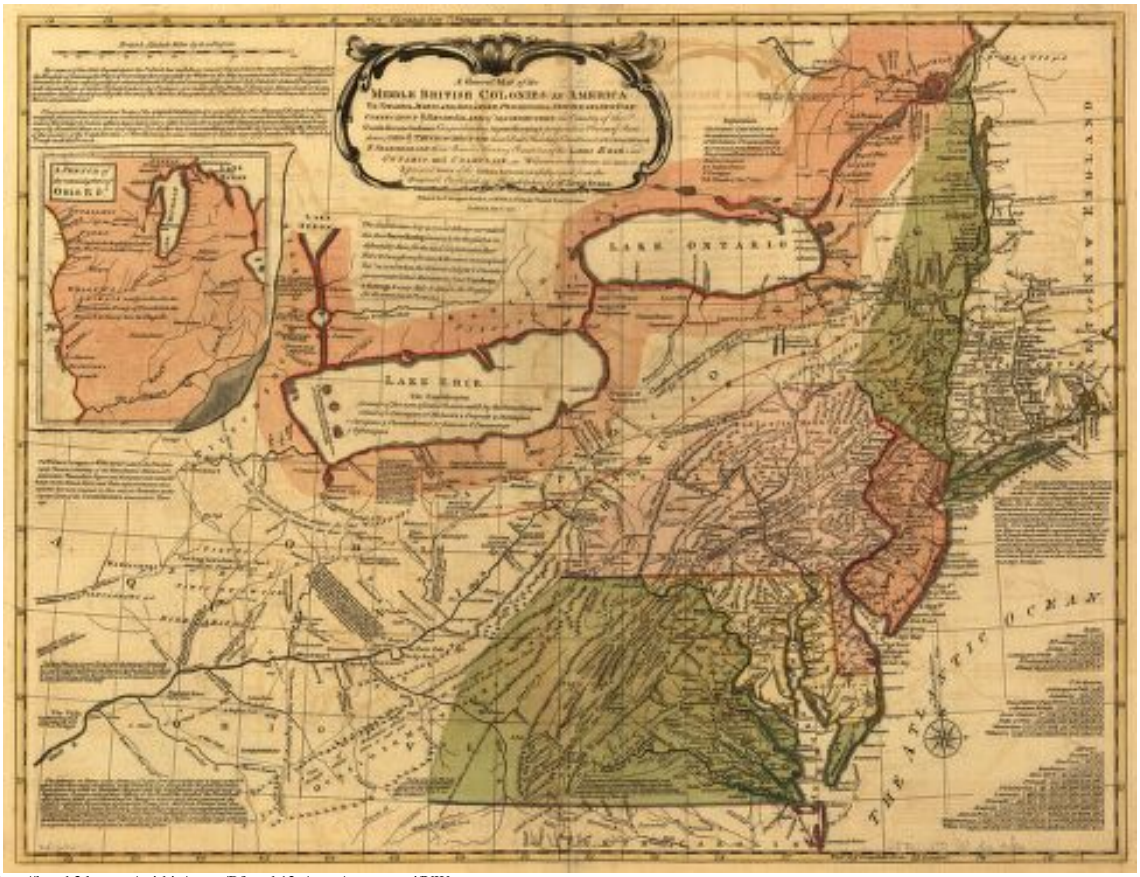
CHAPTER 3

The Process of Federation – 1776-1789

The Thirteen United States: the Declaration of Independence, 1776 – The United States of America, in Congress Assembled, 1777-1781 – The Federal State: The Constitution of the United States of America – The Constitution's ratification: *The Federalist*



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Middle British Colonies in America – 1771

The Thirteen United States: the Declaration of Independence, 1776

The American declaration of independence could be interpreted simply as gesture politics, breaking the ties of loyalty and fealty between colonists and monarch, or as the first step toward a novel form of federalist government. The federation of the new sovereign states also shifted perceptions of the role of the people in choosing who governed them. Although the actual federation did not take place formally until 1789 – when the Constitution of 1787 reached a prescribed level of ratification–, in those early

days of July of 1776 the states were for the first time making joint decisions and declaring themselves to the rest of the world to be a single and unique political body, namely The United States of America. Individual British colonies could have proclaimed their own independence and –as many other colonies in that continent did later on– remain fully sovereign and legally separated from each other. But had they done so, they would not have given future generations the legacy of a structured and unique constitutional process. Breaking entirely new democratic ground, the thirteen British colonies went further and, once independent, started the process of defining a federal United States, process that reached a level of critical mass in June of 1788, at the already described ratification process of "this Constitution for the United States of America." It could not be said that the federalist process had been completed on that date, but rather that a continuous process for development had been established that continues until our time. Day by day, as the need for changes was identified, new Amendments to the Constitution were ratified, or the Supreme Court opinions clarified its meaning. This process has been successful in satisfying every political and social challenge that the United States has faced in the last two hundred and thirty years.

http://upload.wikimedia.org/wikipedia/commons/thumb/1/15/Declaration_independence.jpg/1024px-Declaration_independence.jpg
John Trumbull, 1817-19

The Drafting of the Declaration of Independence

In June of 1776, the delegates to the Second Continental Congress could have recommended to the colonies, as they had done for their state constitutions, that each proceed independently to make its own declaration of independence. Instead, the Continental Congress itself –most probably exceeding its prerogatives (Fioravanti 2001, p. 103)– exercised constituent powers by which it "solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States." Thus the British colonial period was ended and the American process of federalism took its place.

Federal concepts and attempts were not new to the American continent. William Penn, the proprietor of the Pennsylvania and Delaware colonies, was the first man, at the end of the 17th century, to have publicly recognized the many inconveniences of governing multiple colonies, so he proposed to the British authorities "A Brief and Plain Scheme how the English Colonies in the North parts of America, viz.: Boston, Connecticut, Road Island, New York, New Jerseys, Pennsylvania, Maryland, Virginia, and Carolina may be made more useful to the Crown, and one another's peace and safety with an universal concurrence" (see the original in Grau 2009, vol. II, p. 568). The "scheme" of William Penn was, simply, to set up a congress headed by a

commissioner appointed by the King and where representatives of the several colonies would jointly find better solutions to common problems. (See *Penn's Plan* in Ibid., pp. 567-569.)

