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# Localism, History and the Articles of Confederation: Some Observations about the Beginning of U.S. Federalism

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# Localism, History and The Articles of Confederation: Some Observations about the Beginning of U.S. Federalism

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## I. INTRODUCTION.

*There is nothing new in the world except the history you do not know.*[1]
Harry S. Truman 33d President of the United States.

*All politics is local.*[2]
Thomas P. A "Tip" O'Neil
Representative of 8th District Massachusetts

Most Europeans and Americans are not fully aware of how much state autonomy remains embedded in the Federal Constitution of the United States of

[1] WILLIAM HILLMAN, MR. PRESIDENT, pt. 2, Ch. 1 (1952) *quoted in* Robert Andrews, *THE COLUMBIA DICTIONARY OF QUOTATIONS 10* (1993).
[2] Tip O'Neil, ALL POLITICS IS LOCAL (1994).

America. The U.S. Constitution preserves the sovereignty of the states, and two reasons for the preservation are localism and the Articles of Confederation.

In U.S. law schools, a course in Constitutional Law is mostly taken up with studying cases of judicial review by the Supreme Court of challenges to the validity of particular exercises of state or federal government power under the Constitution. Broadly, the issue decided, more often than not, is whether the Constitution restrains state or federal government action. The Supreme Court uses several doctrines to decide that issue including substantive and procedural due process, equal protection, preemption, separation of powers, and federalism. These doctrines and the judicial decisions using them form the core of a U.S. Constitutional law course.

The roots of United States federalism in pre-constitutional history are less often discussed. The origin of United States Constitutionalism helps to explain its persistent structure, which rests on the sovereignty of the Union's constituent states. In 1819, Chief Justice Marshall in the famous case of *McCulloch v. Maryland,* which upheld federal law and limited state power, presciently observed the resiliency of debate over powers granted to the federal government in the Constitution (and by implication

also of disagreement concerning powers residing in the states):[3]

> ... the question respecting the extent of the powers actually granted, is *perpetually arising*, and will probably continue to arise, as long as our system shall exist. (emphasis added).

More recently, Justice O'Connor confirmed that federalism issues are alive and well in U.S. constitutional law:[4]

> The constitutional question [in this case] is as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States.

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[3] 17 U.S. 316, 405 (1819). Here, among other things, the Supreme Court interpreted the Constitution to grant to the federal government *implied* power to establish the Bank of the United States.

[4] *New York v. United States*, 505 U.S. 144, 149 (1992). The Court concluded that Constitution did not confer on Congress the ability to compel the states to provide for the disposal of the low level radioactive waste generated within their borders.

*James Hickey*

## II: The Beginning of U.S. Federalism - Localism and The Articles of Confederation.

Localism in pre-constitutional America was embedded into provisions of the Articles of Confederation and ultimately was preserved in the U.S. Constitution. Over the past 220 years, debate has continued, as yet unsettled, about the structure and limits of that preservation.

### A. Localism in Pre-constitutional America.

The federal system of the United States has become very centralized. However, that centralization exists in an American tradition of preference for local authority, local autonomy, and distrust of federal power.[5] The roots of that localism extend back in time to the early seventeenth Century well before the U.S. Constitution was ratified in the 1790s. As Gordon Wood aptly put it:[6]

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[5] Gordon S. Wood, *The First National Constitution of the United States* in Government Structures In The U.S.A. And The Sovereign States Of The Former U.S.S.R at 13 (James E. Hickey, JR. and Alexy Ugrinsky eds.) 1996.
[6] *Id.* at 12.

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> "The early English migrants to America brought with them strong traditions of local and regional autonomy that conditions in the New World only reinforced and intensified. All the colonies in the seventeenth century experienced an acute localization of authority."

Colonial central government was largely a product of power exercised at the local level. The American colonies essentially governed themselves under royal charters from England. This was a matter of necessity because England, of course, was far away in distance and time and the colonies became accustomed to making decisions and passing laws on their own. This established a pattern of political local autonomy in town and county governments throughout early colonial America.[7] Central government authority at the colonial level in early America was dependent on the towns and counties and ultimately served at the will of local communities. Local authority in towns and counties was pervasive and was exercised in almost every sphere including criminal and civil law, wills and estates, tax collection, titles to land, militia supervision, and even orphans, taverns and welfare.[8]

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[7] The same could not be said economically because the colonies were almost entirely dependent on trade exclusively with England and they did not trade significantly with one another.
[8] Wood *supra* note 5 at 13.

Thus, by the time of the Declaration of Independence in 1776, colonial central governments were politically weak and, for the most part, needed local government permission to act effectively. This localism carried over to the Articles of Confederation and later to the Constitution itself.

B. The Articles of Confederation.[9]

The intense and comprehensive penchant for localism evident in 17th and 18th Century America translated rather easily into concepts of individual state sovereignty when the Continental Congress drafted and adopted the Articles of Confederation between 1776 and 1781.[10]

In 1776, when union became a prime concern, the colonies viewed themselves as 13 independent sovereign nations with strong preferences for local authority. The primary government unit was considered to be the state and not any union or continental government. The newly independent "Americans"

[9] The text of The Articles of Confederation may be found at: http://www.usconstitution.net/articles.html.

