

# Founding Principles of the United States

## 1. Introduction

On March 4, 1801, Thomas Jefferson was inaugurated president of the United States. He delivered his inaugural address before members of Congress and private citizens, and in it, he enumerated what he called the “essential principles of our government” that would shape his administration. Jefferson’s description of American principles of government are set out toward the end of his address as follows.

“Equal and exact justice to all men, of whatever state or persuasion, religious or political:—peace, commerce, and honest friendship with all nations, entangling alliances with none:—the support of the state governments in all their rights, as the most competent administrations for our domestic concerns, and the surest bulwarks against anti-republican tendencies:—the preservation of the General government in its whole constitutional vigor, as the sheet anchor of our peace at home, and safety abroad: a jealous care of the right of election by the people, a mild and safe corrective of abuses which are lopped by the sword of revolution where peaceable remedies are unprovided:—absolute acquiescence in the decisions of the majority, the vital principle of republics, from which is no appeal but to force, the vital principle and immediate parent of the despotism:—a well disciplined militia, our best reliance in peace, and for the first moments of war, till regulars may relieve them:—the supremacy of the civil over the military authority:—economy in the public expence, that labor may be lightly burthened:—the honest payment of our debts and sacred preservation of the public faith:—encouragement of agriculture, and of commerce as its handmaid:—the diffusion of information, and arraignment of all abuses at the bar of the public reason:—freedom of religion; freedom of the press; and freedom of person, under the protection of the Habeas Corpus:—and trial by juries impartially selected. These principles form the bright constellation, which has gone before us and guided our steps through an age of revolution and reformation. The wisdom of our sages, and blood of our heroes have been devoted to their attainment:—they should be the creed of our political faith; the text of civic instruction, the touchstone by which to try the services of those we trust; and should we wander from

them in moments of error or of alarm, let us hasten to retrace our steps, and to regain the road which alone leads to peace, liberty and safety.”

In this paragraph, Jefferson presents a list of practices that express the more fundamental principles of **federalism**, **constitutionalism**, and **republicanism**. Federalism requires that governing authority be held at the most local, specific level possible, and that the more general the level of government, the fewer are its duties. Moreover, sovereignty, the authority to govern, is lodged in the people of each state acting as sovereign political societies through their state and local governments. Constitutionalism is the idea that free people set down in writing the duties of government, and the limits on its powers so that it is clear to all what government must do, and what it must not do. Republicanism is a form of government, guaranteed to each state in Article IV of the Constitution of the United States, in which the people actively participate in government. Many people in our time believe that participation in government consists in voting, but this is not the extent of republican participation because it is the nature of government and those seeking offices in it to grow its power at the expense of the liberties of the governed, and so the most important part of participation in government is vigilantly and quickly checking every unconstitutional act of government. This is done by declaring unconstitutional laws to be null and void. Today, young Americans are taught in school that nullification of the laws of the federal government is treason, but this claim would have startled the Americans who wrote and ratified our Constitution as antithetical to constitutional, republican government. Indeed, without the right of nullification, the people are not sovereign, but the government is sovereign, and this is the unhappy state of domination Americans in the 18<sup>th</sup> century fought a war to escape. In this course, we will seek to describe the development of the political principles that lie at the foundation of the political order of the United States.

## **2. Magna Carta and Due Process of Law**

Due process of law is enshrined in our Constitution in the Fifth and Fourteenth Amendments, and we find it in Magna Carta some 550 years earlier. The idea is that before someone may be deprived of life,

liberty, or property, that person must first be convicted in court by evidence tested by a process designed to reach the truth. Moreover, the people who will pass judgment on the evidence should be of the same social class as the accused because, it was thought, this maximizes the likelihood that juries will be impartial.

Most of what is written in Magna Carta is peculiar to life in England in the 13<sup>th</sup> century, but two sections of it express the principles of habeas corpus and of due process of law. In the early 13<sup>th</sup> century King John was acutely at odds with his barons who were angry at his treatment of them. Moreover, the Archbishop of Canterbury, Stephen Langton, was much disturbed by the King's treatment of the Catholic Church in England. It is thought that Langton was the key impetus in rousing the barons to confront the King. King John, Langton, and the barons met in the meadow at Runnymede in June of 1215 to read and sign the Great Charter. The King had no intention of honoring the provisions of the Charter and appealed to Pope Innocent III to overturn it. On August 24, 1215, the Pope issued a Papal Bull declaring Magna Carta null and void. John found himself faced with war with the barons, but fell ill with dysentery and died on October 18, 1216 at the age of 50. John's son, Henry III, re-issued Magna Carta, and his son, Edward I, affirmed the document. In 1863, the Statute Law Revision Act repealed most of the provisions of the Charter but left intact the provision for due process of law.

