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The Origins of American Federalism

A Tourist's Guide

A full historical treatment of the origination and evolution of American federalism would be a Herculean task for a single chapter of a book about whether twenty-first-century America needs states. Fortunately, a multitude of scholarly writings have collectively supplied the details of the varying events and perspectives that have got us to where we are today. I won't attempt to duplicate those discussions here.[1] But a few general observations are worth highlighting, both for overall context and for their specific relevance to the arguments offered in the ensuing chapters. Here, then, is a thumbnail sketch of the timeline from the colonial period to adoption of the US Constitution:

For much of the eighteenth century, relations between Britain and its American colonies were generally amicable.[2] Trans-Atlantic tensions began brewing – and escalating – during the several years that led up to the Revolutionary War. They came to a head when Britain imposed an import tax on tea that it shipped to the colonies. Objecting to taxation without any representation in the British Parliament, many Americans boycotted British tea. On December 16, 1773, a group of colonists took the protest to the next level. They boarded ships containing 342 chests of British tea and dumped the contents into Boston Harbor.[3]

Parliament's reaction to the Boston Tea Party was to pass what became known in the American colonies as "the Intolerable Laws." These laws, which imposed a series of new constraints on the colonies' economic and political powers, were intended to teach the colonists a lesson. Instead, they only fanned the flames. The colonists' reaction was to convene the First Continental Congress. Twelve of the thirteen colonies (all except Georgia) sent delegates. Among the more distinguished

[1] See especially Craig Green, *United/States: A Revolutionary History of American Statehood*, 119 Mich. L. Rev. 1 (2020).

[2] Adam E. Zielinski, American Battlefield Trust, Life in Colonial America Prior to the Revolutionary War, www.battlefields.org/learn/articles/life-colonial-america-prior-revolutionary-war.

[3] Constitution Center, On This Day, the Boston Tea Party Lights a Fuse (Dec. 16, 2023), https://constitutioncenter.org/blog/on-this-day-the-boston-tea-party-lights-a-fuse.

attendees were the men who would go on to become the first two US presidents – George Washington and John Adams.[4]

Meeting in Philadelphia between September 5 and October 26, 1774, this Congress took several bold steps. These included ordering people to refuse all British imports and endorsing the decision by Massachusetts to raise its own militia. Perhaps most importantly, this Congress created the Continental Association, which soon called for a ban on all trade with Britain. Finally, it arranged for a second Continental Congress to meet in the spring of 1775 if Britain had not satisfactorily addressed the colonists' grievances by then.[5]

Britain did little or nothing to address those grievances, and discontent continued to grow. When word leaked that British soldiers, already ensconced in Boston, were about to march to Concord to seize a rebel arms cache, the colonial militias began to assemble. Paul Revere (memorialized by Longfellow's epic poem[6]) and William Dawes[7] rode from Boston to Lexington to warn the militias.[8] By most accounts, the battles of Lexington and Concord, on April 19, 1775, marked the start of the Revolutionary War. It is generally believed that the colonists' successes in those battles gave them the confidence that they could win an all-out war against their militarily superior masters.[9]

As planned, the Second Continental Congress convened on May 10, 1775 (just three weeks after the battles of Lexington and Concord), again in Philadelphia[10] and again with delegates from every colony except Georgia. This Congress quickly assumed the functions of an unofficial national government, raising an army and directing the military strategy for the war, as well as appointing diplomats.[11]

Even though the war was raging, Congress had not yet gone so far as to declare independence from Britain. Neither the general public nor the governments of the individual colonies seemed quite ready to take that momentous step. Enter Thomas

[4] Katherine Horan, First Continental Congress, www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/first-continental-congress/.

[5] *Ibid*.

[6] Henry Wadsworth Longfellow, Poets.org, Paul Revere's Ride, https://poets.org/poem/paul-reveres-ride.

[7] Dawes, not having been included in Longfellow's poem, had been largely forgotten. But many years later, poet Helen F. Moore remedied the injustice by publishing "The Midnight Ride of William Dawes" in *Century Magazine*. Her poem can be found at 150 Years of "Paul Revere's Ride," www.paulreveresride.org/2010/01/response-midnight-ride-of-william-dawes.html. I am indebted to Carol Boggs for calling Moore's poem to my attention.

[8] Both attempted to continue on to Concord, but en route Revere was captured by British soldiers and Dawes was thrown off his horse. History.com Editors, "Battles of Lexington and Concord," (Jan. 14, 2020), www.history.com/topics/american-revolution/battles-of-lexington-and-concord.

[9] *Ibid*.

[10] Although Philadelphia was the site of their initial meeting, they had to relocate to other cities on several occasions to avoid the British army. Wikipedia, *Second Continental Congress*, https://en.wikipedia.org/wiki/Second_Continental_Congress.

[11] *Ibid*.

Paine. His eloquent pamphlet, "Common Sense,"[12] published on January 9, 1776, is best known for helping to persuade the residents of the colonies to take up arms to resist the tyranny of the King of England and fight for independence. "A government of our own is our natural right," he wrote. But as others have pointed out,[13] Paine also inspired them to create a new kind of government, one built (albeit very imperfectly) on the principle of rule by the people. In his words, "We have every opportunity and every encouragement before us, to form the noblest purest constitution on the face of the earth."

Like Paine's pamphlet, the "elegant" writing of Samuel Adams was credited by both John Adams and Thomas Jefferson as rousing public opinion in support of independence from Britain.[14] On July 4, 1776, with all thirteen colonies now in agreement, the Second Continental Congress approved the Declaration of Independence. At the same time, the Congress gave the new country its name: "the United States of America."[15]

On November 15, 1777, the Congress passed the Articles of Confederation.[16] They took effect on March 1, 1781, upon the approval of all thirteen states, and would remain in force until the adoption of the Constitution in 1789. Under Article II, each state retained "its sovereignty, freedom and independence," as well as every power that the Articles did not "expressly" delegate to the federal government. Article IV provided that each state was to have one vote in Congress. And Article XIII obliged each state to obey the laws passed by Congress as long as those laws were within the powers the Articles conferred upon Congress. As discussed more fully below, however, the powers that the Articles delegated to Congress were extremely limited, a weakness that ultimately led all thirteen states to replace them with the Constitution that in large part survives today.

The official end of the Revolutionary War came with the signing of the Treaty of Paris in 1783. In addition to ending armed hostilities, the treaty defined the boundaries of the United States and contained several other intensely negotiated (mainly by John Adams) provisions of contemporary importance.[17]

[12] Thomas Paine, The Project Gutenberg eBook of Common Sense, www.gutenberg.org/files/147/147-h/147-h.htm (Feb. 14, 1776).

