

## Political Thought in American Tradition

### 1. Background

There is a fracture in the American political tradition of which most Americans are not aware. Yet it is real, and it became unmistakable in the war of 1861-65 (customarily called the “Civil War”). It is the purpose of this first part of our course to explore that fracture and seek to understand it, especially the half that lies before 1860, for this part of American political history is shrouded in myth and falsehood, when it isn’t flatly ignored. Yet without exploring this fracture, the history of the United States cannot be understood.

At the outset, it is important to suggest to people a frame of mind we think most conducive to understanding what will follow. People in every age who want power over others understand well that citizens (or subjects) are much easier to control when they believe about their past what is often not true, but which serves the interests of rulers in the present. For this reason, much of what Americans have been taught about our past for the better part of 150 years has been deliberately false. Perhaps the most harmful practice in this regard has been the attempt to keep from Americans the facts of nearly half of our political history. That part of our history, from 1776-1860, is and has been the object of much distortion. This distortion can be corrected by understanding, as we will see, that American political tradition is practical and must be understood in this way. The people of the states that formed a voluntary union for the purposes of security and trade were not motivated by abstract rights and ill-defined notions of equality. They had in their various states living cultural traditions, that is, valued ways of life they wanted to protect and nurture. The principles that guided them were distilled from their lived experience. This is captured perfectly by the Virginian Patrick Henry, who declared with admirable concision the core of the American political tradition as it grew from the time of the settlement of Jamestown in 1607. In a speech at St. John’s Church in Richmond in March of 1775, Henry proclaimed: “I have but one lamp by which my feet are guided, and that is the lamp of

experience. I know of no way of judging the future but by the past.” We learn what is good and healthy for us from experience. We are not guided by abstract ideas that often cannot be translated into practice because they are inimical to human nature or the reality we actually inhabit. The experience of early Americans led them to three fundamental principles for preserving liberty and valued ways of life: federalism, republicanism, and constitutionalism. These are the founding principles of the United States, and these will be the objects of our attention.

This course may be challenging to many people because much of what is discussed here will be at odds with what we have been taught. But the truth as it can best be known from what people were saying and doing in our past is there in the public domain for anyone to see who has the time and the energy to explore the documents of our history. In our American political tradition, and in our Constitution, sovereignty, the authority to rule, resides in the people of each state, and so we believe that Americans have both the right and even the duty to come to as clear, truthful, and precise an account as we can of who we have been in history, for the lamp of experience cannot guide our feet when we are not open and honest about our past. If we distort the past, we cannot anticipate what the future might hold, and so we cannot judge prudent from imprudent practices.

## 2. Early History in Europe

It was an achievement of Christian western Europe, and England in particular, to discover the tension between power and liberty that has shaped western political thought. European thinkers of the early Christian period in the West wrote much about an episode in the 22<sup>nd</sup> chapter of the Gospel of St. Matthew. Jesus is speaking to men who were seeking to trick Him into saying something that would be offensive to their Roman conquerors. The men asked Jesus if it was lawful, under Jewish law, to pay tribute to Caesar. Jesus told the men to show Him a coin, and He asked them whose image was on it. Caesar’s image, they said. Jesus replied: “Render, therefore, unto Caesar the things which are Caesar’s, and unto God, the things that are God’s.” This passage from the New Testament gave rise to the two-kingdom theory, that there

are in the world both the kingdom of God and the kingdom of man. Where then lies our obligation of loyalty, and what does this tell us about the limits on the kingdom of man imposed by the presence among us of the kingdom of God? Specifically, in the interest of advancing the kingdom of God, what kinds of restraints must there be on political power?

On August 24, 410 A.D., an army of the Germanic Visigoth tribe invaded and sacked Rome. The attack shocked people of the Mediterranean world and many began to believe that the ancient gods of Rome were punishing Romans for abandoning them in favor of the Jewish God, Jesus of Nazareth. In response to this furor, St. Augustine, a Christian bishop in North Africa, in what today is the country of Algeria, produced one of the most important books ever written. The book is *The City of God*, in which Augustine advances a philosophy of history that dominated western thought for more than a thousand years. He decisively de-divinized Roman history, and with it, swept away the gods of Rome. Importantly, he describes human societies as comprised of two incompatible cities: the city of God, and the city of man. At the beginning of this book, the first of more than a thousand pages, Augustine introduces the idea of the city of man saying: “Therefore I cannot refrain from speaking about the city of this world, a city which aims at dominion, which holds nations in enslavement, but is itself dominated by that very lust of domination.” Augustine wrote in Latin, and in that language the “lust of domination” has a lyrical sound: *libido dominandi*. This affliction is a product of inordinate self-love, which Augustine takes to be the defining characteristic of the city of man.

