

E PLURIBUS UNUM: FORGING UNION ON THE ASHES OF THE ARTICLES OF CONFEDERATION AND THE TRANSATLANTIC CONSTITUTION

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ABSTRACT

What, if anything, did the delegates to the Philadelphia Convention do that was new? This seemingly basic question is remarkably difficult to answer. Yet having an accurate and defensible answer is important, both to place the delegates' contributions to American constitutional development in a proper light and to better protect the Constitution from specious claims that may nonetheless have some basis in the history and tradition of the founding and its ideological origins. We cannot find the answer anywhere in the Bill of Rights, the work of the First Congress. The answer must lie in the plan of union that came out of the Convention. That plan featured federalism, representative government, and separation of powers with checks and balances. These are the places to look for innovation, but two factors complicate the endeavor. First, public opinion produced a consensus in favor of these institutions, at least in conceptual form, from the outset. They were included in the original plan on May 29, approved in every vote of the Convention, and retained in every draft of the Constitution in the summer of 1787. If anyone deserves credit for these features of the constitutional order, it is the American public. Second, the Constitution draws from preexisting models in the British and state constitutions in ways that invite an "apples-to-oranges" comparison of limited federal government with general government constitutions. The proper reference points are the two preceding forms of union with which the delegates had lived experience—the Articles of Confederation and the transatlantic constitution. After taking account of general agreement and these older forms of union, the central innovations of the

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Convention delegates stand in relief. First, tying federal suffrage to state suffrage made the state and national electorates coextensive and established the American voter as the wellspring of all constitutional authority. Second, providing the American voter with overlapping representation in every law-making institution made the bicameral lawmaking process credible and conformable to republican principles. Third, restricting states' "salutary defense" against federal laws in the Senate to a majority of state legislatures embraced the principle that a majority of states could bind the minority and placed federalism on a secure footing.

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1. INTRODUCTION – A SEEMINGLY SIMPLE QUESTION

[A] system without a[n] example ancient or modern, a system founded on popular rights, and so combining a federal form with the forms of individual Republics, as may enable each to supply the defects of the other and obtain the advantages of both.¹

What did the delegates to the Philadelphia Convention propose that was new? Not necessarily for the world, about which they knew little, but relative to British civilization, of which they were a part. It is a simple enough question at first glance, yet it is hard to provide an accurate and defensible answer. This is especially odd given the volume of ink that has been spilt on the American founding. The Bill of Rights was not part of the plan of the Convention, so that cannot be the answer. Federalism, representation, separation of powers with checks and balances, and a written constitution are the usual suspects, but there are serious problems with asserting that the Convention delegates were the first to employ any of these—even when we limit our scope of inquiry to British and American experiences. Both the transatlantic constitution that preceded the American Revolution and the Articles of Confederation were federal in nature.² Representation had been a fundamental feature of the British and colonial lower houses for centuries.³ The separation of powers with checks and balances was inspired by the

¹ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 3 (Adrienne Koch ed., Ohio Univ. Press 1966) (1840) [hereinafter MADISON'S NOTES].

² JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITICS OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788, at 205 (1986) (“Like the [early modern British] empire, the American federal system did not concentrate authority in a single government but distributed it among different levels.”); Dudley Odell McGovney, *The British Privy Council's Power to Restrain the Legislatures of Colonial America: Power to Disallow Statutes: Power to Veto*, 94 U. PA. L. REV. 59, 59 (1945) (“While the Atlantic seaboard of what is now the United States of America was a part of the British Empire the colonists, the British subjects in America, lived under a federal system, or a dual system of governments, as their descendants do today.”).

³ JEFFREY GOLDSWORTHY, THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY 29 (1999) (“By the middle of the fourteenth century, consultation and participation in parliamentary law-making had been extended from the earls and barons to representatives of counties and towns.”).

British constitution.⁴ England had formerly employed and abandoned two written constitutions;⁵ the colonists employed charters as written constitutions;⁶ and the states had won fame and renown for putting their revolutionary constitutions in writing.⁷

These considerations can lead one to question whether the Convention delegates came up with anything new. A prominent line of literature advances along that very premise, concluding that the Convention was a reactionary retreat from the democratization of the revolutionary period.⁸ There are substantial problems with that interpretation. For one, the United States Constitution is much more democratic than the Articles of Confederation, and it is that much more democratic than the transatlantic constitution

⁴ CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 171, 181, 183 (Thomas Nugent trans., Batoche Books 2001) (1748) [hereinafter MONTESQUIEU] (framing his discussion of the separation of powers as an analysis of the English constitution); M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 23, 28 (2d ed. 1998) (underscoring the importance of English political history in the development of separation of powers doctrine); see also *THE FEDERALIST* No. 47, at 298 (James Madison) (Jacob E. Cooke ed., 1961) (“The British Constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry.”).

⁵ See GRAHAM E. SEEL, *THE ENGLISH WARS AND REPUBLIC, 1637–1660*, at 73, 75 (1999).

⁶ See, e.g., H. LOWELL BROWN, *THE AMERICAN CONSTITUTIONAL TRADITION: COLONIAL CHARTERS, COVENANTS, AND REVOLUTIONARY STATE CONSTITUTIONS, 1578–1780*, at 4 (2017) (providing a detailed analysis of colonial charters and their contribution to a unique American constitutional tradition); see also MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 40–41 (2004) (describing the Rhode Island Charter as equivalent to a constitution for the colony).

⁷ WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 3, 5 (2001); Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 388, 389 (Paul Finkelman & Stephen E. Gottlieb eds., 1991) (“State constitutions . . . were by more than a decade the ‘first’ American constitutions The Massachusetts Constitution of 1780 . . . is the world’s oldest working frame of government.”).

⁸ CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 16–17, 151 (1913); J. ALLEN SMITH, *THE SPIRIT OF AMERICAN GOVERNMENT* 27–39 (Cushing Strout ed., 1907); see also Samuel Kernell, *Introduction: James Madison and Political Science*, in *JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT* 5–6 (Samuel Kernell ed., 2003) [hereinafter MADISON, *THEORY AND PRACTICE*] (placing the influence of Beard and Smith in historical context).

that preceded the break with Britain.⁹ Against the backdrop of these two prior attempts at union, the Constitution betrays no reactionary streak. Concluding that the Constitution retreated from democracy must rest on a comparison of the plan of the Convention with certain state constitutions.¹⁰ But it makes little sense to compare the United States Constitution to any state constitution. As blueprints for general government, state constitutions reach every conceivable question of public policy that has not been surrendered to a superintending government or constitutional principle. They are the product of political processes internal to the state. The American Constitution, in contrast, is limited in its objects; and it is the product of Convention deliberations involving state delegations and an interstate ratification process.¹¹ Binding counties and states together are different things.

Avoiding an “apples-to-oranges” comparison of limited and general governments is critical if we are to place the contributions of the delegates to constitutional development in their proper light. One of the innovations highlighted in this discussion is the creation of a coextensive federal and state electorate, accomplished by tying federal suffrage to state suffrage.¹² This innovation can be hard for us to appreciate because tying federal to state suffrage accommodated all the various restrictions on suffrage in effect under state law, including restrictions tied to debts, enslavement, property, race, religion, sex, and taxation.¹³ By democratic lights, it is far easier to celebrate states that were lifting restrictions on suffrage than a national government that was accepting the worst of them. But what if we compare this rule of suffrage to that which existed under the transatlantic constitution or the Articles of Confederation? When British Parliament was the imperial legislature, American voters did not vote for or send representatives to the House of Commons. And, under the Articles, state legislatures controlled the choice of delegates to the Continental Congress, which gave American voters only an indirect voice.¹⁴ Giving voters in every state the power to elect direct

⁹ See *infra* Part 3.

¹⁰ SMITH, *supra* note 8, at 27–28 (unfavorably comparing the Constitution to constitutions of the revolutionary period vesting power in the legislature).

¹¹ See *infra* note 30 and accompanying text.

¹² U.S. CONST. art. I, § 2.

¹³ See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 3–7 (2000); see *infra* Part 3.

¹⁴ ARTICLES OF CONFEDERATION of 1781, art. V.

representatives to the superintending layer of government was both unprecedented and democratizing. Yet this is evident only once we avoid “apples-to-oranges” comparisons with general government constitutions.

Identifying the novel contributions of the Convention delegates is not a frolic into trivia. Doing so is essential to understand the original public meaning of the Constitution. At the point that consensus ended and existing models proved wanting, the delegates had no choice but to fashion new institutions. The fact that delegates created new institutions to deal with particular problems is itself quite revealing. Innovation is, first, an expression of dissatisfaction with existing models—creation would not otherwise be worth the effort. The places where the delegates innovated are the places where their shared maxims and understanding of good government could not take them. Second, their innovations show us what the delegates found acceptable and serviceable in addressing gaps in their extant political culture. They therefore speak to the sorts of policy and value tradeoffs that delegates reached after profound disagreement and robust debate, and which were subsequently adopted as the supreme law of the land in state ratifying conventions. These novel institutions, provided we can identify them, have the potential to productively constrain inquiries into the Constitution’s original public meaning. For one thing, any valid interpretation of the original Constitution should not contradict or deny the existence of the novel institutions that made agreement and ratification possible.

Consider the rather infamous, if ancient, example of John C. Calhoun and the nullification doctrine.¹⁵ If, in the context of federalism, the Constitution stands for a constitutional division of sovereignty between the central and state governments, then why not ask whether a state might reject federal legislation it deems unconstitutional? After all, the colonies had mobilized against unconstitutional legislation from Great Britain when it was the

¹⁵ See generally ROBERT ELDER, *CALHOUN: AMERICAN HERETIC* (2021) (discussing Calhoun’s personal nullification ideology and stating his three advantages of nullification); RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS* 7–8 (1987) (discussing Calhoun’s argument that the states delegated specific powers to the federal government through the Constitution but retained their own sovereignty); WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA, 1816–1836*, at 157 (1992) (discussing Calhoun’s personal relationship with nullification).

superintending government.¹⁶ The text of the Supremacy Clause does not necessarily rule out nullification because it confers supremacy only on federal legislation that is “made in Pursuance” of the Constitution.¹⁷ However, that the Convention delegates abandoned the concept of giving a veto power to individual states, or even minority groupings of states, becomes readily apparent when we compare the Constitution to the Articles of Confederation. The Articles allowed any one state to block constitutional amendments¹⁸ and any group of five states to block important legislation.¹⁹ These supermajority provisions left a majority of states with little more than the power to adjourn Congress from day to day.²⁰ Convention delegates dropped them from the plan. The Constitution decreed, for the first time, that a majority of state delegates could bind the minority through the federal lawmaking process.²¹ Nullification, which would destroy that principle, could only ever be unconstitutional.

The recent shift in favor of “text, history, and tradition” places an even greater premium on an accurate and defensible understanding of the innovations in the Constitution.²² The invitation to take history and tradition into account may lead to a proliferation of contestable claims based on revisionist accounts of the founding, among other foundational episodes of American constitutional development. Historians will frequently provide evidence that the historical record is more complicated than the lawyers have painted it to be in their zealous advocacy.²³ Historical claims will often prove difficult to resolve. There is value in delineating the innovations of the Convention delegates because our collective understanding of those innovations has the

¹⁶ See JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT 35 (Poli Sci Classics 1947) (1851) (“The necessary consequence of taking the sense of the community by the concurrent majority is . . . to give to each interest or portion of the community a negative on the others.”).

¹⁷ U.S. CONST. art. VI.

¹⁸ ARTICLES OF CONFEDERATION of 1781, art. XIII.

¹⁹ *Id.* art. IX.

²⁰ *Id.*

²¹ See U.S. CONST. art. I, § 7.

²² See generally Dov Fox & Mary Ziegler, *The Lost History of “History and Tradition”*, 98 S. CAL. L. REV. 1 (2024) (describing the relatively recent rise of traditionalism and its role in challenging longstanding precedents).

²³ See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 5–11 (1997).

power to exclude certain interpretations as implausible or impermissible, even when they have a certain historical pedigree—as in the nullification example above. Calhoun was not without some historical footing—the American Revolution was about the power of local governments to resist the encroachments of a central government, and the Articles reflected that vision. His conclusion only appears absurd once we consider how it contradicted the innovations in lawmaking at the Philadelphia Convention.

1.1. Our Modern Lens and Institutional Borrowing in the Constitution Make the Innovations at the Philadelphia Convention Harder to See

The appeal of the Constitution—without the Bill of Rights, and in light of the problems of the 1780s—now approaches the vanishing point. Some of this is the inevitable result of the passage of time. But the larger portion results from the confusion that follows from interpreting the original Constitution through a modern lens. Among the myriad changes that have occurred, two bear particular note. The first is the incorporation of the Bill of Rights against state and local governments and on terms that often would have been unrecognizable to the founding generation. Free speech is a prime example. The prohibition in the First Amendment extends only to Congress and is best understood as a promise that the national government would not interfere with state practices defining the scope of free speech rights or deviate from common law principles in its own dealings.²⁴ The idea of the First Amendment as a yardstick by which to evaluate the suitability of state laws regulating free expression did not exist.²⁵ But today, this understanding of the First Amendment, and other enumerated rights, is a bedrock principle of constitutional law.²⁶ That is why courses on Constitutional Law so often

²⁴ AKHIL REED AMAR, *THE BILL OF RIGHTS* 35–36 (1998); see also Jud Campbell, *Natural Rights and the First Amendment*, 127 *YALE L.J.* 246, 276–77 (2017) (describing founding era conceptions of free speech and other First Amendment rights as natural rights subject to regulation through the political process).

²⁵ Campbell, *supra* note 24, at 253.

²⁶ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (1977) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish . . .”).

emphasize a march through the Bill of Rights.²⁷ However, such an approach reinforces the popular misconception that the American Revolution was an effort to redefine the scope of individual rights.²⁸

The Revolution was a struggle between an imperial government and colonies jealous of their sovereignty, and in that sense had almost everything to do with the public rights of colonies and very little to do with the rights of individuals. Patriots revolted to defend a federal, or divided, conception of sovereignty.²⁹ Federalism remained an important principle to the founding generation and a clear majority of Convention delegates. It implied a two-tiered structure in which the national government would be limited to national purposes, reserving general responsibility for government to the states.³⁰ The distinction between federal and state layers of government eroded greatly over the course of the 20th century, to the point that the

²⁷ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131 (1991).

²⁸ This perspective is reflected in the common view that the Bill of Rights protected minorities against oppressive majorities. When read as federalism-protecting provisions, however, the Bill of Rights offers state majorities robust protections against federal interference with bedrock constitutional principles. AMAR, *supra* note 24, at xiii; Amar, *supra* note 27, at 1131–32.

²⁹ See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 37–50 (2010) (discussing colonial theories dividing legislative power between imperial and colonial governments); PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO BRITAIN, 1765–1776*, at 225–29 (1991) [hereinafter MAIER, *FROM RESISTANCE TO REVOLUTION*] (describing the Patriot conviction that a despotic plot to concentrate power in Great Britain was underway); ERIC NELSON, *THE ROYALIST REVOLUTION* 2–23 (2014) (describing the evolution of colonial thinking about the limited jurisdiction of British Parliament).

³⁰ This reservation was made explicit in the Articles of Confederation, but not in the U.S. Constitution. ARTICLES OF CONFEDERATION of 1781, art. II. Nonetheless, the enumeration of national powers in the Constitution structurally implied that general responsibility for government rested with the states. James Wilson, *James Wilson's State House Yard Speech October 6, 1787*, in 1 COLLECTED WORKS OF JAMES WILSON 171, 172 (Kermit L. Hall & Mark David Hall, eds., 2007) (“When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore . . . if the frame of government is silent, the jurisdiction [of the state legislature] is efficient and complete. But in delegating federal powers . . . the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of the union.”); see also U.S. CONST. art. I, § 8 (outlining the federal government’s enumerated powers).

federal government arguably exercised the powers of a general government superior to that of the states.³¹ The Supreme Court has since issued decisions that somewhat qualify that assessment,³² but the idea of a national government limited to certain national objects does not loom large in the public imagination today. The process by which this transformation took place is fascinating but beyond the scope of this discussion. For present purposes, its principal consequence is that contemporary Americans tend to project their understanding of the national government onto the past, making it much more difficult to place the plan of the Convention in context.

The second is that Convention delegates borrowed institutional forms from British and state constitutions in a way that obscured the revolutionary nature of their handiwork. For example, the House of Representatives is “our House of Commons” in that it is the elected lower house of a bicameral legislature.³³ However, this ignores that the House of Commons, like the rest of British government, wore two hats in the British Empire. The House of Commons was both the lower house of the general government in Great Britain and the lower house of the imperial legislature.³⁴ This would be like conferring the powers of the United States House of Representatives on the California State Assembly, forcing the people of the other states to live with the legislative preferences of the most populous state. The House of Commons was representative only as a general government—as part of the imperial

³¹ See *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942) (holding that the federal government may punish a farmer for consuming wheat grown on his farm under the Interstate Commerce Clause); see also *United States v. Lopez*, 514 U.S. 549, 556 (1995) (“*Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.”).

³² *United States v. Lopez*, 514 U.S. 549, 551, 567 (1995) (holding that the Interstate Commerce Clause did not authorize the Gun-Free School Zones Act of 1990); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (finding that portions of the Violence Against Women Act exceeded federal authority under the Interstate Commerce Clause).

³³ MADISON’S NOTES, *supra* note 1, at 39 (“[For George Mason, the future House of Representatives] was to be the grand depository of the democratic principle of the Government. It was, so to speak, to be our House of Commons . . .”).

³⁴ See *House of Commons*, BRITANNICA, <https://perma.cc/VYX5-TK6A>; Richard Huzzey & Henry Miller, *Colonial Petitions, Colonial Petitioners, and the Imperial Parliament, ca. 1780–1918*, 61 J. BRITISH STUD. 261, 262 (2022).

legislature, it gave no representation to any of the other realms in the empire, including the American colonies. The apt comparison is between the House of Commons in this limited, imperial capacity and the House of Representatives. The radical nature of providing the empire with a lower house representative of each of its parts, and in proportion to population, is then obvious. It is equally obvious that this innovation represented a step in the direction of political equality and democracy.

1.2. Broad Agreement Among Delegates and the Constraints of Consensus-Bargaining Make the Innovations at the Convention Easier to See

Much of the plan was never in doubt. A bicameral legislature, federalism, representation, and separation of powers with checks and balances all featured in Edmund Randolph's proposed plan of government on May 29th.³⁵ These parts of the plan were never seriously challenged;³⁶ the delegates endorsed them by large majorities in every floor vote;³⁷ and they

³⁵ MADISON'S NOTES, *supra* note 1, at 30–33.

³⁶ Some delegates expressed contrary opinions, but they remained in the minority throughout the deliberations. *See, e.g., id.* at 39 (“Mr. Sherman opposed election [of representatives to the lower house] by the people . . . They want information and are constantly liable to be misled.”); *id.* at 41 (“Mr. Gerry did not like the election [of representatives to the lower house] by the people. The maxims taken from the British constitution were often fallacious when applied to our situation which was extremely different.”); *id.* at 46 (reporting that Roger Sherman argued that the executive “ought to be appointed by and accountable to the Legislature only, which was the depository of the supreme will of the Society”); *id.* at 78 (reporting George Read’s view that “[t]oo much attachment is betrayed to the State [Governments]” and that people “must look beyond their continuance”); *id.* at 213 (reiterating Read’s views that “[the states] must be done away with”); *id.* at 251–52 (“As to the danger or difficulty that might arise from a negative in the 2^d [branch] . . . , [Benjamin Franklin believed] it might easily be got over by declaring that there should be no such Negative; or if that will not do, by declaring that there shall be no such branch at all.”); *see also* AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840*, at 201 (2021) (describing the contrarian New Jersey Plan as a “stalking horse for state equality within at least one branch of the new national legislature”).