In our history, judges, using the Fourteenth Amendment, invented "substantive" due process in the 19<sup>th</sup> century. Substantive due process is the principle that the Fifth and Fourteenth Amendments protect fundamental rights from government interference. Specifically, the Fifth and Fourteenth Amendments prohibit the government from depriving any person of "life, liberty, or property without due process of law." The Fifth Amendment applies to federal action, and the Fourteenth applies to state action. However, many judicial scholars believe substantive due process has no place at all in the Constitution. Due process of law, as it has existed in English and American history before the 19<sup>th</sup> century, is how the substance of a case is tried. In other words, substance and process are different things, and so "substantive due process" is an oxymoron.

Clearly, we see wrangling over an important principle of government, due process of law, that has been going on at least since 1215. We see also, in our American Constitution, the important influence of political ideas that go back in history for much longer than our republic is old.

### **3. The English Bill of Rights**

When Americans were debating whether to ratify our Constitution, one of the disagreements that animated them was whether to include a bill of rights. James Madison argued against, holding that the purpose of a bill of rights is to restrain tyrants, but the general government proposed in the Constitution is not a sovereign power able to exploit citizens, but rather an agent of the sovereign states that created it. The general government has only those powers delegated to it in the Constitution and nothing more. Thus a bill of rights would not add to our security, but it could become a locus of contention as scheming people will assert that the rights in the bill of rights are the only rights possessed by the people. Thomas Jefferson argued in favor, holding that a bill of rights will give to Americans a common language in which to discuss the political implications of our rights. Several states insisted they would not ratify the Constitution without assurances of a bill of rights quickly to follow. James Madison relented and agreed to draft a bill. and his work here is influenced by the English Bill of Rights of 1689.

The English Bill of Rights is a basic document of the British constitution alongside such documents as Magna Carta, the Petition of Right, and the Habeas Corpus Act of 1679. By 1689, the English were well into a contentious development away from executive rule by kings and queens and toward Parliamentary rule and a recognition of rights held by the people. Many analysts of this development contend that the English Bill of Rights is influenced by the political philosophy of John Locke, which is likely to be true, but there is disagreement about what Locke was up to, especially in his *Treatise of Civil Government*. Locke asserts that each human being owns him- or herself, and because we each own ourselves, we are not to be used by others without our consent, and we naturally own the products of our labor. At the same time, Locke holds a conception of sovereign government that is in line with that of the 17<sup>th</sup> century English political philosopher Thomas Hobbes, advanced most famously in his 1651 book *Leviathan*, which 20<sup>th</sup> century English philosopher Michael Oakeshott called the most important work on political philosophy written in English. Hobbes argues that in a state of nature, which is a condition without a civil government, there are no moral obligations except to live in peace with anyone

willing to live peacefully with you. Where others are not willing to do this, we are at liberty to do anything at all to them we think will effect our security. This primordial condition of humanity prevents salutary cooperation, since no one is willing to produce wealth lest others kill him for it. To overcome this, Hobbes argues, people will surrender their right to use force against others to a sovereign power, and in return the sovereign protects us from violence, foreign and domestic, and enforces our contracts one with another. This, in brief, is the structure of the “social contract.” We should observe that on Hobbes’ account of the state, the people may consent to establish a sovereign government one time only, after which disobedience or attempts to leave are treason, a capital crime. This, however, is not part of the American political tradition that produced the Constitution of the United States in 1787. Treason against the United States is defined in Article III, section 3 of the Constitution and consists only in levying war against them, or in adhering to their enemies, giving them aid and comfort. Thus in the American political tradition, as explained in the Declaration of Independence, the people of the states are sovereign political societies within each state, and thus possess the right to alter or abolish abusive government and to fashion new government to protect their safety and happiness.

One might notice that Hobbes’ view of legitimate government does not fit well with Lockean self-ownership and the right to the products of one’s labor. In practice, however, whatever rights we might have by nature are not always the rights a political society chooses to protect. The rights we each will enjoy in fact are the rights most dear to the people to whom we belong, for these are the rights a people will protect. This is why the sorts of rights Americans advocated in our colonial and early republican history are those we see developing in early modern England. We might then attend briefly to some of these rights that have been influential for Americans.