Augustine writes that we can distinguish the inhabitants of the two cities of the world by considering what they most love. In the city of God, people love God, and because God is not finite, there is no scarcity in his love, and thus residents of the city of God are not in competition one with another for possession of a scarce good. In the city of man, each one loves himself above all, and this is what leads to suspicion, envy, and conflict because people must compete for the limited positions of wealth, status, and power. This situation, Augustine argues, aggravates the affliction many people have of lusting to dominate others. However, God has determined that the two cities will exist side-by-side until the end of the age, when God will put an end to human affairs and inaugurate the age to come. In the meantime, there will be clashes between the two cities owing to the uncontrollable urges of residents of the city of man to dominate, control, and determine how others will think, speak, and live, and certainly to extract

revenues from them. This is what happened in Rome, Augustine argues, and it will mark human history until its end.

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### 3. The Crucial American Development

Given this understanding of society, is it possible to govern ourselves in a way that restricts the ability of those seeking domination to get their way? The American answer to this question was to keep political power decentralized. If there is no center of coercive power, those who live to control others will find it impossible to get their way, and the people will understand that among the primary objects of citizenship is to block or undo all efforts to draw power into the federal organ. How can this consistently be done? The answer is to preserve and protect the principles of federalism, republicanism, and constitutionalism. The work of preserving these principles defines the obligations of citizenship in a federal republic.

In 1798, Congress passed and President Adams signed the Alien and Sedition Acts. The Sedition laws made it a crime punishable by a 2,000 dollar fine and two years in prison to criticize the president or members of Congress. At the time, Thomas Jefferson was vice president and interestingly, the Sedition laws exempted the vice president from the ban on criticism. Nevertheless, Jefferson saw the Sedition laws as a clear violation of the Constitution and a naked attempt at consolidating power to the detriment of American liberty. In response, Jefferson wrote what now are known as the Kentucky Resolutions of 1798. In the third resolution, Jefferson writes:

“Resolved that it is true as a general principle and is also expressly declared by one of the amendments to the constitution that ‘the powers not delegated to the U.S. by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people’: and that no power over the freedom of religion, freedom of speech, or freedom of the press being delegated to the US by the constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain, & were reserved, to the states or the people:...”

Here we see expressed the principle of federalism, enshrined in the Tenth Amendment to the Constitution, which is there to ensure that all overreaches of power by the federal government may be seen in the Constitution to be illegal. Thus, since the Constitution does not delegate to the federal government power to punish political speech, the Sedition laws were unconstitutional. What happens next is the necessary means by which an unlawful act of the federal government is discarded and power kept decentralized: nullification of unconstitutional federal laws. The idea is this: whatever law Congress passes and the president signs that is enacted on the basis of a power delegated in the Constitution is a law that is binding upon the states. However, any act of Congress that exercises a power not delegated in the Constitution is no law at all, but rather a usurpation of power, and thus not only may states ignore it, they have a constitutional duty to ignore the enactment and chastise Congress for its unlawful behavior. Several times in the Kentucky Resolutions Jefferson declares the Alien and Sedition Acts to be “null, void, and of no force or effect.” In other words, no state nor person within a state is obliged to obey an act of Congress for which there is no authority delegated in the Constitution. Thus without the rights of nullification and secession, there is no union of states, for a union that is not voluntary is not a union. We should be clear that what is being described here is the political order established in the Constitution. If we want to understand what the people who ratified the Constitution thought they were adopting, we need only examine the records of the debates that took place in the ratification conventions of each state in 1788/89 (except for Rhode Island which did not ratify the Constitution until 1790).

