An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution

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> *The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation. The misfortune under the latter system has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it, and to require a degree of enlargement which gives to the new system the aspect of an entire transformation of the old.*[1]

I. INTRODUCTION

Recently, issues concerning the federal structure of the United States under the Constitution, and the role of the states as entities in this

1. THE FEDERALIST NO. 40, at 255 (James Madison) (Edward Mead Earle ed., 1976). *See also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 359 (1969) ("What is truly remarkable about the Confederation is the degree of union that was achieved.").

structure, have come to the forefront of legal scholarship.[2] For example, a number of questions have been raised concerning the powers allocated between the federal government and the several states. Questions such as the proper scope of the federal commerce power,[3]

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2. As one commentator has noted, historically there has been great debate over the precise meaning of the term "federalism":

> [a]lthough virtually no one contests the significance of federalism's influence on the organization and operation of American government and politics, what is contested endlessly is the precise meaning of federalism. Remarkably, the specific form and intentions of the Constitution of 1787 have not been able to create a settled, broadly shared meaning of the term.

ROBERT W. HOFFERT, A POLITICS OF TENSIONS: THE ARTICLES OF CONFEDERATION AND AMERICAN POLITICAL IDEAS xi (1992). Despite disagreement over what exactly "federalism" is, federalism concerns have been discussed by legal commentators in a variety of areas. *See, e.g.*, SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM (1993); RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987); VINCENT OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC (2d ed. 1987); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Raoul Berger, *Federalism: The Founders' Design—A Response to Michael McConnell*, 57 GEO. WASH. L. REV. 51 (1988); Murray Dry, *Federalism and the Constitution: The Founders' Design and Contemporary Constitutional Law*, 4 CONST. COMMENTARY 233 (1987); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994); Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305 (1987); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)); Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 124 (1996) (noting that there have recently been fifteen state resolutions reaffirming the Tenth Amendment); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74 (1989); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994); Symposium, *Federalism: Allocating Responsibility Between the Federal and State Courts*, 19 GA. L. REV. 789 (1985); Symposium, *Federalism's Future*, 47 VAND. L. REV. 1205 (1994); Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995); William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769 (1987); *A Symposium on Federalism*, 6 HARV. J.L. & PUB. POL'Y 1 (1982).

3. *See* United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that a statute regulating the possession of guns within a certain distance of a school exceeded "the authority of Congress '[t]o regulate Commerce . . . among the several States'") (citation

whether the states can impose term limits on members of Congress,[4] the ability of the federal government to provide for suits against the states,[5] and the extent to which the federal government can define new crimes,[6] have recently been addressed in Supreme Court decisions acknowledging the importance of federalism in our constitutional structure. The resolution of such questions is a particularly intractable problem in our federal system within which the national government is granted only certain limited and enumerated powers. As Justice Marshall noted in *McCulloch v. Maryland*, "the question respecting the extent of the powers actually granted [to the federal government], is perpetually arising, and will probably continue to arise, as long as our system shall exist."[7] However, such questions touch only the tip of the iceberg when it comes to examining the nuances of the federal structure established under the Constitution. Many other questions such as the role of the states in the federal system, the "legality" of amendment to the Constitution outside Article V, and the constitutionality of seccession all

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omitted); *id.* at 570 (Thomas, J., concurring) ("The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the States."). *See also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 583 (1985) (O'Connor, J., dissenting) (arguing that the Framers believed that the commerce power was "important but limited, and expected that it would be used primarily if not exclusively to remove interstate tariffs and to regulate maritime affairs and large-scale mercantile enterprise."); BERGER, FEDERALISM: THE FOUNDERS' DESIGN, *supra* note 2, at 125 (arguing that the Commerce Clause empowers Congress only to regulate trade across state lines); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1442 (1987) (arguing for a narrow interpretation of the federal commerce power).

4. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that the states could not add qualifications for membership in the Senate or House of Representatives to those already enumerated in Article I).

5. *See* Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (1996) (holding that Congress lacked authority under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity).

6. *See Lopez*, 514 U.S. at 549; *see also* Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752 (1995). Professor Calabresi has noted the great danger and potential abuse that may be occasioned by reading the constraints of federalism out of the Constitution:

> [T]he commerce power is being used to nationalize state criminal law, a decision that is fraught with danger and controversy. This process of nationalization, which is rapidly gathering steam, threatens to have severe adverse consequences for liberty and for the crowded dockets of the federal courts, a matter on which the Supreme Court has special claims to institutional competence.

Id. at 805.

7. 17 U.S. (4 Wheat.) 316, 405 (1819). *See also* New York v. United States, 505 U.S. 144, 147 (1992) (stating that the question of "discerning the proper division of authority between the Federal Government and the States" is "as old as the Constitution" itself).

invoke the central principles of the federal structure established under the Constitution.[8]

To examine the nature of the federal system established under the Constitution, it is useful to examine the preceding federal system established under the Articles of Confederation. The Articles of Confederation were often criticized by Federalists,[9] and even Antifederalists,[10] as creating a relatively weak general government that

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8. *See infra* Part V (applying the theories developed in this Article to these questions).

9. *See* THE FEDERALIST NO. 15, at 87 (Alexander Hamilton) (Edward Mead Earle ed., 1961) ("[O]pponents as well as . . . friends of the new Constitution . . . in general appear to harmonize in this sentiment, at least, that there are material imperfections in our national system, and that something is necessary to be done to rescue us from impending anarchy."); *id.* NO. 40, at 255 (James Madison) (noting the "charges of inefficiency" levelled at the general government under the Articles). For example, one commentator noted the importance of changing the current system:

> The importance of preserving an union, and of establishing a government equal to the purpose of maintaining that union, is a sentiment deeply impressed on the mind of every citizen of America. It is now no longer doubted, that the confederation, in its present form, is inadequate to that end: Some reform in our government must take place: In this, all parties agree . . . .

A Plebian [Melancthon Smith], *An Address to the People of the State of New York: Shewing the Necessity of Making Amendments to the Constitution, Proposed for the United States, Previous to its Adoption* 11 (1788), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 99 (Paul Leicester Ford ed., 1971) (1888). *See also* Letter from James Madison to Professor Davis (1832), *in* 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 520 (Max Farrand ed., rev. ed. 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION] ("In expounding the Constitution and deducing the intention of its framers, it should never be forgotten, that the great object of the Convention was to provide, by a new Constitution, a remedy for the defects of the existing one.").

10. *See, e.g.*, 2 THE COMPLETE ANTI-FEDERALIST 87 (Herbert J. Storing ed., 1981) (statement of Edmund Randolph) (noting that "the confederation was destitute of every energy, which a constitution of the United States ought to possess"); *id.* at 156, 161 (remarks of Centinel) (observing that "[e]xperience [has] sh[o]wn great defects in the present confederation" and "[t]hat the present confederation is inadequate to the objects of the union seems to be universally allowed"); *id.* at 363-64 (statement of Brutus) (noting that "[w]e have felt the feebleness of the ties by which these United States are held together, and the want of sufficient energy in our present confederation, to manage, in some instances, our general concerns"); 3 *id.* at 15 (Minority of the Pennsylvania House of Representatives) (stating that "[t]he confederation no doubt is defective and requires amendment and revision"); *id.* at 23 (An Old Whig) (noting that "[i]t was the misfortune of these articles of confederation that they did not by express words give to Congress power sufficient for the purposes of the union"); *id.* at 67 (A Federal Republican) (observing that "[w]e were taught by sad experience, the defect of the present articles of confederation, and wisely determined to alter and amend them"); *id.* at 123 (Philadelphiensis) (concluding that "the powers of congress were certainly too limitted

was unable to exert its supremacy over the state governments. This is the standard view of the general government under the Articles held by modern commentators as well.[11] However, as the above passage from *The Federalist No. 40* illustrates, there were profound similarities

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[sic] to promote the general good of the union"); 5 *id.* at 257 (George Mason) ("I candidly acknowledge the inefficacy of the confederation"); 6 *id.* at 150 (Melancthon Smith) (stating that "[t]he defects of the Old Confederation needed as little proof as the necessity of an Union"); 5 *id.* at 199 (The Impartial Examiner) ("It seems to be agreed on all sides that in the present system of union the Congress are not invested with sufficient powers for *regulating commerce*, and procuring the *requisite contributions* for all expences, that may be incurred for the *common defense* or *general welfare*.").

11. The standard view held by commentators is that the Confederation era was a period in which the general government suffered from a lack of necessary power. *See* HERBERT APTHEKER, EARLY YEARS OF THE REPUBLIC 37 (1976) (noting that "clear evidences of inadequacies were present and were recognized by all elements of the revolutionary coalition"); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 47 (1913) (noting that the weaknesses of the general government "were self-evident and there seems to have been a general unanimity of sentiment in favor of the reforms proposed"); JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY, 1783-1789, at 171 (1888) ("[T]he different states, with their different tariff and tonnage acts, began to make commercial war upon one another."); NOEL B. GERSON, FREE AND INDEPENDENT: THE CONFEDERATION OF THE UNITED STATES, 1781-1789, at 146-47 (1970); MAJOR PROBLEMS IN THE ERA OF THE AMERICAN REVOLUTION 1760-1791, at 389 (Richard D. Brown ed., 1992) [hereinafter MAJOR PROBLEMS] ("The history of this Confederation era, once called the critical period, has been dominated by the Federalist belief that the Articles of Confederation were a failure and that the Constitution of 1787 rescued the nation."). As Professor Amar has noted,

> The unicameral assembly created by the Articles lacked power to regulate commerce; to levy duties; to legislate directly upon, and directly tax, individuals; to nullify unjust internal state laws; to enact laws incidental to, or implied by, express enumerations; to nationalize state militias; to directly raise an army and navy; to appoint all military officers; to suppress internal insurrections, coups, and anti-republican governments; to directly execute its own enactments; to set up a general system of national courts; and to insist on observance of the Articles and its own enactments thereunder as supreme law overriding even state constitutions.

Amar, *supra* note 2, at 1442. *See also* Van Alstyne, *supra* note 2, at 773 ("From 1781 to 1787, the Articles of Confederation had set the sole terms of national government, in its lesser specifications of weakly enumerated national powers. The felt deficiencies in those enumerations led to the Annapolis and Philadelphia conventions."); Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 72 (Richard Beeman et al. eds., 1987) (stating that "[b]y 1787 almost every political leader in the country, including most of the later Antifederalists, wanted something done to strengthen the Articles of Confederation"). Even the Supreme Court noted the relative impotence of the federal government:

> [O]wing to the imbecility of congress, the powers of the states being reserved for legislative and judicial purposes, and the utter want of power in the United States to act directly on the people of the states, on the rights of the states (except those in controversy between them) or the subject matters, on which they had delegated but mere shadowy jurisdiction, a radical change of government became necessary.

Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 729 (1838).

between the Articles and the Constitution.[12] Both the Articles and the Constitution established "federal" systems of multiple sovereigns whose continued existence was constitutionally guaranteed.[13] As James Madison noted, the Constitution merely elaborated upon the principles that informed the Articles.[14] Thus, examination of the Articles may yield valuable insights into the structure of the federal system established under the Constitution.

Despite the fact that both the Articles of Confederation and the Constitution established federal systems, there were certain fundamental differences between the two systems. The most fundamental difference was the structure of political authority. As James Madison noted in *The Federalist No. 37*, the Constitution represented a fundamental change in the "superstructure" upon which the union rested.[15] The federal government under the Articles of Confederation was dependent upon the states. The states as entities were the sole source of the political authority of the federal government under the Articles, whereas under the Constitution, the federal government derived its authority directly from the states as well as the people—the whole people of the nation, not merely the various peoples of each state considered as entities.[16]

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12. *See* THE FEDERALIST NO. 38, at 240 (James Madison) (Edward Mead Earle ed., 1976) (asking "is it not manifest that most of the capital objections urged against the new system lie with tenfold weight against the existing Confederation?"); HOFFERT, *supra* note 2, at 29 ("Both the Constitution of 1787 and the Articles of Confederation are dominated by discussions of two broad categories—governmental structures and governmental powers.").

13. *See* HOFFERT, *supra* note 2, at 30 ("The Articles set up a federal system or confederacy described as a league of friendship among sovereign states forming a 'perpetual union.'").

14. *See supra* note 1 and accompanying text.

15. *See* THE FEDERALIST NO. 37, at 226 (James Madison) (Edward Mead Earle ed., 1976).

16. See *infra* notes 210-19 and accompanying text for a discussion of this difference between the Articles and the Constitution. *See also* Hawke v. Smith, 253 U.S. 221, 226 (1920) ("The Constitution of the United States was ordained by the people, and, when duly ratified, it became the Constitution of the people of the United States.") (citation omitted); *Ex parte* Yarbrough, 110 U.S. 651, 666 (1884) (noting that "[i]n a republican government, like ours, . . . political power is reposed in representatives of the entire body of the people"); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819) (Marshall, J.) ("The government of the union, then, . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."); Amar, *supra* note 2, at 1463 n.163. *But see* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 812 (1995) (Thomas, J., dissenting) ("The ultimate source of

The Articles of Confederation represented a compact among the states as entities alone, whereas the Constitution was a compact among *both* the states as entities *and* the people directly.[17]

An implication of this break from the structure of the Articles was that for the first time there was a recognition that the whole people could act to define the scope of the powers exercised by the states individually. This power no longer rested solely with the states themselves. Thus, there was the possibility of a complete consolidation of the states into a unitary national government under the Constitution, which had not existed under the Articles. This was the great danger with which the Antifederalists opposing the new Constitution were concerned.[18] Once this power of the people was recognized, conceivably the people could amend the Constitution in the future in such a way that the powers of the states would gradually be eroded.[19]

In order to gain new insights into the fundamental changes in the federal system made under the Constitution and the current debate over federalism, this Article compares the federal structures established under the Constitution and the Articles of Confederation. Part II discusses certain early models of political union that may have influenced the thought of the Framers of both the Articles of Confederation and the Constitution. Many of the concepts underlying the federal structures of the Articles and the Constitution were already found in the works of various political writers with whom the Framers were familiar. In particular, the concept of a division of sovereignty between a general government and subordinate governments was not novel, but was

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the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.").

17. As Justice Marshall noted in *McCulloch v. Maryland*,

> To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

17 U.S. (4 Wheat.) at 404.

18. *See infra* notes 213-19 and accompanying text.

19. *See infra* notes 235-39 and accompanying text. For example, Professor Amar has noted that "'We the People of the United States' may choose to destroy states by constitutional amendment." Amar, *supra* note 2, at 1465 n.167. Unfortunately he concludes, however, that such amendment may occur outside the constraints of Article V through a bare majority of the national populace. *See id.* at 1465 ("Relocating sovereignty in the People of the United States in the late 1780's did not obliterate all state lines; it only established that any power exercised by state Peoples and state governments was ultimately subject to the absolute control of the American People."); *see also infra* notes 266-78 and accompanying text, discussing Professor Amar's theory of amendment outside Article V.

expressed in the writings of various political philosophers well before ratification of the Articles of Confederation. Part III examines the text of the Constitution and the Articles of Confederation, focusing on the structural similarities and differences between these two documents that are relevant in establishing their respective federal systems. Many of the provisions establishing the federal structure under the Constitution had analogues in the Articles of Confederation, indicating their importance in delineating the federal structures under both constitutional regimes. In fact, the Federalists, and Madison in particular, contended repeatedly that the new Constitution was strikingly similar to the Articles of Confederation. Part IV applies social compact theories that were prevalent in the late eighteenth century in an attempt to gain greater understanding of the nature of the federal systems established under the Articles of Confederation and the Constitution. This analysis indicates that the fundamental difference between the Articles and the Constitution is that the latter represented a compact among *both* the people *and* the states, whereas the former represented a compact among the states alone. In other words, the Constitution represented merely a *partial* consolidation[20] of the states—the Constitution was not purely a compact among the people as a nation[21] or the states as entities[22] as some commentators have contended. Part V applies the theory presented in this Article to several current debates engaging legal academics, including whether the Constitution is amendable outside the procedures listed in Article V, the constitutionality of secession, and the proper interpretation of the

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20. *See infra* notes 210-19 and accompanying text. The Supreme Court has recently noted the importance of this feature of the Constitution. As Justice Stevens noted in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995),

> [T]he Constitutional Convention did not contemplate "[a]n entire consolidation of the States into one complete national sovereignty," but only a partial consolidation in which "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."

Id. at 791 (quoting THE FEDERALIST NO. 32, at 198 (Alexander Hamilton)).

21. *See, e.g.*, Amar, *supra* note 2 (arguing that the Constitution was an expression of national popular sovereignty).

22. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 812 (1995) (Thomas, J., dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."); *id.* at 814 ("The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation."); BERGER, FEDERALISM: THE FOUNDERS' DESIGN, *supra* note 2 (focusing on the states as entities).

enumerated powers of the general government. Finally, Part VI offers a brief conclusion.

In particular, the constitutionality of amendment proceedings outside Article V has been heatedly contested among legal academics. Professors Bruce Ackerman[23] and Akhil Amar[24] have recently argued that the people retain the power to amend the Constitution in a manner that does not conform with the procedures established under Article V. Although other commentators have presented counterarguments based on the constitutional text and the ratification debates,[25] they have not focused on the political theories underlying the Articles of Confederation and the Constitution. The fact that the Constitution was thought to represent a compact among both the people and the states dictated that a majority of the people *as well as* the states would be necessary for amendment. Article V's three-fourths requirement closely tracks this theory.

II. EARLY MODELS OF POLITICAL UNION

Neither the Framers of the Articles of Confederation nor the Framers of the Constitution were working from a completely blank slate when constructing the federal systems established under these two documents. There were various examples throughout history of political unions of varying degrees among states that might serve as blueprints from which to construct a union among the several states of North America.[26] For example, *The Federalist Papers* often referred to a variety of confederations that had existed historically[27] or that existed contemporaneous-

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23. *See* Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475 (1995).

24. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

25. *See, e.g.*, David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990); Monaghan, *supra* note 2.

26. It is interesting to note that today architects of new federal systems often look to the United States as a source of comparisons. *See, e.g.*, George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Thomas C. Fischer, *"Federalism" in the European Community and the United States: A Rose by any Other Name*, 17 FORDHAM INT'L L.J. 389 (1994).

27. *See* THE FEDERALIST NO. 9, at 52-53 (Alexander Hamilton) (Edward Mead Earle ed., 1976) (noting Montesquieu's discussion of the Lycian confederacy); *id.* NO. 16, at 95-101 (Alexander Hamilton) (discussing the Lycian and Achaean leagues); *id.* NO. 17, at 104 (Alexander Hamilton) ("Though the ancient feudal systems were not, strictly speaking, confederacies, yet they partook of the nature of that species of association."); *id.* at 105 ("The separate governments in a confederacy may aptly be compared with the feudal baronies"); *id.* NO. 18, at 106 (Alexander Hamilton and James Madison) ("Among the confederacies of antiquity, the most considerable was that of the Grecian republics, associated under the Amphictyonic council. From the best accounts

ly.[28] Furthermore, various limited plans of union among the states had been devised prior to ratification of the Articles of Confederation, such as the New England Confederation of 1643, the Albany Congress of 1754, and the Stamp Act Congress of 1765.[29] Thus, there were a variety of sources for empirical data concerning the desirability and effectiveness of different aspects of federal structure.

Besides the wealth of empirical data that could be derived from the study of existing political structures, there was a great deal of material written by predominantly continental political philosophers in the area of natural law and international law from which the Framers could draw. Writers such as Montesquieu,[30] Emmerich de Vattel,[31] and Samuel

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transmitted of this celebrated institution, it bore a very instructive analogy to the present Confederation of the American States."); *id.* at 109 ("The Achaean league, as it is called, was another society of Grecian republics, which supplies us with valuable instruction."); *id.* NO. 45, at 298-304 (James Madison) (discussing the Achaean league, the Lycian Confederacy, and the feudal system).

28. *Id.* NO. 19, at 113 (Alexander Hamilton and James Madison) ("The examples of ancient confederacies, cited in my last paper, have not exhausted the source of experimental instruction on this subject. There are existing institutions, founded on a similar principle, which merit particular consideration. The first which presents itself is the Germanic body."); *id.* at 118 ("If more direct examples were wanting, Poland, as a government over local sovereigns, might not improperly be taken notice of."); *id.* ("The connection among the Swiss cantons scarcely amounts to a confederacy; though it is sometimes cited as an instance of the stability of such institutions."); *id.* NO. 20, at 119 (Alexander Hamilton and James Madison) ("The United Netherlands are a confederacy of republics, or rather of aristocracies of a very remarkable texture, yet confirming all the lessons derived from those which we have already reviewed."); *id.* at 121 (discussing the "Belgic confederacy"); *id.* at 121-22 (discussing the "union of Utrecht").

29. *See* MAX FARRAND, THE FATHERS OF THE CONSTITUTION: A CHRONICLE OF THE ESTABLISHMENT OF THE UNION 48-51 (1921); SAMUEL A. PLEASANTS, THE ARTICLES OF CONFEDERATION 4-7 (1968) (discussing the Albany Congress).

30. CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler et al. eds., 1989).

31. The influence of Vattel on the Founding Generation has been well-documented. *See, e.g.*, PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 5, 11 (1993) (stating that "Vattel enjoyed enormous prestige and influence in Europe and America" and that Vattel's *Law of Nations* "was unrivaled . . . in its influence on the American founders"); FRANCIS STEPHEN RUDDY, INTERNATIONAL LAW IN THE ENLIGHTENMENT 281 (1975) ("[T]here is a general agreement among scholars that Vattel's influence was widespread, and that it was particularly strong in England and in the United States."). Vattel's influence in the area of international law was particularly significant:

> A century ago not even the name of Grotius himself was more potent in its influence upon questions relating to international law than that of Vattel. Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence

Pufendorf[32] discussed various models of political union in their works on natural law and the law of nations. The Framers were generally familiar with these writings as is evidenced by the frequency with which they were cited by the Framers themselves and by courts during the Founding Era.[33] Therefore, an analysis of these sources may provide a valuable background for study of the federal structures established under the Constitution and the Articles of Confederation.

A. Montesquieu's Model: A "Confederate Republic"

Of the aforementioned writers, Montesquieu's political writings most evidently influenced the Framers of the Constitution. For example, Alexander Hamilton discussed the views of Montesquieu at length in *The Federalist No. 9*. Hamilton quoted Montesquieu's definition of a "confederate republic" as descriptive of the union among the states. Both Federalists and Antifederalists often referred to the union among the states under the Articles of Confederation and the Constitution as a "confederate republic."[34] According to Montesquieu,

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of executive officials.

Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395 (1913). *See also* Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT'L L. 547, 549 (1909). Vattel was one of many Continental writers who were important in shaping American legal thought:

> At the time of the American Revolution the work of Vattel was the latest and most popular if not the most authoritative of the Continental writers. Citations of Grotius, Pufendorf, and Vattel are scattered in about equal numbers in the writings of the time. Possibly after the Revolution Vattel is quoted more frequently than his predecessors.

Id. For example, Benjamin Franklin stated in reference to Vattel's work, *The Law of Nations*, "'It came to us in good season, when the circumstances of a rising State make it necessary frequently to consult the Law of Nations.'" Benjamin Franklin, *Introduction* to EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW xxx (Charles G. Fenwick trans., 1916) (1758) (quoting 2 WHARTON'S THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE 64). It is particularly noteworthy that Franklin thought Vattel's writings useful in designing plans of Union for the states in America since it is widely recognized that Franklin's plan of Union of 1775 was probably the "starting point" used in drafting the Articles of Confederation. *See* FARRAND, *supra* note 29, at 51.

