A USER'S GUIDE TO THE CONSTITUTION – PART III

THE RELATIONSHIP BETWEEN THE U.S. AND THE STATES: A NEW COUNTRY CHOOSES FEDERALISM OVER CONFEDERATION TO THE ULTIMATE DIMIMISHMENT OF THE POWER OF THE SOVEREIGN STATES OR IS NATIONAL DIVISION CAUSING A RESET OF FEDERALISM?

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OR
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I. Summary: It is useful to look at the state/federal relationship (a/k/a federalism) from a historical vantage point because it allows one to observe the dynamics of federalism in its context.

a. to understand what American federalism is and why the Founders developed it, it is useful to start from the standpoint of the confederation. To make the central government more stable, the Framers elected a limited central government over confederation, which risked devolving into internecine struggle. The new design is like a swimming pool with 51 lanes – one for each state and one for the central government. The Founders thought it unlikely, using this model, that the central government would interfere with the sovereign states. (Federalist 18: 'tyranny from the head"). Did time prove them right?

b. Does the Civil War reveal a design flaw in the Constitution? Or did our human nature foil any consensus? The events leading to war from the vantage point of how issues were processed within governance.

c. Modern federalism, from post-civil war to recently, has been a steady centralizing trend due in part to historical events, such as world wars and an economic depression. These were issues properly in the sphere of the federal government. But several other factors led to the diminishment of the power of the States. Most notably in our time the superior wealth of the central government allows it to offer the states "money-with-strings" that gives the federal government influence in shaping policy outside of the limitations of Art. I, sec. 8 and which traditionally fall within the policymaking sphere of the states.

d. The centralizing trend seemed unstoppable, and it appeared as though the Founders were wrong about "tyranny from the head," although increasing political division manifested itself in State resistance to federal policies. (*e.g.*, sanctuary cities). The breakdown of comity became pronounced with COVID -19, however. The country did not "pull together" to address the issue. COVID is a public health problem and the locus of power to manage it is at the state level primarily. States went their own ways, largely along the political divide. While early days, it appears the State/Federal relationship is undergoing a rebalance, with States reclaiming more of their status as co-equal sovereigns.

II. Historical Backdrop (Part 1): The Articles of Confederation Are Replaced by the Constitution

1776: Declaration of Independence.

1777: Articles of Confederation approved by the Continental Congress, pending approval of the 13 States, largely complete by 1779, and entirely complete by 1781.

1789: Constitution enacted. (*See, Const., Art. VII*).

1791: Bill of Rights goes into effect on Dec. 15, 1791.

III. What's in a Word?: The Definitions of 'Confederation' and 'Constitution'

- **Definition of 'Confederation'**:

NOUN, ***confederations*** *(plural noun)*

1. an organization which consists of a number of parties or groups united in an alliance or league.
"a confederation of trade unions"

ORIGIN
late Middle English: from Old French confederacion or late Latin confederatio(n-), from Latin confoederare, from con-'together' + foederare' join in league with' (from foedus 'league, treaty').
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- **Definition of 'Constitution'**:

NOUN, **constitutions** (plural noun) · **the Constitution** (noun)

1 a body of fundamental principles or established precedents according to which a state or other organization is acknowledged to be governed.

ORIGIN
Middle English (denoting a law, or a body of laws or customs): from Latin constitutio(n-), from constituere'establish, appoint' (see constitute).
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IV. Design Features of the Articles of Confederation

- a "Confederation and perpetual Union between [the original 13 States]".

- conceived by the sovereign states as "a firm league of friendship with each other" for the purposes set forth in the Articles. (*Articles of Confederation, III*; *compare with Const., Preamble*).

- a "Congress of Confederation" is the only governing entity created by the Articles; there is no Executive, nor is there a separate Judiciary.

- the relationship between the States and the Congress of Confederation is direct and controlled by the States; the relationship with the citizen is indirect, *via* State of residence.