#### 4. The State in Europe

In order fully to understand American political thought before, and then after, the war of 1861-65, we must have some familiarity with the nature of that form of government called the state. What we call the state, or the national state, is a modern development. Many Americans are at first confused by this statement because we were taught as children that the ancient Greeks had a form of government called the city-state. But this is a poor translation of the word *polis* (a word from which we derive our words “police” and “politics”). The polis is the home of a Greek society that includes everything: the family, household, including slaves, government, laws,

military training and war, and religion and public ritual. The polis is the place alone in which a person can develop the moral and intellectual aspects of human nature and so achieve an identity. The national state is something quite different.

There are a few competing definitions of the state, but the one encountered most often was advanced by the early 20<sup>th</sup> century German social theorist Max Weber. According to Weber, the state is an agency of coercion having the authority to make law and enforce it within a stipulated territory, with a monopoly on the use of force within the territory, and the right to extract revenues from the people living in the territory. We will see in a moment that the states of the United States are not states in Weber's sense because, in principle, anyway, it is the people of the states, and not the government, who are sovereign. Moreover, in American states, the state government does not have a monopoly on the use of force because the people have the right to keep and bear arms.

How did the state come about? In the early Middle Ages, Europe was highly decentralized. A number of historians have pointed out that in the Middle Ages, there were more independent political jurisdictions in Italy than there are nations in the world today. The same was true of Germany and France. Kings were restrained by resistance from lesser nobles, and also by an important international power: the Papacy. Popes were not afraid to confront wayward kings and in one celebrated episode, a king, frustrated by constraints placed upon him by a pope, declared the pope to be deposed and planned to replace him with a compliant cipher. The pope responded by excommunicating the king and declaring that his subjects no longer had an obligation to submit to his rule. The king was compelled to abase himself in the hope of forgiveness and restoration to communion with the Church. Anyway, the point is that political power in medieval Europe was highly decentralized. An economic historian has written that throughout the Middle Ages, rulers were unable to take more than about seven percent of their subject's incomes. Modern national states often take well more than 50% of people's incomes. The reason for this is decentralization of political power. Where power is diffused and held as locally as possible, when a ruler overreaches, people can simply pack up and move a few miles downriver to a neighboring jurisdiction, and the ambitious ruler would lose income rather than increase it. And happily, kings are limited in the size of armies they can maintain because there are strict limits on their revenues. So wars were smaller and less deadly because kings and

generals were reluctant to engage in battles in which the losses would be great. Often, opposing generals would maneuver their troops on the battlefield seeking to gain a tactical advantage. When one side had outmaneuvered the other, the two sides would often acknowledge the fact and leave the field without fighting.

But people with the lust to dominate others generally do not rest until they get what they want, and this for the well-known reason that power is (perhaps) the ultimate aphrodisiac. People afflicted with the lust for power rarely can settle for a life of quiet and peaceful pursuits like raising families, working farms, building businesses, or importantly, co-operating with others in their communities for the just and lawful governance of themselves. It is such people who produced the state, and they achieved this through repeated acts of forceful consolidation, crushing independent political societies like free cities and smaller, rural jurisdictions into larger centralized political orders with command authority and coercive bureaucracies that today we call nations or national states. This is how countries like Italy, France, and Germany came into existence. Late into the 19<sup>th</sup> century, most people in France did not consider themselves to be “French” but identified themselves with their ancient political societies like Brittany, Normandy, Lorraine and so on.

## 5. The State in America

The people of the thirteen colonies of British America developed politically in the wilderness of North America with little assistance from Britain. This resulted in a very different conception of the state than existed in Europe (with a few exceptions including Switzerland). By the middle of the 18<sup>th</sup> century, the people of the thirteen colonies had come to see themselves each as mature political societies with the sovereign right to govern themselves as they saw fit, without the permission of or interference from Britain. Virginia led the quest for independence declaring itself to be a free and independent state in 1776 several weeks before the publication of the Declaration of Independence. In the Treaty of Paris in 1783, the British acknowledge the independence of the new American states. The treaty begins saying: “His Britannic Majesty

acknowledges [each state is named individually], to be free sovereign and independent States; that he treats with them as such, and for himself his Heirs & Successors, relinquishes all claims to the Government, Propriety, and Territorial Rights of the same and every Part thereof.” So each state was recognized to be sovereign and independent, and in American political thought, the sovereignty of each state is not held in a government, but in the people of each state who are understood to act as sovereign political societies through their respective legislatures and local governments.