³⁷ *See, e.g., id.* at 36 (Connecticut was the only state to oppose the creation of a national government with legislative, executive, and judicial branches on May 31); *id.* at 41 (direct election of representatives by the people opposed only by New Jersey and

remained fundamental features in the final plan of the Convention.³⁸ The reason these parts of the plan were so readily adopted is that they enjoyed widespread popular support going into the Convention. These institutions were not the product of robust debate or deliberation at the Convention. If anyone deserves credit for these basic features of the Constitution, it is the American public who demanded their inclusion.³⁹ For that reason, these institutions cannot be considered delegate innovations. Yet being able to identify them allows us to control for public opinion and more readily identify those portions of the Constitution that remain. It is among these remaining provisions that we are likely to find the important creations of the delegates. Of course, not everything that remains is an innovation, and not every innovation is important. But the broad agreement among delegates on so many basic features of the plan tells us what is important. Those innovations that were instrumental in giving life to bicameralism, federalism, representation, and separation of powers with checks and balances claim our attention.

That the delegates were constrained by consensus-bargaining is a boon for contemporary interpretation. They had no power to force a plan of union on any state.⁴⁰ Yet, for their plan to succeed, they needed every state in the union to ratify their proposal.⁴¹ This want of power left the delegates with no choice but to place their collective faith in the voters of every state.⁴² Voters had to be able to understand and discuss the plan of the Convention

South Carolina on May 31); *id.* at 43–44 (no state delegations opposed proposals to transfer the existing powers of the Continental Congress to the new Congress, or to give the new Congress power to legislate in areas where the states were incompetent on May 31).

³⁸ *Id.* at 616–26.

³⁹ See AMAR, *supra* note 36, at 185, 203, 221.

⁴⁰ *Id.* at 125 (reporting the remarks of James Wilson); PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 29–30 (2010) [hereinafter MAIER, RATIFICATION]; RAKOVE, *supra* note 23, at 94–96.

⁴¹ MADISON'S NOTES, *supra* note 1, at 15–16; *id.* at 37 (reporting Gouverneur Morris's response to the remarks of George Read); *id.* at 153–54 (reporting the remarks of James Wilson and Alexander Hamilton); *id.* at 278 (reporting the remarks of Gouverneur Morris); *id.* at 291 (reporting the remarks of Elbridge Gerry).

⁴² *Id.* at 107 (reporting the remarks of James Madison); *id.* at 171 (reporting the remarks of Edmund Randolph); *id.* at 238–39 (reporting the remarks of James Madison).

in order to see how it could benefit people like themselves.⁴³ No expertise in the “artificial logic” of the law was necessary to comprehend its terms.⁴⁴ The plan of the Convention was not a surreptitious vehicle for the importation of any particular ideology, philosophy, or school of thought. Even if some delegates urged or hoped for quixotic interpretations, which is doubtful, there can be no serious charge that any of the state ratifying conventions proceeded in awareness of such a purpose.⁴⁵ By definition, therefore, any such purposes were not ratified by the people and did not become the supreme law of the land. The Constitution the people ratified was no mystical cypher. The delegates, who proposed a popular ratification process to implement a plan of government in which they might play no part, never intended for it to be one. The text of the original Constitution must speak for itself, just as it had to at the state ratifying conventions.

Nearly every delegate approved the final plan of the Convention, but serious disputes took place along the way. This absence of consensus can be especially useful in identifying the innovations of the Convention delegates. The resolutions that delegates adopted despite contradicting earlier resolutions, or that reflected a close division of the states, point to questions that remained unsettled at the start of the Convention.⁴⁶ These questions often

⁴³ *Id.* at 107 (“Mr. Madison[] observed that . . . [w]e ought to consider what was right & necessary in itself for the attainment of a proper [Government]. A plan adjusted to this idea will recommend itself . . . [A]ll the most enlightened & respectable citizens will be its advocates.”).

⁴⁴ Other scholars who stress the importance of the original public meaning of the Constitution make the same point. *See, e.g.,* John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019) (“Original public meaning posits that the object of interpretation is the text as reasonably understood by a well-informed reader at the time of the provision’s enactment.”) (citation omitted).

⁴⁵ RAKOVE, *supra* note 23, at 149–50.

⁴⁶ The following examples of abandoned provisions and resolutions are especially relevant. On June 11, the delegates voted six to five in favor of proportionate representation in the Senate. MADISON’S NOTES, *supra* note 1, at 104. On July 17, delegates rejected the Electoral College by an eight-to-two margin; on the same day, they unanimously voted in favor of congressional appointment of the president. *Id.* at 309. On July 26, delegates voted eight to three in favor of imposing property qualifications on members of Congress. *Id.* at 376. Delegates were still debating property qualifications for voters in lower house elections on August 7. *Id.* at 401–05. Delegates voted to give Congress the power to establish property qualifications for members and officers on

required a great deal of deliberation and effort on the part of Convention delegates to resolve. Unable to rely on prevailing wisdom or public opinion, the delegates found themselves forced to iron out institutional arrangements that could serve as reasonable alternatives to those preferred by conflicting state delegations. It was on these points that the delegates risked ratification of the Constitution, not knowing whether the people would approve of their creations.⁴⁷ The innovations of the Framers were the least familiar parts of the proposed government for voters, and they were the parts most liable to generate unanticipated results.⁴⁸ Knowing that, voters and critics of the Constitution were sensible in expressing skepticism about its novel aspects.⁴⁹ It is moreover of great significance that voters in every state overcame their collective fears and doubts to adopt the plan. Their expression of faith continues to lend legitimacy to national institutions built on principled accommodation and compromise.

August 10. *Id.* at 428. As late as August 24, delegates rejected the Electoral College “as an abstract question” in a tie vote. *Id.* at 526. A popularly elected lower house was never defeated by a majority of state delegations, but it was assailed in later sessions and omitted from the New Jersey Plan after narrowly surviving an early vote on May 31. *Id.* at 41, 73, 79, 118–21, 166–68. The delegates voted to give Congress expansive, rather than enumerated, powers on May 31. *Id.* at 44. The plan of May 31 included a resolution that would have allowed constitutional amendments without the consent of Congress. *Id.* at 33.

⁴⁷ *Id.* at 73 (reporting the remarks of Pierce Butler); *id.* at 448 (reporting the remarks of Edmund Randolph).

⁴⁸ Centinel, *To the Freeman of Pennsylvania*, INDEP. GAZETTEER (Phila.), Oct. 5, 1787, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 136–37 (Herbert J. Storing, ed., 1981); Letters from the Federal Farmer, I (Oct. 8, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 223, 226–27; Brutus, *Essay I* (Oct. 18, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 363–65 [hereinafter Brutus, *Essay I*].

⁴⁹ See, e.g., Brutus, *Essay I*, *supra* note 48, at 365–67 (arguing that the operation of the federal government upon individuals would lead to a consolidated government); *id.* at 365, 367 (expressing concern about the Necessary and Proper Clause, which had no analogue in the Articles of Confederation); *id.* at 367 (underscoring the potential for the Supremacy Clause to undermine state government authority).

2. BUILDING ON GENERAL AGREEMENT AT THE PHILADELPHIA CONVENTION

We must follow the people; the people will not follow us.⁵⁰

Common understandings took the Framers a long way down the road toward an eventual agreement. They were to design a federal republic with a bicameral national legislature that had the powers necessary to raise revenues and coordinate economic and foreign policy. And one branch of the national legislature was to be popularly elected. Without general agreement on these points, the Convention might have failed. Even with it, important questions remained. How should the upper house be organized? To obtain the benefits of bicameralism—namely, increased deliberation—the upper house had to be organized on a different principle than the lower house.⁵¹ But that was easier said than done. Great Britain was the inspiration for a bicameral legislature, but its upper house featured hereditary nobles, ecclesiastics, and the favorites of the Crown—none of which was compatible with American society.⁵² Some states allowed selection of the upper house by the lower house, but Convention delegates observed that the predomination of

⁵⁰ MADISON'S NOTES, *supra* note 1, at 95–96 (reporting the remarks of William Paterson).

⁵¹ THE FEDERALIST NO. 62, *supra* note 4, at 418–19 (James Madison) (“[A] body which is to correct this infirmity [‘the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions’] ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.”); MADISON'S NOTES, *supra* note 1, at 83 (“The use of the Senate is to consist in its proceeding with more coolness, with more system, & with more wisdom, than the popular branch.”); *id.* at 110 (“[Edmund Randolph believed a] firmness & independence may be the more necessary also in this branch, as it ought to guard the Constitution against encroachments of the Executive who will be apt to form combinations with the demagogues of the popular branch.”); *id.* at 233 (“What is this object [of the upper house]? to check the precipitation, changeableness, and excesses of the first branch.”).

⁵² 1 WILLIAM BLACKSTONE, COMMENTARIES *152–53; MADISON'S NOTES, *supra* note 1, at 57 (“A House of Nobles . . . were the growth of ages, and could only arise under a complication of circumstances none of which existed in this Country.”); M.W. MCCAHERN, THE HOUSE OF LORDS IN THE AGE OF GEORGE III (1760–1811), at 13–43 (2009) (discussing the membership of the House of Lords).

the lower house precluded the benefits of bicameralism, as did popular election.⁵³ Other states relied on higher property requirements for the upper house.⁵⁴ But property requirements, along with the concentration of wealth, varied substantially by state and region—no uniform rule would do.⁵⁵ The organization of the upper house was truly a vexing problem. It called for both innovation and compromise, and was nearly too delicate for the delegates to overcome.

Another relatively blank space in their thinking concerned the executive branch and the federal judiciary. The Articles of Confederation had omitted both, although it did allow for the appointment of commanders in chief

⁵³ MADISON'S NOTES, *supra* note 1, at 110–11; *id.* at 233 (“[Morris thought that all] the guards contrived by America have not restrained the Senatorial branches of the Legislatures from a servile complaisance to the democratic.”).

⁵⁴ The constitutions of Massachusetts, New York and North Carolina employed heightened property requirements to restrict suffrage in elections for the upper house. MA. CONST. of 1780, pt. 2, ch. 1, § 2, art. II; N.Y. CONST. of 1777, art. X; N.C. CONST. of 1776, The Constitution, or Form of Government, &c, art. VII; *contra* DE. CONST. of 1776, art. 5 (no constitutional distinctions in qualifications); MD. CONST. of 1776, The Constitution, or Form of Government, &c, art. XIV (establishing identical qualifications); N.H. CONST. of 1776 (establishing lower house selection); N.J. CONST. of 1776, art. IV (establishing identical qualifications); S.C. CONST. of 1776, art. II (establishing lower house selection); S.C. CONST. of 1778, art. XIII (no constitutional distinctions in qualifications). The constitutions of Massachusetts, Maryland, New Jersey, North Carolina and South Carolina imposed heightened property requirements on candidates for the upper house. MA. CONST. of 1780, pt. 2, ch. 1, § 2, art. II; MD. CONST. of 1776, The Constitution, or Form of Government, &c, art. XV; N.J. CONST. of 1776, art. III; N.C. CONST. of 1776, The Constitution, or Form of Government, &c, art. V; S.C. CONST. of 1778, art. XII; *contra* DE. CONST. of 1776, art. 4 (no constitutional distinctions in eligibility); N.H. CONST. of 1776 (requiring only that members of the upper house be “reputable freeholders”); N.Y. CONST. of 1777, arts. VII, X (omitting property qualifications for candidates). The constitutions of Georgia and Pennsylvania established unicameral legislatures; Vermont, not officially a state, adopted a unicameral legislature in its constitution as well. GA. CONST. of 1777, art. II; PA. CONST. of 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania, § 2; VT. CONST. of 1777, ch. 2, § 2; VT. CONST. of 1786, ch. 2, § 2.

⁵⁵ MADISON'S NOTES, *supra* note 1, at 375–76 (reporting the remarks of James Madison); *id.* at 401 (reporting the remarks of James Wilson, Oliver Ellsworth, George Mason); *id.* at 426 (reporting the remarks of Oliver Ellsworth). Madison observed that a uniform rule did not prevail in England, since many voters in English boroughs and cities were not in fact freeholders. *Id.* at 404.

of the army and navy,⁵⁶ admiralty and maritime courts,⁵⁷ and for *ad hoc* constitutional courts with members of Congress for jurors.⁵⁸ This approach proved inadequate even for a confederation; it was clearly inconsistent with a national government that would operate upon individuals.⁵⁹ The power to tax individuals necessarily entailed the power to charge individuals with tax crimes, which was a prosecutorial or executive function, just as the requirements of due process dictated that there should exist fora in which individuals could contest any such prosecution. This implied courts and suggested the necessity of an institutionalized federal judiciary. Without federal officers to prosecute, and federal judges to hear, such claims, the national government would once again be left dependent on state governments to enforce tax obligations.⁶⁰ Giving the national government the power to tax individuals turned out to be a more complex solution than first appeared; the addition of a few words would not be enough. The transatlantic constitution offered little guidance as the colonists had denied a taxing power to Great Britain.⁶¹ Moreover, government offices, including judicial appointments, had been Crown business.⁶²

⁵⁶ ARTICLES OF CONFEDERATION of 1781, art. IX.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See MADISON'S NOTES, *supra* note 1, at 294 ("[James Madison] called for a single instance in which the General Government was not to operate on the people individually. The practicability of making laws, with coercive sanctions, for the States as Political bodies, had been exploded on all hands.").

⁶⁰ Some Convention delegates expressed grave concerns about any system that would leave Congress dependent upon requisitions from the state governments. *Id.* at 129–32 (reporting the remarks of Alexander Hamilton); *id.* at 303 (reporting Gouverneur Morris's view, in response to a proposal to omit a direct taxing power, "that the [General Government] should recur to quotas & requisitions, which are subversive of the idea of Government"); *id.* at 459 (Madison reported John Dickinson's view that "[i]f the General Government should be left dependent on the State Legislatures, it would be happy for us if we had never met in this room.").

⁶¹ *Id.* at 213 (Madison reported that "[a]ccording to the views of every member, the General Government will have powers far beyond those exercised by the British Parliament, when the States were part of the British Empire. It will in particular have the power, without the consent of the State Legislatures, to levy money directly on the people themselves.").

⁶² JAMES A. HENRETTA, SALUTARY NEGLECT: COLONIAL ADMINISTRATION UNDER THE DUKE OF NEWCASTLE 108 (1972) ("Virtually all American offices were in the hands of friends of

On top of strengthening the federal government, the Framers had to ensure that states would have a legitimate, and peaceful, means of resisting any encroachments on their sovereign authority.⁶³ The patriot interpretation of the transatlantic constitution insisted that British Parliament lacked coercive authority over the colonies.⁶⁴ Consistent with this interpretation, the Articles of Confederation gave every state the power to veto any amendments to the Articles.⁶⁵ By its terms, a minority of five or more states could also block any national law of importance.⁶⁶ These supermajority rules rendered the Continental Congress unable to repair obvious shortcomings, as attested by unilateral vetoes of legislation conferring a taxing power on Congress in 1781 and 1783.⁶⁷ The Articles went too far in empowering states to resist the national government. It encouraged a minority of states or a single state to resist or hold out on the others. On the other hand, abandoning a state veto over national laws left the states in a subordinate position, unable to defend their interpretations of sovereignty under circumstances where the national government might be antagonistic. Leaving the states defenseless was also impractical because it would fuel criticism of the Constitution on the grounds that it established or laid the foundation for a consolidated, national government.⁶⁸

the First Lord of the Treasury and his ministerial colleagues.”); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1112 (1976).

⁶³ MADISON’S NOTES, *supra* note 1, at 87 (Madison reported the views of George Mason immediately in advance of a unanimous vote in favor of giving Senate appointments to state legislatures: “The State Legislatures also ought to have some means of defending themselves [against] encroachments of the [National Government]. . . . And what better means can we provide than . . . to make them a constituent part of, the [National] Establishment.”).

⁶⁴ *Id.* at 76–77.

⁶⁵ ARTICLES OF CONFEDERATION of 1781, art. XIII (“[T]he union shall be perpetual; nor shall any alteration at any time hereafter be made in any of [the Articles of Confederation] unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislatures of every state.”).

⁶⁶ *Id.* art. IX.

⁶⁷ Rhode Island vetoed a proposed impost bill in 1781; New York vetoed a modified proposal in 1783. Calvin H. Johnson, “*Impost Begat Convention*”: *Albany and New York Confront the Ratification of the Constitution*, 80 ALB. L. REV. 1489, 1495–96 (2016/2017).

⁶⁸ MADISON’S NOTES, *supra* note 1, at 95 (statement of William Paterson) (“We have no power to go beyond the federal scheme, and if we had the people are not ripe for any

2.1. Liberty Could Exist Only in a Society that Maintained the Proper Division Between Executive and Legislative Powers

The thinking of the Framers, and the framing generation generally, was politically lopsided because it derived from a “country Whig” tradition of opposition to any government centered around the corrupting influence of Crown and court.⁶⁹ More than any affirmative program, the country Whigs were united in their distrust of power and their reverence for the legislature.⁷⁰ Their notions of self-government were rooted in the ideas of mixed government, which held that the democratic branch of government was the legislature.⁷¹ The Articles reflected this lopsided thinking, concentrating all national authority in a unicameral legislature and omitting the executive nearly altogether. It was also evident in the early state constitutions, which, with few exceptions, made the executive branch dependent upon the state legislature.⁷² The unsoundness of placing too much power in the hands of the legislature was increasingly evident to many observers, including many

other.”); *id.* at 122 (Madison reported John Lansing’s views that “N. York would never have concurred in sending deputies to the convention, if she had supposed the deliberations were to turn on a consolidation of the States, and a National Government.”); *id.* at 159 (statement of Luther Martin) (“At the separation from the British Empire, the people of America preferred the establishment of themselves in thirteen separate sovereignties instead of incorporating themselves into one [T]hey are afraid of granting powers unnecessarily, lest they should defeat the original end of the Union”).

⁶⁹ See generally GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 3–45 (1998) (discussing the influence of the country Whig political tradition on colonists and the founding generation).

⁷⁰ *Id.* at 16–17; MAIER, *FROM RESISTANCE TO REVOLUTION*, *supra* note 29, at 164–65.

⁷¹ VILE, *supra* note 4, at 37–38; see MADISON’S NOTES, *supra* note 1, at 464 (“[Mr. Wilson] remarked that the prejudices against the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty.”).

⁷² Georgia gave the selection of the chief executive to the lower house. GA. CONST. of 1777, art. II. Delaware, New Jersey, Maryland, North Carolina, South Carolina, and Virginia gave it to both houses. DE. CONST. of 1776, art. 7; MD. CONST. of 1776, The Constitution, or Form of Government, &c, art. XXV; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, art. XV; S.C. CONST. of 1776, art. III; VA. CONST. of 1776, para. 9.

Convention delegates, by 1787.⁷³ Yet even Madison, who documented these concerns for posterity, conceded that he had given the organization of the executive little serious thought going into the Convention.⁷⁴ If the executive was largely a blank box for the Convention delegates, they were not without certain foundational principles and historical examples. The axiomatic separation of powers held that the legislative and executive powers could not be wielded by the same person or persons without resulting in tyranny.⁷⁵ Public liberty therefore depended on maintaining a proper division between the two.