[13] For example, Patrick J. Kiger, How Thomas Paine's "Common Sense" Helped Inspire the American Revolution (2021), www.history.com/news/thomas-paine-common-sense-revolution.

[14] Stacy Schiff, The Revolutionary Samuel Adams (2022).

[15] This name replaced "the United Colonies of America." Wikipedia, *Second Continental Congress*, https://en.wikipedia.org/wiki/Second_Continental_Congress.

[16] They are reproduced by the National Archives, in Articles of Confederation (1777), www.archives.gov/milestone-documents/articles-of-confederation.

[17] These included bilateral access to the Mississippi River, British surrender of all its military posts in the United States, payment of all prewar debts, and no retaliation against British loyalists. Amanda A. Mathews, Adams Papers, "Signed, Sealed and Delivered": The Treaty That Ended the Revolutionary War (May 8, 2019), www.masshist.org/beehiveblog/2014/09/signed-sealed-and-delivered-the-treaty-that-ended-the-revolutionary-war/.

It would be another four years before delegates from twelve of the thirteen states (all except Rhode Island) assembled in Philadelphia to draft a new constitution. From May 14 to September 17, 1787, some fifty-five delegates to the constitutional convention, George Washington presiding, labored to resolve fundamental disagreements and narrow issues alike. Among the former, the ones that dominated their discussions were the distribution of power between the national government and the states; congressional representation of the people and the states; and the inclusion or omission of a bill of rights. Their debates closely paralleled those that the Federalist and Antifederalist Papers would contain just months later; they are discussed later in this chapter. Although the delegates never achieved consensus, in the end thirty-nine of the fifty-five signed the draft constitution and sent it to the states for ratification.[18]

Under Article VII, once nine states had ratified the Constitution, it would go into effect – but only for those states. New Hampshire supplied the ninth ratification on June 22, 1788, and Congress made the Constitution effective as of March 9, 1789. By 1790, all thirteen states had ratified it. Under what became known as the Massachusetts Compromise, four states ratified the Constitution but made recommendations to Congress for a bill of rights.[19] "Inspired by Jefferson and drafted by James Madison," the Bill of Rights (the first ten amendments) became part of the Constitution in 1791. The first eight amendments protect various individual rights, and the tenth amendment confirms that all rights not granted to the central government remain with the states and the people.[20]

On the heels of both Continental Congresses, the publication of Thomas Paine's "Common Sense," the American Revolution, the Articles of Confederation, and finally the 1787 constitutional convention, came the Federalist Papers and the lesser-known Antifederalist Papers. As noted earlier, the debates they contain mirror those that had informed the drafting of the Constitution. Apart from their huge impact on public opinion and possibly on the ultimate ratification of the Constitution, these Papers are a rich source of the historical arguments for and against a strong national government.

The Federalist Papers are a series of eighty-five essays written by Alexander Hamilton, John Jay, and James Madison under the pen name "Publius."[21] They were published in various New York State newspapers in 1787 and 1788. Their

[18] ConstitutionFacts, The Constitutional Convention, www.constitutionfacts.com/us-constitution-amendments/the-constitutional-convention/#:~:text=The%20Constitutional%20Convention%20took%20place,delegates%20had%20much%20bigger%20plans; The White House, The Constitution, www.whitehouse.gov/about-the-white-house/our-government/the-Constitution/#:~:text=Delaware%20was%20the%20first%20State,begin%20operating%20under%20the%20Constitution.

[19] See the sources cited in note 18. See also Aaron N. Coleman & Christopher S. Leskiw (eds.), Debating Federalism: From the Founding to Today, Introductory Essay at xvi, (2019).

[20] ACLU, The Bill of Rights: A Brief History, www.aclu.org/other/bill-rights-brief-history#:~:text=The%20American%20Bill%20of%20Rights,the%20law%20of%20the%20l.

[21] They can be found, among other places, at Library of Congress, Full Text of the Federalist Papers, https://guides.loc.gov/federalist-papers/full-text.

immediate purpose was to sway public opinion in the State of New York in favor of ratifying the proposed Constitution, but their influence proved to be nationwide and long-lasting.

Unlike the Federalist Papers, which were an organized collection written by three men, the eighty-five Antifederalist Papers were written by a much greater number of authors acting independently and were assembled after the fact by numerous editors. Like the Federalist Papers, most of the Antifederalist Papers were published individually in various newspapers and later reproduced as collections. While historians differ as to the identities of the major authors, they include Cato (likely George Clinton), Brutus (likely either Melancton Smith, Robert Yates, or John Williams), Centinel (Samuel Bryan), the Federal Farmer (Melancton Smith, Richard Henry Lee, or Mercy Otis Warren), and Patrick Henry.[22] None of the authors disputed the need for some form of union, and most (not all) accepted the concept of a binding Constitution to replace the Articles of Confederation. But all had in common a passion for states' rights and a belief that the proposed Constitution gave the federal government power over too many subject areas. In addition, many of the Antifederalist writers fundamentally objected to the absence of a bill of rights.

Understanding these debates requires a brief detour. There was a menu of possible governmental models from which the constitutional framers could have chosen. Practically every country, and by definition every formal association of nations, has subunits of some sort – at the very least, cities and towns. When it comes to the status and powers of those subunits, and their relations to the whole, the possible governmental models span a continuous spectrum. In the case of the US, I find it helpful to think of four points that the states could have occupied along that spectrum, from their most dominant role down to their not existing at all.

The model that offers the constituent states their greatest power is what is often referred to as a confederation. As their name implies, the Articles of Confederation fit that model. More akin to an international treaty than to a national constitution, the Articles allowed the states to preserve their own individual sovereignties and retain their sole powers over the vast majority of subject areas. They created a common government but delegated only a few limited powers to it. Importantly too, Article XIII required the consent of every state to any amendment of the Articles. Tellingly, when referring to the union, the phrase "united states" was always in lower case letters, not the capitalized format that one would expect for the name of a real country.

[22] Wikipedia, *Anti-Federalist Papers*, https://en.wikipedia.org/wiki/Anti-Federalist_Papers. Different collectors of the Antifederalist Papers have varied somewhat in their selection of essays. In this book, all citations to the Antifederalist Papers refer to the essays compiled by Bill Bailey (ed.), The Anti-Federalist Papers (2012). A convenient hard copy of both sets of papers is "The Complete Federalist and Anti-Federalist Papers" (editor's name absent, Oct. 21, 2022).

