting and representation not only have been addressed in all republican constitutions, ancient and modern, but that conflicts over these issues have flared up in American history. “No taxation without representation” was one potent Revolutionary War-era slogan--and continues to be an (avoidable) obsession with some residents of the District of Columbia and with its municipal government. That slogan arose out of fundamental differences between English and American conceptions of voting and representation that had evolved from the experiences of living under distinctive physical and social conditions.

Voting qualifications and representation have been major controversies in several periods of American history. The Philadelphia Convention in 1787 was deadlocked several weeks over the representational structure of the proposed Congress and nearly broke up over the matter before Roger Sherman and Oliver Ellsworth of Connecticut presented the current compromise system. The constitutional upheaval of the second quarter of the 19th century during the “Age of Jackson” that produced numerous state conventions was triggered by popular restiveness over the outdated systems of voting and representation. One particularly tragic-comic event during that time was the Dorr War, a “civil war” in Rhode Island in 1841/2. It was precipitated by an attempt to reform the voting qualifications and legislative apportionment in place since the old colony’s royal charter had been made, with a few qualifications, the new state’s constitution at independence. Once more, in the 1960s, voting and representation became major constitutional issues. This time the matter was addressed through litigation in courts, rather less democratic than constitutional conventions and less dramatic than civil wars, no matter how small.

As early as 1639, the Fundamental Orders of Connecticut fixed voting for the General Court in all free adult male inhabitants of the towns, if they had taken the Oath of Fidelity. The Orders also fixed representation in that body based roughly on the population of the constituent towns. Other colonial charters followed suit. After independence, the state constitutions addressed these issues, sometimes in considerable detail. For example, the Virginia Constitution of 1776 simply provided in a fraction of one sentence that voters must be free adult males with sufficient

common interest with, and attachment to, their community, presumably based on residency and property ownership. The system of representation, on the other hand, took up two complete sections, with representation in the House of Delegates primarily on the basis of counties and cities, and in the Senate, on the basis of larger districts composed of various counties.

The Massachusetts Constitution of 1780 similarly allowed voting for its two legislative chambers by adult male inhabitants with sufficient estates who lived in their respective electoral units. The forty senators would be elected from districts that were apportioned based on the proportion of taxes that they paid. The number of districts, their lines, and the number of senators from each would be determined periodically by the legislature. The state's House of Representatives would be apportioned on the basis of incorporated towns, with some adjustment for population size among the towns. It was the Massachusetts system of senatorial apportionment by the legislature that made a lasting contribution to the political lexicon. In 1812, the legislature redrew the Senate districts to favor the Jeffersonian Republicans. One district, in Essex County, had a particularly convoluted shape, which an editorial in the *Boston Gazette* compared to a salamander and dubbed a "Gerry-mander." The governor, Elbridge Gerry, had signed the legislation despite personal misgivings about its hyper-partisanship. Partisan apportionment remains a common tactic today, and districts not infrequently have similarly odd shapes. One refreshingly honest practitioner, former California Democratic Congressman Philip Burton, in 1981 called one such creation his "contribution to modern art." While the pronunciation has changed slightly, to a soft "g," the "gerrymander" has endured.

The U.S. Constitution provides for apportionment of representation among the states. In the Senate, representation is based on the political equality of all states in their corporate capacity, in recognition of their residual sovereignty. In the House of Representatives, it is based on a combination of population and political identity, in that more populous states receive more representatives, but each state has at least one, regardless of population. The Constitution initially provided for one representative for each 30,000 residents, which number itself had been controversial. The convention had settled on one member for each 40,000, but George Washington thought that too high. It was the only time that Washington, the presiding officer of the convention, spoke on a substantive issue before the convention. His proposal was quickly adopted. Beyond that, some speakers at the Philadelphia convention and the state ratifying conventions spoke broadly about the desirability of population equality in drawing districts, and the need to avoid the "rotten boroughs" of England, that is, districts that no longer had many residents, yet still elected members of Parliament. State constitutions also endorsed equality in representation. As, the Virginia and Massachusetts constitutions showed, however, their concept of equality was far more nuanced than the numerical rigidity that the Supreme Court later discovered in the Constitution.

While population growth and admission of new states initially resulted simply in increasing the number of representatives, in 1929 Congress capped the size of the House at 435 voting members, to prevent their number from becoming too unwieldy to conduct business efficiently and to deal with a lack of physical space in the chamber. As a consequence, after every decennial census, unequal population increases in the various states now cause some states to gain representatives, and others to lose them. This can also produce significant population disparities among districts in different states, depending on the formula Congress uses. Under the current

formula, the largest district, in Montana, has nearly twice the population of the smallest district, in neighboring Wyoming.

An expert on constitutional law, and member of the Southwestern Law School faculty, Professor Joerg W. Knipprath has been interviewed by print and broadcast media on a number of related topics ranging from recent U.S. Supreme Court decisions to presidential succession. He has written opinion pieces and articles on business and securities law as well as constitutional issues, and has focused his more recent research on the effect of judicial review on the evolution of constitutional law. He has also spoken on business law and contemporary constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Apportionment and State Constitutions- Guest Essayist: Joerg Knipprath

While Congress determines each state's allotted number of representatives, each state draws the lines of its congressional districts. A few states early in their history experimented with at-large elections to maximize their clout in the House, but Congress quickly passed a law to require election from single-member districts. That method reflects the American constitutional tradition, dating back to colonial times, of tying representation to local political units and geographical areas, with their inhabitants voting for one of their own. Although the Constitution does not explicitly require members of the House to live in the districts that they represent (hence, the possibility of at-large elections), residence in the district is a practical requirement. Jon Ossoff, a Democratic candidate in a 2017 special election for a congressional seat in Georgia was found not to reside in that district, a fact that was publicized by his opponent. Despite massive out-of-state financial support, Ossoff lost, and his failure to live in the district likely contributed to that loss.

States also apportion their state legislative districts and determine how local electoral districts are apportioned. State constitutions typically provide for regular reapportionment and fix who--legislatures, courts, commissions--is to conduct that reapportionment. Local districts, such as county commissioners, school boards, and junior college districts, are included in this process, even if they perform multiple functions, as long as one of those functions is legislative and the body is elected by districts. The Supreme Court has recognized one exclusion, in *Ball v. James* (1981), for certain special governmental units that have only limited legislative powers, such as water districts. For those, voting and representation can be apportioned on the basis of amount of water rights or use, rather than population. The distinction between special and general governmental bodies is none-too-obvious, however.

In the 1960s, another wave of discontent arose over voting and representation, originating in litigation over racial discrimination. For many years, the Supreme Court had stayed out of the "political thicket" of legislative apportionment about which Justice Felix Frankfurter had warned in *Colegrove v. Green* in 1946. Constitutional challenges to legislative apportionment were

dismissed as “non-justiciable political questions,” meaning that they were not suitable for resolution by courts. The reason was republicanism. Voting and representation are quintessential expressions of self-government, determined by consent of the governed through direct participation in voting or through representative bodies, such as constitutional conventions or, at least, legislatures. Unelected judicial mandarins accountable only to their conscience imposing a system of government on society fundamentally undercuts the modern consensual basis of the legitimacy of the state.

Another problem was that republicanism requires neither some particular system of voting, nor a specific scheme of representation. Hence, voting qualifications are addressed in clear constitutional provisions. Changes to voting qualifications, at least at the level of the U.S. Constitution, with a few controversial exceptions, have been produced through explicit and formal amendments. Matters of representation, as well, are addressed in express manner in a few rather terse and specific provisions.

Beyond those basics, the Constitution has left such political issues to the political process, particularly in the several states. Especially regarding representation, the Constitution only requires that the states have republican forms of government. We know what a republican form is not, namely, hereditary monarchy or aristocracy. But we do not know what it is. Must representation be based on districts? If so, must these be single-member? Must representatives be elected by a majority, or does a plurality suffice? At the state or local level, must it be based on residents, adult residents, citizens, registered voters, actual voters, or something else? Must all districts be drawn on the basis of population equality only? May the system give recognition or accommodation to political subdivisions; cohesive racial, ethnic, religious, or cultural communities; organized societal subgroups, such as labor unions, business or professional associations, or military veterans; or wealthier areas that contribute more to the maintenance of the political community through their taxes? Most of these variants have occurred in the constitutions of the several states or in current or former republican systems around the world.

Finally, judges approach such issues through the language, methodology, and epistemology of the law. Lawsuits produce winners and losers and deal in absolutes. In constitutional litigation, there is the additional complication that the Constitution confers a certain moral legitimacy on the winner and concurrent illegitimacy on the loser. These institutional factors tend to produce arguments and results that lurch towards conceptual absolutes and hard attitudes rather than compromise, flexibility, and nuance. Representation often requires the balancing of numerous competing interests, particularly in a political system that, through its Madisonian roots, is consciously designed to pit temporary and changing coalitions of diverse self-interested factions against each other.

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constitutional issues before professional and community forums, and serves as a Constituting America Fellow. Read more from Professor Knipprath at: <http://www.tokenconservative.com/>.

