Comparing American Constitutions I and II: Topics Treated in Constitution II Compared to Similar Topics in Constitution I

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ABSTRACT.
OCL explores, topic by topic, the origins of Constitution II, in its appearance as the Early Constitution. Its 5,224 words are surely in debt to the 3,453 words of Constitution I. But by how much? The results are surveyed in the table annexed hereto.

KEY WORDS: federal constitutions, acquired meanings.

A. INTRODUCTION. How original is the federal constitution? Of course, there were two of them. So: how original is our constitutional accomplishment the second time around?

B. HOW SUCCESSFUL HAS IT BEEN? It doesn’t always happen that the second (or third) trip down the aisle brings a greater measure of happiness. But the number of states attempting to divorce themselves from Constitution II over the number of years it’s been in business is a pretty good measure of C II’s success. Eleven states in 224 years isn’t all that bad.

According to Thucydides, colonies were revolting right and left. If a colony didn’t revolt after a generation or two, the mother polis divorced the kids. ‘The shame of it all,’ they said. ‘If you had any dignity in the world, you’d try to make a living on your own.’

Americans have been satisfied enough with C II not to trash it in toto after 224 years. C I? In the rubbish tip after 7+ years. But then again, if you recycle text isn’t that, after a fashion, a means of keeping the Articles alive? A companion piece may be consulted on this point. How Many Unique Words Did It Take to Write Our First Constitution? 2 OCL 180.

However, the foregoing doesn’t answer the question, ‘how original is the text of CII?’

D. START AT THE BEGINNING. Article III (of the Articles of Confederation = C I) reads:

The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.
The Preamble to C II, appears where you would expect it, that is, at the beginning:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

They’re both aspirational; they both reference “common defence” and “general welfare.” C II is refreshingly honest about being ‘second time through’ so that consumer expectations are limited to this one being ‘more perfect’ in union than the last. But hey! You’re kicking Rogue Island out of the union, so you’re new union has got to be ‘more perfect.’ The Mathematical Logic of Blocking Power: From Thirteen to Forty-Four States, 2 OCL 187; The Foreigners Among Us: Constituent Expulsion in the Early American Republic, 2 OCL 188.

[How Rhode Island scored zero points (New Jersey won with a composite score of 132), a result tabled in Who’s Got Bragging Rights? Delaware or New Hampshire or –?, 2 OCL 109, is also addressed in The Few, The Happy Few: How Many Delegates Would be Required To Organize the United States of America? 2 OCL 108.]

D. A NECESSARY AND PROPER EXAMPLE.

Take this Article I, Section 8, Clause 18 from C II:

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.

And this, being Article X from C I:

The committee of the states, or any nine of them, shall be authorized to execute, in the recess of congress, such of the powers of congress as the united states, in congress assembled, by the consent of nine states, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine state[s] in the congress of the united states assembled, is requisite.

C II’s ‘Necessary and Proper’ clause is regularly disavowed by learned authorities, these writers taking the position that ‘necessity’ is what Congress says it is. Charles Warren’s Supreme Court in United States History declares: The “degree of (the bank’s) necessity was solely for ... Congress” to decide. Alexander Bickel concurs with Warren: his Least Dangerous Branch finds the “nature” of the constitution offering “hospitality
to large purposes,” relieving Bickel of the chore of citing to the constitution; Bickel relies heavily on James Bradley Thayer’s *Origin and Scope of the American Doctrine of Constitutional Law*.[1]

It is refreshing to read (in C I = AoC) that Congress merely authorizes its “committee of the states, or any nine of them ... to execute, in the recess of congress, such of the powers of congress as ... congress ... shall ... think expedient ...” and wham! The expediency decision is transmuted from delegation into execution. If it’s ‘expedient’ to delegate then what the committee does is ‘expedient’ = ‘necessary’ as well.

Which is just as Warren wrote, altho’ we are speaking of C I and which he was not. That’s rather the nifty thing about having two constitutions. If you’re remarks are a wee bit off the mark as to C II, then you may be right if you’re speaking of C I.

E. **Table Annexed.** For on-line access to Peter Aschenbrenner’s articles, tables and charts see purdue.academia.edu/PeterAschenbrenner or works.bepress.com/peter_aschenbrenner/

F. **Citation Format.** Please cite as 2 Our Constitutional Logic 206 or 2 OCL 206.

G. **Server Location.** This file is maintained on the I/D server.

H. **Last Revised.** This file was last revised on September 3, 2014; it is version 004.

I. **File Format.** The format of this file is MS Word 2010; the format of the associated table is also MS Word 2010.

J. **References.**