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Falsehoods of Statehood: A Survey of Sovereignty in the Early American Republic, 1790-1820

By

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[1] Charles Brown, "The Northern Confederacy: According to the Plans of the 'Essex Junto' 1796-1814," PhD diss., (Princeton University, 1913), 31.

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Introduction

"If asked," Akhil Amar pondered, "many historians today would say they simply seek to understand the past on its own terms."[2] When these historians shun other realms of inquiry (e.g., law and political science), they lack the context to properly answer questions of *how* and *why*. Establishment of the Constitution was not merely a historical event (i.e., *what*) but a political act that had legal repercussions domestically as well as internationally. Historians of this mindset unsurprisingly tend not to label sides of historical debates as either right or wrong.[3] These criticisms have been no more widely seen than in, what Amar described as, "two of the biggest bones of constitutional contention in American history: whether a state may nullify federal law or secede from the union."[4] I seek, in the following chapters, to affirm the legality of both.

Although historians typically have not been hesitant to rule dispositively on these matters, their judgments have more or less relied on the false assumption of American statehood. Indeed, the falsehood of American statehood has been a point of contention for very few historians. Because this facet of American history involves legal and political theoretics, most have chosen to ignore the issue and subtly confirm the United States of America was a nation-state. Since *nation* can either be synonymous with *state* or describe the ability of multiple states to act in unison with each other, I believe scholars have purposely used this word to avoid being pigeonholed on this topic. Yet, the historiography undoubtedly clarifies this ambiguity. Peter Knupfer's habitual use of the term throughout his own narrative of early American republic with a clear distinction that it denoted a nation-state.[5]

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[2] Akhil Amar, *The Words That Made Us: America's Constitutional Conversation, 1760-1840* (New York: Basic Books, 2021), xii. He also included legal scholars in this critique who often "ignore the appropriate historical materials or offer only superficial accounts."
[3] Ibid.
[4] Ibid., xi.
[5] Peter Knupfer, *The Union As It Is: Constitutional Unionism and Sectional Compromise, 1787-1861* (Chapel Hill: University of North Carolina Press, 1991), 106. In his description of John Calhoun's "theory of state-federal relations,"

A word, or a phrase, by its very existence as the invention of the human psyche may either attain more significance or lose substantive meaning over time. The first half of the twentieth century has arguably shaped present-day conceptions of expressions that carry an immense degree of importance in the realm of international relations, such as *country*, *nation* and *state*.[6] World War I's enduring legacy remains the principle of self-determination which effectively reduced the distinctiveness between these labels since the world powers henceforth repudiated imperialism and thereby enabled any population to lay claim to statehood.[7] Scholars who research the early American republic, 1790 to 1820, often describe it with these modern prejudices in mind by ascribing synonymity to each term. Although people of the aforementioned time period frequently employed these words to describe the American union, they were cognizant of their polysemous nature and thus used these words to specify certain aspects of it rather than its entirety.

Thus, in the following chapters, I hope contextualize these and other words in the context of how and why they were employed. I argue that there was a common understanding of these words even between members of rival factions in the early American republic. Women, whose political writings in this period were limited, nonetheless also opined on the nature of the American union. By studying the validity of secession and nullification in this period, the political language

Knupfer wrote that "[s]overeign states had created a union (not a nation) by temporarily ceding part of their sovereignty to the federal government." Knupfer's parenthetical emphasis on this distinction revealed that his use of the word nation meant nation-state.

[6] Philip G. Roeder, *Where Nation-States Come From: Institutional Change in the Age of Nationalism* (Princeton; Princeton University Press, 2007), 3. "A nation in the modern era is a population that purportedly has a right to a state of its own." A modern tendency exists to prematurely equate nationhood with statehood. Yet, the opposite presents no dilemma and may be true.

[7] Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford: Oxford University Press, 2007), 216-217. "President [Woodrow] Wilson had said that the treaty […] signed at Versailles put an end to the right of conquest and rejects the policy of annexation" and guarantees that peoples "will no longer be subjected to the domination and exploitation of a stronger nation." Whether people were united either by government as well as territory and could therefore be called a *country* or by a wide array of social factors and could therefore be called a *nation*, the phenomenon mentioned in the aftermath of World War I spurred incessant pleas by Egyptians, Indians and Koreans to claim existence as *de facto* states.

used in this period becomes clearer. Additionally, I introduce a legal paradigm to this period to demonstrate that my hypothesis is not only historically accurate but legally plausible too.

Chapter 1 – The Constitution's Democratic Ratification

In the four years between the signing of the Paris Peace Treaty in 1783 and the beginning of the Federal Convention in 1787, the Articles of Confederation's inefficiencies 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.[8] The impetus for this was probably a rebellious group of farmers in Massachusetts who disrupted the courts 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.[9] The Confederation, as it existed under the Articles, was not potent enough to handle everything that came with independence, especially diplomacy. Several proposals were made in the interim about the future: "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.[10] Of these, the most dramatic proposition was the last, but the 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.[11] While Jefferson genuinely believed that James Madison adhered to his recommendation in 1786 to create a semantic national government, some delegates in the

[8] Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787* (Boston: Little, Brown and Company, 1966), 9.

[9] 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. For Alexander Hamilton and James Madison, the reaction was the opposite, and they pressed for reforms to the Articles of Confederation.

[10] Hamilton, "Federalist No. 13," 60.

[11] Amar, America's Constitution, 106. Amar believed that the Convention "aimed to vest Congress with ample authority over interstate and international affairs [and 'continental security'] for the geostrategic reasons soon to be elaborated in the early *Federalist* essays."

Convention felt, though falsely, that this was not his intention. 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, introduced fifteen resolutions laced with "national" language coupled with forceful assertions about the "imbecility of the Confederation" only four days into the Convention on 29 May 1787, other state-delegations believed that the Virginians sought to alter the Convention's original purpose.[12] While some delegates 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.[13]

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.[14] The tone of the Convention's debates of Madison's plan stood on Randolph's tough diatribe of the Articles. The sixth resolution gave Congress 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.[15] Everyone expected the federal government to become stronger, but few expected the distribution of power of the

[12] Edmund Randolph, quoted in David Stewart, *Summer of 1787 ()*, 53.
[13] 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.'"; *See* Stewart, *Summer*, 55. Gouverneur Morris of Pennsylvania said that the first resolution was "unnecessary […] as the subsequent resolutions would not agree with it."
[14] 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."
[15] 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."

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.[16] There was concern to worry about a literal consolidation of the states.

Alexander Hamilton on 18 June 1787 proposed a plan, which Madison noted "went beyond the ideas of most members."[17] Hamilton said that no plan that left "the States in possession of their Sovereignty could possibly" fix the problems of the Confederacy.[18] 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."[19] 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.[20] While the adjective *national* was a nominal term, some, possibly due to Hamilton, observed, as John Lansing of New York did, "that the true question [of Ellsworth and Gorham's motion] was, whether the Convention would adhere to or depart from the foundation of the present Confederacy."[21] Lansing s eventually departed entirely from the Convention on 10 July 1787 because he believed that the

[16] Madison, *Notes,* 159. Martin Luther of Maryland 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. He 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.
[17] Ibid., 137.
[18] Ibid., 129.
[19] Ibid., 132, 136;
[20] Ibid., 154. (emphasis in the original)
[21] Madison, *Notes*, 155.

new government was antithetical to a confederation—leaving New York's delegation without a quorum, and consequently Hamilton without an ability to vote.[22]

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.[23] At the close of the Convention on 18 September 1787, a woman approached delegate Benjamin Franklin of Pennsylvania and inquired about the structure of government agreed upon. "A republic replied the Doctor if you can keep it," observed fellow-delegate James McHenry of Maryland.[24] Franklin's answer 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. "[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."[25]

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

[22] *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.
[23] Stewart, *Summer*, 53. Stewart noted that the Constitution was a far cry away from Madison's Virginia Plan.
[24] *Records*, 3:85.
[25] Madison, "No. 39," 196. (emphasis in the original) In this case, Madison's elaborate comparison between a "federal" and a "national" government included the literal sense of both terms.

casual fraction of an hour," sought to discover those details he missed which created a consolidated state rather than a confederacy.[26] Hamilton never openly admitted the 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.[27] Under the disguise of a 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.[28] Without a clear statement of consolidation, and *nation* being enough of a strong term for that purpose, the American states would individually continue to remain internationally sovereign. Because the Convention eliminated any national verbiage within the document for fear that it would be construed as something literal, theories of singular statehood must argue that an American state was created through means other than an *expressed* manifestation of such.[29]

Patrick Henry, an influential delegate of Virginia's ratifying convention, inferred that "We the People of the United States" was an expression of a "consolidated government." The initial draft of the Constitution contained a preamble written by Charles Pinckney of South Carolina that was included every state's name.[30] However, the revision which produced the Constitution was mostly conducted by Gouverneur Morris of Pennsylvania, who found it necessary to allude to a single American people rather than peoples of various states for it was not known that every state

[26] James Madison, quoted in Stewart, *Summer*, 48.
[27] Ellis, *Quartet*, 176-177.
[28] Here, my interpretation cited an earlier quotation of Madison from *Federalist* No. 39 in which he 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.
[29] Bowen, *Miracle*, 118. Bowen countenanced: "This word national, Ellsworth pointed out, would frighten people."
[30] 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)

would ratify the Constitution.[31] Scholars have largely abandoned this portion of the Preamble as evidence of a consolidated state but have cited another portion: "a more perfect Union."[32] 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.