32. *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 914 n.24 (1993) (noting that during the founding period "[t]he arguments of Pufendorf were among the most scholarly of many that employed a common vocabulary and mode of analysis. In popularizing a succinct, generally stated, and attractive version of the state-of-nature analysis, the briefer works of Hutcheson and Pufendorf were particularly important."). Another writer whose works on international law were influential, but whose work is not addressed in this Article is Hugo Grotius. *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1625) (discussing a system of law among states based on natural law).

33. *See supra* notes 30-32 and accompanying text.

34. *See infra* notes 200-09 and accompanying text.

> This form of Government is a Convention by which several smaller *States* agree to become members of a larger *one*, which they intend to form. It is a kind of assemblage of societies, that constitute a new one, capable of encreasing by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.[35]

The value of this type of government was that it would help to guard against "popular insurrection" and "external force" while maintaining the advantages that small republics provided to the citizenry. Thus, prior to ratification of the Articles and the Constitution, political writers had been considering the benefits of systems analogous to those established under these documents.

B. Vattel's Model: Mutual Defense and Commercial Union

Similarly, Emmerich de Vattel in his treatise, *The Law of Nations or the Principles of Natural Law*, discussed a model of political union among states. Vattel thought that the establishment of such a union was useful in warding off more powerful states that might divide and conquer the smaller ones were they not unified.[36] Thus, one of the most important virtues of a union or alliance was self-protection. Similar concerns were at the forefront of the debate over ratification of the Constitution. As Alexander Hamilton stated in *The Federalist No. 7*,

> America, if not connected at all, or only by the feeble tie of a simple league, offensive and defensive, would, by the operation of such jarring alliances, be gradually entangled in all the pernicious labyrinths of European politics and wars; and by the destructive contentions of the parts into which she was

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35. THE FEDERALIST No. 9, at 50-51 (Alexander Hamilton) (Edward Mead Earle ed., 1976) (quoting Montesquieu).

36. Vattel used the example of the Roman Empire, which grew in large measure due to the fact that smaller states did not unify in the face of Roman aggression. Vattel stated:

> The example of the Romans is a good lesson for all sovereigns. If the most powerful States of that day had united together to watch over the movements of Rome, to set limits to her progress, they would not have successively become subject to her. But force of arms is not the only means of guarding against a formidable State. There are gentler means, which are always lawful. The most efficacious of these is an alliance of other less powerful sovereigns, who, by uniting their forces, are enabled to counterbalance the sovereign who excites their alarm. Let them be faithful and steadfast in their alliance, and their union will insure the safety of each.

EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 250 (Charles G. Fenwick trans., 1916).

> divided, would be likely to become a prey to the artifices and machinations of powers equally the enemies of them all. *Divide et impera* must be the motto of every nation that either hates or fears us.[37]

There were potential dangers for the American states from the European powers—particularly England, France, and Spain.[38] Furthermore, there was a concern that if a common union was not established among all of the states there would be conflicts among the states themselves.[39] Thus, self-protection was an important concern of both the Founding Generation and Vattel.

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37. THE FEDERALIST NO. 7, at 40 (Alexander Hamilton) (Edward Mead Earle ed., 1976) (footnote omitted).

38. There was great concern among the Founding Generation that the European powers would overwhelm the colonies were they divided into two or three distinct confederations. For example, John Jay stated in *The Federalist No. 4*,

> Wisely . . . do [the people of America] consider union and a good national government as necessary to put and keep them in *such a situation* [of peace] as, instead of *inviting* war, will tend to repress and discourage it. That situation consists in the best possible state of defence, and necessarily depends on the government, the arms, and the resources of the country.

Id. NO. 4, at 19. Jay's concern was that:

> If . . . [the European powers] find us either destitute of an effectual government (each State doing right or wrong, as to its rulers may seem convenient), or split into three or four independent and probably discordant republics or confederacies, one inclining to Britain, another to France, and a third to Spain, and perhaps played off against each other by the three, what a poor, pitiful figure will America make in their eyes! How liable would she become not only to their contempt, but to their outrage.

Id. at 22. *See also id.* NO. 25, at 153 (Alexander Hamilton) ("The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common."); *id.* NO. 23, at 142 (Alexander Hamilton) ("The principal purposes to be answered by union are these—the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks."); GERSON, *supra* note 11, at 101-07 (describing the dangers to the new republic from Great Britain, France, and Spain); PLEASANTS, *supra* note 29, at 29-31.

39. Not only was there concern with the European powers, but also that if the states formed separate confederacies there would be conflicts among the confederacies. *See* THE FEDERALIST NO. 6, at 33 (Alexander Hamilton) (Edward Mead Earle ed., 1976) ("'NEIGHBORING NATIONS . . . are naturally enemies of each other, unless their common weakness forces them to league in a CONFEDERATIVE REPUBLIC, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors.'") (quoting Vide, *Principes des Négociations par l'Abbé de Mably*). Defending against potential conflict among the states was viewed as a potential source of liberty-reducing measures such as standing armies:

> [I]f we should be disunited, and the integral parts should either remain separated, or, which is most probable, should be thrown together into two or three confederacies, we should be, in a short course of time, in the predicament of the continental powers of Europe—our liberties would be a prey to the means of defending ourselves against the ambition and jealousy of each other.

Id. NO. 8, at 46 (Alexander Hamilton).

However, Vattel certainly did not believe that the self-protection rationale for establishing a union among states was the sole rationale. Vattel thought not only that the defensive capabilities of the member states might be strengthened through political union, but also that the commercial power of the states might be increased. According to Vattel,

> [States entering a union] have also the right mutually to favor one another, to the exclusion of the sovereign whom they fear; and by the privileges of every sort, and especially by the commercial privileges which they will mutually grant to one another's subjects, and which they will refuse to the subjects of that dangerous sovereign, they will add to their strength, and at the same time lessen his, without giving him reason for complaint, since every one may dispose freely of his favors.[40]

Thus, by unifying and establishing reciprocal commercial privileges, weaker states might strengthen themselves in the face of stronger sovereign powers. Strengthening the commercial relations among the states was a second concern of the Founding Generation.[41] Therefore, the two primary reasons for forming a political union among the states were identified by Vattel in his treatise on the law of nations.

Vattel noted that the states of Europe formed such a political system, which he described as a "sort of Republic":

> Europe forms a political system in which the Nations inhabiting this part of the world are bound together by their relations and various interests into a single body. It is no longer, as in former times, a confused heap of detached parts, each of which had but little concern for the lot of the others, and rarely troubled itself over what did not immediately affect it. The constant attention of sovereigns to all that goes on, the custom of resident ministers, the continual negotiations that take place, make of modern Europe a sort of Republic, whose members—each independent, but all bound together by a common interest—*unite for the maintenance of order and the preservation of liberty. This is* what has given rise to the well-known principle of the balance of power, by which is meant an arrangement of affairs so that no State shall be in a position to have absolute mastery and dominate over the others.[42]

Thus, Vattel's description of a relatively weak political system among the European states may have been one model for the relations among the states of North America. The Articles of Confederation were

40. VATTEL, *supra* note 36, at 250-51.
41. *See infra* notes 118, 121-22.
42. VATTEL, *supra* note 36, at 251.

sometimes referred to as a "mere treaty" between sovereign states.[43] However, the union established under the Articles may have in reality gone beyond that of a mere treaty and may even have gone beyond the political system of the European states described by Vattel. Vattel recognized that sovereign states could form a "confederate republic" in which the union among them was much stronger. According to Vattel,

> [A] number of sovereign and independent States may unite to form a perpetual confederation, without individually ceasing to be perfect States. Together they will form a confederate republic. Their joint resolutions will not impair the sovereignty of the individual members, although its exercise may be somewhat restrained by reason of voluntary agreements.[44]

Thus, Vattel, like Montesquieu, recognized that states could unite without completely relinquishing their sovereignty in a closer political union, which he also termed a "confederate republic." It is striking that the notion of a "confederate republic"—terminology often used to describe the government established under the Articles of Confederation and the Constitution—was discussed by Vattel and other writers prior to ratification of these documents.

C. Pufendorf's Model: A "Perpetual Treaty"

Samuel Pufendorf, a noted seventeenth century natural law theorist, also described a "system" of sovereign states wishing to preserve their "autonomy," united for common defense by a "perpetual treaty," in his *On the Law of Nature and of Nations*.[45] Pufendorf described such a treaty as follows:

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43. *See* THE FEDERALIST NO. 33, at 201 (Alexander Hamilton) (Edward Mead Earle ed., 1976) (making a distinction between "a mere treaty, dependent on the good faith of the parties" and "a government, which is only another word for POLITICAL POWER AND SUPREMACY"). James Madison similarly stated that under the Articles of Confederation, "[t]he federal system . . . wants the great vital principles of a Political Cons[ti]tution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance, between so many independent and Sovereign States." *Vices of Political System* (Apr.-June 1787), *in* 9 THE PAPERS OF JAMES MADISON 351 (Robert A. Rutland et al. eds., 1962). *See also* Wesberry v. Sanders, 376 U.S. 1, 9 (1964) (noting that under the Articles of Confederation "the States retained most of their sovereignty, like independent nations bound together only by treaties").

44. VATTEL, *supra* note 36, at 12.

45. 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (ON THE LAW OF NATURE AND OF NATIONS) 1046-48 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather, trans., 1934) (1688). *See also* Amar, *supra* note 2, at 1446 (recognizing that "[u]nder traditional jurisprudence, sovereign states could enter into treaties with one another, and might even join together in a perpetual federation, or league, without losing their sovereign status").

> [T]here is commonly an agreement that one or other part of the supreme sovereignty should be exercised at the consent of all. For a treaty that gives rise to a system seems to differ from those treaties which are otherwise most commonly drawn up between states, chiefly in this: That in others each people of the league agrees to certain mutual performances, yet in such a way that they are on no account willing to make the exercise of that part of the sovereignty from which those performances flow dependent upon the consent of their associates, nor to limit in any degree their complete and unlimited power to conduct the affairs of their state. So also simple treaties have usually before their eyes only the particular advantage of the different states, as it happens to coincide, and do not produce any lasting union in matters which concern the chief object of states.[46]

Thus, Pufendorf recognized that in such systems there is a delegation of sovereign power from the constituent states to a central entity that exercises supreme sovereign power within the sphere of its delegated powers. The idea of the Articles of Confederation and of the Constitution—of dividing the sovereignty of states between a central entity and the sovereign states composing the union—was therefore not novel with the Framers.[47]

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46. 2 PUFENDORF, *supra* note 45, at 1047. Alexander Hamilton noted the prevalence of such leagues in *The Federalist No. 15*. According to Hamilton,

> There is nothing absurd or impracticable in the idea of a league or alliance between independent nations for certain defined purposes precisely stated in a treaty regulating all the details of time, place, circumstance, and quantity; leaving nothing to future discretion; and depending for its execution on the good faith of the parties. Compacts of this kind exist among all civilized nations, subject to the usual vicissitudes of peace and war, of observance and non-observance, as the interests or passions of the contracting powers dictate. In the early part of the present century there was an epidemical rage in Europe for this species of compacts, from which the politicians of the times fondly hoped for benefits which were never realized.

THE FEDERALIST NO. 15, at 90 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

47. There was some contention during the ratification debates that it was not possible to divide sovereignty between two entities. *See, e.g.*, Benjamin Rush, Speech in the Pennsylvania Ratifying Convention (Dec. 3, 1787), *in* 2 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 458 (Merrill Jensen ed., 1976) (stating that "a plurality of sovereigns is political idolatry"); Thomas Tredwell, Speech in the New York Ratifying Convention (July 2, 1788), *in* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 403 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter DEBATES IN THE SEVERAL STATE CONVENTIONS] ("The idea of two distinct sovereigns in the same country, separately *possessed* of sovereign and supreme power, in the same matters at the same time, is as supreme an absurdity, as that two distinct separate circles can be bounded exactly by the same circumference."). *See also* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (noting that it is an "axiom that, under our federal system, the States possess sovereignty concurrent with that of the

Under such a perpetual treaty there was a more permanent and close relation among the constituent states than was found in ordinary treaties. Pufendorf stated that, unlike simple treaties among states,

> [t]he case is entirely different with the treaties that appear in systems, the purpose of which is that distinct states may intertwine for all time the prime interests of their safety, and on that score make the exercise of certain parts of the supreme sovereignty depend upon the mutual consent of their associates. For there is a great difference between "I will bring you aid in this war, and we will consider in concert how we shall attack the enemy", and "No one of us who have entered this society will exercise his right of peace and war, save with the common consent of all."[48]

Thus, Pufendorf made a sharp distinction between simple treaties of the sort that were commonly found among states in the international arena and "perpetual treaties," which established "systems" among states and under which the sovereignty of the states was divided. He also enunciated a principle of unanimity for collective decision-making—a principle that was employed in certain cases under the Articles of Confederation.[49]

Despite acknowledging that in systems based on perpetual treaties there was a division of sovereignty between the central government and the constituent states, Pufendorf recognized that in such systems there would be certain areas of the states' original sovereignty that remained to be exercised by the states alone:

> We have said that in treaties of this kind [perpetual treaties] the exercise of only certain parts of the supreme sovereignty is made to depend upon the consent of the associated states. For it hardly seems likely that the affairs of several states could be so closely interwoven that it would be to the advantage of one and all of them that no part of the supreme sovereignty be exercised without the consent of all. Or if there were any such, it would have been more to their advantage to unite in one state than to be joined only by a treaty. Therefore, it is convenient that the individual states reserve for themselves liberty in the exercise of those parts of supreme sovereignty, the manner of *conducting which is of little or no interest, at least directly, to the rest.* The same is true as well of such business as is of daily occurrence, or will not suffer the delay consequent upon a discussion of it with others. But matters upon which the safety of the entire league depends may with entire fairness be considered in common council.[50]

Federal Government, subject only to limitations imposed by the Supremacy Clause"); Amar, *supra* note 24, at 1063 (concluding that "[d]ivided sovereignty was almost universally recognized as a theoretical impossibility"). However, as the materials from Pufendorf and other political writers illustrate, such a concept was not entirely novel.

48. 2 PUFENDORF, *supra* note 45, at 1047.

49. *See infra* note 157 and accompanying text.

50. 2 PUFENDORF, *supra* note 45, at 1047.

The division of powers, therefore, seems to be based roughly on an allocation of the power to provide collective goods to the general government, while leaving the day-to-day conduct of most affairs to the member states.

Pufendorf, however, was more specific in delineating the lines of division. Pufendorf continued his discussion of perpetual treaties that established systems of states by enumerating some of the powers over which the central authority would exercise sovereignty and those over which the constituent states would retain sovereignty. The list is striking in its resemblance to the enumerated powers schemes found in the Articles of Confederation and the Constitution.[51] Pufendorf first enumerated some of the powers commonly delegated to the central authority:

> Of these war occupies the first place, both defensive and offensive, and that wherewith it is drawn to a close, even peace. To which should be joined taxes, in so far as they minister to war, and treaties with foreign powers looking to the common safety. Here also belongs the consideration that, if any controversy arises between the allies themselves, the others who have no direct interest in it may at once interpose as mediators, and not allow it to come to open warfare.[52]

Thus, the power of taxation was divided between the member states and the central government, while the powers of making treaties and engaging in war were delegated to the central government. Although the treaty- and war-making powers were left to the general government under the Articles and the Constitution, Pufendorf's concurrent power of taxation was not adopted until after ratification of the Constitution.[53] Similarly, Pufendorf enumerated certain areas that were better left to the states:

> [C]ommercial treaties, taxes which are required for the needs of the individual states, the appointment of magistrates, laws, the right over citizens of life and death, matters of religion, and the like, can without difficulty be left in the province of the individual states. Although every state will so control them that they will in no way disturb the entire system. From this it is evident that one or another of the allies cannot be prevented by the rest from exercising at their

51. *See infra* notes 89-102 and accompanying text.
52. 2 PUFENDORF, *supra* note 45, at 1047-48.
53. *See infra* notes 117-20 and accompanying text.

> own pleasure those parts of the supreme sovereignty on the conduct of which by common counsel there was no special agreement in the treaty.[54]

Thus, Pufendorf's model of political union under a perpetual treaty is somewhat more integrated than that presented by Vattel. Under Pufendorf's model there is actually a ceding of sovereignty by the states in areas of common interest. Pufendorf's model therefore most closely resembles that of the Articles of Confederation under which there was such a ceding of sovereignty in certain areas to the Confederation Congress through an enumerated powers structure.[55] However, as the above passage illustrates, he certainly contemplated that the local affairs of governing the citizenry would be reserved to the individual states and that, in general, a principle that whatever was not delegated to the general government was reserved to the member states would govern interpretation of the treaty of union. Finally, it is interesting to note that Pufendorf appears to leave the power over commerce to the individual states. This similarity to the Articles of Confederation was abandoned with ratification of the Constitution under which the general government was delegated the power to regulate commerce and the states were prohibited from levelling tariffs.[56]

III. TEXTUAL ANALYSIS: COMPARISON OF THE CONSTITUTION AND THE ARTICLES OF CONFEDERATION

The experience of the young nation under the Articles of Confederation helped to shape the emerging Constitution.[57] The Articles served

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54. 2 PUFENDORF, *supra* note 45, at 1048. It is interesting to note that the power of taxation was granted to the general government only under the Constitution and was made concurrent with the states. *See* THE FEDERALIST No. 34, at 209 (Alexander Hamilton) (Edward Mead Earle ed., 1976) ("The convention thought the concurrent jurisdiction preferable to that subordination; and it is evident that it has at least the merit of reconciling an indefinite constitutional power of taxation in the Federal government with an adequate and independent power in the States to provide for their own necessities.").

55. James Madison characterized the union under the Articles of Confederation as a "league or treaty" in *The Federalist No. 43*, arguing that "[a] compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties." THE FEDERALIST NO. 43, at 288 (James Madison) (Edward Mead Earle ed., 1976).

56. *See infra* notes 121-22 and accompanying text.

57. For a discussion of the period under which the Articles of Confederation were in force and the way in which the experience under the Articles influenced the drafting of the Constitution, see FARRAND, *supra* note 29; FISKE, *supra* note 11; GERSON, *supra* note 11; HOFFERT, *supra* note 2; MERRILL JENSEN, THE ARTICLES OF CONFEDERATION (1970); MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789 (1950); ANDREW C. MCLAUGHLIN, THE CONFEDERATION AND THE CONSTITUTION (1963); PLEASANTS, *supra* note 29; GORDON

as a template from which the Constitution was derived. Many of the provisions of the Articles were preserved in slightly modified form under the Constitution—particularly those provisions that established the federal structure.[58] Despite these great similarities, the Constitution did contain certain innovations relevant to the federal structure distinguishing it from the Articles.[59] The Constitution delegated a few additional enumerated powers to the general government. However, this was not a major structural change. The real innovation under the Constitution was that it represented a compact among the people *as well as* the states, while the Articles had been a compact *solely* among the states as entities.

S. WOOD, THE CONFEDERATION AND THE CONSTITUTION: THE CRITICAL ISSUES (1973).

58. *See supra* note 1 and accompanying text.

59. Many innovations found in the Constitution were aimed at the structure of the general government itself. For example, bicameralism was introduced into the legislative structure under Article I of the Constitution. *See* U.S. CONST. art. I, § 2 (establishing the House of Representatives); *id.* § 3 (establishing the Senate). Furthermore, a separate Judicial Branch was established under Article III. U.S. CONST. art. III ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); THE FEDERALIST NO. 22, at 138 (Alexander Hamilton) (Edward Mead Earle ed., 1976) ("A circumstance which crowns the defects of the Confederation remains yet to be mentioned,—the want of a judiciary power."). A separate Executive Branch was established under Article II. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

The Articles did contain some proto-executive and judicial structures. For example, the Articles provided for adjudication of certain disputes among the states by Congress. They also contained a "Committee of the States," which functioned as a sort of executive organ. This structure was preceded in an earlier draft of the articles by a Council of State, which possessed greater authority and whose powers were discussed in a separate article. *See* 5 JOURNALS OF THE CONTINENTAL CONGRESS 546-54, art. XIX (Gov't Printing Office 1906) (listing numerous specified powers of the Council of State); JENSEN, THE ARTICLES OF CONFEDERATION, *supra* note 57, at 178-79 (discussing the Council of State in the Dickinson draft of the Articles). The fact that the Confederation Congress construed the enumerated powers broadly may have led to structures that were very similar to those that were explicitly adopted in the Constitution. As one commentator has noted,

> [T]he overall structure of the government chartered by the Constitution was similar in many respects to the one that already existed under the Articles. A national legislature already engaged actively in the creation of national laws, treaties and policies; a national court of appeals, the institutional predecessor of the Supreme Court, rendered judgments superior within its jurisdiction to state court decisions; and federal administrative departments carried the national will into execution.

Eric M. Freedman, Note, *The United States and the Articles of Confederation: Drifting Toward Anarchy or Inching Toward Commonwealth?*, 88 YALE L.J. 142, 164 (1978) (footnotes omitted).

The political authority supporting the general government was derived from both the states and the people under the Constitution, whereas previously under the Articles it had been derived from only the states as entities. Both the Articles and the Constitution established compound republics, but the Constitution represented a partial consolidation. A number of textual provisions illustrate the validity of this characterization. This Part examines these structural similarities and differences between the Constitution and the Articles.

A. Structural Similarities

It is not surprising that there should be many similarities in the text of the Articles of Confederation and the Constitution. Not only were many of the individuals responsible for drafting the Articles involved in drafting the Constitution,[60] but also the nation did not desire a complete overhaul of the Articles—only amendment.[61] The Confederation Congress had limited the Convention to "the sole and express purpose of revising the Articles of Confederation."[62] As a result, many structural provisions in the Constitution are similar to those found in the Articles. Both documents created political unions of the states; both ensured reciprocity among the states under their fourth articles; both employed an enumerated powers scheme in dividing the respective spheres of the general and state governments, with the states retaining residual powers; both provided safeguards for the continued existence of the states as entities; and both established the supremacy of federal law. Thus, the textual similarities extend to many of the most fundamental provisions establishing the federal system.

1. Formation of a Union

Both the Articles of Confederation and the Constitution represented federal systems in which sovereign states were joined in some sort of

60. FARRAND, *supra* note 11, at 39.

61. The desire to merely amend the Articles is evidenced in statements made during the debates over ratification of the Constitution. *See, e.g.*, 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 278 (remarks of William Grayson at the Virginia Convention) ("I would recommend that the present Confederation should be amended. Give Congress the regulation of commerce."); 4 *id.* at 70 (remarks of Timothy Bloodworth at the North Carolina Convention) (stating that "he was for giving power to Congress to regulate the trade of the United States"); 2 *id.* at 80 (remarks of General Thompson at the Massachusetts Convention) ("Let us amend the old Confederation. Why not give Congress power only to regulate trade?").