The British constitution ultimately failed to do this. The framing generation, no more than Convention delegates, did not necessarily agree on the reasons why, but there was widespread agreement that British politics had improperly entangled the legislative and executive branches.⁷⁶ For those colonists and Convention delegates who stressed the absence of personal rule on the part of the Crown and the role of the ministry in guiding the British Empire, it was the legislature that had usurped the prerogatives of the Crown and attempted to make itself master of all.⁷⁷ For them, the unravelling of the transatlantic constitution was the story of an ambitious British

⁷³ See, e.g., MADISON'S NOTES, *supra* note 1, at 312 (Madison believed that "[e]xperience had proved a tendency in our governments to throw all power into the Legislative vortex.").

⁷⁴ Letter from James Madison to George Washington (Apr. 16, 1787), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 344, 348 (Gaillard Hunt ed., 1901) ("A National Executive must also be provided. I have scarcely ventured as yet to form my own opinion either of the manner in which it ought to be constituted or of the authorities with which it ought to be clothed.").

⁷⁵ MONTESQUIEU, *supra* note 4, at 173 ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.").

⁷⁶ See WOOD, *supra* note 69, at 36–43.

⁷⁷ MADISON'S NOTES, *supra* note 1, at 308 (Madison reported Gouverneur Morris's view that "[i]f the Executive be chosen by the [National] Legislature, he will not be independent [of] it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence. This was the case in England in the last Century.") (footnote omitted); *id.* at 463–64 (Madison reported Gouverneur Morris's view that "[i]f the Executive be overturned by the popular branch, as happened in England, the tyranny of one man [the prime minister] will ensue."); *id.* at 465 (reporting the remarks of James Wilson).

Parliament that overstepped its constitutional boundaries. Those who preferred to blame the Crown described a corrupt system of bribery and influence that made a sham of the pretense that Parliament was the voice of the people, or even independent of the government it supposedly oversaw.⁷⁸ Either way, the proper division of legislative and executive authority had not been maintained, and, as Montesquieu foretold, the result had been disastrous for public rights and the British Empire.⁷⁹ Agreement at this general level led to further agreement that the executive should be separate from the legislature and that both should be able to resist encroachments from the other.⁸⁰

What this implied in practice was another matter. Madison reported two predominant strains of thought. There was one faction that rallied around the principle of individual responsibility in the executive branch. A chief executive who bore responsibility for the performance of government was someone the public could, and would, hold accountable for its management.⁸¹ That public responsibility would fortify the executive in its dealings with the legislature.⁸² This view was open to the charge that it came close to describing the ancient constitution of England, which stressed the independent role of the Crown and had perished in the preceding century.⁸³ There was also the faction that rallied around the principle of regional

⁷⁸ MADISON'S NOTES, *supra* note 1, at 63 (reporting the views of Pierce Butler); *id.* at 64 (reporting the views of George Mason); *id.* at 65–66 (reporting the views of Benjamin Franklin); *id.* at 175 (reporting the views of Pierce Butler and George Mason).

⁷⁹ MONTESQUIEU, *supra* note 4, at 183 (“[English liberty] will perish when the legislative power shall be more corrupt than the executive.”); NELSON, *supra* note 29, at 16–23.

⁸⁰ MADISON'S NOTES, *supra* note 1, at 56 (reporting the views of George Mason and John Dickinson); *id.* at 306–08 (reporting the views of James Wilson and Gouverneur Morris); *id.* at 311–13 (reporting the views of James Madison and James McClurg).

⁸¹ *Id.* at 58–59 (reporting the views of John Rutledge, Charles Pinckney, and James Wilson); *id.* at 67 (reporting the views of James Wilson); *id.* at 80–81 (reporting the views of Elbridge Gerry, Rufus King, and John Dickinson); *id.* at 127 (reporting the views of James Wilson); *id.* at 315–16 (Madison reported Nathaniel Gorham's views that “[t]he Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone.”).

⁸² *Id.*

⁸³ NELSON, *supra* note 29, at 10–13, 29–31, 41–47.

representation in the executive.⁸⁴ A plural executive that gave a voice to different regions within the United States held attraction because such an executive would presumably check itself before embarking the government upon a course of action that, whether out of malice or ignorance, harmed the interests of any part of the country.⁸⁵ However, the experience of the Roman Republic suggested the frailty of a plural executive, where indecision on the battlefield and factional strife fed directly into civil war and collapse.⁸⁶ Moreover, the ministry in Great Britain was a plural executive—and was not the entire world, the Framers and Montesquieu included, confused as to the nature of the government there?

2.2. A Confederate Republic Enabled Republican Society to Expand Its Territory and Match the Strength of a Large Empire

Montesquieu's discussion of the advantages of a "confederate republic" was as influential as his thinking on the separation of powers.⁸⁷ Alexander Hamilton quoted Montesquieu at length on the subject in *The Federalist*.⁸⁸ A confederate republic was one in which different republics agreed to associate with one another in a new nation that preserved the republican character of the member states.⁸⁹ Montesquieu found examples in ancient

⁸⁴ MADISON'S NOTES, *supra* note 1, at 58 (reporting the remarks of Edmund Randolph); *id.* at 357 (reporting the remarks of Hugh Williamson).

⁸⁵ *Id.*

⁸⁶ *See id.* at 127 (statement of James Wilson) ("[T]he Consuls of Rome prove also the factious consequences of dividing the Executive Magistracy."); THE FEDERALIST NO. 70, *supra* note 4, at 473 (Alexander Hamilton) ("The Roman history records many instances of mischiefs to the republic from the dissensions between the consuls, and between the military tribunes, who were sometimes substituted to the consuls."); *see also* MIKE DUNCAN, THE STORM BEFORE THE STORM 124–26 (2017) (relating the refusal of the former consul Caepio to cooperate with the consul Mallius on the grounds that the latter was a commoner and the resulting Roman catastrophe at Arausio in 105 B.C.); ERICH GRUEN, THE LAST GENERATION OF THE ROMAN REPUBLIC 89, 92 (1995) (discussing the contentious co-consulship of Julius Caesar and Marcus Bibulus in 59 B.C.).

⁸⁷ MONTESQUIEU, *supra* note 4, at 148–50 (discussing the advantages and presenting examples of confederate republics).

⁸⁸ THE FEDERALIST NO. 9, *supra* note 4, at 69–70 (Alexander Hamilton).

⁸⁹ MONTESQUIEU, *supra* note 4, at 148.

Greece and Rome, as well as in contemporary Germany, Holland, and Switzerland.⁹⁰ Were it not for such republics, he predicted that kings and tyrants would rule over every part of the globe.⁹¹ The chief advantage of confederate republics was the ability to leverage the defensive capabilities of member states into a coherent whole that could counter the military strength of large states.⁹² A further advantage of confederate republics was their ability to expand indefinitely so as to include more member states—again, without compromising the republican character of institutions in any state.⁹³ The growing scale of the union of states fortified republican institutions by making it more likely that the whole would be capable of curing a disease in one of its members.⁹⁴ As Montesquieu put it, “[T]he form of this society prevents all manners of inconveniences.”⁹⁵ The confederate republic was the republican response to the security challenges raised by the need to defend extensive territories against foreign empires and inoculate the republic against corruption.

The United States had been a form of confederate republic from its inception.⁹⁶ However, experience under the Articles demonstrated that the

⁹⁰ *Id.* at 148–50.

⁹¹ *Id.* at 148 (“It is, therefore, very probable that mankind would have been, at length, obliged to live constantly under the government of a single person, had they not contrived a kind of constitution that has all the internal advantages of a republican, together with the external force of a monarchical, government. I mean a confederate republic.”).

⁹² *Id.* (“It was these associations that so long contributed to the prosperity of Greece. By these the Romans attacked the whole globe, and by these alone the whole globe withstood them; for when Rome had arrived at her highest pitch of grandeur, it was the associations beyond the Danube and the Rhine—associations formed by the terror of her arms—that enabled the barbarians to resist her.”).

⁹³ *Id.* (“This form of government is a convention by which several petty states agree to become members of a larger one, which they intend to establish. It is a kind of assemblage of societies, that constitute a new one, capable of increasing by means of further associations, till they arrive at such a degree of power as to be able to provide for the security of the whole body.”).

⁹⁴ *Id.* at 149 (“Should a popular insurrection happen in one of the confederate states, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound.”).

⁹⁵ *Id.*

⁹⁶ Alexander Hamilton equates a confederate republic with any compound or federal state that preserves the existence of the constituent republics: “The extent,

benefits of such a constitution might prove illusory. The Continental Congress could not harness the defensive capabilities of the different states into a coherent whole. Shirking on the part of states starved the national government of resources and precipitated a race to the bottom that robbed the Continental Congress of all credibility.⁹⁷ Washington and Hamilton, among others, bore witness firsthand to the self-serving “imbecility” that left the army cold, desperate and starving for much of the war.⁹⁸ The inadequacies of the national government ensured that it would not long endure. There was serious talk of dividing the nation into several smaller confederacies.⁹⁹ That may well have been the end result if the Philadelphia Convention had deadlocked, or if the states had failed to ratify the Constitution.¹⁰⁰ By the logic of Montesquieu, such fragmentation could only result in less security for republican government in each state, since the smaller confederacies would be less capable of resisting external threats. In addition, the confederacies that resulted from the fragmentation of the United States would not long remain

modifications, and objects of the federal authority are mere matters of discretion.” THE FEDERALIST NO. 9, *supra* note 4, at 473 (Alexander Hamilton).

⁹⁷ James Madison, *Vices of the Political System of the United States*, reprinted in MADISON, THEORY AND PRACTICE, *supra* note 8, at 329, 331.

⁹⁸ Letter from George Washington to Henry Laurens, President of Congress (Dec. 22, 1777), reprinted in 10 THE WRITINGS OF GEORGE WASHINGTON 183, 183–88 (John C. Fitzpatrick ed., 1933); Letter from Alexander Hamilton to George Washington (Feb. 13, 1783), reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON 253–55 (Harold C. Syrett ed., 1962); see also MADISON’S NOTES, *supra* note 1, at 15; *id.* at 127 (summarizing Edmund Randolph’s speech, which “painted in strong colors, the imbecility of the existing Confederacy”).

⁹⁹ THE FEDERALIST NO. 2, *supra* note 4, at 31–35 (John Jay); MADISON’S NOTES, *supra* note 1, at 290 (reporting the remarks of Luther Martin).

¹⁰⁰ THE FEDERALIST NO. 2, *supra* note 4, at 35 (John Jay) (“They who promote the idea of substituting a number of distinct confederacies in the room of the plan of the convention seem clearly to foresee that the rejection of it would put the continuance of the Union in the utmost jeopardy.”); MADISON’S NOTES, *supra* note 1, at 97 (Madison reported James Wilson’s view that “[i]f the small States will not confederate on this [proportionate] plan, [Pennsylvania] & he presumed some other States, would not confederate on any other.”); *id.* at 164–65 (Madison believed that “[a]ll the examples of other confederacies prove[d] the greater tendency in such systems to anarchy than to tyranny; to a disobedience of the members than to usurpations of the federal head. Our own experience had fully illustrated this tendency.”) (footnote omitted); *id.* at 217 (Madison reported Elbridge Gerry’s view that “[t]he fate of the Union will be decided by the Convention.”).

friends. Internal jealousies and external meddling would turn neighbors into enemies before long—just like everywhere else.¹⁰¹

For the delegates who subscribed to Montesquieu's thinking, maximizing the security of their respective states meant forging an effective union that was as large as possible. A union that existed only on parchment was insufficient. Efficacy lay in an ability to marshal resources and capabilities that commanded the respect of other powers. There was no point in turning away any states who were willing to commit to a plan of union that offered more security to all and in proportion to the number and extent of members involved. The critical concession was the functional independence of the national government, secured by the power to raise a revenue that was independent of the states.¹⁰² If member states could tolerate that power, then their participation in the union would redound to the benefit of all by reinforcing national security and thereby improving the long-term prospects for the survival of republican government. Conformity to a common plan of republicanism was not necessary to realize the benefits of a confederate republic.¹⁰³ There was therefore no appetite among the delegates for reforming the domestic political institutions of any state, much less any group of states. Such was simply not a subject of discussion at the Philadelphia Convention. Rather, every state was presumed to have a republican character that made it eligible to join the proposed union.¹⁰⁴ Presuming otherwise would have jeopardized ratification and placed public rights at risk everywhere.

¹⁰¹ THE FEDERALIST NO. 5, *supra* note 4, at 45 (John Jay) ("Hence, like most other *bordering* nations, they [smaller American confederacies] would always be either involved in disputes and war, or live in the constant apprehension of them."); MADISON'S NOTES, *supra* note 1, at 508 (Madison summarized Oliver Ellsworth's view that "[i]f we do not agree on this middle & moderate ground he was afraid we should lose two States, with such others as may be disposed to stand aloof, should fly into a variety of shapes & directions, and most probably into several confederations and not without some bloodshed."); see AMAR, *supra* note 36, at 254–56 (noting the prominence of such concerns during the ratification debates).

¹⁰² MADISON'S NOTES, *supra* note 1, at 7, 13.

¹⁰³ Montesquieu argues that each state should be republican in form and illustrates his point by discussing flawed confederate republics in which some constituent states were republics and others, monarchies. MONTESQUIEU, *supra* note 4, at 149–50.

¹⁰⁴ The Convention delegates presumed that even states that did not send delegates were eligible to ratify the Constitution, indicating the irrelevance of inquests into the

2.3. Great Britain Precipitated the American Revolution by Reinterpreting the Transatlantic Constitution Without Colonial Consent

Another essential point of consensus among the Framers and framing generation was that Great Britain bore responsibility for the Revolution.¹⁰⁵ The Stamp Act, which required that individuals purchase stamped paper for most official or legal business,¹⁰⁶ was unconstitutional in their eyes. Not marginally so, not theoretically so, but flatly so.¹⁰⁷ We cannot begin to understand the historical context of the Revolution and the framing without comprehending why this was. In rejecting the Stamp Act, patriots were not denying that governments had taxing powers. They were denying that British Parliament had the power to tax them in their respective colonies.¹⁰⁸ The colonists elected their own assemblies, which were responsible for laying taxes on the community.¹⁰⁹ If it was in the interest of the British Empire to raise additional revenues from the colonies, then the officers of the Crown should make their needs known to the colonial assemblies, who would proceed to take those needs into account when establishing policy.¹¹⁰ Such a system bore a strong resemblance to that later established under the Articles of Confederation. It suffered from many of the same problems, too, and the inability of British Parliament to efficiently harness the wealth and

republican character of state governments. See MADISON'S NOTES, *supra* note 1, at 561–65.

¹⁰⁵ *Id.* at 4, 76–77 (reporting the remarks of James Madison). The Declaration of Independence and the preambles of every state constitution adopted during the revolutionary period blamed Great Britain for the separation. THE DECLARATION OF INDEPENDENCE paras. 2–30 (U.S. 1776); GA. CONST. of 1777 pmbl.; MD. CONST. of 1776 pmbl.; N.H. CONST. of 1776 pmbl.; N.J. CONST. of 1776 pmbl.; N.C. CONST. of 1776 pmbl.; N.Y. CONST. of 1777 pmbl.; PA. CONST. of 1776 pmbl.; S.C. CONST. of 1776 pmbl.; VA. CONST. of 1776 pmbl.; VT. CONST. of 1777 pmbl. Delaware's constitution did not include a preamble. DE. CONST. of 1776.

¹⁰⁶ Stamp Act 1765, 5 Geo. 3, c. 12 (Eng.).

¹⁰⁷ See, e.g., MAIER, *supra* note 29, at 51–52; C.A. WESLAGER, THE STAMP ACT CONGRESS 12 (1976).

¹⁰⁸ See, e.g., WESLAGER, *supra* note 107, at 34–35.

¹⁰⁹ *Id.* at 142.

¹¹⁰ MADISON'S NOTES, *supra* note 1, at 102 (reporting Benjamin Franklin's discussion of the voluntary requisition process under the transatlantic constitution).

manpower of the colonies arguably made the French and Indian War more of a struggle than it otherwise would have been.¹¹¹

Nonetheless, from the colonial perspective, the war had gone rather well. The colonies had provided revenues, supplies, and men for the war effort, which resulted in a magnificent victory.¹¹² The conquest of New France eliminated the only serious geopolitical threat to British North America.¹¹³ The path to westward expansion was cleared.¹¹⁴ The future of the colonies had never appeared more secure. Though they had grown in stature and confidence, the colonists celebrated the new reign of George III throughout the land, and without any hint of resentment.¹¹⁵ It was in the afterglow of victory that Great Britain attempted to redefine the British Empire around a hub-and-spokes model with it at the center. From the colonial perspective, if that form of organization had been unnecessary when New France posed a credible threat, it certainly could not be justified now that the threat was gone.¹¹⁶ Moreover, the colonies had demonstrated their loyalty to Great Britain and provided her with an unmatched advantage over her opponents, both in North America and in Europe. British politicians had not been shy

¹¹¹ See CHARLES R. RITCHESON, *BRITISH POLITICS AND THE AMERICAN REVOLUTION*, at viii (1954) (linking the war debts of Great Britain with the “inadequate and altogether unsatisfactory” colonial requisition system); WESLAGER, *supra* note 107, at 33.

¹¹² BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 84 (5th prtg. 2017) (“English successes in the Seven Years’ War made [the American notion of a special destiny] seem particularly realistic, for it seemed reasonable, after the conquest of Canada, to envision . . . ‘a mighty empire’ in America . . .”).

¹¹³ See *generally* LEWIS NAMIER, *ENGLAND IN THE AGE OF THE AMERICAN REVOLUTION* 320–21 (2d ed. 1961) (1930) (discussing British politics surrounding the decision whether to retain French Canada after the Seven Years’ War); WESLAGER, *supra* note 107, at 21.

¹¹⁴ See JOHN BREWER, *PARTY IDEOLOGY AND POPULAR POLITICS AT THE ACCESSION OF GEORGE III* 201 (1976) (“The government’s decision to plump for hegemony on the North American continent by retaining the whole of Canada, and to content itself with a holding operation in the West Indies, placed the Americans at the very centre of the British imperial design.”) (footnote omitted).

¹¹⁵ See NELSON, *supra* note 29, at 108 (2014) (“NEVER were a people more wrapped up in a King, than the Americans were in George the Third in the Year 1763.”) (quoting WILLIAM HENRY DRAYTON, *A CHARGE, ON THE RISE OF THE AMERICAN EMPIRE* 3 (1776) (internal quotation marks omitted)).

¹¹⁶ WESLAGER, *supra* note 107, at 33.

about acknowledging as much during the war.¹¹⁷ The success and prosperity of the colonies, and of the empire, was evidence of the wisdom of Salutary Neglect.¹¹⁸ The policy of leaving colonies alone had fostered robust economies and self-governing institutions.¹¹⁹

Patriots were suspicious that Britain's newfound interest in taxing the colonies had nothing at all to do with their security. Perhaps it had everything to do with the enormous war debts of the British government.¹²⁰ By expanding its tax base to include the property of colonists, Parliament could reduce the tax burden on the people of Great Britain and tax people who elected no delegates to Parliament.¹²¹ Insofar as representation was the proper check on any taxing authority, Parliament was placing the colonists in an untenable position. Their property could be taxed for the benefit of another country, and there was nothing they could do about it. Colonial consent, or lack of consent, appeared to be of no constitutional significance. This made the colonists distinctively lesser than the people in Great Britain, whose consent presumably held sway in British Parliament.¹²² A hub-and-spokes empire was not one in which all the British people were equal; British people in Great Britain were first class citizens with respect to all others, both in the enjoyment of rights and in the arbitrary exercise of power over the persons and properties of other realms.¹²³ That was a revolutionary change from the

¹¹⁷ William Pitt the Elder (Earl of Chatham) in particular extolled the colonists for their contributions to the war effort. See WILLIAM PITT, *POLITICAL DEBATES* 15 (1766) (“[T]he profits to Great Britain from the trade of the colonies . . . is two millions a year. This is the fund that carried you triumphantly through the last war.”).