We must recognize, then, that the state as it developed in British America was not like the state of Great Britain or elsewhere in Europe. Americans at the time were aware of this, and most wanted to ensure that a European-style national state does not develop here. However, there were Americans who wanted to create a national state and control it, and this because they understood that the great value of national states is their ability to produce for their controllers large amounts of wealth. John Adams once recounted a dinner he attended with Thomas Jefferson at Monticello at which Alexander Hamilton and a few others were present. Adams commented that the British have a very good government but for the corruption (that is, the perpetual abuses of power for personal gain). Alexander Hamilton is reported to have replied that it was precisely the corruption of the British form of government that made it so good. Indeed, Hamilton was clear that he wanted to establish that form of government, a government we fought a war to escape, here under American control, and particularly under the control of men like himself and his friends and colleagues. In what follows, we will examine three documents: the Continental Association of 1774, the Declaration of Independence of 1776, and the Articles of Confederation and Perpetual Union (our first constitution) that was written in 1777 but not ratified until 1781. We will not consider the Constitution of the United States because we have a separate course on that document at this website. Moreover, from the Continental Association, the Declaration of Independence, and the Articles of Confederation we get a careful look at the mature principles of American political order before 1865. We will seek to understand the form of government either indicated or established in these documents, and also what they indicate about the two competing conceptions of government at the time, namely, a federation of sovereign states, that is the political embodiment of the founding principles of federalism, republicanism, and



constitutionalism versus a unitary national state that rejects these principles in practice, though not often in rhetoric.

6. Continental Association, October 20, 1774

The Continental Association is not well known to Americans, but it is held to be among the founding documents of the United States along with the Declaration of Independence, the Articles of Confederation and Perpetual Union, and the Constitution of the United States. The Continental Association was the product of the First Continental Congress which convened in September of 1774 to formulate a response to a series of punitive acts of Parliament, known as the Intolerable Acts, aimed at punishing Massachusetts for the Boston Tea Party, and to make of the colony an example to the other colonies lest they become accustomed to too much liberty. The Continental Association may be thought of as a decisive step away from the British Empire and toward political independence, and thus it is not a coincidence that the colonies agreed to inflict economic pain on Britain to force it to leave Massachusetts alone in October of 1774, and the War of Independence broke out in Massachusetts in April of 1775.

In the Continental Association, the colonies imposed economic sanctions on Britain by agreeing among themselves not to buy any products of England and Ireland, not to sell any of their products to them, and not to consume any English or Irish products that made their way into the colonies. The thirteen articles of the Association represent American political thought as it is reaching its maturity.

In the first article, the colonies describe the boycott against goods from England and Ireland, but add also a total boycott on: "... East India Tea from any Part of the World, nor any Molasses, Syrups, Paneles, Coffee, or Pimenta, from the British Plantations, or from Dominica, nor Wines from Madeira, or the Western Islands, nor foreign Indigo."

The second article is most significant and thus should be reproduced in whole.

*Second.* That we will neither import nor purchase any Slave imported after the first Day of December next, after which Time we will wholly discontinue the Slave Trade, and will neither be concerned in it ourselves, nor will we hire our Vessels, nor sell our Commodities or Manufactures, to those who are concerned in it.

New England slave traders returned to the trade after the present crisis had passed, and remained in the trade until it was abolished by an act of Congress, signed by President Jefferson and put into force in 1808. However, it does reveal something about Americans and the ubiquitous and unjust institution of slavery: they were perfectly willing to get drop it if it was helpful in securing and protecting their liberty. The southern states would follow this course again between 1861-65.

Article five provides in part for retaliatory action against businessmen in the colonies who violate the boycotts. Regarding such men, the colonies pledge to break all commercial connections with them. The concern of the delegates here is that the boycott, while inflicting economic harm on the British Empire, will also inflict economic harm on Americans. Yet they thought that the economic harm of the boycotts was minor compared to the loss of liberty which the British had in mind for them. Moreover, Articles seven, eight, and nine, encouraged Americans to be frugal, industrious, to improve the quality of their sheep and thus of wool production, to refrain from slaughtering sheep as much as possible so as to keep wool production high, to provide sheep at modest cost to poor people wherever sheep populations rose high enough, and other measures by which Americans would help one another negotiate the economic hardships of the boycotts.