- the difference between the national government under the Articles and the national government under the Constitution is that the former is rule by the sovereign states and the latter is rule by a newly-created sovereign separate from the several States and on an equally sovereign footing with them. This is "federalism". The Founders thought history demonstrated that the design flaw of confederation was that it degenerated into a power struggle between the big and the small states. They thought a central national government would manage against that tendency:

> "I have thought it not superfluous to give the outlines of this important portion of history; …[because]… it emphatically illustrates the tendency of federal bodies rather to anarchy among the members, than to tyranny in the head." [Federalist No. 18 (Madison? Hamilton?). *See also*, Federalist Nos. 19 and 20].

V. Historical Backdrop (Part 2): Compromises That Lead to the Adoption of the Constitution

The geography of the United States has from the beginning been an assemblage of different peoples and local economies and interests, usually organized regionally. The States themselves were of different sizes and populations. Several concerns had to be overcome to get a minimum of nine states to ratify the Constitution; the first 'in-action' example of the Framers' design for policymaking by consensus. Two compromises are addressed here:

(1) the fear by small states that they would lose power to the large states:

- addressed by the makeup of the Senate (equal amount to every state) and the House of Representatives (by population) (*Const., Article I, Sec. 3*).

- addressed by the use of the Electoral College to select the President, the only nationwide elected official. This device assures the President is elected by a majority of the votes *in the majority of the states,* wherein – because most electoral votes are based on the number of districts in a state - is located *a majority of the population* (*i.e.*, not voters). (*Const., Article I, Sec. 2*).

(2) The fear by the slave-holding States of interference with their slave-based economy:

- addressed by the Fugitive Slave Law, which required the return of runaway slaves

(*Const., Article IV, Sec. 2, repealed in pertinent part by Amendment XIII (1865)*).

- addressed by the ban on the importation of slaves, but not before 1808. (*Const., Article I, Sec. 9*).

VI. Historical Backdrop (Part 3): The Breakdown of Compromise leads to Civil War

(a) Seventy-two years elapsed between the enactment of the Constitution in 1789 and the onset of war in 1861. In other words, the generation that fought the Civil War were the grandsons or great-grandsons of the generation that created the Constitution. This was not an instance of citizens not understanding the Constitution. Rather, they understood it as a matter of personal family history. Once the North and South became polarized, however, each side thought the other had reneged on the bargains struck in 1789 to get the Constitution ratified.

In broad strokes, several factors lead to the breakdown:

(i). *New Technology: The Cotton Gin:* The Constitution was ratified in 1789, with a provision that the importation of slaves was prohibited after 1808. (*Const. Art. I, Sec. 9*). Had past been prologue, the expectation was slavery would eventually die out in the South as it earlier had in the Northern states. In 1794, however, Eli Whitney invented the cotton gin. This device automated the removal of the seeds from cotton fiber, allowing planters to scale up the planting and picking of cotton and increasing cotton production overall. Thus, the demand for slave labor to work in larger and larger plantations *increased* in the nineteenth century.

(ii). *The Industrial Revolution*: The mass production of goods began initially in England in the late Eighteenth Century. The textile industry was among the earliest mechanized. By the early nineteenth century, the South was the major supplier of cotton, primarily on the international market, yet also to the textile mills of the North. Cotton, thus, was a major economic force in America, entrenching and expanding agricultural cotton.

(iii). *The Territorial Growth of the United States and the Admission of New States:* Through purchase and war, the territorial reach of the United States by mid-century was from coast-to-coast. This raised the question whether slavery should be allowed outside the original southern states and, if so, where. There were a series of compromises that addressed the question, but the increasing economic success of agricultural cotton forced revisiting the question, with increasing acrimony, as new territory was acquired.

Thus, by mid-century two powerhouse economies existed in the United States, the northern and western wage-based, industrial economy and the southern one-crop, slave-based, agricultural economy. Slave labor and wage labor could

not operate in the same geography, as the one undercut the other in wages and in the competition for land.

Closely related to the settling of new territories was the admission of a territory as a State. This affected the balance of power in Congress. The House of Representatives largely favored northern policies, including anti-slavery. The South had a slim majority in the Senate. Presidents were selected, to varying degrees, with pro-Southern backgrounds.