Apportionment and State Judiciaries- Guest Essayist: Joerg Knipprath

Unfortunately, the Court cast aside Justice Frankfurter's warning that judges should stay out of the apportionment controversy and let the democratic process resolve it. Where wise men feared to tread, the justices foolishly rushed in. In 1962, in *Baker v. Carr*, they decided that such issues were "justiciable," after all. Two years later, in *Reynolds v. Sims*, they decided that the Equal Protection Clause of the Fourteenth Amendment supplied the solution. All legislative districts, whether congressional, state legislative, or local, had to be equal in population to be constitutional. The history of the Equal Protection Clause contains no evidence that the Congress or the states intended it to address this issue. Indeed, section two of that amendment addresses a very specific instance of representation, that is, a state's representation would be reduced in the House of Representatives by the proportion that it denied its adult male citizens the right to vote on racial grounds. The framers of the amendment were fully aware of political representation, yet did not consider the Equal Protection Clause itself applicable broadly to representation or voting.

The Court cast the operative principle as "one man, one vote." The cases most assuredly had nothing to do with voting. No one was denied the right to vote. Nor did one person's vote count differently than that of the next person in line. What it came down to was that, in districts with unequal population, a voter in a larger district allegedly had his vote diluted in the legislature in comparison to a voter in a smaller district, because the former's representative represented more residents than the latter's. The Court ignored the fact that there was no logical connection between who could or could not vote and any particular system of representation.

Other difficulties with the Court's opinion were that districts with equal numbers of residents might not have equal numbers of voters. In *Evenwell v. Abbott*, in 2016, the Court ruled that population equality is based on residents, not voters. Of course, this will result in vote dilution for those who vote in districts with many voters, compared to those who vote in equally-sized districts with many non-voters, such as children, prisoners, and aliens, legal or otherwise. Moreover, populations change over ten years, so any attempt to adhere slavishly to population equality is doomed to immediate failure, as districts change in relative size.

Why, then, did the Court decide to tilt at these constitutional windmills? The catalyst was the decades-long failure of certain mainly Southern states to reapportion their districts in violation of their own state constitutional requirements. This produced often significant discrepancies in population between small rural districts and populous urban areas, a trend exacerbated by the 20th century's technology-driven trend of urbanization. The Court viewed recourse to state constitutional conventions as too cumbersome. Since the delegates to those conventions were likely to be elected from those same malapportioned districts, they, like the legislatures, could not be counted on to challenge the existing system in a meaningful manner. Congressional interference with state districting would tread on thin constitutional ice and, in any case, was

unlikely in light of the malapportionment of many congressional districts. The justices are drawn from a legal elite that shares many common outlooks, whatever their personal partisan affiliation. The common wisdom for that elite was that the existing systems exaggerated the influence of rural, socially and politically “unenlightened” residents and politicians, and constrained the economically, racially, and socially more progressive urban dwellers.

If the goal was to make the political environment reflect imagined urban progressivism, the results definitely have been inconclusive. The reapportionment cases, with their emphasis on population equality over everything, did break down the power of rural and small-town politicians and interests. In the South, they helped loosen the stranglehold of the Democratic Party that had produced the “Solid South” for over a century. But political power did not flow from the rural Democrats to the urban Democrats, as much as it did from the rural Democrats to the suburban Republicans. In non-Southern states, power similarly tended to flow to the expanding suburban areas, many of which did not share the mindset of the urban elites.

More significant in the long run was the “law of unintended consequences” manifesting itself in the guise of naked partisan gerrymandering. Going back to the country’s founding, most states apportioned one of their legislative chambers primarily on the basis of population and the other at least partially on other factors, such as county lines or city boundaries, much as the old Massachusetts and Virginia constitutions had done. In many states, the latter had been used for the lower, more numerous house. In contrast, more recent apportionment plans, as in California and Colorado, had followed the “federal model” and used population for the more numerous house and allowed political boundaries as a significant factor to apportion the less numerous upper legislative chamber.

The Court rejected both systems in *Reynolds*. As to the “federal model,” the Court argued that the Constitution was a compromise among sovereign states. However, the states’ political sovereignty did not extend to deciding how to govern themselves internally, because the cities and counties were not themselves sovereign actors, but mere creatures of the states. The same day as *Reynolds*, in *Lucas v. 44th General Assembly of Colorado*, the Court used the same reasoning to strike down a recent reapportionment of the Colorado legislature, approved by a significant majority of voters in every legislative district in the state. The Court’s objection was that the political majority might elect the governor and the lower house of the legislature, but it would take two-thirds of the population in the most populous districts to elect a majority of the upper house. The purpose of the Colorado system was to give some political influence to the residents in the large areas of Colorado not within fifty miles of the intersection of I-25 and I-70 and the city of Denver. The Court was unmoved by the fact that Colorado’s urban and suburban residents had themselves voted in favor of the plan, and that the voters had also overwhelmingly rejected a proposal that incorporated the system the Court eventually imposed. If even one voter’s vote was diluted, the Court declared, a constitutional violation had occurred.

In subsequent decisions, the Court softened its numerical rigidity somewhat. For congressional districts, under *Karcher v. Daggett* (1983), any deviation from absolute equality will be strictly scrutinized. For internal state legislative districts and for local districts, however, the Court decided in *Mahan v. Howell* (1973) that only “substantial equality” is needed, with deviations up to 20% from an ideal equality among districts being acceptable.

But the damage is done. By severely curtailing the ability of states to consider factors other than population, the Court removed the constraints on the one apportionment tool that coexists comfortably with population equality, the partisan gerrymander. When apportionment had to occur within set political boundaries, partisan considerations were blunted. Moreover, population movements and new political issues could change the partisan composition of a district. Politicians more likely had to moderate ideological predispositions and be less rigidly partisan. When preexisting district lines are meaningless and the quest for numbers is paramount, districts are drawn to maximize partisan advantage. Using computerized data and statistical formulae, apportionment experts create “safe” districts to maximize the majority party’s advantage well beyond their share of voter registration. For example, in California, Democrats have 46 congressional seats, Republicans 7, even though the Republican share of the vote in California is around 38%. Based on percentages, the Republicans should have had an additional 13 seats. These safe seats are won during primaries by the most militant candidate appealing to the party’s ideologically committed base. The winners then become difficult to dislodge and serve many terms, thereby putting them in legislative leadership roles.

Many observers have mourned the increased partisanship and hardening of ideological lines facilitated at least in part by the representational paradigm of population equality. At the state level, longevity of service is restrained by term limits, but ideological militancy is not. A final chapter may be emerging in the Supreme Court’s apportionment experiment. So far, the Court has avoided tackling partisan gerrymandering. However, the justices served notice in *Davis v. Bandemer* (1986) that such gerrymandering might violate the Constitution if it resulted in systematic and continuous exclusion of a party from political power. The justices could not agree on a specific standard to determine whether such an injury had occurred. In *Vieth v. Jubelirer* (2004), a plurality led by Justice Antonin Scalia found such cases to be non-justiciable, precisely because courts had not been able to discover any constitutional standard to apply in political gerrymandering claims. The intensely and inherently political nature of partisan gerrymandering and the many nuanced shapes it can take makes this a very difficult area for judicial resolution. However, the recent case of *Gill v. Whitford* (2018) and current litigation involving partisan gerrymandering in Maryland suggest that the judiciary’s struggle to extricate itself from the political issues that infuse partisan gerrymandering continues.

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Down-Ballot Elections- Guest Essayist: Scot Faulkner

Every year elections are held in the United States.

Federal and state elections every other year (except a few states who are truly “off-year” outside of the two-year cycle). Local elections, county and municipal, are held somewhere every year.

There are approximately 88,000 local governments, districts, and commissions containing over 500,000 elected officials.

Many local offices are nonpartisan, meaning not party affiliated. School Boards and small cities and towns assume local functions are not truly partisan. Is there a Republican or Democrat way of collecting trash or plowing snow?

Local government is designed to be more intimately related to the people it serves. Ironically, few Americans understand its functions, and fewer know their local officials.

This is unfortunate, as local government is, in many ways, far more important than national and statewide offices. Local laws and their enforcement can affect property values, quality of education, quality of water, and determine life or death when managing first responders.

This dichotomy of importance and ignorance creates numerous challenges and opportunities.

On the one hand there is less interest in running for these offices. In smaller towns and cities, of importance and as many as 79 percent of local elections are uncontested. There is also less interest in voting for these offices. Stand alone local races, held in off-years, may experience voter turnouts of less than 20 percent. Local elections held during regular cycles, usually county and school boards, may garner 30-40 percent less votes than for the high-profile state and federal offices.

On the other hand, smaller voter turnout means a dedicated group of activists can elect a candidate as change agent. It also means a low threshold for a first-time candidate entering a local race.

21st Century campaigns have become extremely expensive.

In 2014, the average winning campaign for the U.S. Senate campaign spent \$10.6 million. In 2018, incumbent U.S. Senator Claire McCaskill (D-MO) spent \$33.5 million in her losing re-election campaign. In 2018, Senator Bill Nelson (D-FL) spent \$25 million to lose his re-election, while Governor Rick Scott (R-FL) spent \$68 million to defeat him.

Campaigns for the U.S. House of Representatives can also be very expensive. Congressman Alex Mooney (R-WV) spent \$1.8 million for winning his 2018 re-election.

These campaign finance numbers do not include the millions spent by “independent” organizations to promote or oppose candidates through direct mail and professionally produced radio and television advertisements.

Compare this with county-level campaigns where \$5,000-\$20,000 may be all that is required for victory. Winning small town and School Board campaigns may only require a just few hundred dollars.

“Down-Ballot” offices are ideal for average citizens to run for office for the most idealistic of reasons – to help their community. Many who run for these positions do not desire political careers. They are motivated by seeing something that needs to be done and answer the call to do it.