62. 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 14.

union.[63] For example, the title of the Articles itself is "The Articles of Confederation and Perpetual Union Between the States . . . ." The Articles thus seemed to contemplate the sort of perpetual treaty, or league, of which Pufendorf spoke in discussing systems of states.[64] Article III elaborated on the nature of the union, stating that the "states hereby severally enter into a firm league of friendship" and continued by enumerating the purposes of the league among the states, which included "common defence" and securing the states' "liberties and their mutual and general welfare."[65] Thus, much as the Constitution purported to ensure the general welfare of the people, the Articles ensured the general welfare of the states—indicating that the league established under the Articles was among states, rather than a compact to which the people directly were parties. Further evidence of the nature of the union under the Articles is to be found in the fact that the Articles were to be approved by the legislatures of the states, rather than directly by the people themselves.[66] Thus, the source of the political authority

63. As one commentator has noted, "[t]he most intriguing dimension of the Articles of Confederation is its simultaneous commitment to the pursuit of sovereign statehood and to a perpetual union of states." HOFFERT, *supra* note 2, at 35. Similarly, Gordon Wood, in his important work on the Constitution, noted:

> *What is truly remarkable about the Confederation is the degree of union that* was achieved. The equality of the citizens of all states in privileges and immunities, the reciprocity of extradition and judicial proceedings among the states . . . , the elimination of travel and discriminatory trade restrictions between states, and the substantial grant of powers to the Congress in Article 9 made the league of states as cohesive and strong as any similar sort of republican confederation in history—stronger in fact than some Americans had expected.

WOOD, *supra* note 1, at 359.

64. *See supra* notes 45-56 and accompanying text.

65. ARTICLES OF CONFEDERATION art. III. A previous draft of the Articles provided that "[t]he said Colonies unite themselves so as never to be divided by any Act whatever, and hereby several enter into a firm League of Friendship with each other . . . ." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 546-54, art. II. This wording emphasized the perpetual nature of the union among the states. However, the language was dropped. The language might have been thought to be redundant or perhaps inaccurate—a broader right of seccession may have been contemplated. Even though this language was present, this draft allowed for amendment on the same terms as the final draft. *See id.* art. II, para. 2.

66. ARTICLES OF CONFEDERATION art. XIII, para. 2 ("These articles shall be proposed to the legislatures of all the United States, to be considered, and if approved of by them, they are advised to authorize their delegates to ratify the same in the Congress of the United States; which being done, the same shall become conclusive.").

establishing the general government under the Articles was to be found in the states alone.

In contrast, the Constitution proclaimed in its Preamble that the "People of the United States" established the Constitution "in Order to form a more perfect Union."[67] Promotion of the general welfare and the blessings of liberty was not stated in terms of the states, as under the Articles, but rather in terms of "ourselves and our Posterity."[68] However, to a large extent the states as entities retained the role that they enjoyed under the Articles. Thus, the Constitution was to be a union not only of the states, conceived of as entities, but also of the people of the United States.

2. *Reciprocity Among the States*

A second important commonality between the Articles of Confederation and the Constitution that helps to establish the federal system is

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67. U.S. CONST. pmbl. Forrest McDonald has argued that the "We the People" language of the preamble was understood as "We the People of the Several States." *See* FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 280-81 (1985). Farrand's analysis also indicates that the "We the People" language was used as a matter of convenience. According to Farrand,

> The articles of confederation formed an agreement "between the States of New Hampshire, Massachusetts, Rhode Island, . . ." and the rest of the thirteen. At one stage of the development of its report, the committee of detail tried in the preamble "We the People of *and* the States of New Hampshire, Massachusetts, Rhode Island," etc., but later the "and" was dropped out. When the committee of style took up this point they found themselves confronted with a new difficulty. The convention had voted that the new constitution might be ratified by nine states and should go into effect between the states so ratifying, and no human power could name those states in advance. How far this was the controlling factor and what other motives may have been at work, we have no record. The simple fact remains that the committee of style cleverly avoided the difficulty before them by phrasing the preamble:—"We, the People of the United States."

FARRAND, *supra* note 11, at 190-91. However, even if such an interpretation of the preamble is incorrect, the Constitution did represent a compact among both the people and the states as entities. *See infra* notes 210-19 and accompanying text. The preamble may have merely been reiterating the proposition that in republican governments all political power was ultimately derived from the people.

68. U.S. CONST. pmbl. The fact that the preamble did not explicitly mention the states may have been the result of the fact that the Convention was not sure which states would end up ratifying the Constitution. The preamble approved by the Convention before sending the Constitution to the Committee of Style had read: "We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia . . . ." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 565. However, the Committee of Style revised this language, perhaps over a concern that not all of the states would ratify the Constitution. *See* FARRAND, *supra* note 11, at 190-91.

found in Article IV of the respective documents.[69] This article served to establish a federal system by allowing for the free movement of not only people, but also property among the several states.[70] The right of entry among states established under Article IV has been recognized as a valuable mechanism for preserving individual liberties.[71] Article IV of the Articles ensured that "free inhabitants of each" of the states would "be entitled to all privileges and immunities of free citizens in the several states."[72] It further ensured that "the people of each state shall

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69. *See* PLEASANTS, *supra* note 29, at 45 ("The delegates at Philadelphia were greatly influenced by Article IV of the Articles of Confederation. In fact, they adopted much of its language for the fourth article of the new Constitution."). *See also* Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 526 (1839) ("The Constitution of the United States was formed to establish a national government . . . . The great object of the Constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing. The prosperity of every state could alone be promoted and secured by establishing these on principles of reciprocity; and on the security and protection of the citizens of each state, in all the states united by the government.").

70. Evidently, despite the scholarly consensus that the Articles of Confederation established a weak central government, there was a great deal achieved in the way of comity among the several states under the Articles. For example, Merrill Jensen came to the following conclusions concerning commerce among the states after examining newspapers from the era of the Articles:

> [T]he picture by the end of 1787 is not the conventional one of interstate trade barriers, but a novel one of reciprocity between state and state. American goods were free of duties, and foreign goods arriving in American ships were charged lower duties in most of the states than when brought in in foreign ships, and particularly, in the ships of non-treaty countries. Cooperation between the states extended to other matters than trade. Ancient disputes about boundaries and navigation rights were discussed and settled rapidly. . . . The usual procedure was for the states concerned to appoint commissioners, and, once these had agreed, for the legislatures to adopt the agreement, a process still followed as problems arise among American states.

JENSEN, THE NEW NATION, *supra* note 57, at 342.

71. *See* Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 923 (1985) ("The federal right to exit to another state or locality provides an important safeguard against local oppression, reducing the need for national intervention."); *see also* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that jurisdictions will compete for citizens and that social welfare may be maximized by allowing citizens to choose among jurisdictions).

72. ARTICLES OF CONFEDERATION art. IV, para. 1. The Privileges and Immunities provision of the Articles of Confederation was an amalgamation of two separate articles found in an earlier draft. In the Dickinson draft, Articles VI and VII read as follows:

> ART. VI. The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.

have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively."[73] The article included an Extradition Clause that ensured that upon demand of the governor or executive power of the state from which a fugitive fled, the fugitive would be "delivered up and removed to the state having jurisdiction of his offense."[74] Finally, the article provided that "Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the courts and magistrates of every other state."[75] Thus, the Articles provided for interstate comity[76] with respect to the rights of citizenship, commercial privileges, and

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ART. VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony [or any Commercial Society, established by its Authority shall] enjoy.

5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 546-47.

73. ARTICLES OF CONFEDERATION art. IV, para. 1.

74. *Id.* art. IV, para. 2.

75. *Id.* art. IV, para. 3.

76. In general, the principles of international comity were well-enunciated prior to ratification of the Articles of Confederation and the Constitution by political writers such as Vattel and Grotius. There were certain rights that commentators thought must be respected among nations as part of the "law of nations." As the Court noted in *Bank of Augusta v. Earle*:

> The term "comity" is taken from the civil law. Vattel has no distinct chapter upon that head. But the doctrine is laid down by other authorities with sufficient distinctness, and in effect by him. It is, in general terms, that there are, between nations at peace with one another, rights, both natural and individual, resulting from the comity or courtesy due from one friendly nation to another. Among these, is the right to sue in their Courts respectively; the right to travel in each other's dominions; the right to pursue one's vocation in trade; the right to do all things, generally, which belong to the citizens proper of each country, and which are not precluded from doing by some positive law of the state. Among these rights, one of the clearest is the right of a citizen of one nation to take away his property from the territory of any other friendly nation, without molestation or objection. This is what we call the comity of nations. It is the usage of nations, and has become a positive obligation on all nations.

38 U.S. (13 Pet.) 519, 556-57 (1839). In his work on the conflict of laws, Justice Story explained the principles of international comity as expressed by Huber: That laws have no force beyond the territorial jurisdiction of a state; persons within a given jurisdiction "whether their residence is permanent or temporary" are subject to the laws of the jurisdiction; and nations and states "from comity admit" that the laws of other nations and states ought to "have the same force every where" as long as "they do not prejudice the power or rights of other governments, or of their citizens." This form of voluntary comity was not derived from civil or natural law, but rather out of convenience. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 30 (1st ed. 1834). The flaw with this variety of comity was that it "is, and ever must be, uncertain. That it must necessarily depend on a variety of circumstances, which cannot be reduced to any certain rule." *Id.* at 29.

judicial proceedings, much like the systems discussed by writers such as Montesquieu, Vattel, and Pufendorf. However, the Privileges and Immunities Clause of the Articles of Confederation went beyond such voluntary recognition of principles of international comity because it mandated recognition of certain rights—the privileges and immunities of citizens—and because some of the rights to be recognized were not voluntarily recognized as rights of foreign citizens visiting the United States. As such, it was a fundamental element of the compact among the states.[77]

Article IV of the Constitution contains similar provisions. The article begins with a Full Faith and Credit Clause containing wording similar to that of the Articles of Confederation.[78] The Privileges and Immunities Clause of the Constitution is greatly simplified, providing that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[79] Alexander Hamilton termed this

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77. As the Supreme Court noted in *Bank of Augusta v. Earle*:

> Comity . . . is international courtesy; never allowed between provinces, districts, counties, cities, or other parts of the same empire. The connexion between these United States is closer and more intimate than that of comity. Their union by federal compact expressly settles the relation of the states to each other, and leaves no room for tacit or constructive comity to operate. . . . An article of the Constitution provides for the force and proof of public acts of state, for the privileges and immunities of the citizens of each state in all the rest, for fugitives from justice and fugitives from labour; leaving little or nothing on this important subject to judicial construction.

38 U.S. (13 Pet.) at 569-70. The scope of the protection was broadened to include all of the rights of citizenship. The clauses, in effect, mandated that the states recognize citizens of other states as citizens of their own states and not deny them the rights of citizenship that belong to their own citizens. *See* ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 127-28 (1935); *see also* Peter S. Onuf, *The First Federal Constitution: The Articles of Confederation, in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 82 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (noting that Jonathan Witherspoon conceived of the confederation as a more perfect form of the international system).

78. U.S. CONST. art. IV, § 1. One change is the inclusion of a congressional power of prescribing "the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." *Id.*

79. *Id.* art. IV, § 2, cl. 1. Charles Pinckney, who is probably responsible for this clause, stated in a letter written in 1787 that "[t]he 4th article, respecting the extending [of] the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation . . . ." Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention, In Philadelphia, on the 28th of May, 1787, reprinted in* 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 112. Thus, the parallel between the Articles and the

provision "the basis of the Union"[80] because it placed all citizens on an equal footing with resident citizens when travelling in foreign states. The Constitution differed from the Articles only insofar as it contained an improved mechanism for enforcing this provision through a national judiciary that would preside over conflicts among citizens of different states.[81] The article also contains an Extradition Clause,[82] supplemented by a Fugitive Slave Clause having similar wording.[83] Section 3 of Article IV was an innovation, containing provisions governing the admission of new states and the joining and splitting of states, requiring the consent of the state legislatures as well as Congress,[84] and provid-

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Constitution was recognized by the Founders. Furthermore, this provision was adopted with almost no debate. *See id.* at 437. For a discussion of the Privileges and Immunities Clause, see generally Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967); David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987).

80. THE FEDERALIST NO. 80, at 518 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

81. *See* U.S. CONST. art. III. Alexander Hamilton noted the importance of a national judiciary to the enforcement of this clause in *The Federalist No. 80*. Hamilton argued,

> [I]f it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

THE FEDERALIST NO. 80, at 518-19 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

82. U.S. CONST. art. IV, § 2, cl. 2.

83. *Id.* art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.").

84. *Id.* art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."). The Articles of Confederation did contemplate the expansion of the Confederacy. For example, Article XI provided for the addition of Canada to the Union. *See* ARTICLES OF CONFEDERATION art. XI. However, as James Madison noted in *The Federalist No. 43*, Congress was forced to assume a power that was not delegated due to the omission of such a power in the Articles. Madison stated: "The eventual establishment of *new States* seems to have been overlooked by the compilers of [the Articles]. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the

ing for congressional regulation of the territories.[85] Thus, a mechanism was put into place for the general government to regulate the formation of new states, protecting the stability of the federal structure. The final innovation was the inclusion of the Guarantee Clause in Section 4. This clause may be viewed as similarly protecting the stability of the federal system by delegating to the general government a power to ensure that states with only certain types of governments exist within the union.[86]

Finally, it is interesting to note that both the Constitution and the Articles prevented the states from entering into treaties with each other without the consent of Congress. The Articles provided: "No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue."[87] Similarly, the Constitution provided that "[n]o State shall, without the Consent of Congress, . . . Compact with another State . . . ."[88] Such prohibitions served to ensure that the structure established under the Constitution and the Articles was not disturbed through further contracting among the states.

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new system supplied the defect." THE FEDERALIST NO. 43, at 281 (James Madison) (Edward Mead Earle ed., 1976).

85. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."). Of this power, Madison stated: "This is a power of very great importance, and required by considerations similar to those which show the propriety of the [power of Congress to create new states]." THE FEDERALIST NO. 43, at 281 (James Madison) (Edward Mead Earle ed., 1976).

86. *See infra* notes 142-56 and accompanying text.

87. ARTICLES OF CONFEDERATION art. VI, para. 2. An earlier draft of the Articles also contained such a provision. *See* 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 546-54, art. V.

88. U.S. CONST. art. I, § 10, cl. 3. James Madison quickly dismissed discussion of this provision, stating "[t]he prohibition against treaties, alliances, and confederations makes a part of the existing articles of Union; and for reasons which need no explanation, is copied into the new Constitution." THE FEDERALIST NO. 44, at 289 (James Madison) (Edward Mead Earle ed., 1976).

3. *A General Government of Enumerated Powers*

A third structural similarity between the Articles of Confederation and the Constitution is that the general governments under both documents were designed to be governments of enumerated powers, much like the political union described by Pufendorf. Under Article IX of the Articles, the United States Congress was delegated the sole and exclusive powers to determine the conditions of peace, to declare war, to send and receive ambassadors, to enter into treaties and alliances, to establish rules for legal confiscations and their appropriation, to grant letters of marque and reprisal in times of peace, to appoint courts to try piracy and high seas felonies, to determine appeals in cases of captures,[89] to hear appeals of land disputes between the states,[90] to set the alloy and value of coins struck through its own action or those of the states, to fix standards of weights and measures, to manage trade and other affairs with Indians not in any state, to establish a post office and postage system, to appoint officers of land forces except for regimental officers and naval officers, to manage the regulation and direction of all land and naval forces,[91] to borrow money and emit bills of credit, to build a navy,[92] and to determine all expenses for common defense and general welfare.[93] This enumeration of powers is similar to that found in Article I, Section 8 of the Constitution. In fact, the similarity between the two documents is striking.[94] New enumerated powers included the power to tax,[95] the

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89. ARTICLES OF CONFEDERATION art. IX, para. 1.
90. *Id.* art. IX, para. 2.
91. *Id.* art. IX, para. 4.
92. *Id.* art. IX, para. 5.
93. *Id.* art. IX, para. 4. *See also id.* art. II (stating that all powers that were not "expressly delegated to the United States in Congress assembled" were reserved to the states).
94. James Madison emphasized the great amount of power exercised by the Confederation Congress in *The Federalist No. 38* where he stated:

> The present Congress can make requisitions to any amount they please, and the States are constitutionally bound to furnish them; they can emit bills of credit as long as they will pay for the paper; they can borrow, both abroad and at home, as long as a shilling will be lent. Is an indefinite power to raise troops dangerous? The Confederation gives to Congress that power also; and they have already begun to make use of it. . . . The existing Congress, without any such control, can make treaties which they themselves have declared, and most of the States have recognized, to be the supreme law of the land.

THE FEDERALIST NO. 38, at 240 (James Madison) (Edward Mead Earle ed., 1976). The Constitution in many cases improved the mechanisms through which the general government could exercise its enumerated powers. As one commentator has noted,

> Although the Congress enjoyed some important powers on paper, it had no means of carrying them out or of compelling compliance. It could not directly

power to regulate interstate and foreign commerce,[96] the power to establish uniform rules concerning bankruptcy and naturalization,[97] to grant patents,[98] and to establish inferior courts.[99] Importantly, the congressional power to coin money was effectively made exclusive and a national currency established under the Constitution through provisions prohibiting the states from coining their own money and emitting bills of credit under Article I, Section 10.[100] Despite the addition of some

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> tax or legislate upon individuals; it had no explicit "legislative" or "governmental" power to make binding "law" enforceable as such in state courts; it lacked authority to set up its own general courts; and it could raise troops and money only by "requisitioning" contributions from each state. On paper, such requisitions were "binding." In fact, they were mere requests.

Amar, *supra* note 2, at 1447. This evaluation of the powers of Congress may overestimate the weakness of the central government. However, it does usefully point out that there were improvements made in the mechanisms for exercise of congressional powers under the Constitution.

95. U.S. CONST. art. I, § 8, cl. 1.

96. *Id.* art. I, § 8, cl. 3.

97. *Id.* art. I, § 8, cl. 4.

98. *Id.* art. I, § 8, cl. 8. According to Madison, "[t]he utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors." THE FEDERALIST NO. 43, at 279 (James Madison) (Edward Mead Earle ed., 1976).

99. U.S. CONST. art. I, § 8, cl. 9.

100. *Id.* art. I, § 8, cl. 5. This power was effectively made exclusive since under Article I, Section 10, a state could not "coin money; emit bills of credit; [or] make anything but gold and silver coin a tender in payment of debts . . . ." *Id.* § 10, cl. 1. Historically under the Articles there had been problems with both the states and the general government printing money, which then lost most of its value. As James Madison noted,

> The loss which America has sustained since the peace from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public councils, on the industry and morals of the people and on the character of republican government, constitutes an enormous debt against the States chargeable with this unadvised measure, which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it.

THE FEDERALIST NO. 44, at 290 (James Madison) (Edward Mead Earl ed., 1976). *See also* FARRAND, *supra* note 29, at 88-90 (noting the rise of "paper money parties" that captured state legislatures); GERSON, *supra* note 11, at 46-50 (noting the rampant inflation of this period).

The prohibition on the states against emitting bills of credit, like the delegation of a federal power to regulate interstate commerce, was a further attempt to unify the United States commercially. *See* THE FEDERALIST NO. 44, at 290 (James Madison) (Edward Mead Earle ed., 1976) (noting that "[h]ad every State a right to regulate the value of its

significant new powers, however, the vast majority of the powers delegated to Congress under the Constitution were available to Congress under the Articles. Furthermore, the Confederation Congress had construed their enumerated powers broadly and had exercised powers that were arguably not expressly delegated, such as creating a national bank and regulating the Northwest Territories.[101]

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coin, there might be as many different currencies as States, and thus the intercourse among them would be impeded"). For example, in *Briscoe v. Bank of Kentucky*, it was argued by counsel that

> [t]he separation of all these powers of coining; issuing bills; making legal tenders; fixing standards; and the bestowal of them on the Union, to the total exclusion of the states; was indispensably necessary to accomplish the great ends for which the constitution was formed. Its leading object was to make the people, one people, for many purposes; and especially as to the currency. One, so far as to the high immunities and privileges of free citizens are concerned. One, in the rights of holding, purchasing and transferring property. One, in the privilege of changing domicil and residence at pleasure. One, in the modes and means of transacting business and commerce. It intended to break down the divisions between the states; so far, if you please, and so far only, as to remove all obstacles to intercourse and dealing between their respective citizens. To do this, one currency was necessary.

36 U.S. (11 Pet.) 257, 289 (1837). This conception of one political community and the substantive set of primarily commercial rights accompanying the union of the people was tied to the Privileges and Immunities Clause of Article IV, Section 2.

> [A Uniform national] currency was altogether proper and indispensable, under a system, which for the first time, in the history of free governments, established it as a fundamental principle that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." It was impossible to carry out this principle without it.

Id. at 290. It is interesting to note that it appears that an early draft of the Articles of Confederation had made the power of coining money exclusive in the general government, providing that "The United States assembled shall have the sole and exclusive Right and Power of . . . Coining Money and regulating the Value thereof . . . ." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 546-54, art. XVIII.

101. *See* Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 529 (1925) (noting that the Articles of Confederation "might easily have come to support an even greater structure of derived powers than the Constitution of the United States does at this moment"). Professor Currie, in particular, has noted the apparent illegitimacy of Congress' passage of the Northwest Ordinance:

> The most arresting feature of [the Northwest] Ordinance was the audacity of the Continental Congress in enacting it at all. One searches the Articles in vain to find even the slimmest reed to support the power of Congress to adopt such a measure. Yet under the Ordinance a federal territory was set up and governed with general acquiescence.

David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 842 (1994). *See also* Freedman, *supra* note 59, at 162-65; MAJOR PROBLEMS, *supra* note 11, at 389-90 (noting that the general government under the Articles "shared much in common with the [government under the] Constitution and was by no means its opposite . . . . In reality, strong continuities ran between the two governments").

The similarity between the Articles of Confederation and the Constitution is noteworthy because it was certainly not necessary to employ an enumerated powers structure in dividing the sphere of the general government from that of the states. For example, delegates to the Constitutional Convention twice voted for vesting Congress with a more general legislative power, and the Virginia Plan specified "[t]hat the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the confederation; and moreover [t]o legislate in all cases, to which the separate States are incompetent . . . or in which the harmony of the united States may be interrupted by exercise of individual legislation."[102] Therefore, other mechanisms for dividing power were possible. Both the Articles and the Constitution divided power between the states and the general government by listing the powers that were to be exercised by the general government. Furthermore, they both rejected the functionalist approach of defining the powers of the general government in terms of the "competence" of the state governments. Finally, under both documents the legislative power of the general government was limited—a general legislative power was not delegated to the general government. Thus, it is significant that such similar enumerated powers structures were chosen for the general governments under the Articles and under the Constitution.

4. Residual Powers Retained by the States

A fourth interesting similarity between the Articles and the Constitution is that both documents reserved to the states all powers not delegated to the general government, much like the system established under Pufendorf's perpetual treaty. Although the original Constitution did not have an explicit textual provision that declared that the states or the people retained residual powers, the Tenth Amendment made the reservation of residual powers to the states explicit.[103] Originally, such an explicit textual declaration may not have been thought to be necessary since the reservation of powers might be easily deduced from the

102. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 47.
103. U.S. CONST. amend. X ("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.").

delegation of only enumerated powers to the general government.[104] For example, Alexander Hamilton noted in *The Federalist No. 32* that "the State governments would clearly retain all the rights of sovereignty which they before had, and which were not . . . *exclusively* delegated to the United States."[105]

Article II of the Articles of Confederation stated that the states retained "every Power, Jurisdiction, and right, which is not by this Confederation expressly delegated to the United States . . . ."[106] Thus, under both documents the states retained powers not delegated to the general government. As James Madison noted in *The Federalist No. 40*, "in the new government, as in the old, the general powers are limited; and . . . the States, in all unenumerated cases, are left in the enjoyment

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104. It is important to emphasize that rights were not explicitly reserved to the people under the original Constitution either, and yet no one thought that the people did not have any rights other than those embodied in the original unamended text of the Constitution. This construction was made explicit by the Ninth Amendment. *Id.* amend. IX.