Finally, the Continental Congress finishes their proclamation with the fourteenth article that reads thus:

And we do farther agree and resolve, that we will have no Trade, Commerce, Dealings, or intercourse whatsoever, with any Colony or Province in North America, which shall not accede to, or which shall hereafter violate, this association, but will hold them as unworthy of the Rights of Freemen, and as inimical to the liberties of their Country.

## 7. The Declaration of Independence

It is important to understand that the Declaration of Independence is not what we might call a forensic document, that is, one that is the product of careful consideration and debate, like the Articles of Confederation and the Constitution of the United States. It is a political document written largely by one man, Thomas Jefferson, who worked with a committee of four others. The document was written for a political body, the Continental Congress, that represented colonies that had already decided on secession from the British Empire. It is therefore a mistake to read the Declaration, as so many do today, as if it is the product of country-wide deliberation and solemnly approved in conventions of the people, and bristling with abstract principles to which Americans were devoted as propositions. It is indeed a grievous mistake to draw from the Declaration abstract ideological claims like a commitment to an idea of equality that is left undefined, and thus open to endless manipulation and mischief.

The Declaration of Independence is a secessionist document. To secede is simply to withdraw from something. If an officer of a corporation resigns his office, he may be said to have seceded from his employer. The American Declaration begins thus: “When in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and 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, a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.” The words “dissolve the political bands” and “separation” are clear indicators of political secession. Whatever other name one wishes to use to describe it, “secession” fits most neatly. Of course, in our time, people are taught that secession is treason, but treason against the United States is defined in Article III, section 3 of the Constitution, and secession is not included in it. Here we are considering American political thought before the war of 1861-65, and for Americans at that time, secession was a natural and often necessary act of sovereign political societies and the ultimate means of preserving peace when differences among people become irreconcilable. We understand this in marriage. When a husband and wife grow so far apart that their differences cannot be negotiated, they separate.

## 8. The Declaration of Independence Continued

The second paragraph of the Declaration begins with these famous words: “We hold these Truths to be self-evident, that all Men are created equal,…” In our time, many people use these words as a political weapon, asserting that the founders were hypocrites for holding slaves while saying this, and that we as a people have not yet “lived up” to this commitment. The assertion is wrong, and obviously so, yet many people affirm the error. The phrase “all Men are created equal” is not a sentence but simply a five-word phrase within a long sentence containing about 110 words. So, it should be clear that it is an illegitimate approach to textual interpretation to lift five words from a much longer sentence, treat them as a free-standing sentence, which they aren’t, and then declare, as Lincoln does in his “Gettysburg Address,” that this is the proposition that binds Americans together as a people. The error is compounded by reading the word “equal” in the Declaration to mean “interchangeable,” as today’s advocates of “equity” insist. It is obvious that human beings are not interchangeable; this reading of equality is a mistake borne of ideology. An ideology is a form of intellectual error in which the ideologue has a theory of something, like equality as the interchangeability of all people, and then, seeing that reality doesn’t conform to the theory, condemns society for what is asserted to be its moral failure, and demands that society be changed to fit the erroneous theory. In fact, theory serves to explain some aspect of our lived reality, and so we can test the quality of a theory by examining how well it explains what it purports to explain. If a theory fails, it is the theory that should be revised, not human beings or the presumed facts of nature. So the question we should ask is what did the people who wrote and adopted the Declaration of Independence mean by saying all men are created equal, and more than that, what is the purpose of the longer sentence containing the phrase.

## 9. The Declaration of Independence Concluded

At the time of the adoption of the Declaration, some colonial delegates objected to the phrase on equality because it wasn’t clear, indeed it appeared to be hypocritical, and in a public

declaration of secession from Britain, the document should be as clear and precise as possible. Others argued that the meaning of equality is determined in practice, and in practice, it means that political societies are equal among themselves. Thus each state in British America is equal each to the other, and each American state is equal with Britain and other European states. Each one is equal in holding power to govern themselves without the permission of any other state. Whatever the case, in 1776 many Americans north and south wanted to end slavery, but people couldn't agree on how to do it because of the practical difficulties involved and because of serious and growing sectional differences in economic and political interests. But this important issue is not relevant to the purpose of the Declaration of Independence, which was to announce to the world the appearance in history of thirteen new free, sovereign, and independent states.