Half a century later, motivated by the requirements imposed on the colonies by the French and Indian War, Benjamin Franklin proposed in 1754 a "Plan of Union Adopted by the Convention at Albany," commonly known as "The Albany Plan." (The text of the *Plan* is to be found in Ibid., pp. 663-671.) This Plan proposed to create, by an Act of the British Parliament, a general government for all the colonies, to be

> Benjamin Franklin (1706-1790) was an American politician, diplomat, publisher, inventor, musician and writer. Born in Massachusetts, within a humble family, he was self-taught, since he had to leave school at the age of 10 years because his father could not pay the teacher. Franklin worked first as a printer apprentice. At the age of 17, he ran away to Philadelphia and then migrated to London, where he worked as a typesetter. After returning to Philadelphia, at age 21 he started The Pennsylvania Gazette, and at 25 he created the Library Company of Philadelphia. Although he never patented any of them, several inventions are attributed to Franklin, such as the lightning rod and the bifocal lenses. In 1751, Franklin was elected as Representative to the Pennsylvania Assembly and, three years later, he was part of the delegation sent to Albany, where he presented his Plan of union of the colonies. In 1765, Pennsylvania colonists sent him to London, to sue William Penn's heirs for the proprietorship of the colony, returning to America ten years later, when the Lexington and Concord battles had already been fought. As a delegate to the Second Continental Congress, Franklin was part of the committee that drafted the Declaration of Independence. In 1776, he was sent as the Ambassador to France of the newly independent states, remaining there until 1785. After coming back from that post, he was elected President (governor) of Pennsylvania, an office he held until 1788. In 1787, Franklin was one of the delegates for Pennsylvania to the Constitutional Convention in Philadelphia, but owing to his age and medical condition, his participation was mainly testimonial. Some 20,000 persons attended his funeral in 1790.

administered by a President-General, appointed and paid for by the Crown, and a Grand Council, chosen by the representatives of the people of the several colonies. The number of counselors would have been proportional to the population of each colony.

This British President-General would be advised by the Grand Council and his powers would have related mainly to the dealings with the Indian tribes: to sign treaties, make peace, declare war, regulate trade, and undertake the purchase of lands for new settlements. As with William Penn's Plan, the British Parliament considered that Franklin's Plan was not conducive to the best interests of the Kingdom.

The next factor persuading the colonies that they should make an urgent effort to work together was the publishing by the British Parliament of the Coercive Acts (already identified in the previous chapter). The blockade of Boston Harbor and other punitive measures included in the Acts convinced the colonists that joint action had become necessary to defend themselves from what they considered to be an attack by the British Parliament on their legitimate rights. To that end, in 1774 all the colonies except Georgia sent delegates to Philadelphia to meet in a convention that they called the (first) Continental Congress. Colonists in Georgia were dependent on British troops to protect them from attacks by both native Indians and Spaniards, so they did not want to do anything to upset the British government.

The Continental Congress decided that all the colonies should boycott imports from Great Britain (a boycott that was actually never fully implemented). In addition, Congress sent a Petition to the king, asking him to revoke the Coercive Acts and to proclaim a Declaration of Rights in favor of the colonists. The delegates agreed to meet the next year if the differences reported in their petition had not been resolved to their satisfaction. But by then, as it has been mentioned, those differences had already become the cause of an armed confrontation between the British troops and the American minutemen. The Continental Congress sent then new Petitions to the King, asking him again to repeal the British Acts that had caused the conflict and to stop the

> Richard Henry Lee (1732-1794) was an American politician. Born in an aristocratic and influential Virginian family, in 1757 he was elected justice of the peace and Representative to the House of Burgesses. When in 1769 the Royal governor dissolved the House, Lee met in a tavern with other radical representatives to plan how to boycott British imports. In 1774, Robert Henry Lee was elected delegate to the Continental Congress, and in 1776 he and John Adams proposed to declare formally the independence of the colonies. Lee considered that the federal Constitution was taking away the sovereignty of the new states and he was against ratifying it, but in 1789 he was elected U.S. Senator for Virginia.

attacks of the British troops on the citizenry. Instead the King responded to those Petitions with A Proclamation for Suppressing Rebellion and Sedition, thereby adding further heat to the dispute between king and colonists. In the following year, on the 4th of July, the Continental Congress proclaimed The unanimous Declaration of the thirteen united States of America.

The reader will remember from the previous chapter that in 1775, at the beginning of conflict between Great Britain and the colonies, most of the British officials responsible for governing the colonies, including their governors, abandoned their duties and fled the country, leaving the colonists without government institutions. In consequence, several of the colonial Assemblies requested that the Continental Congress issue its recommendation to resolve the problem of the British dereliction and the consequent anarchy they faced as a result. In May of 1776, Congress "Resolved, That it be recommended to the respective assemblies, and conventions, of the united colonies, where no government sufficient to the exigencies of their affairs has been heretofore established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general." (Proceedings of the Conventions of the Province of Maryland, p. 139.) On the 7th of June, several delegates presented motions, not for the establishment of acting governments, but for a joint declaration of independence.

During the first months of 1776, the declaration of independence was a frequent subject of debate on the floor of the Continental Congress. On the 10th of June, Richard Henry Lee of Virginia and John Adams of Massachusetts proposed to elect a committee to prepare a declaration of independence in the following terms: "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" (Grau

2009, vol. III, p. 112). The committee was formed by Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman and Robert Livingston, and tasked Jefferson, who was a quiet man but known for his rhetoric ability, with writing the draft of the