Another aspect of local “down-ballot” campaigns is that they usually transcend partisanship. This is certainly the case for officially nonpartisan offices. Even partisan local campaigns will see bipartisan cooperation when community values, honesty in government, and civic reform is at stake. There are countless examples of activists who may be deeply divided on national issues joining forces to “drain the swamp” of county courthouse insiders.

Successful “Down-Ballot” campaigns may include a few yard signs, but rarely include major advertising. Social media, especially Facebook pages and groups, have been the winning edge for many of these first timers. Some create their own Facebook and YouTube videos to introduce themselves or highlight issues.

The intimacy of local campaigns also allows for neighbors to help neighbors. “Meet and Greets” in private homes and door-to-door face-to-face interactions are the purest form of grassroots campaigning. Money is not as important. One local candidate, who was revered for her charity work, won by a landslide despite being outspent 21-1.

This lack of interest in running and voting has, by design or chance, levelled the field for average citizens to make a difference. Either as a candidate or as a supporter/voter of that candidate, “down-ballot” offices provide a way for caring members of the local community to get involved and contribute to the greater good.

What could be more American than that?

Scot Faulkner advises corporations and governments on how to save billions of dollars by achieving dramatic and sustainable cost reductions while improving operational and service excellence. He was the Chief Administrative Officer of the U.S. House of Representatives. He started his Congressional career as an intern for Rep. Don Young (R-AK), then served on the legislative staffs of Rep. Arlan Stangeland (R-MN) and Rep. John Ashbrook (R-OH). Faulkner later served on the White House Staff and as an Executive Branch Appointee.

Renewal of American Federalism- Guest Essayist: Michael C. Maibach

The Roots of Our Debt & Dysfunction Today

President Franklin Roosevelt: “Fortunately for the stability of our Nation, it was already apparent that the vastness of the territory presented geographical and climatic differences which gave to the States wide differences in the nature of their industry, their agriculture and their commerce... Thus, it was clear to the framers of our Constitution that the greatest possible liberty of self-government must be given to each State, and that any national administration attempting to make all laws for the whole Nation, such as was wholly practical in Great Britain, would inevitably result at some future time in a dissolution of the Union itself. The preservation of this “Home Rule” by the States is not a cry of jealous Commonwealths seeking aggrandizement at the expense of sister States. It is a fundamental necessity if we are to remain a united country.”

After winning a war against the world's greatest power, our Founders wrote what is today the world's oldest, and many consider, its best Constitution. Yet 70% of Americans now say we are on the "wrong track" because Washington has become highly dysfunctional. The list of federal failures is now painfully familiar: Wall Street bailouts, failed "Stimulus", "Fast and Furious", "Cash for Clunkers", corruption in the IRS, FBI and Justice Department, perhaps 20 million illegal immigrants, crisis at the border, the impending collapse of Social Security, Medicare and the Affordable Care Act, Congressional gridlock... and \$22 trillion in debt! To Americans, these are clear signals of *systemic failure* in the federal government. We owe it to our Nation to examine how we fell off the wise course our Founders charted for us in 1789, and what we might do to improve self-governance.

A clue to our failure is found in our Nation's name: The *United States* of America. We are a nation of 50 states – not one central government as found in France or Egypt. The more we've centralized taxation, regulation and power in Washington, the more we have witnessed systemic failure. This is because most problems are best addressed by local and state government – as Jefferson told us. The ideas of federalism and subsidiarity need to become fashionable again.

Federalism and *the decentralization of factions* (interest groups) were at the heart of the Founders' plan (Federalist #10 and #51/Madison). Governmental duties were best divided between federal (national) and state governments. The Founders also believed government should be limited, supporting "life, liberty and the pursuit of happiness" without managing its every aspect. They assumed self-reliant citizens of strong character and durable families would do much of society's heavy lifting through businesses and voluntary civic organizations serving others.

During the ratification debates of 1787-88, James Madison wrote in Federalist #45 of American federalism: “The powers delegated... to the federal (national) government are few and defined. Those which remain in the State governments are numerous and indefinite. The former will be exercised principally on **external objects** such as war, peace, negotiation, and foreign

commerce... The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the **internal order**, improvement, and prosperity of the State.”

The government in Washington was to look *outward* at other nations and markets and keep harmony among the states. The 50 states were to look **inward** towards internal improvements and citizen services. Here are the major issues our President and Congress face as their **Outward Agenda** today:

- National Security: Russia - North Korea - China - Cyber Attacks... Iran & the Middle East.
- International Trade: China - Steel & Aluminum Tariffs - BREXIT - EU Trade...
- North America: Trade - A new NAFTA - Border Security & Illegal Immigration.
- US Immigration: DACA & 20+ Million Illegal Immigrants - Failing Federal Policy.
- Mexico: Illegal Gun & Drug Running + Sex Trafficking + Cartel Violence.
- Latin America: Marxist Regimes in Venezuela, Nicaragua & Cuba. MS-13 Gangs.
- EU: US-EU Trade - Euro Crisis - EU Internal Strife - Future of NATO.
- North Korea: Missile Tests & Nuclear Weapons.
- Russia: Possible New Cold War.
- Israel: Failed Palestinian Peace Talks – New US Embassy in Jerusalem.
- Africa/Libya/Sudan: Failed States - Civil Wars.
- Syria: A Seven-Year Civil War - Islamic State - ISIS.
- Terrorism: Across many continents...
- Egypt & Turkey: Uncertain Allies.
- Iran: US-Iran Tensions - Threat of a New Nuclear Power.
- Iraq: Another Failed State?
- Pakistan: Strained Relationship with India & the US.
- Afghanistan: Eighteen Years of War, No End in Sight.
- India: The Promise of Our Improved Relationship.

The Founders (and we) might ask how our current leaders in Washington can **effectively and prudently** deal with this formidable array of external challenges? But now let's look at Washington's **Inward Agenda** today:

- Social Security: Funding begins to fail in 2030.
- Medicare: Begins to fail in 2024.
- Dodd-Frank: Financial services regulations: 20,000 pages.
- Affordable Care Act: US health care scheme now failing. 20,000 pages, 18% of GDP.
- Justice & FBI: Major charges of corruption.

- IRS: Administers US tax code of 76,000 pages. 2012-4 NGO scandal.
- Farm Bill: Huge farm subsidies. Food stamps for 30+ million Americans.
- Education: US Ed Dept. requires all K-12 schools to complete 30+ reports annually.
- College Loans: US Gov't makes all college loans. Student debt: \$1.5T > credit card debt.
- Housing: US Housing & Urban Development Dept. = \$40b annual budget.
- Minimum Wage: Also dealt with at the state level, closer to regional economic realities.
- Unemployment Insurance: Partially managed at the state level.
- Transportation: Highways, bridges, ports, rail, urban transit... all in need of major repairs.

Our Founders would be astonished at the domestic focus of our \$4T federal budget today:

- | | |
|--|--------------------------------------|
| • OUTWARD: 42% of Federal Budget | INWARD: 58% of Federal Budget |
| • 20% - Defense | 22% - Social Security |
| • 15% - Federal Agencies | 23% - Medicare + Medicaid |
| • 7% - Interest on a \$22T National Debt | 13% - Grants to the States |

The argument here is a "managerial argument" for a return to federalism. Washington has "too much on its plate" to do any of its work well. Moreover, Congress does not have the time or staff to *effectively oversee* this colossus of a government. Indeed, Congress has only passed one annual federal budget ("regular order") in 20 years! The Founders would not see the wisdom in a **federal** Department of Housing, or of Education that deals with K-12. Housing and K-12 schools are best left to the states...

Much of the work now done by Washington can be better managed by our 50 states and/or local governments, or not done at all. Outsourcing of other federal work would allow the injection of competitive bidding, merit pay, and innovation in technology and service delivery. Today virtually no one can fire a federal employee – even if they fail to show up for work! Federal jobs have become life-time sinecures, while average tax-paying Americans have less job security than in the past.

Absent a major move away from the federal income tax system such as a national sales tax, a financing formula to return to American federalism might roughly break this way: The IRS would leave a certain percentage of the federal income taxes it collects within the states where collected. The percentage would be decided by the kinds of federal services that would be largely transferred to the states. Those states that have a healthy business climate would see their share of IRS funds grow – rewarding their positive policies for growth and job creation. Federal funds left in each state would be allocated by the 50 state legislatures, which would move much of this funding to counties and cities for such things as K-12 education, housing, food stamps, intra-state transportation infrastructure, and other "inward looking" human services. Healthcare

engagement would remain for now in federal hands, so deep is it imbedded in our lives via Medicare, Medicaid, CHIPS, the VA, et al. While initial transfers back to the states would be modest, e.g. most all HUD services and programs, mindsets among citizens, the news media and elected officials would gradually shift to more robust “distributed government” – to coin a term we used as the mainframe computer world gave way to the PC and then mobile hand-held devices. Ironically, while the power of information technology has become more and more decentralized and empowering, Washington DC has centralized more and more of our government. We want to reverse this trend and reflect what is happening in the Age of Information.

There is also a "societal or political argument" for a return to American federalism. Before Roe vs. Wade in 1973, states had 50 different abortion laws. And in turn, before that 1973 decision, the entire career of a Supreme Court nominee was reviewed by the US Senate as to their suitability for this lifetime judicial office. Since Roe in 1973 our Nation’s politics have become sharply and continuously divided on the question of "life". Given this, the central question asked about all new Supreme Court nominees is their view on abortion. Supreme Court Justice Ginsburg has suggested that our Republic might be better off if this issue had been left to the states, in keeping with 150+ years of American jurisprudence.