105. THE FEDERALIST NO. 32, at 194 (Alexander Hamilton) (Edward Mead Earle ed., 1976). *See also id.* NO. 83, at 541 (Alexander Hamilton) ("[A]n affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended."); 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 463-64 (remarks of Edmund Randolph) (stating that Congress' "powers are enumerated. Is it not, then, fairly deducible, that it has no power but what is expressly given it?—for if its powers were to be general, an enumeration would be needless.").

106. ARTICLES OF CONFEDERATION art. II. It is interesting to note that this provision as enacted in the Articles was not originally understood as being necessary. The original version provided that "Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 675. Thomas Burke of North Carolina, who proposed amendment of the Articles to include this provision, recounted the way in which it was added as follows:

> [The article] stood originally the third article; and expressed only a reservation of the power of regulating internal police, and consequently resigned every other power. It appeared to me that this . . . left it in the power of the future Congress . . . to make their own power as unlimited as they please. I proposed, therefore, an amendment, which held up the principle, that all sovereign Power was in the States separately, and that particular acts of it, which should be expressly enumerated, would be exercised in conjunction, and not otherwise . . . . This was at first so little understood that it was some time before it was seconded . . . . The opposition was made by Mr. Wilson of Pennsylvania, and Mr. R.H. Lee of Virginia: in the End however the question was carried for my proposition, Eleven ayes, one no, and one divided. . . . I was much pleased to find the opinion of accumulating powers to Congress so little supported, and I promise myself, in the whole business I shall find my ideas relative thereto nearly similar to those of most of the States.

Letter from Thomas Burke to Richard Caswell (Apr. 29, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 671, 672 (Paul H. Smith ed., 1976).

of their sovereign and independent jurisdiction."[107] Perhaps no explicit textual provision was necessary in order to convey this aspect of the federal structure since both documents represented compacts wherein the states delegated only certain enumerated powers and not a general legislative power to the general government.

5. *Constitutional Protection for the States as Entities*

A fifth structural similarity between the Constitution and the Articles of Confederation is that both documents guaranteed the existence of the states as entities. Article II of the Articles provided emphatically that "[e]ach State retains its sovereignty, freedom and independence."[108] The fact that the Articles instituted a confederacy "between the states" arguably also guaranteed their continued existence. Similar guarantees are to be found in the constitutional text. For example, Article V precluded amending the Constitution to take away the equality of representation of the states in the Senate.[109] Similarly, the Guarantee Clause of Article IV may be construed to guarantee the continued existence of the states as entities possessing "republican" forms of government.[110] Thus, both the Articles of Confederation and the Constitution explicitly ensured that the system established was "an indestructible Union, composed of indestructible States."[111]

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107. THE FEDERALIST NO. 40, at 255 (James Madison) (Edward Mead Earle ed., 1976).

108. ARTICLES OF CONFEDERATION art. II.

109. U.S. CONST. art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

110. *Id.* art. IV, § 4. *See also infra* notes 142-56 and accompanying text (discussing the role of the Guarantee Clause in the federal structure).

111. Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869). The Court's emphasis on the constitutional protections guaranteeing the continued existence of the states as entities is worth quoting more fully:

> "[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," . . . "[W]ithout the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

6. *Supremacy*

Finally, a sixth structural similarity between the Articles of Confederation and the Constitution is that both appear to have established the supremacy of the general government over the states within its sphere of operation, much like the political union described by Pufendorf. The Articles of Confederation made the determinations of Congress binding upon the states. Article XIII declared: "Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State . . . ."[112] Similarly, the Constitution provided: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."[113] Thus, one of the most centralizing aspects of the Constitution was also present in the federal structure established under the Articles.

Id. (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)). *See also* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (noting that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"); Tafflin v. Levitt, 493 U.S. 455, 458 (1990) (noting that "under our federal system, the States possess sovereignty concurrent with that of the Federal Government"); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926) (stating that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers").

112. ARTICLES OF CONFEDERATION art. XIII, para. 1. An earlier draft of the Articles contained similar language: "Every Colony shall abide by the Determinations of the United States assembled, concerning the Services performed and Losses or Expences incurred by every Colony for the Common Defence or general Welfare . . . ." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 546-54, art. XII.

113. U.S. CONST. art. VI, § 2. James Madison defended the Supremacy Clause in *The Federalist No. 44*. Although he did not state that the principle was already recognized in the Articles of Confederation, he did not doubt the necessity of the principle. He argued that if there were no Supremacy Clause in the Constitution, but rather a "saving clause" declaring the supremacy of the state constitutions,

> the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members.

THE FEDERALIST NO. 44, at 296 (James Madison) (Edward Mead Earle ed., 1976). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403 (1819) (Marshall, J.) ("If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature.").

B. Structural Differences

Although many of the provisions establishing the federal systems under the Articles of Confederation and the Constitution are similar, there are a few notable exceptions. For example, the Constitution added a few enumerated powers that were deemed necessary to remedy specific problems occurring under the Articles. The Constitution also included additional clauses such as the Sweeping Clause and the Guarantee Clause. Furthermore, the Constitution included alterations in the provisions governing amendment and ratification as well as the reservation of powers delegated to the general government. Many of these structural differences may be traced to the fundamental difference under the Constitution, which was the source of political authority of the general government. The political authority of the general government under the Constitution was derived from both the states and the people, unlike the political authority of the general government under the Articles, which was derived from the states alone.

1. Scope of Enumerated Powers

As previously noted,[114] although many of the enumerated powers under the Articles and the Constitution were identical, the general government enjoyed greater enumerated powers under the Constitution than it had under the Articles of Confederation. Still, the powers delegated to the general government remained "few and defined," while those of the states remained "numerous and indefinite."[115] There was

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114. *See supra* notes 89-102 and accompanying text.

115. THE FEDERALIST NO. 45, at 303 (James Madison) (Edward Mead Earle ed., 1976). Madison elaborated:

> If the new Constitution be examined with accuracy and candor, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing Congress by the Articles of Confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. The change relating to taxation may be regarded as the most important; and yet the present Congress have as complete authority to

merely a slight readjustment in the allocation of powers between the general and state governments. As Alexander Hamilton noted,

> The question, then, of the *division of powers* between the general and state governments, is a question of convenience: it becomes a prudential inquiry, what powers are proper to be reserved to the latter; and this immediately involves another inquiry into the proper objects of the two governments. This is the criterion by which we shall determine the just distribution of powers.[116]

The most important additions to the list of enumerated powers were the power to levy taxes[117] and the power to regulate interstate and foreign commerce.[118] The Articles had proved inadequate since under the

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> REQUIRE of the States indefinite supplies of money for the common defence and general welfare, as the future Congress will have to require them of individual citizens; and the latter will be no more bound than the States themselves have been, to pay the quotas respectively taxed on them.

Id. at 303-04.

116. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 350 (statement of Alexander Hamilton). James Wilson gave a rule of thumb during the ratification debates concerning the proper division of powers:

> Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.

Id. at 424. Similarly, James Madison concluded that "The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 303 (James Madison) (Edward Mead Earle ed., 1976). As Raoul Berger has noted, the distinction between local and national governmental functions was important to the Founding Generation:

> A State's regulation of its schools, hospitals, jails, and the like ordinarily has no "effect" beyond its borders, and . . . it remains the domain of the State. Once, therefore, a particular function is identified as "local" as understood by the Founders—e.g., "agriculture"—it is protected by the State's "exclusive" jurisdiction of such matters.

BERGER, FEDERALISM: THE FOUNDERS' DESIGN, *supra* note 2, at 75.

It is interesting to note that during debates over the drafting of the Articles of Confederation, little time was spent on the proper division of powers between the general government and the states. *See* JENSEN, THE ARTICLES OF CONFEDERATION, *supra* note 57, at 138-39 ("Over . . . the distribution of power between the states on the one hand and Congress on the other . . . there was only a short discussion . . . ."). Perhaps this is due to the fact that there was widespread agreement over the proper province of the general government and the state governments.

117. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . .").

118. *Id.* art. I, § 8, cl. 3 (delegating the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Prohibitions against state activities in Article I, Section 10 further strengthened this power. The states were prohibited from laying "any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws" with the "net Produce of all Duties and Imposts, laid by any State on Imports or Exports [going to] the Treasury of the United States . . . ." *Id.* §10, cl. 2. Furthermore, a state could not "lay any Duty of

Articles it was up to the states to obtain funds to support the general government.[119] As Alexander Hamilton argued in *The Federalist No. 30*,

> [T]here must be interwoven, in the frame of the government, a general power of taxation, in one shape or another.
>
> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution.[120]

Tonnage." *Id.* cl. 3. James Madison noted the importance of these provisions in *The Federalist No. 44*:

> The restraint on the power of the States over imports and exports is enforced by all the arguments which prove the necessity of submitting the regulation of trade to the federal councils. It is needless, therefore, to remark further on this head, than that the manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports, and to the United States a reasonable check against the abuse of this discretion.

THE FEDERALIST NO. 44, at 292 (James Madison) (Edward Mead Earle ed., 1976).

119. For example, Article VIII provided as follows:

> All charges of war and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.
>
> The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States, within the time agreed upon by the United States in Congress assembled.

ARTICLES OF CONFEDERATION art. VIII. The states were purportedly obliged to follow these directives under Article XIII, which stated: "Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State . . . ." ARTICLES OF CONFEDERATION art. XIII. Alexander Hamilton attacked both the system of quotas for defense as well as requisitions for funds in *The Federalist No. 22*, stating: "The system of quotas and requisitions, whether it be applied to men or money, is, in every view, a system of imbecility in the Union, and of inequality and injustice among the members." THE FEDERALIST NO. 22, at 134 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

120. THE FEDERALIST NO. 30, at 182-83 (Alexander Hamilton) (Edward Mead Earle ed., 1976). Hamilton reiterated this theme in *The Federalist No. 31*:

> As revenue is the essential engine by which the means of answering the national exigencies must be procured, the power of procuring that article in its full extent must necessarily be comprehended in that of providing for those exigencies.

Thus, a taxing power in the general government was deemed a necessary reform. Similarly, provision for a power to regulate interstate and foreign commerce was deemed necessary to ensure free movement of goods among the several states.[121] As Alexander Hamilton noted while attempting to justify a federal commerce power in *The Federalist No. 22*,

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.[122]

Thus, the addition of enumerated powers under the Constitution was an attempt to remedy certain narrow inadequacies of the general government under the Articles of Confederation. It was neither a wholesale increase in the powers of the general government nor a grant of a general legislative power. The alterations made in this aspect of the federal structure were minimal.

2. *The Sweeping Clause*

The Constitution did, however, add one potentially broad enumerated power—the 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."[123] The so-called "Sweeping Clause"[124] was the subject of some concern during the

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> As theory and practice conspire to prove that the power of procuring revenue is unavailing when exercised over the States in their collective capacities, the federal government must of necessity be invested with an unqualified power of taxation in the ordinary modes.

Id. NO. 31, at 190 (Alexander Hamilton).

121. *See* PLEASANTS, *supra* note 29, at 36 (noting that "[t]here were many Americans at the time [of ratification of the Constitution] who felt that the absence of federal control over commerce was indeed a major problem").

122. THE FEDERALIST NO. 22, at 132 (Alexander Hamilton) (Edward Mead Earle ed., 1976). *See also id.* NO. 42, at 274 ("The defect of power in the existing Confederacy to regulate the commerce between its several members [has] been clearly pointed out by experience.").

123. U.S. CONST. art. I, § 8, cl. 18.

124. This terminology was used by Antifederalists and was adopted by the Federalists. *See, e.g.*, THE FEDERALIST NO. 33, at 199-200 (Alexander Hamilton) (Edward Mead Earle ed., 1976) (referring to "the sweeping clause, as it has been affectedly called"); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal*

debates over ratification of the Constitution.[125] However, the clause may be viewed as merely a principle of construction which was made textually explicit under the Constitution, much like the Tenth Amendment. As James Madison stated in *The Federalist No. 44*,

> Had the Constitution been silent on this head, 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. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included.[126]

Thus, this power of the general government may have implicitly existed even under the Articles of Confederation.

The Federalists noted that the general government had already exercised a great degree of power not explicitly provided for in the Articles.[127] Under Article II of the Articles of Confederation, the

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Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L.J. 267, 270-71 (1993).

125. *See* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 218. As the following passage makes clear, the fear was that the clause would legitimate the unlimited exercise of power:

> There is a general power given to [the national government] to make all laws that will enable them to carry their powers into effect. There are no limits pointed out. They are not restrained or controlled from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect.

Id. See also 3 *id.* at 436 (remarks of Patrick Henry) ("If [members of Congress] think any law necessary for their personal safety, after perpetrating the most tyrannical and oppressive deeds, cannot they make it by this sweeping clause?"). One commentator characterized the danger as follows:

> [T]o make all such laws which *the Congress shall think necessary and proper*,—for who shall judge for the legislature what is necessary and proper?—Who shall set themselves above the sovereign?—What inferior legislature shall set itself above the supreme legislature?—To me it appears that no other power on earth can dictate to them or controul them, unless by force . . . .

An Old Whig, *No. 2* (1787), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 239 (Philip B. Kurland & Ralph Lerner eds., 1987).

126. THE FEDERALIST NO. 44, at 294 (James Madison) (Edward Mead Earle ed., 1976).

127. *See id.* NO. 38, at 241 (James Madison). According to Madison, "Out of this lifeless mass has already grown an excrescent power, which tends to realize all the dangers that can be apprehended from a defective construction of the supreme government of the Union." *Id.* Madison listed a number of specific instances of congressional exercise of such powers and concluded: "All this has been done; and done without the least color of constitutional authority. Yet no blame has been whispered; no

general government was prohibited from exercising any power not *expressly* delegated. In *The Federalist No. 44*, James Madison argued that this was one of three textual alternatives to the Sweeping Clause that would serve a similar function. However, the term "expressly" was somewhat ambiguous in Madison's opinion. Madison argued both that the term "expressly" could potentially be construed broadly so as to impose no restriction on the powers of Congress and that the term "expressly" had in fact been too narrowly construed, enfeebling the general government.[128] Madison also noted that there were certain powers that were not "expressly" delegated, under the narrow construction of that term, but which were necessary and proper.[129] Thus, the "necessary and proper" language may have been merely an attempt to make more precise principles that were already present in the Articles of Confederation.

Furthermore, it should be noted that whereas the Articles of Confederation provided almost no explicit constraints on the exercise of the enumerated powers by Congress, the Constitution made explicit many constraints on the legislative powers of Congress in Article I, Section 9.[130] Similarly, the first ten amendments, which were contemplated at

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alarm has been sounded." *Id.*

128. According to Madison,

> Had the convention taken the first method of adopting the second article of Confederation, it is evident that the new Congress would be continually exposed, as their predecessors have been, to the alternative of construing the term "*expressly*" with so much rigor, as to disarm the government of all real authority whatever, or with so much latitude as to destroy altogether the force of the restriction.

Id. NO. 44, at 293 (James Madison).

129. Madison stated:

> It would be easy to show, if it were necessary, that no important power, delegated by the articles of Confederation, has been or can be executed by Congress, without recurring more or less to the doctrine of *construction* or *implication*. As the powers delegated under the new system are more extensive, the government which is to administer it would find itself still more distressed with the alternative of betraying the public interests by doing nothing, or of violating the Constitution by exercising powers indispensably necessary and proper, but, at the same time, not *expressly* granted.

Id. Thus, Madison once again noted the broad scope of the powers exercised by Congress under the Articles of Confederation—powers that were not explicitly recognized in the text.

130. U.S. CONST. art. I, § 9, cl. 2 (guaranteeing the privilege of the writ of habeas corpus); *id.* cl. 3 (prohibiting bills of attainder and ex post facto laws); *id.* cl. 4 (prohibiting capitation and other direct taxes); *id.* cl. 5 (prohibiting taxes on articles exported from any state); *id.* cl. 6 (prohibiting preferences to individual states given by regulations of commerce); *id.* cl. 7 (requiring appropriations made by law prior to the withdrawal of money from the treasury); *id.* cl. 8 (prohibiting the granting of titles of nobility). The prohibition against direct taxation was in effect repealed with ratification of the Sixteenth Amendment in 1913, authorizing the income tax. *See id.* amend. XVI.

the time of ratification of the original Constitution, spell out additional constraints on the powers of the general government. Finally, the Sweeping Clause authorized only those laws that were both "necessary *and proper*"—perhaps indicating a further constraint on congressional lawmaking authority.[131] Thus, in explicitly granting the power to make all laws that were necessary and proper, the Constitution may merely have been evidencing the tendency of the Framers to more explicitly state the scope of the enumerated powers. The Sweeping Clause stands in contrast to the list of limitations on the exercise of congressional powers in Article I, Section 9, but both illustrate the greater specificity of the Constitution.

3. *Source of Political Authority*

Although the enumerated powers of the general government were slightly enlarged under the Constitution, the most significant alteration in the federal structure is the source of the political authority of the general government. Under the Articles, this authority was derived completely from the state governments as entities.[132] There was a

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131. *See* Lawson & Granger, *supra* note 124, at 273-74 (arguing that the term "proper" places some restrictions on the exercise of the enumerated powers by the general government and concluding that "a 'proper' executory law must be peculiarly and distinctively within the province of the national and therefore must respect the national government's jurisdictional boundaries"). The Framers probably contemplated executive and judicial review of legislative determinations of what was necessary and proper. As James Madison noted in *The Federalist No. 44*:

> If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning, I answer, the same as if they should misconstrue or enlarge any other power vested in them .... In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort a remedy must be obtained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers.

THE FEDERALIST NO. 44, at 294-95 (James Madison) (Edward Mead Earle ed., 1976). *See also* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 362 (statement of Alexander Hamilton) ("[T]he laws of Congress are restricted to a certain sphere, and when they depart from this sphere, they are no longer supreme or binding.").

132. *See* HOFFERT, *supra note 2, at 39-40. Modern commentators have noted the* importance of the states in the constitutional structure of the Articles:

> The Articles does not center its attention on autonomous individuals. This is not to suggest that it does not care about liberty. On the contrary, the Articles specifically mentions the securing of liberties as one of the primary purposes of the confederated league. The liberty it wishes to secure, however, is that

complete equality among the states in terms of the political authority that they could exercise.[133] The title of the Articles underscored the fact that it was perceived to be a compact among the *states* as entities. Furthermore, under the Articles the delegates to Congress were appointed "in such manner as the legislature of each State shall direct" and not directly by the people.[134]

In contrast, under the Constitution, the political authority of the general government is arguably derived both from the state governments as entities as well as from the people of the several states. Thus, the Constitution represents a *partial* consolidation as compared with the Articles of Confederation. Evidence of this fact may be found within the constitutional text. For example, under the Constitution, Senators were originally appointed by the state legislatures,[135] whereas members of the House of Representatives were to be elected directly by the "People of the several States."[136] This differed from the Articles of Confederation where members of Congress were appointed by the state legislatures and there was no direct election of representatives. Furthermore, the electoral college provided a mechanism under which the states appointed "in such Manner as the Legislature thereof may direct"[137] electors who would then vote for the President and Vice President.[138] Therefore, the states exercised their political authority as entities in determining representatives in both the legislative and executive departments. Similarly, under Article V of the Constitution, the state legislatures as well as the people themselves had a role to play in amending the Constitution, indicating that both the state governments

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> of the states—or, more precisely, that of the primary communities, which are the states.

Id. The question of where to vest most of the power under the Articles was another issue implicating questions of political authority. *See* JENSEN, THE ARTICLES OF CONFEDERATION, *supra* note 57, at 161 ("The fundamental issue in the writing of the Articles of Confederation was the location of ultimate political authority, the problem of sovereignty. Should it reside in Congress or in the states?").

133. In fact, in an early draft of the Articles, this equality was underscored in a separate article. Article XVII provided that "[i]n determining Questions each Colony shall have one Vote." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 546-54.

134. ARTICLES OF CONFEDERATION art. V. Further enhancing delegates' dependence on the state legislatures was the fact that under the Articles there was "a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year." *Id.*

135. U.S. CONST. art. I, § 3, cl. 1.

136. *Id.* art. I, § 2, cl. 1.

137. *Id.* art. II, § 1, cl. 2. The Twelfth Amendment changed this process slightly. *See id.* amend. XII.

138. *Id.* art. II, § 1, cl. 3.

and the people directly were the source of political authority for the general government.[139]

The real innovation under the Constitution was that the general government depended at all for its authority on the people. The Constitution, unlike the Articles of Confederation, could no longer be viewed as merely a treaty among sovereign state governments, but rather established a system under which the general government was directly accountable to the people. It represented a real change from the political unions described by Vattel and Pufendorf. This was a source of potential danger with which Antifederalists were concerned. Since the general government depended for its political authority, at least in part, on the whole people of the United States, through amendment of the Constitution, the whole people could progressively erode the province of the individual states, while enlarging that of the general government.[140] In fact, Antifederalist concerns were realized, to a certain extent, when the Constitution was amended to provide for direct election of Senators by the people under the Seventeenth Amendment.[141]

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139. *See infra* notes 157-64 and accompanying text.

140. As one Antifederalist noted,

> It is beyond a doubt that the new federal constitution, if adopted, will in a great measure destroy, if it do not totally annihilate, the separate governments of the several states. We shall, in effect, become one great Republic. . . . From the moment we become one great Republic, either in form or substance, the period is very shortly removed, when we shall sink first into monarchy, and then into despotism.

3 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 31-32. *See also infra* notes 214-19 and accompanying text.

141. U.S. CONST. amend. XVII, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . ."). In a dissenting opinion in *Garcia*, Justice O'Connor observed the importance of this structural change:

> [R]ecent changes in the workings of Congress, such as the direct election of Senators and the expanded influence of national interest groups . . . may well have lessened the weight Congress gives to the legitimate interests of States as States. As a result, there is now a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic.

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 584 (1984) (O'Connor, J., dissenting) (citation omitted).

4. *The Guarantee Clause*

A further innovation in the text of the Constitution was the Guarantee Clause. This was an addition to Article IV, which had been substantially copied from the Articles to the Constitution.[142] The fourth section of Article IV of the Constitution provides as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.[143]

It is noteworthy that this provision is placed in that article of the Constitution that governs the relations among the states. Other provisions in Article IV such as the Privileges and Immunities Clause and the Full Faith and Credit Clause establish the reciprocal relations among the states. However, this provision seems to guarantee both the continued existence of the states as well as the continued existence of states *of a certain sort*—those having "republican" forms of government. Thus, the clause guarantees the maintenance of a federal system of a certain sort, as well as the stability of the federal system.[144] As James Madison noted in *The Federalist No. 43*,

> In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained.[145]

Madison justified this provision as a useful guarantee, querying "who can say what experiments may be produced by the caprice of particular

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142. *See supra* notes 69-88 and accompanying text.

143. U.S. CONST. art. IV, § 4.

144. A number of commentators have recently addressed the potential role of the Guarantee Clause in maintaining the federal system. *See, e.g.*, Charles L. Black, Jr., *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469 (1984); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

The fact that the Supreme Court has interpreted the clause to raise nonjusticiable political questions has effectively emasculated this valuable provision maintaining the integrity of the federal system. *See* Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).

