

“[A] system which we wish to last for ages.”¹: An analysis of early American external and internal sovereignty, 1774-1790



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¹ James Madison, *Notes of Debates in the Federal Convention of 1787*, ed. Adrienne Koch (Athens: Ohio University Press, 1985), 194.

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² Thomas Paine, “Common Sense” in Eric Foner, ed., *Thomas Paine: Collected Writings* (New York: Library of America, 1995), 34.

³ From John Adams to John Penn, *ante* March 27, 1776, Sara Martin, ed., *The Adams Papers Digital Edition*, 18 vols. (Charlottesville: University of Virginia Press, 2008), 4:83. Henceforth, abbreviated as *AP*.

⁴ Max Farrand, ed., *The Records of the Federal Convention of 1787*, 3 vols (Washington D.C.: 1911, reprinted 1934), 3:85. Henceforth, abbreviated as *Records*.

⁵ From William Bradford (, Jr. son) to James Madison, October 17, 1774, J. C. A. Stagg, ed., *The Papers of James Madison Digital Edition: Congressional Series*, 17 vols. (Charlottesville: University of Virginia Press, 2008), 1:120. Henceforth, abbreviated as *PJM*.

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⁶ Bob Dylan, *The Nobel Lecture* (New York: Simon & Schuster, 2017), 1.

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Introduction

Although the British émigré pamphleteer Thomas Paine had no direct role with the Constitution, Thomas Edison, the famed inventor, credited him as the real architect of the document's republic. Such esteem might have appeared far-fetched for Michael Kiley found that Paine's relevance in American history greatly dissipated by 1787.⁷ Paine undoubtedly deserved the title of Founding Father of the American Revolution, but why was he a less important figure relative to those who framed the Constitution?⁸ I suggest that Paine's focus in *Common Sense* of a continental future for the thirteen American colonies was a theme that continued to exist in every one of the three American unions, 1776-1790. Chapters 1-3 analyze the respective document(s) associated with each specific union's establishment via external, or international, sovereignty and explain why and how they conformed to Paine's vision, a continental republic of sovereign states. Paine's inclusion in my thesis does challenge attempts made by those historians who have transformed his message of continentalism into true nationalism, but his main incorporation was mostly tied to the purpose of a coherent thematic narration.⁹

⁷ Michael M. Kiley, "Thomas Paine: American Founder and Political Scientist," *Biography*. vol. 8, no. 1 (1985): 51. "In 1925, Thomas A. Edison urged readers to "consider 'Common Sense', and Paine's planning of this great American Republic, of which he may very justly be termed the real founder." "During the preceding period, that of the Revolution and [the Articles of] Confederation, Paine was regarded in America as a founder." Yet, as the narrative temporally moved further away from these periods, Kiley observed, Paine became less of an important figure.

⁸ *Ibid.*, 55. I agree with Kiley's definition of "an American Founder," which "suggest[ed] [that] [t]he concept [...] include[s] these elements: public service at personal cost, exposure and loyalty, innovativeness, performance of the duties of office, a charter position in the new republic, high character, and a vision of the future." Based on this "formulation of 'an American Founder,'" Paine was a Founder just as much as the framers of the Constitution were; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: The University of North Carolina Press), 523-524. Yet, Wood like other nationalist-minded academics averred that the Constitution broke away from the principles of 1776, which included those in *Common Sense*. "The Constitution presented no simple choice between accepting or rejecting the principles of 1776. [...] [T]hose who clung to the principles of 1776 could only stand amazed with confusion, left holding remnants of thought that had lost their significance."

⁹ Bernard Bailyn, *To Begin the World Anew: The Genius and Ambiguities of the American Founders* (New York: Alfred A. Knopf, 2003), 54. The title of Bailyn's book used a quotation from *Common Sense* to argue that the Constitution fulfilled Paine's expression with the instillation "of a centralized, national, self-financing state." How did the creation of a supposed single American state change the world anew since large-scale states such as Britain and France already existed? As Chapter 1 demonstrates, Paine's thoughts of a continental government, which remained static throughout his life, were antithetical to this analysis; See Eric Foner, *Tom Paine and Revolutionary America – Updated Edition* (Oxford: Oxford University Press, 2005), 75-78, 80-85. Unfortunately, Foner's assessment of

David Armitage's characterization of the Declaration of Independence, 1776, as "the birth certificate of a nation" and the date of its adoption "as the birthday of a nation" supposed that the colonies could assume the international status of a sovereign state without the recognition and relinquishment of sovereignty by Great Britain.¹⁰ To George Billias, Armitage's usage of *nation* was unabashedly literal for he too explained that the Declaration proclaimed the existence of an American "sovereign nation."¹¹ Billias's assessment, as all nationalist interpretations of the Declaration began, viewed the term *states* as just provincial arms of an American state. Billias's main argument for this theory of singular American statehood rested on the fact that these colonies, which called themselves states, contracted treaties in unison—ostensibly proving the reality of singular American independence. In Chapter 1, I suggest, with the pertinent background story, that the Revolution was a war to establish a continent of sovereign states, and thus I treat the thirteen colonies, not as states, but as colonies bound with an individual desire to achieve statehood. In my analysis of the Declaration, I continue this approach because I believe it answers questions as to why odd discrepancies in these treaties existed such as the lack of a consistent name for the whole of the colonies, the repeated usage of *states* to refer to the colonies and the incessant insertion of every colony's name.

Common Sense, which said that "Paine always considered the republican argument of *Common Sense* more important than the pamphlet's call for independence," misunderstood what Paine actually said. Foner correctly observed that "Paine was the conscious pioneer of a new style of political writing," which was plain and simple, but Foner completely overturned this fact with accusations that Paine's pamphlet focused on vague notions of "republicanism." Thus, Foner accused Paine of seeking the establishment of a literal "continental state" and "empire"—a gross misinterpretation of the word *continental* in this context. Because Foner believed the intent of the Revolution was to create a single American state, he failed to understand Paine's actual call for several independent American states and the creation of a continental, or federal, union for them. Hence, Foner was unable to understand that Paine tied American independence to the construction of a continental republic. After all, without independence, there would be no possibility to create any government.

¹⁰ David Armitage, "The Declaration of Independence and International Law," *The William and Mary Quarterly*. vol. 59, no. 1 (2002): 43, 61, 64.

¹¹ George Athan Billias, *American Constitutionalism Heard Round the World, 1776–1989* (New York: New York University Press, 2011), 17.

Billias further surmised that the Declaration was more about “interdependence” rather than “independence,” but he failed to recognize the distinct influence of the Articles of Association, 1774, which unified the colonies in an effort to seek better treatment under the British state through measures of protest.¹² Although the Association’s union had no desire for independence, its union—to paraphrase John Adams—set a historical precedent for structuring the three future American unions.¹³ Timothy Breen acknowledged that the Association essentially arose out of the sympathy the colonies had on Britain’s harsh treatment of Massachusetts, which meant that this union was voluntary.¹⁴ In my opinion, the foundation of the Declaration’s unification was at least in one aspect synonymous with the Association’s. According to eighteenth-century standards, both texts employed verbiage that was eerily close to a marital vow, which was entirely characteristic of a federal union.¹⁵ I ultimately conclude that the Declaration confederated these colonies rather than united them as provincial arms of a future or existing state.

Bruce Ackerman, a legal scholar, did not agree with his fellow-lawyer Akhil Amar that “the Founding was consummately legal,” but to disregard the reality that American texts of unification like the Articles of Confederation, 1781, were standalone texts, which spoke for themselves, invited a misinterpretation of them and only partially told history.¹⁶ However,

¹² Ibid.

¹³ Barry Alan Shain, ed., *The Declaration of Independence in Historical Context: American State Papers, Petitions, Proclamations & Letters of the Delegates to the First National Congresses* (New Haven: Yale University Press, 2014), 181.

¹⁴ T. H. Breen, *The Will of the People: The Revolutionary Birth of America* (Cambridge: Belknap, 2019), 20, 34-35. It was not the Boston Tea Party of 1773 that united the colonies, but the punishments Great Britain legislated on Massachusetts did. With the Articles of Association, they united in protest against Great Britain, but the main goal was not revolutionary but to assuage the tensions between the colonies and the mother country. The most relevant aspect of the Association was how the colonies all voluntarily banded together in protest—thus, this voluntary binding together became, I believe, a characteristic of all three of the future American unions, which were political unions.

¹⁵ Akhil Reed Amar, *America’s Constitution: A Biography* (New York: Random House, 2005), 5. This interpretation was influenced by Amar’s own correlation the Constitution’s famous phrase “We the People” to a wedding vow, wherein “We the People” was actually “We do” “ordain and establish this Constitution.”

¹⁶ Bruce Ackerman and Neal Katyal, “Our Unconventional Founding,” *The University of Chicago Law Review*. vol. 62, no. 2 (1995): 476, 540.

Ackerman’s interpretation of the Articles did rely on this perspective but only when it gave credence to his argument.¹⁷ Jack Rakove’s own assumption that the perpetuity of the Articles referred to sovereignty rather than chronicity of the Revolution and Gordon Wood’s indication that the explicit retention of sovereignty under them was all that kept the states sovereign fell into the same trap of contradiction.¹⁸ Fon Boardman defined the role of the historian as twofold, whereby he or she recounted “exactly *what* happened” as in the Articles made an explicit promise of perpetuity and acknowledged the sovereignty of its members, but the historian also explained “*why* something happened” as in the purpose of these two noteworthy statements.¹⁹ In Chapter 3, I explain exactly why the Articles formed what Amar called a “multilateral treaty” with textual analysis of these and other relevant portions of the Articles, but also separately and simultaneously connected, I recount the original intent behind the formation of them.²⁰ In other parts of Ackerman’s work, it appeared that his nationalist reading of a few historical actors—including Adams—influenced his reading of the Articles, whereas in my analysis, I suggest that the Articles alone stand as a confederate government meanwhile I also challenge Ackerman’s absolute that “[t]reaty language was almost never used to describe the [confederate] arrangement.”²¹

Merrill Jensen’s seminal work on the Articles remains unmatched even present-day, but in his research, he discovered that the Articles lacked an original intent for “few sources remain[ed]

¹⁷ Ackerman and Katyal, “Our Unconventional Founding,” 479. Because Ackerman believed that the Articles inhibited any state’s right to secede solely with the phrase “the Union shall be perpetual,” he himself unknowingly agreed with Amar’s assertion for Ackerman did not supply any anecdotal evidence for this—only relying on a reading of the text itself. Ackerman cannot sporadically choose to utilize and abandon this methodology whenever it suited his narrative.

¹⁸ Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996), 17; Wood, *American Republic*, 355, 358.

¹⁹ Fon W. Boardman, Jr., *History and Historians* (New York: Henry Z. Walck, Inc., 1965), 5. (emphasis in the original)

²⁰ Amar, *America’s Constitution*, 25. “Legally, the words ‘confederacy,’ ‘confederation,’ and ‘league’ all connoted the same thing: The ‘United States’ would be an alliance, a multilateral treaty of sovereign nation-states.”

²¹ Ackerman and Katyal, “Our Unconventional Founding,” 539-540, 545, 551-552. Ackerman’s asserted that none of Amar’s “legal conclusions” on the Articles “do not follow” because he “uncovered virtually nothing” to support this assessment of them as treaty. However, he did agree with Amar on one point: James Madison was “remarkably nationalistic.”

for the study of the work.”²² Thus, I incorporate all of those areas in which Jensen said the Articles could be “analyzed” in the construction of an intent that tells how Paine’s influence continued in this second American union.²³ As James Madison’s hand was often associated with the Constitution, I believe Adams best represented the tale of the Articles as even Wood portrayed him to be the Madisonian architect of them.²⁴ What I discovered with Adams, and what Ackerman did not discern, was that he and his colleagues like Madison, Thomas Jefferson, George Washington, John Jay and Alexander Hamilton—figureheads of the Constitution, did discuss the Articles as a treaty. All wrote in a lexicon of metaphors, semantics and symbolism—influenced by eighteenth-century political philosophy—in descriptions of the Confederation, or of a truly federal system. Indeed, if we take Ackerman’s explanation that the Articles already constituted a truly national government, that would make the entire nationalist interpretation of the Constitution a superfluous nostrum.

Aaron Coleman saw that the “nationalist viewpoint,” which “assum[ed] the correctness” of previous scholars that the Constitution constituted a truly national government, dominated most academic circles.²⁵ Madison’s role in the nationalist narrative was essential for his ubiquitous

²² Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-constitutional history of the American Revolution, 1774-1781* (Madison: The University of Wisconsin Press, 1976), 126; Rakove, *Original Meanings*, 167. Rakove also acknowledged the limitations of the records.

²³ Jensen, *Articles of Confederation*, 124. Jensen realized that this document could be “analyzed in various ways”: “the historic origins of its phrases and clauses,” “the political theories upon which it [was] thought to be based” and “the purpose of its writers and with those features which permit of ‘interpretation,’ either by the popular mind or by legal and judicial processes.”

²⁴ Wood, *American Republic*, 568. Of John Adams, Wood wrote, “[n]o one read more and thought more about law and politics. [...] At the outset of the constitution-making period his pamphlet, *Thoughts on Government*, became the most influential work guiding the framers of the new republics” and the republic of the Articles—I might add. Wood’s brief biography of Adams can likewise describe Madison’s stature with the Constitution in his various writings and statement made from 1786 to 1787.

²⁵ Aaron Coleman, *The American Revolution, State Sovereignty, and the American Constitutional Settlement, 1765-1800* (New York: Lexington Books, 2016), 3. Ironically, Coleman himself agreed with the nationalist interpretation of the Constitution. However, what Coleman tried to stress was that scholars on the Constitution assume that previous scholars who might have been “[i]nfluenced by the expansion of federal power—the presidency and federal courts especially—during the Civil War, the New Deal, and the Great Society, [...] often read modern exercises of national power back into the past.”

presence throughout the Constitution's history made him both an unavoidable and authoritative voice, and therefore Wood quickly labeled him as a "thorough nationalist" by at least 1787—throwing him into the fold of Hamilton, a true nationalist.²⁶ On his bout in the *Federalist* project, Rakove provided nationalist analyses on Madison's essays to suggest that his nationalist tendencies were so evermore pervasive. Yet, Mary Bilder revealed that Madison's nationalist mind changed as soon as the Federal Convention, 1787, ended because he thought his nationalist thoughts would give Jefferson cause to terminate their friendship—though Wood claimed Jefferson was quite aware.²⁷ All in all, this was an unwieldy biography of Madison which simultaneously crumbled as fast as ratification of the Constitution approached, 1787-1790. Where Bilder openly rejected Madison's comments in the Virginia ratifying convention, Wood conveniently omitted his star witness from this portion of the history of *The Creation of the American Republic*.²⁸

I believe the reason Madison appeared inconsistent to these scholars was because they failed to seriously take into account the lexicon of the age, which I do in Chapter 3. The "distinction made by eighteenth-century political leaders between the terms 'federal' and 'national' as applied to central governments," Jensen wrote, though present-day scholars "use the terms interchangeably," "the Founding Fathers of 1776, and the quite different set of Founding Fathers

²⁶ Wood, *American Republic*, 473. These nationalist tendencies make appear almost interchangeable with Alexander Hamilton—a claim also made by Andrew Shankman in his book *Original Intent*.

²⁷ Mary Sarah Bilder, *Madison's Hand: Revising the Constitutional Convention* (Cambridge: Harvard University Press, 2015), 37, 78, 154, 217-218. "Madison's understanding of the [Federal] Convention altered" so radically in such a short period of time, [...] Soon thereafter, for [...] Hamilton's *Federalist* project, Madison constructed rationales and superimposed a single intent. At the Virginia ratification convention in the summer of 1788, he distanced himself from his apparent support for a consolidated government." Bilder's nationalist interpretation even encapsulated Washington, who stated to Madison, that he "wanted 'a nation' with 'national objects' to promote." Bilder used these expressions to solidify her argument that both Madison and Washington were nationalists—an allegation I challenge; Wood, *American Republic*, 505. Yet, Wood included Jefferson as an encourager and supporter of Madison's supposed nationalist plans. In sum, I argue that this nationalist narrative of the Constitution was deeply flawed.

²⁸ For Wood, there was perhaps no more central or reoccurring figure than Madison on the Constitution. Yet, because Madison unequivocally denounced, as Bilder confessed, accusations that the Constitution was a consolidated government as Anti-Federalist paranoia, Wood simply chose to glide over these statements.

of 1787,” understood the difference.²⁹ However, Jensen himself was as unaware as his future contemporaries for these words did not solely contain a literal denotation but a figurative connotation too, and the vocabulary involved in this was quite extensive. Therefore, when Madison, or one of his colleagues, used politically charged words and phrases like *consolidation* and/or *national government*, the first inclination should not be to take them so literally. Scholars have made this mistake, and consequently they have abandoned historical continuity—the reason why I chose to write the first two chapters of my thesis. While on a journey to create an American nation, Andrew Shankman purported that the Confederation already existed as a nation.³⁰

To Shankman, the call for “a stronger national government” did not mean anything other than the strengthening of an existing nation.³¹ While Chapter 3 tackles the Madison-nationalist-narrative without any exception of Madison’s most important moments, it should be recognized that his words, or the statements of any other historical commentator, really mattered insofar as they became true. Alongside Madison, I also include both Jay and Hamilton in this chapter because

²⁹ Merrill Jensen, “The Idea of a National Government during the American Revolution,” *Political Science Quarterly* vol. 58, no. 3 (1943): 357; Bilder, *Madison’s Hand*, 7. Bilder stated that “[o]ver the last two centuries, certain terms—“national,” “state,” “federal”—have become increasingly contested. Terms such as “national” and “state” were inherently entangled with the realities of political power.” Thus, Bilder’s constant literal interpretation of the words *nation* and *national* reflected her disregard for any figurative senses of the words.

³⁰ Andrew Shankman, *Original Intent: Hamilton, Jefferson, Madison, and the American Founding* (Oxford: Oxford University Press, 2018), 14. On the Confederation in the 1780s, Rakove remarked, “[t]he nation’s future was bleak.”; Bilder, *Madison’s Hand*, 7, 34, 78. Bilder wrote, “Madison wanted to save the nation [of the Confederacy] from the Virginians [in the Convention] and in 1786, “Madison prepared an outline of problems facing the nation” meanwhile he was simultaneously on a “quest to establish a national government.”

³¹ Shankman, *Original Intent*, 14. Shankman possibly viewed the American states united as the states of present-day Brazil, where states hold relative domestic sovereignty—meaning ever-changing to the whims of the national government. However, the most basic fact of a nation is the ability of its central government to be supreme over all subordinate governments. Thus, if the Confederacy already existed as a nation, then there was no point to bother with constitutional reforms; See Rakove, *Original Meanings*, 168. Rakove strangely claimed that somehow the Constitution created a national government that was not entirely national because the state governments had some powers, which the national authority did not possess. In his nationalist interpretation of the *Federalist*, he fabricated a government completely at odds with the Constitution. For all the talk of nation-building, the weird fact that it did not become a true nation seemed peculiar, and instead placed a “middle ground” between the national and state governments, which, unlike the present-day national governments, could not disrupt. In my opinion, his analysis did not fit the narrative and vice versa because he held a preconceived notion of an American nation—when what he clearly read was the innerworkings of a confederate government; See also Ackerman and Katval, “Our Unconventional Founding,” 549. Ackerman and Katval both described the *Federalist* as “revolutionary nationalism.”

Joseph Ellis's *The Quartet* brilliantly depicted these men as influential players in the constitution-making process. However, I disagree with the premise of Ellis's narrative that these three men shared a political endeavor to create a single American state, or a plan of literal consolidation.³² Instead, I concisely demonstrate that the only avid nationalists were Jay and Hamilton, both of whom eventually acquiesced to the establishment of another confederate government, which was more accurately labeled a federal republic—Madison's position. Yet, Rakove forewarned those who study the Constitution that "there can be no single story of any event" associated with it because there existed too many "expectations," "intentions" and "understandings" that writing an "unbiased" history of what happened and why it happened becomes impossible.³³

Ironically, these problems did not discourage Rakove to conclude that the Constitution established a "Leviathan"—an all-powerful, truly national government.³⁴ The question I asked in conducting my research, and which I investigated of the other unions in the previous chapters, was *how* the Constitution established a single American state—to play devil's advocate. My question did not seek to discover the "meaning" of any specific power contained in any article of the

³² Joseph J. Ellis, *The Quartet: Orchestrating the Second American Revolution, 1783-1789* (New York: Vintage Books, 2015), xv. Madison, Washington, Hamilton and Jay, the quartet, were the main "stars" of Ellis's narrative. I relegate Washington's role in my thesis to the "supporting cast" because, though important in other areas of American history, his relevance on this topic was immaterial since he refused to get involved on political matters—though he did personally favor a stronger confederate government. Aside from Madison, Jay was not a delegate of the Convention and Hamilton, though an attendee, was not a key player in it for his influence was either passive or almost nil. The two New Yorkers eventually served as delegates to New York's state ratifying convention in 1788, but the input in the Convention was either passive or almost nil respectively. Yet, according to Ellis, they orchestrated the Convention and were influential in the adoption of the Constitution. While I agree with Ellis on the importance of these individuals, they are relevant to the Constitution for the *Federalist Papers* they wrote along with Madison under the pseudonym Publius; Martin Diamond, "Democracy and *The Federalist*," in Gordon S. Wood, ed., *The Confederation and the Constitution: The Critical Issues* (Washington D.C.: University Press of America, Inc., 1979), 138. I challenge Diamond's beliefs that "Jay's small contribution [in the *Federalist*] may be disregarded," and that the "individual opinions" of the three men "radically diverged" in every aspect of the Constitution.

³³ Rakove, *Original Meanings*, 6.

³⁴ *Ibid*, 162. Rakove wrote that the "Anti-Federalists [accurately] knew that the Constitution would form the states into a new Leviathan."

Constitution, but it tested theories of singular American statehood.³⁵ Regardless of what any framer of the document said, the Constitution, if it sought to consolidate the states into a single state, must have confronted the issue of sovereignty—primarily its absolute characteristic. A serious consideration of Amar’s arguments for national unification allowed me to uncover that propositions of consolidation made by historians, lawyers and political scientists alike hinged on *inferences* of the Constitution’s text. One of Amar’s arguments likened the Constitution’s alleged national unification to the national unification between England and Scotland vis-à-vis the Treaty of Union, 1707, but a comparison of the two texts will reveal that no legal parallels existed.

As a matter of fact, I noticed a disparity; the Constitution lacked an *expressed* relinquishment of sovereignty which this treaty did not. When the thirteen American colonies individually achieved independence via the Treaty of Paris, 1783, Britain explicitly relinquished its sovereign claims over them and recognized them as sovereign. Today virtually no international compact refers to existing member-states as “sovereign” because international sovereignty is inherently inviolable by outside inference, and ironically it is inherently implied as continuing unaltered in foreign relations. Therefore, I argue in Chapter 3 that in the eighteenth-century, the scene on the international stage was no different for there was ample historical as well as logical precedent that sovereignty could only be relinquished with the expressed intent of the sovereign. Thus, the sovereignty of the American states could not have been easily removed as Jonathan Gienapp suggested, with a subjective reading of the Constitution’s text for the mere expansion of power of the central government was nowhere close to the satisfactory requirement of a merger of

³⁵ *Ibid.*, 7-8. With Rakove’s constraints in mind, my question was a narrow inquiry, and thus easier to assess, investigate and validate. If I undertook an investigation of “original meaning,” it was on the Constitution’s text, phrases and sections, which were deemed by Rakove and other scholars as definitive proof of consolidation.

sovereignties.³⁶ Logically, if the opposite was true, then any state could lose its sovereignty to a foreign state with the latter suggesting that the other state was tricked either by some “fine print” or unwitting forfeiture in an international agreement—arguing that there could exist a higher authority than a sovereign state.³⁷

Although external sovereignty was an important preoccupation of the Revolution, the Declaration also made an ideological promise of internal sovereignty, or supreme power, as much as it did of external sovereignty. In that document, Jefferson desired that the people of America, the people of each individual colony, be the supreme final authorities of these soon-to-be recognized states. In sum, the Declaration’s explanation that the masses could overrule any government for any reason attested to the notion of popular sovereignty, which the political science of the eighteenth-century christened democracy. While the Constitution established a government similar to its predecessors, what made this union different was that the process of constitution-making ushered in American democracy. In Chapter 4, I detail what the eighteenth-century definition of democracy entailed and also how it applied to the Constitution’s federal republic. At the same time, I provide more troubling obstacles for the nationalist-minded scholars who believed that the Constitution installed a truly national government.

A repercussion of the supposed consolidation of the American states into a single American state was the simultaneous creation of one national population, Americans—Amar coined this theory “the unitary People thesis.”³⁸ In order to accomplish this, ratification of the Constitution must have been conducted as a nation-wide popular vote. In contrast, popular sovereignty resided

³⁶ Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Cambridge: Belknap Press, 2018), 72-73.

³⁷ *Ibid.*, 88-89. Indeed, Gienapp proposed that the Constitution’s Preamble “smuggled in” the creation of a truly national government.

³⁸ Akhil Reed Amar, “Of Sovereignty and Federalism,” *Faculty Scholarship Series*. Paper 1021 (1987): 1450-1451.

with the respective people of each state, who since 1776 waited for this promise to be realized and who since 1781 lived under thirteen totalitarian democracies. Moreover, the choice between acceptance (or ratification) and rejection (or no ratification) of the Constitution marked the moment when the people became sovereign for they held the power, by direct vote, to unilaterally nullify the Articles and secede from its union—in other words, overrule federal as well as state government. The gradual deterioration of power of the state legislatures in the proceedings of the Convention did not affect the external sovereignty of the states because henceforth the term *state* took on a new definition. Scholars of this event must grapple with the fulfillment of the Declaration's ideological promise which assured that sovereignty was no longer bureaucratic—residing with the state legislatures—but popular, and therefore the question of merging international sovereignty resided with the states, the people thereof.³⁹

In his book *Our Undemocratic Constitution*, Sanford Levinson told readers that the Constitution was a deeply flawed document because it did not contain any democratic safeguards. Instead, the document protected the ability of the federal government to overrule the wishes of the American people—Americans only could vote for public officials and hope for the best in the event of necessary societal change.⁴⁰ Levinson's grim picture was not too far-off from the reality of a nationalist reading of the Constitution because to view it as the governing document of a nation, rather than a confederation, invited these accusations. Indeed, this explanation likewise brought to the surface the issue of popular sovereignty, which scholars, already named, postulated was mostly nominal. Richard Tuck in *The Sleeping Sovereign* presented a defense of eighteenth-century democracy with the assistance of two well-known and highly influential political writers, Jean

³⁹ Whether the state legislatures were or were not *really* sovereign remains debatable, but they were clearly the final authorities until the Constitution's ratification process.

⁴⁰ Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (Oxford: Oxford University Press, 2006), 168-174.