¹¹⁸ EDMUND BURKE, *On Moving His Resolutions for Conciliation with the Colonies* (Mar. 22, 1775), in BURKE'S *SPEECH ON CONCILIATION WITH AMERICA* 22 (Sidney Carleton Newsom ed., London, MacMillan & Co. 1918) (“[T]he Colonies . . . owe little or nothing to any care of ours, and that they are not squeezed into this happy form by the constraints of watchful and suspicious government, but . . . through a wise and salutary neglect . . .”).

¹¹⁹ BURKE, *supra* note 118, at 22; BAILYN, *supra* note 112, at 203–04.

¹²⁰ WESLAGER, *supra* note 107, at 22–23, 33.

¹²¹ AMAR, *supra* note 36, at 35.

¹²² PITT, *supra* note 117, at 6 (“When therefore in this house we give and grant, we give and grant what is our own. But in an American tax, what do we do? We, your majesty's commons of Great-Britain . . . give and grant to your majesty the property of your majesty's commons of America—It is an absurdity in terms.”).

¹²³ GOLDSWORTHY, *supra* note 3, at 194; see MICHAEL G. KAMMEN, *A ROPE OF SAND* 152–64, 208, 227–33 (1968).

transatlantic constitution under Salutary Neglect. That constitution had protected the equality of the British people in every realm by respecting the legislative supremacy of assemblies and parliaments in each.¹²⁴

3. PROBLEM 1 – THE CLASS BASIS OF REPUBLICAN THEORY

G. Britain contains three orders of people distinct in their situation, their possessions & their principles But the U. States contain but one order . . . the order of the Commons.¹²⁵

If the Framers were going to design a confederate republic with a bicameral national legislature complemented by an executive and a judiciary, as they further agreed early on,¹²⁶ then the transatlantic constitution was the historical example that spoke most directly to them. Madison and others discussed ancient confederacies,¹²⁷ but they also acknowledged their limited knowledge of how these confederacies operated in practice, as well as other

¹²⁴ See WOOD, *supra* note 69, at 10–13. Even those who believed that the power of British Parliament was uncontrollable acknowledged that British statutes did not extend to other realms within the empire absent an express statement to that effect. See 1 BLACKSTONE, *supra* note 52, at *63–64.

¹²⁵ MADISON'S NOTES, *supra* note 1, at 186–87 (reporting the remarks of Charles Pinckney).

¹²⁶ *Id.* at 34 (noting that “a *national* Government . . . consisting of a *supreme* Legislative, Executive & Judiciary” carried in the affirmative); *id.* at 38 (“[T]he national Legislature ought to consist of two branches was agreed to without debate or dissent.”) (internal quotation marks omitted); *id.* at 43 (“On the question for transferring all the Legislative powers of the existing [Congress] to this Assembly, there was also a silent affirmative *nem. con.*”); *id.* at 44 (reporting that “giving powers [to the proposed national Legislature], in cases to which the States are not competent” carried in the affirmative); *id.* at 72 (Madison believed that “[a] Government without a proper Executive & Judiciary would be the mere trunk of a body, without arms or legs to act or move.”).

¹²⁷ See, e.g., *id.* at 132 (reporting Alexander Hamilton's discussion of the Amphyctionic Council); *id.* at 143–45 (reporting James Madison's discussion of the Amphyctionic and Achaean Councils); *id.* at 161 (reporting James Wilson's discussion of the Amphyctionic and Achaean Councils); *id.* at 206–07 (reporting James Madison's discussion of Athens, Carthage, Rome, Sparta, Thebes, as well as the Amphyctionic and Achaean Councils); THE FEDERALIST NO. 18, *supra* note 4, at 122–24 (James Madison with Alexander Hamilton) (discussing the Amphyctionic and Achaean Councils).

fundamentals of organization.¹²⁸ In contrast, the framing generation had experienced firsthand the disintegration of the transatlantic constitution.¹²⁹ Many were old enough to remember how proud the colonists once were to be British subjects.¹³⁰ That pride had not dissipated during the Stamp Act crisis, which the colonists had won by placing economic pressure on British merchants, who in turn leaned on Parliament to repeal the law.¹³¹ Had Parliament backed down then, the episode would have demonstrated the power of the people in the colonies to defend their constitutional rights under the transatlantic constitution. Parliament did not back down, but Parliament was also responsible for its own abuse of authority. The transatlantic constitution had been built on many sound principles, save for the imperfections that allowed the imperial government to overstep constitutional boundaries in the effort to consolidate power.¹³²

¹²⁸ THE FEDERALIST NO. 18, *supra* note 4, at 110–11 (James Madison with Alexander Hamilton) (“From the best accounts transmitted of this celebrated institution [the Amphyctionic Council], it bore a very instructive analogy to the present Confederation of the American States. . . . Very different nevertheless was the experiment from the theory.”); MADISON’S NOTES, *supra* note 1, at 161 (Madison reported James Wilson’s view that “[t]he Amphyctionic & Achaean were formed in the infancy of political Science; and appear by their History & fate, to have contained radical defects.”).

¹²⁹ The colonists did not use the term transatlantic to describe their constitution; rather, they described it as part of the British Constitution. BILDER, *supra* note 6, at 1–11; WOOD, *supra* note 69, at 11; *see* MAIER, *supra* note 40, at 289–94; *see generally* JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1764) (arguing that colonists, as British subjects, are entitled to the rights of the British Constitution).

¹³⁰ *See, e.g.,* BAILYN, *supra* note 112, at 129–31; MAIER, *supra* note 29, at 103–05; NELSON, *supra* note 29, at 2; GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 4 (1993).

¹³¹ MAIER, *supra* note 29, at 74–75, 114–22. George Mason expressed concern that British merchants would seek a similar influence in the new Congress. MADISON’S NOTES, *supra* note 1, at 441.

¹³² Convention delegates spoke in praise of the Crown’s power of disallowance. MADISON’S NOTES, *supra* note 1, at 88 (reporting the remarks of Charles Pinckney); *id.* at 92 (reporting the remarks of James Madison); *id.* at 305 (Madison contended that “[a] power of negating the improper laws of the States is at once the most mild & certain means of preserving the harmony of the system. Its utility is sufficiently displayed in the British system.”). James Madison proposed that the federal government exercise a similar veto over state laws, *id.* at 92, which the Convention delegates rejected. *Id.* at 518 (“Mr. Mason wished to know how the power was to be exercised. Are all laws whatever to be brought up? Is no road nor bridge to be established without the

The transatlantic constitution had failed in the final analysis, so it could never be more than a starting point for discussion. There were three principal problems with translating the transatlantic constitution to post-revolutionary America in 1787. The first of these was its basis in a feudal class structure that the American Revolution firmly rejected.¹³³ By colonial admission, the Crown operated as the linchpin of the system, serving as the ultimate executive authority in every realm composing the empire.¹³⁴ The idea of instituting a hereditary monarch in the United States in 1787 was absurd. The Convention delegates never supposed they had the power to propose such an office, and discussed it rather as an outcome to be avoided.¹³⁵ Yet, it was difficult to envision how something like the transatlantic constitution could operate without Crown authority. No other institution connected the various realms together, at least in their domestic, peacetime capacity.¹³⁶ The Crown appointed the governor and the council, two of the three colonial institutions with lawmaking power.¹³⁷ Crown officials on the Privy Council and the Board of Trade exercised a power of disallowance over colonial laws,

Sanction of the General Legislature?" Madison reported John Rutledge's view that "[i]f nothing else, this alone would damn and ought to damn the Constitution.").

¹³³ WOOD, *supra* note 130, at 271–86 (describing the founding generation's rejection of aristocracy); *see also* WOOD, *supra* note 69, at 18.

¹³⁴ *See, e.g.*, KAMMEN, *supra* note 123, at 158–59.

¹³⁵ MADISON'S NOTES, *supra* note 1, at 45 (reporting the views of Charles Pinckney); *id.* at 46 (reporting the reviews of Edmund Randolph); *id.* at 57 (reporting the views of John Dickinson); *id.* at 64–65 (reporting the views of George Mason); *id.* at 65–66 (reporting the views of Benjamin Franklin); *id.* at 67 (reporting the views of John Rutledge); *id.* at 107 (reporting the remarks of Elbridge Gerry); *id.* at 181–82 (reporting the remarks of Charles Pinckney); *id.* at 356–57 (reporting the views of Hugh Williamson); *id.* at 584 (reporting the remarks of Edmund Randolph).

¹³⁶ BAILYN, *supra* note 112, at 204 ("The condition of British America by the end of the Seven Years' War was therefore anomalous: extreme decentralization of authority within an empire presumably ruled by a single, absolute, undivided sovereign.").

¹³⁷ *See* 1 BLACKSTONE, *supra* note 52, at *108 ("Their general assemblies, which are their House of Commons, together with their council of state, being their upper house, with the concurrence of the king or his representative the governor, make laws suited to their own emergencies."); PEVERILL SQUIRE, *THE EVOLUTION OF AMERICAN LEGISLATURES* 13 tbl.2.1 (2012) (listing nine colonies in which the Crown appointed members of the council; they were elected only in Connecticut and Rhode Island).

often on grounds of legitimate public policy.¹³⁸ The attraction of the transatlantic constitution was its respect for the legislative supremacy of different realms,¹³⁹ but Crown government was at its center.¹⁴⁰

Social class was also fundamental to the bicameral lawmaking system. The House of Lords in Great Britain was an upper house consisting of hereditary nobles, ecclesiastics, and appointed friends of the Crown.¹⁴¹ None of these individuals sat for election. The chamber was not, in fact, a representative body.¹⁴² Neither were the colonial councils, which operated as upper houses in the colonial legislatures.¹⁴³ The Crown appointed members of the council, usually from men of distinction in the colony.¹⁴⁴ These men were not nobles, and they had no power to bequeath their offices to their children, but their selection reinforced the notion that wealth and property were important criteria for participation in the upper house. Of several approaches to bicameral organization taken by the states, the most common imposed heightened property requirements for electors, candidates, or both.¹⁴⁵ Social class was no less important for the organization of state lower houses. Only politically privileged segments of the population were entitled to vote or run in lower house elections.¹⁴⁶ Some sort of property or taxpaying requirement

¹³⁸ See sources cited *supra* note 132; CHARLES MCLEAN ANDREWS, *COLONIAL SELF-GOVERNMENT 1652–1689*, at 22–40 (Scholarly Press 1969) (1904); see generally Charles M. Andrews, *The Royal Disallowance*, 1914 AM. ANTIQUARIAN SOC'Y 342 (describing the subordination of colonial legislation to imperial constitutional authority).

¹³⁹ BILDER, *supra* note 6, at 1 (2004) (“The central principle—that a colony’s laws could not be repugnant to the laws of England but could differ according to the people and place—bound all American colonies.”); 1 BLACKSTONE, *supra* note 52, at *105 (“That all laws, bye-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect.”).

¹⁴⁰ NELSON, *supra* note 29, at 33–34 (summarizing Franklin’s views as expressed in a 1766 essay).

¹⁴¹ See sources cited *supra* note 52.

¹⁴² MADISON’S NOTES, *supra* note 1, at 443 (Madison reported George Mason’s view that “[t]he House of Lords does not represent nor tax the people, because not elected by the people.”).

¹⁴³ See sources cited *supra* note 137.

¹⁴⁴ See SQUIRE, *supra* note 137, at 26–37 (describing the institutional evolution of bicameralism in the North American colonies as contrasted with that of England).

¹⁴⁵ See *supra* note 54 and accompanying discussion.

¹⁴⁶ KEYSSAR, *supra* note 13, at 8.

was typical.¹⁴⁷ There were states who limited voting to white residents,¹⁴⁸ and every state constitution restricted voting to men except those of New Jersey and South Carolina in 1776.¹⁴⁹ Candidates for office frequently faced additional requirements, such as that they profess to be Christians—often, more specifically, Protestants.¹⁵⁰

3.1. The Conflation of the Separation of Powers with Traditions of Mixed Government Made Envisioning Political Institutions in a Post-Feudal World Difficult

The delegates, and framing generation generally, were very closely attached to the theory of separating government powers.¹⁵¹ As Madison noted, this idea was older than Montesquieu, but it had been Montesquieu who did the most to popularize the idea.¹⁵² Montesquieu framed his discussion as an encomium of the British constitution, which he found perfectly calibrated to promote a free and fearless population.¹⁵³ Insofar as his ideas

¹⁴⁷ DE. CONST. of 1776, art. 3; GA. CONST. of 1777, art. IX; MA. CONST. of 1780, pt. 2, ch. I, § 3, art. IV; MD. CONST. of 1776, *The Constitution, or Form of Government*, &c, art. II; N.H. CONST. of 1776; N.J. CONST. of 1776, arts. III, IV; N.Y. CONST. of 1777, arts. VII, X; N.C. CONST. of 1776, *The Constitution, or Form of Government*, &c, arts. VII, IX; PA. CONST. of 1776, § 6; S.C. CONST. of 1776, art. XI; S.C. CONST. of 1778, art. XIII; VA. CONST. of 1776.

¹⁴⁸ GA. CONST. of 1777, art. IX; S.C. CONST. of 1778, art. XIII.

¹⁴⁹ DE. CONST. of 1776, art. 3; GA. CONST. of 1777, art. IX; MA. CONST. of 1780, pt. 2, ch. I, § 3, art. IV; MD. CONST. of 1776, *The Constitution, or Form of Government*, &c, art. II; N.Y. CONST. of 1777, art. VII; N.C. CONST. of 1776, *The Constitution, or Form of Government*, &c, art. VII; PA. CONST. of 1776, § 6; S.C. CONST. of 1778, art. XIII; VA. CONST. of 1776; *contra* N.J. CONST. of 1776, arts. III, IV; S.C. CONST. of 1776, art. XI.

¹⁵⁰ DE. CONST. of 1776, art. 22; GA. CONST. of 1777, art. VI; MA. CONST. of 1780, pt. 2, ch. II, art. II; *id.* pt. 2, ch. VI; MD. CONST. of 1776, *The Constitution, or Form of Government*, &c, art. XXXV; N.J. CONST. of 1776, art. XIX; N.C. CONST. of 1776, *The Constitution, or Form of Government*, &c, art. XXXII; S.C. CONST. of 1778, art. XII; *contra* PA. CONST. of 1776, § 40; VA. CONST. of 1776.

¹⁵¹ VILE, *supra* note 4, at 133.

¹⁵² THE FEDERALIST NO. 47, *supra* note 4, at 298 (James Madison).

¹⁵³ *Id.* (“The British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry . . . [T]his great political critic appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered, in the form of elementary truths, the

extended to the transatlantic constitution, this was perhaps a sign that the delegates were building on a firm foundation. Yet, this meant Montesquieu had, at the same time, been singing the praises of a system featuring a hereditary monarch in the executive and landed nobility and clergy in the upper house of the legislature. For all its other merits, Montesquieu's analysis, expressing unqualified praise for the British system, confused and ultimately conflated two different theories of constitutionalism—the separation of powers, and the much older theory of mixed government. The goal of mixed government was to blend monarchical, aristocratic, and democratic institutions in such a way as to obtain the principal benefits of each in a stable system.¹⁵⁴ The British Constitution reflected such thinking.¹⁵⁵ The Crown was the monarchical element. The House of Lords stood for the aristocracy. The House of Commons represented the voice of the people.

The traditional justification for the British constitution was not that it separated power, but that it forced the three political branches, representing the three fundamental stakeholders in society, to share legislative power.¹⁵⁶ Any bill had to win approval in both the House of Lords and the House of Commons before it could be presented to the Crown, who could then elect to veto the bill or sign the bill into law.¹⁵⁷ By the logic of mixed government, such a division of legislative power ensured that no class in society could enact policy without the consent of the other two classes.¹⁵⁸ Montesquieu described this division of legislative power, but treated it as a form of checks and balances in a system of separated powers.¹⁵⁹ The separation of powers that drew Montesquieu's attention was that between the Houses of Parliament, on the one hand, and the Crown, on the other. The Crown appointed magistrates and judges, and defended its prerogatives through an absolute veto over legislation.¹⁶⁰ The Houses of Parliament proposed legislation and

several characteristic principles of that particular system.”); MONTESQUIEU, *supra* note 4, at 171–205.

¹⁵⁴ VILE, *supra* note 4, at 107.

¹⁵⁵ JOSEPH GALLOWAY, *A CANDID EXAMINATION OF THE MUTUAL CLAIMS OF GREAT BRITAIN, AND THE COLONIES* 7 (1775).

¹⁵⁶ 1 BLACKSTONE, *supra* note 52, at *150–51, *154; VILE, *supra* note 4, at 41.

¹⁵⁷ 1 BLACKSTONE, *supra* note 52, at *150–51, *177–78.

¹⁵⁸ VILE, *supra* note 4, at 37.

¹⁵⁹ *Id.* at 115; MONTESQUIEU, *supra* note 4, at 177.

¹⁶⁰ *Id.* at 175, 177, 181, 186; 1 BLACKSTONE, *supra* note 52, at *178, *223.

protected their interests through money bills.¹⁶¹ The upper house was also the court of last resort.¹⁶² This might be more accurately described as a separation of institutions than a separation of powers, since Montesquieu did not in fact endorse a system in which the legislative, executive and judicial powers were kept entirely separate from one another.¹⁶³

The conflation of separation of powers with mixed government presented quite a challenge for the Convention delegates. The separation of powers was fundamental to popular notions about good government. Conversely, mixed government had no bearing in a society that lacked aristocratic and monarchical distinctions. Yet, both had been used to describe the British Constitution, which Montesquieu had raised up as the paragon of perfection. If the Framers were going to keep faith with the separation of powers, they needed to find a way to distill its essential components, which they then had to translate to a very different kind of society. Difficulty lay in every direction. The delegates would need to propose new institutions to take the place of the Crown and the House of Lords. But that was only considering the problem in its simplest dimension. How, in a republican society, could one create substitutes for these political institutions that would be capable of resisting the unwise impulses of the popularly elected lower house and fostering the responsible administration of government? The rise to preeminence in Great Britain of the House of Commons itself seemed to suggest that the Crown and the hereditary nobility were no match for popular government.¹⁶⁴ Since those institutions proved too feeble to check majority sentiment, the delegates would have to imagine credible substitutes.

¹⁶¹ 1 BLACKSTONE, *supra* note 52, at *150–51, *163–64; MONTESQUIEU, *supra* note 4, at 177, 182.

¹⁶² 3 BLACKSTONE, *supra* note 52, at *56–57; MONTESQUIEU, *supra* note 4, at 177.

¹⁶³ THE FEDERALIST NO. 47, *supra* note 4, at 299 (James Madison); MADISON'S NOTES, *supra* note 1, at 80 (reporting the remarks of James Madison); *id.* at 340–41 (reporting the remarks of James Madison); VILE, *supra* note 4, at 135.