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 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."[33] The states of Scotland and England agreed to 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"—by 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 forever 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

[31] Akhil Reed 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 irrebuttable 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.

[32] 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."

[33] 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.

> 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.[34]

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**.[35]

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

> **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.[36]

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

This historically-established legal principle was, and remains present-day, the bright-line rule of international law.[37] In short, states cannot forfeit their sovereignty simply by failing to expressly retain it in international compacts because by definition it is inviolable by any outside

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[34] "The Treaty of Union of the Two Kingdoms of Scotland and England" or The Articles of Union, Art. I, in George S. Pryde, ed., *The Treaty of Union of Scotland and England, 1707* (London: Thomas Nelson and Sons Ltd, 1950), 83. (emphasis added)
[35] *Constitution*, Preamble (emphasis added)
[36] "Definitive Paris Peace Treaty,"
[37] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2009), 6. "Put differently, a modified positivism, deriving not from legislation or from agreements among polities but from proliferating practices and shared expectations about legal processes, stretched across the centuries of European imperial expansion and rule. Patterns of legal variation […] formed a pervasive and persistent element of this global legal order."

inference.[38] Once territories are relinquished of their subordinate status and formally recognized as states, foreign relations assume that they are *in toto* sovereign in international compacts. Hence, states must directly manifest any intention to alter their international character because there cannot exist any higher (judicial) authority that can abrogate it. Therefore, states cannot surrender their sovereignty under the hazy reading of a treaty whereby a party utilized subtext to *infer* a transfer of another party's sovereignty to itself since this dangerous scenario would naturally produce an unstable world—agreeable only to conquerors.[39] With regard to the Constitution, specious arguments have been made that the American states lost their individual sovereignty through methods antithetical to the procedure of present-day international affairs, rooted in centuries of precedent.

Compliance with Article V of the Constitution demanded that a ratified amendment be in full effect in every state, even in those which voted against its ratification, but these stipulations did not further elaborate on a newfound subservience of the states, much less was the necessary *expressed* forfeiture of their respective sovereignty.[40] As already explained, the thought of a subjective implication being the acceptable criterion to the infringement of sovereignty would have had irrevocable consequences. By this standard, the statehood of every member of the United

[38] John J. Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities* (New Haven: Yale University Press, 2018), 93.

[39] Can one imagine 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. If a state could lose its sovereignty by implication, that would make it ambiguous—backed only by a force of arms rather than the original intent of the parties in question.

[40] Akhil Reed Amar, *The Law of the Land: A Grand Tour of Our Constitutional Republic* (New York: Basic Books, 2015), 17-18. 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."

Nations (U.N.) would be in danger since amendments to the organization's Charter go through a ratification process quite reminiscent of Article V.[41] The Charter's authority to bind every member-state to any properly ratified amendment, regardless of the nature of their respective votes, could be utilized to *imply* that the U.N. exists as a state, but this theory would deny the ability of states to govern themselves in the manner they see fit. Inference was largely rejected by the state ratifying conventions to settle the question of state sovereignty, and scholars should do likewise.

After Francis Corbin, a delegate of the Virginia ratifying convention, heard a substantial amount of the Federalist and Anti-Federalist persuasions, he stated that on 4 July 1788, his mind was set on the Constitution—mainly convinced by Madison's explanations.[42] Martin 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.[43] "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."[44] 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

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[41] The Constitution provided that two-thirds of either houses of Congress or the state legislatures may propose an amendment and that three-fourths of either the state legislatures or the state ratifying conventions may ratify an amendment. The United Nations Charter also specified a similar two-step process for amending the document—set out in Chapter XVIII, Article 108 of the U.N. 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.

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

[43] *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."

[44] Ibid., 9:1010.

"to protect, defend, and strengthen the United States," the individual states themselves as confederated.[45]

This paper determines the precise location of internal American sovereignty during and after the Constitution's ratification. 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. When the people of each state were tasked with the decision of ratification, 1787-1790, the Declaration's ideological promise of democracy was fulfilled. Most analyses by scholars of ratification have 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 authority of the people to overpower delegated-agents.[46] 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.[47] Arguably, once the colonies became actual states, the state legislatures became the closest things deemed as the repositories of sovereignty, or at least final authority.[48]

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[45] Ibid; "Declaratory Act," in Shain, *Historical Context*, 128-129.

[46] 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.

[47] G. 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."

[48] 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,

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. 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.[49] Commentators insinuated that the people were sovereign, but these assertions were without legal force—merely, decorative language.[50] 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 Declaration, the first American union, the external sovereignty of the individual states was the main concern throughout the Revolution, and the question of internal sovereignty (i.e., sovereignty of the people) was reserved for ratification of the Constitution. 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, characterized as "the powers of the earth."[51] Many eighteenth-century political philosophers theorized that the masses were the original holders of

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."

[49] The people did not possess the power to overrule the state governments, much less the federal government. *See* J. L. Talmon, *The Origins of Totalitarian Democracy* (London: Mercury Books, 1919), 1-3.

[50] 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 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.

[51] 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, they did not distort the message of the Declaration's famous preamble nor its concluding paragraph, which borrowed language from Richard Henry Lee's June 1776 resolutions.

sovereignty, and as time progressed, they forfeited it to install new 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."[52] 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.[53]

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.[54] The state governments, those which even put their constitutions to a referendum, did not exist by the

[52] Ibid. Democracy, by definition, is rule by the people. The Declaration outlined the two key principles of democratic government: equality and consent. Equality means that every vote has equal weight; while consent implies that voters hold final authority over their own nation. Many equate democracy with simple elections. But elections of government officials alone, does not connote consent to government; but simply ultimatums by government officials, among their dictated choices.

[53] Ibid. Actual consent requires that actual voting citizens hold final authority. Opponents of consent, attack this premise with a false dichotomy; holding democracy as being either "direct" or "indirect;" with the former requiring voters to make all choices of government, and the latter placing final authority with elected officials. Usually, "direct democracy" is dismissed as "mob rule," and thus the alternative of "indirect democracy" is held as somehow safeguarding rights against the so-called "tyranny of the majority" via a plethora of written proscriptions which the voters are held to enforce via their choice of elected officials. However, this convoluted logic simply masks the plain fact, that final authority always rests with an elite minority via these elected officials; thus, precluding consent under simple covert oligarchy, or totalitarian democracy. In reality, the people do not "vote" for government; but only opt among the token choices it allows them, in order to present the illusion of consent. Naturally, this presented a strange idea of "consent by proxy," i.e. with an elite minority holding final authority over the majority within a state that dictates the people's prescribed manner of "consenting" to government—precluding individual equality and consent and presenting only the illusion of both via covert oligarchy and ultimatum; *See* Talmon, *Totalitarian Democracy*, 201-202.

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

will of the people.[55] Democracy meant the seemingly legitimization of revolutionary activity, but revolution was not democracy at all. 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 the political theory sovereignty, which they defined as being absolute, final and indivisible.[56] Just as a king could at any moment exercise his authority over a legislative body, the same would be true of the people under a democracy.[57] According to William Bradford, Jr., the official printer of the First Continental Congress, members of that body heavily relied 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."[58]

These Europeans 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. [59] Additionally, these three forms could be

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[55] 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 government, and also by Adams's intervention for his ideas of popular sovereignty in the whole matter forced these events.

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

[57] 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."

[58] *Papers of James Madison*, 1:120.

[59] 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,

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.[60] 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.[61] The Constitution operated on these terms for the people of each state empowered a federal congress to legislate on 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.[62] "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."[63]

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)

[60] 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."

[61] 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.

[62] 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)

[63] Ibid., 301. (emphasis added)

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.[64] 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 changes could be made without the unanimous agreement of all the state legislatures.[65] 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."[66] Madison stressed that "[t]he act, therefore, establishing the Constitution, will not be a *national*, but a *federal* act."[67] 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: "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."[68]

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

[65] Madison, "Federalist 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."

[66] Madison, "No. 39," 196. (emphasis added)

[67] Ibid. (emphasis in the original)

[68] 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.

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-state basis, where each elector was associated by a sovereign territory. 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.[69] 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."[70] 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.

[69] 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 meaning of *sovereignty*, i.e. external and internal.
[70] Madison, "No. 39," 197.