> Thomas Jefferson (1743-1826) was an American erudite, politician, diplomat, and statesman, and 3rd President of the United States. Born in one of the most influential families of Virginia, in 1762 he graduated in Laws from the College of William & Mary, establishing a prosperous law practice. In 1769, Jefferson was elected as a Representative to the House of Burgesses, and in 1774 drafted several resolutions against the Coercive Acts passed by the British Parliament. Elected in 1775 as one of the delegates to the Second Continental Congress, in 1776 he was the main drafter of the Declaration of Independence. From 1779 to 1781, Jefferson was the governor of Virginia, and in 1784 he was sent as Ambassador to France, where he remained until 1789, not being able to participate in the Constitutional Convention. George Washington, in his first term as President, appointed Jefferson Secretary of State. From 1797 to 1801, during the presidential term of John Adams, Jefferson was elected Vice-President. The main candidate of the Democratic-Republican Party, Jefferson won the Presidential election of 1800, serving two terms, until 1809. During his Presidency, the United States carried out the "Louisiana Purchase" from France. Jefferson organized the Lewis and Clark transcontinental expedition. Almost bankrupt as a result of the poor administration of his estate, in 1815 Jefferson sold his library of more than 6,000 volumes to the Library of Congress, to replace the books that had been burned by the British during the War of 1812. Jefferson died the 4th of July of 1826, a few hours before John Adams did.

declaration. The following day Congress organized two more committees, one to draft the form of federation to be adopted by the colonies, and the other to prepare the treaties the new independent states should sign with the foreign powers. On the 12th of June, the Continental Congress organized a fourth committee, named "A Board of War and Ordnance." In less than a month the movement toward independence had become unstoppable.

On June 25th, the delegates from Pennsylvania requested a vote to declare the United Colonies an independent state. Three days later, on June 28th, the committee

> Roger Sherman (1721-1793) was an American politician, attorney and judge. He was born in Massachusetts but after the death of his father moved to Connecticut, where he opened a store. Self-taught, in 1754 Sherman was admitted to the Connecticut Bar. The following year he was elected to the House of Representatives of Connecticut and, after 1766, he became a member of the Governor's Council, holding that office until 1785. At the same time, Sherman was elected justice of the peace and subsequently became judge of the court of common pleas, before finally becoming justice of the Superior Court of Connecticut. Sent as a delegate to the Continental Congress, he was one of the five members of the committee who drafted the Declaration of Independence. After having a very active part in the Constitutional Convention of Philadelphia, in 1789 Sherman was elected Senator for Connecticut, holding the seat until his death.

drafting the Declaration of Independence submitted its proposal. On July 1st, the delegates from Maryland declared themselves for independence, and that same day the whole Continental Congress organized itself into a full committee to decide the wording

of a motion for independence. Next day, a resolution was adopted declaring the colonies to be free and independent states. On the 4th of July, after striking out the most radical paragraphs of Jefferson's original draft, the delegates voted the final terms of The unanimous Declaration of the thirteen united States of America. A copy on paper was made, and John Hancock signed it as President of the Continental Congress, and printed copies were sent to the several assemblies, conventions, and committees

> John Hancock (1737-1793) was an American businessman and politician. Born in Massachusetts, in 1754 he graduated from Harvard University, and in 1760 he traveled to London to take care of the commercial interests of his uncle. In 1766 Hancock was elected a member of the House of Representatives of Massachusetts and in 1774 delegate to the Second Continental Congress. When he reached Philadelphia, after escaping the British attack on the town of Lexington, Hancock was unanimously elected President of the Continental Congress, holding that seat until 1777. As President of the Congress, Hancock's signature appears conspicuously in the parchment of the Declaration of Independence. After the Constitution of Massachusetts was ratified in 1780, John Hancock was elected governor, resigning in 1785. In 1787, in the middle of uprisings by the farmers of Massachusetts, Hancock was again elected governor, holding the office until his death.

charged with responsibility for the safety of the new states, as well as to the Continental Army generals. The Declaration was read publicly in towns and cities, and printed in many of the newspapers of the time. (It is said that George III learned of the Declaration through the newspapers, before the official documents arrived in England.) Although the parchment copy is dated as "In Congress, July 4, 1776," it was actually completed later and signed on August 2, when signatures of some delegates who had not been present on the 4th of July were added.

The unanimous Declaration of the thirteen united States of America is, as the text itself explains, a justification of the drastic measure taken and the vehicle to present a just cause to the rest of the nations since "a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation" (Ibid., p. 108). To that end, the rebels made an exhaustive account of all those deeds of the British monarch that, according to them, made of him a tyrant and, thus, justified the withdrawal of fealty to the Crown due by the colonies in their Charters. Reflecting the feelings of the time, the new constitutions of South Carolina, Virginia and New Jersey, which were written prior to the actual Declaration of Independence, include as Preambles an account of the tyrannical British deeds. After the Declaration, all the other states, except Massachusetts and Delaware, included in their constitutions similar accounts in more or less detail. In the particular case of New York, the drafters literally copied the Declaration into the Preamble of its constitution.

In fact, the Declaration of Independence includes very few legal clauses. Its very famous paragraph "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," is undoubtedly an excellent example of rhetorical literature, but above all it is just an expression of general principles of natural law. The only legal relevance of the document comes in its last paragraph, where the authors "solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are

Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved" (Ibid., p. 112), which is the actual declaration of independence. The other legally important wording in the Declaration is the formal use for the first time of the title United States of America, instead of the one used by the Continental Congress up to that time of United Colonies.

This detail is the really relevant point of interest here. Contrary to subsequent wording in the *Articles of Confederation*, in the Declaration of Independence the Continental Congress makes no reference to thirteen independent states that subscribe a common treaty, but it rather makes a unanimous Declaration of thirteen United States, and all of them mutually pledge the support of this Declaration. Thus, it seems that the intention of the delegates was to speak as a single, federated voice, and not as a chorus of thirteen independent little nations.

"The United States of America, in Congress Assembled" – 1777-1781

As we saw earlier, the Second Continental Congress set up several committees. The first was to draft the Declaration of Independence, and the second to decide the kind of federation that the newly independent states should take. However, the original mandates brought by delegates from the several states to the Continental Congress in Philadelphia, authorized them exclusively to agree with the delegates of other colonies over such measures exclusively necessary to reconcile the colonies with the King and the British Parliament. Consequently, the delegates were exceeding their mandate when they solemnly publish and declare the unanimous Declaration of independence. Any other act of government taken up by the delegates would have been a further violation of the prerogatives granted to them.