The English Bill made it illegal for the executive power (the king) to spend money without consent of the legislature (Parliament). Moreover, the executive cannot levy taxes on the people; this is the power of the elected legislature. The people have the right to petition the executive for redress of grievances, and any attempt to punish such acts is illegal. The Bill made it illegal for the king to maintain a standing army in peacetime without consent of the Parliament. This issue, whether to maintain a standing army in peacetime, was a very serious concern during the ratification debates for our Constitution because Americans saw in a standing army the means of their oppression by tyrannical governments. The sword, the argument goes, is to be held by state militias who in time of emergency protect the country while an army is raised, and the army is to be disbanded when the emergency passes. Protestants, but not Catholics, may keep arms for their defense as allowed by law. This should

be familiar to all of us: “Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

In these rights we see enshrined, not only in our Bill of Rights, but also in Article I of the Constitution that sets out the powers delegated to Congress, and in Article II that establishes the authority, and limits thereto, of the executive, ideas that came to North America with the English settlers in the 17<sup>th</sup> century, and which remain vital today.

#### **4. The Virginia Declaration of Rights**

So far in our consideration of American founding principles we have examined Magna Carta of 1215, and the English Bill of Rights, 1689, as documents advancing principles, like habeas corpus and due process of law, that would become important to American political tradition. The Virginia Bill of Rights is part of the Virginia Constitution of 1776 that Virginians adopted when they voted to secede from the British Empire a few weeks before publication of the Declaration of Independence. This document is a mature expression of American political thought in the Jeffersonian tradition. Several principles that inform this tradition are found in the Virginia Bill of Rights, but the rest we find contained in the Declaration of Independence, the Articles of Confederation, the Constitution of the United States, and artfully summed up by Thomas Jefferson in his first inaugural address.

Americans in the 18<sup>th</sup> century were in agreement that the purpose of moral and political reflection is action, and thus moral and political principles have meaning only when people act on them. When a president is inaugurated, he pledges to “preserve, protect, and defend the Constitution of the United States.” What does this mean? The oath is to protect and defend the *Constitution* of the United States, that is, to act in accord with the text of the Constitution, and to ensure that the constitutional officers serving at the pleasure of the president do the same. This assumes that Americans, including presidents, can read the Constitution and understand it for themselves. The document is not a mystery to be understood only by people of rare and esoteric training. It was debated and ratified by farmers and merchants as well as by lawyers. There is no clause in the Constitution that gives authority to the Supreme Court to interpret the Constitution for the rest of us. Before the Constitution was written and adopted, the states already had constitutions that were not superseded by it. Thus the meaning of the federal Constitution was intended to be understood in accord with the constitutions of the states that

created the federal government. If the Constitution gave to the Supreme Court the authority to tell us what early Americans had ratified, the Constitution would have been rejected because the federal government would then be able to determine the limits of its own authority simply by “interpreting” the Constitution as a grant of endless power. If Americans are to ensure that the federal government observes the limits placed on it in the Constitution, then Americans in their localities and states must understand and act according to the principles of federalism contained within it.

Principles of federalism are firmly and clearly advanced in the Virginia Bill of Rights. Federalism in the United States is the idea that political power should be held as close to home as possible, that governing authority rests in the people of each state as sovereign political societies, and that therefore the federal government, established in our Constitution, is but an artificial corporation created by the sovereign states for specified and limited purposes, and nothing else. How do a people sustain a decentralized political order in the face of a federal government seeking ever to expand its power relative to the states and the people thereof? This question was constantly in the air during the ratification conventions in each state in 1788/89. Many people saw in the proposed constitution a document containing key passages that are sufficiently vague to be interpreted to give more power to Congress than was intended, to the detriment of the federal political order established in our first constitution, the Articles of Confederation and Perpetual Union.