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.[71] Hamilton confessed that the political elite outside of the Federal Convention favored consolidation, but the popular opinion scared the majority of "thinking men" in the Convention in "not go[ing] far enough" to support a truly national government.[72] 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."[73] "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."[74] 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 this 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

[71] 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 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.
[72] *PAH*, 4:223. Again, Hamilton did not desire "a strong well mounted government," but one of "a different [nationalistic] complexion."
[73] Jay, "Federalist 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.
[74] Ibid.

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 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 fictious nor temporary because the popular exercise of sovereignty associated with ratification was not a one-off event that was never to be repeated again.[75] Jean Bodin, the sixteenth-century French jurist, 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.[76]

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.[77] From this exposition, democracy existed only in the vague sense that the federal government's powers were legitimatized by the people, but the people were in no position to supersede any government—they could only act through public officials.[78] The only aspect of the principal-sovereign-delegated-agent relationship of the Constitution, they recognized was the distribution of powers among certain officials in order to carry-out the day-to-day operations of government. In

[75] Rakove, *Original Meanings*, 106-107. "The framers thereby sough 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.
[76] Jean Bodin, *On Sovereignty: Six Books of the Commonwealth*, Tooley, M. J., ed., (Oxford: Seven Treasures Press, 2009), 92; *See* Morgan, *Inventing the People*, 174.
[77] 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."
[78] Amar, "Central Meaning," 764-766.

the event of a breakdown in the relationship whereby a rogue agent 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. The long-term solution was that the people could, with time, vote to change the circumstances through the confines set-out by law, but voting was only a piece of the democratic equation. If plebiscite meant just meant the election of government officials without the unilateral ability of the majority to override them, then it would not be a democracy.[79] There was no single American people for there was no single American state—every state was the sovereign embodiment of its respective people.

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. 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

[79] Rakove, *Original Meanings*, 107. Rakove's definition of sovereignty contradicted any eighteenth-century understanding of sovereignty. Through a limited exercise of popular sovereignty with the ratification of the Constitution, the states somehow merged themselves as one whole people. However, this people could never again assert any sovereignty, they were only sovereign in a theoretical sense that government derived powers from them, which they could never resume.

> by majesty, and these are called by the general word *magistrates*. Their names are different in different states.[80]

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."[81] In a true democracy, the people, out of their own self-interest, may shift the political boundaries of the society and enable a reorganization of powers. Still, how could the people of each state usher in new political circumstances?

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.[82] It may be difficult to understand democracy as defined by Bodin because modern democracy conflates the daily governmental functionaries with popular sovereignty. 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.[83] Additionally, the people of each state

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[80] 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)
[81] Burlamaqui, *Natural and Politic Law*, 91.
[82] 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.
[83] 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."

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 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.[84]

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.[85] 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.[86] Indeed, the sovereigns of this third American union were in the same position. The people of each state elected

[84] 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.

[85] 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;

[86] Richard 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."

officials among other civil duties. However, at any given moment, the people of each state could awaken to change the course of the union.

Chapter 2 – "[A] perfect separation & a perfect incorporation"[87]: The American Nation and Consolidation

When the consensus of the Philadelphia Convention in the summer of 1787 swiftly abandoned its assigned instructions to reform the union as it existed under the Articles of Confederation—ratified in 1781—and ultimately opted for constituting a new union, a few of the body's delegates saw an opportune moment to persuade other members to merge the respective sovereignty of the American states, which they secured in 1783 vis-à-vis the Treaty of Paris, into a single American nation-state.[88] Roger Sherman of Connecticut passionately warned the participants: "To consolidate the States as some had proposed would dissolve our Treatises with foreign Nations, which had been formed with us, as *confederated* States."[89] At the outset of the Constitution's ratification, John Jay of New York noted that "America ha[d] already formed treaties with no less than six foreign nations."[90] Sherman's concern was not conjecture since the colonies had separately claimed statehood in each treaty contracted during the American Revolution.[91] Although politicians in the early republic understood the framers of the Constitution to have rejected consolidation, its threat resurged acutely with the collapse of the Federalist party in the aftermath of the War of 1812. Furthermore, the war pressed Americans to define exactly what democracy meant in the context of an international North American union.

Among the six treaties cited by Jay included the Franco-American Alliance made in 1778 that ostensibly forever entangled both countries in each other's affairs with a promise of collective

[87] June 28.
[88] Alexander Hamilton of New York and James Wilson of Pennsylvania were the outspoken nationalists.
[89] James Madison, *Notes of Debates in the Federal Convention of 1787*, ed. Adrienne Koch (Athens: Ohio University Press, 1985), 153. (emphasis in the original)
[90] Alexander Hamilton, John Jay and James Madison, "No. 3" in *The Federalist*, eds. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2008), 10.
[91] Because the colonies had yet to attain sovereignty, they essentially paraphrased the Declaration of Independence's reference to international sovereignty in every treaty made before 1793, when recognition of the American colonies as states was codified.

defense.[92] No matter how well-negotiated terms of any international agreement may be, its enforcement is entirely voluntary for a state can upon its own volition unilaterally withdraw from its commitments to other states. When an excuse could be mustered to absolve the United States of its responsibilities under the aforementioned pact, President George Washington declared it so amidst the outbreak of renewed conflict between France and Great Britain in 1793. The overthrow of the French monarchy, the execution of Louis XVI and the creation of the French Republic was enough reason for the Washington administration to inform the newly formed French government's American ambassador, Genet, that America would not continue the alliance.[93] Alexander Hamilton, the chief proponent of neutrality on the issue of war between these European superpowers, argued that across these quick turn-of-events came a shift in the political authority of the state—a state governed by the French king was now controlled by the people.[94] Indeed, Sherman foresaw the same worry should anyone tamper with American sovereignty and give the states of Europe reason to casually invalidate American treaties.[95]

America's third flirtation with unification spurned a serious but ephemeral debate about whether the future of the U. S. was to be truly federal or completely national. The difference was

[92] "Treaty of Alliance," Article 4 (1778):
"The contracting Parties agree that in case either of them should form any particular Enterprise in which the concurrence of the other may be desired, the Party whose concurrence is desired shall readily, and with good faith, join to act in concert for that Purpose, as far as circumstances and its own particular Situation will permit; and in that case, they shall regulate by a particular Convention the quantity and kind of Succour to be furnished, and the Time and manner of its being brought into action, as well as the advantages which are to be its Compensation." *See* NATO's Article 5 of collective defence, which shares characteristics similar to the Franco-American Treaty of 1778.
[93] William Sewell, "Historical Events as Transformations of Structures: Inventing Revolution at the Bastille," *Theory and Society* 25 (1996): 859. "From then on the capture of the fortress [Bastille] was enshrined as the defining event of a revolution in the modern sense – a rising of the sovereign people whose justified violence imposed a new political system on the nation."
[94] Ron Chernow, *Alexander Hamilton*, (New York: Penguin Books, 2004), 436.
[95] *See* Francis Carroll, "Diplomatic Recognition" from *The Encyclopedia of Diplomacy*, ed. Gordon Martel, (Hoboken: Wiley-Blackwell, 2018), 1:585-586. Although "[r]ecognition of the state is regarded as permanent; recognition of the government may change with different circumstances[, such as] rebellion, coup d'état, fraudulent elections, or other events that change the character of the receiving state. [These] may cause the sending state to reconsider recognition of the receiving state."

obvious to not just the framers of the Constitution but to voters who ultimately decided to "ordain and establish" the union it proposed. Whereas a federal, or *feodus*, union would mean a system of states, a national union would mean just a singular state (i.e., nation-state.)[96] Madison hoped the Convention would produce a government that included elements of both structures: "a perfect separation & a perfect incorporation."[97] While the former meant the "independent [American] nations [would be] subject to no law, but the law of nations," the latter meant "they would be mere counties of one entire republic, subject to one common law."[98] Madison described the Constitution as "partly federal and partly national" for these very reasons.

Congress, in 1798, passed four laws collectively known as the Alien and Sedition Acts, which altogether increased the years of residency for American citizenship, gave President John Adams arbitrary powers to detain and deport noncitizens and protected government officials from any "false, scandalous and malicious" speech or writing.[99] The Sedition Act punished, with a fine and imprisonment, anyone who spoke, wrote or printed any of the latter material that intentionally defamed any facet of the government of the United States, except Vice-President Thomas Jefferson. Execution of this legislation further demonstrated that Federalists cared more about the persecution of their political opponents than foreign adversaries of the country. When the Republicans countered the Federalist-backed federal legislation with resolutions in the Virginia and Kentucky state legislatures, a slew of state legislatures, on an erroneously and *prima facie* interpretation, openly lambasted the assertion that a state legislature could either interpose or nullify.[100] Although correct that Virginia's state government could not legally repudiate federal

[96] Hendrickson, *Union, Nation or Empire*, 10-11.
[97] Madison, *Notes*, 153. Comment was made on 28, June 1787.
[98] Ibid.
[99] The four acts were the Naturalization Act, the Enemies Act, the Friends Act and the Sedition Act.
[100] Geoffrey Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: W. W. Norton & Company, 2004), 45.

law, the state of Kentucky could legally repudiate a federal law. James Madison, author of the former state's resolutions, explained this distinction in an expanded report—published in 1800.