A second point on the spectrum (a lower point for states' rights) would be the federation that the US Constitution ultimately created and that continues to exist today. While the states retained their individual sovereignties, they ceded far more power to the federal government than the Articles of Confederation had. Those federal powers are still limited to the ones affirmatively granted by the Constitution, but when the federal government exercises those powers, its decisions become the supreme law of the land, prevailing over any state actions with which they conflict. In subject areas that are not granted to the federal government, the Tenth Amendment to the US Constitution makes clear that the states (or the people) have the last word.[23] For me, that is the distinguishing feature of a true federation: There are at least some subject areas over which the national government has the last word and others over which the subunits have complete autonomy to make policy decisions without interference from the national government.

To be clear, the distinction between a confederation and a federation is not cut and dried. First, the difference is often just one of degree. The broader the range of subject areas over which the national government has exclusive authority, the more likely it is that the arrangement will be described as a federation rather than a confederation. But second, the very definition of a federation has varied over time. Dimitrios Karmis and Wayne Norman point out that until the twentieth century, the terms "federation" and "confederation" were typically used interchangeably.[24] Today, different writers emphasize different attributes in distinguishing federations from confederations. Under one definition, a federation is a model in which "two or more self-governing communities share the same political space."[25] Some will use the term "confederation" if the constituent units can veto constitutional changes or leave the union unilaterally or "if they are the primary locus of their citizens' identity and political loyalty."[26] For Ronald Watts, the key ingredient of a confederation is that the common government consists of delegates from the constituent units.[27]

Under these definitions, the US system, despite being generally perceived as a federation, has elements of both models. On the one hand, there are the trappings of a confederation. Any constitutional amendment requires (among other things) the ratifications of three-fourths of the state legislatures. The national Senate consists of delegates of the fifty states. And the President is elected by an Electoral College whose members are selected by the individual states. On the other hand, there are attributes of a federation. There is no constitutional provision that authorizes states to secede, and the one serious attempt of the southern states to leave the union

[23] The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[24] Dimitrios Karmis & Wayne Norman (eds.), Theories of Federalism – A Reader 5 (2005); accord, Robert A. Dahl, How Democratic Is the American Constitution? 180 (2nd ed. 2003).

[25] Karmis & Norman, note 24, at 3.

[26] *Ibid.*, at 5.

[27] Ronald Watts, *Models of Federal Power Sharing*, 167 Int. Soc. Sci. J. 25 (2001).

ended in defeat after a bloody civil war. The US House of Representatives is elected by the people, not by states. And while I offer this only as an impression, not as empirical fact, it would seem that in the United States "the primary locus of [most] citizens' identity and political loyalty" would be the nation, not their states of residence. So under the criteria offered either by Karmis and Norman or by Watts, this country is a hybrid, with both federal and confederal elements.

The third point on the spectrum is what some writers call "decentralization."[28] The terminology is a bit misleading, because the first two models also entail decentralized power – in fact, even more so than this one. But when these writers refer to decentralization, they mean "mere" decentralization, that is, decentralization without federalism or confederalism. Under that model, the national government is not constitutionally required to cede any powers to the states at all, but it can do so voluntarily whenever it wishes. The national government becomes the supreme authority on all matters, and the states effectively become just subunits to which the national government may delegate whatever responsibilities it wishes. There are no subject areas in which the states have the last word. Edward Rubin and Malcolm Feeley, who favor this model, liken it to a management regime, in which the top executives decide which duties to assign to their subordinates.[29]

The fourth point, at the very bottom of this spectrum, would be the one favored in this book. State government would cease to exist entirely. As with decentralization, the national government would have power over all subject matters (as long as they complied with all the remaining constitutional constraints). The powers currently possessed by the states would be reallocated between the national government and the local governments as Congress sees fit.

At the Constitutional Convention, the whole notion of a unitary republic was a nonstarter. Robert Dahl observes that it was "simply out of the question."[30] That is not to say there were no outliers. As Dahl also notes, there was at least one delegate, George Read of Delaware, who saw the states as an "evil," the only "cure" for which was "doing away with States altogether and uniting them all into [one] great Society."[31]

What all four of these points on the spectrum have in common is that the national government has supreme (though in some cases delegable) authority over all the

[28] Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994).

[29] *Ibid.*, at 910–14. A similar distinction between federalism and decentralization is drawn by Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317, 380–81 (1997). ("Federalism is a system in which government units actually have autonomy in decision-making, while in a decentralized system of government ultimate authority rests at the top, or center, and the center makes the strategic decision to delegate decision-making authority or administration to the lower levels of government.")

[30] Dahl, note 24, at 12. In 1819, a unanimous Supreme Court was similarly dismissive. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) (opinion written by Chief Justice Marshall).

[31] *Ibid.*, at 196–97 n.7; Max Farrand (ed.), The Records of the Federal Convention of 1787, vol. I, at 202 (1966).

subjects it is permitted to regulate and that the states have supreme authority over whatever is left, if anything. The difference among these models lies in what those respective jurisdictions are in the first place. As one moves from confederation to federation to (mere) decentralization to no states at all, the powers of the national government increase from only a few specifically designated subjects to many such subjects and finally (under the last two models) to any subjects it wishes. Conversely, the exclusively state powers decrease from all but a few subjects, to only a few subjects, to no subjects at all – and ultimately to nonexistence.

It is common to invoke state sovereignty as a distinguishing factor, at least as between federations and mere decentralization. While there are varying definitions of sovereignty, my view is that the simplest and most comprehensive definition is the one synthesized by Heather Gerken from previous formulations: that which "formally guarantees a state's power to rule without interference over a policymaking domain of its own."[32] The powers that are within the state's own policymaking domain might relate to the structure of its government, the services it provides, its regulation of private conduct, or anything else. But whatever those powers are, they could be considered "sovereign" powers under Gerken's definition if the state is free to exercise them without interference.

The difficulty with even that straightforward definition is that, by its terms, a state would be considered a sovereign entity as long as there is at least one power, however trivial, that it is free to exercise without interference. Perhaps that definition could be jiggered to convert the word "sovereign" into an adjective that merely describes specific powers rather than entire states. But that modification would merely provide a convenient shorthand for powers over which states have sole dominion. And for that, we already have a useful word – autonomy.

Other writers offer more substantive definitions of sovereignty. Frank Michaelman, for example, defines sovereignty as "a state's interest in governing its own internal governmental arrangements and affairs."[33] But these and other substantive definitions[34] seem to me to reflect little more than the authors' own normative opinions concerning the powers they believe states ought to have.

For these reasons, I don't find the concept of state sovereignty particularly useful as a device for deciding how specific powers ought to be allocated between the federal government and the states.[35] Rather, with one possible qualification described

[32] Heather Gerken, *The Supreme Court, 2009 Term: Foreword, Federalism All the Way Down*, 124 Harv. L. Rev. 4, 11 (2010).