Thomas Jefferson wrote a letter to James Madison explaining how the people of each state can prevent the federal government from expanding its powers beyond those delegated in the Constitution. Jefferson’s explanation was succinctly expressed to the people of Massachusetts by the estimable Mercy Otis Warren: “...resist the first approaches of tyranny, which at this day threaten to sweep away the rights for which the brave Sons of America have fought....” Usurpation is the exercise by any branch of the federal government of a power not delegated to it in the Constitution. Since the federal government is a creature of the states, the argument goes, any act of the federal government that is in fact a usurpation must immediately be dismissed by the people of the several states. To fail to do this at the appearance of any usurpation, however small or even desirable, will be destructive of liberty in the long run by establishing the precedent that government may overstep the bounds of power placed on it in the Constitution. Jefferson put it to Madison this way. “To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.”

The Virginia Bill of Rights begins thus: “All men are by nature equally free and independent and endowed with rights held by nature, which include life, liberty, property, and the pursuit of happiness and safety. These rights, because deriving from human nature, we cannot deprive future generations by any compact of government we make during our lifetimes.” Here we find an interesting assertion that sounds odd to 21<sup>st</sup>-century ears. The idea is that since we have our rights from human nature, we can no more surrender the rights of our nature than we can surrender our nature itself. Therefore, the political arrangements we establish must be entered into voluntarily. But since each generation shares equally in human nature, no generation may enter into any “compact of government” that binds subsequent generations without their consent.

In 1789, Thomas Jefferson sent a letter ostensibly to James Madison, but likely in fact to the Marquis de Lafayette, inviting him to join with Jefferson in a serious consideration of this principle: “The earth belongs in usufruct to the living. The dead have neither right nor power over it.” Usufruct defines a legal arrangement in which a person has the right to use a piece of land and enjoy the fruit of it without holding legal title to it. So Jefferson is saying that we who are alive enjoy the right to cultivate the earth and enjoy it, but the dead have that right no longer. What this meant, and it is the intent in the Virginia Declaration, includes the idea that when a generation passes, their governments should leave no debt behind them, for then the dead would assert power over the earth to the detriment of the liberty of the living. This is a discussion about one of the cornerstone principles of the American founding: liberty first. Patrick Henry would assert that we should have no attachment to any government above our attachment to liberty. As vice president, John C. Calhoun offered this toast at a dinner: “To the union. Next to our liberty, most dear. May her burdens and benefits always be shared equally.”

The Virginia Declaration contains a principle central to our founding and asserted in the Declaration of Independence, which is that all power derives from the people (of Virginia, in this case) and thus all magistrates and office holders are servants of the people. Government is established to protect the community and the rights of citizens. Thus whenever government fails in these regards, “a majority of the community has an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”

A principle dear to 18<sup>th</sup>-century Virginians, that was altered in the Constitution of the United States, is that “No property shall be taken for public use without the consent of the owner.” The



Constitution allows the taking of property for public use so long as the owner is given “just compensation,” but the Virginia Declaration forbids this. The owner must consent...liberty first.

Included in the Virginia Declaration is an important restriction on government taken from the English Bill of Rights of 1689. “That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Moreover, there shall be no general warrants for these were seen to be the exercise of arbitrary power, which is the definition of tyranny. Of course, the right to keep and bear arms is affirmed along with freedom of the press, and of religion, but the Declaration concludes in a most interesting way that expresses a view of a free people that would be embraced in every colony of British America. “That no free government, or the blessings of liberty, can be preserved to any people but by a firm adherence to justice, moderation, temperance, frugality, and virtue and by frequent recurrence to fundamental principles.”

## **5. The Declaration of Independence and the Spirit of '76**

With the publication of the Declaration of Independence, we may say that we come to the beginning of the United States as mature political societies. Of course, we could have an interesting and probably interminable conversation about the origins of the United States if we look for what we might call the “seeds” of the people from England who first settled here. In his excellent multi-volume history of colonial America *Conceived in Liberty*, Murray Rothbard begins his discussion of the origins of America with long-ago migrations of northern Europeans into the British Islands. Yet with the Declaration of Independence, the thirteen colonies of British America became thirteen free, sovereign, and independent states, assuming “among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them.” At this point, we can say that the new states had become mature political societies able fully to govern themselves without the assistance of outsiders. The political principles that animated Americans of our founding generation are written into the Declaration of Independence, and were held to embody the Spirit of '76. In what follows we will examine this spirit, and it should be born in mind that the form of government established under its principles is rather different in its self-understanding than many Americans today will find familiar. Yet this is an important part of American history, and thus it is important to understand it.