The Virginia Report thoroughly defined the word *state*: the land thereof, the government thereof or the people thereof acting in their highest sovereign capacity. Although he authored the latter state's resolutions, Jefferson's draft of the Kentucky Resolutions went through a revision. Kentucky's legislature voted on a series of resolutions that emphasized the responsibility of state officials to combat the unconstitutionality of the Alien and Sedition Acts. Whoever edited the Kentucky Resolutions clearly sought to attack these laws but only to an extent—a tactic defined as political brinkmanship—that omitted what Madison also described as the foundation of American governance.[101] If an unconstitutional action was undertaken by the federal government, then, Madison held, "a change by the people [of each state] would be the constitutional remedy." The omission of this detail gave the impression that what the Kentucky and consequently Virginia Resolutions advocated was civil disobedience sanctioned by state governments.

While he was silent on both the revision of the resolutions and the flurry of attacks it received, neither could suggest Jefferson rejected the focal point of the resolution's original draft: nullification. A rejection of nullification would have been a rejection of the law of nations. Nullification was not a figment of Jefferson's imagination; it was the authority (i.e., "natural right") every state in the eighteenth century held and which present-day states continue to hold. Indeed, non-compliance is a recurrent theme of international relations. Although members of the European Union must abide by austerity rules that limit their debt and deficit, there were no legal repercussions for the violations committed by either Germany or Greece in 2009 and 2020

[101] Historians have their suspicions but remain altogether indecisive as to who specifically revised the Kentucky Resolutions.

respectively. States always calculate their position relative to other members of the international system.

If the balance of power tilts in a disadvantageous direction, a state may seek to nullify informal norms but also formal agreements to return to a place of solace. Therefore, it came as no surprise that Madison, an avid reader of state behavior, particularly those of confederations, agreed with Jefferson that the American states were "in duty bound, to interpose for arresting the progress of […] evil," which specifically referenced the Alien and Sedition Acts but also implied that nullification's application could be subjective.[102] However, the greatest evil, of course, was and continued to be the incessant desire of a few political elites for consolidation. Consolidation, like most of the political terminology and phraseology of the early American republic, was polysemous. It could refer to either literal state-creation or figurative amalgamation of several interests into one creed.[103] While a writer for the *National Gazette*, Madison observed that the former kind of consolidation was to be avoided at all costs.

The colonists fought and won a revolution in order to secure their separate independence from Great Britain; and they had expressly *retained* their independence from each other. However, unity was a goal that many sought to attain in the immediate aftermath of the American Revolution, which forced the colonies to share burdens for a greater purpose. The states animated from colonies that could arguably have been figuratively called nations. Although nothing yet legally made them into nation-states, the colonies and even regions of these future states were able to garner enough attachment to lay claim to statehood. However, once in a confederacy, the American states understood, as Jefferson did, the need to "consolidate the affairs of the states into one harmonious

[102] "Virginia Resolution," Madison used the word *interposition* rather than nullification; *See* (), 80. Pickering called this a "negative."
[103] "Consolidation" *National Gazette*, Philadelphia, 3 December 1791

interest."[104] In order to do so, Madison, as he would as the fourth President of the U. S., implored politicians to "contemplate the people of America in the light of one nation"[105]

Most, if not all, of the political class in the early Republic knew the American union to be a confederacy. [106] However, this soon changed with the demise of one of the major parties that would emerge from the Washington presidency. Led primarily by the personalities of Alexander Hamilton and Thomas Jeferson, the Federalist and Democratic-Republican parties were distinguished by their policy disagreement.[107] However, they were later recognized by foreign observers, such as Thomas Hamilton, for their perceptions on the nature of the confederacy. The Federalists "regard[ed] the United States as one and indivisible," Hamilton wrote, meanwhile the Democratic Republicans "consider[ed] the [u]nion as […] possessing no other principle of cohesion than that of mutual convenience. The […] right of withdrawing from the national confederacy as indefeasible in each of its members."[108]

So, what occurred to affect this change? The Federalists enjoyed legislative success and control of the direction of the U. S. for the first nearly fifteen years of its existence. However, Jefferson's ascendence to the presidency, christened a "Revolution," did set back the Federalist agenda. Yet, the Federalists did not immediately revise the entire narrative of the American Revolution to claim the American union was actually a national union in which the states had given up their independence to form a singular American state.

Jefferson's deal in 1803 with the French, known as the Louisiana Purchase, sparked not just outrage but also threats from the Federalists. "We are all Republicans, we are all Federalists,"

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[104] "Kentucky Resolution," as passed by the Kentucky legislature.
[105] Madison, "Consolidation"
[106] Merril Peterson, *The Great Triumvirate: Webster, Clay, and Calhoun* (Oxford: Oxford University Press, 1987)
[107]
[108] Thomas Hamilton, *Men and Manners in America* (Cambridge:) 1:285.

Jefferson uttered in his First Inaugural Address, regardless of policy differences. Although this difference certainly existed between the Federalists and the Democratic Republicans, they did see eye to eye on issues, such as immigration, as well as "principle."[109] Jefferson understood that Federalists officials comprehended the nature of the union as he did. No matter how the balance of power may shift within the American confederacy, "[i]f there be any among us who would wish to dissolve this [u]nion or to change its republican form, let them stand undisturbed," Jefferson foretold.[110] Secession, like nullification, is a right enjoyed by every state by virtue of its sovereignty.

And by the same token, states use the power of secession as leverage for their own goals. No one would question the legitimacy of any member of the European Union to withdraw for whatever reason.[111] Similarly, in response to perhaps the most consequential negotiated deal the U. S. has ever made, Timothy Pickering of Massachusetts, former Secretary of State for Presidents Washington and Adams, said that "I will rather anticipate a new confederacy, exempt from the corrupt and corrupting influence and oppression of the aristocratic Democrats of the South."[112] Pickering was frightened at the thought of assimilating not the territory but the inhabitants thereof for reasons of governance that had racial undertones.[113] "There will be […] a separation," he

[109] Thomas Woods, "Did the Founding Fathers Support Immigration?" from *33 Questions About American History: You're Not Supposed to Ask* (New York: Crown Forum, 2007), 5-10. Both groups feared the influx of immigrants to the United States until Thomas Jefferson was elected president. Jefferson believed immigrants put him over the electoral edge and were more receptive to Republican efforts. Therefore, he changed his opinion.

[110] Thomas Jefferson, First Inaugural Address

[111] The Treaty of Lisbon delineated a formal process of secession for members of the European Union. Yet, no one would have denied secession for any state of the E. U. with the absence of this treaty.

[112] Clearly, the Federalists believed in the American principle of unification through confederation. The history of the American Revolution to the Constitution was about finding a right model of confederation.

[113] Joseph Ellis, *American Sphinx, The Character of Thomas Jefferson* (New York: Vintage Books, 1998), 251. According to Ellis, "ethnic diversity of the Creole population [in the Louisiana Territory] posed governance problems."

predicted, and "the white and black population will mark the boundary."[114] Pickering assumed that if the American states seceded, they would simply unite under another confederacy.

Murmurs of secessions ran rampant under the Jefferson presidency. Pickering again in 1804, a year later, spoke about secession with more detail on the plotters. Massachusetts, of course, would "take the lead," and soon be joined by Connecticut, who eventually would call Pennsylvania, New Hampshire, New Jersey, New York, Rhode Island and Vermont as confederates.[115] However, just as New York's secession from the former confederate republic under the Articles of Confederacy spurred a flurry of secessions from the other states, Pickering believed New York would be as essential and produce the same results. The Federalists utilized the upcoming gubernatorial election in New York to sever the American union. They would help elect Vice-President Aaron Burr, a Democratic Republican, and he would push the state to secede from the United States.

Alexander Hamilton made his feelings about secession well-known: he opposed it. Strategically, Hamilton, as a high-level Federalist, possibly followed the dictum as espoused by the Essex Junto, a power clique of New England politicians and businessmen: "to secure a branch of the government as a sort of sanctuary for the wise and good, but to place all power in their hands."[116] Hamilton's stint inside of the Washington administration perhaps gave him more resolve that secession was not the correct means to attain policy goals. Hamilton actively opposed Burr's election, and for the second time in his career, he cheated Burr out of an elective office.[117]

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[114] "Timothy Pickering to Richard Peters" in Henry Adams, *Documents Relating to New-England Federalism, 1800-1815* (Boston: Little, Brown, 1877), 338.
[115] "Timothy Pickering to Theodore Lyman," 11 February 1804, in Adams, *New-England Federalism*, 338.
[116] David H. Fischer, "The Myth of the Essex Junto," *The William and Mary Quarterly* 21, no. 2 (1964): 209.
[117] Hamilton played an influential role in the House of Representatives selecting Jefferson over Aaron Burr in the 1800 presidential election since neither candidate reached the electoral college threshold to win outright.