[33] Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities* v. *Usery*, 86 Yale L. J. 1165, 1192 (1977).

[34] For example, Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847, 851 (1979).

[35] Accord, Andrzej Rapaczynski, From Sovereignty to Process, The Jurisprudence of Federalism After Garcia, 1985 Supreme Ct. Rev. 341, 346–59 (arguing that "sovereignty is of questionable value both as an analytical tool and as a norm defining a desirable feature of political organization").

later, sovereignty appears to be more a conclusory term that is used once one has independently determined that a particular power is constitutionally reserved for the states. And that, in turn, is the same as saying that the particular power is not one of those that the Constitution has enumerated for the central government. The Supreme Court has come close to acknowledging this. In *Bond* v. *United States*, it said "[A]ction that exceeds the National Government's enumerated powers undermines the sovereign interests of States."[36]

The one possible qualification concerns the "anti-commandeering" doctrine. A series of Supreme Court decisions struck down federal laws that had directed the states or state officials to aid in the disposal of radioactive waste,[37] to perform background checks in connection with particular kinds of firearms purchases,[38] and to prohibit sports gambling.[39] In each of those cases the Court reasoned that the framers had deliberately constructed a constitutional framework that recognized "dual [i.e., both federal and state] sovereignty." In the words of Justice Scalia in *Printz* v. *United States*, the Constitution gives Congress "the power to regulate individuals, not States."[40]

These cases arguably contradict my view that state sovereignty is just a conclusory label that one can attach to a determination of states' rights once that result is reached, rather than an independent reason to recognize states' rights in the first place. After all, activities like radioactive waste disposal, firearms purchases, and sports gambling have consequences that can, and typically do, reach across state lines. The federal laws in question would therefore seem to qualify as "necessary and proper" to the exercise of Congress's power to regulate interstate commerce.[41] Thus, for the Court to strike down each of those laws despite its apparent nexus to an enumerated power, there had to have been some independent reason. The Court located that reason in the notion of state sovereignty, a concept that in the Court's view prohibited one sovereign (the federal government) from telling another sovereign (the state) what to do.

[36] 564 U.S. 211, 225 (2011).
[37] New York v. United States, 505 U.S. 144 (1992).
[38] Printz v. United States, 521 U.S. 898 (1997).
[39] Murphy v. National Collegiate Athletic Assn., 138 S.Ct 1461 (2018).
[40] Printz v. United States, 521 U.S. 898, 920 (1997).
[41] In Murphy, 138 S.Ct at 1476, Justice Alito says the matter is quite simple, really: "[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority." That reasoning is specious. The content of the laws passed by Congress in the exercise of its enumerated powers rarely find specific expression in the Constitution. When Congress passed Medicare, for example, no one seriously argued that the program was unconstitutional because Medicare is "conspicuously absent" from the list of enumerated powers. If Justice Alito believed that the case turned on whether the federal law fell within the scope of Congress's enumerated powers, then the proper inquiry should have been whether the cooperation of the states in regulating sports gambling was "necessary and proper" to the exercise of Congress's power to regulate interstate commerce – not whether the Constitution said anything about a specific congressional power to issue direct orders to the states.

On the fundamental question discussed in this book – whether state government should be abolished – I see little profit in getting bogged down debating whether the states should be seen as "sovereign" entities. In the domestic context, for purely descriptive purposes, the key variable that distinguishes the possible governmental models seems to be simply the range of specific subjects over which the national government and the constituent subunits have jurisdiction and the final say. And for normative purposes, I again see little gain in invoking or disparaging state "sovereignty" as an argument for or against a strong national government – much less as an argument for or against abolishing state government. It is not that those who invoke state sovereignty offer no other justifications for state government or for particular state powers; it is just that muttering the word "sovereignty" doesn't add anything to those arguments.

One last point on terminology: In the Federalist Papers, Madison takes pains to distinguish what he refers to as a "republic" (which he favors) from a "democracy" (which he doesn't). In Federalist 10, he defines a "pure democracy" as "a society consisting of a small number of citizens, who assemble and administer the government in person." In contrast, when Madison speaks of a "republic," he contemplates "the delegation of the government … to a small number of citizens elected by the rest." He repeats that distinction in Federalist 14 and 39, adding in the latter Paper that the delegates are to be "persons holding their offices during pleasure, for a limited period, or during good behavior." In Federalist 39 he emphasizes that the government must "deriv[e] all its powers directly or indirectly from the great body of the people." And in all these Papers he explains why, in a large country, he prefers a republic to a democracy.

Today, what Madison called a "democracy" or a "pure democracy" (and rejects) would be called a "direct democracy." A modern American example of direct democracy would be local or statewide referenda and initiatives, where the people themselves make changes to the law. What Madison called a "republic" (and favors) would ordinarily be called a "representative democracy," the main form of government in the United States today. In this book I use the terms "republic" and "representative democracy" interchangeably in describing the United States. And I use terms like "democracy," "democratic," and "democratic norms" generically, to describe any system built upon popular sovereignty, majority rule (with exceptions), and political equality.[42]

With that background, we can return to the Federalist and Antifederalist Papers. These papers were in broad agreement that the Articles of Confederation had left the national government too weak to address the states' many common problems, particularly their inability to pay off their huge Revolutionary War debts. There

[42] See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 Mich. L. Rev. 859, 879–81 (2021) (synthesizing writings that define the essential elements of a democracy). For elaboration, see the text accompanying notes 4–6 of Chapter 2, below.

was a general consensus that a stronger national government was needed.[43] But the Antifederalists believed passionately that the proposed constitution overcorrected. They felt it made the national government too powerful and the states too weak. They cited the examples of Switzerland as a successful republic with a weak national government and, conversely, ancient Rome as a republic that had failed soon after expanding into what is now Italy.[44] They also saw the Articles of Confederation themselves as an example of a successful confederation with a weak national government, arguing that all the Articles really needed were a few patches.[45] The Federalists countered with historical examples of loose confederations that had failed, from ancient Greece to countries in eighteenth century Europe.[46]

Of special concern to the Antifederalists was the interaction of two provisions of the proposed Constitution. Article I, Section 8, contains a long list of the federal government's powers. At the end of that list appears one final power: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer Thereof …" The Antifederalists worried that this "necessary and proper" clause would be interpreted so expansively that the federal government would be able to regulate almost any subject matter it wished. Worse still, in their eyes, was that Article VI, Clause 2, declares the Constitution and all federal laws and treaties made under it to be "the supreme Law of the Land," superseding any conflicting state laws. The Antifederalists feared the combination of these two provisions; they foresaw a virtually unlimited range of subjects on which the federal government could legislate and, whenever the federal government exercised that broad authority, the supremacy of the resulting federal law over state law. This, they worried, would render the states practically powerless.[47]