Increasingly, the South felt it needed equal power control in the Federal Government to survive. The election of Lincoln in 1860 represented the first time Congress and the Executive were controlled wholly by legislators from the North.

(iv) *The Great Awakening and the Moral Opposition to Slavery:* There was a religious revival in the North in the first quarter of the nineteenth century. From this arose an anti-slavery sentiment that intensified over time and pursued change in the political arena. As the abolitionists became more political and extreme, however, they demonized their fellow citizens of the South. This, in turn, stiffened the resistance of Southerners, even of those who were not involved in the slave-economy. The willingness of the two sides to reconcile increasingly diminished. John Brown's 1859 raid on the US arsenal at Harper's Ferry in order to arm a slave revolt shocked Southerners.

VII. Historical Backdrop (Part 4): Was the Civil War Due to A Failure of Design? Or of the Citizenry?

The abolitionists were absolutely morally right. Enslavement to the point of deeming humans as property is the worst possible human exploitation of other humans. The abolitionists were right to force its end. But they went about it in the worst possible way; demonizing their fellow citizens who possessed political rights equal to their own. The abolitionists also failed to address the real difficulties the South faced when slavery ended. After all, the economy of an entire region was based upon it. As a practical matter, abolitionists and anti-slavery politicians ought to have worked with Southerners to implement meaningful economic alternatives so the South could transition from a slave-based economy. This the abolitionists failed to do.

The abolitionists and anti-slavery politicians also failed to meaningfully address the transition of slaves themselves to a free economy. It is unfortunately the case that abolitionists, as most Northerners, held racist views.

As pointed out by Thomas Fleming, in "*A Disease in the Public Mind*" (2013), America is the only country that went to war to end slavery within its borders.

Food for thought: In our country, can mutual problems get solved on a policy level in our country if one group of citizens thinks itself morally superior to another group? Put another way, what happens when some citizens think that they are not looked at as equal in the political sphere?

Is history rhyming? See, H.R. 51 (116 Congress), a bill to admit the District of Columbia as a State, introduced by the Congressional Democratic majority on Jan. 3, 2019, the first day of the current legislative session. *See*, https://www.congress.gov/bill/116th-congress/house-bill/51. The significance of this bill is that, if enacted, the District of Columbia would have 2 Senators – likely of the Democratic Party - and the size of the Senate would increase to 102 members. The Bill passed the House of Reps. on 6/29/20. It was read for the first time in the Senate on 8/13/20 and the second time on 9/8/20. (Sen. Calendar #522).

VIII. The Modern Relationship Between the Sovereign States and The U.S. Government

The relationship between the States and the Federal Government today is far-removed from the Constitutional design of co-equal sovereigns. *See, McCulloch v. Maryland, 4 Wheaton 316 (1819):*

(a) *Timeline: Compare the Eighteenth Century (Broad State Protections)*:

1. the Constitution protects the trade of States from unequal treatment by the federal government, (*Const., Article I, Sec. 9)* and guarantees full faith and credit to State laws by every other state. (*Const., Article IV, Sec. 1)(1789).*

2. the Constitution protects free interstate travel of residents of one state to another (privileges and immunities clause) (*Const., Article IV, Sec. 2)(1789).*

3. the Constitution specifically enumerates subject matter areas in which States may not act, (*Const. Article I, Sec. 10)(1789)* and reserves to the States all powers not otherwise delegated to the federal Government nor prohibited to the States (*Const., Amend. X) (1791).*

4. The Constitution does not allow a State to be sued in federal court. *(Const. Amend. XI)(1795) and see Hans v. Louisiana, 134 U.S. 1(1890)(plaintiff is a citizen of State defendant).*

(b) with the Nineteenth and Twentieth Centuries(Narrowing State Protections):

1. the Constitution is amended to add the Anti-Slavery *Amendments XIII, (1865*); *XIV (1868*) and *XV (1870),* which the seceding States had to ratify as a condition of readmission to the US. Note, Amendment XIV forbids using State or federal funds to pay for "any claim for the loss or emancipation of any slave; but all such

debts, obligations and claims shall be held illegal and void." (*Const., Amend. XIV, Sec. 4*).