The independence of the thirteen American states was formally recognized by the British crown in the Treaty of Paris in 1783. That treaty says in Article I: "His Britannic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and independent States; and he treats with them as such, and for himself his Heirs & Successors, relinquish all claims to the Government, Propriety, and Territorial Rights of the same and every Part thereof." In this article of the treaty, we find the word "sovereign." This word appears for the first time in the development of western political thought in 1576 in *Six Books of the Republic* by Frenchman Jean Bodin. We may say in brief scope that sovereignty is the authority to govern without the permission of another. But where does sovereignty lie? Who has it? Is it something to which some people have a right and others do not, such that some people have the authority to command and others the obligation to obey? Can sovereignty be divided? These questions animated the people of our founding generation, as it did English legal thinkers, because it was to them a foreign notion of limited value, sitting uneasily with the idea that the English political tradition is an organic growth, and not a product of rational design. However, the idea of sovereignty developed with the rise of the national state as a form of government in the sixteenth into the seventeenth centuries, and in this development, sovereignty was the defining property of governments. It was embraced by the British crown, and later by the Parliament, but in America, the idea developed a very different expression.

The idea of the state as it developed, rather violently, in Europe is that the state is an agency of coercive authority having a monopoly in the use of force over a prescribed territory, the right to command the people living in that territory, and the right also to extract its revenues from those people. When we consider this definition of the state, it becomes clear that the state is not compatible with liberty as Americans understood it since the state claims authority to command people's conduct without their consent, and to take such portions of people's property as they deem necessary. The great Virginia patriot Richard Henry Lee famously pointed out that "[i]f Parliament may take from me one shilling in the pound, what security have I left for the other nineteen?" The idea being asserted is that if some person or institution in society may take property (which money is) from me without my consent, I cannot be said to be free. This emphasis on the freedom of the individual, understood as a requirement of the rights we each hold by nature, leads to a different form of government than had developed in Europe.

In 1765, the British Parliament passed the Stamp Act that imposed a tax on paper products in the colonies. So if one owned books, newspapers, pamphlets, letters, even playing cards, they had to bear the King's stamp showing the owner had paid the tax. It is usual to say that Americans opposed "taxation without representation," but this phrase is too ambiguous to communicate much of value since it entails the idea that if a duly elected representative legislature decided to tax voters at a rate of 100%, that would be fine. The quote above from Richard Henry Lee is an expression of the commonly held view that any tax on incomes, that is, any direct tax on citizens, is oppressive by its nature and not to be tolerated. To give that kind of power to any person or institution in society, Americans of the time argued, is the end of liberty. Americans resisted the stamp tax to the point of intimidating stamp-tax collectors, many of whom resigned their commissions out of fear. The British repealed the Stamp Act in 1766, but also promulgated the Declaratory Act in which Parliament asserted authority to govern the colonies "in all cases whatsoever." This claim by Parliament infuriated colonists; American orators began repeating in their speeches and essays the damning motto of tyranny, "in all cases whatsoever."

In 1774, Thomas Jefferson wrote A Summary View of the Rights of British America. A reader can see in this document the approach of the Declaration of Independence. Jefferson is clear to say to the British king that Americans are no longer asking for their rights to be respected, but are now demanding it. Toward the end of the document, when Jefferson is making the American position clear to the king, he writes: "Let those flatter, who fear: it is not an American art. To give praise where it is not due, might be well from the venal, but would ill beseem those who are asserting the rights of human nature. They know, and will therefore say, that kings are the servants, not the proprietors of the people." This last sentence insisting that kings are the servants of the people and not their proprietors reverses the British understanding of sovereignty in which the people are not properly called citizens, but subjects of the sovereign crown. An important element of the American Spirit of '76, enshrined in the Declaration of Independence, is that each state is a sovereign political society with the right and authority to govern held by the people thereof.

In the Declaration of Independence, we read that it is to protect our rights to life, liberty, and property (which is the meaning of "happiness") that people establish governments among themselves, and thus if government fails in its narrow purpose, "it is the right of the People to alter or abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness." It is important to note here that this assertion of the right of the people both to establish government and to abolish it

when it misbehaves is exactly how true sovereignty of the people works. Kings are the servants, not the proprietors, of the people. This principle of local sovereignty of the people is re-enforced a bit farther into the Declaration thus: “But when a long Train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism [‘in all cases whatsoever’], it is their Right, *it is their Duty*, to throw off such Government, and to provide new Guards for their future security” (emphasis added). We should observe here that by the mid-19<sup>th</sup> century, leaders in the North in general and particularly in New England, had come to call this sort of thing, that is, people choosing to throw off a despotic government, “treason.” Contemporary Americans should discuss this question of treason since it is a serious charge that has been used frequently, and a good place for this conversation to begin is Article III, section 3 of the Constitution where treason against the United States is defined.