Health care is another highly acrimonious "nationalized, politicized issue" at the center of Washington rancor since the Affordable Care Act was enacted. An alternative to a single federal health care law such as “Medicare for all” would be to allow each state to fashion their own solutions. If Massachusetts chose to have a single payer system, so be it. If Utah chooses a free-market health care system, that should be their right. We'll then see by way of "the laboratories of state government" what works for people and providers, and what fails. Real world experiences are always superior to theories and “one size fits all” approaches. Surely New York will have different health care solutions than Wyoming. And other public services like K-12 education can best be left to the states and local governments – and parents.

A **Renewal of American Federalism** can and will return many of these "**inward looking**" issues to where they belong in the American regime. Washington can then *more effectively deal* with Iran, ISIS, North Korea, China, NAFTA, the current crisis at the border... and other enormous "**outward looking**" challenges. The Congress would then have more time *to oversee federal agencies and pass a real budget*. To enhance oversight even more, perhaps the Congress can enact a **two-year federal budget** during its first year and dedicate the second year of each Congress to oversight. Indeed, a new joint Congressional Oversight Committee might be formed which by its rules has but one mission – looking for ways *to reduce or phase out parts of the federal government that are no longer useful*. Every American company that is competitive constantly looks at ways to re-direct people and resources. Congress never seems to focus on what the federal government can do less of...

When federalism fails in a large republic, the success of the government itself comes into question. The Founders knew the enemies of our republic were *factions* demanding more and more from government and their fellow citizens. These include farmers, seniors, all sorts of industries, homeowners, doctors, patients... students. Once factions are *nationalized*, their combined negative effects on the economic and political health of a Nation can be harsh and in

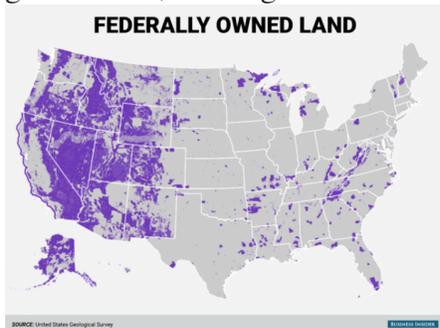
the case of health care, financially catastrophic. National elections become bidding wars for the support of various interest groups. Our \$22T national debt is stark evidence of this, as our leaders print money rather than make difficult choices.

In Federalist #10, Madison wrote: “Among the numerous advantages of a well-constructed Union [federalism], none deserves to be more accurately developed than *its tendency to break and control the violence [damaging effects] of faction...*” To return to the Founders' plan, we must renew American Federalism and rethink what Washington is responsible for in an era of debt, flat demographic growth, and intense global competition. Civic success begins with virtuous citizens rising above the factions of which they may be a part to support what is best for our Nation. **It is time to return to American Federalism.**

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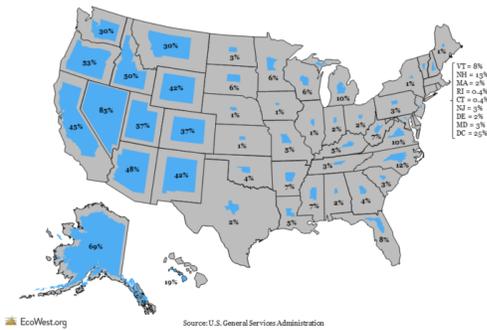
Public Lands and the Federal Government’s “Duty to Dispose” -Guest Essayist: Andrew Langer

If one looks at a map of the United States, a map that differentiates land into who owns that land—privately owned, owned by state or local governments, or owned by the federal government, one might notice something incredibly interesting:



The further west one goes, the more land retained in ownership by the federal government. In fact, from the Rocky Mountains westward (essentially, any states that became states after the United States signed the Treaty of Guadalupe Hidalgo in 1848), it is clear that, as a percentage of land, the United States government exercises enormous dominion:

Portion of each state that is federal land



And let us keep in mind that since this map is not to scale, Alaska's size is under-represented—as seen here:



So, taking the first map and this one together, and understanding that Alaska is 60% federally-owned, it is clear that the federal government owns an enormous amount of land in the United States—much of it brought into the nation in the middle of the 19th Century.

But was the federal government ever intended to maintain permanent ownership of this land? Certainly, as the Constitution originally envisioned, the federal government was only supposed to own very discrete parcels of land, and retain ownership of that land for very specific purposes – as described in Article IV, Section 3, Clause 2.

The 5th Amendment also talks about the “taking” of private property (as differentiated from the out-and-out purchase of that land from other nations, or the gaining of territories via treaty), but is informative as to the *why* of land acquisition. Private property is to be “taken” for “public use” (and necessitating the both “due process” be accorded to the property owner, and “just compensation” be paid once the first two conditions are satisfied).

But the language about “public use” is informative – the federal government is only supposed to acquire lands for public uses (though that definition has shifted over time).

The central question is then raised: was it intended for the federal government to maintain permanent ownership or control over these lands, and did the federal government promise these western states that it would divest itself of these lands over time?

It is a question that has never been adequately answered—and no state has undertaken the necessary litigation to settle the underlying question.

What is clear is this: when states entered the Union (converting their status from federally-owned territories to become sovereign states), that happened via “Enabling Acts” negotiated by the territorial governments and then passed as legislation by Congress. In every state that entered the union after the Treaty of Guadalupe Hidalgo, each enabling act contained some variation of language in which the state set-aside any claim to the title of “unappropriated public lands” within that state—and that the federal government would dispose of those lands.

Take the 1864 Nevada Enabling Act, for example. In Section 3, the state “disclaims” all right and title to these lands. But then, in Section 10, the agreement is as follows:

“That five percentum of the proceeds of the sales of all public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state...”

The “Shall” clause of that sentence makes it clear that the federal government undertook an obligation to dispose of those lands “subsequent to the admission” of Nevada into the Union (with Nevada gaining 5% of the proceeds from those sales).

Incidentally, the reason for this trade-off was a product of good public policy: these states wanted to be settled in the easiest and least chaotic manner possible. An essential element of that was ensuring that unappropriated public lands had “clear title”—a situation discussed at length in Peruvian economist and political scientist Hernando DeSoto’s seminal work, “The Mystery of Capital.”

In that work, DeSoto makes it clear that in order to have a stable and prosperous society, strong property rights are a fundamental necessity. A key aspect of that is the assurance title is clear—thus allowing property to be bought and sold with ease.

“Shall,” as the word was used in these enabling acts, had a very specific meaning especially at the time these enabling acts were written and passed. It was both a “command” on the part of the legislature, and it created a “duty” on the part of the federal government to engage in the activity evinced by the “shall” language.

And for a very long time, the federal government was in the business of fulfilling these obligations by disposing of these lands.

This changed with the passage of the Federal Land Policy and Management Act of 1976 (FLPMA). FLPMA flipped this obligation on its head—and instead of the “duty to dispose,” the federal government now had an “obligation to retain” these public lands in perpetuity.

This has had enormous consequences for the United States... and the specific states which contain these enormous amounts of public lands, both from a fiscal perspective and from a general public policy perspective. This FLPMA represented a fundamental departure from the agreements upon which these states entered the Union.

Andrew Langer has served as President of the Institute for Liberty since 2008. IFL works on a variety of issues—promoting and protecting small business, fighting cronyism, tilting against the regulatory state. At the core of both is the desire to promote freedom and individual rights. Andrew has been involved in free-market and limited-government causes for nearly 20 years, has testified before Congress nearly two dozen times, and has spoken to audiences across the United States.

A nationally-recognized expert on the impact of regulation on business, Andrew is regularly called on to offer innovative solutions to the problem of burdensome regulatory state. Prior to coming to IFL, he was the principal regulatory affairs lobbyist for the National Federation of Independent Business, the nation’s largest small business association. He is also a nationally-recognized expert on the Constitution, especially issues surrounding private property rights, free speech, abuse of power, and the concentration of power in the federal executive branch.

In the Fall of 2019, Andrew joined the faculty of The College of William & Mary in Williamsburg, Virginia, the nation’s second-oldest college (his alma mater). He teaches on the regulatory state in the university’s Public Policy Program.

In addition to being IFL’s President, he also hosts a weekly show on WBAL NewsRadio 1090, Maryland’s largest news/talk station, appears regularly on television and other radio programs, and has guest-hosted on both nationally-syndicated terrestrial radio programs like “The Laura Ingraham Show” and shows on satellite radio.

In 2011, he was named one of Maryland's "Influencers" by Campaigns and Elections magazine. He holds a Master's Degree in Public Administration from Troy University and his degree from William & Mary is in International Relations. He may be reached via: www.IChooseLiberty.org, @Andrew_Langer & @IChooseLiberty on Twitter; <https://www.facebook.com/LangerForLiberty>; or <https://www.facebook.com/AndrewLangerShow>.

Clearing Title: How Simple Legal Acts Have Great Societal Consequences- Guest Essayist: Andrew Langer

Early on in the film, *Lawrence of Arabia*, Colonel Lawrence (played by Peter O'Toole) offers a quote from Themistocles to a British General. "I cannot fiddle," Lawrence says, "but I can make a great state from a little city."