And basically, Burr's entire elective career was over as was Hamilton's, whose death was the result of a duel between the two men.

Yet, the attempt to secede from the American union did not subside. Apart from the Louisiana Purchase, Jefferson's first term was relatively peaceful.[118] President Adams was able to negotiate an end to America's maritime troubles with France, who simultaneously brokered an armistice with Great Britain. However, near the end of Jefferson's term, he began to enter into troubled waters, specifically those of the Mediterranean Sea in which the Barbary Wars were fought.[119] Moreover, the peace between France and Great Britain would break and place the Jefferson administration with the same dilemma that plagued the Adams presidency. Jefferson placed an embargo on international trade, which disproportionately affected the mercantile New England states.[120]

Federalists appear to have never denounced secession in the same terms they denied nullification, and yet in the ensuing years, the northern states would engage in what they falsely believed to be nullification.[121] However, they simply could not have logically nor legally have justified secession without equally understanding that nullification ran in tandem with state authority. Whereas Jefferson was clear with the rights of states as to secession and nullification, the Federalists either denied or greatly misconstrued them. And in no other secessionist plot was this seen than in the War of 1812. While Jefferson was not president during this time, he nevertheless held the same opinion as he did upon entering office: "if any state in the union will declare that it prefers separation […] to a continuance in union […], I have no hesitation in saying

[118] Ellis, *American Sphinx*, 221. "Jefferson inherited the most stable and peaceful international scene since the United States had declared its independence."
[119] Nonetheless, the United States attained victory in that conflict.
[120] Jefferson implemented the embargo in 1807. Enforcement of this embargo was reminiscent of the execution of the Alien and Sedition Acts. Perhaps, it was in some respects a retributive action.
[121] Thomas Woods wrote a book on nullification that ironically laid out this false premise.

'let us separate.'"[122] Jefferson, for all his radical sentiments, was not actually believed to even be, at least not by his archnemesis, Hamilton, someone who sought to destroy the federal government.

Indeed, the 1800 presidential election was decided in the House of Representatives due to Hamilton's background deals, which were predicated on concessions from Jefferson as well as his assessment of Jefferson's motives.[123] As Secretary of State in the Washington administration, Jefferson supported measures that expanded the powers of the executive, which he would also replicate with the Louisiana Purchase. However, Jefferson's vision of the federal government was small in scale. He "consider[ed] union, for specified national purposes, and particularly to those specified in their late federal compact, to be friendly to the peace, happiness and prosperity of all the [s]tates." And of course, national in this sense meant all-encompassing across the vast territory of the American confederation. In order for the United States to succeed and continue its existence, nationalism was not something that could be ignored.

The U. S., though not an actual state, had to think and perform its actions like it was an actual state. Jefferson could agree on this principle with Hamilton, who at the end of the Constitution's ratification argued that the federal government established would be a confederate republic. Hamilton inched closer and closer to asserting that the national supremacy of the government was literal rather than figurative. However, this was a minority view that soon gained traction because, primarily, the Federalists understood with the demise of their party that separation was not the correct strategy to undertake.

[122] Thomas Jefferson to William H. Crawford, 20 June 1816, Monticello
[123] Ellis, *American Sphinx*, 213. "Hamilton […] did not believe that Jefferson had the disposition [...] to dismantle the federal government."

Chapter 3 – The International "balance of power"[124] within the American union

Despite the enormous cost of the War of 1812 in terms of its economic, political and social consequences, the conflict with Great Britain enabled the United States of America to achieve unity that nominally arrived with the ratification of the Constitution.[125] Although the American states collectively engaged with foreign states in a wide-array of capacities, this unification was recognized by all facets of American society as figurative. Members of both the Federalist and Democratic-Republican factions premised their politics on this fact. Women, though not as politically involved as men in politics, also uttered the same truth. Foreign observers distinguished the American union from the states of Europe by the former's ability to dissolve at will. However, the demise of the Federalist party arguably marked the moment in which this basic truth of American governance came under attack.

The language used to describe the present-day community of nation-states was employed by Americans to describe the relationships between the states of the union, namely the *balance of power*.[126] Federalists questioned Jefferson's unilateral decision to buy the Louisiana territory, and Jefferson had some hesitation too since the Constitution did not specifically allow the federal government to hold territory.[127] The states, under the Articles of Confederation, expected new allies, especially ones made from excess territory held by the states.[128] However, the Federalists

[124] Charles Brown, "The Northern Confederacy: According to the Plans of the 'Essex Junto' 1796-1814," PhD diss., (Princeton University, 1913), 31.
[125] The United States of America roughly incurred $100 million in wartime debt and near 15,000 Americans died.
[126] John Mearsheimer, *The Tragedy of Great Power Politics: Updated Edition* (New York: W. W. Norton & Company, 2014), 23. "Power need not be distributed equally among all the major states in a balanced system, although it can be. The basic requirement for balance is that there not be a marked difference in power between the two leading states." "Because great powers care deeply about the balance of power, their thinking focuses on relative gains." "Blackmail and war are the main strategies that states employ to acquire power."
[127] Gary Lawson and Guy Seidman, *The Constitution of Empire: Territorial Expansion and American Legal History* (New Haven: Yale University Press, 2008), 20-22.
[128] The borders of the colonies actually stretched all the way to the Mississippi River. The states would eventually cede this excess land in order for new states to form.

argued that the admission of new states from the Louisiana Purchase would violate the Constitution, which at its core was a treaty between the original thirteen states. New members would shift the balance of power in the confederation away from New England. Vermont and Kentucky were among the first states to be admitted into the union with little debate, except for the balance of power.[129]

Indeed, the union represented an ideal which Thomas Paine popularized: democratic states allied in a continental republic. Hence, the union was religiously worshipped by all politically active people, even those who spoke of disunion did so with some hesitation. Independence Day therefore became an event in which praise was due to both union and, more importantly, the states themselves. Hence, in 1822, a Vermont woman by the name of Miss Cole spoke on the 4th of July with reverence to "the birth day of our nation" with reference that it was erected by the confederated States of the Union."[130] The balance of power was synonymous with peace, and Jefferson had, according to the Federalists, approached that boundary one too many times.[131] Roger Griswold of Connecticut argued that "the accession of Louisiana will dispers[e] […] our population, and destr[oy] [the] balance of power which is so important to maintain between the Eastern and Western States."[132]

Amending the Constitution was seriously considered for both Jefferson and the Federalists in order to avoid what each believe to be unconstitutional territory. Jefferson's main concern was the Constitution's omission about the ability of the federal government to both acquire and then hold foreign territory. Article IV, Section 3 clearly stated that Congress had the power to make

[129] The admission of both states hinged on the balance of power.
[130] Rosemarie Zagarri, *Revolutionary Backlash: Women and Politics in the Early American Republic* (Philadelphia: University of Pennsylvania Press, 2007), 72-73.
[131] Ibid., 132-133. Sally Hastings wrote a poem about Jefferson's embargo. She decried it and said President Jefferson's actions would "[d]issolve the Union, which our peace maintains."
[132] Brown, "The Northern Confederacy," 31.

rules and regulations over "the Territory or other property belonging to the United States," but the United States represented every state in tandem, i.e., the nation.[133] The states, of course, ceded territory with the 1707 Northwest Ordinance on the commitment that they become new allied states, but this was again property won and kept by the states under the Treaty of Paris and held jointly then by all the states vis a vis the aforementioned ordinance. Hence, which is why the Constitution makes it clear that "nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."[134] And of course, once newly formed states were admitted the states lost any claim to the territory because of mutual recognition of state sovereignty.

However, the eruption of war, again, between France and Great Britain during Jefferson's second term caused the greatest backlash and movement towards secession not seen until his successor, James Madison, became president. The maritime issues which plagued the Adams presidency were amplified under Madison's term. American trade was disrespected by France as well as Great Britain, but the British impressed American seamen into their navy and encouraged Indian tribes to battle with American settlers. These were among the "series of acts hostile to the United States[,] as an independent and neutral nation," which Madison addressed to Congress' attention on 1 June 1812 to ask for a declaration of war against the British empire. The Federalists, being more receptive to British inclinations, pressed against the eventual war.[135] And in the most drastic of actions, the Federalists in New England, those known as the Essex Junto, orchestrated a plan to secede from the American union.

[133] *Constitution*, Article IV, Section 3.
[134] Ibid.
[135] Jefferson privately referred to Federalists as "monocrots."