The sentence that comprises most of the second paragraph of the Declaration of Independence works to explain that the purpose of government is to protect the lives, liberty and property rights of individuals in their families and communities. Government, we read, is established by people for this reason, and thus people retain the right to "alter or abolish" a government that fails to perform its function or becomes abusive of the rights of citizens. Among the ways of constraining abusive government is to nullify its unconstitutional laws, that is to refuse to enforce them, and if people in government persist in their abusive practices, we may abolish it, and one important way to do this is to break with the abusive government, that is, to secede.

That each state is a sovereign and independent country is clearly expressed in these words at the end of the Declaration. "...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 do all other Acts and Things which Independent States may of right do." We should repeat that these words are incontestably a declaration of secession, the right to which is central to the principle of federalism. From the Declaration of Independence we can draw four principles for the defence of which the colonies seceded from Britain: liberty, decentralization of power (the principle of federalism), no standing army in peacetime, and the recognition that sovereignty resides in the people of each state.

The colonies tried for years to conciliate the British and to encourage them to respect their rights as political societies, but in the view of the colonists, Britain continued its aggression, and so at length, the colonies seceded from the Empire. The spirit of the Declaration of Independence is clearly captured in the famous speech of Patrick Henry in Richmond in 1775.

“Gentlemen may cry, Peace, Peace—but there is no peace. The war is actually begun. The next gale that sweeps from the north will bring to our ears the clash of resounding arms! Our brethren are already in the field! Why stand we here idle? What is it that gentlemen wish? What would they have? Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty, or give me death!”

#### 10. Articles of Confederation and Perpetual Union

During the war for our independence, people in the various states understood that upon securing their independence they would need to form some kind of union to protect them from invasion by the European powers, Spain, France, and Britain, that operated in North America with the Americans. What is important to bear in mind here is how Americans at the time thought of government and governing power. The American federal, or general, government was not created as a sovereign power. It was created as an agent of the states for limited and special purposes, security and trade, and for nothing else. Sovereign power was held to reside in the people of each state. This is the principle of federalism which requires that power should be decentralized, and held as locally as possible. This is what the Articles of Confederation did, and it is why the nationalists of the time hated it. To be clear, those Americans who wanted decentralized power should be called federalists, because they defended and insisted upon the principle of federalism. Those who wanted a centralized, unitary national state should be called nationalists. When the nationalists determined to push for a new constitution that would give them the kind of government they wanted, they took to calling themselves federalists, because federalism was very popular, and they began to call the true federalists “anti-federalists.” Let us

examine the Articles of Confederation looking in it for what would please federalists and displease nationalists, and in this way, acquire a sense of why the Philadelphia Convention, where the Constitution of the United States was written, was convened when the United States already had a constitution.

The English Constitution is in part unwritten and in part found in writings that are disparate in time and found in political documents as well as judicial opinions. Magna Carta in 1215, the Petition of Right in 1628, the Habeas Corpus Act of 1679, and the English Bill of Rights, 1689, are documents of the English Constitution. The Americans had a different conception of the nature and purpose of government than did the British, rejecting monarchy, for example, and decided upon a single written constitution forming a union of sovereign states for limited and specified purposes. In other words, the Articles of Confederation and Perpetual Union, like the Constitution that followed it, are compacts, some historians have called them treaties, among independent, sovereign countries. This is the crucial fact in understanding American constitutionalism: the states of the United States each one is a free, sovereign, and independent nation, and a constitution is understood to be a contract among them establishing an agent of the states, the federal government, for limited and specified purposes. In short, the federal government, housed now in Washington, D.C., was not intended to be a sovereign government, and within our Constitution it is not one now, even though it behaves like one. This is difficult for many Americans to understand because we have been taught from childhood that the Constitution of the United States establishes the government we presently have. However, although we grew up believing this, it is not true, and this fact lies plainly in the document we are now examining, that is, the Articles of Confederation and Perpetual Union.