Nevertheless, all the delegates clearly understood the need to formalize the very tenuous link so far established among the new states and that, as separate states, all of them were highly vulnerable to the attacks by the powerful British Army. United, as it happened with their adopted symbol of the Roman fasces, they would prove to be unbeatable.

On June 11th, 1776, the Continental Congress set up a committee formed by a delegate from each colony whose task was to write the draft of "certain articles of Confederation," which would be used upon completion to administer those common concerns of the several states. The initial draft of the *Articles of Confederation* was ready by November of 1777, and copies were sent to each of the state legislatures to be revised and modified as they considered fit. Following countless changes, the final version of the document was completed, and finally the *Articles of Confederation* came into force the 1st of March of 1781, after every one of the thirteen estates had ratified them. The next day, the new "Congress of the United States" was inaugurated, and John Hanson was elected its President. The *Articles* and the Continental Congress were in force until the 4th of March of 1789, when the latter was adjourned permanently. The same day, the new federal Congress, established under the Constitution of 1787, immediately replaced it.

Properly, the *Articles of Confederation* does not describe any particular frame or

"form" of a structured government. Essentially, they describe only a common instrument of representation for the new states, named Congress or the United States in Congress assembled. In that forum, an undefined number of delegates could meet for an undefined period of time. The only specific requirement established is that the delegates should meet at least once "on the first Monday in November, in every year."

Within that Congress was another institution, named "A Committee of the States," to sit in the recess of Congress and with only a limited number of its powers

> John Hanson (1721-1783) was an American merchant and politician, Born in Maryland, into a humble family, he was a self-taught person. Hanson reached several government offices during the colonial period as well as after the independence. In 1779 he was elected as a delegate to the Second Continental Congress, and in 1781, once the Articles of Confederation had been fully ratified and its Congress assembled, he was elected President. In very loose terms, John Hanson could be considered the first President of the United States, although his office lacked the executive powers given to the Constitution's President. After serving the one-year term of his presidential mandate, he retired and died shortly after.

delegated. One of the powers withheld was the right "to appoint one of their number to preside." It is not clear from the text whether this President was exclusively to preside over Congress or if his authority extended further. In any case, the *Articles* only specified that his mandate was to be "no more than one year in any term of three years," without determining any functions specifically assigned to his office.

The remaining of the document lists a number of "exclusive rights and powers," either attributed to Congress, or barred to the individual states for having been transferred to Congress. This transfer or limitation of powers required "the consent of nine states" (which was, if not contradictory, at least confusing, since the exercise of the powers required unanimity).

Rather than a constitution or the framework of a government, The *Articles of Confederation and Perpetual Union* was, in reality, just an internal treaty signed by thirteen independent states, in which none of them relinquished any part of their sovereignty. The document simply conferred on a representative body –namely the United States in Congress assembled– a number of tasks considered better managed from a common, joint, and coordinated office. In reality, the *Articles* did not even achieve that goal of coordination, but simply, as its Article III declared, the "States hereby severally enter into a firm league of friendship with each other."

Although there are significant conceptual and fundamental differences between the *Articles* and the present American Constitution, a good number of political elements were drafted almost in identical terms. Thus, for example, the style "The United States of America," which appears in the first article and it was anticipated in the Unanimous Declaration, is used repeatedly in the Constitution. Article v of the *Articles* establishes that "the members of congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendence on congress, except for treason, felony, or breach of the peace." The parallel is to be found in section 6 of the first article of the Constitution, which states the protection for the members who "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their

respective Houses, and in going to and returning from the same."

Some of the limitations imposed on the states by the *Articles* were also included in the Constitution. In article VI of the *Articles*, for example, "No state, without the Consent of the united states in congress assembled, shall send any embassy to, or

James Madison (1751-1836) was an American politician and 4th President of the United States (1809-1817). Born in Virginia, he graduated in 1771 from the College of New Jersey (nowadays Princeton University). Elected in 1776 to the Virginia House of Burgesses, Madison contributed to the drafting of the Virginia Constitution. In 1777 he was elected a member of the governor's Council, where he met Thomas Jefferson, developing a profound friendship with him. In 1780 he was elected delegate to the Continental Congress, taking side with those proposing a strong central government. In 1787 he was part of the Constitutional Convention of Philadelphia. Madison is considered the father of the Constitution because of his major advocacy of its principles. Madison also drafted the Bill of Rights and wrote several of *The Federalist* papers in support of the Constitution. In 1790 he organized, with Thomas Jefferson, the Democratic-Republican Party. During his appointment from 1801 to 1809 as Secretary of State, he was the defendant in the *Marbury v. Madison* case, in which Chief Justice John Marshall stated the constitutional doctrine of the judicial review. In 1808 he was elected President of the United States, and during his mandate declared the War –of 1812– against Great Britain, in which British troops captured the federal capital, Washington, DC, and burned down the Capitol and the White House. After his second term, James Madison retired from politics and became a farmer.

receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King prince or state." The Constitution, in Section 10 of Article I, is more concise but equally categorical: "No State shall enter into any Treaty, Alliance, or Confederation." Another important prohibition in the *Articles* is that which forbids the "grant [of] any title of nobility," and this is restated in the Constitution as "No Title of Nobility shall be granted by the United States."

The *Articles* and the Constitution are unanimous in forbidding "any person holding any office of profit or trust under the united states, or individual state from, accepting any present, emolument, office or title of any kind whatever from any king, prince or foreign state," although the Constitution allows for the specific "Consent of the Congress" allowing the united states some freedoms. Among the exclusive powers granted to Congress in both documents are the powers to coin money and regulate its value, to fix the standards of weights and measures, or to establish post offices and post roads.

A few years after the ratification of the *Articles of Confederation*, a number of deficiencies were identified that were making it very difficult to govern the confederation and that put its survival at significant risk. Among those deficiencies, the most critical were the lack, firstly, of an executive power to enforce the few laws passed by Congress, and, secondly, of a judicial power to resolve the controversies arisen among the different states. Moreover, Congress could not impose taxes and had no mechanism to exact moneys for the common treasury. Consequently, the only source of funds available to the confederation to repay its common debts was the voluntary contributions from the states. Once the War of Independence ended in 1782, the states

were extremely reluctant to make any such contributions.