2. the Constitution is amended to allow for the direct election of Senators instead of selection by the State legislature: (*Const., Amendment XVII (1913*)).

3. the Constitution is amended to eliminate a poll or any other tax on voting for any state or federal official. *(Const. Amendment XXIV)(1964)*).

4. the Constitution is interpreted by the Court to limit the scope of the Eleventh Amendment, in order to allow *federal* judicial jurisdiction to grant prospective injunctive relief against a State officer sued in his official capacity. *Ex. Parte Young, 209 U.S. 123 (1907*). *See also, Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658 (1978)*. This allows federal judicial review of state laws and rules and the power to invalidate them.

5. the Court interprets Congress's enumerated powers broadly: *See*, Commerce Clause: "[t]he Congress shall have the Power …[t]o regulate Commerce among the several States…." (*Const. Article I, Sec. 8*). This was interpreted to apply to commercial activity with no interstate connection. *Wickard v. Filburn, 317 U.S. 111 !942), and see, American Power & Light v. SEC, 329 U.S.90, 104 (1946)*(Congressional power under the Commerce Clause is "as broad as the economic needs of the nation").

NOTE WELL: The Court may have begun to retreat from its broad view of Congress's power to regulate commerce: *see*, *Nat'l Fed. Ind. Bus. v. Sebelius , 567 U.S. 519 (2012)*(the individual mandate of the ACA is *not* a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause, but is under its taxing power).

6. the Court's incorporation of most of the Bill of Rights jurisprudence into the Fourteenth Amendment, expanding the scope of fundamental rights that are binding on the States beyond the text of the Amendment itself. (*Const., Amend. XIV*: "No State shall …deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws").

   The Bill of Rights is limited by its terms to citizens *and the Federal Government*. Barron v. Baltimore, 32 *U.S.* 243 (1833). Over the course of the 20th Century, federal jurisprudence about the First, Second, Fourth, and Sixth Amendments were fully incorporated into the Due Process Clause of the Fourteenth Amendment. The Fifth and Eighth were partially incorporated. The Seventh (right to a civil jury trial) is not incorporated, and there is no case about the Third Amendment.

7. *In sum*: the idea of Federalism, which addresses the apportionment of power between the centralized national government and the de-centralized State governments, while still viable, has been largely tipped in favor of a strong central government, especially after the Civil War, to the detriment of the influence of the several States. Centralization of power grew in the Twentieth Century, to deal with the Depression in the 1930's, and World War II; each problems of nationwide scope. The preeminence of the federal Government on the world stage also accelerated the tendency towards a strong central government. This greatly broadened the range of topics subject to nationwide policymaking by a federal Government that is designed to be limited to 'enumerated' powers. *See, Const. Art. I.*

(c) *The Federal Government expands its policy-making reach by means of State grants with strings attached:*

In policy topics that Congress does not have the power to regulate directly because they are outside its enumerated powers, Congress may nonetheless act by means of grants of money to any state if the state agrees to spend it according to federal rules and policy objectives. Some examples are:

Medicaid; Law enforcement grants; Public housing grants; Highways

IX. Where Should Policy Be Made?

Federal laws have a national reach; state laws a local reach. States are said to supply a laboratory for policy experiments that might be scaled up to a national level.

X. Is National Division Causing a Reset of Federalism?

> The centralizing trend seemed unstoppable, and it appeared as though the Founders were wrong about "tyranny from the head," although increasing political division manifested itself in State resistance to federal policies. (*e.g.*, sanctuary cities). The breakdown of comity became pronounced with COVID -19, however. The country did not "pull together" to address the issue. COVID is a public health problem and the locus of power to manage it is at the state level primarily. States went their own ways, largely along the political divide. While early days, it appears the State/Federal relationship is undergoing a rebalance, with States reclaiming more of their status as co-equal sovereigns.