Bodin and Thomas Hobbes, who in the process of defending absolute monarchy in their respective times professed that democracy, the kind of which I have alluded to here, was not fictitious at all—it was a true form of government.⁴¹ Thusly, in Chapter 4, I also dispel the fiction that eighteenth-century democracy was an imaginative utopia, and that Wood who described, albeit of a whole American people, what I entitled the principal-sovereign-delegated-agent relationship of the Constitution did not understand the legal implications of this construction—that Wood agreed solely to selective aspects of popular sovereignty.⁴²

⁴¹ Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge: Cambridge University Press, 2015), 69. Jean Bodin's idea that "a sovereign might lurk under the superficial apparatus of the day-to-day government and be distinguishable from it; as far as he was concerned the actual administration was the sovereign."

⁴² Wood, *American Republic*, 362, 599. "The trite theory of popular sovereignty gained a verity in American hands that European radicals with all their talk of all power in the people had scarcely considered imaginable except at those rare times of revolution." "All parts of the government were equally responsible but limited spokesmen for the hands of the representatives for the people, who remained as the absolute and perpetual sovereign, distributing bits and pieces of power to their various agents." Wood said that in his view a democracy was where the people, as sovereign, could theoretically delegate authority but never exercise it.

Chapter 1 – “[O]ur strength is continental, not provincial.”⁴³: The Declaration of Thirteen Independent States of North America

Among the sundry Founding documents, the Declaration of Independence, 1776, was the earliest held by a few historians as the focal point for the birth of a single American state. However, I believe these theories were clouded by modern familiarity with the idea of the United States of America (U.S.A.) as a single sovereign state. Thus, these interpretations proceeded, as a confirmation bias does, with an interpretation already in mind that clouded the Declaration’s text, which declared, that these colonies were separate, sovereign and independent states. Historians have prematurely assigned sovereignty to the U.S.A., mostly as a single sovereign state, without the thought that the Declaration was a mere assertion that required legal authorization. Still, another component of the Declaration, seldom appreciated, was the extremely loose union it formed, which retained an attribute from the Articles of Association, 1774, that became so popularized by Thomas Paine’s *Common Sense*—continentalism. Although the word *continental* temporally appeared less and less in the language of the constitution-making processes of American history, the essence of that term, as Paine understood it and as others henceforth defined it, continued to be the impetus of future American union-making.

Before the Declaration announced the colonies as “Free and Independent States,” *Common Sense* in January 1776 publicly argued for the existence of the “FREE AND INDEPENDENT STATES OF AMERICA.”⁴⁴ The British colonists understood exactly what the anonymous author of this pamphlet, Paine, meant. He desired that each British colony on the North American continent be recognized as a state, and in the eighteenth-century, a state exclusively denoted a

⁴³ Paine, “Common Sense,” 34.

⁴⁴ The Declaration of Independence, Conclusion, in Kevin R. C. Gutzman, *The Politically Incorrect Guide to the Constitution* (Washington D.C.: Regnery, 2007), 230; Paine, “Common Sense,” 54. (emphasis in the original)

sovereign, independent nation-state.⁴⁵ Paine presented several arguments for a multiplicity of American sovereignty, “[b]ut the most powerful of all arguments, [was], that nothing but independence, i.e., a continental form of government, [could] keep the peace of the continent and preserve it inviolate from civil wars.”⁴⁶ Here, Paine foretold the entire American struggle of the next fifteen years to create a union of sovereign states—a continental form of government, which was forever understood to be akin to confederation. If “[t]he whole history of England [...] since the [Norman] conquest,” was an indication, Paine alluded, it was that the increased consolidation of the British Isles into a single British state did not decrease the occurrence of internal turmoil for “in which time there have been (including the [Glorious] Revolution) no less than eight civil wars and nineteen rebellions.”⁴⁷

The relatively continuous warfare from the fourteenth to the eighteenth-centuries in the aforementioned time period, which historians through periodization have routinely labeled with the expression “Years’ War” in order to note the lengthy duration of the conflicts, involved several

Hundred Years’ War†	1337-1453	The Glorious Revolution*	1688
The French Wars of Religion*	1562-1598	Nine Years’ War†	1688–1697
Eighty Years’ War†	1568-1648	The War of Spanish Succession†	1702-1713
Thirty Years’ War†	1618-1648	Seven Years’ War†	1756-1763
The English Civil War*	1642-1651		
† denotes a continental (or international) conflict			
* denotes a largely internal conflict, e.g. rebellion, civil war			

Figure 1: England at and in war from the fourteenth to the eighteenth-centuries

⁴⁵ Gutzman, *Guide to the Constitution*, 10-11. “[T]he word *state* had a meaning in the eighteenth century that may be lost on us today. For a Virginia congressman to say Virginia was a state was to put it on par with [...] France and England.”

⁴⁶ Paine, “Common Sense,” 31; See Foner, *Tom Paine*, 75. In contrast with Foner, Paine explicitly tied independence with the hope of establishing a continental republic.

⁴⁷ *Ibid.*, 18-19; See also David Armitage, *Civil Wars: A History in Ideas* (New Haven: Yale University Press, 2017), 144. Armitage wrote that “[i]t is not clear how many civil wars Paine would have discerned during the War of the Roses, or even amid the mid-seventeenth-century troubles, nor does he suggest how to distinguish “rebellions” from “civil war.” “For Paine,” Armitage reasoned, “the Glorious Revolution was simply one more example of how a contested succession could lead to national instability, setting citizens against citizens in their quest to affirm monarchical subjecthood.”

belligerents of the European continent—most notably England as shown in **Fig. 1**.⁴⁸ The lack of a continental body like the European Union (EU) or the United Nations (UN) only added to the tensions between European states which often found no better alternative than war to adjudicate disputes since the real arrival of international conferences developed in the nineteenth-century with the Congress of Vienna between 1814 and 1815 and the First Geneva Convention in 1864.⁴⁹ However, the Peace of Westphalia was the first instance of such a conference, which labeled itself a congress—a term that henceforth indicated a conclave of ambassadors.⁵⁰ The Peace of Westphalia was a strong attempt at a congress because it brought several states together to end the Thirty Years' War in 1648 and kept continental peace for a substantial period of time until the Nine Years' War erupted in 1688. Yet, because the Congress of Westphalia was not a diplomatic body that would regularly meet to maintain the peace, the peace did not last.⁵¹ In 1623, Émeric Crucé, a French political writer, prophetically advocated for such a kind of international body believing that peace would transcend national, cultural and religious lines among the states of several continents.⁵²

In the periods of superficial peace, when England was not rocked by continental-scale conflict as shown in **Fig. 1**, internal turmoil within the state replaced it. In 1642, England

⁴⁸ In **Fig. 1**, I attempt to explain Paine's argument in *Common Sense* that warfare was emblematic in the slice of English history which Paine referenced.

⁴⁹ I suggest "continental" because the European continent was actually international. In this time period, the European continent housed the greatest powers of the world. It was not until the early 20th century with the Russo-Japanese War, in which a non-European state defeated a strong European state, that the powerful states of the world truthfully spread out internationally.

⁵⁰ Gutzman, *Guide to the Constitution*, 10. "In fact, the word *congress* had always denoted assemblies of representatives of sovereigns—as in the case of the Congress of Westphalia in the seventeenth century."

⁵¹ Richard Dunn, *The Age of Religious Wars, 1559-1715* (New York: W.W. Norton & Company, 1979), 91. Dunn's interpretation of the Westphalian peace was that "the settlement of 1648 did prove to be unusually stable."

⁵² Alexander Gillespie, *The Causes of War: Volume III: 1400 CE to 1650 CE* (Oxford: Hart Publishing, 2017), 158. According to Gillespie, Crucé "recommended inviting the territories of the Pope, the Ottomans, the Habsburgs, as well as the Kings of Spain, Moscow, Poland, England and Denmark, as well as the republics of Venice and Switzerland. Persia, China, Japan, Ethiopia and the lands of the New World should also be included." Gillespie credited Crucé as the forefather of international bodies like the League of Nations and the United Nations.

underwent a civil war because of the political differences between Parliament and the king—the result of which would be subsequently reversed by the religiously motivated Glorious Revolution of 1688. Paine theorized that North America could advert Europe’s bloody past, and especially Great Britain’s “corruption,” by forming a “continental union” of states that would regularly convene in a “Continental Congress,” whereby the American states would peacefully tackle their differences.⁵³ While Crucé’s vision failed to be realized until the twentieth-century with the League of Nations, UN and EU—though to some extent the Holy Roman Empire embodied the spirit of a multilateral association, Paine resurrected an interest in Crucé’s plan.

The First Continental Congress, which met in the fall of 1774, gave Paine hope as to the prospects of his plan because “the colonies [had] manifested such a spirit of good order and obedience to continental government” with this body.⁵⁴ Certainly, this Congress was continental in the sense that its formation geographically included thirteen colonies of North America, but it was not truly continental for the colonies were still provinces of Britain.⁵⁵ Congress did not constitute the legislature of a single American state—much less a revolutionary body—as some theories, mainly those promulgated by American Presidents, have asserted.⁵⁶ Congress emanated

⁵³ Paine, “Common Sense,” 21, 32, 48.

⁵⁴ *Ibid.*, 32.

⁵⁵ At the First Continental Congress, Georgia did not have any delegates present, but South Carolina claimed to speak on behalf of that colony.

⁵⁶ Andrew Jackson became the first President under the “Nullification Proclamation” to assert that the United States of America existed as a sovereign nation before the Declaration of Independence: “In our colonial state, although dependent on another power, we very early considered ourselves as connected by common interest with each other. Leagues were formed for common defense, and before the Declaration [...], we were known in our aggregate character as the United Colonies of America. That decisive and important step was taken jointly. We declared ourselves a nation by a joint, not by several acts; and when the terms of our confederation were reduced to form, it was in that of a solemn league of several States, by which they agreed that they would, collectively, form one nation, for the purpose of conducting some certain domestic concerns, and all foreign relations.” See Doris Kearns Goodwin. *Team of Rivals: The Political Genius of Abraham Lincoln* (New York: Simon & Schuster, 2005), 324. Goodwin believes that Jackson’s “Nullification Proclamation” was one of four documents that Abraham Lincoln utilized in drafting his First Inaugural Address. Specifically, Lincoln astonishingly espoused that the “Union is much older than the Constitution” by citing that “[i]t was formed, in fact, by the Articles of Association.” In Lincoln’s mind, a single American state had always existed since 1774 and was simply “matured and continued” by the succeeding Founding documents.

from the authorization of the Articles of Association on 20 October 1774, which the parties who gathered in Philadelphia to contract this compact referred to themselves as “colonies” and “his majesty’s most loyal subjects.”⁵⁷ The gist of Congress was to organize a boycott of British goods in order to force the “British ministry” into modifying, what these delegates felt was, “a ruinous system of colony administration” that stemmed from the Coercive Acts of 1774.⁵⁸ The acts mainly targeted Massachusetts for the role a group of Bostonians played in an under-cover repudiation of Parliament’s move to bestow monopoly privileges on tea to the East India Company.⁵⁹

The closure of Boston’s port, the unilateral overthrow of Massachusetts’s colonial government and a military occupation to enforce it all brought the colony the sympathy of its neighbors.⁶⁰ The Association’s display of a united-front foreshadowed the American conception of union as fundamentally voluntary because the British maladministration was chiefly Massachusetts’s burden, and the other colonies voluntarily arose to assist it. After all, the enforcement of “nonimportation,” “nonconsumption” and “nonexportation” was voluntary—each colony was expected to do its best to put pressure on Britain.⁶¹ While the Association did not constitute a legally international union, John Adams of Massachusetts affirmed, the event

⁵⁷ The Association called itself a “continental congress,” but the name did not literally denote an international body of ambassadors from sovereign states. Only the word *congress* really applied to this group in the general sense of a meeting, convention or conclave as previously mentioned.

⁵⁸ W. C. Ford, et al., eds., *Journals of the Continental Congress*, 24 vols. (Washington, D.C.: Library of Congress, 1904-1937), 1:75-76. Henceforth, abbreviated as *JCC*. The colonies preferred to refer to Parliament’s Intolerable Acts as the Coercive Acts.

⁵⁹ Wood, *American Revolution*, 37. In 1773, Parliament tried to salvage the declining East India Company with the Tea Act, which enabled “the company to grant monopolies for selling tea to favored colonial merchants—a provision that angered those American traders who were excluded.” On 16 December 1774, “a group of patriots disguised as Indians dumped about £10,000 worth of tea into Boston Harbor.”

⁶⁰ Breen, *Will of the People*, 20, 34-35. It was not the Boston Tea Party itself that made other colonies act, but the unprecedented actions the British government took to punish Massachusetts was what alarmed them. The Coercive Acts included the Port Act, which “closed off Boston to all commerce,” and the Massachusetts Government Act, which “annulled key sections of the Massachusetts Bay Charter that had served for almost a century as the colony’s *de facto* constitution”—replacing the colony’s governor with a general appointed by the king, who also appointed the members of the governor’s council.

⁶¹ *JCC* 1:75-76. A strictly *faithful* adherence to the Association was all that was required.

altogether commenced the vision of an “American Union.”⁶² This vision was plainly penned by Thomas Jefferson of Virginia in the Declaration. When the Second Continental Congress convened in May 1775, this vision was asserted by Jefferson in that body which ratified his Declaration. Yet, this Congress initially began with intentions similar to its predecessor—those of reconciliation with Britain.

The outbreak of military conflict between British infantry and Massachusetts militiamen at Lexington and Concord in April 1775 brought the colonies together again at Philadelphia, but as already mentioned, this Congress was not *yet* truly continental. From late-1774 to early-1776, the papers of Congress, as a whole of two iterations, demonstrated that the delegates routinely reaffirmed their colonial status. At the outset, independence was the minority opinion among the members of Congress, which operated until the Declaration’s ratification on reconciliatory terms.⁶³ Nevertheless, the events at Lexington and Concord provoked King George III to such an extent that he prematurely overestimated the strength of the independence-minded delegates whom he described as “dangerous and ill-designing men” more than four months later in an official proclamation on 23 August 1775—refusing to blame Congress as a whole.⁶⁴ Within two months, on 26 October 1775, the King directed his impetuous harsh nature towards all the colonists in a speech to Parliament. “The rebellious war now levied,” the King charged, “[had] become more general and [was] manifestly carried on for the purpose of establishing an independent empire.”

He believed that Congress was now the main culprit of this conspiracy: “They meant only to amuse by vague expressions of attachment to the parent state and the strongest protestations of

⁶² John Adams, quoted in Shain, ed., *Historical Context*, 181.

⁶³ Jensen, *Articles of Confederation*, 13-14. Those who favored reconciliation were a formidable influence in the first Congress and “were still powerful at the beginning of the second [...] Congress, but gradually their hold was weakened by the growing revolutionary movement in the various states.”

⁶⁴ George III, “Proclamation for Suppressing Rebellion and Sedition, August 23, 1775,” quoted in Shain, ed., *Historical Context*, 359.

loyalty to me, whilst they prepar[ed] for a general revolt.”⁶⁵ Congress found the King’s insinuations that it was a revolutionary body bewildering, and out of all the delegates, John Jay of New York was quite possibly the most dumbfounded since he served in the previous session of the conclave. With several citations of various documents of its early business in the second session, Jay wrote a response in which he attempted to exonerate Congress of treason. He characterized the King’s allegations as “ungenerous & groundless” because Congress never “meant not to dissolve that Union which ha[d] so long & so happily subsisted” nor “exite[d] any other nation to War against” Britain. If Congress suggested armed resistance, as it did to New York on 25 May 1775, it was only for defensive purposes.⁶⁶ The “designs and actions” of the delegates, Jay continued, were purely conciliatory: “[W]e not only most ardently desire the former Harmony between [Britain] and these Colonies may be restored, but that a Concord may be established between them upon so firm a Basis as to perpetuate its Blessings uninterrupted by any future Dissentions to succeeding Generations in both Countries.”⁶⁷

When Congress entered 1776, it met under strenuous circumstances as the King, back in October 1775, threatened the colonies with an increase in military presence—some of which included foreign mercenaries—for what he saw was a revolution being fostered by all facets of colonial society.⁶⁸ In late-January 1776, Congress instructed a committee of five delegates to

⁶⁵ George III, “Speech to Parliament, October 26, 1775,” quoted in Shain, ed., *Historical Context*, 384.

⁶⁶ *JCC*, 2:111. The occupation of Boston on 30 June 1775, and the overall military “hostilities” in Massachusetts resulted in “the lives of a number of the inhabitants of that colony destroyed” and “treated with a severity and cruelty not to be justified even towards declared enemies.”; *Ibid.*, 2:59. The aforementioned events gave Congress reasons to be concerned about New York: “*Resolved unanimously*, That the militia of New-York be armed and trained, and in constant readiness to act at a moment’s warning; and that a number of me be immediately embodied and kept in that city, and so disposed of as to give protection to the inhabitants, in case any insult should be offered by the troops, that may land there, and prevent any attempts that may be made to gain possession of the city, and interrupt its intercourse with the country”— May 25, 1775.

⁶⁷ John Jay, “‘Essay on Congress and Independence,’ January 1776” in *Letters of Delegates to Congress, 1774-1789*, Paul H. Smith et al., eds., 29 vols. (Washington, D.C.: Library of Congress, 1976-2000), 3:175-176. Henceforth, abbreviated as *LDC*.

⁶⁸ George III, “Speech to Parliament, October 26, 1775,” quoted in Shain, ed., *Historical Context*, 385.

supply “the inhabitants of the colonies” with a rebuttal to the King’s October speech, but the address went nowhere, and thus displayed the weakness of the reconciliatory-minded delegates to further steer Congress in the direction of reconciliation with Britain.⁶⁹ At the same time, *Common Sense* was in the hands of the colonists, and this became the proverbial last-nail-in-the-coffin for plans of reconciliation.⁷⁰ Adams, an euthanistic supporter of independence in Congress, recalled that he enjoined Paine’s “Arguments in favour of Independence [...] very well,” but he viewed Paine’s plan of “a form of Government for the separate States in One Assembly, and for the United States, in a Congress” to be “foolish.”⁷¹

Talk of a continental structure of government was all well and good, but it was secondary to the individual colonies: “[T]he People of the United States [...] were all waiting only for the Countenance of Congress to institute their State Governments.”⁷² The aim of the Revolution was the individual sovereignty of the American colonies, and in the spring of 1776, Jefferson too expressed that “the whole object of the present controversy” was the colonies.⁷³ In order to realize the total severance of political connection between the colonies and the mother country, and gradually inch Congress towards the fight for independence, the independence-minded delegates,

⁶⁹ Jensen, *Articles of Confederation*, 87-88. “The failure to adopt the address marked the end of the [...] control [by the reconciliatory-minded delegates] of Congress. From that day on, step by step, the [independence-minded delegates] adopted measure calculated to establish the independence of the colonies. Nevertheless the [reconciliatory-minded delegates] remained a powerful restraining influence, not in preventing independence but in delaying its final declaration.”

⁷⁰ Harlow Giles Unger, *Thomas Paine and the Clarion Call for American Independence* (New York: Da Capo Press, 2019), 35. Reconciliation with Great Britain fell on deaf ears probably because Paine’s words of American independence were too powerful to be ignored. Arguably, Paine’s pamphlet *Common Sense* was one of the most influential texts in the movement for American independence; Jensen, *Articles of Confederation*, 89. After the publication, Jensen also noted that “[n]o longer could there be any middle ground where one might urge reconciliation and at the same time sanction force.” “It aroused popular opinion, for it crystallized, in language easily understood and appreciated, the emotions and beliefs of the ordinarily inarticulate masses.”

⁷¹ John Adams, “[In Congress, Spring 1776, and Thomas Paine],” *The Adams Papers Digital Edition: Diary and Autobiography of John Adams*, Sara Martin, ed., 4 vols. (Charlottesville: University of Virginia Press, 2008), 3:330-331. Henceforth, abbreviated as *DA*.

⁷² *Ibid.*, 3:331; Gordon S. Wood, *The American Revolution: A History* (New York: Modern Library, 2003), 66. “The states, not the central government or Congress, were to test the Revolutionary hopes.”

⁷³ Thomas Jefferson, quoted in Wood, *American Revolution*, 66.

in May 1776, devised a scheme to circumvent the reconciliatory-minded delegates in their attempts of resistance. Congress “recommended to the respective assemblies and conventions of the United Colonies,” depicted in **Fig. 2**, to adopt new governments “where no government sufficient to the exigencies of their affairs have been hitherto established.”⁷⁴ Theoretically, the instillation of new



Figure 2: The thirteen British (American) colonies

governments in the colonies eliminated the last political remnants of colonial attachment to Britain, but this move did not mean that Congress was effectively engaged in a revolution—the terms of which were still not declared.⁷⁵ To supplement the recommendation for new governments, Congress “appointed” Adams, Edward Rutledge of South Carolina and Richard Henry Lee of Virginia “to prepare a preamble” to accompany it.⁷⁶

This preamble marked a step towards all-out revolution that Congress could not retreat. Adams accused the King as the sole individual responsible for

the severance of ties. Then in early June 1776, Lee followed suit with three resolutions that finally coalesced the hard work of the independence-minded delegates into a revolution.⁷⁷ Alongside the

⁷⁴ JCC 4:342.

⁷⁵ Shain, *Historical Context*, 439. “Indeed, this was the goal of the resolution’s supporters in Congress: to do whatever they could to bring down the legally constituted mid-Atlantic colonial governments and to lead to their replacement by ones friendlier to independence.”

⁷⁶ JCC 4:342.

⁷⁷ Kevin R. C. Gutzman, *Virginia’s American Revolution: From Dominion to Republic, 1776-1840* (Lanham: Lexington Books, 2007), 1, 23-24. Richard Henry Lee’s colony of Virginia moved faster than any other colony by declaring its independence on 15 May 1776. On 17 May 1776, Virginia instructed its delegates in Congress, of which Lee was one, to convince the other colonies to do the same, institute “federal relations” via a confederacy and prepare a plan to contract “foreign alliances.”

two resolutions to draw up a declaration of independence and a plan to contract alliances and treaties with foreign states, a resolution to form “a plan of confederation” was the last order of business to be addressed by Congress.⁷⁸ Predictably, the committee charged with the responsibility of the last resolution was the only group of which Adams was not a member as his focus rested with the colonies. When the colonies finally ratified new constitutions, they reflected the multilateral goal of independence. In the state constitutions of Virginia and Pennsylvania, the choice to name themselves commonwealths reflected a stronger case that these American colonies desired to be separate, independent states for when England referred to itself as a “Commonwealth and Free-State” in 1649, the colonists understood that the designation of commonwealth meant a popularly governed state.⁷⁹

At Adams’s insistence, Massachusetts’s constitution in 1780 also adopted the word *commonwealth*.⁸⁰ The constitutions of New Jersey, Delaware, Maryland, Georgia, New York and South Carolina adopted the uppercase “State”—New Hampshire decided on “state,” but New Jersey, perhaps in an effort not to seem too presumptuous replaced *state* for *colony*.⁸¹ When New Jersey amended its constitution, it might have doubted the possibility of colonial victory for in 1777 the British were an insurmountable force that was not slowed down until the end of the year at Saratoga, NY—after the colony amended its constitution. Both Rhode Island and Connecticut

⁷⁸ *JCC* 5:425.

⁷⁹ Virginia adopted its constitution on 29 June 1776 meanwhile Pennsylvania adopted its constitution on 28 September 1776. Parliament passed an “Act Declaring and Constituting the People of England to be a Commonwealth and Free-State” on 19 May 1649. Indeed, in the Declaration of Rights attached to its constitution (adopted on 18 December 1776), North Carolina referenced itself as a “free State.” In fact, Virginia and Pennsylvania also included declarations of rights which placed the people of their respective states as the pinnacle of all authority, which was exactly the definition of a free state, or commonwealth; Rakove, *Original Meanings*, 166. Rakove agreed with J. G. A. Pocock that these colonies “could as easily have been called ‘commonwealths.’”

⁸⁰ John R. Vile, *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding*, 2 vols (Santa Barbara: ABC-CLIO Inc., 2005), 1:467.

⁸¹ Dates of adoption: New Jersey (3 July 1776; amended 20 September 1777), Delaware (21 September 1776), Maryland (11 November 1776), Georgia (5 February 1777), New York (20 April 1777), South Carolina (19 March 1778) and New Hampshire (2 June 1784).

refused to adopt new constitutions and remained with their corporate colonial charters until 1790 and 1818 respectively. In all these constitutions, the claim of separate independence with the individual use of *state* affirmed that the thirteen colonies aspired to be thirteen sovereign states. But what did these affirmations of statehood mean when American sovereignty was unrecognized?

While the words “the thirteen united States of America” might appear as the name of a single American state because of our present-day circumstances, the Declaration’s union was not officially named.⁸² “[T]he thirteen united States of America” was in no way meant to be viewed as a name, much less than the name of a single American state, because it was simply a phrase which explained what happened on 2 July 1776 Congress. That is, thirteen colonies on this given date came together to proclaim themselves as thirteen states of North America. The word *united* in lowercase was an adjective which explained that thirteen colonies, assembled in a Congress, declared themselves in unison as states.⁸³ Furthermore, the capitalization of “State” equally emphasized the fact that the Declaration spoke of these “United Colonies” as individually “Free and Independent States” as in the same international standing as the uppercase “State of Great Britain” in that “they [had] full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.”⁸⁴ James Wilson, a signatory of the Declaration, read this document differently and argued as a delegate of the Federal Convention in 1787 that his home-state of Pennsylvania along with the

⁸² Declaration, Introduction, in Gutzman, *Guide to the Constitution*, 229. “The unanimous Declaration of the thirteen united States of America.”

⁸³ Amar, *America’s Constitution*, 22-23. Taken from Amar’s analysis: That *united* in lowercase described the states as “acting in unanimous coordination.”; Rakove, *Original Meanings*, 166. Rakove agreed that this “simplest usage of *state*” which indicated a member of the international community was stressed in the Declaration, but he seemed unable to correlate this to the equal standing the American states shared with the “State of Great Britain”—solely speaking as sovereign states.