Additionally, in many cases the tasks of Congress became inoperable because it was not compulsory for its members to attend the sessions, and yet to approve laws required unanimity. That situation meant that international treaties, negotiated by the foreign ministers or ambassadors, were never ratified by Congress. The fact was that any state could block any decision of Congress. These deficiencies resulted in a lack of legal certainty, and a number of states began to complain frequently about the system in place.

However, not everything was a negative experience during the eight years of rule under the *Articles of Confederation*. Congress was able to pass in 1784 the Resolutions for the Government of the Western Territory (Ibid., pp. 491 ff). The following year it approved a Land Ordinance that set the basis for the method of surveying public lands to today; and finally, in 1787, "the United States of America, in Congress assembled" passed An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio (Ibid., pp. 593 ff), thereby solving several territorial disputes pending among the states and making possible the first westward expansion of the United States.

The Federal State: The Constitution of the United States of America

The deficiencies of the confederation under the *Articles* caused many Americans, particularly the more affluent and influential, to seriously consider the need for severe modifications to the *Articles of Confederation* or even a radical change of the then form of government.

A serious weakness of the confederation was its inability to properly regulate interstate commerce in spite of the direct mandate in the *Articles* that "the people of each state [...] shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively." With the goal of addressing the difficulties of such commerce in general, and to resolve its particular disagreement with Maryland over the commercial use of the Potomac River, Virginia proposed a convention to take place in 1785 at Annapolis, the capital of Maryland. On the scheduled date for the meeting the delegates of eight of the thirteen states failed to make an appearance, including those of Maryland, residents in the very same city where the convention was taking place. The delegate for Virginia, James Madison, wrote a report entitled Proceedings of Commissioners to Remedy Defects of the Federal Government. He sent it to Congress, which was sitting at the time in the city of New York, and copies went to the executives of several states. In the report, Madison recommended that Congress should call another convention to identify the specific changes to the *Articles* needed to improve the governing of the confederation. He even proposed the time and place for the meeting: "at Philadelphia on the second Monday in May next."

Any "alterations" to the *Articles* would be extremely difficult to enact, since its article XIII required any change to "be afterwards confirmed by the legislatures of every state." The *Articles* did not include provisions for popular referenda or to allow Congress to endorse any bill or proposal that had been formulated by extraneous

conventions. In this case, however, claiming that regular government businesses would not allow sufficient time for such a task, the delegates accepted Madison's proposal and authorized the Constitutional Convention with the single and specific goal of revising – not eliminating!– the *Articles of Confederation*.

"On the second Monday in May next," that is of 1787, the required quorum of delegates could not be mustered in Philadelphia to initiate the Convention; but on the 25th of that month, quorum was reached, and the Convention was inaugurated. After unanimously electing George Washington as president of the Convention on the 29th of May 1787, the actual debates begun. Sessions were held behind closed doors and under oath of secrecy. The details of what happened at that Convention have reached us mainly through the notes taken by James Madison, the only delegate to attend the meetings each and every day.

http://en.wikipedia.org/wiki/File:Scene_at_the_Signing_of_the_Constitution_of_the_United_States.jpg
Howard Chandler Christy, 1940

Signing the Constitution – 1787

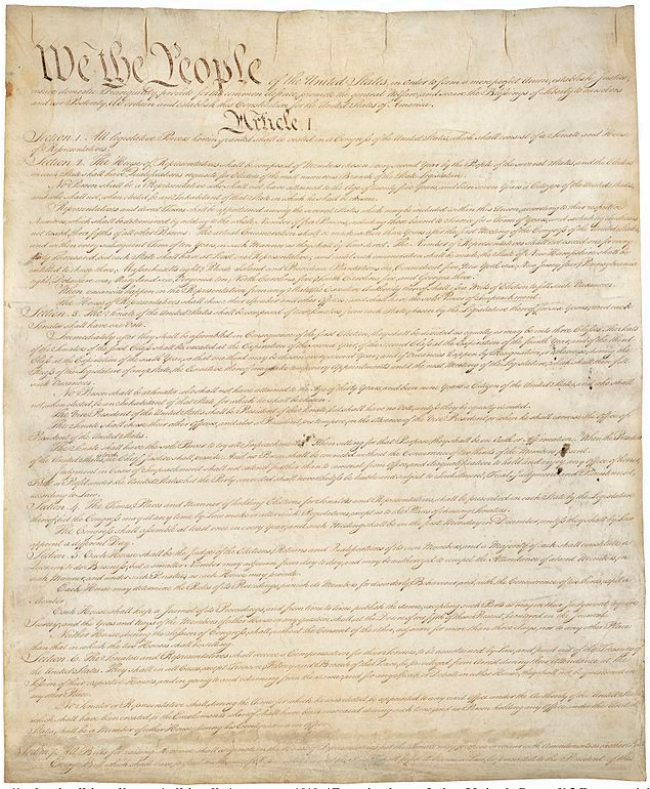
As soon as the debates began, the Virginia delegation tabled a plan that offered not an amendment to the *Articles*, but rather described a new form of government. It would introduce a bicameral legislature of proportional representation (instead of the existing mono-cameral structure and without the proportionality of delegates included in the *Articles*). It was to have a national executive power with one or more supreme courts as well as the appropriate and necessary number of inferior courts (institutions all missing in the *Articles*).

A few days later, after giving the Virginian proposals some thought, the delegation of New Jersey made a different proposal, featuring what was a proper revision of the *Articles*. The core of the following debate focused on the type of government to be chosen. Virginia's proposal seemed to favor the large states, such as Virginia itself or the Carolinas, while New Jersey's proposal seemed to favor the smaller states, such as New Jersey or New Hampshire. Rhode Island, the smallest state of all, had not sent delegates to Philadelphia believing that, no matter what the outcome was, the new arrangement would be more disadvantageous for them than the current *Articles*.

The solution to the dilemma came from the delegation of Connecticut, proposing that the representation in one of the Houses was to be proportional to each state's population, while in the other House each state would have an equal representation, regardless of any other consideration. Connecticut's proposal, however, did not solve all the issues, since the abolitionist states did not want slaves to be counted in those

proportions, while the slave-holding states want them to be calculated as part of their population. Eventually the Convention reached a compromise that was to count each slave as just three-fifths of a person.