## 11. The Articles of Confederation Continued

The Articles of Confederation begins thus: “Articles of Confederation and perpetual Union between the states of New Hampshire, Massachusetts-bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.” Each state is named individually because these states are the parties to the contract of union that is the Articles of Confederation. It is understood that a contract among sovereign states is a contract-at-will, and because this is so, the parties to it possess the right to leave it. It should be clear that a union that is not voluntary is not a union. Moreover, if we say that once a union is formed, it can never be undone, we abruptly encounter two problems. First, our Declaration of Independence asserts that we establish governments to protect our natural rights, and that when government fails, either by not doing its job or by positively violating our natural rights, we have the right to alter the government or abolish it and craft a new one. If this American idea is not true, then our secession from Britain was treason. But if the people of the states are sovereign, no union they establish is immune to alteration or abolition. Second, we run into the insurmountable problem of explaining how it can be that one generation of Americans has the right to consent to a constitutional government which, ever after, subsequent generations have no right to replace, but must live under it, like it or not, or suffer the fate of traitors. The first section of the Virginia Declaration of Rights, 1776, addresses this second problem directly. “Section 1. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, 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 clear assertion here is that all human beings share equally in the rights of human nature, and that when people establish a government, i.e., “enter into a state of society,” they have no right to bind their descendants such that they cannot do the same, establishing new governing arrangements of their own and as they choose. But the governing arrangement we have been taught ignores this, and insists that the Constitution establishes a central, sovereign government to which we owe allegiance and which we must obey, or suffer the consequences.

Article I is straightforward yet interesting. “The Stile of this Confederacy shall be ‘The United States of America.’ “ This is interesting because Americans at the time of the adoption of



the Articles understood the name United States to refer to a group of independent states united in a union for limited and specified purposes. The great 19<sup>th</sup> century classical scholar at the University of Virginia, Basil Gildersleeve, said that the Civil War, the war of 1861-65, was a war about grammar. Are the United States a them, or an it? For Americans until the middle of the 19<sup>th</sup> century, the United States were them. We see this, for example, in Article III, section 3 of the Constitution of the United States that defines treason: “Treason against the United States shall consist only in levying war against *them*, or in adhering to *their* enemies giving them aid and comfort.” We see here clearly that the people who wrote and ratified the Constitution understood the United States to be a gathering of individual, sovereign states, or as South Carolina statesman John C. Calhoun called the country, “an assemblage of nations.”

Article II reads this way. “II. 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.” Here we find the principle of federalism explained. Each state, upon entering the union, retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right that is not expressly delegated to Congress. If each state retains its sovereignty, then the confederal government, Congress, is not a sovereign government. Moreover, the Congress has only those powers “expressly delegated” in the Articles. Therefore, any enactment of the Congress for which there is no authority written in the Articles of Confederation, is an illegal usurpation of power and not a law at all. We should understand that under the Articles of Confederation, Congress was unicameral, that is, it had only one chamber, a house of delegates, but no senate. Delegates were chosen by means to be determined by the legislatures of each state for a term of one year. Moreover, the legislatures of each state had authority to recall any one or all of its delegates at will and replace them with whomever they choose. This gave the states absolute control over the confederal Congress. Importantly, under the Articles, there is no executive, that is no president, and no court. These were left out because each state had its own executive, the governors, and their own courts. Americans who created the union under the Articles feared, rightly, it appears, that a confederal president would hold as his primary object the expansion of his power at the expense of the states. Moreover, the primary means of this expansion would be fanciful and dishonest interpretations of the Articles of Confederation by the

court, forever finding new ways to read the Articles as unlimited bequests of power on the president.

## 12. The Articles of Confederation Concluded

Article III is most important as an expression of the American founding principles of federalism, republicanism, and constitutionalism. It reads this way.

“The said states hereby severally 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.”

The United States under the Articles of Confederation were a “league of friendship” for mutual defense and security of liberty. A league, as it is used here, is a group of independent states bound by a common agreement for limited and specified purposes. Like all agreements among sovereign states, each member retains the right of rescission of the compact. An act of rescission is one in which a member to a compact withdraws and returns to the condition enjoyed before entering the compact or league. We should be clear, in English and American contract law, there is no such thing, and there can be no such thing, as a contract or compact to which someone can consent, and then ever after neither he nor his descendants may withdraw from it, and every attempt to do so is treason worthy of death. Indeed, when the states adopted the Constitution of the United States in 1788/89, they had to dissolve the league of friendship established in the Articles of Confederation. Article VII of the Constitution of the United States says it will go into effect when nine states ratify it, and it will be in effect only for those nine states. The nine-state threshold was achieved in 1788, but North Carolina and Rhode Island had not ratified it. So the states that adopted the Constitution had seceded from the league of friendship while North Carolina and Rhode Island, in 1789 and 1790 respectively, remained alone within what remained of the league of friendship. There was no suggestion of any kind that the states had no right to dissolve the league of friendship under the

Articles. It was known by all, north and south, that each state was a sovereign and independent political society with the right to do as it chose.

