



Written by [Joe Wolverton, II, J.D.](#) on December 26, 2015

## Constitution: Outdated and Overstretched?

On December 20, *The Atlantic* asked if the Constitution was up to the challenge of governing “America’s sprawling empire.”

“The U.S. Supreme Court struggles to stretch a Constitution written for 13 coastal states to encompass non-contiguous states, dependent nations, insular areas, and a commonwealth,” the magazine claims.

There is no arguing that the United States is no longer “a coastal republic of 13 states.” The question remains, however, whether the Constitution is being stretched too thin by its alleged application to a global empire on which, truly, the sun never sets.



The author of *The Atlantic* piece commits several cardinal sins of constitutional understanding, and this confusion likely led him to his flawed premise.

First, the Constitution is not a governing document in the sense that the author implies. The Constitution is a contract among the states creating an organization empowered with specifically enumerated powers. As James Madison explained in *The Federalist*, No. 45, “The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite.”

While that famous *Federalist* quote is always trotted out in defense of a small, limited federal authority, the next few phrases from that essay are just as important when it comes to understanding the proper boundaries of the federal government and the Constitution that established them. Madison writes:

The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. 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 operations of the federal government will be most extensive and important in times of war and danger; those of the State governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State governments will here enjoy another advantage over the federal government. The more adequate, indeed, the federal powers may be rendered to the national defense, the less frequent will be those scenes of danger which might favor their ascendancy over the governments of the particular States.

So, the critical path of *The Atlantic*’s analysis of the Constitution begins with a wrong step — the step of assuming that the Constitution was ever intended to apply to the areas of life “it now governs, awkwardly....”

And, the men who drafted our Constitution and the conventions that ratified it never intended — likely,



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never imagined — that the document on which they were deliberating would ever be called on to “decide issues for imperial subjects.”

There is a second, equally erroneous presumption made by *The Atlantic*: that of federal supremacy over the states.

The Supremacy Clause (as some wrongly call it) of Article VI does not declare that federal laws are the supreme law of the land. It states that the Constitution “and laws of the United States made in pursuance thereof” are the supreme law of the land.

The phrase that pays is “In *pursuance* thereof, not “in *violation* thereof.” If an act of Congress is not permissible under any enumerated power, it is not made in pursuance of the Constitution and therefore not only is not the supreme law of the land, it is not the law at all.

Alexander Hamilton put a fine point on the matter in *The Federalist*, No. 33:

But it will not follow from this doctrine that acts of the larger society which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.

Acts not authorized under the enumerated powers of the Constitution are “merely acts of usurpations” and deserve to be disregarded, ignored, and denied any legal effect.

Just that much of an understanding of the fundamental concept of federalism would disabuse the author of *The Atlantic* piece of his concern for the Constitution’s pliability and it would remove from the shoulders of the Constitution the burden of governing an empire — a burden unnecessarily placed upon it by corrupt congresses, courts, presidents, and a people not familiar with the timeless principles of liberty upon which this country was built.

That brings us to the next misguided step in *The Atlantic*’s scrutiny of the Constitution and its pan-imperial purposes.

From the Declaration of Independence to the Constitution, the Founding Fathers looked to classical history as a reliable guide to their successful experiment in building a lasting Republic.

“I have but one lamp by which my feet are guided, and that is the lamp of experience. I know of no way of judging of the future but by the past,” Patrick Henry wrote in 1775.

Patrick Henry’s view of the value of history was not unique. The men who framed our constitutional Republic agreed with French author Charles Pinot Duclos, who observed:

We see on the theater of the world a certain number of scenes which succeed each other in endless repetition: where we see the same faults followed regularly by the same misfortunes, we may reasonably think that if we could have known the first we might have avoided the others. The past should enlighten us on the future: knowledge of history is no more than an anticipated experience.

All our Founding Fathers believed that history was a precursor of the future. In the annals of history — particularly that of the Greek and Roman republics of antiquity — they believed they could find the key to inoculating America against the diseases that infected and destroyed past societies. Indeed, it has been said that the Founders were coroners examining the lifeless bodies of the republics and democracies of the past, in order to avoid succumbing to the maladies that shortened their lives.

As the Founders read the histories of the rise and fall of the Greek and Roman republics recorded by



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Herodotus, Livy, Tacitus, Sallust, Plutarch, Polybius, and others, they learned that the liberties enjoyed by the citizens of those commonwealths were quite often targeted by conspiracies of men determined to enslave the people and establish themselves as tyrants. The Founders recognized that the conspiratorial view of history was not a theory: It was a fact.

Ancient historians were straightforward in their reports of the secret plots. Surveying the litany of British monarchical abuses, our Founders rightly perceived that the shrouded hand of an evil conspiracy was at work in America and England, just as it had been in the Roman republic they so admired. Famed patriot Charles Carroll of Carrollton invoked the record of Roman historian Tacitus when he wrote that the conspiracy of his own time had led America and England to “that degree of liberty and servitude which [Servius Sulpicius] Galba ascribes to the Roman people in the speech to [Gaius Calpurnius] Piso: those same Romans, a few years after that period, deified the horse of Caligula.”

In other words, the principles underlying our Constitution were thousands of years old and thus already “outmoded” when they informed the form and function of the federal government.

Or, as Garet Garrett, former chief editorial writer of the *Saturday Evening Post*, eloquently explained:

We have crossed the boundary that lies between Republic and Empire. If you ask when, the answer is that you cannot make a single stroke between day and night; the precise moment does not matter. There was no painted sign to say: “You are now entering Imperium.” Yet it was a very old road and the voice of history was saying “Whether you know it or not, the act of crossing may be irreversible.” And now, not far ahead, is a sign that reads: “No U-turns.”

Finally, the apparent diseases in the Constitution diagnosed by *The Atlantic* would nearly all be cured were the three branches of the federal government forced by the states and the people to adhere to the limits on their power and hew rigidly to the small sphere of authority assigned to them in the Constitution.

It is when we, the people, and our elected representatives — state and federal — fail to follow the terms of the original contract that men begin to blame the contract’s capacity rather than recognize the intended restrictions on its application.



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