On 17th September 1787, less than four months after the inauguration of the Convention, the text of the new Constitution was finished. Of the total number of 55 delegates attending the proceedings in Philadelphia, 42 were also present at the signing of the Convention. Three delegates, namely Elbridge Gerry from Massachusetts, Edmund Randolph and George Mason from Virginia, refused to sign the final document at the last moment. The engrossed copy has the signatures of the other 39 delegates. Reasons given by the thirteen delegates who had departed the Convention earlier varied. Some delegates had left for personal reasons, but others thereby registered their opposition to the decisions of the majority. As example, early in June the delegates Robert Yates and John Lansing from New York left Philadelphia alleging that nothing useful would come from the Convention.



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Original Copy of the Constitution of the United States

Article VII of the new Constitution regulated the procedure for its adoption, requiring that at least nine states had to ratify it. That condition was met on June 21st 1788, nine months after the Convention in Philadelphia had closed, when New Hampshire approved it. The old Continental Congress was suspended in October of 1788 and formally disbanded on the 4th of March of 1789, when the new Congress of the United States of America was inaugurated. Only Representatives of eleven of the thirteen states were present that day because North Carolina and Rhode Island had not yet ratified the Constitution. On the 6th of April, George Washington was elected President and John Adams Vice-President.

Under the guidance of these two men, on the 24th of September, Congress passed, as mandated by Article III of the Constitution, An act to establish the judicial courts of the United States. This document gave form to the Supreme Court of the United States and established 16 inferior courts. The three supreme powers of the federal government were, thus, fully established.

The Constitution of the United States fixes the basic principles on which the federal government rests, as well as imposing limits to the power of that government. The constitutional text is structured very simply, having only seven articles. The first

three describe the form of government, and the fourth the terms of the federal relationships, both among the states and between these and the central government. The remaining three articles are dedicated to general procedures, among which, almost hidden in the text, is the Supremacy Clause. This establishes the fundamental principle under-pinning the Constitution, the U.S. treaties, and the federal laws as "the supreme law of the land." Federal law, thus, over-rides the state laws, removing de jure state sovereignty. The Supremacy Clause established the fundamental framework for the federal future of the country.

The first Article describes the structure of the legislative branch or "Congress of the United States," which consists of two Houses: the House of Representatives, proportional to the population of each state; and the Senate, of equal representation for all the states regardless of size or population. This is, by far, the longest article, and illustrates in sufficient detail the composition of the Houses, the requirements to be elected as a Congressperson, the powers and limits of Congress, and the distribution of spheres of authority between the national central government, and the governments of the states.

The second Article is dedicated to the executive branch and describes, although in much less detail than the previous article, its organization, including not just the roles of President and Vice President but of "all other Officers of the United States" and some of their functions. Following Montesquieu's model closely, most of the functions described in this Article are dedicated to foreign relations with other nations. Through the doctrine of implied powers, deduced from the Necessary and Proper Clause in Section 8 of Article I, Congress was able to expand upon the "limited powers" granted in the Constitution. Alexander Hamilton was the first individual who developed this doctrine, saying "[t]hat every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution, or not immoral, or not contrary to the essential ends of political society" (Hamilton, "Opinion as to the Constitutionality of the Bank of the United States, February 23, 1791," p. 446). The doctrine was reiterated again in *The Federalist*, this time by James Madison, in the following terms: "there can be no doubt that all the particular powers requisite as means of executing the general powers would have resulted to the government, by unavoidable implication" (Hamilton-Jay-Madison, p. 249). By that implication, the executive power –i.e., vested in the President of the United States–exercises today many more powers and functions than those explicitly listed in the constitutional text.

The third Article succinctly describes the general nature of the judicial power and the extent of its jurisdiction, leaving most of the details of its institutions to the discretionary powers of Congress. Nevertheless, the Constitution pre-established "one supreme Court" and certain limits to its jurisdiction. In 1789, Congress passed, as already mentioned, An act to establish the judicial courts of the United States, and with it and the many Federal Judiciary Acts that followed, Congress complied with the mandate to "ordain and establish" and completed those details originally missing in the constitutional text.

Hamilton had qualified the Judicial Power as "the least dangerous" branch of government because it was lacking the sword of the executive and the purse of the

legislative (Ibid., p. 428). In 1803, Chief Justice John Marshall formally recognized in the *Marbury v. Madison* resolution the doctrine of judicial review and, in the opinion of some Anti-federalists, the judiciary came to "be exalted above all other power in the government, and subject to no controul" (Storing, p. 182. *Brutus Essay XV*, 20 March 1788). Actually the change was not as radical as *Brutus* had predicted, but it is unquestionable that, after Marbury, the judiciary definitively acquired a much larger influence in the governing of the nation than could strictly have been read in the constitutional text.

The fourth Article orders the states to recognize each other's records and judicial proceedings; extends to all citizens the "Privileges and Immunities" given in the several states; commands to deliver the fugitives of justice to the state having jurisdiction over the crime; recognizes the admission of new states to the Union, but forbids the secession within any existing state; guarantees to every state "a Republican Form of Government" and protects them against invasion and any "internal violence." This Article acknowledges implicitly the legality of slavery, by ordering that run-away slaves be returned to their owners. (The Thirteen Amendment later eliminated this last clause.)

The fifth Article fixes in detail the process to be followed in modifying the Constitution. As already noted, its extreme rigidity and inability to be changed was one of the major problems of the *Articles of Confederation*. Any "alteration [had to] be agreed in a congress of the united states, followed by its confirmation in the legislatures of every state." Clearly only non-controversial changes would achieve the unanimity necessary for them to be adopted. The new Constitution, on the other hand, spelled out precisely the method of adding to it any change or modification. Originally the Constitution contained no provision for a deadline in the ratification processes; but in 1919, through the Eighteenth Amendment, Congress included the possibility to limit in some cases the ratification period (normally to seven years).