For their part, the Federalists defended the "necessary and proper" clause as simply a declaration of an obvious "truth" – that the power to do anything would be illusory without the means necessary to exercise that power.[48] Hamilton articulated the issue as one of responsibility without power: "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care."[49] Along similar lines, the Federalists stressed the need for the federal government to be able to enforce the laws (especially the tax laws) directly, rather than have to depend on the cooperation of state authorities.[50]

[43] See, for example, Federalist 15–22; Antifederalist 21.
[44] Antifederalist 18.
[45] Antifederalist 2, 16.
[46] Federalist 18–20.
[47] Antifederalist 17, 32, 46.
[48] Federalist 31, 33, 34.
[49] Federalist 31.
[50] Federalist 15, 16, 21.

The Antifederalists saw the absence of a Bill of Rights as yet another major obstacle to constraining the federal government. This was a deep and recurring concern.[51] All of those objections were to the lack of a Bill of Rights that would constrain federal government actions, not state actions. The objectors apparently felt that the various state constitutions already provided adequate protection against states' oppression of their citizens; they did not anticipate the rash of voter suppression measures for which so many of today's states have been responsible. Nor could they have foreseen the Fourteenth Amendment prohibition on states denying due process, much less that the Supreme Court would one day interpret the due process clause as incorporating almost all of the Bill of Rights provisions, thus making them binding on the states.[52]

Writing for the Federalists, Hamilton pushed back on the need for a bill of rights, though not very persuasively. He observed that the New York State Constitution similarly lacked a bill of rights, implying hypocrisy on the part of those New Yorkers who had criticized the proposed US Constitution for lacking one. He pointed out that various provisions of the Constitution already protect certain individual rights, including the right to trial by jury and the right to petition for habeas corpus. He mentioned that the Magna Carta and other bills of rights had typically been forced upon monarchs, not added to republican constitutions. On the whole, not a very convincing case.

All this begs the question: Assuming that the proposed Constitution did indeed bestow broad authority on the federal government, why, exactly, did the Antifederalists regard that as a problem?

There were several related reasons. The big one was that they simply found it antithetical to the concept of state sovereignty, which they valued. As they saw it, the states were willing to band together and create a central government to which they would delegate a few limited functions, ones that can best be performed collectively, like defense against foreign invasion. But their assumption was that the states would retain their separate sovereign statuses and the consequent authority over almost all other matters. In the words of Antifederalist 32, "The idea of a confederated government is that of a number of independent states entering into a compact, for the conducting certain general concerns, in which they have a common interest, leaving the management of their internal and local affairs to their separate

[51] For example, Antifederalist 13, 18, 45, 46, 54, 60, 84.

[52] The Bill of Rights applies directly only as a constraint on federal government action. But in Gitlow v. New York, 268 U.S. 652, 666 (1925), the Supreme Court assumed for the sake of argument that Fourteenth Amendment due process incorporates the First Amendment freedoms of speech and press, thus making them binding on the states as well. (In that case, the Court ultimately held that the challenged law did not violate either freedom of speech or freedom of the press.) Over the ensuing years, the Supreme Court read the Fourteenth Amendment due process clause as incorporating the vast majority of the other Bill of Rights protections. For a good catalog of those latter developments, see Cornell Law School Legal Information Institute, Incorporation Doctrine (Oct. 2022), www.law.cornell.edu/wex/incorporation_doctrine#:~:text=The%20incorporation%20doctrine%20is%20a,applies%20both%20substantively%20and%20procedurally.

governments." If the Constitution were interpreted to allow federal control of practically everything, as they feared, the qualified autonomy of the various states – the essence of sovereignty – would cease to exist.

Madison understood this and went out of his way to assure the Antifederalists that state sovereignty would be preserved. In Federalist 39, he said:

> [O]n one hand, … the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, *not as individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong* [emphasis added].

Two centuries later, this passage would be cited in a dissenting opinion of Justice Clarence Thomas.[53] He saw further evidence of state sovereignty in Article VII of the Constitution, which provides that the Constitution would be binding only on those states that ratified it. Still, in Federalist 20, Madison and Hamilton did not try to hide their distaste for the concept of state sovereignty, conceding it only as an unavoidable political compromise.

Although there were also other concerns (discussed below), the multiple emphases on the erosion of the states' authority come very close to arguing that the preservation of the states as autonomous governing bodies is an end in itself. On this point, the language in the various Antifederalist Papers is explicit: "[O]ur sovereignty, as a state, [is] to vanish."[54] "It is agreed by most of the advocates of this new system, that the government which is proper for the United States should be a confederated one; that the respective states ought to retain a portion of their sovereignty …," but the Necessary and Proper clause "would totally destroy all the powers of the individual states."[55] The federal taxing power alone will "swallow up all the power of the state governments."[56] The Constitution treats state governments "as mere dependencies, existing solely by its toleration."[57] A federal judiciary means that "the states will lose their rights, until they become so trifling and unimportant, as not to be worth having."[58] And

> I have … endeavored to shew, that [the proposed Constitution] was calculated to abolish entirely the state governments, and to melt down the states into one entire government, for every purpose as well internal and local, as external and national. … Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial.[59]

[53] Term Limits v. Thornton, 514 US 779, 846 (1995) (5-4 decision, with the majority holding that states cannot constitutionally put term limits on members of Congress).
[54] Antifederalist 30–31.
[55] Antifederalist 32.
[56] Antifederalist 33.
[57] Antifederalist 45.
[58] Antifederalist 81.
[59] Antifederalist 82.

One of the Antifederalist Papers asks rhetorically "[W]ho could imagine, that any man but a Virginian, were [excise taxes] found to be necessary, would ever have a voice towards enacting them? … And that, if ever it should be found necessary to curse this land with these hateful excisemen, any one, but a fellow citizen, should be entrusted with that office?"[60]

One of the several authors of Antifederalist 40, identified only as "a Farmer and Planter," phrases that central question in a different and revealing way: "Who authorized [the drafters of the Constitution] to speak the language of, We, the people, instead of, We, the states? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states."

In my view, the answer to that central question should be clear. The delegates to the Convention were writing a constitution for a representative democracy. To be sure, the individual states intended to play a vital role in the resulting arrangement. But unless those member states are to be considered ends in themselves rather than instruments for promoting the welfare of the people, weren't the drafters right to center the Constitution on the interests of "we the people," not "we the states"?