With Article V, we begin to see what it was that drove the nationalists to seek to dissolve the league of friendship and replace the Articles of Confederation with what they called “a more energetic government.” Article V establishes a congress having one house of delegates and no senate. Delegates were appointed by the legislatures of the states and each state held authority to recall one or all of its delegates and replace them as they saw proper. The term of a delegate was one year, and no delegate could serve more than three years out of each term of six years. So, the power of states to appoint and replace delegates meant that the confederal congress could not expand its powers without the consent of the states. But the states designed the congress this way exactly to prevent the congress from expanding its powers. Moreover, the restriction of delegates to three years in office out of every six meant that members of congress would not be able to stay in office for decades acquiring seniority over others and with it, power to hand out favors as a means of enriching themselves at the public expense. Finally, when votes were taken in congress doing the business of the United States, each state had one vote. This was done, of course, so that large states like Virginia could not dominate smaller states like Rhode Island and New Hampshire as they could do if votes were taken with each member of congress having one vote, as is the case with our present Congress. One can see readily that for someone desiring a powerful central government able to do exactly as it pleases, Article V of the Articles of Confederation and Perpetual Union was an abomination.

Article VI establishes, among other things, that each state is required to maintain and equip militias for defense of the country, but no state may keep vessels of war during peacetime beyond those deemed necessary for the defense of a state or its seagoing trade. Likewise, no state could maintain land forces in peacetime beyond the number deemed necessary by congress.

Article VIII was a particular problem for nationalists because while it provides for means of paying for wars when congress declares them, “...taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.” In other words, the Articles of Confederation does not confer on the confederal congress the power to tax. We see in Articles VI

and VIII a powerful brake on the congress, that is, keeping the sword and the purse out of its hands. Americans in the 18<sup>th</sup> century understood that if you put into the hands of a central government both control of the military and of the treasury, it will be impossible to restrain the growth of its power, and liberty will soon end.

We have said that the Articles did not create a court, by which is meant a supreme court of the sort we presently have. But Article IX permits congress to appoint courts for trying “piracies and felonies committed on the high seas,” and courts of appeals in cases of captures during war, but no member of congress may sit on any of these courts.

The Article establishes a process whereby congress acts as a mediator in disputes on boundaries and jurisdiction between states, and interestingly prevents congress from declaring war, coining money, and performing nearly all of the powers delegated to it without the approval of nine states.

Article X is an example in action of the principle of federalism. It provides a “committee of the states” empowered to exercise the powers of Congress during congressional recesses, and requires that the committee take no action for which the Articles of Confederation require the assent of nine states. We see here that the power to govern resides in the people of the states who act through the institutions of their respective states, not in the confederal government. Once this is understood, it becomes clear that acts of the people taken in conventions within each state are legal by definition because they are acts of the people in whom the authority to govern resides.

The thirteenth, and final, article providing for the ratification of the Articles of Confederation, declares that the states are obliged to obey all laws made by the confederal Congress when those laws are made in accord with a power expressly delegated in the Articles. This is very similar to the much misunderstood “Supremacy Clause” of Article VI of the Constitution of the United States.

### 13. Summary Review

We have seen that human societies have forever been plagued by the predations of people determined to dominate others. We have seen also that the state as it developed in Europe was organized to be the engine of domination by the very type of people set upon domination. This set the frame within which the peculiarly American conception of the state developed, and this development is remarkable for its embrace of the principles of federalism, republicanism, and constitutionalism (explain). Thus we see that American political thought, at least from our founding to 1861, was among the most successful efforts in western history to devise an organization of government that will protect the persons, liberty, and property rights of individuals while leaving them otherwise free to conduct their lives within their communities as each saw fit.