While the diplomatic talks that New England's states had with British representatives may indicate a postulation of sovereignty, a stronger expression of this fact—the sovereignty of the American states—came with threats to assert their sovereignty.[136] Although the Jefferson administration forced several Federalists to murmur and somewhat plot secession, it grew more support and spurred decisive action during Madison's presidency. Jefferson's embargo was the main gripe that Federalists had with him which Congress, mainly Democratic-Republicans, ended at the close of his second term.[137] Before twenty-six Federalist operatives convened in Hartford to discuss the War of 1812, or Madison's War, as termed by them, it had lasted for more than two years with no clear end in sight. Gouverneur Morris of New York erroneously predicted that "[t]he men assembled, will, I believe, if not too tame and timid, be hailed hereafter as the patriots and sages of their day and generation."[138] While he was no longer in public office, this prediction indicated that Morris was still actively political.

Morris therefore premised his conclusion on the secessionist rhetoric he probably was either told or overheard. Yet, a union between New England and the other eastern states would not eventually materialize because the most vocal proponents of secession did not attend the Hartford

[136] Alison L. LaCroix, "A Singular and Awkward War: The Transatlantic Context of the Hartford Convention," *American Nineteenth Century History*, Vol. 6, No. 1, March 2005, 13. "Federalist New England claimed a place for itself in the international community insofar as it sought to articulate its own relations with the world beyond American shores," LaCroix wrote. Yet, but I would say that their assertion to secede was a much stronger assertion of this than simply talks with foreign officials. After all, the colonists had been having talks with several states throughout the American Revolution, but they understood that this in it of itself made them *de facto* states.

[137] Samuel Morison, *The Life and Letters of Harrison Gray Otis, Federalist, 1765-1848* (Boston: Houghton Mifflin Company, 1913), 2:81. "In 1808 a majority of the people of New England for the first time were conscious of oppression and of an intolerable grievance, --Jefferson's embargo,-- and it was just after the presidential election had failed to right their section's wrongs that we find Otis, and several other Federalist leaders, proposing to hold a Northern convention. This proposition never went beyond the pale of private discussion; but had the embargo remained after March 1809, there is every probability that Massachusetts would have called a New England or Northern convention with the object of securing a concerted nullification of the embargo by the disaffected states."

[138] Brown, "The Northern Confederacy," 109; *See* Jonathan Gienapp, *The Second Generation: Fixing the American Constitution in the Founding Era* (Cambridge: Belknap Press, 2018), 153. These sentiments by Morris contradict the argument by Gienapp believed Morris was a true nationalist who secretly included language in the Constitution that made the U. S. into a literal single American state. As seen from this admission, Morris would have completely reversed himself.

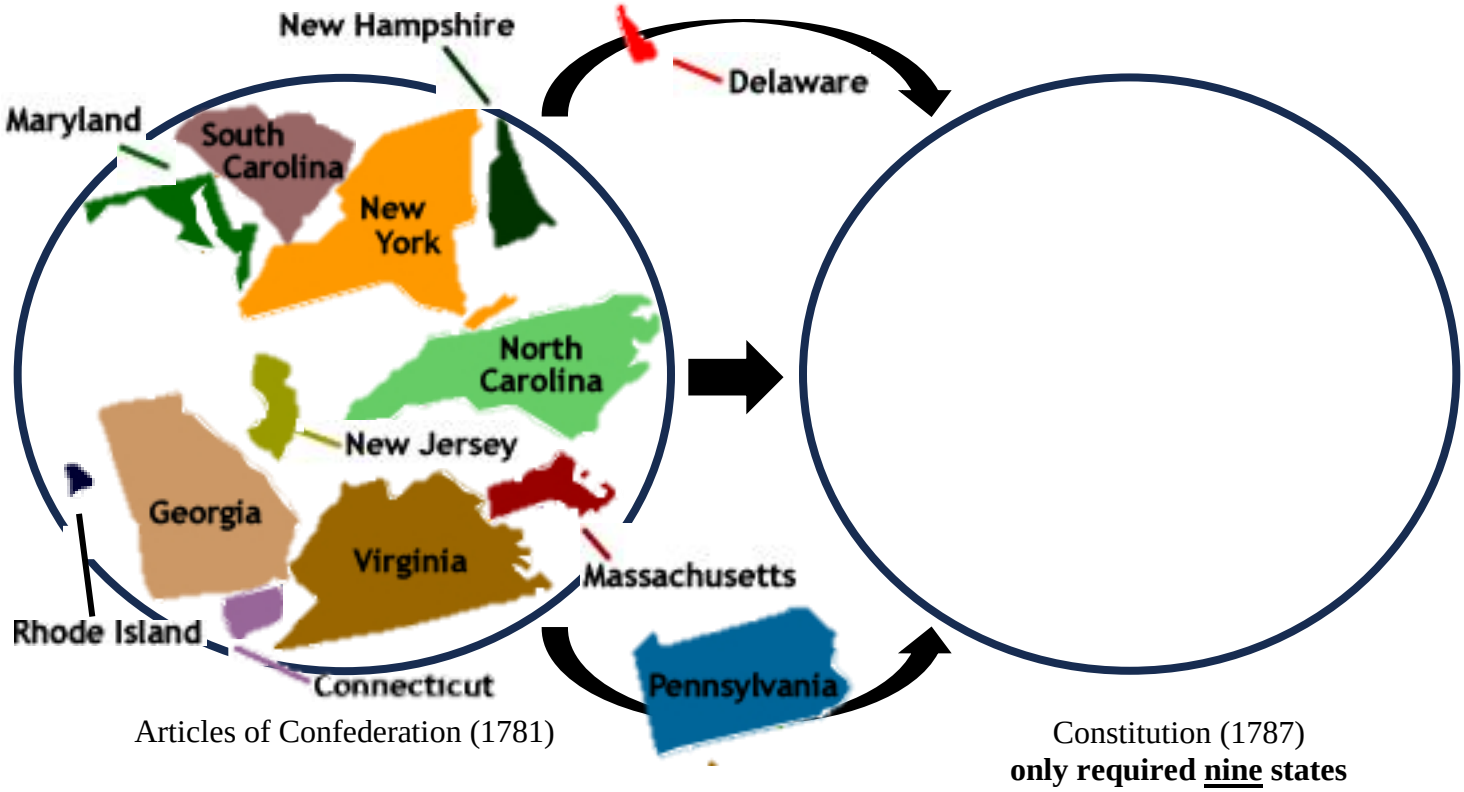
Convention.[139] Harrison Gray Otis of Massachusetts was quite aware of these sentiments, especially from Morris himself.[140] Otis nevertheless pushed through a resolution that presented an opportunity to simply not just discuss and recommend changes to the Constitution but assert the national sovereignty of his state and possibly others.[141] The conclave which met at Hartford drew, as the Federalist correctly viewed it, strong parrels to both the First Continental Congress, who drafted and ratified the Declaration of Independence in 1776, and the Federal Convention, who debated and wrote the Constitution in 1787.[142] However, conventions such as this were no longer applicable and somewhat antithetical to democracy.

The Declaration was approved by the "[r]epresentatives of the united States of America," those ultimately selected by state government officials and which could, more importantly, not be overridden by state populations. Again, the Constitution was framed by delegates chosen by state government officials and which could, more importantly, not be overridden by state populations. Yet, the Constitution was not approved by these delegates; instead, this decision was left for the states to decide. Sovereignty, of course, had first been conferred upon the states externally in the Treaty of Paris in 1783 but then internally by the state governments that had exercised final authority in matters until the Constitution's ratifying conventions which epitomized democracy. The decision to ratify the Constitution was actually the choice to secede, and this was to be

[139] Timothy Pickering, for example, was not a member. 291-293. "a cordial union with the Eastern States," See also, "examine the Question freely Whether it be for the Interest or conducive to the Happiness or consistent with the Freedom of the North and Eastern States to continue in Union with the Owners of Slaves."
[140] William Adams, *Gouverneur Morris: An Independent Life* (New Haven: Yale University Press, 2008), 85. "But to the end of the war Gouverneur Morris continued to urge secession in letters to Otis, Rufus King, and others, and he was exceedingly disgusted at the moderation of the Hartford Convention."
[141] Adams, *Gouverneur Morris*, 103. The language of the resolution but just the very presence of a convention Harrison Gray Otis, *Letters in Defence of the Hartford Convention, and the People of Massachusetts* (Boston: Simon Gardner, 1824), 22. "The Legislature was summoned in September, 1814, The act instituting the Convention, passe din October following. "
[142] LaCroix, "Singular and Awkward War," 18. "Federalists repeatedly attempted to cloak the Hartford Convention in the sacred fabric of the Republic's founding conventions of 1776 and 1787."

exercised by the people of each state through popular vote (i.e., convention.) Henceforth, the people of each state were designated as sovereign, and any convention that claimed to assert sovereignty without proper authorization from them would obviously be a usurpation.