145. THE FEDERALIST No. 43, at 282 (James Madison) (Edward Mead Earle ed., 1976). Madison continued by quoting Montesquieu's discussion of the confederate republics of Germany and ancient Greece as examples of confederate systems that experienced difficulties as a result of members' having varying forms of government.

States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?"[146] Thus, the addition of the Guarantee Clause was necessitated by the closer union among the states established under the Constitution.

However, the question of what constitutes a "republican" form of government has never been well settled.[147] James Madison attempted to give a definition of a "republic" in *The Federalist No. 39*, while trying to demonstrate that the Constitution did indeed establish a general government that was republican in form. Madison's definition is not particularly precise:

> If we resort for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.[148]

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146. *Id.* at 282-83.

147. For example, John Adams stated that he "never understood" what the Guarantee Clause meant and "believe[d] no man ever did or ever will." WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 72 (1972) (quoting Letter from John Adams to Mercy Warren (July 20, 1807)). In *The Federalist No. 43*, James Madison stated that "the forms of government under which the compact was entered should be *substantially* maintained" and that a republican form of government "supposes a preexisting government of the form which is to be guaranteed." As a result, the states were forbidden to "exchange republican for anti-republican Constitutions." THE FEDERALIST NO. 43, at 282-83 (James Madison) (Edward Mead Earle ed., 1976). For a discussion of the history of the clause, see WIECEK, *supra*; Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 565-69 (1962); Merritt, *supra* note 144 (arguing that the Guarantee Clause implies a modest restraint on federal power to interfere with state autonomy); Thomas A. Smith, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 YALE L.J. 561 (1984) (arguing that the clause embodies rule of law values).

148. THE FEDERALIST NO. 39, at 243-44 (James Madison) (Edward Mead Earle ed., 1976). Madison noted that there had been "extreme inaccuracy" in the ways in which the term "republican" had been used to designate different governments. Madison observed:

> What then are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different States, no satisfactory one would ever be found.

Id. at 243. Madison argued that Holland, Venice, Poland, and England had been inaccurately characterized as "republics" when, in fact, the governments of these countries had monarchical and aristocratic aspects. The approach Madison took in arguing that the general government was republican was somewhat complex. Madison

Thus, republics, at a minimum, derived their political authority from the people and not from a subset of the people or a single individual.[149] In *The Federalist No. 43*, Madison noted that the current state governments were republican in nature.[150] Thus, some evidence of what constituted a "republican" form of government may be derived from examining the state constitutions of this period. Furthermore, Madison followed the textual distinction between the guarantee of a republican

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observed:

> In order to ascertain the real character of the government, it may be considered in relation to the foundation on which it is to be established; to the sources from which its ordinary powers are to be drawn; to the operation of those powers; to the extent of them; and to the authority by which future changes in the government are to be introduced.

Id. at 246. Thus, Madison analyzed procedures for ratification, the structure of the legislature and limits on its power, and provisions for amendment of the Constitution.

149. Samuel Johnson's 1786 dictionary defined "Republican" as "Placing the government in the people." Merritt, *supra* note 144, at 24 n.130. James Madison wrote that a republic is "a government which derives all its powers directly or indirectly from the great body of the people." THE FEDERALIST NO. 39, at 243 (James Madison) (Edward Mead Earle ed., 1976). *See also id.* NO. 10, at 59 (James Madison) (stating that a republic is characterized by "the delegation of the Government . . . to a small number of citizens elected by the rest"); *id.* NO. 37, at 227 (James Madison) ("The genius of republican liberty seems to demand on one side, not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people . . . ."). Similarly, Alexander Hamilton stated that "the fundamental maxim of republican government . . . requires that the sense of the majority should prevail." *Id.* NO. 22, at 134 (Alexander Hamilton). *See also id.* NO. 57, at 370 (James Madison or Alexander Hamilton) ("The elective mode of obtaining rulers is the characteristic policy of republican government."). Charles Pinckney stated that a republic was a form of government in which "the people at large, either collectively or by representation, form the legislature." 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 328. Finally, James Wilson stated that republican governments were based on the "principle[] that the Supreme Power resides in the body of the people." Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793). *See also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 146-47 (Thomas M. Cooley ed., 4th ed. 1873) ("Strictly speaking, in our republican forms of government the absolute sovereignty of the nation is in the people of the nation; and the residuary sovereignty of each State, not granted to any of its public functionaries, is in the people of the State."). Modern commentators have also recognized the central importance of the notion of popular sovereignty. For example, Akhil Amar has called this the "central pillar of Republican Government." Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994).

150. THE FEDERALIST NO. 43, at 282 (James Madison) (Edward Mead Earle ed., 1976). However, Madison also noted that:

> Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.

Id. at 283.

form of government and the "protection against invasion"[151] and "protection against domestic violence."[152] Based on Madison's definition of a "republican form" of government and the placement of the Guarantee Clause next to these other clauses in Article IV, the purpose of the Guarantee Clause was probably to ensure that the political authority of each state government was derived from the people *of the state.* Neither foreign invaders, nor internal usurpers, nor even the people of the whole United States[153] were to serve as the source of political authority in any of the states. Rather, the governments of the states had to derive their powers directly from the people *of the state.*[154] Thus, the Guarantee Clause ensured the continued existence

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151. According to Madison, "A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors." *Id.*

152. Madison noted that such guarantees were hardly novel and cited a contemporary example:

> It has been remarked, that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other cantons. A recent and well-known event among ourselves has warned us to be prepared for emergencies of a like nature.

Id. (referring, most likely, to Shays' Rebellion). A further concern of this provision was the potential of a slave revolt. Madison noted that either alien residents or slaves might side with a minority faction and work innovations in the structure of government that would be anti-republican:

> May it not happen, in fine, that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men; but who, in the tempestuous scenes of civil violence, may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.

Id. at 284-85.

153. It is noteworthy, for example, that Madison recognized the danger to the sovereignty of the states from powerful neighbors in discussing the clauses in this article. *See supra* notes 145-52 and accompanying text. If neighboring states could serve as a source of danger, so too could the national government, singling out certain states. Thus, the Guarantee Clause is consistent with the structural provisions found in the Constitution guaranteeing the continued existence of the states as entities. *See supra* notes 108-11 and accompanying text.

154. A corollary of this guarantee might have been that certain rights were presumed to have been retained by the people. As Justice Story speculated in his *Commentaries*:

of the states as entities as long as the people of the state consented to the existence of their state government. This guarantee was particularly important since the whole people of the United States could conceivably amend the Constitution to the detriment of a single state or group of states.

It is unclear whether a comparable provision is found in the Articles of Confederation. One provision that may have served the same purpose as the Guarantee Clause is the guarantee of the preservation of state sovereignty found in Article II. The guarantee of state sovereignty may have been construed to also guarantee governments that were republican in form.[155] However, the guarantee seems to have represented merely a prohibition against action by the general government, and not a guarantee of a republican form of government in the face of internal usurpations. With conflicts such as Shays' Rebellion[156] in Massachu-

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> Whether, indeed, independently of the Constitution of the United States, the nature of republican and free governments does not necessarily impose some restraints upon the legislative power, has been much discussed. It seems to be the general opinion, fortified by a strong current of judicial opinion, that, since the American revolution, no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property; to take the property of A and transfer to B by a mere legislative act. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming, that any State legislature possessed a power to violate and disregard them; or that such a power, so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people, in the usual forms of the constitutional delegation of power. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and positive declarations to that effect.

2 STORY, *supra* note 149, at 261-62.

155. It is interesting to note that in an earlier draft of the Articles of Confederation there was a provision guaranteeing the police power of the states. Article III read as follows: "Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its internal police, in all matters that shall not interfere with the Articles of this Confederation." 5 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 59, at 546-54, art. III. John Dickinson made the following notation next to this provision: "Quaere. The Propriety of the Union's guaranteeing to every colony their respective Constitution and form of Government." *Id.* This notation may indicate that although the provisions of Article III were related to a guarantee of a republican form of government to the states, they were not identical and that Dickinson contemplated the addition of a Guarantee Clause in the Articles.

156. For a discussion of Shays' Rebellion of 1786 and its influence on the Founding Generation, see FARRAND, *supra* note 29, at 95 ("Shays' Rebellion was fairly easily suppressed, even though it required the shedding of some blood. But it was the possibility of further outbreaks that destroyed men's peace of mind."); PLEASANTS, *supra*

setts threatening to result in internal usurpations of state government power, additional guarantees were probably thought to be necessary.

5. *Amendment*

Amendment under the Articles of Confederation was extremely difficult. The union was to be "perpetual," and yet the Articles provided that no alteration to the Articles could be made "at any time hereafter . . . unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State."[157] Thus, unlike Article V of the Constitution, the amendment process depended on the unanimous consent of the state legislatures and did not involve the people directly. This is further evidence that the union under the Articles was a compact among the states as entities and did not involve the people directly.

In contrast, under Article V of the Constitution, amendments had to be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . ."[158] In fact, a requirement for unanimous consent "by the several States" was explicitly rejected by the Convention.[159] This supermajority requirement and the

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note 29, at 34-35.

157. ARTICLES OF CONFEDERATION art. XIII, para. 1.

158. U.S. CONST. art. V.

159. Roger Sherman of Connecticut had made a motion to add a unanimity requirement to Article V. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 558. However, James Wilson intervened, first moving for a two-thirds requirement, which failed 5-6. *Id.* at 558-59. He then moved to insert the three-fourths requirement, and the motion passed unanimously. *Id.* at 559. There was no thought of a simple majority requirement for ratification of amendments. This is consistent with the notion that the states were also parties to the compact forming the federal union. *See infra* notes 235-39 and accompanying text.

The unanimous consent requirement of the Articles was widely criticized. *See, e.g.*, 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 558 (remarks of Alexander Hamilton) ("It had been wished by many and was much to have been desired that an easier mode for introducing amendments had been provided by the articles of Confederation."); Charles Pinckney, *Observations on the Plan of Government Submitted to the Federal Convention, reprinted in* 3 *id.* at 120 (noting the necessity of "destroy[ing] that unanimity which upon . . . the present System has unfortunately made necessary . . . it is to this unanimous consent, the depressed situation of the Union is undoubtedly owing"); 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 89 (remarks of James Madison in the Virginia ratification debate) ("The inconveniences resulting from this requisition, of unanimous concurrence in alterations in the

potential for ratification by constitutional conventions[160] indicates that the people were to have a more direct role in amendment and, therefore, that the Constitution was a compact of both the people and the states as entities. The fact that the requirement was measured in terms of the states as entities indicates that the Constitution was a compact of the states as well as the people. These points were noted by James Madison in *The Federalist No. 39*.[161] Madison recognized that the structure of Article V indicated that the Constitution was based on a compact among the states as entities as well as the people—a partial consolidation—since in effect it mandated consent of a majority of the people as well as a majority of the states for ratification of any amendments.

The danger of this form of government, as far as the Antifederalists were concerned, was that the people could in effect eradicate the power of the states without their consent through amendment.[162] For example, during the Philadelphia Convention Roger Sherman "expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate" and moved that "no State should be affected in its internal police, or deprived of its equality in the Senate."[163] The exception for equal suffrage of the states remained in the final version of the Constitution[164] as a prophylactic against the people's undermining the fundamental nature of the compact forming the union as one among both the people and the states. It is significant that no such exception is found in the Articles. There was no need for such a provision in the Articles, since it was merely a compact among the states as entities.

Confederation, must be known to every member in this Convention.").

160. For a discussion of such conventions, see Amar, *supra* note 2, at 1459-60.

161. THE FEDERALIST NO. 39, at 249-50 (James Madison) (Edward Mead Earle ed., 1976). *See also infra* note 235 and accompanying text; Monaghan, *supra* note 2, at 138 ("To my eyes, neither completely state-centered nor completely nationalist views of the founding capture the original understanding. I believe that Madison got the dominant understanding right.").

162. *See infra* notes 210-19 and accompanying text, discussing Antifederalist concerns that the Constitution created a "consolidation" of the states.

163. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 629.

164. U.S. CONST. art. V. After Sherman's motion failed 3-8, Sherman moved to strike Article V completely. Gouvernour Morris then moved to include the equal suffrage exception alone, and this motion was "agreed to without debate." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 630-31.

6. Ratification

The Articles of Confederation were ratified by the state legislatures—not by the people directly.[165] In contrast, the Constitution was to be ratified by conventions of nine states.[166] There are two important observations that may be made concerning the ratification mechanism under the Constitution. First, the people were to be directly involved in ratification, indicating that they were parties to the compact established under the Constitution. Second, the fact that it was to be ratified by a supermajority of the states further indicates that the people were parties to the compact. If only the states as entities were parties to the compact then a majority of the states would be sufficient for ratification. However, if the people themselves were also parties to the compact then a majority of the people would also be necessary—ratification by a supermajority of the state conventions would be a close approximation to ratification by a majority of the whole people.[167]

7. Residual Powers Retained by the People as Well as the States

Finally, further textual support for the argument that the Articles of Confederation was a compact among the states as entities, while the Constitution was a compact to which individuals also were directly parties, is to be found in the Tenth Amendment. Under that amendment, powers were reserved to both the states and the people.[168] In contrast,

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165. ARTICLES OF CONFEDERATION art. XIII, para. 2.

> And Whereas it hath pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in congress, to approve of, and to authorize us to ratify the said articles of confederation and perpetual union. Know Ye that we the undersigned delegates, by virtue of power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said articles of confederation and perpetual union, and all and singular the matters and things therein contained.

Id.

166. U.S. CONST. art. VII.

167. *See infra* notes 240-44 and accompanying text, further discussing the supermajority requirement of Article VII.

168. *See* U.S. CONST. amend. X. *See also id.* amend. IX (providing that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); THE FEDERALIST NO. 39, at 249 (James Madison) (Edward Mead Earle ed., 1976) (noting that under the Constitution the

under Article II of the Articles of Confederation, powers were reserved only to the states.[169] This indicates that under the Articles of Confederation, the states as entities delegated powers, whereas under the Constitution, both the people and the states delegated powers to the general government.

IV. SOCIAL COMPACT THEORY AND THE POLITICAL AUTHORITY UNDERLYING THE GENERAL GOVERNMENT

From the foregoing textual analysis of the Constitution and the Articles of Confederation, it is clear that there are clues within the structural provisions of these documents indicating the nature of the federal systems established under each. Basic structural elements found in the Articles remained unchanged in the Constitution. The provisions governing reciprocity among the states, delegation of enumerated powers to the general government, and constitutional guarantees of the continued existence of the states as entities—of the continued existence of a compound republic—are similar. However, there is a fundamental difference between the systems established under the two documents. The Articles were based on a compact among the states as entities.[170] The Constitution was based on a compact among the people as well as the states. In order to better understand the nature of this distinction, this Part examines the political theory of society as being based on a compact, which served as the intellectual background of these systems.

A. Background: Constitutions as Compacts

The model of society as being based on a social compact was well-ingrained in the political thought of the Founding Generation.[171] Society was often conceptualized as being based upon the consent of individuals existing in a state of nature. For example, Justice Story

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jurisdiction of the general government would extend to "certain enumerated objects only, . . . leav[ing] to the several States a residuary and inviolable sovereignty over all other objects"); *id.* ("[L]ocal or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere."); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869) (noting that the Constitution recognized "the necessary existence of the States, and, within their proper spheres, the independent authority of the States").

169. *See* ARTICLES OF CONFEDERATION art. II.

170. *See* Ackerman & Katyal, *supra* note 23, at 551 ("The Articles were often described as a 'compact'—usually modified with adjectives like 'solemn' or 'fundamental' to indicate its very special status.").

171. *See* FARRAND, *supra* note 29, at 38-43 (discussing the influence of social compact theories on the Founding Generation).

stated in his *Commentaries* that it was commonly thought that "civil society . . . depend[s] upon a social compact of the people composing the nation."[172] Under these social compact theories, citizens were described variously as "members of a civil society"[173] or a "body politic."[174] Members of the Founding Generation were familiar with the works of political writers such as Burlamaqui,[175] Locke,[176] Pufendorf,[177] and Vattel,[178] who conceptualized society as being

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172. 2 STORY, *supra* note 149, at 225.
173. VATTEL, *supra* note 36, at 87.
174. 2 STORY, *supra* note 149, at 145.
175. *See* JEAN JACQUES BURLAMAQUI, THE PRINCIPLES OF NATURAL AND POLITIC LAW 120 (Nugent trans., 4th ed. 1792). Burlamaqui described the formation of societies as follows:

> All societies are formed by the concurrence or union of the wills of several persons, with a view of acquiring some advantage. Hence it is that societies are considered as bodies, and receive the appellation of moral persons; by reason that those bodies are in effect animated with one sole will, which regulates all their movements. This agrees particularly with the body politic or state.

Id. *See also id.* at 119 ("Among the various establishments of man, the most considerable without doubt is that of civil society, or the body politic, which is justly esteemed the most perfect of societies, and has obtained the name of *State* by way of preference.").

176. JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 56 (Prometheus Books 1986) (1690) ("When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest."); *id.* at 76 (noting that in order to "avoid [the] inconveniencies which disorder men's properties in the state of Nature, men unite into societies that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it by which every one may know what is his").

177. *See* 2 PUFENDORF, *supra* note 45, at 454. Pufendorf described his conception of society based on a compact in the following passage:

> For a multitude, or many men, to become one person, to whom one action can be attributed and certain rights belong, in so far as this one person is distinct from individuals, and the rights be such as the individuals cannot attribute to themselves, it is necessary for them to have united their wills and strength by intervening pacts, without which a union of several persons equal by nature is impossible of comprehension.

Id. at 973-74. In another work, Pufendorf gave a related view of societal pacts:

> There are . . . two pacts which combine in the establishment of society, and primarily of a civil society. One is the pact of individuals with individuals, to the effect that they desire to have their affairs which are mutually intertwined, administered by common counsel; the other is the one which is made with those to whom the care of the common safety is entrusted.

SAMUEL PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO (ELEMENTS OF UNIVERSAL JURISPRUDENCE) 102 (James Brown Scott ed., William Abbot

based on a compact among citizens. Justice Story noted the importance of the theory of society as being based upon a compact, stating: "The doctrine maintained by many eminent writers upon public law in modern times is, that civil society has its foundation in a voluntary consent or submission; and, therefore, it is often said to depend upon a social compact of the people composing the nation."[179] Justice Story referred to this as a "visionary" idea that was present also in the work of Blackstone, who described the social compact as forming the basis of a "union" necessitated by the "weakness and imperfection" of mankind.[180]

Justice Story defined the term "state" as "a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength."[181] The state represented the union of the people through compact into one entity. According to Story, consistent with these theories, the state governments in the United States were based upon compacts among the members of each of the states.[182] Although Story contended that constitutions themselves were not compacts, but rather fundamental laws, which were binding upon the states and people unlike mere contracts that could be breached, he noted that the idea that constitutions themselves were compacts was widespread. For example, he quoted Chief Justice Jay for the proposition that the United States Constitution as well as the state constitutions were "compacts" among the people based upon their consent.[183]

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trans., Clarendon Press 1931) (1672).

178. *See* VATTEL, *supra* note 36.

179. 1 STORY, *supra* note 149, at 225 (footnotes omitted).

180. Blackstone, as quoted by Justice Story, stated that the nature of the "original contract of society" was that:

> the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member; and that in return for this protection each individual should submit to the laws of the community.

Id. at 227-28.

181. *Id.* at 145 (citing EMMERICH DE VATTEL, LAW OF NATIONS and Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 455 (1793) (Wilson, J.)).

182. Justice Story quoted the preamble of the constitution of Massachusetts, which stated that "'the body politic is formed by a voluntary association of individuals; that it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.'" *Id.* at 227.

183. *Id.* Justice Story quoted Chief Justice Jay as stating that:

> "every State constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is, likewise, a compact made by the people of the United States, to govern themselves as to general objects in a certain manner."

Id.

Story's insistence that constitutions themselves were not merely compacts, but rather fundamental laws, was in some sense merely a matter of semantics. A noted nationalist, he wished to emphasize the binding nature of constitutions as supreme law.[184] In this, he was in accord with Alexander Hamilton, who, in *The Federalist No. 78* stated: "A constitution is, in fact, and must be regarded by the judges, as a fundamental law."[185] Similarly, Emmerich de Vattel stated in his *Law of Nations*:

> The fundamental law which determines the manner in which the public authority is to be exercised is what forms the *constitution of the State.* In it can be seen the organization by means of which the Nation acts as a political body; how and by whom the people are to be governed, and what are the rights and duties of those who govern.[186]

Thus, even among those theorists who recognized society as being based on a compact, the terminology of "fundamental law" was used to describe the document establishing the government.

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184. Story made his motivation in making the distinction between compacts and fundamental laws clear in the following passage:

> A constitution is in fact a fundamental law or basis of government, and falls strictly within the definition of law as given by Mr. Justice Blackstone. It is a rule of action prescribed by the supreme power in a state, regulating the rights and duties of the whole community. It is a *rule*, as contradistinguished from a temporary or sudden order; permanent, uniform, and universal. It is also called a rule, to distinguish it from a compact or agreement; for a compact (he adds) is a promise proceeding from us, law is a command directed to us. The language of a compact is, I will or will not do this; that of a law is, Thou shalt or shalt not do it. "In compacts we ourselves determine and promise what shall be done before we are obliged to do it. In laws we are obliged to act without ourselves determining or promising anything at all." It is a rule prescribed; that is, it is laid down, promulgated, and established. It is prescribed by the supreme power in a state, that is, among us, by *the people*, or a majority of them in their original sovereign capacity.

Id. at 236 (second emphasis added) (footnotes omitted).

185. THE FEDERALIST NO. 78, at 506 (Alexander Hamilton) (Edward Mead Earle ed., 1976). As James Wilson noted at the Pennsylvania ratifying convention:

> This . . . is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority—"*We, the people, do ordain and establish*," &c;
>
> . . .
>
> [T]he system itself tells you what it is; it is an ordinance and establishment of the people.

2 DEBATES OF THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 497-99.

186. VATTEL, *supra* note 36, at 17.

Justice Story argued that the social compact upon which the federal government was founded existed, in a sense, prior to ratification of the Constitution. However, Story himself admitted that the view that the Constitution itself was a social compact and was not preceded by the actual social compact had been expressed by some individuals, among them Chief Justice Jay[187] and Tucker in his edition of Blackstone's *Commentaries on the Laws of England*.[188] Justice Story endorsed this position in part. However, he argued that the social compact forming the union of the people in the United States was embodied in the Declaration of Independence and that it existed before the Constitution was ratified. According to him, the Constitution "is . . . to a certain extent, a social compact . . . . But a contract of this nature actually existed in a visible form between the citizens of each State in their several constitutions."[189] In arguing that the political community and social compact existed prior to ratification of the Constitution, Justice Story's concern was that states' rights advocates might use the theory of the Constitution as a compact based on consent to erode the powers of the general government.[190] According to Justice Story, when the

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187. Justice Story quoted Chief Justice Jay's remarks in *Chisholm v. Georgia*, stating that:

> "every State constitution is a compact, made by and between the citizens of the State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact, made by the people of the United States to govern themselves, as to general objects, in a certain manner." The context abundantly shows that he considered it a *fundamental* law of government, and that its powers did not rest on mere treaty, but were supreme and were to be construed by the judicial department; and that the States were bound to obey.

1 STORY, *supra* note 149, at 243 n.1 (emphasis added).

188. *Id.* at 215. Justice Story stated that Tucker believed that

> [T]he Constitution of the United States is an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several States, and ratified by the people thereof, respectively; whereby the several States and the people thereof respectively have bound themselves to each other and to the Federal government of the United States, and by which the Federal government is bound to the several States and to every citizen of the United States.