¹⁶⁴ THE FEDERALIST NO. 71, *supra* note 4, at 433 (Alexander Hamilton); MADISON'S NOTES, *supra* note 1, at 464–65 (Madison reported James Wilson's view that "[a]fter the destruction of the King in Great Britain, a more pure and unmixed tyranny sprang up in the parliament than had been exercised by the monarch."); *see also* sources cited *supra* note 77 and accompanying text.

3.2. State Constitutions Privileged Race, Religion, Sex, and Wealth in Different Ways that Resisted Standardization and Impeded Union

The Framers may have agreed in principle on a popularly elected lower house,¹⁶⁵ but making even that concept work required substantial innovation. There were the obvious questions of eligibility to vote and run in elections for the lower house. That the states had enacted wildly divergent laws with respect to voting and elections within their own borders was a complicating factor.¹⁶⁶ State law presumably reflected the preferences of the electorates in the different states, which the Convention delegates were reluctant to contradict. This was a time before universal suffrage and political equality became the leading lights of democratic self-government. In fact, the ability of a polity to confer rights of political participation on favored persons or groups was considered integral to republican self-government.¹⁶⁷ That strikes modern readers as bizarre because we tend to think of voting rights as civil rights, which belong to all persons in the community. Yet republican thinking in the late 18th century drew a clear distinction between civil rights and political rights.¹⁶⁸ Keeping that distinction in mind explains seemingly contradictory practices, such as guaranteeing religious freedom to

¹⁶⁵ A popularly elected lower house was included as the fourth item in Edmund Randolph's list of resolutions on May 29; a majority of state delegations never retreated from this position, although some delegates advocated appointment by state legislatures and the concept was omitted from the competing New Jersey Plan. MADISON'S NOTES, *supra* note 1, at 30–33 (reporting Randolph's resolutions); *id.* at 39 (reporting the remarks of Roger Sherman, Elbridge Gerry); *id.* at 41 (reporting the remarks of Elbridge Gerry and Pierce Butler); *id.* at 74–75 (reporting the remarks of Roger Sherman); *id.* at 78 (reporting the remarks of Charles Pinckney); *id.* at 86 (related remarks of Roger Sherman, Elbridge Gerry); *id.* at 118–21.

¹⁶⁶ *Id.* at 215 (reporting the remarks of Alexander Hamilton); *id.* at 327 (reporting the remarks of James Madison); *id.* at 365 (reporting the remarks of James Madison); *id.* at 376 (reporting the remarks of James Madison).

¹⁶⁷ See *Ex Parte Virginia*, 100 U.S. 339, 368 (1879) (Field, J., dissenting) (“Civil rights are absolute and personal. Political rights, on the other hand, are conditioned and dependent upon the discretion of the elective or appointing power, whether that be the people acting through the ballot, or one of the departments of their government.”).

¹⁶⁸ See *id.*; JUD CAMPBELL, CONSTITUTIONAL RIGHTS 12 (2024).

all persons in one clause of a state constitution,¹⁶⁹ while elsewhere premising eligibility for office on being a Protestant.¹⁷⁰ Religious freedom pertained to civil rights, but, at the founding, eligibility for office was a limitable political right.¹⁷¹

State variation was such that the percentage of voters eligible to both participate and run in elections ranged from a minority to a clear majority of the male population.¹⁷² How could such divergent state practices be accommodated? On the surface of things, there was the possibility of declaring a national standard that would not affect state elections. That option was illusory, however. A national standard that was more liberal than state practice would create a voting constituency in the state that would demand the vote in state elections, overriding the state standard. A national standard that was less liberal than state practice would arouse intense popular opposition within the state, and probably prevent ratification.¹⁷³ The state variation in candidate eligibility requirements was another issue. Should the delegates settle upon liberal eligibility standards, perhaps without property or taxpaying requirements, or without religious qualifications, then it would be at least theoretically possible that a candidate for the national lower house would be ineligible for the lower house of the state in which he was resident. The influence of state election law over the pool of potential candidates

¹⁶⁹ GA. CONST. of 1777, art. LVI; MA. CONST. of 1780, pt. 1, art. II; MD. CONST. of 1776, The Constitution, or Form of Government, &c, art. XXXIII; N.C. CONST. of 1776, The Constitution, or Form of Government, &c, art. XXXIV; S.C. CONST. of 1778, art. XXXVIII; *see also* DE. CONST. of 1776, art. 29 (prohibiting the establishment of a state sect, but privileging protestants); N.J. CONST. of 1776, art. XIX (prohibiting the establishment of a state sect, but privileging protestants).

¹⁷⁰ *See* sources cited *supra* note 150.

¹⁷¹ *See* MADISON'S NOTES, *supra* note 1, at 215 ("Mr. Hamilton observed that individuals forming political Societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States.").

¹⁷² *See* WOOD, *supra* note 69, at 167; ROBERT E. BROWN, MIDDLE-CLASS DEMOCRACY AND THE REVOLUTION IN MASSACHUSETTS 1691–1780, at 50 tbl.4 (1955); Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 221 (2013); *see also* ROBERT E. BROWN & B. KATHERINE BROWN, VIRGINIA, 1705–1786, at 125–50 (1964) (describing substantial variation in voter qualification laws in Virginia in the eighteenth century).

¹⁷³ MADISON'S NOTES, *supra* note 1, at 401–02 (reporting the remarks of James Wilson, Oliver Ellsworth and Pierce Butler); *id.* at 405–06 (reporting the remarks of John Rutledge and Nathaniel Gorham).

would reduce the likelihood of such scenarios, but this hypothetical illustrates the difficulty of calibrating the national with the state republics.

Restrictive eligibility requirements for voters and candidates raised significant practical, and profound philosophical, concerns. The chief practical concern was that state practice varied and contradicting state practice was not consistent with the goal of securing unanimous ratification.¹⁷⁴ The states agreed on very little, although there was some common ground. Most states coalesced around the idea that male freeholders over twenty-one were eligible to vote.¹⁷⁵ Most states placed additional religious restrictions on potential officeholders, requiring that they profess to be Christians, or, more specifically, Protestants.¹⁷⁶ But most was not all, and enshrining these eligibility requirements in the Constitution put the union at risk. Moreover, placing such restrictions in the Constitution might establish a kind of populist aristocracy that could, in time, produce an interest apart from the people of the states and the new nation.¹⁷⁷ The Framers made certain predictions about the state of society in a mature United States, and one of these was that the ownership of property would become less widespread.¹⁷⁸ They saw the effect of property requirements and religious qualifications in Great Britain, where perhaps six percent of the population voted in Parliamentary elections.¹⁷⁹ A reasonable person could well conclude that restrictions of suffrage had robbed the House of Commons of its democratic character.¹⁸⁰

¹⁷⁴ See sources cited *supra* note 173.

¹⁷⁵ See sources cited *supra* note 147.

¹⁷⁶ See sources cited *supra* note 150.

¹⁷⁷ MADISON'S NOTES, *supra* note 1, at 402 (reporting the remarks of Gouverneur Morris); *id.* at 451 (Madison reported John Francis Mercer's view that "[i]t is a first principle in political science, that wherever the rights of property are secured, an aristocracy will grow out of it.").

¹⁷⁸ *Id.* at 193–94 (reporting the remarks of James Madison); *id.* at 402 (reporting the remarks of John Dickinson and Gouverneur Morris).

¹⁷⁹ W.A. SPECK, STABILITY AND STRIFE: ENGLAND, 1714–1760, at 16 (1977) (concluding that the eighteenth century British electorate peaked at about 5.5 percent of the population).

¹⁸⁰ MADISON'S NOTES, *supra* note 1, at 73 (Madison reported Elbridge Gerry's view that "[i]n England, the people will probably lose their liberty from the smallness of the proportion having a right of suffrage.").

3.3. Tying Federal Suffrage to State Suffrage Accommodated Different States and Made the American Voter the Wellspring of all Constitutional Authority

The delegates responded to the problems of social class in a post-feudal society in a deceptively deferential manner. Article I, section 2 explicitly tied federal suffrage to eligibility to vote in lower house elections at the state level.¹⁸¹ Such a rule was deferential in that it accommodated every existing restriction on suffrage in state law. Yet this rule was nowhere near as deferential as one granting states control over federal voting rights.¹⁸² A rule like that would have allowed state legislatures to find additional ways of restricting national suffrage that might prevent the proper functioning of the federal system or turn it into an aristocratic or oligarchic government. For example, one or more states might restrict the right to vote in federal elections to a subset of wealthy landowners, or even to members of the state legislature. This would not only undermine the affection of the people for their country; it would reduce the efficacy of the federal government and subject it to purely factional pressures.¹⁸³ Aggressively expanding the electorate was certainly out of the question, as that would contradict state law and jeopardize ratification. Instead, by tying federal suffrage to state suffrage, the Framers abandoned the logic of coercion and embraced the logic of equal protection. The federal government could live with whatever rules states chose to live by, so long as they applied to both layers of government.

Tying federal suffrage to state suffrage resulted in a perfect correspondence between those legally entitled to vote in state elections for the lower house and those entitled to vote for the lower house of the new national government. Upon ratification, such a rule promised to turn the electorates of thirteen different states into a single, common electorate for the first time. Every voter in Massachusetts or New York or South Carolina or

¹⁸¹ U.S. CONST. art. I, § 2, cl. 1 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

¹⁸² MADISON’S NOTES, *supra* note 1, at 166 (reporting Charles Pinckney’s motion “that the 1st branch, instead of being elected by the people, should be elected in such manner as the Legislature of each State should direct.”).

¹⁸³ *Id.* at 40–41 (reporting the remarks of James Wilson and James Madison); *id.* at 128–29 (reporting the remarks of Edmund Randolph).

any other state would at once become an American voter. Whereas their respective votes never before sent representatives to the same body, they would now elect the members of the House of Representatives and newly share the lawmaking powers of the nation. It is all too easy to gloss over the significance of this innovation. Under the Articles, the lawmaking powers of the nation belonged exclusively to a unicameral body of delegates who were not popularly elected. Under the transatlantic constitution, the lawmaking powers of the empire belonged to a separate country entirely. In the new American empire, the voters of the respective states would be the true well-spring of all constitutional authority. It was they who consented to government, and it would be their responsibility to discipline their representatives in regular elections. Moreover, the Constitution recognized no other class. The American voter was the supreme authority.

Not only did the Constitution recognize no more restrictive class of voter, it largely omitted restrictive eligibility requirements for candidates for federal office. There are no race, sex, property, taxpaying or religious qualifications in the Constitution.¹⁸⁴ The absence of these reinforces the fundamental equality of the American voter and the national rejection of aristocratic class distinctions.¹⁸⁵ Of course, omitting these restrictions from the Constitution had no impact on their prevalence at the state level. If states wanted to limit voting or officeholding to wealthy white men of a particular religious background, they had that power. Yet states also had the power to extend voting rights and reduce barriers for candidates. By the time of the Revolution, a popular push to reduce property requirements and expand rights of suffrage had been under way for many years.¹⁸⁶ The Framers could anticipate further expansions of suffrage in the future. Tying federal suffrage to state suffrage guaranteed that the federal electorate would expand with the state electorate. While a more restrictive turn in state law could result in a smaller national electorate, the national electorate would never sink below the size of the state electorate. The system locked in dual representation for

¹⁸⁴ The omission of property requirements from the final plan is especially interesting in light of an earlier eight to three vote in favor of property qualifications for members of every branch on July 26. MADISON'S NOTES, *supra* note 1, at 372–76.

¹⁸⁵ U.S. CONST. art. I, §§ 9–10.

¹⁸⁶ See Ratcliffe, *supra* note 172, at 221 (“[A]s early as the 1720s the suffrage was uniquely wide in the colonies.”); WOOD, *supra* note 69, at 167–68; *see also* WOOD, *supra* note 130, at 294–95.

the individual American voter. Without it, the national government might never have fulfilled its constitutional role for want of the affections of the people.¹⁸⁷

3.4. The Principle of State Equality in the Upper House Embodied the Conviction that Popular Power Alone Can Check Popular Power

The delegates in time agreed to resolve the delicate issues raised in the organization of the upper house by giving state legislatures representation in the Senate, and on the basis of equality.¹⁸⁸ Obviously, the Continental Congress had been placed on a similar foundation, if with some differences.¹⁸⁹ But it would be a mistake to treat the Senate as nothing more than a successor to the Continental Congress. It is clear from delegate deliberations that delegates did not feel bound to recreate that body. Rather, they arrived at similar principles after groping in vain for a workable, and agreeable, alternative.¹⁹⁰ The delegates were in search of a self-enforcing check on

¹⁸⁷ MADISON'S NOTES, *supra* note 1, at 40 ("Mr. Wilson contended strenuously for drawing the most numerous branch . . . immediately from the people No government could long subsist without the confidence of the people. In a republican Government this confidence was peculiarly essential."); *id.* at 41 ("[Madison believed] the great fabric to be raised would be more stable and durable, if it should rest on the solid foundation of the people themselves, than if it should stand merely on the pillars of the Legislatures.").

¹⁸⁸ U.S. CONST. art. I, § 3; *id.* art. V.

¹⁸⁹ The critical differences were sixfold. First, Senators were not recallable by state legislatures. Second, Senators served for six-year, rather than annual, terms. Third, senatorial terms were staggered, such that one third of the body stood for election every two years. Fourth, voting was per capita rather than by state. Fifth, senators were paid out of the national treasury. Sixth, senators were not term-limited in any way. Compare U.S. CONST. art. I, §§ 3, 6, with ARTICLES OF CONFEDERATION of 1781, art. V; AMAR, *supra* note 36, at 183.

¹⁹⁰ Convention delegates frequently disparaged the Continental Congress and warned against recreating that body. MADISON'S NOTES, *supra* note 1, at 5–9, 13–16; *id.* at 29 (reporting the remarks of Edmund Randolph); *id.* at 127 (reporting the remarks of Edmund Randolph); *id.* at 160 (reporting the remarks of Roger Sherman); *id.* at 162 (reporting the remarks of James Wilson); *id.* at 293 (reporting the remarks of James Madison); *id.* at 296 (reporting the remarks of James Wilson).

popular majorities in the House of Representatives.¹⁹¹ What interest in society could possibly stand in the way of a train like that without flinching? Land and titles had not been sufficient to prevent the popularly elected House of Commons from dominating the relationship with its upper house, the House of Lords. Even if delegates had found some way to make wealth the basis of membership in the upper house, how could a minuscule number of rich men stand up to popular sentiment? If they offended most of their neighbors, communities could be expected to punish them with methods that ran the gamut from harassment to fines and prosecutions. Popular resistance before the Revolution demonstrated how cruel and effective these could be.¹⁹²

A majority of state legislatures was one of the few forces in American politics that stood a chance of withstanding a popular majority in the House of Representatives. The state legislatures represented state voters and were in no way accountable to a national electorate. Although a national majority might exert pressure on senators, senators could be expected to stand firm so long as they enjoyed the support of their state legislatures, which reflected the consent of state voters. By resting on its own popular base of support, a majority of state legislatures could credibly oppose a national majority. Credible opposition was essential to secure the benefits of bicameralism. Had the delegates followed the example of Virginia and other states in giving the selection of the upper house to members of the lower house, the opposition of the upper house would not have been self-enforcing. By signaling its displeasure and preference for new agents in the upper house, the lower house would have found it easy to dominate the upper house in the event of disputes.¹⁹³ Such an imbalance would have destroyed the purpose of bicameralism. To ensure a deliberative process in which the majority would have no choice but to take minority preferences into reasonable consideration, the

¹⁹¹ See *id.* at 83 (reporting the remarks of James Madison); *id.* at 98 (reporting the remarks of Roger Sherman); *id.* at 110–11 (reporting the remarks of Edmund Randolph and James Madison); *id.* at 113 (reporting the remarks of Pierce Butler and James Madison); *id.* at 135 (reporting the remarks of Alexander Hamilton); *id.* at 233 (reporting the remarks of Gouverneur Morris); *id.* at 238 (reporting the remarks of James Madison); *id.* at 253 (reporting the remarks of Roger Sherman); *contra id.* at 251–52 (reporting Benjamin Franklin’s advocacy for a unicameral legislature).

¹⁹² See MAIER, *supra* note 29, at 51–157.

¹⁹³ MADISON’S NOTES, *supra* note 1, at 110–11.

champion of that minority had to be capable of holding its ground in a political battle with a national majority.

On the surface of things, the delegates merely compromised on the terms of the existing confederation and recreated the Continental Congress. Upon deeper consideration, however, it is fair to say the delegates innovated by proposing a credible form of bicameralism for a confederate republic. A majority of state legislatures could succeed where hereditary princes had failed in opposing national majorities, precisely because state legislatures represented majorities of their own. The unicameral Continental Congress had not been organized with the purpose of addressing the problems of bicameralism. In contrast, the delegates designed the Senate to serve as the upper house of a national legislature. Some delegates were opposed or reluctant to give state legislatures representation in the national government—Madison was certainly one of them.¹⁹⁴ Doing so on the basis of state equality bothered him and many others.¹⁹⁵ These delegates understood the Senate as a compromise extracted by small states, whose delegations won the day through demonstrations of political strength rather than words of persuasion.¹⁹⁶ Had small state advocates been more articulate, they might have argued that the Convention was unable to identify any other alternative that could stand on its own political majorities in a contest of wills with a national majority in the lower house.¹⁹⁷ State equality in the upper house made bicameralism credible, and reconciled it to republican principles.

¹⁹⁴ *Id.* at 83 (reporting the remarks of James Madison); *id.* at 97 (reporting the remarks of James Wilson); *id.* at 220–21 (reporting the remarks of James Wilson); *id.* at 259 (reporting the remarks of James Madison); *id.* at 291–93 (reporting the remarks of Rufus King and James Madison).

¹⁹⁵ At one point, a bare majority of state delegations rejected state equality in favor of proportional representation in the upper house in two successive six to five votes. *Id.* at 103–04.

¹⁹⁶ THE FEDERALIST NO. 62, *supra* note 4, at 375 (James Madison).

¹⁹⁷ In fairness, John Dickinson was probably making this point when he said, “The preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other.” MADISON’S NOTES, *supra* note 1, at 84.

4. PROBLEM 2 – THE ENTANGLEMENT OF EXECUTIVE AND LEGISLATIVE POWER

[I]t [is] absolutely necessary to a well constituted Republic that the [Executive and Legislative powers] should be kept distinct & independent of each other.¹⁹⁸

If it was axiomatic that good government required the separation of powers, finding an enduring means to this end remained mysterious in 1787. The British constitution was the inspiration for the doctrine, but the relationship between the Houses of Parliament and the Crown had been anything but stable. Montesquieu's interpretation began with the assumption that the Crown exerted clear control over the government, while sharing lawmaking power with the two houses of Parliament.¹⁹⁹ The development of the ministry challenged this interpretation.²⁰⁰ The ministry consisted of leading members of Parliament, including the prime minister—the minister chiefly responsible for the administration of Crown government.²⁰¹ One of the consequences of the Glorious Revolution was the requirement that the Crown “govern . . . according to the statutes in parliament agreed on, and the laws and customs of the same,”²⁰² and even forgo personal rule, or at least its appearance.²⁰³

¹⁹⁸ *Id.* at 312 (reporting the remarks of James Madison); *id.* at 326–27 (reporting the remarks of James Madison); *id.* at 360–61 (reporting the remarks of Gouverneur Morris).