Themistocles' quote is illustrative of an important point: sometimes the simplest acts can have tremendous impact in the long term for a society. Clearing title, the action of ensuring that someone owns a particular parcel of land "free and clear" is one of these actions. From the standpoint of real estate law, the importance is obvious: you cannot buy or sell or invest in a parcel of land unless the thread of ownership is crystal clear.

But clearing title goes far beyond that—and is an essential element of a free and prosperous society.

Throughout his works on property, especially the seminal book "The Mystery of Capital," Peruvian economist and political scientist Hernando DeSoto talks at length about the role that strong property rights play in creating prosperous and stable societies. In it, he compares and contrasts the various property rights regimes in a host of nations, and lays out the case for how the protection of private property (or lack thereof) plays into that nation's well-being.

DeSoto is emphatic that ensuring the clarity of title is one of the most-important, if not *the* most, single element that separates a rich and stable nation from a poor and unstable one. Without that clear title, people are hesitant to buy or sell a piece of property. Worse, without that clear title, people cannot use that piece of property to invest in their own future. They cannot better themselves, and without that prospect they lose hope. And it is that loss of hope, combined with economic stagnation, that leads to the collapse of a society.^[1]

From its founding, the United States has looked at such property rights as a bedrock principle of the Republic. But beyond the Constitution's protections in the Bill of Rights, the nation could not have become who we are without recognizing the importance of clear title.

In fact, the very mechanisms by which U.S. Territories became states provide us with example after example of how clearing title was an essential element of the settling of the American West. If one surveys the "Enabling Acts"—especially the Enabling Acts of states which became

a part of the Union after the 1848 Treaty of Guadalupe Hidalgo, one will find a variation on the phrase in each that, the title to all “unappropriated public lands” shall be turned over to the federal government, and that the federal government will become responsible for “disposing” of these lands.[\[2\]](#)

The Territorial Governments (that later became state governments) entered into this agreement because that was this tacit understanding that in order to facilitate smooth settlement (and thus encourage that settlement), ensuring that a parcel of land had a clear title was key.

And it worked. The federal government was able to effectively encourage mass settlement in western states... and those who were able to secure property (either for free or for a very low amount) could not only build on those lands, secure in the knowledge that they wouldn't have someone claiming that land somewhere down the road, but they could use that property as collateral for investment as well – an essential aspect of agriculture, for instance, even in modern times.

The lesson also has ramifications in the context of international law. Many conservatives and conservative organizations (rightly) show skepticism at international legal regimes, like the United Nations Convention on the Law of the Sea. Understandably, they don't like the idea of an international body picking and choosing who or how someone gains access to valuable minerals and other resources under the sea bed in international waters.

But what they fail to understand is that unlike much of what the U.N. does, UNCLOS is a property rights regime that builds on how we understand property and finance to ensure the same kind of smoothness that led to the settling of the American West. It essentially grants that title (in reality, a permitted leasehold interest) to an applicant, who can then turn around and secure the money necessary to extract the resources.

Two companies present themselves before a lending institution attempting to secure financing for an under-the-sea-bed extraction project. One has the “title” from UNCLOS. The other is just asserting that the project is in international waters, and is therefore open to anyone.

Who will the bank give the loan to?

The one who has the legal right to engage in the project, of course. The one who has clear title.

As the World looks to finding ways to promote economic prosperity and political stability—the work of Hernando DeSoto makes it clear. Look towards property rights, including ensuring clear title to property. This, as Themistocles would say it, is how you do make a great state from a small city.

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[1] In another DeSoto work, “The Other Path,” he discusses at length the role that titled property rights, including the issue of determining clear title, played in Peru’s struggles with the Marxist terror organization, The Shining Path.

[2] In fact, there is some question as to whether or not this language in these enabling acts serves to contractually obligate the federal government into disposing of these lands, not retaining them in perpetuity. With the federal government owning and controlling so much land, to the detriment of state and local governance, some believe that the Federal Land Policy and Management Act of 1979 violates the conditions by which these states became states.

The Essential Nature of Borders in Ensuring Sovereignty- Guest Essayist: Andrew Langer

Sovereignty is the very essence of what makes a “nation” a “nation”—a free and independent state in which the people of that nation exercise total control over the governance of that nation. Clear and enforceable borders are an essential element of that sovereignty. Without them, the nation itself cannot be defined, and the sovereignty of that nation falls as a matter of course.

These truisms have been bedrock concepts of both political science and international law for centuries, essentially tracing their roots to the Peace of Westphalia of 1648. A nation’s sovereignty is, in fact, enshrined in the central body of international law, the United Nations Charter, which says that, “nothing should authorise intervention in matters essentially within the domestic jurisdiction of any state.”

But without enforceable borders, what determines the “domestic jurisdiction” for a state? And just how can a state govern itself if its borders are not secure?

Europe, and the EU member nations have been grappling with these issues—especially with the waves of refugees from North Africa and the Middle East. Once a refugee arrives in Southern Europe, that refugee essentially has unfettered access to other EU member nations, which has created huge problems in public policy—from managing essential services to crime to dealing with Europe’s well-known social welfare state.

This was an important factor in Great Britain’s decision to leave the European Union—the pressure being placed on the United Kingdom to further open their borders—as the British people were facing a huge threat from immigrants sneaking through the Chunnel from refugee camps formed right outside it.

It is not as though the world hasn’t been well-aware of these problems for years. In fact, in the late 1990’s, celebrated free-market economist Milton Friedman remarked in the pages of the *Wall Street Journal* that, “It’s just obvious... you can’t have free immigration and a welfare state.”

This is not to say that a nation should have closed borders—far from it. One of the things that makes America the *most exceptional* nation on the planet is that *anyone* can migrate here (legally) and become an American.

But when you have a combination of a labyrinthine immigration system and you essentially fail to punish illegal migration, you create massive disincentives towards doing the right thing. And you exacerbate those disincentives when you are promising all-manner of giveaways to those who are considering the arduous journey of migration.

However, the impact to the public treasury is only one aspect of this. An essential aspect of sovereignty is the ability of a nation to control the time, manner, place, and method of migration. This allows a country to figure out the best way to absorb new populations, to create policies to assimilate those who migrate into a nation's legal and political culture, and to ensure that the overall security of that country isn't compromised.

Otherwise, what ensues is the undermining of the very things that make that nation what it is.

Founding father (and law professor to Thomas Jefferson) George Wythe believed fervently, for instance, in the importance of an educated populace. Without that education, without that understanding of who we are as an American people, the republic would collapse.

So, now assume that you have a situation in which illegal migration is incentivized. You have a little in the way of punishment for those who migrate illegally, it is an inordinately expensive proposition to remove the millions who are illegally present. You have made it easy for those ineligible to participate in the public decision-making of this nation to participate. You are apportioning representation within the political process in a manner which includes those who have no legal voice, so that the voice of the citizenry is diminished. All the while, those who are within a nation illegally may not have any knowledge, understanding, appreciation for or allegiance to the principles upon which that nation was created.

As Margaret Thatcher quipped, “When you rob Peter to pay Paul, you will always have the consent of Paul.” And when you have an influx of illegal immigrants into a country and give them, through both action and inaction, a voice in the political process, it is a shortcut to the destruction of that country.

Without borders, sovereignty ceases to exist. Without that sovereignty, there is no nation.

Andrew Langer is President of the Institute for Liberty and host of the Andrew Langer Show on WBAL NewsRadio 1090.

Civil Society and Local Government (Part 1)- Guest Essayist: Will Morrisey

Why have ‘states’ in the Union, anyway? True, the colonies predated the United States, the colonies became states, and ratification of the Articles of Confederation and the United States Constitution proceeded on a state-by-state basis. But many municipalities preceded the states; some existed before the British wrestled control of them from the French. And, as Gary Porter explained in a recent essay here, courts in most states regard all or many of the municipalities to be creatures of the state for legal purposes, even if historians beg to differ. Why not treat states the same way? Whatever practical barriers to this there may be, what is wrong with it in principle? After all, many countries around the world have commercial-republican regimes while nonetheless treating the provinces as, well, provincial. Why *shouldn't* we do the same?

If the distinctive human characteristic is the ability to speak and to reason, then what is *good* for such a being must not only allow but encourage it to exercise that ability, just as it must be good for a horse to have room to run. To live in societies ruled by tyrants terrorizing their subjects with brute force must be bad for human beings, somehow beneath their real nature—hence the adjective ‘brute.’ By nature, human beings belong in *civil* societies, societies in which they may speak and reason together, deliberate with one another on what they should do, how they should act. Old-fashioned mothers would tell unruly children to ‘be civil,’ to ‘keep a civil tongue in your head.’ A civil tongue is one indirectly but closely attached to a reasoning brain, a brain more fully developed in accordance with its nature than the brain of a madman or a dolt, to say nothing of a barking pit bull or a chorusing frog.

Civil society begins in the home. Parents command children, ‘for their own good.’ But father and mother themselves properly form a civil relationship, ruling one another by mutual consent, by shared responsibilities, authority, and obligations. Outside the home, what we call civil society works the same way, as fellow citizens form businesses, churches, clubs, and schools. Families and civil associations alike govern themselves deliberately, reasonably—insofar as they are genuinely civil, institutions fitted for mature human beings. Children learn to do the same thing, choosing up sides for games, ‘ganging up’ (for better or for worse), imitating the adults (also for better or for worse).