As usual, Madison makes the point more eloquently than I have. In Federalist 45, he writes:

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty? We have heard of the impious doctrine in the Old World, that the people were made for kings, not kings for the people. Is the same doctrine to be revived in the New, in another shape that the solid happiness of the people is to be sacrificed to the views of political institutions of a different form? It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object. … [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, "Let the former be sacrificed to the latter."

He reemphasizes this basic principle in Federalist 46, adding "The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject."

Together, Madison and Hamilton actually go a step further in Federalist 20. Rather than acknowledge state sovereignty and argue merely that it is less

[60] Antifederalist 30–31.

important than the welfare of the people, Federalist 20 would not recognize state sovereignty at all:

> [A] sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice, it is subversive of the order and ends of civil polity, by substituting VIOLENCE in place of LAW, or the destructive COERCION of the SWORD in place of the mild and salutary COERCION of the MAGISTRACY [emphasis in original].

To be fair, however, the Antifederalists' opposition to a strong federal government did not rest solely on their apparent view of state sovereignty as an end in itself. They also feared an undue concentration of power in a single national government. They saw the diffusion of power that would result from a true federal-state partnership as a safeguard against government oppression – an especially critical safeguard in a constitution that lacked a bill of rights. Oppression aside, Antifederalist 3 and 60 saw an undue concentration of power in the national government as a recipe for corruption. In defense, Madison, in Federalist 47, asserted separation of powers among the three branches of the federal government as a sufficient safeguard.

The Antifederalists perceived another problem with concentrating too much power in the national government. A country as large, as populous, and as diverse as the United States, they argued, cannot be governed effectively by a single republic – by which they meant a republic with an all-powerful national government. In contrast, they maintained, a confederation of separate, small republics – in this case, states – would be the better model for a country the size of ours.

Why was that so? The various Antifederalist Papers offered several reasons. The vast territories make travel to the seat of government nearly impossible for most people. In addition, the larger the area, and the larger and more diverse the population, the more variation there will be in the laws, climates, customs, opinions, and needs of the different regions; uniform regulation thus becomes both less feasible and less desirable.[61] One of the Antifederalist Papers additionally quotes Montesquieu, who had articulated some of these same concerns and had added one other: "[I]n a large republic there are men of large fortunes, and consequently of less moderation" who will oppress their fellow citizens.[62] (Who am I to question Montesquieu, but it's not clear why that problem would be confined to large republics. Perhaps his notion was not so much that a large republic expands the incentive for oppression, but that the power it adds makes it easier to act on that incentive.)

To the contrary, said the Federalists, it is precisely in large countries that republics work best. What the Antifederalists described as physically distant regions populated by citizens whose diverse needs and preferences merit narrowly tailored laws

[61] See Antifederalist 13, 14, 17, 18, 37, and 47.
[62] Antifederalist 17.

and policies, Federalist 10, for example, saw as warring factions that only a strong national government can control. Moreover, the same Paper argued, larger populations mean a greater number of qualified representatives to choose from and a larger electorate that is both less vulnerable to trickery or oppression and more diverse in its interests. Federalist 14 conceded that these particular arguments assume a federal authority that is limited to certain specific subjects and that the arguments would be weaker if the Constitution were proposing the abolition of state government. (I agree and in this book do not offer either of these arguments to support the abolition of state government.) Finally, as for the difficulty of travel to a distant seat of government, Federalist 14 notes that the problem would be serious if the Constitution were proposing direct citizen participation in the decisions of government; the representative model substantially reduces the number of individuals who would have to travel. Today one might add that physical travel is not only far easier, but in the digital age more frequently avoidable. Whether the states are essential to the optimal diffusion of power is discussed in detail in Chapter 5, Section A.

These broad differences played out in the debates over many of the specific constitutionally enumerated powers. Although there was a consensus that the national government was best situated to provide a defense against foreign invasion,[63] there was disagreement over whether to authorize it to maintain a standing army, especially in peacetime.[64] There was strenuous disagreement over the professed need for the national government to prevent hostilities among states or other internal violence.[65] The opposing parties also clashed over the scope of Congress's powers to tax citizens directly (as opposed to requisitioning the states), borrow, and spend[66]; to regulate interstate commerce[67]; to have the final say in regulating the times, places, and manner of congressional elections[68]; to set uniform rules for naturalization[69]; and to create a federal judiciary.[70]

In contrast, there were a few subjects that received surprisingly scant attention. Neither the Federalist Papers nor the Antifederalist Papers devoted much space to the question of slavery. That subject came up only briefly, in connection with two different constitutional provisions. First, Article I, Section 9, Clause 1 (which expired on its own terms after twenty years and at any rate was superseded by the Thirteenth Amendment,

[63] See Federalist 2–5. Although the consensus was fairly broad, at least one person – Patrick Henry – dissented. He argued that the states didn't need the protection of the national government; the state militias, he contended, could get the job done. See Antifederalist 4.

[64] Compare Federalist 16 and 22–28 with Antifederalist 15 and 23–29.

[65] Compare Federalist 6–10 with Antifederalist 6–7. In fact, the author of Antifederalist 7 (identified as "Philanthropos") contended that, if anything, a strong central government that imposes uniform national laws on the states will make civil war more likely, not less so.

[66] Compare Federalist 12, 15, 21, 23, 30, 32–34, and 43 with Antifederalist 29–35.

[67] Compare Federalist 11, 23, and 42 with Antifederalist 11.

[68] Compare Federalist 43 and 59–61 with Antifederalist 26, 36, 44, 52, 59, and 61.

[69] See Antifederalist 11.

[70] Compare Federalist 22 with Antifederalist 80–82.

which prohibits slavery), reads as follows: "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight …" The framers could not bring themselves to include the words "slave" or "slavery" in the text of the Constitution, but the import of this provision was that the States were free to import slaves until 1808. After that, Congress *could* prohibit the practice.

The few Antifederalists who addressed the issue were divided. On the one hand, both Antifederalist 15 (anonymous) and Antifederalist 16 (by "Alfred") objected to allowing the importation of slaves at all. The former commended Rhode Island for being the only state that had refused to send delegates to the constitutional convention, in part because their leaders saw little chance that the Constitution would prohibit the importation of slaves. On the other hand, in Antifederalist 54, Rawlins Lowndes of South Carolina objected to allowing Congress to prohibit the importation of slaves after 1808. He remarked that slavery can be "justified on the principles of religion, humanity, and justice; for certainly to translate a set of human beings from a bad country to a better, was fulfilling every part of these principles."[71]

The middle ground, a political compromise, was staked out by Hamilton and Madison. In Federalist 8, Hamilton acknowledged that the Constitution wasn't perfect but argued that it was at least better than the Articles of Confederation that it would replace. In particular, he pointed out that the Articles of Confederation gave Congress no power ever to prohibit the importation of slaves, while the proposed Constitution at least would give Congress that power after 1808. In Federalist 42, Madison made a similar point, while calling slavery "barbarism" and expressing regret that slavery would continue for at least twenty years.