¹⁹⁹ MONTESQUIEU, *supra* note 4, at 177–78.

²⁰⁰ SPECK, *supra* note 179, at 23–26 (describing the evolution of the cabinet in the first half of the 18th century and its role as the “main link” between the Crown and Parliament).

²⁰¹ SPECK, *supra* note 179, at 25 (noting that the prime minister came from the House of Commons, although other ministers might be members of the House of Lords). Gouverneur Morris referred to Prime Minister as the “real King” and described William Pitt the Elder (Lord Chatham) as a “leader of a party” who “forced himself into place.” MADISON’S NOTES, *supra* note 1, at 360.

²⁰² GOLDSWORTHY, *supra* note 3, at 159.

²⁰³ Personal rule was inconsistent with the logic of a balanced, post-revolutionary constitution because the legal fiction that the king could do no wrong precluded public accountability for the administration of government. BREWER, *supra* note 114, at 113. Ministerial responsibility addressed this problem as Parliament could hold the ministers responsible without attacking the person of the monarch. *Id.* The concept of

The Hanoverian monarchs, including George III, delegated much of their monarchical power to the ministers who, in fact, governed the country.²⁰⁴ The ministers were accountable to Parliament for their conduct of the government, and no ministry could long endure without majority support in the House of Commons.²⁰⁵ Although the Crown retained the formal power of

ministerial responsibility was not fully developed in the 18th century, *id.* at 112–36, but it had become its own justification for doctrinal developments that constrained the Crown—such as requiring that ministers be the exclusive source of advice on public matters. RICHARD PARES, *KING GEORGE III AND THE POLITICIANS* 95 (Oxford Univ. Press 1967) (1953); *see also* NAMIER, *supra* note 113, at 45 (“The Government [of the first two Hanoverian monarchs] was based on a party majority in the House of Commons, the King had to accept the leaders or makers of that majority [as ministers], and had to act, and even think, through them—they were already conscious of knowing the King’s (constitutional) mind better than he knew it himself.”). It should be stressed that the king remained an active participant in politics in the 18th century, able to exert significant influence over cabinet appointments and policy. NAMIER, *supra* note 113, at 51 (“For the King was to [the leading politicians] a real factor in government, and not a mere figurehead or an abstract idea He was . . . the fountain-head of power and honors.”); *see also* BREWER, *supra* note 114, at 116 (noting that the royalist position did not deny ministerial responsibility, but insisted that the Crown was free to choose its own ministers).

²⁰⁴ BREWER, *supra* note 114, at 112 (“Put in its baldest form, the notion of ministerial responsibility, as it was generally understood in the eighteenth century, was that the king’s ministers were responsible for the general conduct of government, including the exercise of many powers legally vested in the monarch.”); *id.* at 115 (“The relations between the king and his ministers, therefore, appeared to be perfectly clear: he appointed and dismissed them, and while in office they were responsible for the government’s actions.”); GOLDSWORTHY, *supra* note 3, at 131 (“It was argued that just as the King’s judicial powers were exercised by the courts of Westminster, and not by him personally, so his other official powers were exercised in his regular councils and courts.”); PARES, *supra* note 203, at 143 (“[Ministerial responsibility for Crown government] was manifested, above all, in the claim that the king was obliged to accept the collective advice of his servants in the form of a Cabinet minute, and that he could not use his veto upon the bills which his servants collectively promoted in parliament.”); *see also* MADISON’S NOTES, *supra* note 1, at 62 (Madison recorded Benjamin Franklin’s explanation for why the Crown’s veto power atrophied: “The bribes and emoluments now given to the members of parliament rendered it unnecessary, every thing being done according to the will of the ministers.”).

²⁰⁵ NAMIER, *supra* note 113, at 45–48, 156–58; SPECK, *supra* note 179, at 239. George III learned this lesson when he made Lord Bute, his childhood mentor yet a political novice, prime minister, NAMIER, *supra* note 113, at 156–70, only to soon see Bute and his government collapse for want of support in the House of Commons. BREWER, *supra*

appointment, it would be more accurate to say that the Crown had its choice of the small pool of men who could command majority support in the Commons.²⁰⁶

Did Britain feature a unitary executive or a plural executive? The answer could depend on the speaker. Those who believed the monarchy predominated in British politics would explain away the power of the House of Commons and the ministry as chimerical, an elaborate production produced for public consumption and the pleasure of the King.²⁰⁷ They pointed to Crown-appointed officers in the Commons and the power to create new peers in the Lords to make their case.²⁰⁸ How could the Commons check the Crown when so many members of that body depended on Crown offices for their daily bread?²⁰⁹ The House of Lords, aristocratic though it was, could not constrain the monarch either. If the King stood to lose a vote in that chamber, he could simply appoint additional peers until victory was assured.²¹⁰ Knowing this, the House of Lords simply capitulated to the

note 114, at 120; *see id.* at 11 (“[H]ostility to Bute, and the evolution of a coherent political case against him is the one common characteristic of Old Corps politicians, regardless of whether or not they agreed on other matters of policy.”).

²⁰⁶ BREWER, *supra* note 114, at 115–16; NAMIER, *supra* note 113, at 46–48; SPECK, *supra* note 179, at 14, 23–27. Even when multiple politicians could be said to enjoy majority support in the Commons, the Crown could still find itself constrained to select politicians who did not enjoy the full confidence of the Crown. *See* NAMIER, *supra* note 113, at 74 (“I ask’d his Majesty, suppose Mr. Pitt should quit now, how does Your Majesty propose to have your affairs carried on? He said, you can do it; you have the majority in the House of Commons. I replied, it would be betraying Your Majesty, if I flattered you with the possibility of my being able to do it. No one will have a majority at present, against Mr. Pitt. No man, Sir, will, in the present conjuncture, set his face against Mr. Pitt in the House of Commons.”) (quoting Letter from Duke of Newcastle to Lord Hardwicke (Oct. 25, 1759)).

²⁰⁷ MADISON’S NOTES, *supra* note 1, at 63 (reporting the remarks of Pierce Butler); *id.* at 64 (reporting the remarks of George Mason); *id.* at 175 (reporting the remarks of Pierce Butler); *id.* at 177 (reporting the remarks of George Mason).

²⁰⁸ NAMIER, *supra* note 113, at 224–28; SPECK, *supra* note 179, at 14–15.

²⁰⁹ *See* THE FEDERALIST NO. 56, *supra* note 4, at 346–47 (James Madison); NAMIER, *supra* note 113, at 224–25.

²¹⁰ 1 BLACKSTONE, *supra* note 52, at *156 (“[The] number [of peers in the House of Lords] is indefinite, and may be increased at will by the power of the crown; and once, in the reign of queen Anne, there was an instance of creating no less than twelve together . . .”).

demands of the King. On the other hand, there were Framers like Alexander Hamilton and James Wilson who perceived that the House of Commons had become the center of gravity in British politics.²¹¹ The rise of the ministry and the relative retreat of the monarch were conclusive evidence of this transformation.

Whether Britain was led by a plural or unitary executive was not a purely academic question. The answer carried certain implications that promised to guide the deliberations of the Framers, particularly with respect to the organization of the executive and the adoption of checks and balances to maintain its separation from the legislature. If Britain featured a unitary executive in the form of the Crown, then that unitary executive betrayed its obligations to the colonies in the attempt to deprive them of their public rights.²¹² A terrible civil war had resulted. Such an interpretation of events might counsel in favor of a plural executive. But if the ministry represented a plural executive in Great Britain, things appeared in a different light. From this vantage, the ministers, who were the leaders of Parliament, abused Crown authority to, among other things, expand their tax base and avoid laying taxes on their constituents.²¹³ That they had done so in the name of the Crown only confused the public as to the accountable parties. If scholars like Montesquieu and Louis de Lolme struggled to take account of the ministry,²¹⁴ what chance did ordinary voters consumed with colonial politics have? The fact of so much disagreement about the nature of the British and transatlantic constitutions emanated from the ambiguity surrounding the organization and control of British government.

²¹¹ THE FEDERALIST NO. 71, *supra* note 4, at 485 (Alexander Hamilton) (“If a British House of Commons, from the most feeble beginnings, *from there mere power of assenting or disagreeing to the imposition of a new tax*, have, by rapid strides, reduced the prerogatives of the crown and the privileges of the nobility within the limits they conceived to be compatible with the principles of a free government . . .”); MADISON’S NOTES, *supra* note 1, at 444 (reporting the remarks of James Wilson); *see also* WOOD, *supra* note 69, at 26.

²¹² *See* MADISON’S NOTES, *supra* note 1, at 92 (noting that the Crown had not always exercised the power of disallowance in conformity with American interests).

²¹³ WESLAGER, *supra* note 107, at 22–23, 33.

²¹⁴ *See* C.P. COURTNEY, MONTESQUIEU AND BURKE 66–67 (1963).

4.1. The Ancient Constitution Died in the 17th Century Struggle for Power Between the Two Houses of Parliament and the Crown

The ministry was easy to overlook because its role was new and evolving in an unwritten constitutional order.²¹⁵ There was nothing new about ministers. Such people had surrounded the monarch for centuries.²¹⁶ And, sometimes, when ministers incurred the wrath of the public, Parliament passed bills of attainder and executed them.²¹⁷ In that sense, it was always dangerous to seek influence over the Crown without an adequate base of support in the legislature. But the importance of the ministry grew into an altogether different animal after the political transformations beginning in England during the 17th century.²¹⁸ If the Crown predominated at the start, it was clear by the end that the Houses of Parliament stood on top.²¹⁹ This shift in power had not been peaceful. The English Civil Wars in the 1640s and early 1650s led to the deaths of a larger share of the adult male population than perhaps the First World War.²²⁰ These wars were fought between forces loyal to Parliament and forces loyal to the Crown.²²¹ If the separation of powers was generally seen as essential for good government, here was a clear illustration of the terrible consequences of intractable conflict between

²¹⁵ JOHN P. MACKINTOSH, *THE BRITISH CABINET* 40–60 (1962) (describing the development of the cabinet in the 18th century); PARES, *supra* note 203, at 150–64 (describing the development of the cabinet in the 18th century).

²¹⁶ See ALMERIC FITZROY, *THE HISTORY OF THE PRIVY COUNCIL* 4–5 (1928) (discussing reasons for dating the origins of the Privy Council to the reign of Henry III); *id.* at 7–8 (“By way of special emphasis, [1237] is the first occasion upon which it is recorded that the counsellors were sworn on the gospels to furnish faithful counsel, and still more remarkably the King gave his oath to follow their advice.”).

²¹⁷ See, e.g., JONATHAN HEALEY, *THE BLAZING WORLD* 137–44 (2023) (describing the political wrangling that culminated in the execution of the Earl of Strafford); CHRISTOPHER HIBBERT, *CHARLES I*, at 153–57 (1968) (discussing the bill of attainder that led to the execution of the Earl of Strafford over the objections of Charles I).

²¹⁸ MACKINTOSH, *supra* note 215, at 38–44 (describing the process by which the cabinet came to take preeminence over the privy council in the years after the Glorious Revolution in 1688); SPECK, *supra* note 179, at 185–274.

²¹⁹ See, e.g., GOLDSWORTHY, *supra* note 3, at 159.

²²⁰ MICHAEL BRADDICK, *GOD’S FURY, ENGLAND’S FIRE*, at xxii, 661 n.2 (2008).

²²¹ *Id.* at 241–388 (detailing the history of the English Civil Wars).

them. Forces loyal to Parliament prevailed; they arrested Charles I, placed him on trial, convicted him of treason; and, finally, “his head was severed from his body.”²²²

England transformed into a republic with a written constitution. The House of Commons abolished the House of Lords and the Crown, making itself the unicameral legislature of England.²²³ Despite Cromwell’s protestations to the contrary, parliamentary elections in the 1650s lacked popular legitimacy.²²⁴ For many or most, the last legitimate election took place in 1640.²²⁵ In addition, Oliver Cromwell had excluded most of the elected members from Parliament to ensure the conviction and execution of Charles I.²²⁶ What appeared to be a republican government was widely regarded as a military junta under Cromwell’s sway.²²⁷ Belying the flimsiness of the regime is the fact that it crumbled soon after Cromwell’s death. In the aftermath, new and legitimate parliamentary elections were finally held, and the House of Lords and the Crown were restored to power.²²⁸ Charles II purported to have been the rightful king ever since his father’s demise in

²²² *Id.*; accord HEALEY, *supra* note 217, at 252–56 (describing the trial of Charles I); SOCIETY OF KING CHARLES THE MARTYR, KING CHARLES THE MARTYR 4–5 (n.d.), <https://perma.cc/B6VU-GUYG>.

²²³ HEALEY, *supra* note 217, at 256.

²²⁴ Blair Worden, *The Campaign for a Free Parliament, 1659–60*, 36 PARLIAMENTARY HIST. 159, 161–62 (2017).

²²⁵ *Id.* at 160.

²²⁶ THOMAS HOBBS, BEHEMOTH 320 (Oxford Univ. Press 2009) (1668) (“The first Act . . . was the Exclusion of those Members of the House of Commons which had been formerly kept out by violence for the procuring of an Ordinance for the Kings trial.”). This exclusion raised serious questions about the legitimacy of the actions leading to the execution of Charles I, later undermining claims of the accused “regicides” that they acted pursuant to law. GOLDSWORTHY, *supra* note 3, at 144.

²²⁷ HEALEY, *supra* note 217, at 288 (“It was embarrassingly close to a truth Cromwell would have preferred unspoken, that his Protectorate’s authority, ultimately, rested on the Army.”); Austin Woolrych, *The Cromwellian Protectorate: A Military Dictatorship?*, 75 HIST. 207, 208 (1990) (“An element of dictatorship there certainly was . . . [Cromwell] never would never have become head of state if he had not been the general of a powerful army, and the only body that gave any meaningful assent to his elevation, at least until 1657, was his Council of Officers.”).

²²⁸ GODFREY DAVIES, *THE RESTORATION OF CHARLES II, 1658–1660*, at 62, 67–68 (1955); ANTONIA FRASER, *ROYAL CHARLES: CHARLES II AND THE RESTORATION 170–76* (1979).

1649.²²⁹ However, legal fictions could not blanket out the reality that the House of Commons had demonstrated great power. It raised armies, waged war, killed kings and destroyed feudal privileges. It proved it could also create kings and restore feudal privileges if that is what it wanted to do. The power to throne and dethrone monarchs suggested that sovereignty belonged to Parliament and not the king.²³⁰ Rather than respect the balance of power this implied, Charles II and James II tried to rule as though the Interregnum had never happened.²³¹

With the Glorious Revolution in 1688, Parliament reasserted its predominance over the monarchy by expelling James II and inviting William and Mary of Holland to rule in his place.²³² The co-regents agreed to govern according to the laws of Parliament.²³³ The exact relationship between Crown and Parliament remained undefined and continued to undergo significant change. The power of the Crown to veto legislation became controversial and atrophied.²³⁴ Queen Anne was the last monarch to veto a bill passed by both houses, and even that example failed to carry much weight because the ministry requested her veto.²³⁵ By the time of the American Revolution, it was Whig orthodoxy that the British monarch could not refuse

²²⁹ GOLDSWORTHY, *supra* note 3, at 145.

²³⁰ Parliament's involvement in the making and unmaking of kings and the regulation of the succession to the Crown date back to the fourteenth century. *Id.* at 31–38.

²³¹ DAVIES, *supra* note 228, at 339 (“To allow Cavaliers to sit in the Commons and all peers in the Lords . . . made certain the restoration of monarchy without any new legal restrictions on the prerogative.”); JOHN MILLER, *JAMES II*, at 135–47 (2000). James II received an annual stipend from Louis XIV that furthered his independence from Parliament and lack of public accountability. DAVID S. LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA* 55, 105 (Wesleyan Univ. Press 1987) (1972); *see also* MADISON’S NOTES, *supra* note 1, at 335 (Madison reported Gouverneur Morris’s remarks that “[o]ne would think the King of England well secured against bribery. He has as it were a fee simple in the whole kingdom. Yet Charles II was bribed by Louis XIV.”).

²³² STEVEN PINCUS, *1688: THE FIRST MODERN REVOLUTION* 224, 229 (2009).

²³³ GOLDSWORTHY, *supra* note 3, at 159.

²³⁴ MADISON’S NOTES, *supra* note 1, at 62 (reporting the remarks of Benjamin Franklin and Alexander Hamilton).

²³⁵ *Parliaments: 1705*, INST. HIST. RSCH.: THE HISTORY OF PARLIAMENT, <https://perma.cc/EKC8-LWP7>; *see also* GEOFFREY HOLMES, *BRITISH POLITICS IN THE AGE OF ANNE* 186 (1967) (“Queen Anne’s rejection of the Scottish Militia Bill in March 1708 produced not even a ripple of political excitement at the time, let alone a sense of constitutional occasion.”) (internal quotation marks omitted) (footnote omitted).

assent to the acts of Parliament.²³⁶ The Crown ceded substantial control and influence over patronage and the composition of Parliament to the ministry.²³⁷ The Hanoverian monarchs, like other important special interests in British politics, had to negotiate with the ministry in order to place their personal favorites in government offices or the House of Commons.²³⁸ There were many government officials in the Commons, but, as a general rule, these owed their positions to politicians in the ministry far more than to the Crown.²³⁹ The person of the monarch could not rule; the Crown acted on the advice of its ministers—this was the essence of ministerial responsibility for government.²⁴⁰ George III had ignored the petitions and pleas of colonists

²³⁶ Denials of the Crown veto power date back to the English Civil Wars and the constitutional debates of the seventeenth century. James Jay Carafano, *William III and the Negative Voice*, 19 ALBION 509, 510 (1987); GOLDSWORTHY, *supra* note 3, at 130–31; *see also* MADISON'S NOTES, *supra* note 1, at 63 (reporting the remarks of James Madison); THOMAS ERSKINE MAY, A TREATISE UPON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGES OF PARLIAMENT 291–94 (Cambridge Univ. Press 2015) (1843).

²³⁷ NAMIER, *supra* note 113, at 58 (noting that the prime minister had “the patronage of the Crown at his disposal”); *id.* at 142 (noting that George III and Lord Bute were forced to rely on the Duke of Newcastle to manage the general election of 1760 because “the only permanent election organisation on an extensive scale centred in the Treasury”). Two years later, George Grenville was able to leverage his position as First Lord of the Treasury to control patronage and survive as prime minister, for a time, despite losing the confidence of George III. BREWER, *supra* note 114, at 127 (noting that Grenville “effectively shackled the king”). Grenville demanded, for example, that the king refrain from ever again consulting Lord Bute about affairs of state, and that the king dismiss Lord Bute’s brother from his Scottish sinecure despite the king’s personal assurances of the permanency of the position. The king yielded, Macaulay tells us, “with a very bad grace.” THOMAS BABINGTON MACAULAY, THE EARL OF CHATHAM 65–66 (H. Wesley Dennis ed., Longmans, Green, & Co. 1902) (1844).

²³⁸ NAMIER, *supra* note 113, at 139 (“Bute had told [Newcastle] that the King might wish three or four persons to be chosen in certain places.”) (internal quotation marks omitted); *id.* at 154 (“[Bute] brought [Newcastle] the names only of three persons from the King, to be brought into Parliament, who are all very unexceptionable.”).

²³⁹ *Id.* at 145 (observing that the political battle over patronage in 1760 was waged between ministers Bute, Newcastle, and Pitt); *see* sources cited *supra* note 237; *see also* PARES, *supra* note 203, at 144 (“George III claimed and exercised the right to make appointments of his own mere motion, but mainly in certain departments—the Church, the army, the royal household, and, to a rather less degree, the peerage.”).