⁸⁴ Declaration, Conclusion, in Gutzman, *Guide to the Constitution*, 230. The punctuation of the Declaration with its uppercase of “United States” and the “State of Great Britain” even stressed the separate international equality each colony desired to have. Thus, the transformation was from “United Colonies” to “United States.”

twelve other states declared themselves “the *United Colonies*...to be free & independent States; and inferring that they were independent, not *individually* but *Unitedly*” under the Declaration.⁸⁵

The document did not announce the sudden appearance of a single American state for this required a relinquishment and recognition of sovereignty by the British for although the colonies now claimed to be states, they legally remained colonies until those actions. Nevertheless, the Declaration did sanction a union between these colonies—a union, characteristically voluntary as the Association’s union. As the colonies of the Association proclaimed, “[W]e [...] *solemnly* bind ourselves and our constituents, under the ties aforesaid, to adhere to this association, until” Parliament repealed the Coercive Acts, the colonies of the Declaration declared, “[W]e mutually *pledge* to each other our Lives, our Fortunes, and our sacred Honor” in a military conflict to ensure international sovereignty.⁸⁶ What these two statements shared, or more precisely what the Declaration retained from the Association, was the voluntary nature of a union, where unification depended on an assurance that each party would fulfil its obligations. In essence, a literally structured federal government was just like a matrimonial vow—a unified but breakable bond, something that any partner could terminate at any given moment. Samuel Johnson’s quintessential dictionary defined *vow* as a “solemn promise,” and the Oxford English Dictionary likewise equated the word *pledge* to a “solemn commitment” and a “promise,” which accurately portrayed the Declaration’s union as an international treaty between several colonies.⁸⁷

⁸⁵ Madison, *Notes*, 153. (emphasis in the original)

⁸⁶ *JCC* 1:79. (emphasis added); Declaration, Conclusion, in Gutzman, *Guide to the Constitution*, 230. (emphasis added)

⁸⁷ Gienapp, *Second Creation*, 25, 43. Initially published in 1755, Samuel Johnson’s *A Dictionary of the English Language* was “one of the first rigorous attempts to systematize use of the English language.” Hence, it was “definitive” and “widely referenced.”; Samuel Johnson, *Samuel Johnson’s Dictionary of the English Language*, Alexander Chalmers, ed., (London: Studio Editions Ltd, 1994), 806; The Oxford English Dictionary, “pledge” 2. a. “A solemn commitment to do or refrain from doing something; a promise, a vow.” As early as the fourteenth-century, the word was used in this context.; See also Amar, *America’s Constitution*, 28. “Based on the Latin *foedus* (meaning treaty or covenant) and its cognate *fides* (faith), a traditional ‘confederated’ union ultimately depended on the good

However, why was there an incessant need by the colonies to assert themselves as states?⁸⁸ When the colonies contracted treaties as near fledgling states, they existed in a political state where their sovereignty was vulnerable for it was unrecognized—something remedied by the Treaty of Paris, 1783.⁸⁹ Thus, they continued to affirm this claim in every international agreement contracted henceforth until recognition. On 6 February 1778, the colonies signed a “Treaty of Amity and Commerce” with France, which recognized them as “the thirteenth United States of North America,” “the United States of America” and “the thirteen United States.”⁹⁰ Additionally, an “Act Separate and Secret,” which included a few provisions designed to persuade France’s ally Spain to join the Revolution, concluded with “the united states of America.”⁹¹ The diversity of names indicated that the American union lacked a proper official title, which also meant that if the United States was a single state, then it was odd that this state lacked a concrete name.

The Continental Army had no official name—though this designation was used in Congress. If the Declaration created a single American state, then certainly the revolutionary army’s name included an official designation. Instead, in other correspondence of Congress, “the army of the United Colonies” was employed or when directly writing to George Washington of Virginia, and to avoid this name game, John Hancock of Massachusetts vaguely referred to the

faith and voluntary compliance of member states.” Thus, a truly federal government was one that was at its core voluntary. I must add that the “pledge” of the Declaration was solely personal among the representatives themselves.

⁸⁸ Rakove, *Original Meanings*, 166-167. Rakove believed these colonies existed under a “new condition” with the Declaration and became states, but Rakove was unsure how to really define a state, either in Jefferson’s terms or in the realm of eighteenth-century diplomacy—implying a difference. In my view, the colonies remained colonies until recognition, and the Declaration was simply a claim that was expressly retained in order to safeguard the future sovereignty of the colonies.

⁸⁹ Billias, *American Constitutionalism*, 16-17 Billias explained through the text of the Declaration that these colonies were, or *possibly* claimed, to be states, but inspired by Armitage’s analysis, he confusingly contradicted that proposition only a few paragraphs later: “Independence amounted to a new status of interdependence [as] the United States was now a sovereign nation entitled to the privileges and responsibilities that came with that status.” I suggest that the United States under the Declaration could not constitute anything legally sovereign, state or states, as this required the British to relinquish their sovereign claim and recognize American claims of sovereignty.

⁹⁰ David Hunter Miller, ed., *Treaties and other International Acts of the United States of America*, 8 vols. (New York: J.D. Torrey, 1861), 2:3, 5, 27.

⁹¹ *Ibid.*, 2:45.

army as “the troops under your command.”⁹² Washington himself called the army, “Troops of the United Provinces of North America,” and with this moniker, he cited the rebellion of the United Provinces of the Netherlands against Spain in their revolution for individual sovereignty—the Netherlands ultimately constituted a confederation of sovereign states.⁹³ Washington’s reference to this tidbit of history noted the true intention of the Revolution: The sovereignty of thirteen colonies.⁹⁴

Oddly enough, the colonies also drew up a draft treaty with the Dutch that read as “[a] Preparatory Plan of a Treaty of Commerce of the Seven Provinces of Holland and the Thirteen United States of North America, to be Put on the Table of the High Mightinesses [the States General, i.e. the legislative body of the Dutch confederacy] in the event that England should recognize them as Free Nations.”⁹⁵ In every treaty already mentioned, and in all those contracted until 1783, the individual names of the colonies were also included for whatever variation of the union was used. Because these international agreements listed each colony as a state, this indicated that a single American state was not the actual party to the treaties, but that every colony as a self-proclaimed state held an obligation to uphold them.⁹⁶ Though these colonies called themselves states, and performed powers associated with sovereignty, these were claims unrecognized as the

⁹² David McCullough, *1776* (New York: Simon & Schuster, 2005), 24.

⁹³ *Ibid.*

⁹⁴ See Dunn, *Religious Wars*, 43, 117. As Dunn explained, the seventeen Dutch provinces which rebelled against Spain did not want to “mold a Netherlands nation-state; each of the seventeen provinces wanted to preserve its cherished autonomy.” When the northern provinces won their independence, the seven provinces which constituted the Dutch republic “continued to cherish their separate identity.” “Each province sent ambassadors to the Hague to meet in the States-General, a body which rarely acted energetically because its decisions required the consent of all seven provinces.”

⁹⁵ Hans Krabbendam, Cornelis A. van Minnen and Giles Scott-Smith. *Four Centuries of Dutch-American Relations: 1609-2009* (New York: State University of New York Press, 2009), 208.

⁹⁶ Billias, *American Constitutionalism*, 17. Billias argued that with the Declaration “America thus became a member of the international community, which meant becoming a maker of treaties and alliances, a military ally in diplomacy, and a partner in foreign trade on a more equal basis.” However, with these treaties contracted over the course of the Revolution, Billias overlooked the strange variety of names a supposed single American state had and the significant feature that each treaty named every colony individually as a state, and therefore as a separate party to the treaty.

Declaration even asserted, “That these United Colonies *are*, and of Right *ought to be* Free and Independent States.”⁹⁷ Hence, the Declaration adhered to Paine’s vision of an American continental future which extended beyond just mere separation from Britain.⁹⁸ When Paine remarked, “our strength is continental, not provincial,” he argued that the colonies should no longer remain legally subordinate appendages to any singular sovereign state, they should themselves be sovereign states united with one another in a confederate union.⁹⁹ And as we shall see, Americans understood, or came to understand, the strength of a continental, voluntary and federal government as American history progressed.

⁹⁷ Declaration, Conclusion, in Gutzman, *Guide to the Constitution*, 230. (emphasis added) Here, the Declaration claimed that these colonies were throwing off colonialism and sought separate independence. Yet, the document also acknowledged that its claims required legitimization. Thus, the phrase “ought to be” noted the legal paradigm of international sovereignty. Sovereignty must be relinquished as well as recognized—something to be discussed in more detail in Chapter 3.

⁹⁸ See Kiley, “Thomas Paine,” 56-57, 64. “Paine's influence in Philadelphia during the Second Continental Congress (he was not a delegate) [...] led one [twentieth-century writer] to wrongly credit Paine with authoring the Declaration of Independence.” Additionally, Kiley admitted that what “can be seen by reading *Common Sense* and then looking at the *Declaration*, is that Paine's ideas are there.” (italics in the original)

⁹⁹ Paine, “Common Sense,” 34.

Chapter 2 – “We have heard much of a Continental Constitution. I see no occasion for any But a Congress.”¹⁰⁰: The Articles of a *confederate republic*

While 1776 marked the year of declared independence, it also began a drawn-out constitution-making process that eventually continued Thomas Paine’s continental vision. To understand why the Articles of Confederation constituted a treaty, the text of the document must reflect the original intent, which won out in the Second Continental Congress, of the framers.¹⁰¹ The lexicon used to describe the structure of the government was very unique for it showed just how the political science of the late eighteenth-century heavily influenced the formation of the Articles. Yet, the Articles were more than a historical document for they also constituted a legal document. Hence, the Articles should also reflect the intent to form a confederation as well as explain the reasons for its flaws in the period after its complete ratification by the state legislatures in 1781, also called the Critical Period. This chapter also stretches to those years right before the Federal Convention precisely because the main figures of Chapter 3 retain a lot of the political language used in the complete timeframe of both the creation of and existence under America’s second union, 1776-1790.

“[W]e have every opportunity and every encouragement before us,” Paine believed, “to form the noblest, purest constitution on the face of the earth.”¹⁰² While many of the revolutionaries shared Paine’s fervent commitment to independence, few demonstrated that support in the multitude of ways he did. Paine adamantly opposed reconciliation because he saw that “[w]e have it in our power to begin the world over again” with a continental vision.¹⁰³ Although John Adams

¹⁰⁰ *AP*, 4:83.

¹⁰¹ Amar, *America’s Constitution*, 25, 28. Amar agreed that under the Articles of Confederation: “The ‘United States’ would be an alliance, a multilateral treaty of sovereign nation-states” since an international agreement was “[b]ased on the Latin *foedus* (meaning treaty or covenant) and its cognate *fides* (faith), a traditional ‘confederated’ union ultimately depended on the good faith and voluntary compliance of member states.” (italics in the original)

¹⁰² Paine, “Common Sense,” 52.

¹⁰³ *Ibid.*

shared Paine's passion and foresight, he disagreed with Paine's argument about the necessity of a constitution for the allied colonies. "We have heard much of a Continental Constitution," Adams remarked, "I see no occasion for any But a Congress."¹⁰⁴ Adams did not completely reject the adoption of such a constitution, but he relegated that need behind the sake of the colonies for the adoption of their constitutions was a more urgent concern, and Congress, as it stood, would just have to do for now.

However, one of Richard Henry Lee's three resolutions in early June 1776 called for "a plan of confederation."¹⁰⁵ While Adams chose to be physically absent in the committee charged with this duty, he remained an influential voice among his colleagues in the formation of such a constitution. Before Congress directed the states to form their own governments, several states were already in the constitution-making process.¹⁰⁶ In March 1776, North Carolina contemplated such action, and two of the state's delegates in Congress, John Penn and William Hooper, asked Adams about the structure of government the state's constitution should implement. The recommendations circulated among all the delegates, and in particular, George Wythe of Virginia found himself so captivated by Adams's advice that he pressed for its publication, *Thoughts on Government*, though anonymously in April 1776.¹⁰⁷ While the specific delineations of union between the colonies were of far less importance for Adams, he nevertheless briefly opined in *Thoughts* about this very matter: The constitution's "authority," Adams argued, "should sacredly

¹⁰⁴ *AP*, 4:83.

¹⁰⁵ *JCC*, 5:425.

¹⁰⁶ Wood, *American Revolution*, 65; See also Jensen, *Articles of Confederation*, 163-164. Colonists in the American Revolutionary period saw themselves from the position of their colony or state. "In 1774 John Adams wrote of Massachusetts Bay as 'our country' and of the Massachusetts delegation in Congress as "our embassy." Adams's cousin, Samuel Adams also said that "[i]stead of feeling as a Nation, a State is our country." For the independence-minded delegates of Congress, this was the purpose of a revolution.

¹⁰⁷ Richard B. Bernstein, "John Adams's *Thoughts on Government, 1776*," *Articles & Chapters*. 1012 (1990): 123. In part, this pamphlet competed with *Common Sense* by emphasizing the importance of the state constitutions over a continental constitution.

be confined to these cases, viz. war, trade, disputes between Colony and Colony, the Post-Office, and the unappropriated lands of the Crown, as they used to be called.”¹⁰⁸

This enumeration of central authority signified that Adams shared Paine’s definition of a continental government as a body which would govern an international union of sovereign states. The fundamental difference between a literal national government of single state and a government which claimed a figurative sense of national authority among several states lied in the extent of each structure’s powers whereby the former, like the British Parliament, acted “in all cases whatsoever” and the latter operated on terms that were codified to a unified foreign policy and shared-domestic issues that transcended every colony’s borders.¹⁰⁹ A continental plan required certain rights of its members to be voluntarily repressed in the interest of cohesion, and overall for the survival of the confederacy. “These Colonies,” Adams explained, “under such Terms of Government and such a Confederation would be unconquerable by all the Monarchies of Europe.”¹¹⁰ Adams’s insistence came most likely from the French jurist Baron de Montesquieu, who said that this government, which he called a “confederate republic,” had “all the internal advantages of a republican, together with the external force of a monarchical, government.”¹¹¹ More specifically, a confederate republic, or simply a confederation, was when “several states agree to become members of a larger one [...] It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of new associations.”¹¹²

However, this “larger” and “new” state was actually a semantic invention used to describe the coordination between the states of a confederacy. While they agree to act in concert in the

¹⁰⁸ *AP*, 4:92.

¹⁰⁹ “Declaratory Act, March 18, 1766,” quoted in Shain, *Historical Context*, 128-129.

¹¹⁰ *AP*, 4:83.

¹¹¹ *Ibid.*, 4:80; Charles de Secondat, *baron de Montesquieu, The Spirit of Laws: A Compendium of the First English Edition*, ed. David Wallace Carrithers, trans. Thomas Nugent (Berkeley: University of California Press, 1977), 183. An English translation of the text at the time called it a “confederate republic.”

¹¹² *Ibid.*, 183.

sense of a semantic state either for mere convenience or survival, the confederated states remain internationally sovereign. Similarly, the sovereignty of each state was not even slightly impaired in the decision of these states to engage with other foreign states in a singular voice as in declaring war or contracting treaties.¹¹³ Indeed, it was precisely on this point that Montesquieu noted that at any given moment “[t]he state may be destroyed on one side, and not on the other,” which meant that the fictitious state of “the confederacy may be dissolved and the confederates [i.e. states] preserve their sovereignty.”¹¹⁴ Conversely, states which merge their sovereignty in a truly national republic would cease to exist. Montesquieu’s description of a “confederate republic” accurately reflected the sentiment behind the Articles: “The [C]onfederacy,” Adams explained according to Jefferson, who recorded the debates on the Articles from 7 June to 1 August 1776, “[was] to make us one individual only; it [was] to form us, like separate parcels of metal, into one common mass. We shall no longer retain our separate individuality, but become a single individual as to all questions submitted to the Confederacy.”¹¹⁵

The mere fact that legislated acts and contracted treaties respectively under a singular identity in the name of either Congress or “[t]he Stile [*sic*] of this Confederacy,” “The United States of America,” did not mean that the colonies *de facto* constituted one single American state.¹¹⁶ Of course, questions of war, treaties and joining other confederations required the unanimous consent of every member-colony under the Articles—though in other areas, the

¹¹³ Gutzman, *Guide to the Constitution*, 41. The delegation of powers from nation-states to a federal or central government does not imply the making of “the states into components of a nation[-state], any more than the European Union’s assumption of some power, formerly exercised by its sovereign member made Germany, France, Italy, and the rest parts of a sovereign European nation[-state].”

¹¹⁴ Montesquieu, *Spirit of Laws*, 184.

¹¹⁵ John Adams, quoted in Wood, *American Republic*, 357. Additionally, of “[t]he debates that took place in the [Second] Continental Congress in 1776-1777 over the formation of the Confederation,” “[o]nly those over representation [...] touched on the nature of the union and the problem of sovereignty.”

¹¹⁶ The Articles of Confederation, Art. 1, in Jensen, *Articles of Confederation*, 263. “The Stile [*sic*] of this Confederacy shall be The United States of America.”

Articles were less strict, but the unanimous approval of other colonies and the directives of Congress on discrete decisions did not impede any colony's claim of sovereignty. From the history of the Dutch confederacy, Montesquieu observed that the vitality of a confederate republic required laws which restricted the exercise of certain international powers of its members whereby, for example, "one province [could not] conclude an alliance without the consent of the others."¹¹⁷ As such, the Articles listed this as well as other restrictions, which were simply emblematic of this type of organized government for again each member-state held a right to resume its powers or leave.¹¹⁸ But more than a model of government, Montesquieu gave the colonists a political language that consisted of semantics, metaphors and symbolism to describe the mechanics of a confederacy.¹¹⁹

Yet, some like James Wilson took these metaphorical statements literally, and claimed, "Congress [was not] a representation of states" for the American colonies did not deserve "the name of 'State' [because] of those matters which are referred to Congress, we are not so many

¹¹⁷ Montesquieu, *Spirit of Laws*, 185. Such a rule was "excellent" and "even necessary" for a confederacy's existence.

¹¹⁸ Frank Monaghan, *John Jay: Defender of Liberty* (New York: The Bobbs-Merrill Company, 1935), 33. *Commentaries on the Laws of England*, a series of positive law writings from the British jurist William Blackstone which reached the colonies by the late 1760s; William Blackstone, *Commentaries on the Laws of England: Book I – Of the Right of Persons*, Wilfrid Prest, ed., (Oxford: Oxford University Press, 2016), 323; Montesquieu as well as several other highly influential political writers that were either published of or whose writings remained prominent until the late eighteenth century were quite clear about the fundamental nature of a confederation and defined a confederacy according to its federal structure. Blackstone called it a "*foederate alliance*," which was entirely voluntary because "an infringement [on the agreed conditions of the alliance] would certainly rescind the compact." (emphasis in the original); Emer de Vattel, *The Law of Nations*, Béla Kapossy, Richard Whatmore and Knud Haakonssen, eds., (Indianapolis: Liberty Fund, 2008), 84, 207, 338. Emer de Vattel, a Swiss jurist, chose to refer to a confederacy as "federal republic" and, like Blackstone, defined the federal nature of this structure of government—the "voluntary engagements" between several states—as treaty-like for "a treaty, in Latin *foedus*, is a compact." The formation of a federal republic was in complete accordance to construction of a treaty, whereby states perhaps without "sufficient strength" and "unable to resist its enemies" may draw up a compact based on the "certain conditions agreed to by both parties."; Charles de Secondat, *baron de Montesquieu, The Spirit of the Laws*, eds. and trans., Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (Cambridge: Cambridge University Press, 2004), 131. Dependent on the translation of Montesquieu's *The Spirit of Laws*, a "confederate republic" could be translated as a "federal republic."; See also Wood, *American Republic*, 355-357. Wood noted the influence and adherence to Montesquieu and Vattel on these matters: "The Confederation was intended to be, and remained, a Confederation of sovereign states." However, Wood did not view them as impactful on this issue when it came to the Constitution.

¹¹⁹ In reference to the previous comment, where Montesquieu likened a confederacy to a large state, and Adams explained it via an "individual."

states; we are one *large state* [for] we lay aside our individuality whenever we come here.”¹²⁰ The insistence of the reconciliatory-minded delegates to deny even the appearance of individual sovereignty of the colonies came from a deep-seated optimism that in a few months the Revolution would fail and the colonies would happily reunite with the mother country, which consequently, influenced an unsuccessful last-minute attempt on 1 July 1776 to delay approval of the Declaration by John Dickinson of Pennsylvania, the leader of the reconciliatory-minded delegates.¹²¹ Simultaneously, should separation from Britain succeed, these delegates proceeded in Congress with precautionary measures to replace the British government with another government that would form a single state.¹²² The ambiguities of the original draft of the Articles penned by Dickinson showed that he snuck his nationalist tendencies into the first draft. Compared with the finalized version of the Articles, Article I of the Dickinson draft remained mostly unchanged wherein the Confederation was called “The United States of America,” but Article II asserted that the “Colonies [could] never [...] be divided by any Act whatever.”¹²³ Also, when the colonies were in the process of throwing off colonialism, the draft almost always referred to the Confederacy’s members as “Colonies,” which may have shown the intent of Dickinson to create a union similar to the Articles of Association in order to maintain some sort of connection with King George III. The entire episode of writing and ratification of the Articles lasted six years, with much of this time being spent in debate, political impasses or distracted by the Revolution, but once Congress

¹²⁰ James Wilson, quoted in Wood, *American Republic*, 357. (emphasis added) Wood believed that both Wilson’s and Adams’s comments were similar, but they were not for Wilson did not share Adams’s view of Congress nor his view of a Continental Constitution. Indeed, Wilson mockingly blurted that those who claimed that the states were sovereign “must be [under] the effect of magic, not of reason.”

¹²¹ Jensen, *Articles of Confederation*, 115, 126.

¹²² *Ibid.*, 111.

¹²³ The Dickinson Draft of the Confederation, Art. I & II, in Jensen, *Articles of Confederation*, 254.

agreed to the finalized version of the Articles on 8 April 1777, and disagreements around land cessions that delayed ratification ended, all thirteen colonies finally united in 1781.¹²⁴

The most highlighted aspect of the finalized Articles was Article 2 which explicitly affirmed each state's sovereignty: "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."¹²⁵ As demonstrated in Chapter 1, all of the treaties ratified before the signing of the Paris Peace Treaty in 1783, which officially christened these colonies as states, also functioned as *explicit* affirmations of these claims of sovereignty. An obvious omission of the future 1787 Constitution was any textual affirmation of state sovereignty, which historians have mistakenly interpreted as an eventual surrender of sovereignty by the states. The purpose of these expressed affirmations in documents during the Revolution—the period between 1776 and 1783—especially Article 2 of the Articles, was both practical as well as legal because the colonies needed to expressly retain their respective claims of sovereignty since they had yet to secure it. Once Great Britain officially recognized the colonies as members of the international community, they no longer had to fear losing their separate independence to another state in any international agreement.

The Articles should be viewed as the war-time document it was because, above all, the colonies bound together for mutual military defense in the hope of international recognition.¹²⁶

¹²⁴ See Jensen, *Articles of Confederation*, 249-251; Wood, *American Revolution*, 71. As a result, the Second Continental Congress became the Confederation Congress, but historians usually view it as "essentially a continuation of the Second Continental Congress."

¹²⁵ Articles, Art. 2, in Jensen, *Articles of Confederation*, 263.

¹²⁶ Jensen, *Articles of Confederation*, 6. In contrast, Jensen believed that "[t]o approach the Articles of Confederation from the point of view of the difficulties and tribulations that followed the Revolution, real as these were, [was] to miss largely their true significance."

Once this objective was obtained, the Confederation had the potential to disassemble.¹²⁷ A war against the greatest military power of the late eighteenth-century had no known end in sight. In mid-June 1775, before extreme military conflict, George Washington wrote to his wife that “I shall return safe to you in the fall,” which signaled grand expectations for the “American Cause” that lasted seven years.¹²⁸ To address the potential ephemerality of a confederation, the Articles borrowed language that was customary in many international agreements of the time. A *perpetual* treaty did not imply the impossibility to exit a treaty but provided a means of avoiding the exact termination of it.¹²⁹

With regards to the “perpetual Union” of the Articles, “perpetual” did not relinquish the future sovereignty of thirteen states-to-be by suggesting that the Confederacy was insoluble, or that it was in reality a single sovereign state.¹³⁰ Instead, the Confederation was “perpetual” because of the lack of knowledge surrounding the Revolution’s duration. A provision that suspended the American union at a given date would have been counter-productive as well as wholly unnecessary since any member-state was free to leave. Emer de Vattel, an influential Swiss jurist, himself even described a confederacy as perpetual for this very purpose for he too noted that under such a system no member-state had its sovereignty diminished but remained “individually, a perfect state.”¹³¹ From the moment the Articles were fully ratified in 1781, the colonies still had a little less than two years until the Paris Peace Treaty in which the King “acknowledge[d] the said United States”

¹²⁷ Jack Rakove, *Revolutionaries: A New History of the Invention of America* (Boston: Houghton Mifflin Harcourt, 2010), 355. “For the first time, Madison feared that the revolutionary Union of thirteen states might actually devolve into two or three regional confederacies.”

¹²⁸ From George Washington to Martha Washington, Philadelphia, June 18, 1775, Theodore J. Crackel, ed., *The Papers of George Washington: Revolutionary War Series Digital Edition*, 24 vols. (Charlottesville: University of Virginia Press, 2008), 1:3-4. Henceforth, abbreviated as *PWR*.

¹²⁹ Gutzman, *Guide to the Constitution*, 12. “In [these] days treatises between European states often purported to be ‘perpetual,’ [which] did not mean that neither side could bring a treaty agreement to an end, but that there was no built-in sunset provision.”

¹³⁰ Articles, Preamble in Jensen, *Articles of Confederation*, 263.

¹³¹ Emer de Vattel, *Nations*, 84.

individually as “free sovereign and independent states.”¹³² And as a result of that action, the United States of America literally became a conglomeration of states.

The sovereignty of the American states was so well-understood from this point on that a Virginia congressman believed that Alexander McGillivray, a non-official plenipotentiary of the Creek Nation, sought to admit his people “as a member of the federal Union” so as to cement Creek sovereignty in eighteenth-century European legalism via *de facto* recognition by the Confederacy’s other members.¹³³ The Articles did leave open the possibility for the admission of new member-states into the Confederation, James Madison wrote in *Federalist* No. 43, but Article 11 mostly applied to Canada and other British colonies.¹³⁴ Theoretically, other states, formed out of territory either ceded by members of the Confederation or by Britain in the Paris Peace Treaty, would achieve statehood by mere admission into the Confederacy because all new members were “entitled to all the advantages of this Union.”¹³⁵ However, the Articles were silent on the specifics because, Madison also noted, “[t]he eventual establishment of *new states*, seems to have been overlooked by the compilers of that instrument.”¹³⁶ This was one of the many errors of the Articles that the Constitution rectified, but the main justification for a new constitution was in the realm of

¹³² “Definitive Paris Peace Treaty,” Art. I, in Miller, ed., *Treaties*, 2:152.

¹³³ Kathleen DuVal, *Independence Lost: Lives on the Edge of the American Revolution* (New York: Random House, 2015), 254. As the son of a Scottish father and a Creek mother, McGillivray found himself as the default international representative of his people because, unlike most of his fellow Creeks, he did not lack the language nor the knowledge of eighteenth-century diplomacy to argue for Creek sovereignty. A Virginian believed McGillivray wanted the Creek Nation to be admitted into the Confederacy in order to achieve eighteenth-century European standards of legal independence and sovereignty.

¹³⁴ Alexander Hamilton, James Madison and John Jay, “No. 43,” in George W. Carey and James McClellan, eds., *The Federalist* (Indianapolis: Liberty Fund, 2001), 224.

¹³⁵ Articles, Art. 11, in Jensen, *Articles of Confederation*, 270; Thomas Jefferson, quoted in Ellis, *Quartet*, 75. Jefferson himself wrote that the territory of the Confederation “shall be laid out and formed into states [...] and that the states so formed shall be [...] admitted members of the Federal Union, having the same rights of Sovereignty, Freedom and Independence as the other states.”