[10] Prior to 1776 there were two specialized attempts at "union" for specific limited purposes: first, in 1643 the colonies in the northeast unionized to respond to threats from the Dutch, the French, and native Americans; second, in 1754 the Albany Plan of Union was formed for military purposes. Neither attempt at Union was long lasting or significant in the U.S. constitutional history.

thought of their state and identified with their state first and foremost. At the time it would have been odd and uncomfortable for the people of America to say they were "Americans". Rather, they were "Virginians", "Marylanders", and "New Yorkers". Their country was their state, not the "U.S.A.". John Adams succinctly summed up the notions of individual state sovereignty when he referred to the Massachusetts delegation to the 1776 meeting of the Continental Congress as "Our Embassy".

The Articles of Confederation was more of a "compact" or treaty among sovereign states, governed by public international law, than it was a constitution. At the time, it was understood and accepted that the sole source of power of the union being formed was the states. It was through the states, as gatekeepers, that the will and consent of the people was channeled to the central government. The *peoples* of the various states were not directly represented in the confederation.

Under the Articles of Confederation, the term "United States" was plural and not singular as a matter of grammar, meaning, and feeling. The U.S. Constitution that replaced the Articles of Confederation converted the plural "peoples of the United States" to the singular.[11] The implication of that semantic con-

[11] The first words of the U.S. Constitution state in the Preamble "We the *People* of the United States, in Order to form a more perfect union..."

version, of course, is that the *people* are directly represented in the Constitution.

Most analyses of the Articles of Confederation stress the weaknesses that compelled adoption of the United States Constitution to cure. Those weaknesses were: 1) no central government authority to act directly on individuals and the states; 2) no central government authority to enforce treaties and central government laws; 3) no amendment of the Articles of Confederation without the unanimous consent of the states; 4) no proportional representation of the population in the central government; 5) no power in the central government to tax; 6) no power in the central government to print money; 7) no central government authority to regulate trade among the states; and 8) no central government courts or executive.

All those weaknesses in the Articles of Confederation were addressed in the Constitution.[12] What is not so often appreciated is that the Constitution did not jettison entirely the principles that had animated The Articles of Confederation.

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(emphasis added). JOHNNY H. KILLIAN AND LELAND E. BECK, EDS. ,THE CONSTITUTION OF THE UNITED STATES OF AMERICA (GPO 1987) at 3.

[12] The Constitution addressed those weaknesses respectively in Article VI, cl. 2; Article I, § 8, cl. 15; Article V; Article I, § 3, cl. 1; Article I, § 8, cl. 1; Article I, § 8, cl. 5; Article I, § 10, cl. 2; Article I, § 8, cl. 3; Article III, § 1; and Article II, § 1, cl. 1.

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The state sovereignty and state equality concerns reflected in The Articles of Confederation were carried over in several respects to the Constitution: in guaranteeing survival of the states as discrete sovereign legal personalities; in the scheme of representation; in the doctrine of enumerated powers for the central government; and in the reservation of powers in the states.[13]

The Articles of Confederation preserved the state sovereignty notion of an agreement among states. In addition, the Articles provided a new vehicle through which all the people of the country could agree to bestow certain powers directly on the federal government. Thus, state sovereignty (local power) was preserved in the Constitution and the states did not disappear as a source of power in the new "United States of America."

1. *Preservation of the states as discrete legal personalities.*

The Articles of Confederation in its form accepted that the states had discrete legal personalities. The Articles of Confederation, after all, were essentially a treaty controlled by public international law. A treaty by definition was an agreement among

[13] *See* Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 San Diego L. Rev. 249, 278-84 (1997).

*states*. In the 18th Century, the only recognized legal personalities with rights and correlative duties as subjects of international law were states.[14]

Any doubt about the legal personality of the states was addressed simply and bluntly in Article II: "Each state retains its sovereignty, freedom, and independence." Sovereignty, of course, is the automatic consequence of statehood and means that states are essentially autonomous in the sense of having a discrete legal personality. Among several states sovereign power is necessarily limited and implies theoretical equality among the states.

The Constitution established a much stronger central government with specific authority over the states and it dropped the language of Article II of the Articles of Confederation about state "sovereignty, freedom and independence." Nonetheless, the Constitution preserved the discrete legal personality of the states and did not replace the states with a "national" government.

That preservation of state legal personality is addressed in Article IV § 4, Article V, and in the Tenth

[14] Under international law a state is a subject of international law and characterized by a defined territory, a permanent (i.e. stable) population, an effective and functioning government, and a capacity to enter into relations with other states.

Amendment to the Constitution.[15] Article IV § 4 (the Guarantee clause) provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article V provides in relevant part:

> . . . no state, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The Tenth Amendment 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.

[15] A related question regarding the Tenth Amendment is what powers do the states have? This is discussed below.