Fig. 1: Sporadic Secession of the American States



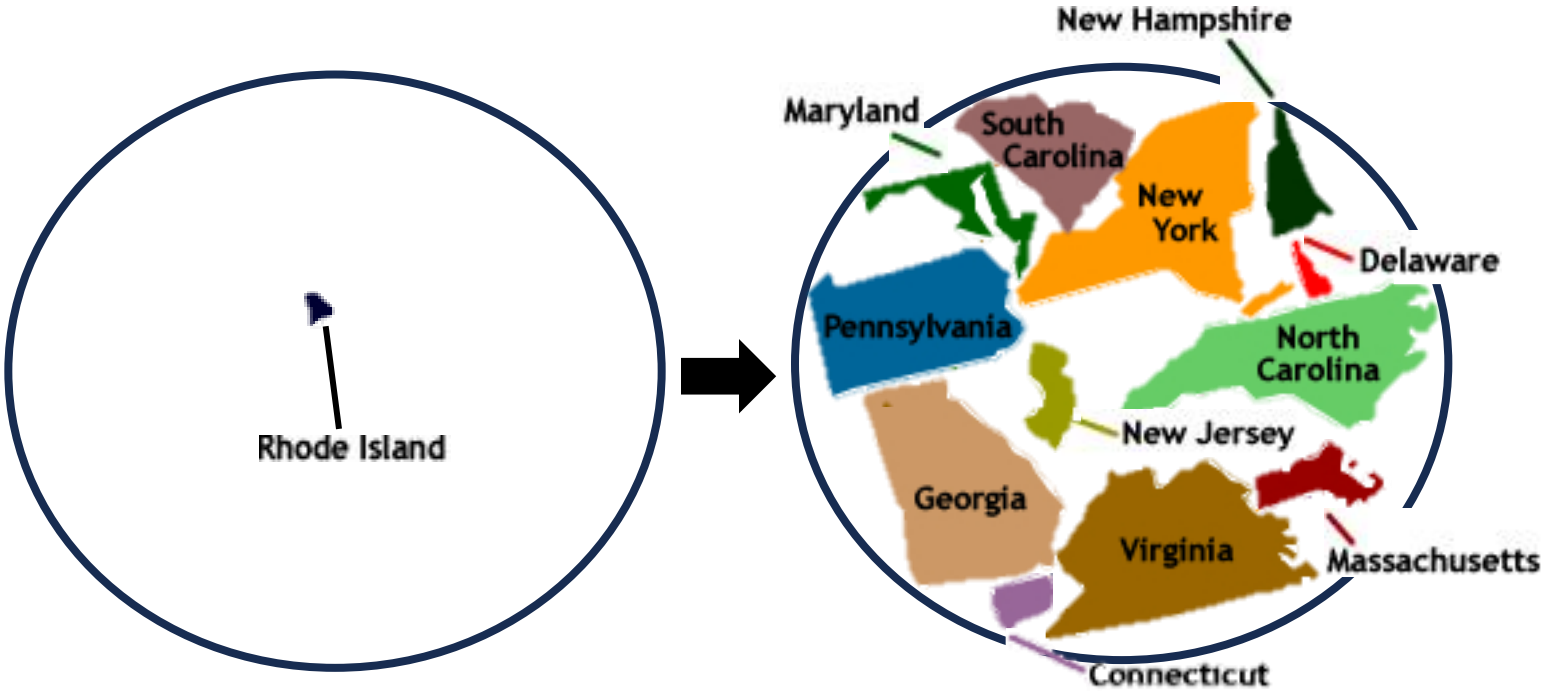
Articles of Confederation (1781)

Constitution (1787)
only required nine states

The international sovereignty of the individual states was evident with the departure of some of the states from the union of the Article of Confederation which occurred at sporadic times that reflected the desire and whims of their respective people. By its respective *power* as a *separate* and *sovereign nation*, the people of Delaware were the first to secede and ratify the Constitution on 7 December 1787. Pennsylvania's ratification followed a few days later on 12 December 1787 but was not legally bound to endorse the Constitution's union simply because of Delaware's actions. *Non*-ratifying states would remain *outside* of this third attempt at unification once the

Constitution's threshold of nine members was met. Again, no state's ratification legally carried over another state's membership—this would have indicated the American union actually be a singular nation-state. Hence, the dates of ratification were separated by more than a few days, such as weeks, months and even years.

Fig. 2: Defunct Confederation After Flurry of Secession with the Constitution



Articles of Confederation (1781)
DEFUNCT

Constitution (1789)
only required <u>nine</u> states

New Hampshire's (ninth) ratification put the Constitution into effect. By 30 April 1789, the date of George Washington's inauguration, the Constitution's union only included eleven states. North Carolina would join before the year ended which left Rhode Island as the odd man out in a defunct confederation. Since the state of Rhode Island did *not* secede from the "Confederation and perpetual union"—a phrase often twisted to insinuate national union among the American states in a manner utterly devoid of its actual meaning and context—it was faced

with the prospect of either joining the Constitutional union or remaining solitary. When the sovereign nation of Rhode Island ultimately *did* ratify the Constitution on 29 May 1790, it simply joined an international union of sovereign nations, which had already been carried into effect almost two years earlier. So, in order to ratify and join a separate union, every state had to *unilaterally* secede from the Articles by its respective power as nation-states.

Although he disapproved of secession (and nullification), from a policy standpoint, Otis correctly understood that it was well within the authority of the "Free and Independent State" of Massachusetts to leave the union.[143] However, secession was to be conducted on the democratic principle of the *consent of the governed*, which to paraphrase and contextualize the Declaration meant the people of each state could overrule its state as well as the federal governments by popular vote. Effectively, democracy is an ultimatum. If the American union was not a in an oligarchy to the federal government without

Just as the belligerents of the War of 1812 negotiated an end on 24 December 1814 with the signing of the Treaty of Ghent, the Hartford Convention was in the midst of its deliberations, which continued until early January. Whatever decisions, save any plans to assert New England's national sovereignty, were really moot. Actually, the delegates only produced a list of recommendations—mostly amendments—that would, in large part, deplete the power of the southern states.[144] Consequently, the balance of power would shift in the union. Democracy was the only means by which the states could reposition themselves in the union. If the states believed the direction of the union was skewed against good policy, morals or any other subjective agenda,

[143] Otis, *Letters in Defence*, 28. Otis still held these views years after the Hartford Convention.
[144] A theory suggested that Federalists only sent its recommendation to Washington, D. C. to humiliate the Madison administration.

they could, by authority of their citizen-voters, unilaterally pursue actions that were even deemed unconstitutional.

The Constitution was, Hamilton correctly summarized, "a frail and worthless fabric" because without sovereignty its promises were unenforceable against the federal government.[145] Yet, the Federalists who involved themselves in schemes of sovereignty appeared to believe the consent of the governed was not a requirement. Additionally, the validity of these assertions of sovereignty were never legally questioned by Federalists; instead, they, such as Morris, Otis and Pickering, questioned its arrival. Nevertheless, the Hartford Convention attained notoriety for its perceived intent to sever the bonds of union, which again were familial and affectionate. Criticism of the Federalist party was not centered on the illegality of their conduct but on their inopportuneness given the American victory at the Battle of New Orleans on 8 January 1815.[146] Rather than give the Federalists an edge in the politics of the early American republic, the Hartford Convention ushered in the demise of their party.[147]

A few of the Federalists continued to comment on and defend the Hartford Convention. Specifically, Otis wrote two books to vindicate the reputation of the gathering. Otis attempted to demystify the secretive nature of the event by dispelling the notion that secession was seriously considered by the members. New England's actions, Otis reasoned in 1824, were completely within the state of Massachusetts's rights to converse with other states on policy changes—in short, domestic diplomacy between the American states. But, maintained Otis, though ill-advised was

[145] Alexander Hamilton quoted in Adams, *Gouverneur Morris*, 279.
[146] General Andrew Jackson's victory in New Orleans basically changed the view that the War of 1812 was an American loss.
[147] C. Edward Skeen, *1816: America Rising* (Lexington: The University of Kentucky Press, 2003), 85-88. However, it would seem that officeholders were particularly hurt over how they voted on the Compensation Act of 1816, especially Federalists, such as Timothy Pickering who refused to run for reelection.

nevertheless also within the authority of Massachusetts.[148] Otis believed that disunion's sole offense would have been to one's personal conscience.[149]

The American nation therefore was tangentially connected to unified sentiments that allowed the federal government to effectively operate across the vast territory of the confederation. However, foreign observers too differentiated the American nation from statehood. Frances Wright, an English woman, observed the U. S. for about two years and did not see a singular American state at the end of her travels in 1820. America had "raised [itself] to the rank of an independent nation" on the world stage, Wright concluded—perhaps due to Britain's newfound respect for its maritime rights in the aftermath of the War of 1812.[150] Wright noted that the "bonds" of the United States were "numerous and intimate": "A people who have bled together for liberty […] are bound together by ties of amity […] far beyond what is usual in national communities."[151] The complexity of America could only be, as described by Wright, a "confederacy."[152]

With the collapse of the Federalist party, the next generation of political leaders who inherited the Hamiltonian branch of Federalist politics. These men would not only reject secession and nullification (i.e., state sovereignty in total), they would consequently revise American history to suggest the United States constituted a nation-state. Indeed, the variety of complicated arguments for this sophistry between politicians, judges and even presidents would demonstrate the falsehood of singular American statehood.[153] Because foreign observers were obviously less