¹³⁶ Madison, “No. 43,” 224. (emphasis in the original)

foreign affairs. Once the states actually achieved international recognition, they each had an obligation to uphold contracted treaties.¹³⁷

The reforms made in the Convention of 1787 emphasized cohesion on matters of foreign diplomatic strength, and the language utilized in arguments that produced the Convention signified this for it was very Montesquieu-esque in its symbolic use of words like *nation(al)* and *state* to refer to the illusion of a single state.¹³⁸ Yet, every significant critic of the Articles was influenced by various factors: experience, a rigid political philosophy or colleagues. At the start of the “common cause in which we are all engaged,” Washington wrote on 4 July 1775, he “hoped that all Distinctions of Colonies will be laid aside; so that one and the same Spirit may animate the whole” of the colonies.¹³⁹ Two weeks after the American colonies legally achieved statehood, John Jay, one of the American diplomats sent to Paris to negotiate peace, was “perfectly convinced that no Time [was] to be lost in raising and maintaining a national Spirit in America” in order to “grant” sufficient “Power[s] to govern the Confederacy, as to all general purposes.”¹⁴⁰ Eight years of revolution produced a sense of unity among the states, which could have been regarded as “a national Spirit,” but Jay’s, as well as any future, reference to a nation was solely semantic for as

¹³⁷ Kevin R. C. Gutzman, *James Madison and the Making of America* (New York: St. Martin’s Press, 2012), 51. Gutzman reasoned Madison’s main fears on the Articles as concerns over foreign affairs: “While foreign governments have not yet punished the United States for violating, say, the Treaty of Paris, the French alliance, or the Dutch treaty, it [was] only a matter of time until one or more of them [did] so.”

¹³⁸ Bilder, *Madison’s Hand*, 38. Bilder linked Madison’s writings to Montesquieu’s *The Spirit of Laws*. Madison essentially paraphrased this text to such an extent that Madison began to adopt Montesquieu-esque language. However, for Bilder, this was not a direct adoption as Madison generally “translated ideas into his political vocabulary [...] As Madison wrote, he was reformulating the original text into his own conceptual vocabulary.” Madison’s development as a political writer, philosopher and scientist was tied to authors like Montesquieu, who wrote with a certain semantic, symbolic or even metaphorical style. Madison, along with several of his colleagues also adopted this style. In the *Federalist*, as will be shown in Chapter 3, Hamilton blatantly copied entire paragraphs of Montesquieu’s *Laws* and, as a result, also employed the same stylistic writing—indicative of Montesquieu’s influence.

¹³⁹ *PWR*, 1:54.

¹⁴⁰ From John Jay to Gouverneur Morris, Passy, September 24, 1783, Elizabeth M. Nuxoll, ed., *The Selected Papers of John Jay Digital Edition*, 4 vols. (Charlottesville: The University of Virginia Press, 2014), 3:484. Henceforth, abbreviated as *JP*.

long as the states were each internationally sovereign.¹⁴¹ Essentially, like Washington, who had hoped that the states could be unified in spite of their differences in 1775, Jay also hoped that a strong bond could be built upon for the sake of the present domestic difficulties in 1783.

While Jay doubted the efficiency of the Articles, his concerns did not initially lead him to believe that the Confederation was entirely irreparable. Indeed, Jay's call to empower the Confederacy for "general purposes" demonstrated a continual degree of faith in a federal structure of government.¹⁴² Although the phrase "general purposes" may appear vague, it actually designated a specific intention. The expression had a dual connotation—first, in the increased strength of current powers with greater central authority to enforce and secondly, in the expansion of a "national government." The former would require a reorganization of delegated power between the central government and the state legislatures, and the latter would attempt Jefferson's imperative: "To make us one nation as to foreign concerns, and keep us distinct in Domestic

¹⁴¹ Ellis, *Quartet*, 27. Ellis noted that "the union of states [were] held together, however tentatively, by the common goals of independence." "Once that goal was achieved," Ellis continued, "the states [...] were poised to go their separate ways, loosely confederated under the Articles."; also See Bilder, *Madison's Hand.*, 37-39. Additionally, words like *common* and *general* also reflected semantic notions of a nation. In his notes on the history of various confederacies, Madison almost perfectly quoted Montesquieu's analysis of the Lycian confederacy, but substituted the word *common* for *general* to describe the semantic national unification of that confederacy. It was not a coincidence that Washington himself spoke and wrote in the same political tongue as Madison, who sent him this information which Washington "read and copied."; See From George Washington to James Madison, Mount Vernon, November 30, 1785, Theodore J. Crackel, ed., *The Papers of George Washington: Confederation Series Digital Edition*, 6 vols. (Charlottesville: University of Virginia Press, 2008), 3:420. Henceforth, abbreviated as *PWCS*. The reciprocation of these kinds of messages were extremely commonplace for Washington, on the difficulties of the Articles in 1785, told Madison, "let us, in all matters of *general* concern act as a *nation*, which have *national* objects to promote, and a *National* character to support." (emphasis added) Washington's use of *nation* was entirely rhetorical and completely in line with the consensus that the American states needed to conduct themselves according to the welfare of each state, the Confederacy as a whole, rather than as a separate state selfishly unconcerned about affairs of co-states.

¹⁴² Jensen, *Articles of Confederation*, 125. In drafting the Articles, the question "What affairs were of 'general' or 'national' concern?" directed the creation of the Confederation. Jay's continued usage of these words demonstrated that his mindset was within the paradigm of a federal or confederate system; See Brion McClanahan, *The Founding Fathers' Guide to the Constitution* (Washington D.C.: Regnery History, 2012), 5. In addition to Madison and Jefferson, others of the "founding generation" also labeled "the government created by the Constitution" as "general" or "central." Thus, there was, as will be shown, a multitude of synonymous ways to describe a confederacy, or a federal republic.

ones.”¹⁴³ Here, Jefferson espoused that a confederation was “the proper division of powers between the general and particular [state] governments” but the states needed to restrain themselves from the exercise of certain international powers so that they may properly conduct foreign policy in unison.¹⁴⁴

When Congress appointed Jay as Secretary of Foreign Affairs in 1784, this initiated a political transformation within himself which coincided with the negotiations with Spain to secure the Mississippi River as the western border between the two powers.¹⁴⁵ Congress assigned Jay with this impossible task to ensure American navigation rights on the river, but for the Spanish, any discussion of the river was a non-starter, which particular members of Congress did not understand.¹⁴⁶ To make matters worse, state legislatures routinely disobeyed the Treaty of Paris which allowed the British to become lax on its enforcement too.¹⁴⁷ During his tenure, Jay attempted to establish uniformity and coercive obedience in the realm of foreign affairs, but in response, he suffered demonization, especially for his unilateral decision to concede to Spanish demands in 1786.¹⁴⁸ While in 1785 Jay began to reverse his political views as he chastised a confederation as a “feeble” and “mortifying” way to govern, it was in May 1786 that he reached a political epiphany:

¹⁴³ From Thomas Jefferson to James Madison, Paris, December 16, 1786, McClure, P. James and J. Jefferson Looney, eds., *The Papers of Thomas Jefferson Main Series*, 41 vols. (Charlottesville: University of Virginia Press, 2009), 10:603. Henceforth, abbreviated as *TJP*.

¹⁴⁴ *Ibid.*; Bilder, *Madison's Hand*, 78. Bilder wrote that Madison was unsure about Jefferson's political ideology, but this letter demonstrated that he was quite familiar with Jefferson's belief that a sufficiently empowered confederacy was a viable structure of government.

¹⁴⁵ Ellis, *Quartet*, 71. Ellis argued that this occurred much earlier when Jay served as president of Congress between 1778 and 1779. I suggest there was a distinguishable difference in Jay's criticism before and after he assumed this office.

¹⁴⁶ *Ibid.*, 84-88. Originally viewed as a friend to Southern interests, and the primary foreign policy goal at the time being the Mississippi River, Congress unanimously appointed Jay because three years prior he argued that the river was a negotiable issue—America's future lied to the west. But when he talked with Don Diego María de Gardoqui, the Spanish ambassador, the possibility of attaining that goal was slim. Jay reckoned that Spain was a waning power, which in a few years, would be unable to counter American wishes. However, Jay's colleagues were mostly impatient and ridiculed him for conceding to Spanish demands.

¹⁴⁷ *Ibid.*, 86-87. Loyalists, or British sympathizers during the Revolution, had their property confiscated, and state legislatures also refused to pay British creditors. All of this gave the British reasons to be as noncompliant with the treaty's terms as the Americans.

¹⁴⁸ *Ibid.*, 88.

“[T]o see the People of America become one nation in *every* Respect—for as to the separate Legislatures, I would have them considered with Relation to the Confederacy, in the same Light, in which Counties should to the State of which they are parts—viz., merely as Districts to facilitate the purposes of domestic order, and good Government.”¹⁴⁹ Here, Jay’s use of “every” rather than *general* demonstrated that the kind of strong national government he desired was literal and not figurative.

The standard narrative of the Critical Period encapsulated many of the most prominent figures associated with the Constitution’s birth into the nationalist camp of Alexander Hamilton of New York such as Jay, Washington and Madison, but this correlation was flawed for historians failed to recognize the differences in speech between these men. Although the ineffectiveness of Congress during the Revolution surely impacted Hamilton’s political views in his service as a military officer, his nationalist views may have actually stemmed from his youth.¹⁵⁰ And yet the man whom he served under as aide-de-camp was not politically aligned with him on his nationalist

¹⁴⁹ *JP*, 4:83; *Ibid.*, 4:330. (emphasis added)

¹⁵⁰ Rakove, *Revolutionaries*, 412. Rakove described Hamilton and Washington as “nationalists in every sense of the term,” but Washington was not the same kind of “nationalist” that Hamilton was. Hamilton conjured or supported theories that the states were never sovereign only to contradict himself later by conceding that they were. While I agree with Rakove that Hamilton was a true nationalist—seeking to create a single American state, Washington was not of the same nationalist cloth. Washington never denied the sovereignty of the states. He always understood the American Revolution was a fight for the separate independence of each colony by correlating the situation of the American colonies, which rebelled against Great Britain, to the provinces of the Netherlands, which revolted against Spain. Only in a very semantic sense can Washington be described as a nationalist. As commander of the army that protected the colonies as a whole, Washington gained a reputation as a fatherly figure, a protector, over his country. Like many of his day, Washington had “provincial loyalties” to his home state, but he had a wide-ranging concern about the welfare of the states as a whole; Wood, *American Republic*, 361. Hence, when Hamilton implored the states to “think continentally” in a series of *Continentalist* essays in the 1780s, Washington agreed because such was his mentality as was Adams’s, Jefferson’s and Madison’s. After all, any “continental” reference started with the proposition that a government was federal. As Hamilton wrote—confided in this paradigm—in one of these essays he pleaded for more powers for the Confederation, especially the power to tax. An explicit call for a truly national government would have been antithetical to a continental structure of government. Nevertheless, Hamilton did slip a few of his nationalist tendencies within these papers—something he also did in the *Federalist*; Shankman, *Original Intent*, 26. According to Shankman, “Hamilton grew up in the fast-paced commercial world of the British West Indies,” and as a “young teenager,” the mercantilist practices of the British monarchy came to infuse with his politics.

proposal to create a single American state.¹⁵¹ In the midst of the Convention, Hamilton told Washington that a “strong well mounted [central] government” was an insufficient plan, but “[n]ot having compared ideas with you, Sir, I cannot judge how far our sentiments agree.”¹⁵² Washington did not agree for he genuinely believed that a “strong & energetic [national] government” was what the states required, but he ultimately left these political decisions to the men who brought him out of retire.¹⁵³ Like Wilson, Hamilton drew on “implications” to suggest that the states were already united as a single state for the Declaration, war, deployment of an army and navy and “emitting money” were actions which proved that Congress had “complete sovereignty.”¹⁵⁴

For Madison, the Convention came at a time when his mind was heavily shaped by his friendship with Jefferson, who supplied him with hundreds of books from Europe.¹⁵⁵ These books

¹⁵¹ Ibid., 12-13. “When describing the inadequacies of the Articles of Confederation, Hamilton drew heavily on his experience, particularly his fury over the treatment of the Revolutionary army.” Because Congress lacked the power to tax, the paper money it paid the army essentially left the “[s]oldiers and officers [...] unpaid, or [they] were given promises of future payment in the form of debt certificates.” These criticisms were outwardly similar to the criticisms of his colleagues, but inside Hamilton rested a desire to institute a single American state.

¹⁵² From Alexander Hamilton to George Washington, New York, July 3, 1787, *The Papers of Alexander Hamilton Digital Edition*, Harold C. Syrett, ed., 27 vols. (Charlottesville: University of Virginia Press, 2011), 4:223. Henceforth, abbreviated as *PAH*. Hamilton understood the difference between the use of *national* in a “stronger national government” and in a national government that was entirely of a “different complexion”—not semantic.

¹⁵³ David O. Stewart, *The Summer of 1787: The Men Who Invented the Constitution* (New York: Simon & Schuster Paperbacks, 2007), 54. “When Nathaniel Gorham of Massachusetts replaced Washington as the presiding officer in the Convention for a moment, Washington refused to say word on the floor and “maintain[ed] his customary [and neutral] posture above the fray.”; *PWCS*, 5:257. Pressured by Hamilton to endorse his propositions, Washington held onto his commitment to remain silent—though he regretted his silence. However, the biggest disappointment for Hamilton was Washington’s personal commitment to what Hamilton said was ineffective: “a strong & energetic government.”

¹⁵⁴ Alexander Hamilton, quoted in Shankman, *Original Intent*, 32.

¹⁵⁵ Kevin Hayes, *The Road to Monticello: The Life and Mind of Thomas Jefferson* (Oxford: Oxford University Press, 2008), 282-283. “The ideas these books contained let Madison apply them in the profound task on which he was engaged, drafting the U.S. Constitution. If Jefferson had any regrets about being in Paris, they involved his inability to help draft this essential document. But he may have aided Madison more than he realized. By selecting pertinent books and shipping them as expeditiously as possible, Jefferson exerted a significant influence on the thought of his friend at a time when he was putting the final touches on the Constitution.”; Ellis, *Quartet*, 118. “In late 1783 and early 1784, Madison [still] seemed to believe that the Articles needed to be revised, not replaced.” The text of the plan, which the Convention used, continued this belief, but the creation of another confederation, properly structured, was not an idea that Madison disliked. He earnestly believed there were problems with the Articles, but in Jay’s negotiations with the Spanish over the Mississippi River, Madison was one of those tough Southern critics. It was only until Madison himself spoke with Gardoqui that he understood both Jay’s position and the real situation of the Confederacy.

were among those that Madison used for his critique of the Articles, which included not only an overview of the “vices” in the document but also remedies for them, grounded in the history of confederacies.¹⁵⁶ The relationship did not suggest that Madison lacked independent and original thoughts of his own because whatever he believed of Jefferson’s vision, he translated it differently—delegates at the Convention certainly felt so. Ironically, as the Confederacy received a lot of flak, it was actually Jay and Hamilton, the nationalists, which eventually converted to Madison’s vision of a federal republic in the end.¹⁵⁷ Hamilton, in particular, held onto his nationalist proposals longer than Jay. In the Convention, plans to create a single American state came somewhat dangerously close to upending Paine’s continental vision.

¹⁵⁶ Gutzman, *James Madison*, 50. “In 1786-1787, Madison devoted himself to [the study of] ancient, medieval, and modern writings on history and political science. [H]e mastered the history of both bygone and contemporary confederations. In the main, his conclusion was that confederations tended to fail for lack of power in the central government. Distilling this book learning and his own experience, Madison also came to certain conceptions about the ways that the American system needed to be improved.” And “vices” are in reference to Madison’s “Vices of the Political System of the United States.”

¹⁵⁷ Shankman, *Original Intent*, 14. In contrast to Shankman: “Between 1776 and the mid-1780s, Jefferson and Madison came essentially to agree with Hamilton.”

Chapter 3 – “A Republic [...] if you can keep it.”¹⁵⁸: The Constitution of a *federal republic* of United States

In the four years between the signing of the Paris Peace Treaty in 1783 and the beginning of the Federal Convention in 1787, the inefficiencies of the Articles of Confederation enhanced difficulties within the sectors of “trade and commerce of the United States” to such a degree that they ultimately forced fifty-five delegates to convene in Philadelphia.¹⁵⁹ The most recognizable catalyst for action was possibly a rebellious group of yeoman farmers in Massachusetts, who disrupted the judicial apparatus of the state in 1786, because they validated the concern that most of the individuals hereafter named in this chapter already believed to be true.¹⁶⁰ The Confederation, as it existed under the Articles, was not potent enough to handle everything that came with independence, especially relations with foreign states. Several proposals were made in the interim about the way forward: “The entire separation of the States into thirteen unconnected sovereignties,” the Confederacy “divided into several confederacies” or the amalgamation of the thirteen states into a single state.¹⁶¹ Of these, the most dramatic proposition was the last, but the

¹⁵⁸ *Records*, 3:85.

¹⁵⁹ Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (Boston: Little, Brown and Company, 1966), 9. In 1786, the states ostensibly attempted to seriously alleviate some tensions between themselves with a convention in Annapolis, MD, which grew out of a commission assembled at George Washington’s Mount Vernon estate in 1785. The lack of attendance doomed the meeting. In response, the members called for a convention in Philadelphia, PA the following summer in 1787 to address “trade and commerce,” which “covered a multitude of troubles [such as] war debt [...], tariff laws [and] shipping arrangements.” In total, seventy-four delegates were named by the state legislatures, Rhode Island completely refused to participate.

¹⁶⁰ The leader of these small farmers was Daniel Shays, a Revolutionary War veteran and farmer, who like these farmers suffered economic difficulties after the Revolution. Because they were unable to pay high taxes, courts across Massachusetts seized their lands and livestock, which produced enough anger to create a revolt; *See Ibid.*, 10. “Shays’s Rebellion had been in the public mind when Congress, after debating the Annapolis report, had voted in favor of a convention at Philadelphia. Even so, Congress proceeded cautiously. The Annapolis report had hinted that not only trade and commerce but the entire federal system might need adjusting.”; *See also* Shankman, *Original Intent*, 43-45. Thomas Jefferson had a blasé reaction to the incident: “I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical.” He went on to propose that state governments should be “mild in their punishments of rebellions, as not to discourage them too much. It is a medicine necessary for the sound health of government.” For Alexander Hamilton and James Madison, the reaction was the opposite, and they pressed for reforms to the Articles of Confederation.

¹⁶¹ Hamilton, “No. 13,” 60; *See PJM*, 10:207. Similarly, Madison wrote to Jefferson on 24 October 1787: “It appeared to be the sincere and unanimous wish of the Convention to cherish and preserve the Union of the States [i.e. a

creation of a single American state did not garner enough support. Instead, the states took another option, which involved the creation of a federal republic.

Although Thomas Jefferson saw errors within the finished product of the deliberations of the Convention, he was pleased that the Constitution addressed the shaky performance of foreign policy under a confederation. In mid-March 1789, Jefferson reflected on the Constitution as already ratified by nine states: “This instrument forms us into one state as to certain objects, and gives us a legislative and executive body for these objects.” To Jefferson, who resided in France for the entirety of the Convention as America’s ambassador to the country, the Constitution simply established another confederate republic sufficiently empowered to deal with foreign matters. With respect to the executive branch, the Constitution’s quadrennial election of the President who held treaty-making powers, the title of “Commander in Chief of the Army and Navy” and the appointment of ambassadors replaced the indistinct, annually-appointed “office of president” under the Articles. Congress, split by two legislative assemblies, obtained greater responsibilities in conjunction with the President’s newfound role in foreign policy matters and enacted laws that reigned supreme over the state legislatures. While Jefferson genuinely believed that James Madison adhered to his recommendation in 1786 to create a semantic national government, some delegates in the Convention felt, though falsely, that this was not his intention.¹⁶²

All the delegates that arrived at Philadelphia came with explicit orders from their respective state legislatures to solely amend the Articles. When Edmund Randolph, the leader of the Virginia delegation and governor of that state, introduced fifteen resolutions laced with “national” language

confederation]. No proposition was made, no suggestion was thrown out, in favor of a partition of the Empire into two or more Confederacies.”

¹⁶² *PTJ*, 10:603. Remember Jefferson’s words to Madison on 16 December 1786 about a convention to fix the Articles: “To make us one nation as to foreign concerns, and keep us distinct in Domestic ones.” Jefferson semantically referred to Confederation with the words *state* and *nation* to express a need to strengthen the Confederacy’s foreign policy engagement with the world rather than a need to literally create a single American state.

coupled with forceful assertions about the “imbecility of the Confederation” only four days into the Convention on 29 May 1787, the delegates believed that the Virginians sought to alter the Convention’s original purpose.¹⁶³ Debate over the first three resolutions opened on 30 May 1787.¹⁶⁴ While some delegates, who wished to create a single American state, certainly welcomed the quickly evolving proceedings, others were dismayed at the thought of completely forsaking the Articles. Regardless of the mixed reactions to the resolutions, these politically rigid delegates collectively interpreted the first resolution, which asserted that the subsequent resolutions were mere corrections to Articles, as deceitful.¹⁶⁵ In light of Randolph’s words, there was no reason to theoretically doubt this interpretation of the large expansion of federal authority within the plan.

Yet, it was Madison who actually authored these fifteen resolutions, which altogether constituted the Virginia Plan, but unfortunately his small stature and quiet character deprived him of the ability to adequately present the plan.¹⁶⁶ Therefore, the tone of the Convention’s debates of Madison’s plan stood on Randolph’s tough diatribe of the Articles. Still, Madison was partially responsible for these accusations because his unbridled pen included numerous references to a “national” legislature, executive and judiciary. Furthermore, the sixth resolution gave Congress

¹⁶³ Edmund Randolph, quoted in Stewart, *Summer*, 53.

¹⁶⁴ Bilder, *Madison’s Hand*, 60.

¹⁶⁵ James Madison, “The Virginia Plan, May 29, 1787” from *James Madison: Writings*, Jack N. Rakove, ed., (New York: Library of America, 1995), 89. “Resolved that the Articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, ‘common defence, [*sic*] security of liberty and general welfare.’”; also See Stewart, *Summer*., 55. Gouverneur Morris of Pennsylvania said that the first resolution was “unnecessary [...] as the subsequent resolutions would not agree with it.”

¹⁶⁶ William Lee Miller, *The Business of May Next: James Madison and the Founding* (Charlottesville: University of Virginia Press, 1993), 10, 206. Miller described Madison as “shy, short” and without “a loud voice; people a few rows away had a hard time hearing him.” Randolph was Madison’s opposite in terms of having a “greater physical stature, more oratorical style, and a louder voice.”; Bilder, *Madison’s Hand*, 89. Madison’s written record of his own speeches in the Convention was apparently very different from what his co-delegates heard. For example, Madison’s speech on 19 June 1787, as recorded by “other note takers,” was a “disorganized defense” of the Report from the Committee of the Whole House, which retained much of Madison’s Virginia Plan. “For Madison,” Bilder wrote, “the process of writing [his] Notes also became a process of revising his ideas.” Nevertheless, it was unquestionable that Madison’s intellect surpassed most of the men in the room. It showed in his writings, especially the *Federalist*, which allowed Madison to prepare a proper defense of the Constitution against its opponents, Anti-Federalists, in the Virginia ratifying convention, where Madison stood toe-to-toe to the oratory power of Patrick Henry.

broad legislative power and a veto over state laws, which struck a hard nerve to those who had an interest in largely retaining governmental power with the state legislatures.¹⁶⁷ Fear that the resolutions would scrap the Confederation was actually unwarranted for the text of the Virginia Plan plainly stated that the resolutions were in fact amendments.¹⁶⁸ Therefore, the real opposition to the resolutions came from a different place.

Nearly all of the men were either former or current state government officials. Everyone expected the federal government to become stronger, but few expected the distribution of power of the Confederacy to be completely overturned. A delegate like Luther Martin of Maryland, who had and would continue to have an extensive political career in his state, held the state governments paramount and “support[ed] them at the expence [*sic*] of the General Government,” wrote Madison as the unofficial transcriptionist of the Convention.¹⁶⁹ In the preceding year, the opposition to even a slight empowerment of the federal government was so resistant that the host state of the Annapolis convention, Maryland, was one of four state legislatures that refused to participate in any reform.¹⁷⁰ Moreover, the problems associated with the Confederation animated from the self-interest of each state’s representatives in Congress—the main reason Congress sanctioned

¹⁶⁷ James Madison, “The Virginia Plan, May 29, 1787” in Rakove, *Writings*, 89-90. “Resolved [...] that the national Legislature ought to be impowered [*sic*] to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States.”

¹⁶⁸ Bilder, *Madison’s Hand*, 58. Bilder herself also took the term “national” literally believing Madison’s idea of a “national efficient Government” was different than a call for a strong and energetic national government—characterizations by George Washington of a confederate republic.

¹⁶⁹ Madison, *Notes*, 159. Martin was a member of the Confederation Congress from 1784 to 1785, and then served in the Lower House of Maryland’s state legislature in 1787—when he also became a delegate to the Federal Convention. Martin would also be Attorney General of Maryland from 1778 to 1805. During his tenure from 1818 to 1822, he additionally served as the Attorney General of Maryland. In *McCullough v. Maryland*, Martin represented his state in a defense of a state government’s right to tax the federal government in front of the Supreme Court.

¹⁷⁰ Connecticut, Maryland, South Carolina and Georgia all refused to participate. From 11 to 14 September 1786, twelve delegates from five states, New Jersey, New York, Pennsylvania, Delaware and Virginia, convened at the Annapolis Convention. The rest of the states, New Hampshire, Massachusetts, Rhode Island and North Carolina, appointed delegates, but they failed to arrive in time to participate.

reformatory conventions outside of their body. For these reasons, the decision of ratifying the Constitution would ultimately fall, as will be shown in Chapter 4, to the people of each state.

Nevertheless, there was reason to worry about consolidation of the states. Alexander Hamilton on 18 June 1787 proposed a plan, which Madison noted “went beyond the ideas of most members.”¹⁷¹ Hamilton said that no plan that left “the States in possession of their Sovereignty could possibly” fix the problems of the Confederacy.¹⁷² The “evils” of the Confederation, he pressed, could only be “avoided” by the “compleat [*sic*] sovereignty” in a truly national government—governed by an “elective Monarch.”¹⁷³ On 19 June 1787, James Wilson tried to convince his colleagues that the states were never individually sovereign.¹⁷⁴ Hamilton initially agreed with Wilson’s argument, but Madison noted Hamilton’s contradictory position since he later admitted that each state held a right to secede under the Articles.¹⁷⁵

The culmination of the past two days on 20 June 1787 resulted in a move by Oliver Ellsworth of Connecticut and Nathaniel Gorham of Massachusetts to “drop the word *national* [from Madison’s resolutions], and retain the proper title ‘the United States’” to refer to the government—a motion met with no objection.¹⁷⁶ While the word *national* was a nominal term, some, possibly due to Hamilton and Wilson, observed, as John Lansing of New York did, “that the true question [of Ellsworth and Gorham’s motion] was, whether the Convention would adhere

¹⁷¹ Ibid., 137.

¹⁷² Ibid., 129.