Id. (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 140 app. note D (St. George Tucker ed.)). According to Story, Tucker distinguished the constitutional compact from a charter or grant because the Constitution was founded by equals "whether considered as States in their political capacity and character, or as individuals . . . ." *Id.*

189. *Id.* at 217.

190. Justice Story's concerns are evidenced in his remarks on the statements made by Chief Justice Jay. *See supra* notes 183, 187. Justice Story argued that theories of the Constitution as a compact "seem mainly urged with a view to draw conclusions which are at war with the known powers and reasonable objects of the Constitution; and which, if successful, would reduce the government to a mere confederation." 1 STORY, *supra* note 149, at 260. Story argued that these views were "not justified by the

Constitution is called a "compact," it means that "it is a voluntary and solemn consent of the people to adopt it, as a form of government . . . ."[191] Therefore, he recognized the establishment of government as being based upon consent, but declined to describe such an establishment as a "compact" among the states alone in order to preclude the possibility that the states as entities could alone decide to breach the contract among themselves.

Whether or not Story's distinction between fundamental laws and compacts was widely held by the Founding Generation, the fact remains that constitutions were viewed as being based upon the consent of the parties to the compact. Whether the compact itself existed prior to ratification of the Constitution or was embodied in the constitutional document itself is not particularly relevant to the present inquiry. There was consensus concerning the model of political society as based on a compact among individuals. For example, James Madison described "the federal union [under the Articles of Confederation] as anal[o]gous to the fundamental compact by which individuals compose one Society, and which must in its theoretic origin at least, have been the unanimous act of the component members . . . ."[192] Thus, the union, if not the Constitution itself, was conceptualized as being a compact. The only difference of opinion that existed concerned whether constitutions represented the embodiment of this compact or were somehow more solid and permanent than a mere compact.

B. States as Contracting Parties

Not only individuals, but also states could be viewed as existing in a state of nature from which they might form a social compact, establishing a "system" of political societies. This was the analytical approach taken by Vattel in his influential work, *The Law of Nations or the Principles of Natural Law*.[193] It was also the model that was some-

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language of the Constitution," had "a tendency to impair, and indeed to destroy, its express powers and objects," and involved "consequences which, at the will of a single State, may overthrow the Constitution itself." *Id.* at 260-61.

191. 2 *id.* at 237 n.3.

192. 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 314.

193. *See* VATTEL, *supra* note 36, at 3a ("There is no doubt of the existence of a natural Law of Nations, inasmuch as the Law of Nature is no less binding upon States, where men are united in a political society, than it is upon the individuals themselves."). Vattel argued that just as the law of nature applied to men, it also applied to states as

times used to describe the systems established under the Articles of Confederation and the Constitution. For example, Alexander Hamilton described the "social compact" existing among the states under the Articles of Confederation in *The Federalist No. 21*.[194] In *The Federalist No. 33*, while justifying the supremacy of federal laws, Hamilton similarly analogized the formation of the union under the Constitution to the formation of a group of individuals into a "state of society."[195] Similarly, James Madison recognized that in the United States the states, which he defined as "the people composing those political societies, in

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entities. According to Vattel, "[A]s the natural law in its proper sense is the Law of Nature for individuals, being founded upon man's nature, so the natural Law of Nations is the Law of Nature for political societies, being founded on the nature of these societies." *Id.* at 7a, note j. Vattel stated that the law of nations was merely the law of nature applied to states.

> [T]he *Law of Nations* is in its origin merely the *Law of Nature applied to Nations*. Now the just and reasonable application of a rule requires that the application be made in a manner suited to the nature of the subject; but we must not conclude that the Law of Nations is everywhere and at all points the same as the natural law, except for a difference of subjects, so that no other change need be made than to substitute Nations for individuals.

Id. at 4. Vattel also noted that states were subject to the law of nature.

> We have already seen that men, when united in society, remain subject to the obligations of the Law of Nature. This society may be regarded as a moral person, since it has an understanding, a will, and a power peculiar to itself; and it is therefore obliged to live with other societies or States according to the laws of natural society of the human race, just as individual men before the establishment of civil society lived according to them; with such exceptions, however, as are due to the difference of the subjects.

Id. at 6. Christian Wolff, another early commentator on international law, had similar notions concerning the relations among states. *See* CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM § 7, at 11 (Joseph H. Drake trans., 1934) (1764) (discussing the role of nature in creating a "society among all nations" much as it creates societies "among individuals"). Pufendorf seems to have taken a similar approach. *See* PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO, *supra* note 177, at 64 ("[T]he things we are saying about the law of nature and the duties of individuals can easily be applied to whole states and nations that have also coalesced into one moral person.").

194. THE FEDERALIST NO. 21, at 125 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

195. Hamilton described the formation of the union as follows:

> If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government . . . .

Id. NO. 33, at 201 (Alexander Hamilton).

their highest sovereign capacity," were "parties to the [constitutional] compact."[196]

Antifederalists also understood the Constitution as a compact among the states as political societies. For example, one Antifederalist made the following remarks in commenting on the federal system in the United States:

> As individuals in a state of nature surrender a portion of their natural liberty to the society of which they become members, in order to receive in lieu thereof protection and conveniency; so in forming a federal republic the individual states surrender a part of their separate sovereignty to the general government or federal head, in order that, whilst they respectively enjoy internally the freedom and happiness peculiar to free republics, they may possess all that external protection, security, and weight by their confederated resources, that can possibly be obtained in the most extended, absolute monarchies.[197]

Thus, there was widespread adherence to this model of a "federal republic" as being based upon a compact among both Federalists and Antifederalists.

Finally, and most importantly, the letter accompanying the Constitution when it was sent to the state legislatures for submission to ratification conventions in each state also analogized the states to individuals entering into a compact.[198] In explaining why the states did not retain every aspect of their original sovereignty under the Constitution, the letter stated:

> It is obviously impracticable in the federal government of these states, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all: Individuals entering into society, must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance, as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered, and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests.[199]

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196. Report of 1800 (Jan. 7, 1800), *in* 17 THE PAPERS OF JAMES MADISON 309 (David B. Mattern et al. eds., 1962).

197. 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 183-84.

198. For a discussion of this letter, see Farber, *supra* note 2.

199. Letter of the President of the Federal Convention to the President of Congress (Sept. 17, 1787), *in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1003 (Charles C. Tansill ed., 1927). The letter also recognized that it was the consent of the *states* that was necessary for ratification, conceding that the Constitution "will meet the full and entire approbation of every state is not perhaps to be expected . . . ." *Id.*

Thus, social compact theory as it was developed prior to the ratification period contemplated both states as well as individuals as compacting parties. Social compact theory was expanded by Vattel and applied to states in order to analyze problems arising in international law. However, the same theories may be applied to relations among the states in the federal system established by the Constitution.

C. The Articles of Confederation and the Constitution

The model of society as being based upon a compact among either individuals or states may be applied to the federal systems established under the Articles of Confederation and the Constitution. Such an analysis indicates that, although both documents established confederate republics, the fundamental difference between the Articles and the Constitution is that the latter represented a compact among *both* the people *and* the states, whereas the former represented a compact among the states alone. In other words, the Constitution represented merely a *partial* consolidation of the states—the Constitution was not purely a compact among the people as a nation or the states as entities. Several structural provisions of the Constitution support this interpretation, including the bicameral legislature, the original appointment of Senators by state legislatures, equal representation of the states in the Senate, the electoral college, reservation of residual powers to the states and the people, and the provisions governing ratification and amendment of the Constitution.

1. Confederate Republics

Both systems established under the Articles of Confederation and under the Constitution might be termed "federal,"[200] "confederal," or "confederate" republics.[201] To use the terminology of Madison, they

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200. 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 183-84.

201. *See* THE FEDERALIST No. 16, at 97 (Alexander Hamilton) (Edward Mead Earle ed., 1976) (arguing that the "federal system" should be "speedily renovated"); *id.* No. 22, at 131 (Alexander Hamilton) (discussing the "existing federal system" under the Articles); 1 WORKS OF JAMES WILSON 262-63 (Robert Green McCloskey ed., 1967) ("[T]he United States have been formed into one confederate republick; first, under the articles of confederation; afterwards, under our present national government."); 2 *id.* at 764 (stating that the Constitution was "a plan of a confederate republick"); *id.* at 768 (stating that in "confederate republick[s]," states "retain the free and generous exercise of all their other faculties as states, so far as it is compatible with the welfare of the general and superintending confederacy"). *See also* ONUF & ONUF, *supra* note 31, at 55 (noting that "the usage of the time made the terms 'confederate' and 'federal' effectively synonymous").

were "compound" rather than "simple" republics.[202] Both Federalists and Antifederalists described the union among the states in such terms. As previously noted,[203] Alexander Hamilton had referred to Montesquieu's definition of a "confederate republic" in describing the union among the states. Based on Montesquieu's discussion of this form of government, Hamilton concluded: "The definition of a *confederate republic* seems simply to be 'an assemblage of societies,' or an association of two or more states into one state."[204] Thus, Hamilton recognized that states could form an "assemblage" much as individuals did in creating the states themselves. In such confederate republics it was important that the compact guarantee the continued existence of the constituent states. Hamilton argued that

> [s]o long as the separate organization of the members be not abolished; so long as it exists, *by a constitutional necessity*, for local purposes; though it should be in perfect subordination to the general authority of the union, it would still be, in fact and in theory, an association of states, or a confederacy. The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a *direct representation in the Senate*, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.[205]

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202. *See* THE FEDERALIST NO. 51, at 339 (Alexander Hamilton or James Madison) (Edward Mead Earle ed., 1976) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."). Madison also made a distinction between "national" and "federal" governments. According to Madison,

> The proposed Constitution . . . is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

Id. NO. 39, at 250 (James Madison). The fact that the Constitution was a "composite" was a result of the nature of the union as being among both the states and the people. As Madison noted, the only aspect of the Constitution that was primarily national was the fact that the general government could legislate on individuals. However, it could also legislate for states in certain circumstances, indicating that even in this it could not be characterized as being completely national.

203. *See supra* note 35 and accompanying text.

204. THE FEDERALIST NO. 9, at 52 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

205. *Id.* (emphasis added).

Thus, the key to maintaining the federal structure in a confederate republic was a constitutional protection for the continued existence of the states as entities. Textual provisions such as those guaranteeing the equal representation of the states in the Senate, direct election of the Senate by state legislatures, and the electoral college, all ensured the continued existence of the states as entities in the governmental structure.[206] As James Madison noted, such structural features of the Constitution ensured that the states would remain "constituent and essential parts of the federal government."[207]

Not surprisingly, Antifederalists also emphasized this fundamental characteristic of confederate or federal republics. For example, one Antifederalist described such systems as follows:

> To erect a federal republic, we must first make a number of states on republican principles; each state with a government organized for the internal management of its affairs: The states, as such, must unite under a federal head, and delegate to it powers to make and execute laws in certain enumerated cases, under certain restrictions . . . . A federal republic in itself supposes state or local governments to exist, as the body or props, on which the federal head rests, and that it cannot remain a moment after they cease. In erecting the federal government, and always in its councils, each state must be known as a sovereign body; but in erecting this government, I conceive, the legislature of the state, by the expressed or implied assent of the people, or the people of the state, under the direction of the government of it, may accede to the federal compact.[208]

Thus, the Antifederalists as well as the Federalists viewed the essential character of a federal republic as one in which republican state governments were parties to the federal compact establishing the union.

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206. *See supra* notes 108-111 (discussing such structures).

207. THE FEDERALIST NO. 45, at 301 (James Madison) (Edward Mead Earle ed., 1976). Madison elaborated:

> The State governments may be regarded as constituent and essential parts of the federal government; whilst the latter is nowise essential to the operation or organization of the former. Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it. The Senate will be elected absolutely and exclusively by the State legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State legislatures.

Id.

208. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 10, at 331. It is interesting to note that in this passage an emphasis is placed on the fact that enumerated and limited powers are delegated to the general government, perhaps indicating that such a structural feature is essential to federal republics. *But see supra* note 102 and accompanying text.

All governmental authority was still derived ultimately from the people.[209] The states derived political authority from the peoples of the several states. Therefore, any authority derived from the states was derived indirectly from the peoples of the several states.

The Federalists viewed the union as one of the people as well as the states, a structure that was reflected in many of the provisions of the Constitution. The Antifederalists objected to any form of government representing a consolidation of the states—one in which the states as entities were not contracting parties. However, as the Federalists argued, the Constitution represented merely a *partial* consolidation since the union that it established was one of the people as a whole as well as the states as entities.

2. *The Constitution: A Partial Consolidation*

The greatest flaw in the Articles of Confederation, according to Federalists, was the fact that the general government was one established by the states as entities, rather than the people directly. After discussing a number of historical and contemporary examples of confederacies, James Madison and Alexander Hamilton noted in *The Federalist No. 20*,

> Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that 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

209. For example, James Madison noted that even though the consent of a majority of the people and a majority of the states was necessary for constitutional lawmaking, both the state and federal governments derived their political authority ultimately from the people, since under republican principles of government all sovereignty ultimately resided with the people. In *The Federalist No. 46*, Madison stated:

> The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments, not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. These gentlemen must here be reminded of their error. They must be told that the ultimate authority, wherever the derivative may be found, resides in the people alone . . . .

THE FEDERALIST NO. 46, at 304-05 (James Madison) (Edward Mead Earle ed., 1976).

> place of *law*, or the destructive *coercion* of the *sword* in place of the mild and salutary *coercion* of the *magistracy*.[210]

Thus, Madison and Hamilton noted the defects of confederacies where the general government was not a government established by a compact among the people themselves, but only the states. From the discussions of such political unions given by Pufendorf and Vattel, it appears that this was the dominant form of confederacy prior to ratification of the Constitution. A consequence of this structural feature of the Articles was that the Congress legislated for the states, rather than the people, in most cases.[211] As Alexander Hamilton noted in *The Federalist No. 15*,

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210. *Id.* NO. 20, at 124 (Alexander Hamilton & James Madison). Alexander Hamilton reiterated this position in *The Federalist No. 27*:

> One thing, at all events, must be evident, that a government like the one proposed would bid much fairer to avoid the necessity of using force, than that species of league contended for by most of its opponents; the authority of which should only operate upon the States in their political or collective capacities. It has been shown that in such a Confederacy there can be no sanction for the laws but force; that frequent delinquencies in the members are the natural offspring of the very frame of the government; and that as often as these happen, they can only be redressed, if at all, by war and violence.

Id. NO. 27, at 169 (Alexander Hamilton). James Madison also made this point in *The Federalist No. 37* in which he stated that "the existing Confederation is founded on principles which are fallacious . . . we must consequently change this first foundation, and with it the superstructure resting upon it." *Id.* NO. 37, at 226 (James Madison).

211. This was not always the case under the Articles. For example, James Madison noted, "In some instances, . . . those [powers] of the existing government act immediately on individuals" and cited "cases of capture; of piracy; of the post office; of coins, weights, and measures; of trade with the Indians; of claims under grants of land by different States; and, above all, in the case of trials by courts-martial in the army and navy . . . ." *Id.* NO. 40, at 254 (James Madison). *See also* Freedman, *supra* note 59, at 151-53 (describing the use of the court-martial power and enforcement of treaty provisions and commercial regulations). Madison also pointed out that the Constitution would act on the states in their collective capacities in certain cases:

> The difference between a federal and national government, as it relates to the *operation of the government*, is supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy, in their political capacities; in the latter, on the individual citizens composing the nation, in their individual capacities. On trying the Constitution by this criterion, it falls under the *national*, not the *federal* character; though perhaps not so completely as has been understood. In several cases . . . [the states] must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan; and the operation of the government on the people, in their individual capacities, in its ordinary and most essential proceedings, may, on the whole, designate it, in this relation, a *national* government.

THE FEDERALIST NO. 39, at 248 (James Madison) (Edward Mead Earle ed., 1976). *See also* Fed. Energy Reg. Comm'n v. Mississippi, 456 U.S. 742, 791 (1982) (O'Connor, J., concurring in part and dissenting in part) (noting that "[t]he Constitution . . . permitt[ed] direct contact between the National Government and the individual citizen").

> The great and radical vice in the construction of the existing Confederation is in the principle of LEGISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of which they consist. Though this principle does not run through all the powers delegated to the Union, yet it pervades and governs those on which the efficacy of the rest depends.[212]

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212. THE FEDERALIST NO. 15, at 89 (Alexander Hamilton) (Edward Mead Earle ed., 1976). Later, Hamilton concluded:

> [I]f we still will adhere to the design of a national government, or, which is the same thing, of a superintending power, under the direction of a common council, we must resolve to incorporate into our plan those ingredients which may be considered as forming the characteristic difference between a league and a government; we must extend the authority of the Union to the persons of the citizens,—*the only proper objects of government.*

Id. at 91. In *The Federalist No. 16*, Hamilton used a comparative approach in decrying the form of government that existed under the Articles, which legislated merely for states in their "political capacities":

> The tendency of the principle of legislation for States, or communities, in their political capacities, as it has been exemplified by the experiment we have made of it, is equally attested by the events which have befallen all other governments of the confederate kind, of which we have any account, in exact proportion to its prevalence in those systems. The confirmations of this fact will be worthy of a distinct and particular examination. I shall content myself with barely observing here, that of all the confederacies of antiquity, which history has handed down to us, the Lycian and Achaean leagues, as far as there remain vestiges of them, appear to have been most free from the fetters of that mistaken principle, and were accordingly those which have best deserved, and have most liberally received, the applauding suffrages of political writers.

Id. NO. 16, at 95 (Alexander Hamilton). *See also* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 197 (remarks of Oliver Ellsworth in the Connecticut convention) ("This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity . . . . But this legal coercion singles out the . . . individual."); 4 *id.* at 256 (remarks of Charles Pinckney before the South Carolina House of Representatives) ("[T]he necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present."); 2 *id.* at 56 (remarks of Rufus King) ("Laws, to be effective, therefore, must not be laid on states, but upon individuals."). Hamilton also noted the importance of granting the federal government the power to legislate for the people directly:

> But can we believe that one state will ever suffer itself to be used as an instrument of coercion? The thing is a dream; it is impossible. Thus we are brought to this dilemma—either a federal standing army is to enforce the requisitions, or the federal treasury is left without supplies, and the government without support. What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do.

2 *id.* at 233 (remarks of Alexander Hamilton at the New York Convention). *Cf.* 4 *id.* at 153 (remarks of Samuel Spencer at the North Carolina Convention) ("[A]ll the laws of the Confederation were binding on the states in their political capacities, . . . but now

Thus, the Articles truly represented a compact among states, rather than a compact among the people themselves.

Antifederalists argued time and again that the Constitution represented a "consolidation" of the states.[213] As Antifederalist Patrick Henry noted, "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. . . . Here is a resolution as radical as that which separated us from Great Britain."[214] The Federalists went to great pains to argue that the Constitution did not represent a complete "consolidation" of the states[215] and even that there was no danger of a consolidation under

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the thing is entirely different. The laws of Congress will be binding on individuals.").

213. *See* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 134 (remarks of Antifederalist Samuel Nasson at the Massachusetts ratifying convention) (arguing that if the preamble of the Constitution "does not go to an annihilation of the state governments, and to a perfect consolidation of the whole Union, I do not know what does"). Patrick Henry, in particular, noted the danger of consolidation:

> The fate . . . of America may depend on this. . . . Have they made a proposal of a compact between states? If they had, this would be a confederation. It is otherwise most clearly a consolidated government. The question turns, sir, on that poor little thing—the expression, We, the *people*, instead of the *states*, of America.

3 *id.* at 44 (remarks of Antifederalist Patrick Henry at Virginia ratifying convention). *See also* HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 10-11, 15-23 (1981); WOOD, *supra* note 1, at 526 (concluding that the Antifederalists "had no doubt that it was precisely an absorption of all the states under one unified government that the Constitution intended, and they therefore offered this prospect of an inevitable consolidation as the strongest and most scientifically based objection to the new system that they could muster"); BERGER, FEDERALISM: THE FOUNDERS' DESIGN, *supra* note 2, at 56 (arguing that the colonists were "[c]onvinced that the distant British government had oppressed them . . . [and] were little minded to put their trust in a remote federal government"); 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 45 (statement of Fisher Ames) ("[N]o argument . . . has made a deeper impression than this, that [the Constitution] will produce a consolidation of the states.").

At least part of the normative argument against consolidation rested on the diversity found within the several states. *See* 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 639 ("So long as climate will have effect on men, so long will the different climates of the United States render us different. Therefore a consolidation is contrary to our nature, and can only be supported by an arbitrary government."). Edward Carrington, for example, noted the great diversity throughout the States:

> [G]eneral Laws through a Country embracing so many climates, productions, and manners, as the United States, would operate many oppressions, & a general legislature would be found incompetent to the formation of local ones, as a majority would, in every instance, be ignorant of, and unaffected by the objects of legislation.

Letter from Edward Carrington to Thomas Jefferson (June 9, 1787), *in* 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 38.

214. 3 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 22, 44 (remarks of Antifederalist Patrick Henry).

215. For example, Alexander Hamilton argued in *The Federalist No. 9*:

the plan of the Constitution.[216] The government under the Constitution

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> A distinction, more subtle than accurate, has been raised between a *confederacy* and a *consolidation* of the States. The essential characteristic of the first is said to be, the restriction of its authority to the members in their collective capacities, without reaching to the individuals of whom they are composed. It is contended that the national council ought to have no concern with any object of internal administration. An exact equality of suffrage between the members has also been insisted upon as a leading feature of a confederate government. These positions are, in the main, arbitrary; they are supported neither by principle nor precedent. It has indeed happened, that governments of this kind have generally operated in the manner which the distinction, taken notice of, supposes to be inherent in their nature; but there have been in most of them extensive exceptions to the practice, which serve to prove, as far as example will go, that there is no absolute rule on the subject.

THE FEDERALIST NO. 9, at 51-52 (Alexander Hamilton) (Edward Mead Earle ed., 1976); *id.* NO. 32, at 194 (Alexander Hamilton) ("[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."); Letter from James Madison to George Washington (Apr. 16, 1787), *in* 9 PAPERS OF JAMES MADISON 382, 383 (Robert A. Rutland et al. eds., 1975) (noting that "a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable"). Madison noted the utter undesirability of a complete consolidation of the states:

> I hold it for a fundamental point that an individual independence of the States, is utterly irreconcileable [sic] with the idea of an aggregate sovereignty. I think at the same time that a consolidation of the States into one simple republic is not less unattainable than it would be inexpedient. Let it be tried then whether any middle ground can be taken which will at once support a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful.

Letter From James Madison to Edmund Randolph (Apr. 8, 1787), *in* 9 PAPERS OF JAMES MADISON, *supra*, at 368, 369. *See also* STORING, *supra* note 213, at 12. Herbert Storing also noted that:

> the characteristic Federalist position was to deny that the choice lay between confederation and consolidation and to contend that in fact the Constitution provided a new form, partly national and partly federal. This was Publius' argument in *The Federalist*, no. 39. It was Madison's argument in the Virginia ratifying convention. And it was the usual argument of James Wilson himself, who emphasized the strictly limited powers of the general government and the essential part to be played in it by the states.