You learn to be civil in small groups. The earliest *political* societies were small, outgrowths of extended families or clans which united with one another for convenience and protection. The *polis* or city-state rules itself, perhaps as a democracy, more often as an oligarchy, sometimes as a monarchy. Whatever its regime, the city-state occupies a small territory and consists of a small population; in ancient Greece, they seldom consisted of more than 30,000 souls. Given this small size, political life mattered. There was nowhere to hide from whomever ruled; whether it was the one, the few, or the many, whether he or they were good or bad, the ruler(s) could and did reach out and in many respects determine your way of life. No adult could be indifferent to politics because everyone felt the effects of political rule.

City-states faced a serious, ultimately fatal threat. If children and adults like to ‘gang up,’ what is to prevent the most ambitious, if perhaps the less reasonable, among them from gathering

together not merely to tyrannize the city-state but to conquer other city-states? If, say, a tyrant gains control of Macedonia, masters the nearby city-states, and sets sail for Greece, what is to prevent him from conquering it? In the event, nothing, as Alexander the Great proved not only in Greece but throughout the ancient Mediterranean world. As did many others: The Old Testament is full of Egyptians, Ethiopians, Assyrians, Babylonians, Persians, the New Testament full of Romans. A small people could retain its self-government among the empires only if God chose to protect it. It couldn't go it alone.

What is more, small places foster political passions as much as they foster rational deliberation. If I care intensely about who rules me, because whoever that is he will make me feel his rule, I may gang up with others to make sure that we are the hammers, not the nails. In *The Federalist*, Publius remarks that small republics were as often as short in their lives as they were violent in their deaths. When not ruined by foreign conquerors, they succumbed to suicide-by-faction. Although human beings may be rational by nature, they often fail to live up to their nature. "Why has government been instituted at all?" Publius asks. "Because the passions of men will not conform to the dictates of reason and justice without constraint."

The problem only intensified in the modern world, the world of Machiavelli. As an official of the Italian city-state of Florence, Machiavelli became impatient with smallness, with puny states which squabbled with one another, incapable of extending their power beyond their own small territories. He conceived not so much of another empire but of *lo stato*, a governing body extending over the whole of the Italian nation. *Lo stato* might be governed by one or many, be a principality or a republic, but whichever regime it had, it would be able to extract substantial numbers of soldiers and revenues from all parts of Italy. Even the larger nations of Europe—the French, the Turks—did not have *lo stato*; they were feudal societies, in which monarchs reigned but found themselves constrained by 'the few,' by titled aristocrats, by churches or mosques—by elites of various descriptions, all bent on aggrandizing themselves at the expense of the central government. Machiavelli recommended what we would now call a strategy of 'state-building'—of bring 'the few' to heel, extending the administrative apparatus of the central government into the provinces and subordinating those provinces to it. Once a few rulers took the advice he preserved in his books (he died powerless), once the Tudors in England and the Bourbons in France began to put an end to feudalism, all European nations needed their own states, if they were to avoid conquest. On that continent, the Hohenzollern-Bismarck-Prussian forging of the many small German states into one nation-state proved the most salient fact of the nineteenth century, and the most ominous fact of the first half of the twentieth century. Without states of their own, European nations would have fallen under German rule, as Germans aimed at reconstituted a new and much more malevolent form of the Holy Roman Empire, no more holy or Roman than the original, but very much more an empire.

Will Morrisey is William and Patricia LaMothe Professor Emeritus of Politics at Hillsdale College, and is a Constituting America Fellow; his books include Self-Government, The American Theme: Presidents of the Founding and Civil War and The Dilemma of Progressivism: How Roosevelt, Taft, and Wilson Reshaped the American Regime of Self-Government.

Civil Society and Local Government (Part 2)

Guest Essayist: Will Morrisey

Having felt the pinch of rule within an empire by a would-be absolute monarch wielding the powers of a modern state, Americans needed to solve two problems at once. United, they could depict themselves as a rattlesnake telling the world, “Don’t tread on me.” Disunited, severed into thirteen pieces, as depicted in an equally famous illustration of the period, they would die, prey to one or more of the surrounding empires. Americans needed a modern state to defend themselves against other modern states. Divided, they would be conquered, even as the American Indian nations and tribes had been, and would continue to be conquered, whenever they attempted to resist ‘modernity.’

At the same time, they had won their independence in resistance to tyranny, in resistance to an overbearing modern state that denied them their rights not only as Englishmen but as human beings. The natural rights of life, liberty, and the pursuit of happiness require self-government, *civil* society. Civil or genuinely political life, the association of citizens who share rule with one another, requires small associations—families, towns, city-states. How can civil society exist in a large, centralized, modern state, the very thing needed for self-defense in a world dominated by such states—a ‘Eurocentric’ world in which men armed with the instruments of modern science, very much including the new, Machiavellian science of politics, of statism, was already extending its tentacles onto every continent? Europeans ruled not only with gunpowder-propelled projectiles but with a new form of ruling organization, one sufficient to divide, conquer, and perhaps most crucially rule even a vast empire like China, or a subcontinent of such staggering diversity as India.

Statism and self-government at the same time: that sounds very much like a circle never to be squared. They found their answer in another institutional device: federalism.

Writing only a few decades before the American founding, the political philosopher Montesquieu had written, “If a republic is small, it is destroyed by a foreign force; it is destroyed by an internal vice”—typically, corruption. What is needed is a “constitution that has all the internal advantages of republican government and the external force of a monarchy,” namely, “the federal republic.” Each element of this republic should itself be commercial-republican—peaceful and moderate, not a warrior-state like that of Alexander the Great. Each element should have liberty, which “in no way consists in doing what one wants” but rather in “having the power to do what one should want to do and in no way being constrained to do what one should not want to do.” What one should want to do is to observe “the law of nature, which makes everything tend toward the preservation of species,” the “law of natural enlightenment, which wants us to do to others what we would want to have done to us,” and “the law that forms political societies,” which aims at the perpetuation of those societies. Certain moral virtues inhere in liberty itself. Republicanism consists of citizens who rule one another reciprocally, doing to one another as they would have done to themselves; federation enables republics to follow the political law of self-perpetuation.

If one were to draw a diagram representing a modern state, it might look like a wagon wheel: a solid border or rim; a central government or hub; strong but limited lines of control or spokes extending from the center to the border, reinforcing the border but emanating from the rim. But if civil society consisting of local associations and institutions exists in the spaces between the spokes, how can this state be republican, an association of self-governing citizens, and not mere subjects? A return to feudalism would solidify the spaces, widen the spokes at the expense of weakening the hub. Federalism retains the integrity of both the central state and the constituent, smaller states. In the United States Constitution, the central government gains certain *enumerated* powers, including the power to raise revenues from within the territories of the states without the consent of the state legislatures and governors and the power to regulate interstate commerce. The states retain powers not enumerated, albeit limited by their republican regimes, guaranteed by Article IV, section IV. State governments were assured a voice in the councils of the central government by their power of electing two representatives each to the United States Senate. The peoples of those states had their voice in the House of Representatives, elected by popular vote within voting districts located within the boundaries of each state. Additionally, of course, the people of each state also elected their representatives to the legislatures which chose the U. S. Senators, making the entire system republican either directly or indirectly. Neither the state governments nor the central governments exercise *sovereignty* over the people; James Monroe titled his book, *The People the Sovereigns*.

To return to the image of the wheel, in a federal-republican state we see the powers of the central government as strong *filaments* running through the spokes, which are the constituent states of the federation. If one shifts the image from a wheel to the more dynamic example of a power grid, the powers of the sovereign people are energies that run through intertwined, mutually strengthening wires. One wire depicts the government of your state; the other depicts the government of your country as a whole—the central government. Both derive their energy from the same source, the people, united through the political union of their states, each itself a political union encompassing smaller ‘unions’ from families to civil associations to counties.

The sovereign people in a republican regime will rule and be ruled, therefore more likely to do as they would be done by. Their way of life will be genuinely political, civic, fostering habits of mind and heart that incline toward civility because each citizen knows he needs the others and wants to do harm to none of them. At the same time, such a people will have the strength to defend themselves against other states and empires, far more centralized and far more ambitious for conquest.

For more than a century, the constitutional republicanism established by the Founders increasingly has given way to administrative government at the national, state, county, and even the local levels. As a result, Americans have needed to deliberate together less. The decline of civility in what remains of American political conversation may well originate in the decline of genuine civic life, genuine self-government, as part of the American way of life.

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Right of the States to Oppose Tyranny- Guest Essayist: Jennie Jones

Few factors are more fundamental to our early state constitutions, declarations of rights, and bills of rights than the Christian theory and practice of the right, or duty, of resisting injustice and tyranny. The right of resistance is rooted in the Biblical principle summarized by the Apostle Peter: “We ought to obey God rather than men” (Acts 5:29). Civil government is one of the kinds of governments ordained by God (others being self-government, family government, church government, and employment-based government), and the “powers that be” are ordained by God, so every soul is to be subject to them, not to resist them (Romans 13:1,2).

But it does not follow from this that the ruled are obligated to obey absolutely everything that the rulers of civil government (or any kind of government) command. Being ordained by God does not authorize government officials to usurp the place or authority of God. Being ordained by God does not exempt the ruler from the standards by which all men’s words and actions are judged: the standards decreed by God in His law. Furthermore, the ruler, like everyone else, is sinful: in the very core of his being, he longs to replace God with himself and God’s standards of good and evil with his own (Genesis 3:5). Neither the providence of God nor the judgment of his Christian peers enables any man, or any ruler of civil government to act without sin in all that he does. These highly unflattering truths are hard sayings, but they are essential to good government.