¹⁷³ Ibid., 132, 136; Bilder, *Madison’s Hand*, 93. Bilder claimed that Madison either exaggerated this account or this was a ploy devised by the two in order to make the plan of the formation of a nation easier to swallow. I cannot agree with this assessment because the private correspondence of Hamilton demonstrated that the call for a single American state was very much his own brainwork.

¹⁷⁴ Madison, *Notes*, 153. According to Madison, Wilson thought “that when the Colonies became independent of G[reat] Britain, they became independent also of each other. He read the declaration of Independence, observing thereon [*sic*] that the *United Colonies* were declared to be free & independent States; and inferring that they were independent, not *individually* but *Unitedly*.”

¹⁷⁵ Ibid., 153. Hamilton “assented to the doctrine of Mr. Wilson. [...] He was not yet prepared to admit the doctrine that the Confederacy, could be dissolved by partial infractions of it.”

¹⁷⁶ Ibid., 154.

to or depart from the foundation of the present Confederacy.”¹⁷⁷ While the end of the Convention resulted in a new constitution, delegates like Lansing and Gorham did all they could to re-center the focus of the Convention to solely amending the Articles, but to no avail—the majority opinion was for a new a constitution.¹⁷⁸ This development forced neither Gorham nor Lansing to exit the Convention as they both remained to view the progression of the proceedings. However, after six weeks, two of the three New York delegates, Lansing and Robert Yates eventually departed entirely from the Convention on 10 July 1787 because they believed that the new government of the Convention was antithetical to a confederation—leaving New York’s delegation without a quorum, and consequently Hamilton without an ability to vote.¹⁷⁹ Although not one delegate was completely satisfied with the Constitution, the delegates spent an entire summer locked in secrecy and agreed to a constitution that instituted a particular structure of government.¹⁸⁰

At the close of the Convention on 18 September 1787, a woman approached delegate Dr. Benjamin Franklin of Pennsylvania and inquired about the structure, a republic or a monarchy, the Framers agreed upon. “A republic replied the Doctor if you can keep it,” observed fellow-delegate James McHenry of Maryland.¹⁸¹ Franklin’s answer hinted that the Constitution’s new government

¹⁷⁷ Madison, *Notes*, 155; Bilder, *Madison’s Hand*, 96. To Bilder, the phrase “government of the United States” was “ambiguous” because in her mind, Madison’s as well as any other delegate’s use of national, was exclusively literal rather than possibly figurative at certain moments. However, as Madison wrote in the *Notes*, this phrase was more “proper” for it specified the intent to institute a sufficiently empowered central government to govern a union of sovereign states.

¹⁷⁸ When Gorham seconded Ellsworth’s motion to drop the word “national,” he also made a motion to consider the resolutions as amendments to the Articles. The former succeeded, but the latter did not.

¹⁷⁹ See From Robert Yates and John Lansing to Governor George Clinton, Albany, December 21, 1787, *The Documentary History of the Ratification of the Constitution Digital Edition*, John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan, eds., 28 vols. (Charlottesville: University of Virginia Press, 2009), 19:454-459. Henceforth, abbreviated as *DHRC*. The two delegates in a joint letter to New York Governor George Clinton explained that their departure centered on two objections—the abandonment of the Articles and a confederate structure of government. Gorham stayed until the very end and was a signatory to the Constitution, but his co-delegate Elbridge Gerry of Massachusetts alongside Randolph and George Mason of Virginia all refused to sign the document for somewhat varying details except for the common request of a Bill of Rights.

¹⁸⁰ Stewart, *Summer*, 53. Stewart noted that the Constitution was a far cry away from Madison’s Virginia Plan.

¹⁸¹ *Records*, 3:85.

was a republic mixed with truly federal principles since he implied that its existence was as ephemeral as the previous two American unions. The “republican complexion” of the Constitution was unambiguously clear, Madison publicly said in *Federalist* No. 39 on 18 January 1788, but the nature of the republic was less certain for the opponents of the Constitution. Aside from the abandonment of the present Confederacy, Lansing’s other issue with the Convention was its ostensible departure from the creation of another confederation. “[T]he adversaries of the proposed constitution”—of which Lansing was clearly one, Madison added, claimed that the Convention did not “preserve the *federal* form, which regards the union as *confederacy* sovereign states; instead of which, they have framed a [truly] *national* government, which regards the union as a *consolidation* of the states.”¹⁸²

The accusation astonished Madison, who asked, “by what authority this bold and radical innovation was undertaken?” Madison, who was never absent from the Convention except for “a casual fraction of an hour,” inquired to learn of those details he missed which created a consolidated state rather than a confederacy.¹⁸³ When Ellsworth’s motion passed on 20 June 1787, the date marked the end of any plans to create a single American state for the nationalist camp’s leader, Hamilton, who relayed to Washington on 3 July 1787 that he was “seriously and deeply distressed” at the Convention’s proceedings when he departed on 29 June 1787.¹⁸⁴ Hamilton never openly admitted defeat of his nationalist plans, but he implicitly did so in *The Federalist*—a collaborative effort between him, Madison and John Jay which produced a series of newspaper articles that intended to persuade New York to ratify the Constitution.¹⁸⁵ Under the disguise of a

¹⁸² Madison, “No. 39,” 196. (emphasis in the original) In this case, Madison’s elaborate comparison between a “federal” and a “national” government noted the literal connotations of both terms.

¹⁸³ James Madison, quoted in Stewart, *Summer*, 48.

¹⁸⁴ *PAH*, 4:223-224. Hamilton, a Convention attendee from 18 May to 29 June 1787, felt his attendance was tantamount to a “waste of time.” Although Hamilton did return to Philadelphia sometime between 6 and 13 August 1787, he found all of the Convention’s proceedings up to this point detrimental to his nationalist plans.

¹⁸⁵ Ellis, *Quartet*, 176-177.

pseudonym, Publius, the three men, though in different tones, agreed with the assessment that the Constitution was the result of a combination of republicanism and federalism, or more directly a federal republic.¹⁸⁶ Without a clear and explicit statement of consolidation, and *nation* being enough of a strong term for that purpose, the states would individually continue to remain internationally sovereign.

Because the Framers eliminated any national verbiage within the document for fear that it would be construed as something literal, theories of singular statehood from current scholars must argue that a single American state was created through means other than an *expressed* manifestation of such.¹⁸⁷ These theories have resorted to *inferences* of the Constitution's text to argue that certain provisions are incompatible with a union of multiple sovereignties. Still, a few scholars have indicated that specific phrases of the Constitution did merge the sovereignty of the states. Of all the state ratifying conventions, which decided admission to the Constitution's union, Virginia's was the most important for it included Madison, one of the most authoritative voices of the Constitution, and a debate on this very question of confederation versus consolidation via an *expressed* statement.¹⁸⁸ Did the Preamble to the Constitution announce the creation of an American state? Patrick Henry, an influential delegate of the Virginia ratifying convention, rightly believed that "[t]he fate of this question and America may depend on" the document's would-be most recognizable words, "We the People of the United States," which he viewed as evidence of a "consolidated government."¹⁸⁹

¹⁸⁶ Here, my interpretation referenced an earlier quotation of Madison from *Federalist* No. 39, in which Madison harnessed Emer de Vattel more so than Baron de Montesquieu in the explanation of the structure of the Constitution's government—though he did specifically cite Montesquieu's influence in other *Federalist* essays.

¹⁸⁷ Bowen, *Miracle*, 118. Bowen countenanced: "This word national, Ellsworth pointed out, would frighten people."

¹⁸⁸ Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic* (New York: Vintage Books, 2007), 120. Ellis agreed about the importance of the Virginia ratifying convention in Richmond: "The Henry-Madison debate in June of 1788 can lay plausible claim to being the most consequential debate in American history." In particular, 5 June 1788 was the day that produced the most pertinent answers to these questions.

¹⁸⁹ *DHRC*, 9:951.

In response to Henry's suspicion, Madison argued, figurately-speaking, "that this Government is not completely consolidated,—nor is it entirely federal" because of its various features such as an appointed Senate and popularly-elected House of Representatives.¹⁹⁰ Still, "[t]he question turns, Sir, on that poor little thing—the expression," said Henry, "*We, the people*, instead of the States of America," where, to him, the former signified consolidation and the latter meant confederation.¹⁹¹ Unknown to Henry, the delegates did utilize the language he desired for the initial draft of the Constitution contained a preamble written by Charles Pinckney of South Carolina that was more prolix with respect to the inclusion of every state's name:

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, do ordain, declare, and establish, the following constitution, for the government of ourselves and posterity.¹⁹²

Although this preamble was unanimously adopted, the draft of the Constitution had serious flaws: wordiness, unreasonably lengthy and lack of finesse. Therefore, the Convention "appoint[ed] a committee of five, to revise the style of, and arrange, the [twenty-three] articles agreed to."¹⁹³

Then, five days before the Constitution was signed, the most active member of the Committee of Revision, commonly renamed by historians as the Committee of Style, Gouverneur Morris of Pennsylvania, presented a revised preamble; he decided to change Pinckney's phrase to "We the People of the United States." The next day, the Convention "proceed[ed] to the comparing

¹⁹⁰ See Madison, "No. 39," 197. Madison made the same argument in *Federalist* No. 39, but employed the word *national* rather than *consolidated*. Here, Madison semantically compared the terms *national* and *consolidated* with *federal*: "The house of representatives will derive its powers from the people of America [in this respect] the government is *national*, not *federal*. The senate, on the other hands, will derive its powers from the states [and in this respect] the government is *federal*, not *national*." (emphasis in the original) The different components of the government and Constitution were "partly federal" and "partly national," but these were semantic usages of the words because the government was, at its core, federal—a confederacy.

¹⁹¹ *DHRC*: 9:951. (emphasis in the original)

¹⁹² Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*. 5 vols. (Washington, D.C.: United States Congress, 1827-1830), 1:145. Henceforth, abbreviated as *DAFC*. (emphasis added)

¹⁹³ *Ibid.*, 1:295.

of the report from the committee of revision, with the articles which were agreed to by the [Convention].”¹⁹⁴ On 13 September 1787, the Convention agreed that the committee’s work largely conformed to the resolutions previously passed by the Convention.¹⁹⁵ The Convention implicitly agreed that the Preamble drafted by Morris conformed entirely in meaning with Pinckney’s preamble since the Convention charged this committee with instructions to “revise” the document according to “style” only.¹⁹⁶ The committee held no authority to change the meaning of any resolution, and thus the Constitution was nothing more than, as Pinckney relayed in his initial draft, a compact “to be agreed upon between the free and independent States of America.”¹⁹⁷ The Preamble ostensibly signified the existence of a single American people, but actually Morris’s change was necessary for it was not known that every state would ratify the Constitution—it would have been incongruous for the Constitution to have mentioned North Carolina and Rhode Island since these states initially refused to ratify the document.¹⁹⁸

As such, Madison explained to Henry that the Constitution was at its core federal for the “parties” to it were “[t]he people—but not the people as composing one great body—but the people as composing thirteen sovereignties.”¹⁹⁹ The real significance of this process, Madison

¹⁹⁴ Ibid., 1:307.

¹⁹⁵ Ibid., 1:298, 308. With respect to the Preamble, the changes were minimal as the Convention “moved and seconded [only] to strike out the word ‘to’ before ‘establish justice,’ in the preamble [drafted by Morris].”

¹⁹⁶ Ibid., 1:295.; See Ellis, *Quartet*, 150. In contrast, Ellis believes that the changes to the Preamble were “not just a stylistic revision,” but that “Morris smuggled the national agenda into the preamble of the Constitution.”

¹⁹⁷ *Records*, 3:604.

¹⁹⁸ Amar, “Of Sovereignty and Federalism,” 1450. “It is tempting here simply to invoke the Constitution’s famous first seven words—‘We the People of the United States’—and be done with it,” Amar admitted, “[f]or at first blush, they seem to furnish irrefutable proof that the sovereignty of one united People, instead of thirteen distinct Peoples, provided the new foundation of the Federalist Constitution.” Yet, that “temptation to place exclusive reliance on the Preamble’s opening phrase,” according to Amar, must be resisted. For historically, it denoted a multiplicity rather a singularity of sovereignty.

¹⁹⁹ *DHRC*, 9:995-996. Madison, further elaborated that under this system the Constitution’s government, “Should all the States adopt it, [...] will be then a Government established by the thirteen States of America.”; Wood, *American Republic*, 526-527. Wood recognized Madison as an authoritative voice on the Constitution, but in the Virginia state ratifying convention, Wood took the Anti-Federalist position, Patrick Henry’s, on the Preamble over Madison’s statements. Wood wrote that the Anti-Federalists who thought “that the Constitution intended [...] inevitable consolidation,” were correct, but he shockingly omitted Madison’s rebuttal from his analysis.

highlighted, was that the state legislatures abdicated the slim claim they had as the final authorities of the union to the people of each respective state, and consequently the term *state* altogether gained a new definition: the people in their sovereign capacity—the focus of Chapter 4. Yet, the Preamble included a few other words that could be construed as the unification of several sovereignties into one American state, “a more perfect Union.”²⁰⁰ These words apparently bore some resemblance to the language used by officials to describe the unification of Scotland and England into the state of Great Britain in 1707 under the Treaty of Union. In a letter to the Scottish Parliament dated 1 July 1706, Queen Anne stressed the necessity of “an entire and *perfect union*,” and an official decree in 1707 summarized the treaty as “rendring the *union* of the two kingdoms *more intire and compleat* [*sic*].”²⁰¹ Because the word *union* is an ambiguous political term—referring to either a single state or a confederation of states, its usage in a multitude of instances deserves more context than a simple glance over a few documents for apparent similarity.

Undoubtedly, the Founding generation was quite aware of the unification of Britain for in *Federalist* No. 5 Jay excerpted portions of Queen Anne’s letter to argue in support of ratification of the Constitution. The purpose of Jay’s reference to the incorporate union between England and Scotland was not to argue for American consolidation but to offer an example familiar to his readers about the broad importance to unify for defensive purposes in a single confederacy.²⁰² Before England, Scotland and Wales united as “one [literal] nation,” Jay wrote, they “were almost constantly embroiled in quarrels and wars with one another.”²⁰³ When Jay further noted that the

²⁰⁰ Rakove, *Original Meanings*, 180. “From the framers’ perspective, the ‘more perfect union’ embodied in the Constitution created a mode of federalism far more complex than either the Confederation or the [Virginia] program.”

²⁰¹ Amar, *America’s Constitution*, 36. Amar hypothesized that the Constitution’s phrase “a *more perfect Union*,” as written by Gouverneur Morris, “blended language from the official 1707 enactment [...] with Queen Anne’s [...] letter to the Scottish Parliament.” (emphasis added by Amar); See also Rakove, *Original Meanings*, 175, 180. Rakove singled out this specific phrase for he too believed it had consolidating tendencies.

²⁰² Jay, “No. 5,” 17-18. “The history of Great-Britain is the one with which we are in general the best acquainted, and it gives us many useful lessons.”

²⁰³ *Ibid.*, 18.

American states “may profit by [this] experience without paying the price which it cost them, “he alluded to Thomas Paine’s argument that a way to avoid both continental-scale conflict between several states and civil war within a single state was to form a federal union between them.²⁰⁴ Jay reasoned, with Montesquieu-esque semantics, that a single American nation rather than the division of the present-union into either “three or four nations” or “three or four confederacies” would temper “jealousies” and remove “apprehensions” between the states.²⁰⁵ For all his denunciations of a confederacy, Jay came to realize that in a confederate union the states proved to be a formidable structure of government: “As a nation we have made peace and war[,] vanquished our common enemies[,] formed alliances and made treaties, and entered into various compacts and conventions with foreign states.”²⁰⁶ Thus, the question about ratification was not a choice between confederation or consolidation, but “whether [the states would be] firmly united under one national government, or split into a number of confederacies.”²⁰⁷

Hamilton viewed the situation through the same lens: “The ideas of men who speculate upon the dismemberment of the empire, seem generally turned towards three confederacies; one consisting of the four northern, another of the four middle, and a third of the five southern states.”²⁰⁸ Hamilton assured his readers: “Nothing can be more evident than that the Thirteen States will be able to support a national government, better than one half, or one third, or any number

²⁰⁴ Ibid., 18.

²⁰⁵ In *Federalist* No. 5, Jay used both the denotation as well as the semantic connotation of the word *nation*. When he discussed the history of Great Britain, he employed a literal sense of the word. But in reference to the Constitution, the word *nation* was used to portray a metaphorical representation of a confederacy’s ability to act as single state. Throughout his *Federalist* writings, Jay routinely wrote the words *nation* and *confederacy* as if they were interchangeable. The latter being figuratively synonymous with the literal definition of a *confederation*.

²⁰⁶ Ibid., 6.

²⁰⁷ Ibid., 8.

²⁰⁸ Hamilton, “No. 13,” 60; See Bowen, *Miracle.*, 124. Before his departure from the Convention, Martin gave a speech of grievances that stretched two-days, which included a proposal to form two separate confederacies, one formed by the largest three states and the other formed by the remaining ten.

less than the whole” of the states.²⁰⁹ Although the three Federalists ultimately reached a similar conclusion on the Constitution’s fundamental structure, they expressed this consensus in somewhat different terms—at least, ways in which historians could later misconstrue.²¹⁰ The *Federalist* was initially a collaborative effort, where Madison and Hamilton engaged in peer-review, but this almost immediately suspended—leaving every member of the trio to work independently.²¹¹ While Hamilton agreed that the Constitution created another “confederate republic”—directly quoting Baron de Montesquieu on this topic at great length in *Federalist* No. 9, in *Federalist* No. 32 on the relationship between the central government and the state legislatures, he mentioned a “national sovereignty,” which was his own unique way of explaining that the state governments would aid the central authority as the holders of *governmental* power, or semantic sovereignty.²¹² If Madison and Hamilton had continued to read each other’s work,

²⁰⁹ Hamilton, “No. 13,” 62.

²¹⁰ Bailyn, *World Anew*, 101, 106. I agree with Bailyn on the *Federalist*: “While there was broad agreement on fundamental points and an acknowledgement of each author’s particular concerns, there was no ‘special allotment,’ Madison wrote, ‘of the different parts of the subject to the several writers’ and no concurrence on the weight to be given the various issues.” Understandably, it was impossible for each member of Publius to perfectly define and agree on the practical application of every article and every clause of the Constitution because Article III, on the federal Judiciary, was the shortest among the articles of the other branches. The Judiciary Act of 1789, chiefly authored by Oliver Ellsworth, delineated omissions such as the size and legal quorum of the Supreme Court (SCOTUS)—the most important of the federal courts. Specifics on the operation of SCOTUS were theoretical in the *Federalist*, but the fundamental framework of the Constitution was entirely fact-based. If there was one issue that received repeated explanation, it was over the concern that the Constitution effectively consolidated the states into a single American state. In every instance, Madison, Jay and Hamilton assured readers that this was not the case; Diamond, “Democracy,” in Wood, *Critical Issues*, 139. To wit, “The Federalist deals largely with factual matters. Whatever their differences, Hamilton and Madison could agree as to what the convention had done and what kind of country would be the result.”

²¹¹ *Ibid.*, 101.

²¹² Hamilton, “No. 9,” 39; *Ibid.*, 154-155. A “national sovereignty” was simply Hamilton’s way of expressing the governmental powers of the central and state governments rather than the admission that the Constitution would create a single American state. The Constitution does not propose “[a]n entire consolidation of the states into one complete national sovereignty [which] would imply an entire subordination of the parts; [...] 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.” In terms of actual *international* sovereignty, this would be untouched by the central authority—as it rested with the people rather than the governments of each state.

Madison may have suggested better phrasing of Hamilton's essay so as not to produce fears and confusion because Madison himself had abandoned this type of ambiguous language.²¹³

Hence, the Constitution's union was not politically similar to the union specified under the Treaty of Union. The former was a confederate union where each member-state was voluntarily bound meanwhile the latter was an "incorporate union" in which, Blackstone wrote, "[t]he two

²¹³ *JPM*, 9:357. In his "Vices of the Political System of the United States" of April 1787, Madison wrote that "[t]he great desideratum in Government is such a modification of the Sovereignty," which referred either to an international as well as governmental definition of the word, or possibly both. In "Vices," the majority of Madison's argument was the manner in which the states, though confederated, behaved "as a league of sovereign powers" rather than as "one sovereign power." Madison did not argue that a "confederation" was an impractical form of government, it was that the Confederacy under the Articles lacked the cohesion and unity of a true confederation. Therefore, Madison realized a reorganization of government power, or of semantic sovereignty, was vital to the remedy of the Confederacy's ills. For Madison, sovereignty also became a frequent synonym with metaphorical notions of a *nation* and *consolidation*. Oddly enough, an editorial footnote explained that "[a]t a later time someone other than [Madison] interlined '[governing power]' at this point [i.e. "modification of the Sovereignty"]." Madison did not seek to overturn the Confederacy, but to amend it with real coercive measures; Bilder, *Madison's Hand*, 92. Bilder wrote that when the Committee of Whole House, which included the very same delegates as the entire Convention merely ensured repeated debates on every issue for anything agreed in this committee reflected a mere recommendation to be accepted by the delegates later on in the capacity of the Convention, presented its Report on what aspects of the Virginia Plan survived on 13 June 1787—nearly everything even the veto of state laws made it through committee, Madison's *Notes* on it were radically different from the personally recorded observations of delegates William Paterson of New Jersey, Rufus King of Massachusetts, Hamilton and Yates. Bilder found that Madison refused to characterize the Virginia Plan as the absorption or annihilation of "state sovereignty" or "state governments" as the aforementioned delegates did and, instead, replaced "sovereignty" with "the more ambiguous idea of 'power.'" Actually, I find the term *sovereignty* in this context to be "ambiguous" and Madison's explanation of the Virginia Plan with *power* to be a clarification. Under the Articles, the state legislatures were arguably the sovereign authorities because the people were not recognized as such until the Constitution's ratification. However, in this respect, the Virginia Plan did not relocate international sovereignty of the state legislatures to the central government of the Constitution, which would have constituted a single American state. Under the Constitution, the power of the central government and the state legislatures were one and the same—sustained by delegated powers which animated from the sovereign authority of the people of each state. It was in this literal sense, international sovereignty, that Madison rightly differentiated governmental power from sovereignty. Thus, Madison chose to record the proceedings of the Convention in this light. The other delegates, whether they were dismayed at the fact that the state governments would no longer hold most governmental authority or like Hamilton simply had nationalist agendas, exaggerated the main point, which was that the central government of the Constitution "absorbed" only the semantic aspect of sovereignty. As Hamilton later explained in *Federalist* No. 32, the state legislatures became a part of the symbolic "national sovereignty" of the Confederacy's central government. Madison abandoned this semantic use of sovereignty, which referred to governmental power, in his *Federalist* essays because it was precisely ambiguous. With the Constitution, real sovereignty belonged to the people of each state, not any kind of government; George W. Carey, "Publius: A Split Personality?" *The Review of Politics*. vol. 46, no. 1 (1984): 7-9. Carey centered his essay on the work of two academics, Douglass Adair, who settled authorship disputes between some of the *Federalist* essays in the mid-1940s, and Alpheus T. Mason, who utilized Adair's methodology on the authorship debate to explain the political backgrounds of Madison and Hamilton in the *Federalist*. I think past debates about authorship can contextualize the differences in language utilized by Madison and Hamilton. "Adair [...] contends: Hamilton felt so strongly about the need for an overruling, irresponsible and unlimited government that it showed through even in his *Federalist* essays, in spite of his attempt to conceal his opinions in order to achieve ratification." "Likewise, both Adair and Mason detect authoritarian over-tones in many of Hamilton's essays, overtones which, they maintain, are absent from Madison's contributions."

contracting states are totally annihilated [qua sovereign states], without any power of a revival; and a third arises from their conjunction, in which all the rights of sovereignty [...] must necessarily reside.”²¹⁴ The states of Scotland and England agreed to merge/relinquish their respective sovereignty in order to form a third state. Naturally, these “contracting” states would forever be politically non-existent, and secession—Blackstone’s “power of revival”—of any of the two parties would be illegal. The abrogation of sovereignty contained in this treaty was totally absent in the Constitution. The treaty included an *expressed* statement which both relinquished the sovereignty of the contracting states and announced the creation of a single state:

That **the two Kingdoms of Scotland and England, shall**, upon the first Day of May next ensuing the Date hereof, and for ever after, **be united into one Kingdom by the Name of Great-Britain**, and that the Ensigns Armorial of the said united Kingdom, be such as her Majesty shall appoint; and the Crosses of St. Andrew and St. George be conjoined in such a manner as her Majesty shall think fit, and used in all Flags, Banners, Standards, and Ensigns, both at Sea and Land.²¹⁵

In stark contrast, the Constitution’s Preamble did not include either of these two characteristics found in the treaty above:

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**.²¹⁶

Historically, the legal precedent established for both the relinquishment and recognition of sovereignty was an expressed, or written, statement of such actions. This treaty did not set the precedent, but it did continue the trend of expressed intent into the eighteenth-century. As a result, in 1783, the signatories to the Treaty of Paris strictly adhered to this rule:

²¹⁴ William Blackstone, quoted in Amar, *America’s Constitution*, 30-31. Amar argued that the Treaty of Union and the Constitution espoused Blackstone’s idea of a merger of sovereignties. The former being a model for the latter.

²¹⁵ “Articles of Union” or The Treaty of Union, Art. I, (U.K.: Parliament, 1707), <https://www.parliament.uk/documents/heritage/articlesofunion.pdf>. (emphasis added)

²¹⁶ Constitution, Preamble, in Amar, *America’s Constitution*, 479. (emphasis added)

His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina and Georgia, **to be free sovereign and independent states**, that he treats with them as such, and **for himself, his heirs, and successors, relinquishes all claims** to the government, propriety, and territorial rights of the same and every part thereof.²¹⁷

As shown above, King George III of Britain *expressly* recognized the sovereignty of every member of the United States by individually naming each state and unambiguously relinquishing any and all claims of sovereignty over them.

Additionally, the Treaty of Münster, which emerged out of the Peace of Westphalia in 1648, heavily inspired the Treaty of Paris. Indeed, the eerie similarity between the two treaties demonstrates that the historical legal precedent was an expressed manifestation of intent:

Firstly, **the aforesaid Lord King declares and recognizes that the aforesaid** Lords States General of the **United Netherlands** and the respective provinces thereof, with all their associated districts, cities, and dependent lands, **are free and sovereign states**, provinces, and lands, upon which, together with their associated districts, cities, and lands aforesaid, **he, the Lord King, does not now make any claim, and he himself and his successors descendants will in the future never make any claim**; and therefore is satisfied to negotiate with these Lords States, as he does by these presents, a perpetual peace, on the conditions hereinafter described and confirmed.²¹⁸

As shown above, King Philip IV of Spain *expressly* recognized the sovereignty of each province of the United Netherlands. However, unlike the British-American accord, the negotiators at Münster decided to preface the first article with the names of these “aforesaid” states rather than to individually name them within the initial article. Yet, everything else remains unchanged as this treaty also unequivocally relinquished Spanish control over these territories. Moreover, this historically-established legal principle was, and remains present-day, an assumed rule of international affairs.