The Spirit of ’76 is the spirit of independence and the liberty of individuals in their communities, where alone self-government can be exercised. If the people are sovereign, then the people are logically and morally prior to government. Moreover, if the people are sovereign, then government is not sovereign, for in the theory of sovereignty, it cannot be divided, for then one half of the division could not govern without the permission of the other half, which is not sovereignty. Having set down a list of the “long train of abuses and usurpations” of the British crown, the Declaration of Independence ends in a way that is fitting for free, sovereign people.

We, therefore, the Representatives of the united States of America, in General Congress, assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do, in the Name, and by the Authority of the good People of these Colonies, solemnly Publish and Declare, 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; 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. —And for the support of this Declaration, with a firm Reliance on the Protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

## **6. The Articles of Confederation and Perpetual Union**

The Articles of Confederation and Perpetual Union is the first constitution of the United States. When the colonies of British America secured their independence from Great Britain, each colony became a free, sovereign, and independent nation, a fact that is expressly recognized by the British government in the Treaty of Paris in 1783. Americans at the time were agreed among themselves that they needed some kind of political union for common defense and to facilitate free trade among the states. In the early years of American independence, Britain, France, and Spain were active in North America, and as imperial powers, were a danger to the American states without a political arrangement among them for mutual defense. For example, the Americans did not so much defeat the British in our war for independence as Britain simply gave up the fight. At the time, the British Empire was at war with multiple nations and the shoot-out with the Americans was seen as an unnecessary distraction. There was discussion among the British when the decision was taken to let the Americans go that when things calmed down elsewhere in the Empire, they could then commit the necessary resources, should they desire, to re-imposing British rule over the former colonies. This danger was acknowledged as well as the possibility that any single state could be conquered by France or Spain, and so the need for a union for common defense was clear to all (possibly excepting Rhode Island which was reluctant in the early years to join the union).

When independent sovereign states enter into alliances, what is the nature of the agreement among them? The answer to this question is suggested in the title of the constitution agreed to among the states. The Articles of Confederation established a “perpetual” union. But the perpetual union established among the thirteen American states in 1781 ended in 1788 when nine states withdrew from it (without charges of “treason”). What, then, is a “perpetual union”? The Articles of Confederation, like the Constitution of the United States, was a compact among sovereign states. A compact (a contract) is said to be perpetual when it has within it no term of duration. If a compact does not stipulate an end date, it is said to be a compact of perpetual term, or a compact-at-will, which means that the parties to the compact may negotiate a departure from it as each party deems proper. There is no such thing in law as a compact into which people may enter at will, but once a party to the compact, may never leave on pain of force and violence. Moreover, no living generation may agree to a political compact that binds their descendants forever thereafter. It is odd indeed to say, following the Declaration of Independence, that the authority of government rests on the consent of the governed, and then insist nevertheless that future generations must abide by the current political order whether they like it or not. Every compact must provide for rescission, for the parties to it to withdraw from it, otherwise it is

not a compact but an instrument of continual political control which cannot exist among a free and sovereign people. In other words, where such an instrument of political control is in force, the people living under it are not free, regardless of official rhetoric. This shows us what people in our founding generation understood well: for freedom to flourish, government must be kept to its narrow and proper functions, and thus usurpations of power must be resisted the moment they appear. The concern here is the dreaded precedent. If we allow an unlawful act by government, we have accepted that government may act outside the law that governs it, and thus there are no functioning limits on its power.

The Articles of Confederation was designed to establish a general government that was sufficiently bounded that its officers could not grow its power. The Congress had a house of delegates but no senate. There was no executive and no court (except courts for trying acts of piracy and other felonies committed on the high seas). The reason for this was simply that each state had a governor and its own courts, so a federal executive and supreme court would add nothing but opportunities for federal mischief. The Articles of Confederation were formally adopted by the states on November 15, 1777, but didn't go into effect until 1781. The document contains thirteen articles of which we will consider the ones that express the political principles animating it.