²⁴⁰ *See* sources cited *supra* note 204.

not so much out of haughtiness as out of deference to the ministers choosing foreign policy.²⁴¹

4.2. Concentrating Legislative Power and Dividing Executive Power Created Space for Legislative Tyrannies to Emerge in the American States

James Madison observed two worrying tendencies in the state constitutions of the revolutionary period. First, most states concentrated too much authority in their respective lower houses.²⁴² Pennsylvania went so far as to confer exclusive lawmaking powers on a unicameral, popularly elected legislature that was not so much as subject to an executive veto.²⁴³ Virginia retained the institutional forms of bicameralism, but the more numerous lower house dominated the choice of executive and exercised certain exclusive legislative powers, including over money bills.²⁴⁴ Jefferson described the Virginia constitution as a form of legislative tyranny in a letter to Madison, which the latter quoted in *The Federalist*.²⁴⁵ The trend toward placing so much power in the lower house was understandable in light of the traditional association of that institution with the democratic element of mixed government. Both Hamilton and Madison believed the preponderance of the legislature was in fact inevitable in a republican form of government.²⁴⁶ One could not alter that fact without defeating the purposes of republicanism. At

²⁴¹ Letter from King George III to Lord North (Sep. 10, 1775), in 1 THE CORRESPONDENCE OF KING GEORGE III WITH LORD NORTH 1768–1783, at 267, 267 (W. Bodham Donne ed., 1867) (“I am fighting the battle of the legislature . . .”). Despite the king’s personal support for the Stamp Act, for example, Lord Rockingham was able to enlist the king’s public support for the repeal. His private opposition proved unable to prevent repeal of the Stamp Act. MACAULAY, *supra* note 237, at 76–77.

²⁴² THE FEDERALIST NO. 48, *supra* note 4, at 335–38 (James Madison) (analyzing constitutions in Pennsylvania and Virginia); MADISON’S NOTES, *supra* note 1, at 75–77 (reporting the remarks of James Madison), 126–27 (reporting the remarks of James Wilson).

²⁴³ PA. CONST. of 1776, §§ 9, 20.

²⁴⁴ VA. CONST. of 1776.

²⁴⁵ THE FEDERALIST NO. 48, *supra* note 4, at 335–36 (James Madison) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (1787)).

²⁴⁶ THE FEDERALIST NO. 51, *supra* note 4, at 319 (James Madison); THE FEDERALIST NO. 78, *supra* note 4, at 463–64 (Alexander Hamilton); MADISON’S NOTES, *supra* note 1, at 79 (reporting the remarks of James Madison).

the same time, the Convention delegates knew that legislatures could cause much mischief in the name of pleasing their constituents.²⁴⁷ The threat of demagoguery was real, and it posed a threat to all private rights.²⁴⁸ Hard experience reinforced the wisdom of dividing legislative power.²⁴⁹

The second tendency was the converse of the first, with most states dividing executive authority across an excessive number of principal officers.²⁵⁰ Most states had a nominal chief executive,²⁵¹ but most also qualified the independence and effective influence of their chief executive in two distinctive ways. First, the lower house or joint session of the state legislature generally selected the executive officer.²⁵² Such selection left the executive dependent upon the legislature and unable to resist its encroachments.²⁵³ Viable candidates had little choice but to understand the scope of their duties in ways that pleased their respective selectorates in the legislature.²⁵⁴ Second, state constitutions generally excluded the chief executive from lawmaking.²⁵⁵ If the chief executive was given a role in the legislative process, it was

²⁴⁷ James Madison, *Vices of the Political System of the United States*, reprinted in MADISON, THEORY AND PRACTICE, *supra* note 8, at 332–34.

²⁴⁸ *Id.* at 333.

²⁴⁹ THE FEDERALIST NO. 51, *supra* note 4, at 319 (James Madison); THE FEDERALIST NO. 62, *supra* note 4, at 375–76 (James Madison).

²⁵⁰ Some Convention delegates castigated Rhode Island as an egregious example. MADISON'S NOTES, *supra* note 1, at 315 (reporting the remarks of Nathaniel Ghorum).

²⁵¹ *Id.* at 59 (reporting the remarks of James Wilson).

²⁵² DE. CONST. of 1776, art. VII; GA. CONST. of 1777, art. II; MD. CONST. of 1776, The Constitution, or Plan of Government, &c, art. XXV; N.J. CONST. of 1776, art. VII; N.C. CONST. of 1776, The Constitution, or Plan of Government, &c, art. XV; S.C. CONST. of 1776, art. III; S.C. CONST. of 1778, art. III; VA. CONST. of 1776.

²⁵³ MADISON'S NOTES, *supra* note 1, at 308 (reporting the remarks of Gouverneur Morris); *id.* at 309 (reporting the remarks of James Wilson); *id.* at 324 (reporting the remarks of Gouverneur Morris); *id.* at 325 (reporting the remarks of Edmund Randolph); *id.* at 326–27 (reporting the remarks of James Madison).

²⁵⁴ *Id.* at 325 (reporting the remarks of Edmund Randolph); *id.* at 525–26 (reporting the remarks of Gouverneur Morris).

²⁵⁵ DE. CONST. of 1776, arts. 2, 6, 7, 10; MD. CONST. of 1776, The Constitution, or Plan of Government, &c, arts. X, XI, XXXIII; N.H. CONST. of 1776 (omitting any reference to an executive veto or negative); N.C. CONST. of 1776, The Constitution, or Plan of Government, &c, arts. X, XI; PA. CONST. of 1776, § 9; S.C. CONST. of 1778, art. XVI; VA. CONST. of 1776 (omitting any reference to an executive veto or negative); *see also* VT. CONST. of 1777, ch. 2, § XIV.

typically shared with an executive council chosen by the state legislature or otherwise diluted.²⁵⁶ Absent some veto power, it was unclear how the executive branch was supposed to defend its constitutional role against innovations in the legislature.²⁵⁷ If the nature of the executive branch in Britain had become a source of great confusion by the time of the Revolution, the states had done a remarkable job of replicating that confusion on this side of the Atlantic. As with the ministry in Britain, the plural executive provided for legislative influence in the executive and constituted a deviation from Montesquieu's articulation of the separation of powers.²⁵⁸

Most states fit these trends, but not every state did. Two important exceptions were Massachusetts and New York. The constitutions of both states featured a unitary executive that was popularly elected and therefore independent of the state legislature.²⁵⁹ The executive was further fortified with a portion of the state lawmaking power, although this was diluted in New York with a council of revision.²⁶⁰ But in Massachusetts, the governor wielded a veto power more reminiscent of the Crown of yore. The governor could veto any bill passed by the two houses of the state legislature.²⁶¹ However, the Massachusetts constitution allowed the state legislature to override the governor's veto with a two-thirds vote in each house.²⁶² No other state constitution of the revolutionary period granted a similar power to an independently elected chief executive. It is therefore intriguing that the delegates lifted the qualified veto power from the Massachusetts Constitution and embedded it within Article I of the Constitution.²⁶³ Massachusetts was the

²⁵⁶ GA. CONST. of 1777, arts. VIII, XXVII; N.Y. CONST. of 1777, art. III; N.H. CONST. of 1784, art. 44 (providing executive with a vote on legislation); N.J. CONST. of 1776, art. VII (providing executive with a vote on legislation); *see also* VT. CONST. of 1786, ch. 2, § XI (providing the governor with a casting vote); MADISON'S NOTES, *supra* note 1, at 60 (reporting the remarks of Roger Sherman).

²⁵⁷ THE FEDERALIST NO. 73, *supra* note 4, at 494 (Alexander Hamilton) ("Without [a veto power] the [executive] would be absolutely unable to defend himself against the depredations of the latter.").

²⁵⁸ MONTESQUIEU, *supra* note 4, at 177–78.

²⁵⁹ MA. CONST. of 1780, ch. 2, § 1, art. II; N.Y. CONST. of 1777, art. XVII; *see* MADISON'S NOTES, *supra* note 1, at 48 (reporting the remarks of James Wilson).

²⁶⁰ N.Y. CONST. of 1777, art. III.

²⁶¹ MA. CONST. of 1780, ch. 1, § 1, art. II.

²⁶² *Id.*

²⁶³ THE FEDERALIST NO. 73, *supra* note 4, at 498–99 (Alexander Hamilton).

outlier state. If the delegates had emulated the common practice of the states, they would have given Congress the power to select both the chief executive and the members of a council with whom the executive would have been forced to share power. The delegates clearly doubted that most states had arrived at the correct balance.

4.3. Delegates Designed a Credible Unitary Executive and Fortified It Against the Development of an Executive Council Under Legislative Domination

The delegates did not invent the separation of powers, but their application of it was unique and constituted a break with the clear trajectory of republican practice on both sides of the Atlantic. For more than a century, the constitutional development of British civilization had tended toward the end of personal rule on the part of the monarch and the expanding influence of the legislature over the government.²⁶⁴ Taking power from one person, limiting it by law, and spreading it among a multitude had become an instinctive reaction long before the American Revolution.²⁶⁵ The delegates nonetheless resisted this impulse and recommended a very different formula to the people of the several states. The delegates proposed a unitary chief executive who would serve as commander in chief of the armed forces and be responsible for nominating the significant officers of the government.²⁶⁶ The power of appointment meant that the unitary executive would control some measure of patronage, which would be necessary for promoting the internal accountability of government officers.²⁶⁷ In addition, the delegates gave the unitary executive a share of the legislative power, both in the form of a qualified veto and in the ability to propose treaties for Senate

²⁶⁴ See BREWER, *supra* note 114, at 112–36; GOLDSWORTHY, *supra* note 3, at 78–197.

²⁶⁵ See LOVEJOY, *supra* note 231, at 220–93.

²⁶⁶ U.S. CONST. art. II, § 2. The decision to vest executive power in a single person was made without dissent on August 24. MADISON'S NOTES, *supra* note 1, at 523.

²⁶⁷ MADISON'S NOTES, *supra* note 1, at 67 (reporting the remarks of James Wilson); THE FEDERALIST NO. 76, *supra* note 4, at 509–15 (Alexander Hamilton).

ratification.²⁶⁸ These facilitated executive self-defense in the domestic arena and executive agenda-setting in foreign relations.²⁶⁹

Importantly, the delegates took an essential step to foreclose the development of anything resembling the ministry in Great Britain. They prohibited any member of the legislature from holding national office.²⁷⁰ That made it impossible for any leading member of Congress to hold a cabinet or other executive office without surrendering his or her seat. It is well known that this provision of the Constitution reflected widespread frustration with placemen—members of Parliament whose dependence on Crown offices raised doubts about their independence.²⁷¹ Ministers were the ultimate placemen. They both led Parliament and the government. Had the delegates allowed members of the legislature to hold executive office, it is very likely that the cabinet would have evolved into something like the ministry.²⁷² In that scenario, the president, like the king himself, would have lost both power and public accountability. Despite a unitary blueprint on paper, the executive would become plural in fact. Delegate fears about the politics of blame supplanting those of individual responsibility would then be realized, and government accountability would suffer.²⁷³ All their finely wrought language would then be rendered pointless. But by excluding members of the

²⁶⁸ U.S. CONST. art. I, § 7; *id.* art. II, § 2.

²⁶⁹ THE FEDERALIST NO. 73, *supra* note 4, 492–99 (Alexander Hamilton); THE FEDERALIST NO. 75, *supra* note 4, 503–09 (Alexander Hamilton); *see also* MADISON’S NOTES, *supra* note 1, at 461 (“[Mr. Mercer] contended that the Senate ought not to have the power of treaties. This power belonged to the Executive department; adding that Treaties would not be final so as to alter the laws of the land, till ratified by legislative authority. This was the case of Treaties in Great Britain; particularly the late Treaty of Commerce with France.”).

²⁷⁰ U.S. CONST. art. I, § 6. The exclusion of legislators from offices struck some delegates as unduly novel. MADISON’S NOTES, *supra* note 1, at 453 (Madison reported that Gouverneur Morris preferred the British approach: “He was for rendering [members of the legislature appointed to offices] eligible again after having vacated their Seats by accepting office.”); *id.* at 454 (Madison reported Charles Pinckney’s view that “[n]o State has rendered the members of the Legislature ineligible to offices.”).

²⁷¹ NAMIER, *supra* note 113, at 224–28; MADISON’S NOTES, *supra* note 33, at 454–55.

²⁷² *See* SPECK, *supra* note 179, at 15 (noting the adoption of a later-repealed provision forbidding officeholders from serving in the House of Commons in 1701, which would have forestalled the development of the ministry in Great Britain).

²⁷³ THE FEDERALIST NO. 76, *supra* note 4, at 509–15 (Alexander Hamilton).

legislature from the executive branch, the Framers proposed a unitary executive framework that could stand the test of time.

The unitary executive marks one of the very few instances where the Convention delegates signaled a willingness to contradict state constitutional traditions. This made endorsing the unitary executive a bold move for the Convention. Delegates spent a significant amount of their political capital on this innovation. If the delegates cared about nothing other than facilitating ratification, they would have offered some kind of plural executive under legislative domination. That the delegates were willing to compromise their odds of a successful outcome to propose a unitary executive is noteworthy. They must have believed the risk was worth the reward, but what was the reward? Different delegates surely saw things differently, but the rationales that emerge from Madison's notes and *The Federalist* were individual responsibility for government performance and the maintenance of the separation of powers.²⁷⁴ These goals were entirely consistent with notions of efficiency and good government. In particular, the Constitution reflected the conviction that a unitary executive would better enable the United States to provide for its security needs and manage its foreign relations.²⁷⁵ The President of the United States was an innovation that might assist a confederate republic in fulfilling its promise of matching the strength of a large empire.

4.4. Overlapping Representation of the American Voter in Every Lawmaking Institution Harnessed Interbranch Conflict to Peaceful Political Processes

The delegates had designed a formidable presidency on paper, but that alone could never ensure its integrity. There remained every likelihood that the legislature would eventually encroach upon the executive. Its

²⁷⁴ See *supra* notes 81–82 and accompanying text; THE FEDERALIST NO. 73, *supra* note 4, at 492–99 (Alexander Hamilton); MADISON'S NOTES, *supra* note 33, at 59–60 (reporting the remarks of James Wilson); *id.* at 63 (reporting the remarks of James Wilson); *id.* at 315 (reporting the remarks of Nathaniel Gorham); *id.* at 333–34 (reporting the remarks of Rufus King); *id.* at 358 (reporting the remarks of Elbridge Gerry).

²⁷⁵ THE FEDERALIST NO. 70, *supra* note 4, at 471 (Alexander Hamilton); THE FEDERALIST NO. 75, *supra* note 4, at 503–09 (Alexander Hamilton).

popular base of support in the community is what gave the legislature—and particularly the lower house—its preponderance in dealings with other law-making branches. The ancient constitution of England was the prime example. The hereditary monarch had been possessed of great powers, including control of all government patronage, and an absolute veto over laws. The upper house had provided the monarchy with a well of consistent support. Yet, none of that prevented the House of Commons from smashing through everything in its path.²⁷⁶ Set against popular will, the power of hereditary kings seemed almost insubstantial. Charles I and James II illustrated with profound clarity the dire consequences that would befall a king of England who placed himself in opposition to the legislature.²⁷⁷ Survival and survival of one's children were at stake. The rational response of any monarch was to delegate meaningful power to the legislature, which was what happened in the wake of the Glorious Revolution.²⁷⁸ The same thing could well happen to the presidency in America, despite the intentions of most delegates.²⁷⁹

One clear solution stood in view: provide the President of the United States with the same base of popular support as the national legislature. Doing so would deprive the legislature of its inherent advantage in interbranch

²⁷⁶ See GOLDSWORTHY, *supra* note 3, at 124, 131 (describing Charles I's charges of usurpation against the House of Commons); THE FEDERALIST NO. 71, *supra* note 4, at 433 (Alexander Hamilton) ("If [a British House of Commons] have been able, in one instance, to abolish both the royalty and the aristocracy, and to overturn all the ancient establishments, as well in the Church as the State; if they have been able, on a recent occasion, to make the monarch tremble at an innovation attempted by them . . ."); PARES, *supra* note 203, at 43 ("The primacy of the House of Commons in politics [by the time of George III]—its ultimate superiority not only over the Crown, but also over the House of Lords—was beginning to be generally assumed, in way or another.").

²⁷⁷ See C.V. WEDGWOOD, *A COFFIN FOR KING CHARLES* 135–223 (1964); MILLER, *supra* note 231, at 195–209.

²⁷⁸ See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment*, 49 J. ECON. HIST. 803, 816 (1989) (noting that Parliament became a permanent partner in government, gained a credible and durable power of the purse, and subjected royal prerogative to law as a direct result of the Glorious Revolution); PINCUS, *supra* note 232, at 476 ("[Whigs] convinced the largely unsympathetic King William that winning the war against France required him to adopt their political and economic vision [A]fter the failed Assassination Plot of 1696, the Whigs were able to show that only their political ideology and their version of the Church of England could guarantee political stability.").

²⁷⁹ THE FEDERALIST NO. 73, *supra* note 4, at 441 (Alexander Hamilton).

relations.²⁸⁰ Both the Congress and the president could then rightfully claim to speak for the electorate. This would make obsolete the older view, inherited from the theory of mixed government, that the legislature was the democratic element of government, while the executive was the monarchical element. If the chief executive and the members of the national legislature were all chosen by the American voter, then both branches would consist of representatives of the people. The legislature and the executive would often agree on policy for this very reason, but when they did not, it would presumably be due to sincere differences of opinion about how to advance the interests of the American voter. The government might deadlock for a time, but regular elections in both the legislature and the executive would encourage the members of Congress and the president to take their policy differences to the electorate. That promised a peaceful method of conflict resolution that might foreclose the kinds of civil conflicts that devastated England, in which forces loyal to Parliament and the Crown slaughtered one another.

Overlapping representation in the legislature and the executive held great promise for an enduring separation of powers, but the concept was difficult to implement due to variations in state election law. As Madison expressly recognized, barriers to suffrage were much lower in northern than southern states.²⁸¹ This meant that a much larger proportion of the northern population was enfranchised at the state level. Thus, if the delegates had implemented a national popular vote for president, the northern states would have dominated presidential elections relative to the southern states.²⁸² Such a rule would have pressured southern states to liberalize their election practices to secure representation in the executive. However desirable that outcome would have been, it was a non-starter for southern states. They almost certainly would have preferred legislative appointment to such a rule because the former provided southern states with greater influence in presidential selection.²⁸³ Note that the Electoral College carefully respected this baseline by awarding every state the same number of Electoral Votes as

²⁸⁰ See MADISON'S NOTES, *supra* note 1, at 322–25 (reporting the remarks of Gouverneur Morris); *id.* at 326–27 (reporting the remarks of James Madison); *id.* at 333 (reporting the remarks of Rufus King).

²⁸¹ MADISON'S NOTES, *supra* note 1, at 365.