In short, a state cannot lose, or forfeit, its sovereignty, simply by failing to *expressly* retain it in international compacts. Even before the Westphalian conferences, states already began to

²¹⁷ “Definitive Paris Peace Treaty,” Art. I in Miller, *Treaties*, 2:152. (emphasis added)

²¹⁸ “Peace of Münster,” The Treaty of Münster or The Treaty of Westphalia (1648), Art. I, in H. Rowen, ed., *The Low Countries in Early Modern Times: Select Documents* (London, Macmillan, 1972), 181. (emphasis added)

operate on this basic principle of international sovereignty.²¹⁹ States must directly manifest any act or intention to *alter* their national sovereignty, e.g. to *abdicate* such sovereignty to another sovereign state, again, as with the Articles of Union of 1707. Foreign relations assume that parties to international compacts are states since there cannot exist any higher authority than a sovereign state to abrogate it.²²⁰ A state could never lose its sovereignty either by an omission of retention or by an *inferred* claim that it was lost/surrendered through a hazy reading of a treaty since these dangerous precedents would naturally produce an unstable world—agreeable only to conquerors.²²¹ Nevertheless, with regard to the Constitution, specious arguments have been made that the American states lost their individual sovereignty through such an inference.²²²

A brief comparison between the Articles and the Constitution will strikingly note the omission of Article 2 from the former in the latter, which expressed a retention of sovereignty. As explained in Chapter 2, the sole purpose of including this provision was for the fact that the colonies had *yet* to be recognized-states. By the time of the Constitution’s ratification, the American states were *already* official members of the international community—a status that no longer required consecutive assertions as sovereignty preceded the Constitution. The golden rule

²¹⁹ Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Martinus Nijhoff Publishers, 2004), 82, 87-88. Before the Peace of Westphalia, “distinct separate polities both within and without the Empire had started to establish a solid foundation based on the idea of political autonomy.” Indeed, Beaulac acknowledged that the Treaty of Münster “formally recognized” the Netherlands and “explicitly provided for the independence of Swiss Confederation”—though it was not necessary since the Swiss “were already at this point *faits accomplis*.”

²²⁰ Tuck, *Sleeping Sovereign*, 69. Tuck acknowledged that “the modern idea of sovereignty in international relations [means] there is no juridical superior over them.” Hence, only sovereign states have the authority to relinquish their own sovereignty by expressed consent.

²²¹ In other words, I ask, can one imagine sovereign states having to expressly retain their sovereignty in order to avoid losing it every time they joined an international association or compact? If one answers in the affirmative, then this interpretation would legalize rank imperialism.

²²² Rakove, *Original Meanings*, 181. Rakove, though not nearly explicit, suggested that the Constitution as a whole “possess[ed]” national tendencies that “would unfold gradually.” This interpretation of consolidation had no historical or legal precedent; Gienapp, *Second Creation*, 88. Gienapp was also vague in his argument about the basis for the Constitution as a national act, but does erroneously credit phrases of the Preamble as auxiliary language. All that Gienapp implied was that nationalist tendencies were “smuggled in” and thus, the Constitution itself constituted a national rather than a federal act.

of international law was, and still is, that only a state itself can expressly relinquish its own sovereignty over a territory—therefore it is always assumed or implied that it remains sovereign in the absence of such an explicit indication. Still, theories of statehood for a single American state associated with the Constitution argue that the opposite can be true. Article I, Section 10 of the Constitution prohibited any state from exercising powers that the Declaration of Independence verbatim associated with sovereign states:

No State shall enter into any Treaty, Alliance, or Confederation [...]
No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports
No State shall, without the Consent of Congress, [...] enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War [...]²²³

Would it be safe to infer that the Constitution’s prohibitions signaled the creation of a single American state? Well, to positively answer this question would ignore the fact that such regulations completely complied with the structure of a federal republic. According to the Swiss jurist Emer de Vattel,

several states may untie themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a **federal republic**: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put restraints on the exercise of it, in virtue of voluntary engagements.²²⁴

If the American states were no longer individually sovereign, then a list of specific prohibitions of powers for the state governments would be wholly unnecessary as a national government by virtue of its character wields unabated authority. Indeed, this list clearly reads as an agreement to restrain the exercise of sovereign powers. The Articles contained similar restrictions—though particularly loose. To argue, by an inference that a multi-purposeful phrase, word or entire section of text eliminated a state’s sovereignty was a trivial argument—antithetical to international law.

²²³ Constitution, Art. I, Sect. 10, in Amar, *America’s Constitution*, 484-485; Declaration, Conclusion, in Gutzman, *Guide to the Constitution*, 230. “Power to levy War, conclude Peace, contract Alliances, [and] establish Commerce.”

²²⁴ Vattel, *Law of Nations*, 84. (emphasis added)

When Article V of the Constitution provided that a ratified amendment be in full effect, even in states which voted against it, it should not be immediately assumed that the international sovereignty of the states was somehow infringed.²²⁵ Clearly, the Constitution’s provisions, especially Article VI’s supremacy clause, bound and compelled obedience, but this was necessary for a confederation’s survival. If somehow the voluntary compliance of every member of a truly federal system could destroy the internationally sovereign status of the states, then every member-state of the United Nations (UN) whose Charter likewise bound states by all ratified amendments could be deemed a district of a sovereign state called the UN.²²⁶ The supremacy of the Constitution, federal laws, treaties and judicial decisions made by federal courts did not imply national supremacy of the literal kind, which would have placed the states at unlimited submission to the federal government.²²⁷ The authority of the federal government rested on the “*republican cause*” and the “*federal principle*,” Madison reiterated in *Federalist* No. 51, which altogether structured the “federal republic of the United States.”²²⁸ After Francis Corbin, a delegate of the Virginia ratifying convention, heard a substantial amount of the *Federalist* and Anti-Federalist persuasions,

²²⁵ Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (New York: Basic Books, 2015), 17-18. This is Amar’s argument: “In dramatic contrast to Article VII—whose unanimity rule that no state can bind another confirms the sovereignty of each state *prior to ratifying* the Constitution—Article V does not permit a single state convention, *post-ratification*, to modify the federal Constitution for itself. Instead, Article V makes clear that a state may be bound by a federal constitutional amendment even if that state votes against the amendment in a properly convened state convention [...] This sharp Article V break with the Article VII protocol of state unanimity in 1787-1788 is flatly inconsistent with the idea that states remain sovereign *after* joining the Constitution, even though they were sovereign *before* joining it. Ratification of the Constitution itself marked the moment when previously sovereign states gave up their sovereignty and legal independence.”

²²⁶ Amendments to the United Nations Charter are also made by a procedure quite similar to the Constitution—set out in Chapter XVIII, Article 108 of the UN Charter:

Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.

²²⁷ Rakove, *Original Meanings*, 171. On the principle of federalism, Rakove began with the assertion of “national supremacy,” but his tangled web of political interpretation cannot explain why the Constitution’s supposed national government did have authority associated with a nation. To him, any coercive measures effectively translated into literal national authority.

²²⁸ Madison, “No. 51,” 270, 272. (emphasis in the original)

he stated that on 4 July 1788, his mind was set on the Constitution—mainly due to Madison’s explanations.²²⁹

When in the Convention, Martin observed the additions of a central judicial authority and a bicameral Congress, he forcefully postulated that such things were inconsistent and never existed with confederations.²³⁰ He was too blinded by political ideology to realize as Corbin did that “coercive power [was] necessary in all Governments” and that that was vitally essential in a “confederate Government,” but the description of the Constitution’s government as a confederacy was not completely accurate, Corbin admitted.²³¹ “Let me,” he interjected, “call it by another name, a Representative Federal Republic, as contradistinguished from a Confederacy [for] [t]he former is more wisely constructed than the latter.”²³² Therein lied the significance of the transition from a continental republic to a confederate republic and from this to a federal republic, all of which linguistically connoted the same thing, but each successor indicated stronger central authority than its predecessor coupled with an increase in optimism that this particular unification would ultimately last longer apropos Franklin’s characterization of the Constitution’s republic. To be comprehensive, the government, Corbin explained, could not be “oppressive” since it was not a truly national government that could legislate “in all cases whatsoever,” but it existed as a government with “powers [...] only of a general nature” which meant that they extended solely “to protect, defend, and strengthen the United States,” the individual states themselves as

²²⁹ *DHRC*, 9:1010. Francis exclaimed that “[t]he definition given of [the Constitution] by my honorable friend (Mr. Madison) is, in my opinion, accurate.”

²³⁰ *Bowe, Miracle*, 119, 124. “Martin actually said [...] that he saw no necessity for a Congress with two branches. One was preferable [and a] national judiciary extended into the states would ineffectual and resented [...] To grant unnecessary powers to the general government might well defeat ‘the original end of the Union.’” Martin himself said, “I have never heard of a confederacy having two legislative branches.”

²³¹ *DHRC*, 9:1009. “Is there no coercive power in the confederate Government of the Swiss? In the alliance between them and France there is a provision, whereby the latter is to interpose and settle differences that may arise among them; and this interposition has been more than once used. Is there none in Holland? What is the Stadholder? This power is necessary in all Governments.”

²³² *Ibid.*, 9:1010.

confederated.²³³ With all of this taken into consideration, historians, lawyers and political scientists alike have criticized the Constitution for the lack of democratic elements without the thought that this central government was an intergovernmental organization whose popular reality lurked beneath the daily responsibilities of the federal as well as state functionaries.²³⁴

²³³ Ibid; “Declaratory Act,” in Shain, *Historical Context*, 128-129.

²³⁴ Levinson, *Undemocratic Constitution*, 6-7. Levinson postulated that the Constitution was framed with “insurmountable barriers in the way of any acceptable notion of democracy” such as an electoral college and “the ability of thirteen legislative houses in as many states to block constitutional amendments desired by the overwhelming majority of American.” These “structural provisions” protrude as undemocratic because he believed that the Constitution instituted a truly national government which transcended borders of regional districts called *states* rather than a federally representative government where delegations of sovereign states congregated in order legislate on common, “national” interests.

Chapter 4 – “Vattel, Barl[a]maqui[,] Locke & Montesquie[u] seem to be the standar[d]s.”²³⁵: The Manifestations of State Sovereignty via Democracy

While the past chapters verified the external, or international, sovereignty of the American states, this chapter determines the precise location of internal American sovereignty throughout the years already surveyed, but especially within the union established by the Constitution. Although the Declaration of Independence affixed the American Revolution to the cause of separate independence among the thirteen colonies, the document equally contained an ideological promise of popular sovereignty, or democracy.²³⁶ When the people of each state was tasked with the decision of ratification, 1787-1790, the Declaration’s ideological promise of democracy was fulfilled. Most analyses by scholars of ratification were tepid for they failed to realize the political significance of each state’s people’s right to unilaterally nullify the Articles of Confederation and secede from its union. The only possible explanation for these actions was what the political science of the late eighteenth-century defined as democracy, the uncontrollable authority of the people to overpower delegated-agents.²³⁷ If this was the case, how did the phenomenon of popular sovereignty affect the machinations of the Constitution’s federal republic?

During the second American union, the bearer of internal sovereignty, or supreme power, was seriously in flux.²³⁸ Arguably, once the colonies became actual states, the state legislatures

²³⁵ *PJM*, 1:120.

²³⁶ Billias, *American Constitutionalism*, 16. Although Billias’s interpretation was tied to the conclusion that the Constitution created a single American state, he too saw that “[t]he Declaration conveyed [...] the constitutional idea of a sovereign people possessing constituent power in the government.”

²³⁷ Gaetano Salvemini, “The Concept of Democracy and Liberty in the Eighteenth Century,” in Conyers Read, ed., *The Constitution Reconsidered* (New York: Harper Torchbooks, 1968), 105. “The writers of the eighteenth century meant by ‘democracy,’ that form of government in which all the citizens, whatever their social station, met together in a general assembly and there made laws, gave the final decision on peace or war and on the most important affairs of the commonwealth, and appointed officials to deal with the minor matters of daily administrators.” However, they also noted, as I demonstrate, that the people may delegate these responsibilities to officials without ever ceasing to be any less sovereign.

²³⁸ Wood, *American Republic*, 354. “The problem of sovereignty was not solved by the Declaration of Independence. It continued to be the most important theoretical question of politics throughout the following decade, the ultimate abstract principle to which nearly all arguments were sooner or later reduced.”

became the closest things deemed as the repositories of sovereignty, or at least final authority.²³⁹ The federal government of the Articles—being an intergovernmental entity—was the product of ratification by the state legislatures and therefore lived in a condition of dependency, and the states themselves existed as totalitarian democracies wherein each state was a sovereign state, but the state legislatures had final authority by default since the voters in each state simply elected them, nothing more. The people did not possess the power to overrule the state governments, much less the federal government. Commentators insinuated that the people were sovereign, but these assertions were without legal force—merely, decorative language.²⁴⁰ Both the Second Continental Congress and the Confederation Congress rested supposedly on the authority of the people, but authorization on any and all matters rested with the state governments.

Under the first American union erected with the Declaration, the external sovereignty of the individual states was the main concern throughout the Revolution, and the question of internal sovereignty was reserved for a later date. Yet, that promise was always there for Thomas Jefferson, who authored the document, purposefully entangled statehood with popular governance when he announced the dissolution of monarchical “bands” and the resumption of natural, democratic ones,

²³⁹ Ibid., 372. Associations of sovereignty with the ability to legislate muddied the waters of “the orthodox notion of sovereignty” as widely understood in “eighteenth-century political science.” Arguments grounded in this reasoning therefore suggested by default that “the legislatures of the states had become the sovereign powers in America.”; See Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W.W. Norton & Company, 1988), 261-262. Although ambiguities of internal sovereignty in the Confederation existed, Morgan agreed that “[t]he dominance of representatives in the state governments meant their dominance over the [Confederation] Congress, to which they chose the delegates.”; See also *DHRC*, 9:996. Madison even assessed that “[t]he existing system [under the Articles] ha[d] been derived from the dependent derivative authority of the Legislatures of the States; whereas [the Constitution was] derived from the superior power of the people.”

²⁴⁰ Morgan, *Inventing the People*, 373-374. The political elite of each state cemented sovereign authority within the legislature at the expense of the people, which resulted in a confused and contradictory model of sovereignty. If it was argued that the people, in any sense, held sovereign power, it was restricted to the election of representatives, i.e. totalitarian democracy. Furthermore, an election translated into a partial or even complete surrender of the people’s sovereignty to whatever body or individual was elected. Still, the theory continued, the people could theoretically revolt in the event that the government became subjectively tyrannical—apparently whatever the circumstances, sovereign or not—because all power is derived originally from the people. Writers in defense of this system were very selective in the attributes of sovereignty. To them, a delegation of power erroneously meant a surrender of power, and the people themselves, though not “seated” with power, were somehow able to be derived of it.

characterized as “the powers of the earth.”²⁴¹ Many eighteenth-century political philosophers theorized that the masses were the original holders of sovereignty, and as time progressed, they forfeited it to install new sovereign governments—thus arose the monarchies and aristocracies of the day. The Declaration announced the return to the original state of the hoi polloi as the true repository of sovereignty, which translated into a shared political equality, an indispensable tenet of democracy, that the people individually possessed: “The separate and equal station to which the Laws of Nature and of Nature’s God entitle them.”²⁴² Jefferson’s assertions were not mere utopian ideals, he detailed a political reality that had *yet* to exist in the history of the world whereby the people could collectively consent to their government, i.e. “consent of the governed.” Consent, Jefferson meant, was “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect [*sic*] their Safety and Happiness,” or simply the right of the people to refuse.²⁴³

In effect, the Declaration constituted the proposition of popular sovereignty, which in a world of aristocracy and monarchy, could only exist through illegal, revolutionary means.²⁴⁴ The state governments, those which even put their constitutions to a referendum, did not exist by the will of the people.²⁴⁵ Democracy meant the seemingly legitimization of revolutionary activity, but

²⁴¹ Kevin R. C. Gutzman, *Thomas Jefferson – Revolutionary: A Radical’s Struggle to Remake America* (New York: St. Martin’s Press, 2017), 27-28. Although it was edited by Congress, which did not distort the message of its famous preamble, and the concluding paragraph borrowed language from Richard Henry Lee’s June 1776 resolutions, Jefferson was the chief author of the Declaration; Declaration, Preamble, in Gutzman, *Guide to the Constitution*, 229. Many eighteenth-century theorized that the masses were the original holders of internal sovereignty which they then forfeited to install new sovereign governments—thus arose monarchy and aristocracy. The Declaration announced the return to mankind’s original state as the true repositories of sovereignty—“all men are created equal.”

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: The Belknap Press, 2017), 201.

²⁴⁵ Morgan, *Inventing the People*, 257-259. The legislature of Massachusetts *allowed* the people of the state to elect a convention empowered to draft a constitution after the state government bypassed the recommendation of John Adams that the people be involved in the entirety of this process. A constitution was drawn up which the people voted down. None of these actions constituted sovereign authority for this was all a mere allowance by the benevolence of the state

revolution was not democracy at all. The absolute, final and indivisible description of sovereignty, which prevailed in the eighteenth-century, realized the legal potential of a people of one state to be equally sovereign to either a governmental body or a king of another state.²⁴⁶ Among the Founding generation, there was a tacit consensus that Emer de Vattel, Jean-Jacques Burlamaqui, John Locke and Baron de Montesquieu were the premier writers on political theory.²⁴⁷ According to William Bradford, Jr., who was the official printer of the First Continental Congress, the members of that conclave heavily utilized Philadelphia's only "public" library, which shared its residence in the same building as the Congress, Carpenter's Hall. "For by what I was told," stated Bradford, "Vattel, Barl[a]maqui[,] Locke & Montesquie[u] seem to be the standar[d]s to which [the delegates] refer either when settling the rights of the Colonies or when a dispute arises on the Justice or propriety of a measure."²⁴⁸

These European thinkers concluded that only three "kinds," "forms" and "species" of government could possibly exist because a state required a single and specific location of its internal sovereignty whether that was in the people as in democracy, in an elite few as in an aristocracy or in a sole individual as in a monarchy.²⁴⁹ Additionally, these three forms could be

government, and also by Adams's intervention with his ideas of popular sovereignty in the whole matter forced these events. Another constitution was made, with Adams more in control

²⁴⁶ Bailyn, *Ideological Origins*, 198. For these European political thinkers, sovereignty, Bailyn wrote, "was the notion that there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself."

²⁴⁷ See Ray Forrest Harvey, *Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism* (Chapel Hill: The University of North Carolina Press, 1937), 79-80.

²⁴⁸ *PJM*, 1:120.

²⁴⁹ Vattel, *Law of Nations*, 82. Vattel told his readers of only "three kinds of government," a "democracy," an "aristocratic republic" and a "monarchy," which he said, "may be variously combined and modified.;" Jean-Jacques Burlamaqui, *The Principles of Natural and Politic Law*, Petter Korkman and Knud Haakonssen, eds., (Indianapolis: Liberty Fund, 2006), 328. Burlamaqui plainly wrote that "[t]here are three simple forms of government; Democracy, Aristocracy, and Monarchy," which may be "compounded or mixed.;" John Locke, *Two Treatises of Government*, Peter Laslett, ed., (Cambridge: Cambridge University Press, 1994), 354. John Locke named democracy, oligarchy, and monarchy as the default forms of government, which could be "compounded and mixed.;" Montesquieu, *Spirit of Laws*, 107. Montesquieu declared that "THERE are three species of government; *republican*, *monarchical*, and *despotic*," whereby "republican" government denoted either a "democracy" or an "aristocracy," and "monarchical" and "despotic" differed respectively only in terms of limited and absolute rule of an individual. (emphasis in the original)

mixed to create a society which included a variety of the three, but this did not suggest a co-existence of sovereigns in the sense that a single state may be commonly ruled by one people, one oligarchy and one monarch.²⁵⁰ The discussion of a mixed state, and/or constitution thereof, implied the capacity of the sovereign to delegate powers to others in society in order to institute governmental bodies.²⁵¹ The Constitution operated on these terms for the people of each state empowered a federal congress to legislate on the behalf of themselves thereby instituting an aristocracy, but the implication of granted and/or delegation of powers implied that this group's existence was ephemeral—relative to the will of the people.²⁵² “When we inquire [...] into the source of sovereignty, our intent is to know the nearest and immediate source of it;” but Burlamaqui continued, “it is certain, that the *supreme authority*, as well as the title on which this power is established, and which constitutes its right, is derived immediately from the very covenants which constitute civil society, and give birth to government.”²⁵³

The Constitution's Preamble declared that the people of each state “ordain[ed] and establish[ed]” the Constitution, which constituted an illegal turned legal act.²⁵⁴ As Madison explained in *Federalist* No. 40, the Constitution was not a modification of the Articles, which bound all government officials to its unanimity-provision of Article XIII which held that no

²⁵⁰ Wood, *American Republic*, 197-198. “The theory of mixed government was as old as the Greeks and had dominated Western political thinking for centuries. It was based on the ancient organization of forms of government into three ideal types, monarchy, aristocracy, and democracy—a classical scheme derived from the number and character of ruling power.”

²⁵¹ *Ibid.*, 199, 603-604. Wood overlooked the efficiency of a mixed system of government in which powers of the sovereign may be parceled out to sections of society so that a judicial body may exercise some power and a legislative body may exercise other powers, but all were responsive to the will of the sovereign. Instead, Wood only focused on this theory of a mixed constitution as it related to the ability to diminish or weaken the failures of each of the three systems. While for Wood a mixed constitution was a means to check each of the forms of government, a mixed constitution denoted, first and foremost, a delegation of power.

²⁵² Burlamaqui, *Natural and Politic Law*, 308. “[L]et the form of government be what it will,” Burlamaqui expressed, “monarchical, aristocratical, democratical, or mixt, we must always submit to a *supreme* decision.” (emphasis added)

²⁵³ *Ibid.*, 301. (emphasis added)

²⁵⁴ Amar, *America's Constitution*, 5. Amar wrote that the Preamble “did more than promise popular self-government. [It] also embodied and enacted it.”

changes could be made without the unanimous agreement of all the state legislatures.²⁵⁵ Furthermore, the Articles provided no authority for the people of each state to neither authorize secession nor join another union, much less to unilaterally nullify this document. These actions required legal justification, or sovereignty, which the people of each state, Madison noted in *Federalist* No. 39, acquired through the ratification process of the Constitution: “[T]he Constitution is to be founded on the assent and ratification of the people of America, [...] the assent and ratification of the several States, derived from the *supreme authority* in each State, the authority of the people themselves.”²⁵⁶ Madison stressed that “[t]he act, therefore, establishing the Constitution, will not be a *national*, but a *federal* act.”²⁵⁷ If the Constitution established a single American state and consequently a single American people, then ratification would have been conducted as a plebiscite across one nation rather than a majoritarian-vote in a few states: “Were the people regarded in this [ratification] as forming one nation, the will of the majority of the whole people of the United States would bind the minority.”²⁵⁸

For the sake of comparison, like ratification, the framers of the Constitution structured the electoral college as a state-by-state vote because a vote total comprised of the whole of the states for a President of a federal republic would have been ahistorical. The Holy Roman Empire was the likely inspiration for such a system since this confederation elected its Emperor on a state-by-

²⁵⁵ Madison, “No. 40,” 203. “Instead of reporting a plan requiring the confirmation [of the legislatures] of all the states,” Madison explained in *Federalist* No. 40, the Federal Convention “reported a plan which [wa]s to be confirmed [by the people,] and may be carried into effect by nine States only.”; Rakove, *Original Meanings*, 128-129. “The adoption of the Constitution has been described, with good reason, as the result of a series of acts that were illegal, even revolutionary, in character.” Yet, Rakove further wrote, this “was not a coup d’état but a démarche.”

²⁵⁶ Madison, “No. 39,” 196. (emphasis added)

²⁵⁷ *Ibid.* (emphasis in the original)

²⁵⁸ *Ibid.*, 197. However, ratification was not a national vote, or more specifically it was not “the decision of a *majority* of the people of the union.”; Akhil Reed Amar, “The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator,” *Yale Law School*. (1994): 767-768. Amar was bewildered in his analysis of Madison’s *Federalist* No. 39 because it did not fit so well in the nationalist narrative.

state basis, where each elector was associated by a sovereign territory.²⁵⁹ The American electoral college, where electors are associated by state, simply does not fit with the nationalist narrative of the Constitution, and hence this entire system actually exists present-day as a remnant of the document's original past. As already mentioned, when the framers constructed ratification, the people, in any capacity, possessed no authority whatsoever, and consequently with a blank-slate, they had the opportunity to stipulate the rules of ratification as it related to the people: federal as in the formation of a union of sovereign states or national as in the formation of a single sovereign state.²⁶⁰ The framers chose the former, and thereby limited ratification as admission into the union by each state's popular vote: "[T]hat 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."²⁶¹ If the Constitution established a literal American nation, then ratification would have wholly looked different since the threshold for the creation of such a polity was a nation-wide popular vote.

Alexander Hamilton and John Jay, two of the staunchest supporters of singular American statehood, countenanced that such a proposal was not favorable to the people of the thirteen states.²⁶² Hamilton confessed that the political elite outside of the Federal Convention favored

²⁵⁹ Dunn, *Religious Wars*, 91.

²⁶⁰ Rakove, *Original Meanings*, 107. Rakove failed to assess why the people of each state rather than the populations of the states as a whole ratified the Constitution. Especially, since Madison stressed that consolidation would have required the latter to act. Though Rakove vastly differs in interpretation, he admitted that the Framers were in full-control of the regulations on ratification; See *DHRC*, 9:995-996. Furthermore, Wood's use of the phrase "people-at-large" in his book *The Creation of the American Republic* suggested that this was a national ratification that instituted a truly national government which governed over one sovereign people. However, this was not the case. For Madison said himself that ratification was done "by the people at large" of each state, and thus it was "thirteen sovereignties."; See also Amar, "Central Meaning," 750. Again, the states themselves were internationally sovereign, but the people of each held no sovereign authority whatsoever. Thus, Amar's claim that "[b]ecause each state was sovereign and independent prior to ratification, popular sovereignty took place within each state, per Article VII of the new Constitution" was inaccurate because the framers could have easily established ratification on the basis of a national plebiscite. Additionally, Amar failed to take into account the dual connotation of *sovereignty*, i.e. external and internal.

²⁶¹ Madison, "No. 39," 197.

²⁶² Wood, *American Republic*, 531. "A consolidated government could never result unless the people desired one. For only the people-at-large could decide how much power their various governments should have." And the

consolidation, but the popular opinion scared the majority of the “thinking men” in the Convention in “not go[ing] far enough” to support a truly national government.²⁶³ In *Federalist* No. 3, Jay admitted his support of the Constitution contradicted his past thoughts about strength of a confederacy: The “high opinion [of] the people of America” was to remain “firmly united one federal government, vested with sufficient powers for all general and national purposes.”²⁶⁴ “The more attentively I consider and investigate the reasons which appear to have given birth to this opinion [of the people],” Jay continued, “the more I become convinced that they are cogent and conclusive.”²⁶⁵ Moreover, unlike the previous acts of union, which government officials themselves ratified, the Constitution’s union was established by a different principle for in truth the *ratifying states*, specifically their respective *people*, to the Constitution, were the sole parties to it, and therefore it was their intentions and mutual agreement that solely determined the effect and meaning of their respective compact.