Under the guarantee clause, of course, a "Republican Form of Government" cannot be assured unless the states have discrete legal personality and sufficient autonomy to make and run their own governments in the first instance.[16]

Article V assured external sovereignty and sovereign equality among the states by forbidding the amendment of the Constitution to alter the equal state representation in the Senate. And, the Tenth Amendment assures a reservoir of states rights under the Constitution (see discussion below).

Finally, the overall structure adopted in the Constitution and reflected in Articles IV, V and the Tenth Amendment presupposes independent states with legal personality and sovereignty. The Supreme Court acknowledged the continuing legal personality of states in the Constitution after the Civil War:[17]

> [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent

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[16] *See generally*, Deborah Jones Merrit, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*; 88 Col. L. Rev. 1 (1988).

[17] *Texas v. White*, 74 U.S. 700, 725 (1869) *quoted in* Smith *supra* note 13 at 283 n. 111.

> existence, ... '[W]ithout the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

2. *Equal State Representation.*

Article V of The Articles of Confederation embraced sovereign equality among the states in their votes in the central government Congress by mandating that "each State shall have one vote ... [i]n determining questions in the United States in Congress assembled." Here, no matter the geographic size, population or economic wealth of each state, the principle of one state, one vote, was adopted in recognition that otherwise state sovereignty equality would be disturbed. In the Constitution, Article I, §

3, cl. 1 carries over that state equality in voting in the Senate:[18]

> The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

3. *The doctrine of enumerated powers.*

The Articles of Confederation did not bestow on the central government any general, open-ended, legislative authority. It only gave to the Congress certain powers and no more than those that were listed in The Articles.

Article II of The Articles provides that "Each state retains ... every power, jurisdiction, and right ... not ... expressly delegated to the ... Congress."

For example, Article IX provided in part:

> Congress ... shall have the sole and exclusive right and power of determining on war and peace ... of sending and receiving ambassadors ... en-

[18] Since the Constitution, unlike the Articles of Confederation also conferred power directly on the people, it added a House of Representatives with proportional representation based on state population in Article 1 Sections 2 and 3.

> tering into treaties ... of establishing rules for [Prize] ... of granting letters of marque and reprisal ... [of] appointing courts for the trial of piracies and felonies committed on the high seas ... [of] establishing courts for ... cases of capture ... [of deciding] all [boundary and jurisdictional] disputes between states ... of regulating ... coin [and] ... weights and measures ... [and] all affairs with the Indians ... [of] establishing ... post offices ... of appointing [army and navy] officers ... [of] directing ... [land and naval] operations ... [of] borrow[ing] money ...

The Constitution adopts completely the approach of enumerated powers for the Federal Government. As a result, like the central government under The Articles, the Federal Government under the Constitution has no general legislative authority. Thus, Article I, § 8 of the Constitution contains a list of enumerated powers that is strikingly similar to the Articles of Confederation.

The Scope of enumerated powers was admittedly broader in the Constitution because Article I, § 8 of the Constitution also added new enumerated powers not in The Articles like the power to tax, to regulate interstate commerce and to establish inferior federal courts (below the Supreme Court). However,

the approach, the structure, is the same: the source of federal power is those powers granted and enumerated by the States (and the people) in the Constitution.

4. *Reservation of State Power.*

An intimately related but distinctive question to the federal government's legislative power is about the power the states have retained after the grant of central authority power is made.

Article II of The Articles of Confederation provided in this regard that the states have a reservoir of power *vis-à-vis* the Congress:

> 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 II by its words leaves no doubt that the States meant to keep all powers not specifically named as conferred on the Congress.

The Constitution initially did not have this explicit retention of state power. It also did not address the power retained by the people who, under the Constitution, are now directly represented in the federal

government. Both these retention considerations were addressed in 1791 by the Ninth and Tenth Amendments to the Constitution[19] which provide as follows:

> Amendment IX.
> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
>
> Amendment X.
> 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.

Thus, under both instruments, no general legislative authority over the states was granted to the central government. Additionally, under the Constitution no general legislative authority was conferred over the people either. Thus, the states (and the people of those states) have their local sovereignty, their local autonomy, and their independence, reserved.[20]

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[19] Article V of the Constitution provides that the Constitution may be amended as "necessary" with the approval of 2/3 of Congress and 3/4 of the States.

[20] A related concern not addressed by this essay is the scope of enumerated powers which surround the word "expressly" in Article II of The Articles which is omitted from the Tenth Amend-

## III. CONCLUSION.

After over 200 years of federalism under the Constitution, the United States has a highly centralized government with enormous power that nevertheless remains a *federal* government and not a consolidated *national* government. The daily lives of most Americans are guided by local governments, local preferences, and local values. Even if one views the Constitution as something more than a treaty, a contract, or a compact among states (in part because it also establishes a direct relationship between the people and the federal government), it remains today something substantially less than the sole source of law for the United States. Part of the explanation for this is the American people's adherence to localism, rooted in our pre-constitutional history, articulated in the Articles of Confederation, and embedded deeply into our Constitution.

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ment to the Constitution. The omission raises the issue of which additional powers the Federal Government may have that may be fairly *implied* from the enumerated powers even though not expressed.

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