Moreover, the ruler of civil government is not to use the power of the sword to be a terror to good works but to evil deeds: he is the minister of God to the ruled for good, not for evil (Romans 13:3-7). The ruler is God’s minister, or servant, not his own. The rulers and the ruled are under the authority of God and His law. God’s law is the authoritative standard that defines good and evil, the ethical laws of “nature,” and love. Hence the Apostle Paul summarizes God’s law as the standard by which men can know that they are following the law of love and working no ill to their neighbors (Romans 13:8-10). The ruler who enacts evil laws that violate God’s standards of law exceeds his authority, rebels against God, and violates the terms of his ministry under God. To the extent that he violates God’s legal standards he is unworthy of honor, for Christians are not bound to honor or obey that which is evil (or he who commands that which is evil) but rather that which is good.[\[1\]](#)

A ruler who systematically violates God’s law—God’s standards and definitions of justice (and injustice)—is rebelling against God. He is systematically scrapping God’s standards of good and evil and replacing them with his own. He is a tyrant.

A tyrant is to be resisted by his subjects, and if he persists in his tyranny, may be removed from office. Medieval, Reformation, and later Christian theorists differed about who should undertake this process of resistance and (if necessary) revolution.[\[2\]](#) Most held that the “lesser civil magistrates,” lower-ranking civil government officials—who are also among the “powers that be” who are ordained by God—are to lead the people in this process of resistance (the constitutional theory). Some maintained that the people, private individuals or the majority of citizens, are to do what is Biblically permissible to resist or overthrow the tyrant (the private

right theory). Such was a long tradition of Christian resistance theory dating back to the medieval period. It was:

- fundamental to the action of the barons led by Archbishop Steven Langton, who gave England the Magna Carta in 1215;
- revived in the Reformation and Counter-Reformation;
- practiced in the Dutch war for independence from the Spanish tyrant Philip II;
- exemplified in the Petition of Right (1628);
- taught and practiced in the English Civil Wars (1642-1651);
- maintained (after a fashion) against the king in the Glorious Revolution (1688);
- asserted in the English Bill of Rights (1689);
- continued in the English colonies in America;
- and preached in sermons before congregations and public officials during the movement to resist British tyranny.[\[3\]](#)

The right to petition rulers for a redress of grievances was a basic part of this tradition of Christian resistance theory. The colonies followed this theory in resisting the king-in-Parliament and in their War for Independence. This theory continued to be widespread in early America before and long after the framing and ratifying of the Constitution of the United States (and, of course, of our national Bill of Rights). At least six states—New Hampshire, Maryland, New Jersey, Pennsylvania, Virginia, and Massachusetts—stated this right explicitly in their fundamental laws, and thereby implied the people’s right to use all legitimate means of resistance endorsed by that tradition. The Maryland Declaration of Rights (1776) phrased it pointedly:

IV. That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct; wherefore, whenever the ends of government are perverted and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government. The doctrine of non-resistance, against arbitrary power and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.

Where not stated explicitly, this doctrine was implicit in all the states’ constitutions and declarations—which owed their existence to exercising precisely such a conviction.

The right and duty of the states to resist the central government was originally intended to apply to future civil government officials. The Framers gave the states the means of protecting their people and the **only** legitimate means of changing the Constitution—the amendment process and convention of the states stated in Article V. That right and that means **still** apply. State and local officials have a duty to resist injustice and tyranny imposed upon their people by our central government. American citizens need to remind not only candidates for federal office, but also candidates for state office, of this fundamental constitutional reality, right, and duty. That is the only way (humanly speaking) we will reclaim and preserve our freedom.

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[1] Romans 13:1-7 is frequently misinterpreted. Including verses 8-10 of Romans 13 makes it easier to avoid misinterpreting the first seven verses, but a reading of the Rev. James M. Willson's *The Establishment and Limits of Civil Government; An Exposition of Romans 13:1-7* (Powder Springs, Georgia: American Vision Press, [1853] 2009) should eliminate all controversy over this crucial passage, for it destroys the misinterpretations that were fashionable in the early nineteenth century and which are too fashionable now.

[2] Revolution to depose the tyrant, not revolution to overthrow the religious and social or economic order, is the intention here, for to overthrow a religious, social or economic order based upon Biblical standards of justice would be sinful and unjust.

[3] See Quentin Skinner, *The Foundations of Modern Political Thought: Volume Two: The Age of Reformation* (Cambridge: Cambridge University Press, 1978); Julian H. Franklin, trans. and ed., *Constitutionalism and Resistance in the Sixteenth Century: Three Treatises by Hotman, Beza and Mornay* (New York: Pegasus, 1968); Junius Brutus, *A Defense of Liberty Against Tyrants; or, of the Lawful Power of the Prince Over the People and of the People Over the Prince: Vindiciae Contra Tyrannos* (St. Edmonton, Alberta, Canada: Still Waters Revival Books, 1989); and Richard L. Greaves, *Theology and Revolution in the Scottish Reformation; Studies in the Thought of John Knox* (Grand Rapids: Christian University Press, 1980).

Battle for Power Between the National Government and the States- Guest Essayist: J. Eric Wise

How to Keep the Founders' Intentions for "We the People" Who Are in Charge of Their Own Governing

The first mention of the United States in an official document is found in the Declaration of Independence. The thirteen colonies that declared their separation from England became thirteen "free and independent States."

As a practical matter, these states were always united, if perhaps at first only in war against the British. By 1781, these united states had entered into The Articles of Confederation and Perpetual Union, commonly called the Articles. The Articles provided that "Each 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."

But the powers delegated to the United States in Congress were not insubstantial. Under the Articles, the power over foreign policy and the laying of imposts and duties, and responsibility for determining war and peace, resided in the national government. In time, however, the inability of the Articles to deal with a failing economy and serious governance problems led to the calling of a constitutional convention.

The Articles provided that the compact could be altered only with the consent of Congress and confirmation "by the legislatures of every State." The impracticality of this rule led to the

proposal that the new Constitution be effective, with respect to ratifying states only, when ratified by conventions held in just nine states. The new Constitution thus was never approved by the unanimous mechanism described in the Articles. The rights of states embodied in the provisions requiring unanimity were cast aside for the sake of “The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional [under the Articles] limits.” Federalist 38.

The Constitution established a new relationship among the states. No longer were the states held together in perpetual union as a compact of states; rather “We the People of the United States” formed a government directly as a compact of a people. A confederation of independent states no more, the government was to be –

“partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.” Federalist 39.

Almost immediately following ratification of the Constitution, the nation adopted the Bill of Rights as the first ten amendments to the Constitution. The Tenth Amendment to the Constitution provided that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As the powers delegated to the United States were listed in the enumerated powers of Article I and related largely to defense, interstate and international commerce, coinage, bankruptcy, and citizenship, the Constitution left to the states “police powers” to look after the health, safety and welfare of the people of the United States.

The dispersal of these very important police powers concerned more than the simple preservation of the *status quo* in place under the Articles of Confederation. The dispersal of police power had an important philosophic idea underlying it, based on the nature of human society. A republic, in which the people govern themselves, requires a body of people closely familiar with one another. With a smaller territory, the people of a republic could be familiar with and attached to the customs and habits of the people, and make sound policies and laws suited to their way of life and economic livelihood.

Indeed, opponents of the Constitution had cited “Montesquieu on the necessity of a contracted territory for a republican government.” Federalist 9. A large territory, Montesquieu had supposed, encouraged a monarchy, as monarchies were more adept at communications over distance and operate on principles that do not require thorough familiarity with the governed (rather they require familiarity with a small body of subordinate princes). The Constitution resolved these issues by creating a federal republic, where local rule prevailed in areas touching the daily lives of the people.

The power of the states to make different policies and laws suited to their way of life and industry had what one might call a beneficial “knock-on effect.” James Madison observed that the federal republic would take in a large number of different interests – obviously in no small part on account of the independent police powers of the states to shape the citizenry – which would have the effect at the national level of cancelling out narrow selfish interests. He wrote:

“Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.” Federalist 10.

In the Twenty-First Century, this model has been partly abandoned. Not only has American society adopted practices that homogenize its culture, such as national television, newspapers, radio, and a largely uniform way of higher education – universities are homogenized by, among other things, the competition for national rankings prepared by U.S. News and World Report – the national government has also increasingly absorbed the traditional police powers of the states through expansive readings of the commerce clause and of “substantive due process,” circumscribing the role states play in shaping the character of their citizens through policies and laws.

In today’s climate of identity politics, the resulting uniformity of laws and culture may not seem like a threat. But consider perhaps that a uniform national culture – identity politics itself – may already exist and that a common national motive for a majority to invade the rights of a minority may be gathering. In this light, it may be time for states to once again jealously protect their rights and to exercise with renewed vitality their police powers to shape diverse interests for the common benefit of the United States.

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Conclusion: The States and the Union- Guest Essayist: Will Morrisey

On September 19, 1796 George Washington published his Farewell Address. Best remembered now for its warning against American embroilment in European wars, the Address centers on what Washington considered a far more important and urgent question: the need to maintain the American union.