Ergo, the Preamble naturally held this pre-ratification context in addressing the peoples of the individual ratifying states as being free, sovereign and independent from one another since the state legislatures abdicated supreme final authority to its respective people, as per Madison’s explanation in *Federalist* No. 39. This detail challenges any nationalist interpretation of the Convention which supposed that both the empowerment of the federal government and the disempowerment of the state legislatures translated into the elimination of international sovereignty of the states. With the decision of ratification, the abrogation of any state’s sovereignty

understanding, by both John Jay and Alexander Hamilton, was that they did not. The toughest critics of a federal government, Jay and Hamilton, both understood that the people of each state would never have voted for ratification on a constitution which would have consolidated them into a single people.

²⁶³ *PAH*, 4:223. Again, Hamilton did not desire “a strong well mounted government,” but one of “a different [nationalistic] complexion.”

²⁶⁴ Jay, “No. 3,” 9. To Jay, a confederation was no longer “feeble” and “mortifying” as he claimed in the immediate months before the start of the Federal Convention in 1787. Indeed, a deep reflection had shown him that a confederacy could produce political stability.

²⁶⁵ *Ibid.*

did not ultimately fall on whatever happened to the state legislatures in the Convention for the people were now the repositories of internal sovereignty. However, these historical consequences were neither fictitious nor temporary because the popular exercise of sovereignty associated with ratification was not a one-off event that was never to be repeated again.²⁶⁶ Jean Bodin, the sixteenth-century French jurist, who wrote, “Democracy, or the popular state is one in which all the people, or a majority among them, exercise sovereign power collectively”—insisting that popular sovereignty was not a utopian ideal but a political reality.²⁶⁷

Scholars have long recognized the role of popular sovereignty in the ratification process, but the boilerplate interpretation had been to describe it as partially pseudo-sovereignty.²⁶⁸ From this exposition, democracy existed only in the vague sense that the federal government’s powers were legitimized by the people, but the people were in no position to supersede any government—they could only act through public officials.²⁶⁹ The only aspect of the principal-sovereign-delegated-agent relationship of the Constitution, as depicted in **Fig. 3**, they recognized was the distribution of powers among certain officials in order to carry-out the day-to-day operations of government. In the event of a breakdown in the relationship whereby a rogue agent

²⁶⁶ Rakove, *Original Meanings*, 106-107. “The framers thereby sought to confine this exercise of popular sovereignty to the mere legal act of ratification.” In sum, Rakove averred that ratification meant consolidation, but it also meant that the people quickly gave up their sovereign status—thus powerless in comparison to an all-powerful national government and its subordinate state governments. As a side note, Rakove failed to assess why the people of each state rather than the populations of the states as a whole, or in the aggregate, ratified the Constitution. Especially since Madison stressed in *Federalist* No. 39 that consolidation would have required the latter to have happened; Tuck, *Sleeping Sovereign*, 212. Tuck accurately captured Rakove’s argument: “[I]f one were to suppose [...] that the essence of popular sovereignty [under a nationalist interpretation] was a mechanism whereby one had to appeal in some way to the people in order to pass fundamental laws, then in the new American nation the people would have spoken as sovereign only to deny themselves sovereignty in the future.”

²⁶⁷ Jean Bodin, *On Sovereignty: Six Books of the Commonwealth*, Tooley, M. J., ed., (Oxford: Seven Treasures Press, 2009), 92; Morgan, *Inventing the People*, 174.

²⁶⁸ Rakove, *Original Meanings*, 130. For Rakove, all this talk of popular sovereignty meant that the only (notable) result was that “the Constitution would attain immediate legitimacy.”

²⁶⁹ Amar, “Central Meaning,” 764-766; See Levinson, *Undemocratic Constitution*, 168-174. Levinson also believed that the American people, according to his nationalistic interpretation, are trapped inside a governmental system, which they cannot change unilaterally but only through channels structured by government.

usurped undelegated authority out of self-interest, the sovereign American people, to use the complete nationalist interpretation, in a quasi-democracy would be theoretically at the mercy of the government.²⁷⁰ The long-term solution was that the people could, with time, vote to change the circumstances through the confines set-out by law, but a vote was only one part of the democratic equation for plebiscite meant the unilateral ability of the majority to change political circumstances.²⁷¹ In contrast to the contrary, there was no single American people for there was no single American state—every state was the sovereign embodiment of its respective people.

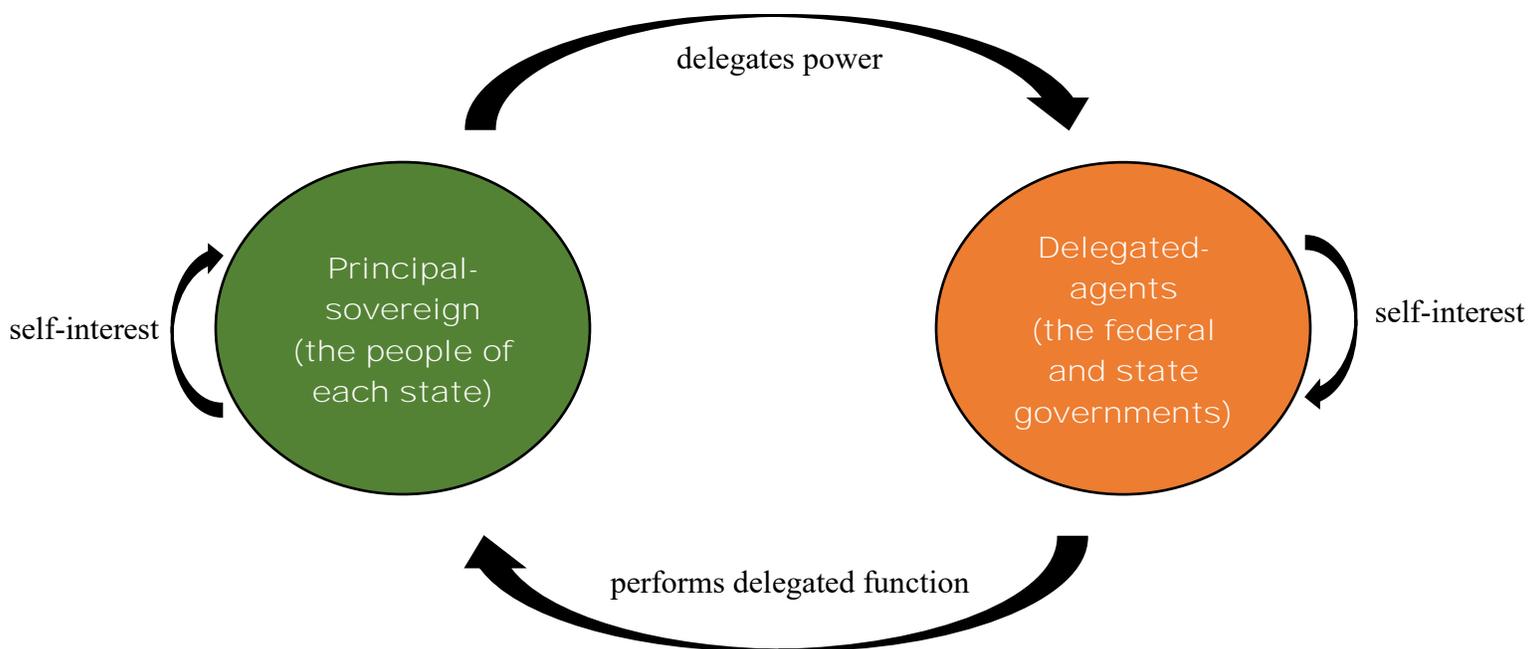


Figure 3: Principal-sovereign and Delegated-agent Relationship (and Problem)

²⁷⁰ Tuck, *Sleeping Sovereign*, 69. It was “Bodin’s [view] that a sovereign might lurk under the superficial apparatus of the day-to-day government and be distinguishable from it.” Because an executive or legislature might appear on the surface to perform sovereign acts, this alone did not reflect the reality that it might exist only on the basis of delegated authority; Wood, *Creation*, 362, 599. “The trite theory of popular sovereignty gained a verity in American hands that European radicals with all their talk of all power in the people had scarcely considered imaginable except at those rare times of revolution.” “All parts of the government were equally responsible but limited spokesmen for the hands of the representatives for the people, who remained as the absolute and perpetual sovereign, distributing bits and pieces of power to their various agents.” Wood did not understand the legal implications of what he exactly wrote.

²⁷¹ Rakove, *Original Meanings*, 107. Rakove’s definition of sovereignty contradicted any eighteenth-century understanding of sovereignty. Somehow the people of each state ratified the Constitution, but they actually formed themselves as one whole people. Then, this people could never again assert any sovereignty, but they were sovereign, only in a theoretical sense that government derived powers from them that they could never resume.

As in **Fig. 3**, Bodin noted that the masses in democracy cannot possibly assert all prerogatives of sovereignty and operate the daily functions of government so they delegate responsibilities to officials. While the delegation of powers to a governmental body like a state-house or congress created a republican, or an aristocratic form, of government, the core of the state was a democracy because the people were the progenitors of all power. Bodin was not a supporter of democracy, which he deeply criticized, but he and Thomas Hobbes, a seventeenth-century English political philosopher who also despised popular rule, as apologists for absolute monarchy simultaneously buttressed the concept of democracy in their writings.²⁷² In his defense of the conventional notion of sovereignty, these men averred that the masses could hold all the same prerogatives and attributes of a sovereign monarch. Thus, they implied that the machinations of a democracy were in no way different from either a monarchy or an aristocracy. Samuel Pufendorf, a German political theorist, explained that

some rule the state with *supreme authority*, such as emperors, kings, princes, or by whatever name they are listed in whose hands is supreme sovereignty. Some exercise a part of sovereignty, by an authority delegated by majesty, and these are called by the general word *magistrates*. Their names are different in different states.²⁷³

In very much the same spirit, the sovereign in a democracy, the people, delegate authority to officials or representatives who carry out the actual powers associated with sovereignty. However, the delegation of powers does not make the people any less sovereign as it would a monarch. Yet, the parallels between these forms of government do not end there for as Burlamaqui eloquently wrote, “[t]he sovereign [...] has a right to command in the last resort.”²⁷⁴ In a true democracy, the people, out of their own self-interest, may shift the political boundaries of the

²⁷² Indeed, this is one of the main arguments made in Richard Tuck’s *The Sleeping Sovereign*.

²⁷³ Samuel von Pufendorf, *Two Books of the Elements of Universal Jurisprudence*, Thomas Behme and Knud Haakonssen, eds., (Indianapolis: Liberty Fund, 2009), 39. (emphasis added and in the original respectively)

²⁷⁴ Burlamaqui, *Natural and Politic Law*, 91.

society and enable a reorganization of powers—demonstrated in **Fig. 3**. Still, how could the people of each state usher in new political circumstances?

The chain-of-command under the Articles placed the state governments over the central authority, but the Constitution reversed this and relegated the power of state governments, as drawn in **Fig. 4**:

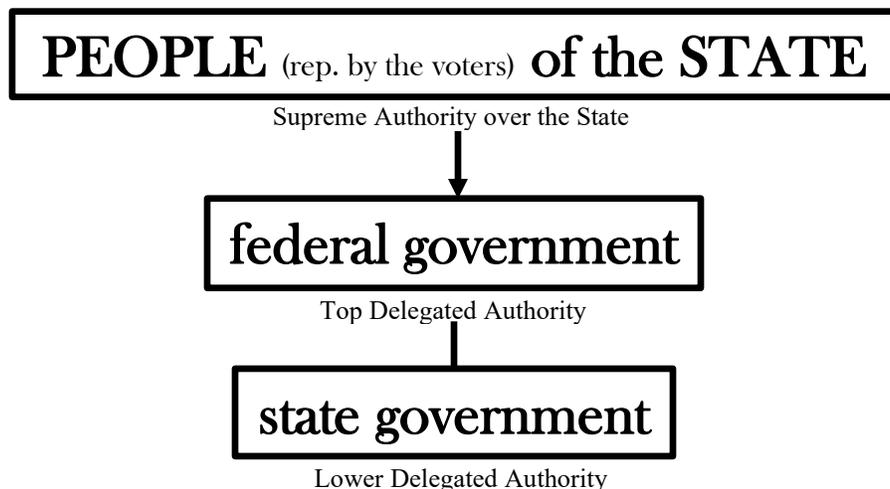


Figure 4: The chain-of-command under the Constitution as a federal republic

The people delegated powers to the federal government which the legislative authority of Congress did not possess under the Articles such as the power to tax the people directly, to form a federal court, to supersede state governments and to bind state governments to obey treaties. However, the Constitution did not bind the people of the states, only public officials like state judges, which further demonstrated the subordinate role of government.²⁷⁵ After all, Bodin reiterated, “the sovereign [...] cannot in any ways be subject to the commands of another, for it is [the sovereign] who makes law for the subject, abrogates law already made, and amends obsolete law.”²⁷⁶ In **Fig. 4**, the people of each state are depicted as the supreme final authority over the

²⁷⁵ Constitution, Art. VI, Cl. 2, in Amar, *America’s Constitution*, 489. “[T]he Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

²⁷⁶ Bodin, *On Sovereignty*, 68.

state—undoubtedly, real sovereignty, and thus the *state* henceforth connoted the sovereign embodiment of its respective people. The overall importance of **Fig. 4** can be seen below in **Fig. 5**, where the workings of the federal republic are displayed as it related to democracy.

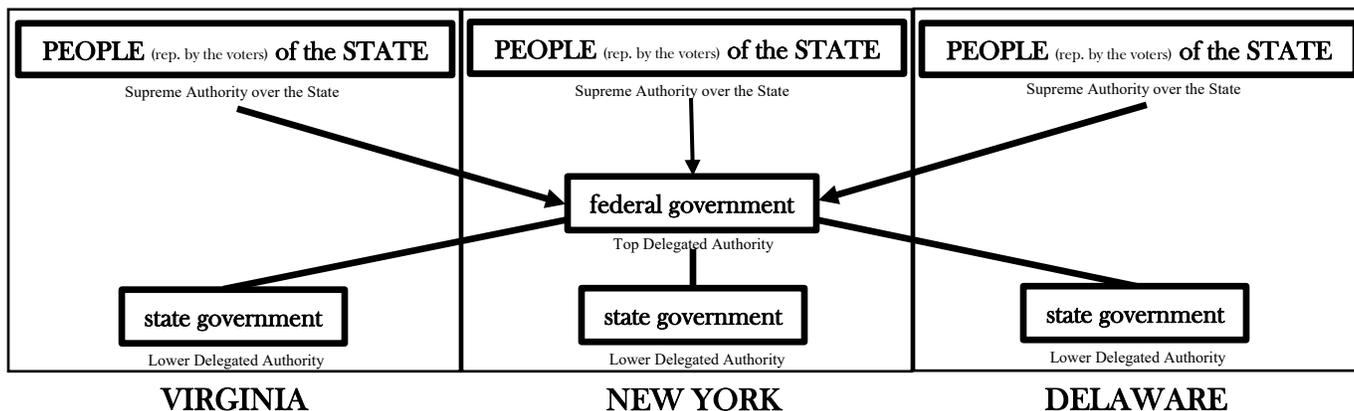


Figure 5: Operation of the Constitution as a federal republic of democratically ruled states

At the core, each state was a democracy as defined by the eighteenth-century’s political consensus, which stated, as Montesquieu did, that “WHEN the people in a republic are possessed of the supreme power, this is called a *democracy*.”²⁷⁷ As it related to the federal republic, as shown in **Fig. 5**, because the state was the sovereign embodiment of the people associated with it, each state held a right to determine the meaning of the Constitution.²⁷⁸ The people of any state could exercise their sovereignty, or their “right to command in the last resort,” to overrule the federal government as well as their state governments just as they did with ratification.²⁷⁹ Secession, a power which any state held by virtue of its sovereignty, could be either asserted to withdraw from the Constitution’s union or threatened to negotiate better terms with other co-states. **Fig. 5** portrays the states as separate and equal parties to the international agreement of the Constitution—meaning

²⁷⁷ Montesquieu, *Spirit of Laws*, 107. (emphasis in the original)

²⁷⁸ See Gienapp, *Second Creation*, 283. Gienapp exclaimed that “[t]he Constitution [...] was the only true embodiment of the people,” but actually through the process, and not the act, of ratification did each American state become the true embodiment of its respective people, who supremely ruled it.

²⁷⁹ Amar, *America’s Constitution*, 34. Amar admitted that if the American states continued to remain sovereign under the Constitution, then the people of each state could legitimately assert real sovereign authority over both their federal and state governments as was done via the Constitution’s ratification.

that, like ratification, no state could ever speak for another in the exercise of its sovereignty. Any state for whatever reason could exercise the power of nullification to cancel enforcement of a federal directive, but the nullification would only apply to the nullifying state.

Contrary to misbelief, nullification was not an American invention, it was the power of any state to legally withdraw its obligations to an international agreement, but as the American states were supremely commanded by the people, the power to nullify was reserved only for their authorization.²⁸⁰ It may be difficult to understand democracy as defined by Bodin because modern democracy conflates the daily governmental functionaries with popular sovereignty, but true democracy was the ability of the people to exercise sovereignty.²⁸¹ As the Constitution was ushered in by popular sovereignty, the same kind of expression of power could reverse the terms of the entire constitutional arrangement.²⁸² In addition, this meant that the people of each state could also nullify acts made by their state governments—as there could be no power above sovereignty. Thus, the federal republic was ephemeral for it remained intact for the purposes and whims of the people of each state. Jefferson was really the architect behind this, for again, the Declaration really

²⁸⁰ Thomas E. Woods, Jr. *Nullification: How to Resist Federal Tyranny in the 21st Century* (Washington, D.C.: Regnery Publishing, 2010), 7. Woods believed that nullification was an American invention, a complete fabrication by Jefferson, that essentially meant civil disobedience sanctioned by state legislatures.

²⁸¹ Tuck, *Sleeping Sovereign*, 69. Bodin's idea that "a sovereign might lurk under the superficial apparatus of the day-to-day government and be distinguishable from it; as far as he was concerned the actual administration was the sovereign."; Bodin, *On Sovereignty*, 112. Bodin smirked at "those who say that there cannot be, never was, nor ever could be a truly popular state where the whole assembled people make law, appoint to office, and exercise all the prerogatives of sovereignty." What defined a democracy was not the ability of every single person to perform the duties of government, it was that they had the final say in all matters. Bodin noted that "it was customary when some law of importance was under discussion to add some clause, such as that the law about to be published could not be rescinded save by the assembly of the whole people, six thousand citizens at least being present." Here, Bodin described that a democracy was the ability of the people to effectively nullify government acts they disliked.

²⁸² Tuck, *Sleeping Sovereign*, ix, x. "The title of the book refers to a long passage in Thomas Hobbes's *De Cive* of 1642, in which Hobbes worked systematically through an extensive analogy between a democratic sovereign and a sleeping monarch, a passage I discuss in detail in the second chapter. Remarkably, it is one of the first full accounts of how we might think about democracies to be found in the literature of political theory after the disappearance of the ancient republics, despite the fact that Hobbes was primarily interested in defending the sovereignty of the kings of England. In it, Hobbes argued that a sovereign democracy need not be involved at all in the ordinary business of government; it could simply determine who should rule on its behalf and how in general they should behave, and then retire into the shadows, just as a monarch might appoint a vizier to govern in his place before going to sleep."

detailed a political system in which the people were legally sovereign and therefore legitimately consented to their government by overruling the decisions of their representatives via popular vote.²⁸³

Because of the accustomed history of conventions as the proper mode of exercising extra-legal authority, it was natural for the *convention* to be the contemporary medium of ratification.²⁸⁴ However, future expressions of popular sovereignty could take any mode that adequately expressed majority-rule, e.g. popular state conventions, state referendums, etc.²⁸⁵ Nonetheless, this episode of American history did not translate into an automatic, mass-wide sovereign endowment. The ideological promise of democracy still remained a gradual development which began with the moment European social ranks broken down and the American colonists assumed the common, non-exclusive title of “citizen” in the 1770s, but even this unifying term for the people represented

²⁸³ Gienapp, *Second Creation*, 199. Jefferson’s “principle of generational sovereignty superseded any formal acts of popular sovereignty.” Jefferson stated that it was by the sovereignty of the states, which allowed the people to supersede any and all decisions.

²⁸⁴ Wood, *American Republic*, 310, 312. The definition of a convention was expansive for anything and everything was thought of either as a convention, or some other tangential word. “Eighteenth-century Americans, like the English, [...] generally regarded conventions as legally deficient bodies existing outside the regularly constituted authority. Not that such conventions or meetings of the people were necessarily illegal, for they were closely allied in English thought with the people’s right to assemble and to present grievances to the government. It was this right of assembly that justified the numerous associations and congresses that sprang up during the Stamp Act crisis, all of which were generally regarded as adjunct rather as replacements of the constituted governments.”; Morgan, *Inventing the People*, 257-258. Morgan also shared the same analysis: “Even before the Revolution it was not uncommon for crowds, organized and unorganized to assemble for the purpose of implementing policies that government was slow in effecting. With the coming of independence, local communities formed committees to suppress Tories in their midst and sometimes gathered to curb profiteers who tried to fatten on wartime shortages. When the objective was larger than local they did not hesitate to organize statewide or even interstate conventions, with or without government backing, to address the problem.” Thus, the problem was the constant fear that these conventions were illegal either because Parliament was sovereign or the state legislatures were sovereign; *See also* Wood, *American Republic*, 310. “Literally a convention was a meeting, an act of coming together, used to refer to all sorts of assemblies, especially formal assemblies, convened for deliberation on important matter, whether ecclesiastical, political, or social.” Thus, an assembly could theoretically also denote a convention, but direct plebiscite was the more modern approach.

²⁸⁵ Tuck, *Sleeping Sovereign*, 215. “[T]he radical view put forward recently in a series of stimulating works by Akhil Reed Amar, that Article V [of the Constitution] is non-exclusive and that a national convention and plebiscite could legally amend the Constitution, as they would be in keeping with the fundamentally popular character of the document.” I agree with Amar insofar that the Constitution was dependent on the subjective view of the people of each state, which they could change by plebiscite, but only in each state—as they were sovereign states rather than a single state.

something unequal.²⁸⁶ In his legal papers, Jefferson cited Montesquieu who stressed that “the laws that establish the right of suffrage are fundamental in a democratic government.”²⁸⁷ “[B]ecause,” Jefferson added, “by their votes the people exercise their sovereignty.”²⁸⁸

Bodin, whom Jefferson meticulously studied and cross-referenced with Vattel (and vice versa), likewise acknowledged that in a democracy, the ruling “majority” might not be the true “majority” of the people for varying reasons—restrictions of suffrage or the intentional absence of voters themselves.²⁸⁹ Therefore, as written in **Fig. 4**, the people of the state were *actually* represented by the voters of that state. After all, an exercise of democratic sovereignty required the ability to vote. In the end, this historical episode resulted in a contradiction whereby the states existed as democracies, but only a few citizens actually held sovereign power. Yet, with this historically unprecedented move in political government, the new goal was to establish a real democracy, where every citizen regardless of race, gender and any other variance held sovereign power. The trajectory of the American union therefore depended on the sovereign authority of the voters of each state since it was by their action that the sovereignty of the state manifested itself.²⁹⁰

²⁸⁶ Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1993), 233. “By adopting the title of citizens for members of their new republics, the revolutionaries thereby threatened the distinctive status of ‘gentleman’ and put more egalitarian pressure on their society than they meant to.” Other socially divisive words like “yeoman” and “husbandman” were gradually replaced (at least in Boston by 1777) with “occupational titles.” Additionally, “‘Mr.’ increasingly came into general use among adult white males.”

²⁸⁷ Thomas Jefferson, *Jefferson’s Legal Commonplace Book*, James P. McClure, et al, eds. (Princeton: Princeton University Press, 2019), 432. Jefferson quoted a passage from Montesquieu’s *The Spirit of Laws* and inserted his own interpretation of popular sovereignty. Jefferson’s legal papers were those writings that Jefferson copied down as a law student to his presidency. As he read and learned, he penned down the essentials.

²⁸⁸ *Ibid.*

²⁸⁹ Hayes, *Road to Monticello*, 84. Jefferson cross-referenced Bodin with Vattel and vice versa. In his personal athenaeum, Jefferson counted Bodin’s *Six Livres de la République* or *Six Books of the Commonwealth*, among his collection, which he meticulously studied; Bodin, *On Sovereignty*, 91. Bodin spoke of the several political variances of the state, or in his vernacular the “commonwealth,” and like the standard political texts, he also “conclude[d] that there are only three types of state, or commonwealth,” Bodin asserted, “monarchy, aristocracy, and democracy.” Jefferson utilized Bodin to explain the machinations of a democracy.

²⁹⁰ Bailyn, *Ideological Origins*, 198. By the eighteenth century, Bailyn wrote, sovereignty was understood to be necessary to the state. That is, “there must reside somewhere in every political unit a single, undivided, final power, higher in legal authority than any other power, subject to no law, a law unto itself.” Therefore, the people of each state could exercise their supreme power to invalidate laws, since their authority was a law unto itself, and gave rise to textual law.

If the people of America refused to exercise sovereignty, even say for two centuries and counting, that only signified tacit consent to the actions of their governmental agents. A sovereign could not gradually lose sovereignty through an omission of sovereign action. Hobbes himself had argued that a “sleeping” king who does nothing more than wakes up to only appoint officials to run his administration, and promptly goes back to sleep, does not lose sovereignty.²⁹¹ Indeed, the sovereigns of this third American union were in the same position.²⁹² The people of each state voted to appoint certain officials among other civil duties. However, at any moment, the people of each state could awaken to change the course of the union.

²⁹¹ Tuck, *Sleeping Sovereign*, x. “Hobbes argued that a sovereign democracy need not be involved at all in the ordinary business of government; it could simply determine who should rule on its behalf and how in general they should behave, and then retire into the shadows, just as a monarch might appoint a vizier to govern in his place before going to sleep.”

²⁹² Richard Tuck also believed that Hobbes’s argument related to American sovereignty—though Tuck correlated this interpretation to a single American people.

Conclusion

According to Richard Hofstadter, a survey of the history from the American Revolution to the Federal Convention, 1775-1787, will demonstrate that democracy was doubted, despised and even denounced by the Founding “Fathers.”²⁹³ Consequently, the explicit absence of democracy in the Constitution meant that it was directly opposed to majority-rule.²⁹⁴ However, these assertions ignored the first fifty-two words of the Constitution, which signified the greatest democratic experiment in the history of the world.²⁹⁵ The Preamble proclaimed that the people of each of the United States of America, by a popular vote, ratified the Constitution. Once the people of each state held the authority by the mere decision of ratification to overrule any American government, they henceforth became the supreme rulers of their respective state—fulfillment of the political ideology, democracy, enshrined in the Declaration of Independence. Yet, Hofstadter wrote that James Madison’s *Federalist* No. 10 unequivocally disavowed any democratic scheme.²⁹⁶

When Madison contrasted a republican structure, rather than form, of government, with a “pure democracy,” he argued why federal referendums should not exist.²⁹⁷ Referendums on the federal level would have been an improper manifestation of a federally structured republic among sovereign states because such a mechanism would have allowed a popular majority to overrule the majority of a state, effectively creating a truly national government. Yet, the Constitution was not the construction of a single American state for the American people could not overrule the federal

²⁹³ Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (New York: Vintage Books, 1973), 13.