[148] Otis, *Letters in Defence of*, 28-29. Again, no legal consequence.
[149] Ibid., 41-42. "I admit," Harrison Otis wrote, "that if the framers of the Convention or its members, permitted themselves in the hour of their country's extreme peril, even to brood over schemes of disunion, whether to be executed by themselves or others, their impotency of means would furnish no palliation for the political depravity of their hearts."
[150] Frances Wright, *Views of Society and Manners in America* (Cambridge: Belknap Press, 1963), 168.
[151] Ibid., 208.
[152] Ibid., 194.
[153] There was not even disagreement as to which of three Founding era charters—namely, the Declaration of Independence, the Articles of Confederation or the Constitution—created a fictitious singular American state

attached to American politics, their assessments of America's political system are somewhat trustworthy. However, female politicians of the early American republic succinctly wrote and spoke about the nature of the U. S. in terms similar to their foreign counterparts. Hannah Crocker of Massachusetts, an early advocate of women's rights and Federalist thinker, claimed that it was through the "virtue, energy and fortitude" of both sexes that "the freedom and independence of the United States *were* attained and secured."[154]

Crocker was family to several prominent Federalists who likewise spread the same notion of American sovereignty. These factors, Crocker implored, must continue "as long as we continue a free, *federal*, independent nation."[155] Crocker's use of "federal" meant that she understood the American nation to be a patriotic figment of imagination held within the hearts of the people of every state in the union. Furthermore, the description also included the fragility and potential ephemerality of the American republic that male Federalists too described. Sovereignty was the central resource which Federalists relied on to shift the balance of power. Indeed, acknowledgement of the national sovereignty of every state in the union proved to be even transatlantic.

Yet, what Federalists did not (fully) acknowledge was the democratic, or popular, sovereignty of the states. John Taylor of Virginia, a Democratic-Republican politician and writer, understood the political repercussions of a democracy: the people of each state had a "conventional power" over their respective state as well as federal governments called sovereignty.[156] Jefferson and Madison came to the same conclusion in the Kentucky and Virginia Resolutions. And though the principle of national unity (i.e., union) was so dear to many Americans, democracy was more

[154] Hannah Crocker quoted in Zagarri, *Revolutionary Backlash*, 67. (emphasis added)
[155] Ibid. (emphasis added)
[156]John Taylor, *Construction Construed and Constitutions Vindicated* (Clark: The Lawbook Exchange, 2009 [1820]), 36-37.

crucial since it was through nullification and secession that the American union could survive. Jefferson hence enshrined democracy (i.e., "the Right of the People to alter or to abolish […], and to institute new Government") with the cause of American independence (i.e., "these United Colonies are, and of Right ought to be Free and Independent States") in the Declaration of Independence.[157] Jefferson, in the aftermath of his presidency, continued to speak, though in private correspondence, about the validity and importance of both nullification and secession, which again required the consent of the people in each state.[158]

"[T]he peculiar happiness of our blessed system is that in differences of opinion between these different sets of servants [i.e., Representatives and Senators]," Jefferson remarked in 1821, "the appeal is to neither, but to their employers [i.e., the voters of each state] peaceably assembled by their representatives in Convention."[159] Here, Jefferson referenced the principal-sovereign-delegated-agent relationship in which the people act in their highest sovereign capacity to overrule any acts by the state as well as federal governments. Surprisingly, Jefferson also responded to and agreed with the other state legislatures that claimed the state governments of Kentucky and Virginia of could not assert their sovereignty to nullify. "[I]t is a fatal heresy to suppose that either our state-governments are superior to the federal, or the federal to the states. [T]he people, to whom all authority belongs, have divided the powers of government."[160] Consequently, the people of

[157] Ibid., 47. "Not a single one of the United Staes would have consented to have dissolved its people, to have reunited them into one great people." Consent implied that it was the people of each state who were the sovereigns thereof.
[158] Dumas Malone, *Jefferson & the Ordeal of Liberty* (Charlottesville: University of Virginia Press, 2005), 408. Dumas Malone claimed that Jefferson never further commented on the Virginia and Kentucky Resolutions after their passage and took his silence as validation that he rejected nullification. However, Jefferson did continue to profess the crux of nullification and its importance.
[159] "Recommendation of John Taylor's Construction Construed" ca. 27 June 1821 *Papers of Thomas Jefferson: Retirement Series* (Princeton: Princeton University Press, 2020), 17:249. Jefferson had actually recommended Taylor's volume as the best assessment of the Constitution.
[160] Ibid.

each state had the authority to resume these powers since they were the sovereigns in the American system.

"I admit," Taylor wrote, "that [sovereignty] may be found among us, either in congress or in the people; but I deny that it can exist in both."[161] Yet, politicians would, after the collapse of the Federalist party, would attempt to claim that not only was the U. S. a singular state but its people had a shared, dual and divided sovereignty with the federal government. The states were recognized as being sovereign and never gave up that status, let alone *expressly* conjoined themselves into one people.[162] Federalists, and those within the same political mindset, would argue that parts of the federal government could lay claim to being sovereign. Taylor, however, countered that such a dangerous inference "directly assails the sovereignty of the people" and might "depose the sovereignty of the people."[163] A shared, dual and divided sovereignty was a logical fallacy dismissed by every European political thinker of the eighteenth century, especially Jean-Jacques Rosseau who detested the concept.

"[I]t would be found that every time it is thought that sovereignty is divided," Rosseau commented, "the rights are mistaken for parts of that sovereignty are always subordinate to it."[164] The delegation of power—though associated with sovereignty—does not confer sovereignty.[165] If the intent was to actually parcel sovereignty, then it would constitute, as likened by Rosseau, a horrific and convoluted juggling act.[166]

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[161] Ibid., 27.
[162] Taylor, *Construction Construed*, 35. "If the government created the people, that is, organized them into a nation, there can be no doubt but that the government is sovereign." However, this was not the case with the Constitution, which formed a confederate union of sovereign states which were governed by their respective voters.
[163] Ibid., 35, 37.
[164] Jean-Jacques Rosseau, *On the Social Contract with Geneva Manuscript and Political Economy* (New York: St. Martin's, 1978), 60.
[165] Robert Tucker & David Hendrickson, *Empire of Liberty: The Statecraft of Thomas Jefferson* (Oxford: Oxford University Press, 1990), 44. Rosseau's plan of confederation inspired Madison's Virginia Plan, the draft of what would become the Constitution.
[166] Ibid.

Fig. 3: Two-Row Wampum Treaty with the Dutch (c. early 1600s)

Because sovereignty was absolute, final authority, a state would never be able to operate in this circumstance. Indeed, the implications would be so insurmountable that natives completely understood this notion of sovereignty. **Fig. 3** depicts the Two-Row Wampum Treaty—made of white and purple shell-beads called wampum—between the Haudenosaunee tribes and the Dutch whose colony of New Amsterdam bordered their country.

The alliance made between these nations constituted a confederation for very loose purposes: "peace, friendship and respect."[167] Nevertheless, the wampum belt demonstrated that both, as represented by two rows of purple shell-beads, were sovereign yet never intersected because of the inherent characteristics of sovereignty (i.e., the nonexistence of a higher power than a sovereign.) But under a confederation, a system with multiple sovereigns (i.e., states) was possible since each party could simply assert its sovereignty to sever these friendly but not politically legal bonds. If either member of this alliance decided to secede, it would do so upon its

[167] The Oneida Nation, "Wampum: Memorializing the Spoken Word," https://www.oneidaindiannation.com/wampum-memorializing-the-spoken-word/

own volition. "We shall," as explained by a Haudenosaunee analogy, "each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel."[168]

A shared, dual and divided sovereignty was illogical to native tribes. Yet, theories of the American continued to perpetuate well into the nineteenth century of America's history. Because of the way states behave—always calculating the balance of power—they will continuously undermine other states to get an advantage.[169] Sovereignty is the greatest check and balance. Surprised to see that, Wright observed, "the different interests of the multitudinous parts of this great confederacy [were] balanced or employed as checks one upon the other."[170] Thus, each time states delegated treaty-powers and other various powers, jurisdictions and rights, they delegated the power of embassy but never expressly formed a national union (which would contradict this delegation of powers, since national unions automatically have those powers.)

[168] Ibid.
[169] Mearsheimer, *Great Power*, 15. "[I]n a system of many states, since states then must accurately predict the behavior of many other states in order to calculate the balance of power between coalitions." "[A] great power will defend the balance of power when looming change favors another state, and it will try to undermine the balance when the direction of change is in its own favor." "Great powers, therefore, should be content with the existing balance of power and not try to change it by force. After all, it makes little sense for a state to initiate a war that it is likely to lose; that would be self-defeating behavior. It is better to concentrate instead of preserving the balance of power."
[170] Wright, *Society and Manners*, 194.

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