The first Article gives us a name: "The Stile of this confederacy shall be 'The United States of America'." The second Article declares the new confederacy to be based on the principle of federalism that will be expressed in the tenth amendment to the Constitution of the United States. "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." So the general government has only those powers that are "expressly delegated" to it in the Articles of Confederation. Every other power, no matter what, is retained by the states individually and to the people thereof. Thus every act of the general government that is not grounded in the basic law of the Articles is a usurpation of power and not a law at all, and so the means of dealing with such a usurpation is to correct the government immediately by declaring the offending act to be "null, void, and of no force or effect." It is foundational to a government founded on the principle of federalism that sovereign, independent states retain at all times the power to nullify unconstitutional laws of the general government. Recall that the Articles of Confederation is a compact among sovereign nations, and so when the general government acts beyond its stipulated authority, it violates the compact and so its act has no force within the common agreement among the states. When a compact is violated, the parties to it are released from obligation to the agreement unless the parties correct the error. Under

the Articles, and under the Constitution, the method of correction is to declare the unlawful act to be null and void, and to refuse to comply with it. The general government under the Articles and the Constitution is an artificial corporation for specified and limited purposes and nothing more. It possesses no sovereignty of its own because the general government is not a party to the compact, but rather exists as an agent of the parties to the compact.

The third Article explains the purpose of the confederation. “The said states hereby enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.” A league is a gathering of independent persons or entities for agreed-upon purposes, and in this Article the members are clear to enumerate the purposes agreed to. There is nothing in this Article that confers on the Congress authority to educate children, run hospitals, manage agriculture, build roads and bridges, provide for the retirement of the aged, or whatever else people in government may want to do. All such concerns, according to the second Article, are matters for the people of each state to decide for themselves. The sovereign people of South Carolina may have different ideas about education than do the sovereign people of New York, and so the insistence on having uniform laws on such matters emanating from the center is a frightful intrusion on the sovereign freedom of a state. The reference to general welfare, also in the Constitution of the United States, is, of course, intolerably vague, but in the Articles of Confederation it remains that whatever people in government might assert “general welfare” to mean, the general government has only those powers “expressly delegated” to it. In the Articles of Confederation, there are no implied powers.

Article five provides in part for selecting and regulating delegates to the Congress. Each state shall have no fewer than two and no more than seven delegates. When Congress is in session, it is the responsibility of each state to provide material support for its delegation. Moreover, delegates are to be selected by a method to be determined by each state, and each state legislature possesses the authority to recall its delegates at any time and to replace them as deemed proper. This, of course, is intended as an absolute brake on confederal usurpations of power. If it came to a contest between Congress and the states, the states may simply recall their delegates and put an end to the business of the offending legislative body.

Perhaps what was most objectionable about the Articles of Confederation to the nationalists of the time, like Alexander Hamilton, was that the Congress had no power to tax. The revenues for operating the general government were to be raised by the state legislatures according to a formula laid out in the eighth Article. However, if a state decided to send less money than determined, and arguably even none, the general government had no recourse at its disposal. This made many men of the governing class at the time seethe with frustration. Gouverneur Morris of New York reportedly insisted that if it helped get rid of the Articles of Confederation, he would argue that under its government, water wouldn't boil. Happily, no one in office today would ever think this way...

After a few years of government under the Articles of Confederation, there was much displeasure expressed about it. True federalists, like Thomas Jefferson, very much liked the Articles for its constraints on government, but others, including George Washington who feared the general government under the Articles was too weak to provide for the common defense, wanted to replace the document with one of "a more energetic government." Importantly, one with power to tax. There were a few efforts to organize a convention for a new constitution, but opposition to it was too great for success. At length, James Madison and others got agreement for a convention in Philadelphia in 1787 to prepare amendments to the Articles of Confederation for the states to consider. When the delegates convened in May, their first act was to swear themselves to secrecy (James Madison died without publishing his notes on the convention). Although it was a hot summer in 1787, the delegates kept the windows closed in the room where they met so that people outside could not hear them. The delegates then proceeded to write a new constitution for the United States, one of a more energetic government. Those Americans who wanted to keep the Articles, it seems, went along with the new constitution, with amendments, because they feared the union would break apart over dislike of the Articles of Confederation among nationalists, and the loss of security within the union was thought more grievous than the dangers to liberty of the new, more energetic government. So a new constitution was written and ratified, and Americans have been coping with the stresses of interpreting it ever since.