²⁹⁴ *Ibid.*, 7. “The Fathers were intellectual heirs of seventeenth-century English republicanism with its opposition to arbitrary rule and faith in popular sovereignty.”

²⁹⁵ Amar, “Central Meaning,” 761. “In fact, it was the most participatory, majoritarian (within each state) and populist event that the planet Earth had ever seen.”

²⁹⁶ Hofstadter, *American Political Tradition*, 12.

²⁹⁷ Madison, “No. 10,” 46.

government collectively as a national republic would. Instead, the people of America could *only* do so in their respective states, which was the true character of federalism. The people could not directly vote on the decisions of the federal government, but they could vote in popular state conventions, referendums or through any other means which the majority could use to exercise its will for the policy of their state alone, and no others. The federal government was intended to be a representative body for the states on the international stage, and not democratic since the states were at their core pure democracies.

The ability of the people to unilaterally “alter or to abolish” governments—an unambiguous trait of popular sovereignty, was, what Patrick Henry described as “the genius of democracy.”²⁹⁸ In the Virginia ratifying convention, Henry defined democracy, in the language of the Declaration and Virginia’s Declaration of Rights—essentially Virginia’s bill of rights, as the proper response in the event “that whenever any Government shall be found inadequate, or contrary to [its] purposes, a majority of the community hath, an undubitable, unalienable and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal.”²⁹⁹ Of course, this right fell on the people of each state for it was them who ratified the Constitution. Indeed, scholars have long doted on specific verbiage of the Constitution to argue as Akhil Amar did with his “unitary People thesis” that the states, and the people thereof, consolidated into a single state, and single people.³⁰⁰ They have overlooked the primary threshold of such a venture: Ratification of the document must have occurred as a truly national ratification. However, a national ratification did not occur because the Constitution did not implement a national scheme, and as shown below in **Fig. 6**, the states, which began as mere colonies, provincial

²⁹⁸ Declaration, Preamble, in Gutzman, *Guide to the Constitution*, 229; *DHRC*, 9:956.

²⁹⁹ *Ibid.*

³⁰⁰ Amar, “Of Sovereignty and Federalism,” 1450.

1776	The Declaration of Independence	Each state declared separate sovereignty.
1781	The Articles of Confederation	States expressly retained <i>claim</i> of sovereignty.
1783	The Treaty of Paris	States became <i>officially</i> sovereign.
1787	The Constitution	No need to <u>expressly</u> retain sovereignty.

Figure 6: A succinct synopsis of Chapters 1-3

appendages of the Great Britain, could not have possibly eliminated their sovereignty in any vague sense by the time of the Constitution since statehood could solely be relinquished by their own *expressed* act.³⁰¹

Still, the Constitution eerily lacked any specific *democratic* language. When the Constitution was ratified by the necessary number of states for it to go into effect, the document also lacked a Bill of Rights, but Madison did not believe that without a few amendments to protect things like speech, press, religious worship, etc., that these things could be legislated away for the sovereign states did not constitute a single state. On 5 June 1788, as president of the Virginia ratifying convention, Edmond Pendleton explained that the federal government “extend[ed] to the general purposes of the Union,” which historically meant that it was a federal republic of sovereign states.³⁰² The Constitution’s government was not national in any literal sense, Pendleton progressed, which would theoretically have “sole and exclusive power, Legislative, Executive, and Judicial, without any limitation.”³⁰³ As Alexander Hamilton also explained in *Federalist* No. 32, the powers of the federal government were “affirmative grants of general authorities,” which included more powers per se than enumerated by the document but were nevertheless not as

³⁰¹ I cannot fathom a theory arguing against this important precept of international law. However, all theories of national unification of the Constitution must argue against this rule because the document lacked specific language of consolidation. These arguments which try to infer the sovereignty of the states was relinquished cannot be deemed tenable.

³⁰² *DHRC*, 9:947.

³⁰³ *Ibid.*

infinite as a truly national government would characteristically have.³⁰⁴ Nevertheless, the demand for a Bill of Rights pushed the First Congress to approve the eventual ten measures.

Along with the Bill of Rights, Madison also proposed, on 8 June 1789, a pre-Preamble:

That there be prefixed to the Constitution a declaration, that all power is originally vested in, and consequently derived from, the people.

That Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and using property, and generally of pursuing and obtaining happiness and safety.

That the people have an indubitable, unalienable, and indefeasible right to reform or change their Government, whenever it be found adverse or inadequate to the purposes of its institution.³⁰⁵

Like Henry, Madison was inspired by the Declaration as well as Virginia's Declaration of Rights in his draft of this pre-Preamble. As Madison felt about the Bill of Rights, he also felt it was not perhaps "absolutely necessary" to include the "absolute truth" of popular sovereignty.³⁰⁶ Madison also proposed the addition of a statement about the Constitution's understood mechanisms, separation of powers and checks and balances.³⁰⁷ The eventual omission of these two measures did not make either the truth that the people of each state were sovereign or the fact that the Constitution included self-regulating machinery invalid. Although I disagree with Amar's interpretation of the Constitution, I concede to his assertion that those closest to this period best understood the development of this period of history.³⁰⁸

Thomas Jefferson and his colleague Madison were two such men who accurately understood the history of these states. The two secretly demonstrated this knowledge with the authorship of two resolutions—passed by the Democratic-Republican-controlled state legislatures of Kentucky and Virginia in 1798. The two friends believed President John Adams's Sedition Act, which threatened imprisonment for anyone who disseminated words the administration deemed

³⁰⁴ Hamilton, "No. 32," 157.

³⁰⁵ James Madison's pre-Preamble quoted in Lance Banning, *Jefferson and Madison: Three Conversations from the Founding* (Madison: Madison House Publishers, Inc., 1995), 17.

³⁰⁶ *Ibid.*, 17-18.

³⁰⁷ *Ibid.*

³⁰⁸ Amar, *America's Constitution*, 39.

rebellious, was a usurpation of undelegated authority. Thus, these resolutions, in their own unique words, separately but unitedly professed the assumed truth that the people of each state were sovereign, and could therefore overrule the Adams administration's oppressive laws. "[T]he said compact, the states who are parties thereto, have the right, and are in duty bound," Madison wrote in 1798 on the behalf of Virginia, "to *interpose* for arresting the progress of the evil [of the federal government], and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them[selves]."³⁰⁹ The "constitutional remedy" would be an election to change "the members of the General Government, being chosen by the people," but Jefferson interjected, "where powers are assumed which have not been delegated, a *nullification* of the act is the rightful remedy: that every State has a natural right in cases not within the compact, [...] to *nullify* of their own authority all assumptions of power by others [i.e. the federal or state government] within their limits."³¹⁰

Essentially, these documents argued that "a compact under the style and title of a Constitution for the United States," which instituted a federal republic with firmer unification than either the loose union of the Declaration or the confederate republic of the Articles of Confederation—with a greater delegation of authority being given to the federal government rather than to the state governments. In turn, because the Constitution was a treaty, the states had the right to interpret it according to generational political circumstances. Jefferson revealed that "the several States composing the United States of America, are not united on the principle of unlimited submission to their General Government," which they would have been if they were simply parts

³⁰⁹ "James Madison, The Virginia Resolutions, December 21, 1798," in Banning, *Jefferson and Madison*, 215. (emphasis added)

³¹⁰ "Thomas Jefferson, Draft of the Kentucky Resolutions, October 1798," in Banning, *Jefferson and Madison*, 211. (emphasis added)

of a truly national government.³¹¹ As each state was popularly governed, the rights to secede or nullify could not be sanctioned by the state legislatures—only by the people, the sovereigns. However, some in their time erroneously thought that the word *state* used in these writings referred to the state governments. In 1800, Madison clarified himself and expanded on the language of the resolutions.

Madison explained that the word *state* contained three separate definitions. First, it could refer to a state legislature, and secondly, it could refer to the territory of a state. Lastly, and this was Madison’s usage of the term, it could refer to “the people composing those political societies, in their highest sovereign capacity”—a connotation achieved by the choice of ratification. It was “in that sense, the Constitution was submitted to the ‘states:’ in that sense the ‘states’ ratified it,” Madison wrote, “and, in that sense [...] [t]hey are consequently parties to the compact, from which the powers of the federal government result.”³¹² In his retirement, Adams, at an old age in 1824, reflected on the Constitution: “Congress is not a representative body, but a diplomatic body, a collection of ambassadors from thirteen sovereign States.”³¹³ “A consolidated government was never alluded to, or proposed, or recommended in any part of the work,” Adams continued, “nor indeed, in any moment of my life, did I ever approve of a consolidated government, or would I have given my vote for it.”³¹⁴

A year later on 24 December 1825, Jefferson, reiterated his comments in the Kentucky Resolution in some of the last words before his death the next year:

³¹¹ Ibid., 207.

³¹² James Madison, “Virginia Report,” in Leonard W. Levy, ed., *The Virginia Report of 1799-1800 & Virginia Resolutions of December 21, 1798* (New York: Da Capo Press, 1970), 191.

³¹³ From John Adams to John Taylor, Quincy, April 12, 1824, *The Works of John Adams, Second President of the United States: With A Life of the Author*, Charles Francis Adams, ed. 10 vols. (Freeport: Books for Libraries Press, 1969), 10:413.

³¹⁴ Ibid.

The States in North America which confederated to establish their independence on the government of Great Britain, of which Virginia was one, became, on that acquisition, free and independent States, and as such authorized to constitute governments, each for itself, in such form as it thought best.

They entered into a compact (which is called the Constitution of the United States of America,) by which they agreed to unite in a single government as to their relations with each other, and with foreign nations, and as to certain other articles particularly specified. They retained at the same time, each to itself, the other rights of independent government comprehending mainly their domestic interests. [...]

And as a further pledge of the sincere and cordial attachment of this commonwealth to the Union of the whole so far as has been consented to by the compact called “The Constitution of the United States of America,” (construed according to the plain and ordinary meaning of its language, to the common intendment of the time, and of those who framed it);³¹⁵

In essence, the commonwealth of Virginia as well as the other thirteen American commonwealths were unified as they had always been and for the same reason they had always been. The Constitution was structured in no way different than the previous acts of union—as all that held it together was a “pledge,” summarized Jefferson. Jefferson, whose relevance extended beyond the fateful year of 1776 explained that the Constitution was not antithetical to the purpose of the Revolution. Thomas Paine, a figure that rivals with Jefferson over the legacy of 1776, wrote to his old friend George Washington, the newly elected and first President under Constitution, on 30 July 1796, only a few months into Washington’s presidency. Paine had many things on his mind but mostly criticism, but he began with a reflection about those events in America which he missed as he departed for France in April 1787—just as the “continental convention,” as he called the Federal Convention, was set to convene.³¹⁶

The two defects of the Constitution, he singled out, were in the formation of the presidency and “the long duration of the Senate,” but these were minor flaws, the largest defect would have been in the creation of a single American state.³¹⁷ “The mere independence of America,” Paine retrospectively remarked, “were it to have been followed by a system modelled after the corrupt

³¹⁵ Thomas Jefferson, “Draft Declaration and Protest of the Commonwealth of Virginia, on the Principles of the Constitution of the United States of America, and on the Violations of them,” December, 1825, in Merrill D. Peterson, ed., *Thomas Jefferson: Writings* (New York: Library of America, 1984), 482, 485.

³¹⁶ From Thomas Paine to George Washington, Paris, July 30, 1796 in Ian Shapiro and Jane E. Calvert, ed., *Selected Writings of Thomas Paine* (New Haven: Yale University Press, 2014), 522.

³¹⁷ *Ibid.* Paine did not single out the provisions on slavery—though he was fiercely anti-slavery.

system of English Government, would not have interested me with the unabated ardor it did.”³¹⁸ Save for his two complaints mentioned earlier, Paine admitted, “I would have voted for it myself, had I been in America, or even for a worse rather than have had none.”³¹⁹ Indeed, his answer was of the exact sentiment of Adams, who likewise expressed disgust at the thought of consolidation. Nonetheless, even with the small errors of the “federal constitution,” Paine took credit for the entire enterprise: “[I]t so happens, that the proposition for that purpose came originally from myself.”³²⁰ “[F]or the proposition of a Continental Convention to form the Continental Government is one of the subjects treated of in the pamphlet *Common Sense*.”³²¹

Paine never abandoned the language of the Revolution, and it seemed as though Americans never abandoned the principles associated with it either, for the states created what he continued to refer to as a continental republic. The creation of a single American states was not the purpose of *Common Sense* at all, Paine added, “[i]t was to bring forward and establish the representative system of government, as the work itself will show, that was the leading principle with me in writing.”³²² And the Constitution did not establish a truly national government, but a government that was representative of the American states. Would this union survive for future generations? That was the thought that ran through Madison’s mind in the Convention: “[A] system which we wish to last for ages.”³²³ Though he was considered the father of the document, the Constitution was no longer Madison’s train-set so to speak because it rightfully belonged to the states to

³¹⁸ Thomas Paine, quoted in Foner, *Tom Paine*, 75.

³¹⁹ Thomas Paine, *Selected Writings*, 522.

³²⁰ *Ibid.*, 522.

³²¹ *Ibid.*, 523. (italics in the original)

³²² Paine, quoted in Foner, *Tom Paine*, 75. In contrast to Foner’s interpretation of these quotations, *Paine’s Common Sense* argued that American independence would have been for naught if it later resulted in the creation of a single American state.

³²³ Madison, *Notes*, 194.

interpret because neither him nor any other Founder's interpretation of the Constitution could impede democracy.

Contrary to Jonathan Gienapp's interpretation, the Constitution was not meant "to rule over future generations," but it was the people, the states thereof, who would rule over it and over every American government.³²⁴ Thus, I conclude that if there was a true meaning of the document as a whole, then it most obviously meant whatever the states, who were the parties to this treaty, desired at any given moment. However ideal this system may sound; the truth was that many injustices and imperfections existed with the establishment of this third union. The Constitution's ratification had set a wonderfully democratic precedent in the expansion of suffrage in some states which removed voting restrictions thereby allowing all adult men regardless of race or property to exercise powers normally associated with monarchs and aristocrats.³²⁵ Yet, there were many in American society who had no political voice for they were either in bondage or viewed as second-class citizens. Hence, America's destiny was now tied to the creation of a truly democratic society where all American citizens could exercise the right to vote, and consequently become sovereign rulers.

³²⁴ Gienapp, *Second Creation*, 66.

³²⁵ Amar, *America's Constitution*, 7. "For instance, New York temporarily set aside its usual property qualifications and, for the first time in its history, invited all free adult male citizens to vote." However, states which did alleviate these voting restrictions simultaneously preserved them for the election of government officials.

Abbreviations

- AP* *The Adams Papers Digital Edition*, ed. Sara Martin (Charlottesville: University of Virginia Press, 2008), 18 volumes
- DA* *The Adams Papers Digital Edition: Diary and Autobiography of John Adams*, ed. Sara Martin (Charlottesville: University of Virginia Press, 2008), 4 volumes.
- DAFC* *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, ed. Jonathan Elliot, (Washington, D.C.: United States Congress, 1827-1830), 5 volumes.
- DHRC* *The Documentary History of the Ratification of the Constitution Digital Edition*, eds. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan (Charlottesville: University of Virginia Press, 2009), 28 volumes.
- JCC* *Journals of the Continental Congress*, eds. W. C. Ford, et al. (Washington, D.C.: Library of Congress, 1904-1937), 24 volumes.
- JP* *The Selected Papers of John Jay Digital Edition*, ed. Elizabeth M. Nuxoll (Charlottesville: The University of Virginia Press, 2014), 4 volumes.
- LDC* *Letters of Delegates to Congress, 1774-1789*, eds. Paul H. Smith, et al. (Washington, D.C.: Library of Congress, 1976-2000), 29 volumes.
- PAH* *The Papers of Alexander Hamilton Digital Edition*, ed. Harold C. Syrett, (Charlottesville: University of Virginia Press, 2011), 27 volumes.
- PJM* *The Papers of James Madison Digital Edition: Congressional Series*, ed. J. C. A. Stagg (Charlottesville: University of Virginia Press, 2008), 17 volumes.
- PWCS* *The Papers of George Washington: Confederation Series Digital Edition*, ed. Theodore J. Crackel (Charlottesville: University of Virginia Press, 2008), 6 volumes.
- PWR* *The Papers of George Washington: Revolutionary War Series Digital Edition*, ed. Theodore J. Crackel (Charlottesville: University of Virginia Press, 2009), 41 volumes.
- TJP* *The Papers of Thomas Jefferson Main Series Digital Edition*, eds. McClure, P. James and J. Jefferson Looney (Charlottesville: University of Virginia Press, 2009), 3 volumes.
- Records* *The Records of the Federal Convention of 1787*, ed. Max Farrand (Washington D.C.: 1911, reprinted 1934), 3 volumes.

Bibliography

- Ackerman, Bruce and Neal Katyal, "Our Unconventional Founding," *The University of Chicago Law Review* 62, no. 2 (1995): 475-573.
- Adams, John. *The Works of John Adams, Second President of the United States*. Edited by Charles Francis Adams. 10 volumes. (Freeport: Books for Libraries Press, 1969.
- Amar, Akhil Reed. *America's Constitution: A Biography*. New York: Random House, 2006.
- . *The Law of the Land: A Grand Tour of Our Constitutional Republic*. New York: Basic Books, 2015.
- . "Of Sovereignty and Federalism," *Faculty Scholarship Series Paper* 1021. (1987): 1425-1520.
- . "The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Problem of the Denominator," *Yale Law School* (1994): 749-786.
- Armitage, David. *Civil Wars: A History in Ideas*. New Haven: Yale University Press, 2017.
- . "The Declaration of Independence and International Law," *The William and Mary Quarterly* vol. 59, no. 1 (2002): 39-64.
- Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge: The Belknap Press, 2017.
- . *To Begin the World Anew: The Genius and Ambiguities of the American Founders*. New York: Alfred A. Knopf, 2003.
- Banning, Lance. *Jefferson and Madison: Three Conversations from the Founding*. Madison: Madison House Publishers, Inc., 1995.
- Beaulac, Stéphane. *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia*. Leiden: Martinus Nijhoff

- Publishers, 2004.
- Bernstein, Richard B. "John Adams's Thoughts on Government, 1776," *Articles & Chapters* 1012 (1990): 118-137.
- Bilder, Mary Sarah. *Madison's Hand: Revising the Constitutional Convention*. Cambridge: Harvard University Press, 2015.
- Billias, George Athan. *American Constitutionalism Heard Round the World, 1776–1989*. New York: New York University Press, 2011.
- Blackstone, William. *Commentaries on the Laws of England: Book I – Of the Right of Persons*. Edited by Wilfrid Prest. Oxford: Oxford University Press, 2016.
- Boardman, Fon W. *History and Historians*. New York: Henry Z. Walck, Inc, 1965.
- Bodin, Jean. *On Sovereignty: Six Books of the Commonwealth*. Edited by M. J. Tooley. Oxford: Seven Treasures Press, 2009.
- Bowen, Catherine Drinker. *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787*. Boston: Little, Brown and Company, 1966.
- Breen, T. H. *The Will of the People: The Revolutionary Birth of America*. Cambridge: Belknap, 2019.
- Burlamaqui, Jean-Jacques. *The Principles of Natural and Politic Law*. Edited by Petter Korkman and Knud Haakonssen. Indianapolis: Liberty Fund, 2006.
- Carey, George W. "Publius: A Split Personality?" *The Review of Politics* vol. 46, no. 1 (1984): 5-22.
- . *The Federalist*. Indianapolis: Liberty Fund, 2008.
- Coleman, Aaron. *The American Revolution, State Sovereignty, and the American Constitutional Settlement, 1765-1800*. New York: Lexington Books, 2016.

- Dunn, Richard. *The Age of Religious Wars, 1559-1715*. New York: W.W. Norton & Company, 1979.
- DuVal, Kathleen. *Independence Lost: Lives on the Edge of the American Revolution*. New York: Random House, 2015.
- Dylan, Bob. *The Nobel Lecture*. New York: Simon & Schuster, 2017.
- Ellis, Joseph J. *The Quartet: Orchestrating the Second American Revolution, 1783-1789*. New York: Vintage Books, 2015.
- . *American Creation: Triumphs and Tragedies at the Founding of the Republic*. New York: Vintage Books, 2007.
- Foner, Eric. *Tom Paine and Revolutionary America – Updated Edition*. Oxford: Oxford University Press, 2005.
- Gienapp, Jonathon. *The Second Creation: Fixing the American Constitution in the Founding Era*. Cambridge: Belknap Press, 2018.
- Gillespie, Alexander. *The Causes of War: Volume III: 1400 CE to 1650 CE*. Oxford: Hart Publishing, 2017.
- Goodwin, Doris Kearns. *Team of Rivals: The Political Genius of Abraham Lincoln*. New York: Simon & Schuster, 2005.
- Gutzman, Kevin R. C. *The Politically Incorrect Guide to the Constitution*. Washington D.C.: Regnery, 2007.
- . *Virginia's American Revolution: From Dominion to Republic, 1776-1840*. New York: Lexington Books, 2007.
- . *James Madison and the Making of America*. New York: St. Martin's Press, 2012.
- . *Thomas Jefferson – Revolutionary: A Radical's Struggle to Remake America*. New York:

- St. Martin's Press, 2017.
- Harvey, Ray Forrest. *Jean Jacques Burlamaqui: A Liberal Tradition in American Constitutionalism* (Chapel Hill: The University of North Carolina Press, 1937), 79.
- Hayes, Kevin. *The Road to Monticello: The Life and Mind of Thomas Jefferson*. Oxford: Oxford University Press, 2008.
- Hofstadter, Richard. *The American Political Tradition and the Men Who Made It*. New York: Vintage Books, 1973.
- Jensen, Merrill. *Articles of Confederation: An Interpretation of the Social-constitutional history of the American Revolution, 1774-1781*. Madison: The University of Wisconsin Press, 1976.
- Johnson, Samuel. *Samuel Johnson's Dictionary of the English Language*. Edited by Alexander Chalmers. London: Studio Editions Ltd, 1994.
- Krabbendam, Hans, Cornelis A. van Minnen and Giles Scott-Smith. *Four Centuries of Dutch American Relations: 1609-2009*. New York: State University of New York Press, 2009.
- Kiley, Michael M. "Thomas Paine: American Founder and Political Scientist," *Biography* vol. 8, no. 1 (1985): 51-67.
- Locke, John. *Two Treatises of Government*. Edited by Peter Laslett. Cambridge: Cambridge University Press, 1994.
- Madison, James. *Notes of Debates in the Federal Convention of 1787*. Edited by Adrienne Koch. Athens: Ohio University Press, 1985.
- . *The Virginia Report of 1799-1800 & Virginia Resolutions of December 21, 1798*. Edited by Leonard W. Levy. New York: Da Capo Press, 1970.
- McClanahan, Brion. *The Founding Fathers' Guide to the Constitution*. Washington D.C.: Regnery History, 2012.

- McClure, P. James, et al, eds. *Jefferson's Legal Commonplace Book*. Princeton: Princeton University Press, 2019.
- McCullough, David. *1776*. New York: Simon & Schuster, 2005.
- Miller, David Hunter, ed. *Treaties and other International Acts of the United States of America*. 8 volumes, New York: J.D. Torrey, 1861.
- Miller, William Lee. *The Business of May Next: James Madison and the Founding*. Charlottesville: University of Virginia Press, 1993.
- Monaghan, Frank. *John Jay: Defender of Liberty*. New York: The Bobbs-Merrill Company, 1935.
- Montesquieu, Charles de Secondat, *baron de*. *The Spirit of Laws: A Compendium of the First English Edition*. Edited by David Wallace Carrithers, Translated by Thomas Nugent. Berkley: University of California Press, 1977.
- . *The Spirit of the Laws*. Edited and Translated by Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone. Cambridge: Cambridge University Press, 2004.
- Morgan, Edmund S. *Inventing the People: The Rise of Popular Sovereignty in England and America*. New York: W.W. Norton & Company, 1988.
- Peterson, Merrill D. ed. *Thomas Jefferson: Writings*. New York: Library of America, 1984.
- Pufendorf, Samuel von. *Two Books of the Elements of Universal Jurisprudence*. Edited by Thomas Behme and Knud Haakonssen. Indianapolis: Liberty Fund, 2009.
- Rakove, Jack. *Revolutionaries: A New History of the Invention of America*. Boston: Houghton Mifflin Harcourt, 2010.
- . *James Madison: Writings*. New York: Library of America, 1995.
- . *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: Alfred A. Knopf, 1996.

- Read, Conyers ed. *The Constitution Reconsidered*. New York: Harper Torchbooks, 1968.
- Rowen, H., ed. *The Low Countries in Early Modern Times: Select Documents*. London, Macmillan, 1972.
- Shain, Barry Alan, ed. *The Declaration of Independence in Historical Context: American State Papers, Petitions, Proclamations & Letters of the Delegates to the First National Congress*. New Haven: Yale University Press, 2015.
- Shapiro, Ian and Jane E. Calvert, eds. *Selected Writings of Thomas Paine*. New Haven: Yale University Press, 2014.
- Shankman, Andrew. *Original Intent: Hamilton, Jefferson, Madison, and the American Founding*. Oxford: Oxford University Press, 2018.
- Stewart, David O. *The Summer of 1787: The Men Who Invented the Constitution*. New York: Simon & Schuster Paperbacks, 2007.
- Tuck, Richard. *The Sleeping Sovereign: The Invention of Modern Democracy*. Cambridge: Cambridge University Press, 2015.
- Unger, Harlow Giles. *Thomas Paine and the Clarion Call for American Independence*. New York: Da Capo Press, 2019.
- Wood, Gordon. *The Creation of the American Republic, 1776-1787*. Chapel Hill: The University of North Carolina Press.
- . *The Confederation and the Constitution: The Critical Issues*. Washington D.C.: University Press of America, Inc., 1979.
- . *The Radicalism of the American Revolution*. New York: Vintage Books, 1993.
- . *The American Revolution: A History*. New York: Modern Library, 2003.

Woods, Jr., Thomas E. *Nullification: How to Resist Federal Tyranny in the 21st Century*.

Washington, D.C.: Regnery Publishing, 2010.

Vattel, Emer de. *The Law of Nations*. Edited by Béla Kapossy, Richard Whatmore and Knud

Haakonssen. Indianapolis: Liberty Fund, 2001.

Vile, John R. *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of*

America's Founding. 2 volumes, Santa Barbara: ABC-CLIO Inc., 2005.