The sixth Article recognizes the validity of all previous debts and contracts incurred by the previous Congress (under the *Articles of Confederation*), and orders an "Oath or Affirmation, to support this Constitution" to be taken by all Congresspersons as well as "all executive and judicial Officers." The Article explicitly prohibits any religious test for any of the federal positions (though not necessarily for the state offices!). In between these two almost-innocuous clauses (the recognition of previous debts was the minimum of legal certainty for the United States to be recognized by the foreign powers, and the Oath of Loyalty was an ancient and common requirement in a time when personal honor still counted) is the fundamental Supremacy Clause, already mentioned.

In the *Articles of Confederation*, the first proclamation made, just after announcing the style of the new confederation, was that "Each state retains its sovereignty, freedom, and independence." The issue of the sovereignty of the individual states had been highly controversial, dividing the nation into federalists and anti-federalists, and it was to remain latent until the Civil War, in 1861. On the other hand, state sovereignty and a powerful central federal government were incompatible. To express as an opening line of the new Constitution the supremacy of the federal Constitution, U.S. treaties, and federal laws over the state laws or constitutions, would have been to call for its premature defeat. On the other hand, without that clause the

rest of the Constitution was hardly worth the paper it was written on. In 1787 the Philadelphia Convention dedicated very little time to the clause. Already in the New Jersey plan a clause had been included that made federal laws related to a particular state the supreme law in that state. One month later, a new phrasing of the same clause was approved *nemine contradicente*. At the beginning of August the draft of the new Constitution included the supremacy clause as a separate article. By the end of that month, John Rutledge (future Chief Justice) proposed a new phrasing that was accepted without further arguments, also *nemine contradicente*. The differences between that and the final version were that the "supreme law" was then "of the several States and of their citizens and inhabitants," and now it is simply "of the Land" and the separate article had become a simple paragraph embedded in between two other clauses in the Article. So with minimum debate, the sovereignty of the states had become subordinated to the federal Constitution "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Finally, in only 24 words, the seventh Article included the ratification process needed for the Constitution to be adopted and go into effect.

The Constitution of the Unites States therefore represents a number of principles and characteristics that have since become a requirement in every constitution claiming to have universal acceptance. First of all –and above all– the Constitution is a written document. This means that the literal meaning of the text becomes an essential factor to guarantee legal certainty. No longer is there a need to go back to ancient customs and traditions retained in the memory of elderly people to determine the prerogatives and duties of the governor. Then, the Constitution has to be drafted by a constituent convention (in this case the Philadelphia Convention) and has to be ratified by the people (in state conventions and referenda). It specifies powers and determines limits to authority; hence even the punctuation of the text is as relevant to convey the intention of the law as the words themselves. That must be a rigid text, difficult to change through amendments and requiring qualified majorities to approve them; but, unlike the *Articles of Confederation*, which were unable to adapt to a changing reality and therefore doomed to disappear, it should not be inflexible.

Although the main objection to its ratification was the lack of a declaration of rights, the original text of the Constitution holds a number of individual rights, declared to limit the powers of government, such as active and passive suffrage (Secs. 2 y 3, Art. I, and Sec. 1, Art. II), the right of Habeas corpus (Sec. 9, Art. I), intellectual property rights (Sec. 8, Art. I), the right to a trial by jury and in the vicinity of the community in which the crime was committed (Sec. 2, Art. III), and the equal protection of the states (Sec. 2, Art. IV).The structure of its government is based on the separation of three powers. The executive is monocratic, the legislative bicameral, and the judiciary internally independent. It is a republican system, in which government officials are elected democratically in frequent elections, and with the exception of judges, who "shall hold their Offices during good Behaviour," must be replaced periodically. It is a balanced democracy, in which the majority rules, but not over the rights of the minority. That balance is reached through the bicameralism of the legislative and the "negative" –the veto power– of the executive, over which stands a constitutional review by the judiciary. Thus is provided a system of checks and balances

among all the branches of government.

The Constitution is the supreme law of the land, but above it and above all is the ultimate will of "We, the People," in whom is vested all sovereignty. According to Prof. Fioravanti, it is an unequivocally democratic constitution, resting firmly over the constituent power of the American people, who in themselves cannot be considered a posthumous product of the traditional mixed constitution. To the Americans, there are no longer "forces" and "realities" to mend, but only States to join through the federal bond, and federal powers to legitimize through the agreement of citizens. (Fioravanti 2001, p. 106).

The Constitution's ratification: *The Federalist*

Once submitted to the states, the earliest ratifications of the Constitution were reached quickly and positively. Two months after submission, Delaware, Pennsylvania, and New Jersey had ratified the Constitution either unanimously or by a very large majority. Shortly after, however, several states objected to its text, mainly because it lacked a Bill of Rights. One of the states presenting the strongest opposition was New York. Although all that was needed for the adoption of the Constitution was the ratification by nine states, the survival of the new federation depended largely on the inclusion of New York because of its size, its large population, and its economic strength.

> Alexander Hamilton (1755?-1804) was an American lawyer, soldier, banker and politician. Born in the British colony of Nevis Island, in the Caribbean, he was sent to study at King's College (now Columbia University), where he graduated in a single year. When the American Revolution started, Hamilton joined the American troops and shortly after became George Washington's aide. In 1782 he was elected delegate for New York to the Continental Congress. The following year, after three arduous months of self-tuition, Hamilton was admitted to the New York Bar, where he practiced law very successfully. In 1784 he founded the Bank of New York (the oldest American bank in operation today). In 1786 Hamilton went to the Annapolis Convention where he met James Madison, contributing to the report sent to Congress by the latter. Hamilton was one of the delegates to the Constitutional Convention, contributing to it significantly. During the ratification process, Hamilton wrote most of the essays of The Federalist. George Washington appointed him Secretary of the Treasury, though he felt obliged to leave that office in 1795, as a result of an adulterous affair. As one of the leaders of the Federalist Party, in 1804 Hamilton campaigned bitterly against Aaron Burr, with whom he had a personal vendetta. Burr challenged him to a duel in which Hamilton was mortally wounded.