Id. It is instructive to note the insistence of opponents of the Constitution on equal representation of the states. The fact that the union under the Constitution was both a union of the people as well as a union of the states explains the lack of equality in the House of Representatives. Some members of the modern Supreme Court have recognized the distinction made between a partial and a complete consolidation. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 792 (1995) (Kennedy, J., concurring).

was to remain a "compound republic."[217] They certainly desired to have the general government established based on the political authority of the people directly.[218] However, the states were also to remain parties to the social compact. James Madison termed this structure a "mixed Constitution."[219] Several structural provisions of the Constitution clearly indicate that it represented merely a partial consolidation of the states.

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216. One concern, besides the amendment power under Article V, was the extent of the powers granted to the general government. Madison attempted to assuage concerns that the general government would usurp greater powers in *The Federalist No. 45*:

> We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members, to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments. . . . In the Achaean league it is probable that the federal head had a degree and species of power, which gave it a considerable likeness to the government framed by the convention. The Lycian Confederacy, as far as its principles and form are transmitted, must have borne a still greater analogy to it. Yet history does not inform us that either of them ever degenerated, or tended to degenerate, into one consolidated government.

THE FEDERALIST NO. 45, at 299-300 (James Madison) (Edward Mead Earle ed., 1976).

217. *Id.* NO. 62, at 401 (Alexander Hamilton or James Madison).

218. Alexander Hamilton noted in *The Federalist No. 27*:

> The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistracy of each, in the execution of its laws. It is easy to perceive that this will tend to destroy, in the common apprehension, all distinction between the sources from which they might proceed; and will give the federal government the same advantage for securing a due obedience to its authority which is enjoyed by the government of each State, in addition to the influence on public opinion which will result from the important consideration of its having power to call to its assistance and support the resources of the whole Union.

Id. NO. 27, at 169 (Alexander Hamilton). This was also the accepted position soon after ratification of the Constitution. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 235 (1796) ("There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established . . . ."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 470 (1793) (Jay, C.J.) (noting that "the people, in their collective and national capacity, established the present Constitution"); *id.* at 454 (Wilson, J.) (noting that the people "*might* have announced themselves 'SOVEREIGN' people of the *United States*: but serenely conscious of the *fact*, they avoided the *ostentatious declaration*").

219. THE FEDERALIST NO. 40, at 250 (James Madison) (Edward Mead Earle ed., 1976). Madison noted that under the Constitution the states were to be "regarded as distinct and independent sovereigns." *Id.* at 253.

a. Bicameralism and Equal Representation of the States in the Senate

It is the accepted wisdom that the "great compromise" that resulted in the equal representation of the states in the Senate and direct representation of the people in the House of Representatives was just that—a compromise.[220] However, the nature of the union as being both a union of the states as entities as well as a union of the people in their individual capacities indicates that the Great Compromise may have been more than merely a political expedient designed to secure ratification of the Constitution by both large and small states.[221] Representation of

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220. *See* FARRAND, *supra* note 29, at 127-28. Nationalists at the Constitutional Convention had desired that representation in the Senate be based on population. *See* M.E. BRADFORD, ORIGINAL INTENTIONS ON THE MAKING AND RATIFICATION OF THE UNITED STATES CONSTITUTION 9 (1993); Monaghan, *supra* note 2, at 141-42 (discussing the goals of nationalists).

The author of *The Federalist No. 62* recognized the nature of the provision for an equality of representation of the states in the Senate as being "the result of compromise between the opposite pretensions of the large and the small states" and therefore not worthy of "much discussion." However, *The Federalist No. 62* continues, trying to justify the provision for an equality of representation on theoretical grounds.

> If indeed it be right, that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government, and that among independent and sovereign States, bound together by a simple league, the parties, however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason that in a compound republic, partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try, by the standard of theory, a part of the Constitution which is allowed on all hands to be the result, not of theory, but "of a spirit of amity, and that mutual deference and concession which the peculiarity of our political situation rendered indispensible."

THE FEDERALIST NO. 62, at 401 (Alexander Hamilton or James Madison) (Edward Mead Earle ed., 1976). Thus, although the provision was admittedly born of compromise, a theoretical justification could be made for it.

221. An additional reason offered for dividing the legislature had to do with the danger inherent in delegating the federal government greater powers. As Alexander Hamilton stated,

> The organization of Congress is itself utterly improper for the exercise of those powers which are necessary to be deposited in the Union. A single assembly may be a proper receptacle of those slender, or rather fettered, authorities, which have been heretofore delegated to the federal head; but it would be inconsistent with all the principles of good government, to intrust it with those additional powers which, even the moderate and more rational

the states in one house of the legislature and the people in the other may have a solid foundation in theory.[222] Under the Constitution, both the states as entities as well as the people had representatives in the general government.[223] As James Madison noted in *The Federalist No. 39*, the House of Representatives was to "derive its powers from the people of America," and the fact that the government was to operate "on the people, in their individual capacities" made the new government a "*national*" one in this respect.[224] The states were accorded equal suffrage as they had been under the Articles[225] in acknowledgement of

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adversaries of the proposed Constitution admit, ought to reside in the United States.

THE FEDERALIST NO. 22, at 140 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

222. Statements justifying the bicameral legislature with representation in one house based on population and the other house having equal representation of the states indicate the theoretical foundations of this structure. For example, Dr. William Johnson of Connecticut indicated that the states were considered as "political societies" or in their "political capacity"—indicating that the theoretical notion of states as well as the people being parties to the social compact establishing the union under the Constitution was in the minds of the Founding Generation:

> The controversy must be endless whilst Gentlemen differ in the grounds of their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies. The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. . . . On the whole, he thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the *States*.

Doctor William Johnson, Remarks in Debate (June 29, 1787), *in* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 461-62.

223. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 46 (statement of Fisher Ames) ("The state governments are essential parts of the system . . . . [T]he *senators* represent the *sovereignty of the states*.").

224. THE FEDERALIST NO. 39, at 247-48 (James Madison) (Edward Mead Earle ed., 1976). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819) ("The government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.").

225. *See* ARTICLES OF CONFEDERATION art. V (declaring that "each State shall have one vote"). The equal suffrage of the states under the Articles was attacked by Federalists as being anti-republican. For example, Alexander Hamilton stated in *The Federalist No. 22*,

> The right of equal suffrage among the States is another exceptionable part of the Confederation . . . . Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and common-sense. It may happen that this majority of States is a

the fact that the Constitution represented a compact among the states as well as the people. The equal suffrage of the states in the Senate was one mechanism by which the continued existence of the states as entities—parties to the national compact—was recognized and given constitutional protection. As *The Federalist No. 62* stated,

> [T]he equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.[226]

The Federalist No. 62 characterized the government under the Constitution as a "compound republic" rather than a "simple republic," which would have resulted were there a complete consolidation of the states. This is perfectly consistent with the theory of the Constitution as representing a compact not only among the people as a whole, but also among the states as entities. As *The Federalist No. 62* noted, "[n]o law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States."[227] Thus, the bicameral legislature reflects the fact that because the Constitution is a compact of both the states and the people, the consent of a majority of both groups is necessary for action by the general government.

Importantly, the provision for equality of suffrage in the Senate could not be amended under the Entrenchment Clause of Article V.[228] As

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small minority of the people of America.
THE FEDERALIST NO. 22, at 134 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

226. THE FEDERALIST NO. 62, at 402 (Alexander Hamilton or James Madison) (Edward Mead Earle ed., 1976). James Madison made similar observations in *The Federalist No. 39*:

> The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*.

Id. NO. 39, at 247 (James Madison). Thus, Madison recognized the different sources of political authority of the Senate and the House of Representatives.

227. *Id.* NO. 62, at 402 (Alexander Hamilton or James Madison).

228. *See* U.S. CONST. art. V. This exception was introduced without opposition. *See* Debate of Sept. 15, 1787 *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 631 ("This motion being dictated by the circulating murmurs of the small States

James Madison noted in *The Federalist No. 43*, "[t]he exception [in Article V] in favor of the equality of suffrage in the Senate, was probably meant as a *palladium to the residuary sovereignty of the States*, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality."[229] Thus, this feature of the Constitution was truly a constitutional essential. As James Iredell noted in debates in the North Carolina ratifying convention, "in order that no consolidation should take place, it is provided that no state shall, by any amendment or alteration, be ever deprived of an equal suffrage in the Senate without its own consent."[230] Consistent with social compact theory, a majority of the parties to the compact must give their consent to governmental action—in this case, a majority of the people *as well as* the states. Just as "all men are created equal," all states enjoy an equality in the state of nature.[231] Thus, the provisions in the Articles of Confederation

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was agreed to without debate, no one opposing it, or on the question, saying no.") (footnote omitted). Prior to this addition, Roger Sherman had offered a motion that would "annex to the end of the article a further proviso 'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.'" Roger Sherman, Remarks in Debate (Sept. 15, 1787), *in* 2 *id.* at 620, 630. However, this motion failed as did Sherman's motion to remove Article V completely. Debate of Sept. 15, 1787, *in* 2 *id.* at 621, 630-31.

229. THE FEDERALIST NO. 43, at 286-87 (James Madison) (Edward Mead Earle ed., 1976) (emphasis added). *See also* St. George Tucker, *View of the Constitution of the United States*, *in* 1 BLACKSTONE'S COMMENTARIES 141-42 app. note D (St. George Tucker ed., 1803) (noting that the states were "constituent and necessary parts of the federal government," without which "there could be neither a senate, nor a president"); James Wilson, Remarks in Debate (June 19, 1787), *in* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 329, 330 ("I dont [sic] agree that the Genl. Govt. will swallow up the states . . . . I think they must be preserved they must be continued . . . our Country is too extensive for a single Govt . . . ."). Thornton Anderson has concluded that the nationalists were defeated in 1787:

> This focus on the states makes it clear that the defeat of the nationalists on the Connecticut compromise was not confined to the Senate or to the structure of the government. Here at the end of the Convention their opponents were relentlessly building the equality of states into the foundations of the system whence it could reassert itself on all future amendments. The idea of a single national body politic whose people were the source of supreme power, and therefore of the supreme law, was not even a debatable position.

THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 160 (1993) (footnote omitted).

230. 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 177 (statement of James Iredell). *See also* 1 *id.* at 315-17; 5 *id.* at 551.

231. Vattel made this point in his *Law of Nations*:

> Since men are by nature equal, and their individual rights and obligations are the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights.

ensuring the equality of the states in Congress and the provisions in the Constitution enshrining equality of representation in the Senate may be explained by referring to the first principles of social compact theory. Bicameralism might be viewed as a theoretical outgrowth of the nature of the compact establishing the union.

b. The Electoral College

The compound nature of the compact establishing the general government may be seen not only in the legislative department, but also in the executive. The procedural mechanisms for the election of the President represent another illustration of the fact that the union in the United States was one of the people and the states. James Madison recognized this characteristic of the Constitution in *The Federalist No. 39*. According to Madison,

> The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election, again, is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations, from so many distinct and coequal bodies politic. From this aspect of the government it appears to be of a mixed character, presenting at least as many *federal* as *national* features.[232]

Thus, the seemingly incomprehensible electoral college mechanism also finds a theoretical basis in the theory of the Constitution as being based on a compact among both the states and the people.

c. Residual Powers Retained by the States and the People

As previously noted,[233] the Constitution reserved powers to the people as well as the states. Under the Articles, powers were textually reserved to the states alone. This situation is explicable if one keeps in

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VATTEL, *supra* note 36, at lxii.

232. THE FEDERALIST NO. 39, at 247-48 (James Madison) (Edward Mead Earle ed., 1976). *See also id.* NO. 45, at 301 (James Madison) ("Without the intervention of the State legislatures, the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will, perhaps, in most cases, of themselves determine it.").

233. *See supra* notes 168-69 and accompanying text.

mind the fact that the Constitution was a compact among the people as well as the states. The people as well as the states could be viewed as delegating powers to the general government. Therefore, a rule for determining where residual power was to lie was necessary with respect to both the people and the states. James Madison recognized that, in this respect, the government established under the Constitution was a federal and not a national one. According to Madison,

> The idea of a national government involves in it, not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation, this supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. . . . In this relation, then, the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.[234]

Thus, the fact that residual powers were retained by the states under the Constitution is an indication that the union established under the Constitution remained at least partially one of the states as entities.

d. Amendment

Like the bicameral legislature erected in Article I with direct representation of the people in the House of Representatives and equal representation of the states in the Senate, the rules for amendment of the Constitution found in Article V also reflect the nature of the compact establishing the union as being one among the people as well as the states as entities. James Madison noted in *The Federalist No. 39* that the mechanism for amendment under Article V reflected that the union was one of the states as well as the people. According to Madison,

> If we try the Constitution by its last relation, to the authority by which amendments are to be made, we find it neither wholly *national*, nor wholly *federal*. Were it wholly national, the supreme and ultimate authority would reside in the *majority* of the people of the Union; and this authority would be competent at all times, like that of a majority of every national society, to alter or abolish its established Government. Were it wholly federal on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all. The mode provided by the plan of the Convention is not founded on either of these principles. In requiring more than a majority, and particularly, in computing the proportion by *States*, not by *citizens*, it departs from the *national*, and advances towards the *federal*

234. THE FEDERALIST NO. 39, at 248-49 (James Madison) (Edward Mead Earle ed., 1976).

> character: In rendering the concurrence of less than the whole number of States sufficient, it loses again the *federal*, and partakes of the *national* character.[235]

Thus, the rules found in Article V for amendment of the Constitution illustrate the nature of the union as being based on a compact to which both the states and people are parties.[236] Article V may be viewed, therefore, as being merely descriptive of the first principles governing the Constitution itself. It does not pretend to place any limitations on the power of the people that are not already dictated by the nature of the union, other than the two limited exceptions for slave importation and equal suffrage of the states in the Senate. Even these two exceptions may have explanations based on the theory presented above. The equal suffrage of the states may have been thought to be dictated by the nature of the union as a compact among the states as well as the people.[237] Therefore, the only purely practical compromise in Article V seems to be the Slave Importation Clause, which would bind only the generation ratifying the Constitution—perhaps representing a commitment of that generation not to use its amendment power to end slave importation. As *The Federalist No. 49* aptly states, "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions."[238] Article V merely "mark[s] out" this road that the Framers thought was dictated by the political principles governing the Constitution.

The procedures for amendment of the Constitution recognize the nature of the union as being based on an agreement of both the states and the people. Although the ultimate sovereignty from which the Constitution derives its authority lies with "We the People," there is both a direct as well as an indirect channel through which the sovereignty of the people is expressed. The Constitution therefore represents a compact among both the people of the United States as well as the *peoples* of the

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235. *Id.* at 249-50.

236. Thus, the Constitution did not represent a "consolidation." *See A Freeman II*, PENN. GAZETTE (Jan. 30, 1788), *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION 511 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter DOCUMENTARY HISTORY: COMMENTARIES] (arguing that the fact that two-thirds of the states could propose amendments and that three-fourths of the states only could ratify amendments meant that no consolidation was possible under the proposed Constitution).

237. *See supra* notes 220-31 and accompanying text.

238. THE FEDERALIST NO. 49, at 328 (Alexander Hamilton or James Madison) (Edward Mead Earle ed., 1976).

United States through the agency of the states. Because the states have "republican" forms of government, they are ultimately creatures of the people as well. However, they are creatures of the various *peoples* of the several states. Under social compact theory, the political authority to abolish or alter any given state government rests with the people of that state alone—the parties to the compact upon which the state government was formed. This theoretical principle is arguably recognized by the Guarantee Clause, through which the republican nature of the state governments was guaranteed to continue under the new Constitution.[239] The danger under the Constitution, which the Antifederalists recognized, is that arguably the document could be construed in such a way that three-fourths of the peoples of the several states could abolish a given state without the consent of the people of that state. However, the fact that the Constitution itself declares that the equal suffrage of the states in the Senate cannot be destroyed and that the states will retain republican forms of government argues against such an interpretation. Inequality of the states or the abolition of any state is inconsistent with the theoretical principles informing the Constitution.

e. Ratification

The fact that the Articles of Confederation were not ratified by the people themselves, but rather by the state legislatures, is an indication that the compact forming the government under the Articles was not one of the people, but only one of the states as entities.[240] In contrast, the Constitution was to be ratified by the people of the several states. James Madison noted this feature of the Constitution in *The Federalist No. 39*

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239. *See supra* notes 142-56 and accompanying text.

240. As Alexander Hamilton noted in *The Federalist No. 22*, the fact that the Articles were not ratified by the people was one factor contributing to the weakness of the general government:

> It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers, and has, in some instances, given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that a *party* to a *compact* has a right to revoke that *compact*, the doctrine itself has had respectable advocates. . . . The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE.

THE FEDERALIST NO. 22, at 140-41 (Alexander Hamilton) (Edward Mead Earle ed., 1976). *See also id.* NO. 43, at 287 (James Madison) (arguing that the Constitution could replace the Articles of Confederation because "in many of the States [they] had received no higher sanction than a mere legislative ratification").

and argued that it illustrated the federal character of the government. According to Madison,

> On examining the first relation [the foundation on which the government is established], it appears, on one hand, that 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. It is to be the assent and ratification of the several States, derived from the supreme authority in each State, —the authority of the people themselves. The act, therefore, establishing the Constitution, will not be a *national*, but a *federal* act.[241]

Thus, the ratification procedures of the Constitution illustrate the nature of the union as being one between the states as well as the people. The political authority of the general government was derived from the people, but the sovereignty of the people was expressed through the states as entities. As Madison noted, neither a majority of the people, nor a majority of the states alone was sufficient for ratification.[242]

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241. *Id.* NO. 39, at 246 (James Madison). *See also id.* at 249 ("Were [the Constitution] wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union; and this authority would be competent at all times, like that of a *majority* of every national society, to alter or abolish its established government."). For example, in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819), the Supreme Court stated that:

> The Convention which framed the constitution was indeed elected by the State legislatures. But the instrument . . . was submitted to the people. . . . It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

Id.

242. Madison continued:

> That it will be a federal and not a national act, as these terms are understood by the objectors; the act of the people, as forming so many independent States, not as forming one aggregate nation, is obvious from this single consideration, that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves. Were the people regarded in this transaction as forming one nation, the will of the majority of the whole people of the United States would bind the minority, in the same

In the context of ratification, like amendment, a simple majority of the people or the states was not deemed sufficient to ratify the Constitution. Ratification by the people of nine of the thirteen states was deemed necessary to give binding effect to the Constitution.[243] The requirement that nine of the thirteen states ratify the Constitution may have been an attempt to roughly approximate the consent of a majority of the people as well as the states. Thus, the fraction nine-thirteenths comes close to the fraction necessary for ratification of amendments—three-fourths—but not quite as close as a requirement of ten out of the thirteen states would have.[244]

V. APPLICATIONS

The foregoing analysis of the provisions of the Articles of Confederation and the Constitution that established the federal structure under the respective systems is relevant to several current debates among legal academics as well as within the courts. The theory of the Constitution as being based on a compact among both the people and the states has implications for the debates over amendment outside Article V, the constitutionality of secession, and interpretation of the enumerated powers of the general government. This Part applies the theory to these constitutional questions.

> manner as the majority in each State must bind the minority; and the will of the majority must be determined either by a comparison of the individual votes, or by considering the will of the majority of the States as evidence of the will of a majority of the people of the United States. Neither of these rules has been adopted. Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal*, and not a *national* constitution.

THE FEDERALIST NO. 39, at 246-47 (James Madison) (Edward Mead Earle ed., 1976). *See also* James Madison, Remarks in Debate (Aug. 31, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 475 (noting that ratification should "require the concurrence of a majority of both the States and people").

243. U.S. CONST. art. VII.

244. The disparity may have been due to the realization that the fraction 9/13 was drawn from *existing* states whereas the 3/4 ratio would apply to the existing union as well as to an expanded union, which was contemplated by the Framers. In the future the ratio of small to large states might vary as states of different sizes were admitted to the union. Furthermore, the ratio 3/4 seems more sensible and workable than any ratio of the form $x/13$. Since 4 is less than 13, it is more likely that the number of states in the union at any given time would be a multiple of 4 than a multiple of 13.

A. Amendment Outside Article V

One issue that has recently been heatedly contested among legal academics such as Bruce Ackerman,[245] Akhil Amar,[246] David Dow,[247] and Henry Monaghan[248] is the constitutionality of amendment proceedings outside Article V. The question, more specifically, is whether the people retain the power to amend the Constitution in a manner that does not conform with the procedures established under Article V. The foregoing analysis of the Constitution's federal structure indicates that, in the strictest sense, the answer is "no." An analysis of the text of Article V would seem sufficient to dispel any notions that there is any mechanism for amendment of the Constitution other than that provided for in the text.[249] Furthermore, an examination of the debates surrounding ratification of the Constitution does not seem to produce evidence that amendment outside Article V was contemplated by the Framers.[250] However, the political theory underlying the Constitution leads one to the same conclusion. The Constitution is a compact among the states as well as the people. Therefore, it is necessary for a majority of the people *as well as* the states to consent to amendment of the document. This is what was meant when the Framers stated that the Constitution was only a *partial* consolidation of the states.[251]

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245. *See* Ackerman & Katyal, *supra* note 23 (arguing that ratification of the Constitution was "illegal" under the Articles of Confederation).

246. *See* Amar, *supra* note 24.

247. *See* Dow, *supra* note 25.

248. *See* Monaghan, *supra* note 2.

249. *See supra* notes 157-64 and accompanying text, discussing the text of Article V. As one commentator has recently noted, "[T]he only way to amend the Constitution is in accordance with the mechanism outlined in article V. . . . [T]he mechanism outlined in article V is clear, exclusive, and . . . means what it says. There are simply no other ways to amend the Constitution." Dow, *supra* note 25, at 4 (footnote omitted).

250. *See* Dow, *supra* note 25, at 29 (concluding that "[o]n the relatively few occasions when the amendment process was mentioned at the constitutional convention, the only mode of amendment expressly contemplated by the framers is that specified in article V."). *See also id.* at 41 n.202 (collecting citations to *The Records of the Federal Convention* where the amendment process was discussed).

251. *See supra* notes 210-19 and accompanying text. Thus, Monaghan is correct in his assertion that "Amar's 'consolidation' (i.e., national popular sovereignty) claim is clearly inconsistent with Madison in Federalist No. 39, and with Hamilton in Federalist No. 32, who goes out of his way to deny that any such complete 'consolidation' among

Article V's three-fourths requirement seems to have been designed to ensure that both a majority of the people, considered as a whole, as well as a majority of the peoples of each state consented to any changes to the constitutional text. As Charles Pinckney noted, "[i]f the States [were] equal in size and importance, a majority of the Legislatures might be sufficient for the grant of any new Powers; but disproportioned as they are and must continue for a time; a larger number may now in prudence be required."[252] Therefore, Article V in reality tracks the requirement that flows from the social compact theories that served as the intellectual foundation of the union. In the strictest sense, amendment outside the procedures of Article V would be unconstitutional.

1. Professor Ackerman's Theory: Structural Amendment

In his 1993 Storrs Lectures, Professor Ackerman argued that the Constitution can undergo what he terms "structural amendments" outside the procedural confines of Article V.[253] Such structural amendments occur during extraordinary periods—"constitutional moments"—when the populace engages in what he terms "constitutional politics," rather than the "normal politics" of everyday governance.[254] According to Ackerman, under this "dualistic" conception of political life, when "a series of decisive victories at the polls permits the newly triumphant spokesmen of the People to proclaim their new higher law from *all three* of the branches constituted by the first three Articles . . . a structural amendment . . . achieves its legitimate ratification . . . ."[255] Thus, the people may ratify amendments by voting during moments of "constitutional politics," as opposed to "normal politics," in "glorious reenactment[s] of the American Revolution."[256]

As historical support for his argument, Ackerman points to three historical periods in which the Constitution underwent structural amendment without following the procedures laid out in Article V: ratification of the Constitution, ratification of the Civil War Amend-

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the peoples of the several states was intended." Monaghan, *supra* note 2, at 137 (footnotes omitted).