Second, Article I, Section 2, Clause 3, originally read: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons … three fifths of all other Persons." As with the 1808 clause, the framers were unwilling to debase the constitutional text with the words "slave" or "slavery." Translated, this provision meant that for purposes of the population estimates that would determine how many House members each state gets, a slave would count as 3/5 of a person.

In Antifederalist Paper 54, "Brutus" condemns the importation of slaves as "inhuman" and calls its proponents "barbarous." He argues that if the southern states are

[71] Campaigning for the presidency, Florida Governor Ron DeSantis in 2023 famously offered an analogous view, claiming that slavery had taught African Americans skills that would benefit them once they were freed. See Kevin Sullivan & Lori Rozsa, The Washington Post, DeSantis Doubles Down on Claim That Some Blacks Benefited from Slavery (July 22, 2023), www.washingtonpost.com/politics/2023/07/22/desantis-slavery-curriculum/. See also Antifederalist 11, where James Winthrop criticized Pennsylvania for contaminating America's "pure race" by admitting diverse foreigners to naturalization. In a veiled reference to Rhode Island's anti-slavery laws, he implied that only Rhode Island had worse policies than Pennsylvania.

going to treat slaves as property, then slaves should not be counted at all for purposes of those states' representation in Congress.

But Federalist 54, believed to have been authored by either Hamilton or Madison (the records are not clear), once again opts for compromise. While referring to the southern states' "barbarous policy of considering as property a part of their human brethren," this Paper takes the position that all the states in the union deserve to have their views reflected in the Constitution. It argues that, given the laws that prevail in the southern states, slaves are in fact *both* persons and property. Those two authors were therefore willing to accept the 3/5 clause as a compromise.

Similarly striking was the almost complete absence of any attempt to justify equal Senate representation for states of wildly differing populations. The Federalist writers were clearly not fans, though they accepted that principle too as a necessary political compromise.[72] That Federalists would begrudge the arrangement is not surprising. Their vision of the new republic was that of a national government whose mission is to directly serve the people, not the states. Granting residents of some states far greater per capita Senate representation than others would be inconsistent with that mission.

What might initially seem counter-instinctive is that the same criticisms were coming from several Antifederalist writers.[73] After all, their commitment to state sovereignty would seem consistent with the notion of giving each state, not each individual, equal Senate representation.

But it was the high-population states whose residents would suffer the greatest disadvantage under this scheme.[74] It was likely no coincidence, then, that both the Federalist and Antifederalist writers who condemned the principle of equal Senate representation were from high-population states. Federalist Papers 22, 37, 43, and 62, which criticized equal state suffrage, were all written by James Madison (from Virginia) or Alexander Hamilton (from New York). Antifederalist Papers 36, 47, and 54, which echoed the same criticisms, were written by Richard Henry Lee (from Virginia), Samuel Bryan (from Pennsylvania), and Robert Yates (from New York), respectively.

The only qualification to add is that Yates ended up striking a more ambivalent tone. In Antifederalist 54, he wrote

> On every principle of equity, and propriety, representation in a government should be in exact proportion to the numbers, or the aids afforded by the persons represented. How unreasonable, and unjust then is it that Delaware should have a representation in the senate, equal to Massachusetts, or Virginia? The latter of which

[72] See, for example, Federalist 22, 37, 43, and 62.

[73] See Antifederalist 36, 47, and 54.

[74] Steven Levitsky and Daniel Ziblatt attribute the zeal for equal Senate suffrage to both slave states and states with low populations. See Steven Levitsky & Daniel Ziblatt, Tyranny of the Minority 151–56 (2023).

> contains ten times her numbers and is to contribute to the aid of the general government in that proportion?

But in Antifederalist 62, he seems to approve of the equal suffrage provision in principle for a confederation, by which he means a country in which the member states retain the bulk of their sovereign powers. The merits of giving each state equal Senate representation are discussed more fully in Chapter 2, Section A.

If the Federalist and Antifederalist Papers are a guide, the Electoral College system was also surprisingly noncontroversial. Federalist 68, authored by Hamilton, extolled the virtues of the people voting for electors rather than for the President directly. Antifederalist 72, authored by "Republicus," preferred direct election by the people. But those were the only mentions of the Electoral College that I could find in either set of papers, and neither paper addressed the risk of the Electoral College producing a President whom the people didn't want, an issue taken up in Chapter 2, Section B.

As these observations about the Federalist and Antifederalist Papers demonstrate, the various authors provided thoughtful and serious analyses on a range of issues raised by the proposed constitution. But they were also flesh and blood human beings, and no discussion of these Papers would be complete without additional reference to the emotions that jump off so many of their pages.

First, deep passions on both sides often led to overheated, ad hominem attacks. To put it bluntly, these battles appear to have reflected genuine animosities.

Hamilton especially did not mince words. In Federalist 8, he derides "the airy phantoms that flit before the distempered imaginations of some of [the Constitution's] adversaries." In Federalist 12 he accuses the objectors of "ill-informed jealousy." In Federalist 84 he dismisses an objection to the Constitution as "the offspring of extreme ignorance or extreme dishonesty." And in his concluding Federalist 85, he refers to "the insincerity and affectation of some of the zealous adversaries of the plan of the convention."

The Antifederalists, for their part, were at least as venomous and a tad more verbose. Antifederalist 1 depicts the Federalists as:

> violent partisans … [who] consist generally, of the NOBLE order of Cincinnatus, holders of public securities, men of great wealth and expectations of public office, Bankers and Lawyers: these with their train of dependents form the Aristocratick combination. The Lawyers, in particular, keep up an incessant declamation for its adoption; like greedy gudgeons they long to satiate their voracious stomachs with the golden bait.

Several other Antifederalist Papers similarly portray the Federalists as aristocrats who look down upon the masses.[75]

[75] For example, Antifederalist 9, 26, and 27.