Immediately after the distribution of the constitutional text, a large number of opposing pamphlets were published, often under pseudonyms such as *Cato* or *Brutus*. Those pamphlets emphasized defects such as the centralism and absolutist nature of the Constitution. In response to these pamphlets, Alexander Hamilton published in the New York newspapers, under the pseudonym of *Publius*, an article entitled "The Federalist," promising to respond to all questions and objections posed against the

Constitution or any of its clauses. Hamilton then requested the help of two of his colleagues in the Philadelphia Convention, James Madison and John Jay, to construct answers that were easy for people to understand.

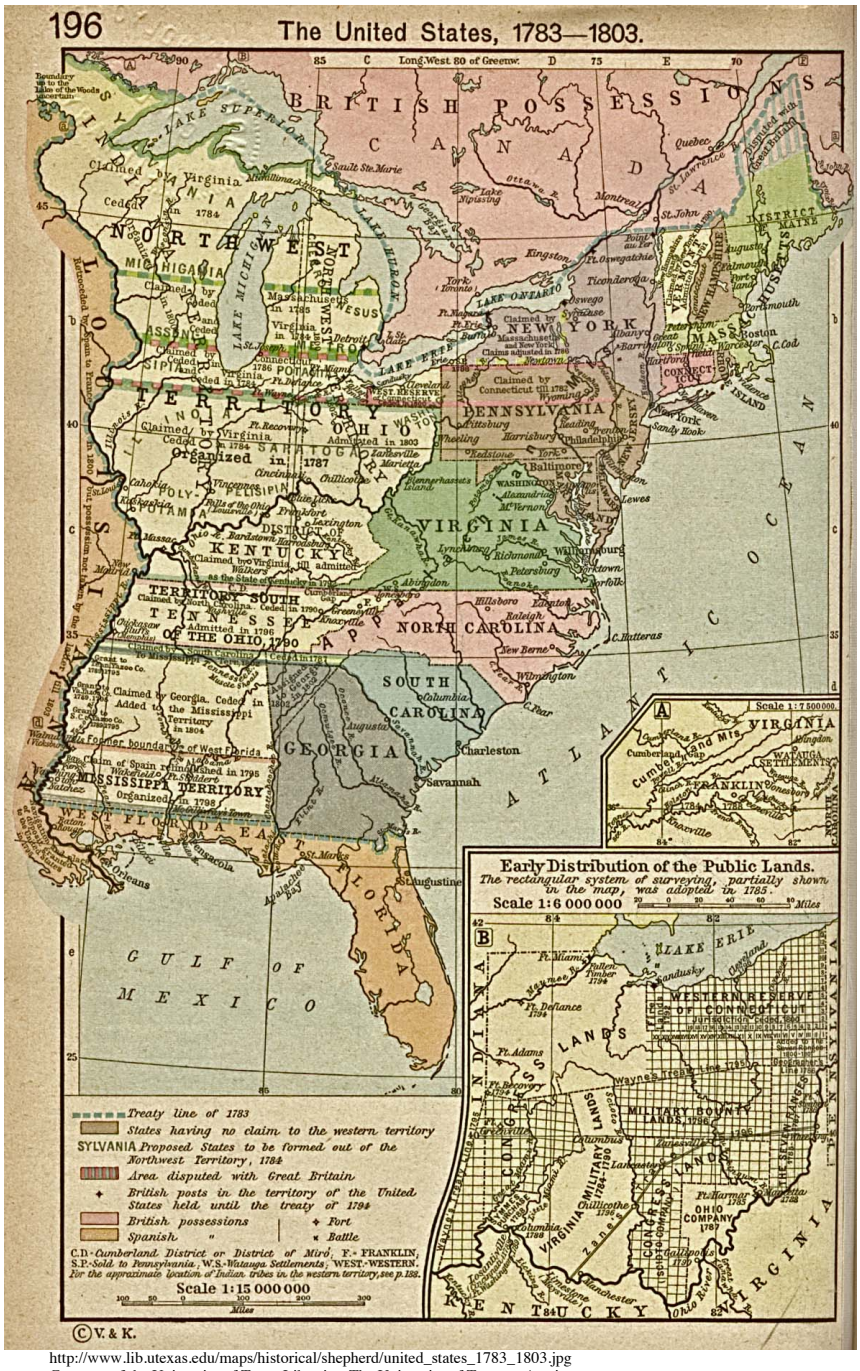
Between October 1787, and the following August, the authors published in two of the New York newspapers, seventy-seven articles under the same pseudonym and with the same title. Publishing under pseudonyms was a common practice at the time, but it was notorious for the authors behind them to be identified, although it has never been possible to be absolutely certain of the specific authorship of each and every article. At the end of 1788, all those seventy-seven, and a further eight additional articles, were published in two volumes under the title *The Federalist*, a Collection of Essays written in favor of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787.

The structure of the whole work, as stated by Alexander Hamilton himself in his first article, *A general Introduction*, is the following:

- The utility of the union to your political prosperity (No. 2 to No. 14).
- The insufficiency of the present confederation to preserve that union (No. 15 to No. 22).
- The necessity of a government at least equally energetic with the one proposed, to the attainment of this object (No. 23 to No. 36).
- The conformity of the proposed constitution to the true principles of republican government (No. 37 to No. 84).
- Its analogy to your own state [New York] constitution (No. 85).
- The additional security that its adoption will afford to the preservation of that species of government, to liberty, and to property (No. 85).

Of all of them, the most famous essays are: No. 10, where Madison develops the argument for avoiding the tyranny of the majority and the advantage of one large state over several small states; No. 14, where the same author explains the need to expand the power of the state; No. 39, where Madison, again, describes federalism and, in No. 51, the doctrine of checks and balances. In No. 70, Alexander Hamilton argues the convenience of a monocratic executive, and in No. 78 the fundamentals of judicial review; in No. 84 Hamilton disputes the need of a Bill of Rights, contending that the constitutional text had already enough personal guarantees.

As time went by, the main value of *The Federalist*, beyond its original intention of getting the votes necessary for the ratification of the Constitution in the State of New York, has been as an aid for the construction of the Constitution. Its two main authors –Hamilton and Madison– had been two of the most active participants in the Philadelphia Convention, and, thus, they knew firsthand what had been intended in each clause. Although it has always been understood that the Papers do not hold actual legal value, the Supreme Court of the United States has often cited them in its opinions.



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