That union, he wrote, provides “a main pillar in the edifice of your real independence.” Americans’ tranquility at home, peace abroad, safety, prosperity, and liberty all require the continued union of the American states. “This is the point in your political fortress against which the batteries of internal and external enemies will be most constantly and actively (though often covertly and insidiously) directed.” In a world of powerful, militarized and centralized modern states, several in command of vast empires, “no alliances, however strict, between the parts” of America “can be an adequate substitute.” Internally, factionalism, the “party spirit”—“itself a frightful despotism,” likely fanned by “the insidious wiles of foreign influence”—can eventually lead to a regime of tyranny, the last resort of a republican people desperate for protection from both domestic and international threats. Therefore, “The name of American, which belongs to you in your national capacity, must always exalt the just pride of patriotism more than any appellation derived from local discriminations.”

As both the leading general in the Revolutionary War against just such an empire and the first president under the United States Constitution, Washington had experienced what eighteenth-century writers termed the “inconveniences” of disunion for the past twenty years. From his difficulties in recruiting and paying the Continental Army to the machinations of French ambassador Edmond Genêt on behalf of the Jacobin regime, Washington had seen how selfish interests and mutual distrust could threaten his country’s still-fragile, controversial experiment in popular self-government.

In this, he had allied with his Treasury Secretary and former Army officer Alexander Hamilton, not only on the battlefield and in his administration, but in the crucial years 1787-91 when the United States Constitution was framed, debated, and ratified. Themes Washington succinctly invoked in the Farewell Address had already been elaborated by Hamilton in *The Federalist*.

Hamilton begins by alerting his readers to dangers Americans face from “dissensions between the states.” Among sovereign states, God’s command to ‘Love thy neighbor’ does not predominate. Quite the opposite: Hamilton considers it “a sort of axiom in politics that vicinity, or nearness of situation, constitutes nations’ natural enemies.” This is so because human nature isn’t divine. One must never “forget that men are ambitious, vindictive, and rapacious”; their unlovely passions direct themselves against those who are nearest to hand. Thus “the causes of hostility among nations are innumerable.” They include both “the love of power or the desire of pre-eminence and dominion” and “the jealousy of power, or the desire of equality and safety.” Trade wars often lead to shooting wars.

Nor do national passions limit themselves to public ambitions and grievances. Many national rivalries “take their origin entirely in private passions,” in the “attachments, enmities, interests, hopes and fears of leading individuals in the communities of which they are members”: love affairs, criminal activity, vanity, religious bigotry, even indebtedness.

More often, however, the causes of war are less petty. Sovereign states fight over territory; given America’s “vast tract of unsettled territory” in the west, this could easily become a source of conflict—as indeed it did, by the 1850s. With existing jealousies and fears of larger states by smaller states under the existing Articles, border disputes “would be likely to embroil the States with each other, if it should be their unpropitious destiny to become disunited.” The public debt of the Union, like the private debt of Shays, “would be a further cause of collision between the separate States or confederacies,” as “foreign powers would urge for the satisfaction of their just demands, and the peace of the States would be hazarded to the double contingency of external invasion in internal contention.” Finally, “incompatible alliances between the different States, or confederacies, and different foreign nation,” would cause us to “be gradually entangled in all the pernicious labyrinths of European politics and wars”—Washington’s famous future argument—as “*Divide and conquer* must be the motto of every nation that either hates or fears us.”

Hamilton especially needs to argue against the argument made by Montesquieu and other writers that commercial republics won’t fight each other. Applied to the United States, this would mean that the American states don’t need a more perfect union to sustain peace amongst themselves because they are all commercial republic. Here, Hamilton engages in some adroit rhetorical sleight-of-hand, although for a good purpose. He first argues by counter-example. Republics

often make war, no less than monarchies. “Are not popular assemblies frequently subject to the impulses of rage, resentment, jealousy, avarice, and of other irregular and violent propensities?” No doubt they are. And “has commerce hitherto done any thing more than change the objects of war? Is not the love of wealth as domineering and enterprising a passion as that of power or glory?” Surely not, and assuredly so, respectively. He then observes that “Sparta, Athens, Rome, and Carthage were all republics; two of them, Athens and Carthage, of the commercial kind. Yet were they as often engaged in wars, offensive and defensive, as the neighboring monarchies at the same times.” And in modern times, the “haughty republic” of Venice often made war on its neighboring states, and the commercial republics of Holland and Britain fought a series of wars against each other.

These arguments are easy to disprove. The two commercial republics of antiquity, Athens and Carthage, didn’t war against each other, except when Athens became a subordinate ally of a Syracusan tyrant. As for Holland and Britain, the Dutch Republic was a republic in name only—a federation, to be sure, but one ruled by kings and trading oligarchs; even Britain, during the time of the wars with the Dutch, was at best a mixed-regime republic, with monarchs not Parliament conducting its foreign policy. Why these sophistries? What justifies them?

What Hamilton knew, as did his political ally James Madison, was that many of the Southern states were not democratic republics at all. Both men had heard Gouverneur Morris chide the representatives of those states at the Constitutional Convention. You are slaveholding, plantation oligarchs, not real republicans, Morris said, and even Madison, himself a slaveholding, plantation oligarch, understood this, while hoping for gradual abolition of slavery and consequent political reform in Virginia and throughout the South. *If not all the American states are commercial republics, the republic peace theory does not apply.* This is the unspoken truth behind Hamilton’s verbal legerdemain.

Having established (directly or indirectly) the several causes of disunion, were the American Union to divide, Hamilton turns to the consequences, the effects those causes would bring down upon us. Whereas in Europe the disciplined armies and fortified borders of its many sovereign states have “been productive of the signal advantage of rendering sudden conquests impracticable,” in “this country the scene would be altogether reversed,” as wars would consist, first, of the “populous States” overrunning their “less populous neighbors,” followed by guerrilla warfare which will make such conquests “difficult to be retained.” Hamilton is thinking of the many instances of exactly such warfare, on both sides, during the recently concluded Revolutionary War. Even the Civil War, decades later, saw the conquest of the South by the more populous North, only to be followed by simmering hit-and-run resistance, including terrorism, by irregular forces led by Nathan Bedford Forrest, to take only the most prominent example.

Such chronic insecurity will lead to standing armies, and then to the undermining of republicanism throughout America. Armies, after all, require executive direction; American constitutions “would acquire a progressive direction towards monarchy,” “at the expense of the legislative authority.” Not only republicanism but commerce would thereby attenuate, as “the industrious habit of the people of the present day, absorbed in the pursuits of gain and devoted to the improvements of agriculture and commerce, are incompatible with the condition of a nation

of soldiers,” as such circumstances would require Americans to become. To those who would cite Great Britain as a counterexample, as a nation that has fought many wars without succumbing to military rule (except for the brief reign of Oliver Cromwell, in the previous century), Hamilton reminds them that they are thinking of the British *Isles*—islands, moreover, protected by the most formidable navy on earth. America, too, has long coastlines, but is largely a continental power, and will become more so as it expands westward.

In sum, history teaches that small-scale republics, clustered together, spell calamity for the peoples so divided. “It is impossible to read the history of the petty republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of evolutions by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy.” The “transient and fleeting brilliancy” of the Age of Pericles and of Renaissance Italy cannot compensate for “the vices of government” that “pervert[ed] the direction and tarnish[ed] the luster of those bright talents and exalted endowments” displayed there. Further, “From the disorders that disfigure the annals of those republics the advocates of despotism have drawn arguments, not only against the forms of republican government, but against the very principles of civil liberty,” arguments enabling such advocates to condemn “all free government as inconsistent with the order of society.”

Confident that he has drawn his readers’ attention to the dangers, causes, and consequences of disunion, Hamilton defends the Framers’ solution: a republican regime and federal state with strong but limited powers. Respecting republicanism, “the science of politics... like most other sciences, has received great improvement” in modern times. Division of powers, checks and balances, judges holding office during good behavior, and perhaps above all “the representation of the people in the legislature by deputies of their own election” are “wholly new discoveries, or have made their principal progress towards perfection in modern times.” Respecting the modern state, it has replaced small, weak political communities with large and powerful ones, but more: With the invention of federalism, it has enabled Americans to combine the self-defense only possible in a large place that organizes numerous soldiers and sailors in a manner permitting coherent military operations, with sufficient revenues to keep them well-armed. Crucially, as Montesquieu argues in his magisterial work, *The Spirit of the Laws*, a “confederate republic” will enable Americans to extend “the sphere of popular government” at to “reconcil[e] the advantages of monarchy”—effective command of well-trained and organized troops—“with those of republicanism”—economic, political, and religious liberty. Such a state, and such a regime, will not only defend itself against foreign enemies but also against “popular insurrection” within, as a beleaguered governor of one state will be entitled to call in assistance from other states, all under the eye (and, more to the point, the authority) of the federal government.

Within that federal government itself, the states will retain representatives. The Senate, elected by the state legislators, will leave the states in possession of “certain exclusive and very important portions of sovereign power,” although not in possession of sovereign power *tout court*. Hamilton cites the example of the ancient Lycian confederacy, which successfully combined self-defense, representation of each of its constituent city-states, and enumerated and forceful authority within those city-states by the federal government.

Throughout this study, essayists have shown how the American federal republic has empowered its own constituent states to retain substantial self-government without sacrificing the general powers needed for national defense against enemies foreign and domestic, retaining the freedom of interstate commerce, communication, and travel that affords the American people one of the highest living standards in the world. In the past century, the centralization and bureaucratization of both the federal and state governments have weakened citizen self-government, but the words of the original Constitution as amended in the years immediately succeeding the Civil War, and the intentions of the Framers and those citizens who have remained loyal to their intentions, guided by their principles of equal, natural (and therefore unalienable rights remain as a standard for those who continue to hold certain truths to be self-evident.

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