Other Antifederalist Papers paint the Federalists as either lunatics or tyrants. Antifederalist 6, for example, attacks one of the Federalists' positions as having "sprung from the deranged brain of Publius" [the pen name for the authors of the Federalist Papers]. Antifederalist 40 attacks the "despotic advocates" of the proposed Constitution: "Unparalleled duplicity! That men should oppose tyranny under a pretence of patriotism, that they might themselves become the tyrants. How does such villainy disgrace human nature!"

Apart from the personal insults, both sets of papers reveal profound distrust – of the federal government by the Antifederalists and of the state governments by the Federalists. In Antifederalist 1, an anonymous author sums up his feelings this way: "I had rather be a free citizen of the small republic of Massachusetts, than an oppressed subject of the great American empire." Antifederalist 3 argues that more centralized power means more power in the hands of a few, which in turn increases the potential for corruption. Antifederalist 9 satirizes the expected all-powerful tyrannical central government.

Conversely, Hamilton makes clear that he would not trust the states to attend to the needs of the people. In Federalist 30, he defends the federal taxing power as the only way the federal government can reliably sustain itself. The Articles of Confederation had obligated the states to fund the federal government through requisitions, but too often the states had failed to come through, and under the Articles of Confederation there was nothing the federal government could do about it. Distrust similarly compels Hamilton to defend the "necessary and proper" clause. In Federalist 33, he acknowledges that common sense should make that clause unnecessary but says "the danger which most threatens our political welfare is that the State governments will finally sap the foundations of the Union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction." And in Federalist 80, he expresses various concerns about state courts acting in the parochial interests of their own territories or citizens whenever the opposing parties are two states, one state and citizens of another state, or citizens of different states.

More generally, Hamilton says in Federalist 85 that the proposed constitution gives security to a republican form of government, liberty, and property

> chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections, and on the ambition of powerful individuals in single States, who may acquire credit and influence enough, from leaders and favorites, to become the despots of the people; … and in the precautions against the repetition of those practices on the part of the State governments which have undermined the foundations of property and credit, have planted mutual distrust in the breasts of all classes of citizens, and have occasioned an almost universal prostration of morals.

Madison agrees, arguing in Federalist 45 that, if anything, the states are a greater threat to the federal government than vice versa.

While both the ad hominem rhetoric and expressions of distrust seem equally distributed between the Federalist and Antifederalist Papers, there was at least one kind of personal excess on which the Antifederalist Papers held a clear monopoly – hysteria. Their pages overflow with apocalyptic warnings of the horrors that the proposed constitution would bring. The following sample – only partial, but representative – imparts the flavor:

Antifederalist 26 (in Part I) informs that if you don't pay your federal excise taxes,

> [t]he excise officers have power to enter your houses at all times, by night or day, and if you refuse them entrance, they can, under pretense of searching for excisable goods, that the duty has not been paid on, break open your doors, chests, trunks, desks, boxes, and rummage your houses from bottom to top. Nay, they often search the clothes, petticoats, and pockets of ladies or gentlemen (particularly when they are coming from on board an East-India ship), and if they find any the least article that you cannot prove the duty to be paid on, seize it and carry it away with them; who are the very scum and refuse of mankind, who value not their oaths, and will break them for a shilling.

Moreover, if you

> refuse or delay to pay your taxes, or do anything that they shall think proper to order you to do, they can, and I have not a doubt but they will, send the militia of Pennsylvania, Boston, or any other state or place, to cut your throats, ravage and destroy your plantations, drive away your cattle and horses, abuse your wives, kill your infants, and ravish your daughters.

But that is not all "they" will do. Antifederalist 27 contains this passage:

> [A] standing army, composed of the purgings of the jails of Great Britain, Ireland and Germany, shall be employed in collecting the revenues of this our king and government … And (which is not improbable) should any one of those soldiers when employed on duty in collecting the taxes, strike off the arm (with his sword) of one of our fellow slaves, we will conceive our case remarkably fortunate if he leaves the other arm on. And moreover, because we are aware that many of our fellow slaves shall be unable to pay their taxes, … our federal judges … shall have power, without jury or trial, to order the said miscreants for immediate execution; nor will we think their sentence severe unless after being hanged they are also to be both beheaded and quartered.

According to Antifederalist 29, in addition to the army, "the whole host of revenue officers, will swarm over the land, devouring the hard earnings of the industrious like the locusts of old, impoverishing and desolating all before them."

The power to tax, we are advised in Antifederalist 33,

> will introduce itself into every corner of the city, and country – It will wait upon the ladies at their toilett, and will not leave them in any of their domestic concerns; it will accompany them to the ball, the play, and the assembly; it will go with them

> when they visit, and will, on all occasions, sit beside them in their carriages, nor will it desert them even at church; it will enter the house of every gentleman, watch over his cellar, wait upon his cook in the kitchen, follow the servants into the parlour, preside over the table, and note down all he eats or drinks; it will attend him to his bedchamber, and watch him while he sleeps; it will take cognizance of the professional man in his office, or his study; it will watch the merchant in the countinghouse, or in his store; it will follow the mechanic to his shop, and in his work, and will haunt him in his family, and in his bed; it will be a constant companion of the industrious farmer in all his labour, it will be with him in the house, and in the field, observe the toil of his hands, and the sweat of his brow; it will penetrate into the most obscure cottage; and finally, it will light upon the head of every person in the United States. To all these different classes of people, and in all these circumstances, in which it will attend them, the language in which it will address them, will be GIVE! GIVE!

And in Antifederalist 34, Patrick Henry sums it all up: "The federal sheriff may commit what oppression, make what distresses, he pleases, and ruin you with impunity; for how are you to tie his hands? Have you any sufficiently decided means of preventing him from sucking your blood by speculations, commissions, and fees?" (Give me liberty or give me blood?)

A fitting place to conclude this overview of US federalism's historical origins is with Thomas Paine's Introduction to *Common Sense*: "Perhaps the sentiments contained in the following pages, are not *yet* sufficiently fashionable to procure them general favor; a long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason" [emphasis in original].[76]

Paine thus acknowledges that his reasoned arguments might not "yet" be received favorably, though history would later prove that he had vastly underestimated his powers of persuasion. His hope, quickly realized, was that the already long history of oppression by the English monarchy, together with time for the ideas in his pamphlet to percolate and to feel more comfortable, would spur people to accept his call for independence.

Might a similar hope be expressed that one day – admittedly, not soon – there will be popular sentiment for an America without state government? "Perhaps … a long habit of not thinking [our current federal system] *wrong* gives it a superficial appearance of being *right*." And, perhaps, the passage of further time will gradually make the idea of a two-level, national/local, unitary system more palatable.[77]

[76] Project Gutenberg, note 12.

[77] No, I am not comparing myself to Thomas Paine. I'm just cannibalizing his idea.