252. Charles Pinckney, *Observations on the Plan of Government, 1787, reprinted in* 4 THE FOUNDERS' CONSTITUTION 578 (Philip B Kurland & Ralph Lerner eds., 1987).

253. *See* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-57 (1984) (arguing that structural amendments come about through voter behavior, rather than through the formal amendment mechanism of Article V).

254. *Id.* at 1022.

255. *Id.* at 1056.

256. *Id.* at 1020.

ments, and the New Deal.[257] Ackerman argues that the ratification of the Constitution was "plainly illegal" under Article XIII of the Articles of Confederation.[258] Ratification of the Constitution violated both the unanimity requirement under the Articles, as well as the requirement that proposed amendments be submitted to the state legislatures, and not the people directly.[259] Furthermore, Ackerman notes that several state constitutions had provisions declaring formal mechanisms for amendment that were not followed in ratification of the new Constitution.[260] As a result of these purported illegalities, Ackerman concludes that the Framers contemplated some form of constitutional amendment process that depended on the actions of "We the People" to ratify certain procedural irregularities that would otherwise render amendment constitutionally illegitimate. According to Ackerman,

> Rather than insulating Article V from the precedent of the Philadelphia Convention, sensitive readers of the text must alert themselves to the possibility that future generations of Americans might, like the Federalists themselves, be called upon to elaborate the higher law of We the People of the United States through legally anomalous lawmaking forms.[261]

However, Ackerman's contention that ratification of the Constitution was "illegal" because the procedures followed in ratification did not precisely track those laid out in Article XIII—the requirement of a unanimous vote of the state legislatures for amendment—is wrong. There are at least two arguments supporting the legality of ratification of the Constitution under the Articles.

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257. *See id.* at 1051-52.

258. *Id.* at 1058 ("[I]n their decision to appeal to nine state 'Conventions' for ratification, the Founders were designing a higher lawmaking procedure that was plainly illegal under the Articles of Confederation"). *See also id.* at 1017 (concluding that there cannot "be any doubt that [the Framers] were acting beyond their legal authority—especially in claiming the right to ignore both the Articles of Confederation and the state legislatures, by having their posturings on behalf of 'the People' ratified by similar 'conventions' posturing in some, but not all, of the States"). For a comparison of the textual provisions governing ratification and amendment in the Constitution and in the Articles, see *supra* notes 157-67 and accompanying text.

259. *See* Ackerman & Katyal, *supra* note 23, at 479-81 ("In the teeth of the Articles' express command, the proposed Constitution cut state legislatures out of the ratifying process, replacing them with special conventions in each state.").

260. *See id.* at 484-87. "[T]he Federalists' initiative amounted to a vast revision of each state's constitution, and yet they proceeded in a manner utterly indifferent to the formal mechanisms for amendment already stipulated by state constitutional law." *Id.* at 484.

261. Ackerman, *supra* note 253, at 1062.

One argument that James Madison made concerning the legality of ratification of the Constitution in the wake of the Articles' requirement of unanimity was that the Articles represented a treaty that had been breached. Under recognized principles of international law, according to Madison, the treaty was therefore no longer binding on any of the parties. Madison recognized the nature of the Articles as a compact among "independent sovereigns" in *The Federalist No. 43* and stated:

> A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorises them, if they please, to pronounce the treaty violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted?[262]

Therefore, any deviation from the Articles of Confederation after the multiple breaches of that agreement would not be "illegal" under recognized legal principles.

However, there is a second, more powerful, argument justifying the procedures followed in ratifying the Constitution. The Framers could always appeal to first principles of republican government in ratifying the Constitution. As previously noted,[263] the Articles represented a compact among the states, establishing a society of political societies. As a result, despite the provisions of the Articles, the consent of a majority of the states should have been sufficient to amend the Articles.[264] Furthermore, a majority of both the states and the people would be sufficient for ratification of the Constitution. Therefore, the ratification procedures found in the Constitution, which approximated a

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262. THE FEDERALIST NO. 43, at 302 (James Madison) (Edward Mead Earle ed., 1976). *See also* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 122-23, 314-17, 485; 2 *id.* at 93.

263. *See supra* notes 210-19 and accompanying text.

264. Akhil Amar makes a similar argument. Professor Amar argues:

> [T]he Articles of Confederation were a mere treaty among thirteen otherwise free and independent nations. That treaty had been notoriously, repeatedly, and flagrantly violated on every side by 1787. Under standard principles of international law, these material breaches of a treaty freed each party—that is, each of the thirteen states—to disregard the pact, if it so chose. Thus, if in 1787 nine (or more) states wanted, in effect, to secede from the Articles of Confederation and form a new system, that was their *legal* right, Article XIII notwithstanding.

Amar, *supra* note 24, at 1048 (footnotes omitted). However, Amar draws different conclusions from this observation. *See infra* notes 266-78 and accompanying text.

requirement for consent by a majority of the states as well as the people, comply with the first principles of republican government that were thought to govern the interpretation of documents such as the Articles and the Constitution. Even though the Articles prescribed unanimity of the state legislatures for amendment, this prescription could be averted by ratification by a majority of the states and the people—a number that was approximated by approval of the majority of the people in nine state conventions. As a result, the Articles of Confederation did not pose a barrier to "legal" ratification of the Constitution. Similarly, provisions in the constitutions of the states prescribing procedures for amendment did not provide barriers to the "legality" of ratification.[265] Since such purported illegalities are the focus of Professor Amar's work, it is to his theory that we now turn.

2. *Professor Amar's Theory: Popular Sovereignty*

Professor Amar's theory of amendment of the Constitution outside Article V differs somewhat from that of Professor Ackerman. According to Professor Amar, "the first, most undeniable, inalienable and important, if unenumerated, right of the People is the right of a majority of voters to amend the Constitution—even in ways not expressly provided for by Article V."[266] However, Amar argues that ratification of the Constitution was not illegal. According to Amar, Ackerman's mistake is that he "fails to fully appreciate the *legal* character of ratification."[267] Amar notes the apparent inconsistency of the ratification procedures with Article XIII of the Articles of Confederation, but adopts the Madisonian argument that the Articles represented a treaty that had been breached and therefore was invalid.[268] However, Amar also raises the possibility that ratification of the Constitution violated the various state constitutions that prescribed procedures for amendment, which were ignored.[269] This is a legitimate point. Some state constitutions did place limitations on the ability of the people to make amendments, such as minimum intervals between amendments, and Antifederalists raised concerns that

265. *See infra* notes 269-78 and accompanying text.
266. Amar, *supra* note 24, at 1044.
267. *Id.* at 1092.
268. *See id.* at 1047-48.
269. *See id.* at 1049.

ratification of the Constitution might violate such provisions.[270] Amar concludes, however, that the Framers obviated these objections by resorting to "first principles"—the people were sovereign and could therefore override these objections by ratifying the new Constitution themselves in constitutional conventions.[271] As a result, Amar con-

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270. *See* Ackerman & Katyal, *supra* note 23, at 484-87 (noting that the New Hampshire and Pennsylvania constitutions prescribed seven year intervals between amendment and that the Massachusetts constitution prescribed a fifteen year interval and authorized a convention only if two-thirds of the voters in the state agreed to one and that the Massachusetts and New Hampshire constitutions subordinated themselves to the Articles of Confederation); Amar, *supra* note 24, at 1049-50 (discussing the constitutions of Massachusetts, Pennsylvania, and Maryland which had provisions that appeared to provide the exclusive means for amendment). The Massachusetts Constitution of 1780 provided as follows:

> The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled.

See MASS. CONST. OF 1780, ch. VI, art. X, *reprinted in* 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 1911 (Francis Newton Thorpe ed., 1909) [hereinafter THE FEDERAL AND STATE CONSTITUTIONS]. *See also* PA. CONST. OF 1776, § 47, *reprinted in* 5 *id.* at 3091; N.H. CONST. OF 1784, pt. 1, art. VII, *reprinted in* 4 *id.* at 2454. John Quincy Adams analyzed the legality of ratification of the new Constitution as follows:

> [T]o crown the whole the 7th: article, is an open and bare-faced violation of the most sacred engagements which can be formed by human beings. It violates the Confederation, the 13th: article of which I wish you would turn to, for a complete demonstration of what I affirm; and it violates the Constitution of this State, which was the only crime of our Berkshire & Hampshire insurgents (in Shays's Rebellion).

Letter from John Quincy Adams to William Cranch (Oct. 14, 1787), *in* 14 DOCUMENTARY HISTORY: COMMENTARIES, *supra* note 236, at 223-24. *Cf.* 1 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 250 (remarks of Paterson) ("He reads the 5th. art: of Confederation giving each State a vote—& the 13th. declaring that no alteration shall be made without unanimous consent. This is the nature of all treaties. What is unanimously done, must be unanimously undone.").

271. Amar, *supra* note 24, at 1050-54.

> [T]he rhetoric of the People's right to alter or abolish their government, rhetoric that appeared in virtually every state constitution and other *legal* texts, was given concrete *legal* meaning by the Founding Generation, and furnished *legal* support for popular ratification in Massachusetts by a mode not explicitly specified in that state's own constitution.

Id. at 1053-54. Amar quotes the following passage from James Madison as support for his theory:

> The difficulty in Maryland was no greater than in other States, where no mode of change was pointed out by the Constitution, and all officers were under oath to support it. The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bill of rights, that first principles might be resorted to.

Id. at 1050 (quoting 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 9, at 476). Madison is correct that the power of the people could override the provisions found in

tends that the Framers contemplated amendment of the *federal* Constitution outside Article V through a mere majority vote of the populace at large at a constitutional convention.[272] According to Amar, "[t]he principles of popular sovereignty underlying our Constitution require that a deliberate majority of the People must be able to amend the Constitution if they so desire."[273]

Amar is correct in asserting that the source of ultimate political authority, or sovereignty, was thought by the Framers to reside in the people.[274] Consistent with republican principles, the ultimate source of political authority for both the state governments[275] and the general

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the state constitutions. In fact, the people can by themselves amend the federal Constitution utilizing the procedures found in Article V. However, at the state level all that is need is a majority of the people within the state under republican principles of government. At the federal level, a majority of both the states and the people is needed, as Madison recognized elsewhere. Article V tracks these principles in its three-fourths requirement. *See supra* notes 235-39 and accompanying text.

272. *See* Amar, *supra* note 24, at 1055 ("[A]lthough Article V is best read as the exclusive mode of governmental amendment *absent participation by the People*, it should not be understood as binding the People themselves, who are the masters, not the servants—who are, indeed, the source—of Article V and the rest of the Constitution.").

273. *Id.* at 1060. *See also id.* at 1044 ("[O]ur choice need not be limited to the Article V amending process versus freewheeling judicial review, as the standard question suggests, for there is a third, usually ignored, possibility: constitutional amendment by direct appeal to, and ratification by, We the People of the United States.").

274. *See* Amar, *supra* note 2, at 1437 (noting the distinction between sovereignty and power made by the Federalists).

275. *See, e.g.*, VIRGINIA DECLARATION OF RIGHTS, art. III, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 3 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[W]henever any Government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable, and indefeasible right, to reform, alter, or abolish it, in such manner as shall be judged most condusive to the publick weal."); N.C. CONST. OF 1776, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 270, at 2787 ("[A]ll political power is vested in and derived from the people only."); MASS. CONST. OF 1780, *in* 3 *id.* at 1890 ("All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive, or judicial, are their . . . agents, and are at all times accountable to them."); MD. CONST. OF 1776, DECLARATION OF RIGHTS art. II, *in id.* at 1686; PA. CONST. OF 1776, DECLARATION OF RIGHTS art. IV, *in* 5 THE FOUNDERS' CONSTITUTION, *supra*, at 6 ("That all power being originally inherent in, and consequently derived from the people; therefore all officers of government . . . are their trustees and servants, and at all times accountable to them."); *id.* art. V ("[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal."). *See also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government,

government[276] was to be found in the people who delegated some measure of power to these respective governments. In simple republics, such as those represented by the several states, a majority of the populace would be both necessary and sufficient to ratify constitutional lawmaking. Accordingly, even if a state constitution specified a different requirement for ratifying amendments to the constitution, this requirement could be trumped by appealing to first principles: In a simple republic a majority of the populace could ratify any change in the constitutional structure and thereby evade such heightened requirements found in the state constitutions.

However, Professor Amar's error is that he applies this same analysis of a simple republic to the *compound republic* of the United States. While the states were simple republics, the United States as a whole was not, and the Federalists repeatedly emphasized this point.[277] The United States was a compound republic—only a partial consolidation, and not a complete consolidation of the states was achieved under the Constitution. There were two channels through which the sovereignty of the people was expressed—a direct channel and an indirect channel.[278] Thus, when one appeals to "first principles," one finds that, as Madison noted, a majority of *both* the people *and* the states would be necessary to ratify constitutional lawmaking in such a compound

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laying its foundation on such principles, and organizing its powers in such form, as to them shall seem must likely to effect their Safety and Happiness.").

276. *See* U.S. CONST. pmbl. In *Chisholm v. Georgia*, Justice Wilson recognized this vital principle of republican government in the United States.

> To the Constitution of the *United States*, the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* that Constitution. They *might* have announced themselves "SOVEREIGN" people of the *United States*.
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> . . .

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454 (1793) (Wilson, J.).

277. *See supra* notes 200-09 and accompanying text.

278. As James Madison noted in *The Federalist No. 51*, "In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments." THE FEDERALIST NO. 51, at 339 (James Madison) (Edward Mead Earle ed., 1976). Thus, Madison analogized the division of power between the states and the federal government to the division among the departments of the federal government. A result of these divisions, according to Madison, is that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Id. See also* 2 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 444 (remarks of James Wilson at the Pennsylvania ratifying convention) ("When the principle is once settled that the people are the source of authority, the consequence is, that they . . . can distribute one portion of power to the more contracted circle, called state governments; they can furnish another portion of power to the government of the United States.").

republic. A mere majority of the people alone would not be sufficient to ratify constitutional lawmaking. The rules laid out in Article V for amendment of the Constitution closely track this model.

B. The Constitutionality of Secession

Although the issue of the constitutionality of secession is no longer of particularly urgent practical concern, it is interesting to explore the ramifications of the foregoing analysis for this seemingly academic question. It would appear that Lincoln was correct that secession was indeed unconstitutional.[279] It was so in a way that is analogous to the question of the constitutionality of amendment of the Constitution outside Article V. States' rights advocates such as John Calhoun were correct in characterizing the United States as "a union of States as communities," but they were wrong in stating that it was "not a union of individuals."[280] The states, by ratifying the Constitution, entered into a compact that was not only a compact among states, but also a compact among the people of the nation. The states maintained some measure of sovereignty—that which was not delegated to the general government nor reserved to the people. However, they were no longer "separately and individually independent" sovereigns[281]—they were

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279. Lincoln described the "sophism" of secession as follows:

> The sophism itself is, that any state of the Union may, *consistently* with the national Constitution, . . . withdraw from the Union, without the consent of the Union, or of any other state. The little disguise that the supposed right is to be exercised only for just cause, themselves to be sole judge of its justice, is too thin to merit any notice.
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> . . .
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> This sophism derives much—perhaps the whole—of its currency, from the assumption, that there is some omnipotent, and sacred supremacy, pertaining to . . . each State of our Federal Union.

Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 433 (Roy P. Basler ed., 1953) (footnotes omitted). As Lincoln noted, the consent of the people as well as the other states was necessary for secession.

280. DAVID F. HOUSTON, A CRITICAL STUDY OF NULLIFICATION IN SOUTH CAROLINA 82 (1896). *See also* JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT (1851); John Calhoun, *Address on the Relation Which the States and General Government Bear to Each Other*, *in* 6 WORKS OF JOHN C. CALHOUN 59 (1855); JEFFERSON DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT (1958).

281. There was some debate concerning whether the states were independent sovereigns upon emancipation from Great Britain. The Declaration of Independence proclaimed that the states were "free and independent." THE DECLARATION OF

essential constituents of a federal system. The consent of a majority of the people as well as the states was necessary to change this compact. Therefore, unless a majority of states approved of secession, *as well as* a majority of the populace, it would seem that secession would violate the Constitution.

C. Interpretation of the Enumerated Powers of the General Government

Many of the most heatedly contested issues facing modern courts that have been said to implicate concerns of federalism have to do with interpretation of the enumerated powers of the general government.[282] Such questions have been said to invoke the central principles of federalism.[283] However, in reality, such questions, although clearly important and of immediate concern, do not invoke the core principles of federal structure. The method whereby a division of powers between the general government and the state governments is accomplished in a

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INDEPENDENCE para. 32 (U.S. 1776). However, it seems that most understood the states as not being completely and separately independent sovereigns, but rather joined in an indissoluble union. For example, Charles Cotesworth Pinckney stated:

> The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration [of Independence]; the several states are not even mentioned by name in any part of it,—as if it was intended to impress this maxim on America, that our freedom and independence arose from our union, and that without it we could neither be free nor independent. Let us, then, consider all attempts to weaken this Union, by maintaining that each state is separately and individually independent, as a species of political heresy.

Charles Pinckney, Speech in the South Carolina House of Representatives (Jan. 18, 1788), *in* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 47, at 301. *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 187 (Marshall, C.J.). Chief Justice Marshall described the relation among the states prior to ratification of the Constitution as follows:

> [R]eference has been made to the political situation of [the] States, anterior to [the Constitution's] formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change . . . .

Id.

282. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995).

283. *See* Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1230 ("Every federal system of government must grapple with the defining element of federalism—the apportionment of authority between the central government and the constituent elements that make up the federal arrangement.").

federal system is only one minor aspect of federal structure. These debates really have little to do with structural provisions establishing the federal system under the Constitution. Instead, under the federal system established in the United States, the issue is merely one of interpretation of the enumerated powers listed in Article I, Section 8 of the Constitution.

As previously noted,[284] an enumerated powers structure was not viewed by the Founding Generation as being essential to a federal system. Instead, it was one mechanism for ensuring that power would be distributed in a way such that liberty was protected. For example, Alexander Hamilton believed that setting the boundary between the powers of the central government and those of the states was based on a naked policy determination. "The extent, modifications and objects of the Federal authority are mere matters of discretion."[285] Thus, one might conclude that the particular enumerated powers delegated to the general government and their scope might vary as they did between the Articles of Confederation and the Constitution without major changes in the underlying structure of the government.

Questions concerning the proper scope of the enumerated powers of the general government would have arisen under the Articles of Confederation as well. The mechanism for dividing power between the general government and the state governments employed in the Articles was the same as that employed by the Constitution—a system of enumerated powers delegated to the general government, with all residual powers left to the states.[286] First, both documents limited the power of the general government. The general government was not delegated a general legislative power, and residual powers were reserved to the states. Second, both documents listed those powers that were to be exercised by the general government, and both documents rejected a functionalist approach to defining the powers—one based on determinations of the "competency" of the state governments. The distribution of powers was fixed in the constitutional text under both documents and was rigidly defined. Consistent with the status of the states as constitutionally-essential constituent entities of the federal structure, a sphere of

284. *See supra* note 102 and accompanying text.
285. THE FEDERALIST NO. 9, at 52 (Alexander Hamilton) (Edward Mead Earle ed., 1976).
286. *See supra* notes 89-102 and accompanying text.

authority in which they could exclusively act was preserved in the national Constitution. However, the particular distribution, whether under the Articles or under the Constitution, was merely a matter of policy—what distribution of powers between national and state authorities would prove most efficient and liberty-enhancing. Thus, today it seems that debates concerning "federalism" have focused on perhaps the least important and least interesting aspect of our constitutional structure—a feature that is not essential to systems that might be deemed "federal."

VI. CONCLUSION

The foregoing analysis of the Articles of Confederation and the Constitution has demonstrated the great similarity in the federal systems established under these two documents and the fundamental difference between the two—that the Constitution represents a partial consolidation of the states, a compact to which both the people and the states are parties. The preceding analysis has been primarily descriptive. An attempt has been made to gain insight into the original understanding of the federal structure established under the Constitution and the political theory informing that structure. The analysis may give guidance in the proper interpretation of the many provisions relating to the federal structure found in the Constitution.

However, a final brief word is in order concerning the desirability of the federal structure established by the Framers under the Constitution. Under the social compact analysis presented above, the states as well as the people are viewed as the sources of political authority for the general government. The nature of a compound republic is that both the states and the people are represented in the general government. The result of such a structure is that the interests of the states as entities—the interests of the *peoples* of the several states—are represented at the level of the general government. Thus, such a structure ensures that the benefits of having a federal system with distinct states carrying on governmental functions that are more efficiently conducted at a more decentralized level are preserved and that the general government does not exercise its power to erode this structure. A structural safeguard exists that may serve to prevent the tyranny of the majority over minorities—particularly geographically localized minorities. Furthermore, the equal representation of the states in the Senate arguably slows the rapidity with which federal action may be taken, thereby encouraging deliberation. Thus, despite ratification of the Seventeenth Amendment, which fundamentally altered this structure by providing for direct election of Senators, the superstructure established under the Constitution remains a vital and

valuable mechanism for ensuring that the liberties of the people themselves will not be eroded.

Under the superstructure established by the Constitution the interests of the states are not represented to the exclusion of national interests. The government established under the Constitution does represent a partial consolidation of the states. Thus, the interests of the majority of the people are also represented at the level of the general government. The Constitution establishes a balance between these sometimes competing interests. As Alexander Hamilton noted in *The Federalist No. 28*, in such a system, "[p]ower [*is*] . . . the rival of power,"[287] leading

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287. THE FEDERALIST NO. 28, at 174 (Alexander Hamilton) (Edward Mead Earle ed., 1976). Hamilton's remarks deserve further quotation:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.

Id. Similar remarks were made in justification of the system of separation of powers established under the Constitution in *The Federalist No. 51*. *Id.* NO. 51, at 337 (Alexander Hamilton or James Madison) (stating that "[a]mbition must be made to counteract ambition"); *id.* at 339 (noting that "[i]n the compound republic of America . . . a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controlled by itself."). James Madison discussed at length the virtues of dividing power among a variety of governmental entities:

> [P]ower is of an encroaching nature, and . . . ought to be effectually restrained from passing the limits assigned to it. After discriminating therefore, in theory, the several classes of power, . . . the next and most difficult task, is to provide some practical security for each against the invasion of the others.
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> [T]he powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

Id. NO. 48, at 327, 330 (James Madison). *See also* Coleman v. Thompson, 501 U.S. 719, 759 (1991) (Blackmun, J., dissenting) ("[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1984) (Powell, J., dissenting)) ("The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'"); Amar, *supra* note 2,

to better protection of individual liberty. In such a system, the people may cast the deciding vote and utilize whichever entity they choose—be it the federal or state government—to protect their interests. Thus, a compound republic wherein the states remain constitutionally-essential constituent entities is a political structure that may serve to enhance the liberty of the citizenry.

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at 1427 ("Guided by emerging principles of agency law and organization theory, the Federalists consciously designed a dual-agency governance structure in which each set of government agents would have incentives to monitor and enforce the other's compliance with the corporate charter established by the People of America.").