²⁸² *Id.*

²⁸³ James Madison discussed his support for electors as a “sacrifice” given his interests as a southerner. *Id.* at 366.

it had seats in the joint houses of Congress.²⁸⁴ This number had nothing to do with turnout, so there would be no pressure on states to liberalize their election laws. At the same time, members of the national legislature were forbidden from participating, foreclosing yet one more avenue by which Congress might dominate the executive.²⁸⁵

The direct election of the president was incompatible with union, and unrealistic given the need for consensus in the ratification process. The Electoral College was a practical innovation that made it possible for the delegates to design a system in which the American voter would at least be indirectly represented in the selection of the executive. Modern attitudes may have shifted, but the delegates largely thought of indirect representation as an effective means of ensuring accountability to the electorate.²⁸⁶ If the state legislature was entrusted with the power to choose senators and direct the allocation of Electoral College Votes, every state legislature was still accountable to the American voters living within its boundaries. American voters were the ultimate principal because they could alter the composition of every political institution through their direct participation in state and congressional elections. Candidates in state elections would likely find themselves forced to communicate their views on presidential and senatorial candidates to voters in advance, making members of the state legislature accountable for their choices. In the British and American experience, at least, no other system of separating powers had ever been established on the principle of providing a common electorate with overlapping representation in every lawmaking institution.²⁸⁷

²⁸⁴ U.S. CONST. art. II, § 1.

²⁸⁵ *Id.* The delegates agreed that members of Congress would be ineligible to serve as Electors in the Electoral College without dissent on July 10. MADISON'S NOTES, *supra* note 1, at 336.

²⁸⁶ MADISON'S NOTES, *supra* note 1, at 114 (reporting the remarks of Roger Sherman); *id.* at 167 (reporting the remarks of John Rutledge). For his part, Madison argued that effective representation was contingent on representatives not having an interest separate from their constituents. *Id.* at 427. Gouverneur Morris agreed with him. *Id.* at 360.

²⁸⁷ VILE, *supra* note 4, at 137 ("The division of functions between agencies of government who will exercise a mutual check upon each other *although both are elected, directly or indirectly, by the same people*, is a unique American contribution to modern constitutional theory.").

5. PROBLEM 3 – CONSOLIDATION AND FRAGMENTATION

Why was America so justly apprehensive of Parliamentary injustice? Because G. Britain had a separate interest real or supposed, & if her authority had been admitted, could have pursued that interest at our expense.²⁸⁸

A third fundamental problem with the transatlantic constitution was its inability to prevent the imperial layer of government in Great Britain from overplaying its hand and driving loyal British colonies into rebellion.²⁸⁹ For their part, the colonies found creative ways to convey their views about the limits of imperial authority. They established committees of correspondence and inspection to embargo British goods and apply social pressure, or worse, on those who did not cooperate.²⁹⁰ By boycotting British goods and inflicting pain on British merchants, the colonists found they could place pressure on Parliament and the ministry to change imperial policy.²⁹¹ This pressure was sufficient to bring about the repeal of the Stamp Act and nearly every one of the Townshend Acts.²⁹² A more thoughtful Parliament might have realized two things: that it was not powerful enough to rule in North America without colonial consent, and that the colonists would never be satisfied with a few seats in Parliament when they were quite capable of beating Parliament with voluntary associations like the Sons of Liberty and committees of correspondence and nonimportation.²⁹³ British government lacked the strength to back up its claim to supremacy over the entire empire. Yet, the colonists were not positioned to prevent Parliament and the ministry from repeatedly violating colonial rights under color of law.

The colonial viewpoint was not a product of English legal precedents; it was the product of power.²⁹⁴ Politicians and lawyers in Great Britain could

²⁸⁸ MADISON'S NOTES, *supra* note 1, at 76–77 (reporting the remarks of James Madison); *see also id.* at 287 (reporting the remarks of James Wilson).

²⁸⁹ *See supra* Section 2.3.

²⁹⁰ MAIER, *supra* note 29, at 116–23, 224.

²⁹¹ *Id.* at 75, 134.

²⁹² *Id.*

²⁹³ *Id.*; *see* KAMMEN, *supra* note 123, at 157; MADISON'S NOTES, *supra* note 1, at 96 (reporting the remarks of William Paterson).

²⁹⁴ GOLDSWORTHY, *supra* note 3, at 192–97.

scoff at colonial theories about the limits of Parliament's reach, but they were missing the point. The colonies were too strong to submit to a hub-and-spokes model of empire with Great Britain at the center. Nonetheless, the voting public in the colonies certainly considered itself both British and loyal.²⁹⁵ But they did not see themselves as loyal to British Parliament and the ministry. They were loyal subjects of the Crown, by which they meant not the person of the monarch, but the idea of a larger British civilization united by a shared executive authority.²⁹⁶ For them, if not for Blackstone, the British empire was truly a joint venture in which Great Britain and the North American colonies were full and equal partners.²⁹⁷ The equality of the different realms ensured the equal public rights of the British people living within their borders. A hub-and-spokes model of empire destroyed that equality and made inferior subjects of all Britons beyond the shores of Great Britain.²⁹⁸ Such an interpretation was therefore unacceptable to colonial society, which rejected it.²⁹⁹ Critics attacked colonial characterizations of the transatlantic constitution for describing a multi-headed hydra, but the empire did, in fact, have many heads.³⁰⁰

That the British empire was under-institutionalized was a problem few were prepared to confront. In many ways, this problem made the empire "a rope of sand."³⁰¹ Great Britain and the North American colonies worked together fairly well when their interests were aligned, as in the conquest of New France. But they failed to cooperate when their interests were not aligned. The empire was an unstructured partnership, perhaps, but not a polity. The full strength of either a unified state or a confederate republic would remain elusive so long as that was the case. Any intractable conflict threatened to, and did, place the colonies and Great Britain in a state of nature with respect to one another. A serious effort to prevent the American

²⁹⁵ MAIER, *supra* note 29, at 77–112; WOOD, *supra* note 69, at 10–17.

²⁹⁶ KAMMEN, *supra* note 123, at 158–59.

²⁹⁷ *Id.*; NELSON, *supra* note 29, at 22–23.

²⁹⁸ HENRETTA, *supra* note 62, at 103 ("In a government based on quasi-republican principles it was logically impossible to have an equality of individual rights and an inferiority of economic and political status.").

²⁹⁹ BREWER, *supra* note 114, at 205.

³⁰⁰ GOLDSWORTHY, *supra* note 3, at 204–08.

³⁰¹ Letter from George Washington to Henry Knox (Feb. 28, 1785), in 28 THE WRITINGS OF GEORGE WASHINGTON 91, 91–94 (John C. Fitzpatrick ed., 1938).

Revolution would have called for something like the Philadelphia Convention.³⁰² Delegates from the different realms might then have negotiated an imperial constitution that gave a just representation to each part and provided for the peaceful resolution of political controversies. There are many reasons why such a convention did not materialize. In 1787, the delegates could feel fortunate that the circumstances for a constitutional convention had arrived, providing them with an opportunity to do what previous generations could not.³⁰³ That did not make their task any easier—it was up to them to forge a constitutional union that could match the strength of a large empire.

5.1. Parliament's Effort to Consolidate Power Exposed the Lack of Adequate Defenses for Colonial Rights Under the Transatlantic Constitution

The transatlantic constitution lacked adequate safeguards for the public rights of British people living beyond the shores of Great Britain. The Revolution, or rather, its necessity, was proof of this fact. More specifically, the different British communities composing the empire lacked any share of the imperial lawmaking power. They could not introduce bills or vote in the Houses of Parliament; nor could the colonies veto the bills passed in Parliament. This left the North American colonies vulnerable to legislative innovations from overseas—the Stamp Act, the Townshend Acts, the Intolerable Acts, and so on. The Crown did, on the other hand, have a share of the colonial lawmaking power. First, the Crown-appointed council and governor provided the Crown with the ability to veto any law passed in the popular assembly.³⁰⁴ Second, the power of disallowance gave the Crown the ability

³⁰² See HENRETTA, *supra* note 62, at 102.

³⁰³ MADISON'S NOTES, *supra* note 1, at 216 (Madison reported Alexander Hamilton's view that "[i]t is a miracle that were now here exercising our tranquil & free deliberations on the subject. It would be madness to trust to future miracles. A thousand causes must obstruct a reproduction of them."); see LACROIX, *supra* note 29, at 22–24 (describing failed efforts at union associated with the Albany Plan of 1754).

³⁰⁴ See SQUIRE, *supra* note 137, at 25 ("[T]he House of Lords was in the main a hereditary body and thus politically independent of both the Crown and the people. In contrast, upper-house members in most of the colonies were appointees of the Crown or the proprietor and thus politically tied to them.").

to invalidate laws even after they had been signed by the governor and may have been put into effect.³⁰⁵ These institutions provided the imperial layer of government with the means of self-defense in cases of wayward colonial assemblies. But what were the colonial assemblies able to do to protect their legitimate interests from imperial overreach? When they resisted too strenuously, Parliament passed laws stripping the colonies of their public rights. That was precisely what had happened in New York and Massachusetts.³⁰⁶

The colonies needed some means of protecting themselves from the whims of Parliament. Had they been in a lawful position to veto the Stamp Act and other taxes imposed by Parliament, the empire might well have endured. In theory, at least, the transatlantic constitution had not condemned the colonies to helplessness in their dealings with Parliament. The Crown could elect to veto legislation that negatively affected the rights of the colonies.³⁰⁷ The idea was that the Crown would jealously guard its executive function and share of the colonial lawmaking power, which, if true, should have motivated the Crown to veto legislation that exceeded the constitutional authority of Parliament.³⁰⁸ This concept of colonial self-defense was predicated upon the existence of an independent executive that no longer existed in the 18th century.³⁰⁹ With the rise of the ministry, the leaders of Parliament exercised executive authority in the name of the Crown. Why would the leaders of Parliament want to veto laws passed in a Parliament they controlled? And why would they want to do so to protect the rights of

³⁰⁵ See sources cited *supra* note 138.

³⁰⁶ MAIER, *supra* note 29, at 113, 113 n.1 (“The Restraining Act suspended the power of the New York Assembly until it complied with a Quartering Act of 1765 Colonists argued this amounted to a tax imposed by Parliament, and was therefore as unacceptable as the Stamp Act.”); *id.* at 225–26 (describing the colonial reaction to the Intolerable Acts punishing Massachusetts in 1774).

³⁰⁷ See NELSON, *supra* note 29, at 39–40 (describing the successful, if controversial, opposition of James I to a series of bills in the 1620s concerning New England fisheries and Virginia on the grounds that America lay beyond the jurisdiction of Parliament); *id.* at 47–50.

³⁰⁸ See *id.* at 42; *id.* at 65 (“Only because patriots remained convinced that the king possessed a constitutional prerogative power to ‘refuse his assent’ to parliamentary bills could they indict him for having refused to wield it on behalf of the colonies.”).

³⁰⁹ GOLDSWORTHY, *supra* note 3, at 159–65; NELSON, *supra* note 29, at 65 (“George could only be styled a ‘tyrant’ on the supposition that he was, as a juridical matter, far more powerful than any British monarch had claimed to be for over a hundred years.”).

colonial assemblies? Constitutional developments in Great Britain had overtaken the veto power of the Crown. The veto had no practical existence, other than as a safety valve in case ministers chose to suddenly reverse course for one reason or another.³¹⁰

The rise of the ministry left the colonial assemblies defenseless, at least in constitutional terms. Relying on Crown authority to guard colonial interests clearly failed. This failure reflected the fact that colonies had nothing to do with making kings, whereas British Parliament did.³¹¹ A rule that allowed the colonial assemblies to directly or indirectly veto bills in Parliament would have better served their interests. But how could such a thing have been made to work, even in retrospect? On the generous assumption that Parliament would have offered the colonies proportionate representation in the House of Commons, their delegates would have been too few to stand in the way of a determined majority. Great Britain was three times as populous as the colonies combined.³¹² Integrating colonial representation into the House of Lords on an electoral basis held some promise, given the example of Scotland,³¹³ but this was just another way of restating the same problem. The colonies could never expect to control a majority of the House of Lords, which was otherwise known to be deferential to Crown government.³¹⁴ The integration of the colonies into Parliament, on whatever terms conceivable, would not have provided the colonial assemblies with a veto over the acts of Parliament.³¹⁵ The colonies were in search of a more robust security than representation alone could provide.

³¹⁰ See sources cited *supra* note 235.

³¹¹ See sources cited *supra* note 230.

³¹² See MADISON'S NOTES, *supra* note 1, at 96 (reporting the remarks of William Paterson).

³¹³ *Id.* at 100 (reporting the remarks of Benjamin Franklin); GOLDSWORTHY, *supra* note 3, at 165–73.

³¹⁴ See MADISON'S NOTES, *supra* note 1, at 96 (reporting the remarks of William Paterson).

³¹⁵ *Id.*

5.2. A Supercharged “Salutary Defense” in the Articles of Confederation Made Lawmaking Unduly Difficult and Promoted State Lawlessness

What the colonies had needed was a “salutary defense” – a veto over pernicious legislation flowing out of Parliament. Though the founding generation never won such a concession from Great Britain, they built the concept into the Articles of Confederation. The Continental Congress, which consisted of delegates chosen by the state legislatures, could not pass any legislation whatsoever without the consent of delegates representing a majority of states.³¹⁶ Had the Articles stopped there, a majority of state legislatures would have been the only group of states with a veto over national laws. But the Articles went much further than that. It employed a series of heightened supermajority requirements that ratcheted up with the importance of the legislation. Major measures required the support of nine states.³¹⁷ As a result, any group of five states, through opposition or mere abstention, could hold up the other eight on matters of public concern. Worse, constitutional amendments to the Articles required unanimity.³¹⁸ This rule allowed one state to defy the other twelve with respect to remedying defects in the Articles. This extreme emphasis on consensus reflected the importance to the founding generation of providing individual states with a robust means of self-defense. But in consequence, a simple majority of states could do no more than pass minor legislation under the Articles.

Protecting state sovereignty with supermajority requirements brought unanticipated consequences. Coalition building was so difficult that states largely gave up on the national government as an effective institution capable of coordinating their activity. Some states did not send delegations to Congress, and the members of those that did often had poor attendance records.³¹⁹ Neglect promoted inefficacy in the national government, which in turn promoted disrespect and lawlessness in the states. The states trampled over many provisions of the Articles by starving the Continental Congress of resources, negotiating separate agreements with foreign powers, taxing one

³¹⁶ ARTICLES OF CONFEDERATION of 1781, art. IX.

³¹⁷ *Id.*

³¹⁸ *Id.* art. XIII.

³¹⁹ MAIER, RATIFICATION, *supra* note 40, at 13–14.

another's trade, and raising armies.³²⁰ These violations were not so much born out of a spirit of defiance as they were fear and jealousy.³²¹ The people of Massachusetts raised a mercenary force to suppress Shays' Rebellion because the national government was not going to do it for them.³²² A national government that could not provide security was essentially worthless. The point of building a confederate republic was to achieve the security of a large empire. Although Shays's Rebellion did not threaten the existence of the country, it demonstrated the dysfunction of the national government in what was supposed to be its most central function.³²³ States observed this sad state of affairs, and so did foreign powers.³²⁴

Rather like the British empire that preceded the war, the United States was a "rope of sand" in 1787.³²⁵ Supermajority requirements made it too difficult to enact sound national policy and implement institutional reforms. This requirement along with the omission of an independent power to raise revenue doomed the Articles of Confederation. The unanimity requirement had prevented the adoption of a taxing power, which was twice vetoed by a single state in defiance of the other twelve.³²⁶ The effort to build in a salutary defense had backfired, undermining the capacity of the national government to provide basic security and coordinate foreign policy. With its supermajority requirements, the Articles had given a minority of states, or a single state in the case of amendments, a portion of the national lawmaking power. The Articles institutionalized a tyranny of the minority. The delegates to the Philadelphia Convention needed to remedy that problem if they hoped to create a workable plan of government. But they could not abandon the concept of a salutary defense for the public rights of state governments.³²⁷ The founding

³²⁰ See James Madison, *Vices of the Political System of the United States*, reprinted in MADISON, *THEORY AND PRACTICE*, *supra* note 8, at 329–30.

³²¹ See *id.* at 331.

³²² See MAIER, *RATIFICATION*, *supra* note 40, at 15–16.

³²³ See *id.* at 17.

³²⁴ See MADISON'S NOTES, *supra* note 1, at 197 (reporting the remarks of James Wilson).

³²⁵ See *supra* note 301.

³²⁶ See MADISON'S NOTES, *supra* note 1, at 350 (reporting the remarks of Nathaniel Gorham).

³²⁷ See *id.* at 87 (Madison recorded George Mason's view that "[t]he State Legislatures also ought to have some means of defending themselves [against] encroachments of the [National Government]."); see *id.* at 98 ("[Roger Sherman] said as the States would remain possessed of certain individual rights, each State ought to be able to

generation was committed to the idea that the imperial, or superintending, layer of government wrongly invaded the legitimate jurisdiction of the colonial governments.³²⁸ Delegates recognized that, without constitutional defenses, such an invasion was inevitable.³²⁹

5.3. Restricting the “Salutary Defense” to a Majority of State Legislatures Placed Federalism on a Secure Footing

The Convention delegates salvaged the concept of a salutary defense by eliminating supermajority requirements in the context of national lawmaking³³⁰ and weakening them in the context of constitutional amendments.³³¹ Majoritarian procedures in Senate lawmaking meant that only a majority of the chamber could pass or prevent the passage of national laws. Given state equality in the Senate, a majority of state legislatures could therefore expect to block any national law by instructing their respective delegates in the Senate to vote against it. This version of the salutary defense was consistent with the Articles of Confederation, which had lodged the same power in the majority of state legislatures with respect to the Continental Congress. A majority of state delegations could defeat every class of legislation under the Articles, from minor to important legislation and constitutional amendments, just as in the proposed Constitution. And, in truth, nothing less than a majority of state delegations could lay claim to the same thing under the Articles. But, somewhat paradoxically, the only advantage

protect itself . . .”); *see id.* at 211 (statement of William Johnson) (“Does it not seem to follow, that if the States as such are to exist they must be armed with some power of self-defence.”).

³²⁸ *See generally supra* Section 2.3 (arguing that Britain’s taxation measures, like the Stamp Act, impermissibly intruded on the colonies’ rightful sphere of governance).

³²⁹ *See* MADISON’S NOTES, *supra* note 1, at 84 (reporting the remarks of John Dickinson); *see id.* at 87 (reporting the remarks of George Mason); *see id.* at 98 (reporting the remarks of Roger Sherman).

³³⁰ *Compare* U.S. CONST. art. I (requiring that a bill pass the House and Senate by a majority), *with* ARTICLES OF CONFEDERATION of 1781, art. IX (requiring that all major legislation be approved with the assent of nine out of the thirteen states).

³³¹ *Compare* U.S. CONST. art. V (requiring proposal of amendments by two-thirds of both Houses or two-thirds of the states and ratification by three-fourths of state legislatures), *with* ARTICLES OF CONFEDERATION of 1781, art. XIII (requiring unanimity for any amendment).

that a majority of states enjoyed over a group of five states was the ability to block minor or unimportant legislation.³³² When it came to major legislation, a group of five states was just as able to block legislative proposals as a majority of states.³³³

The Articles had given two different groups of states an equal share of the national lawmaking power at one and the same time and in one and the same chamber. A majority of states, and a minority of five or more states, could both block every significant legislative proposal. The thresholds chosen reflected geographic divisions over slavery. There were seven northern states in which slavery was dead or dying and six southern states in which slavery was entrenched.³³⁴ The northern states, by virtue of their number, could block any piece of legislation. The southern states could block anything vital. Of course, divisions in the Senate would not always reflect these regional groupings. Yet, by giving a majority and a minority of states the same power to oppose one another in the same chamber, the Articles created an *imperium in imperia*, a two-headed and inherently contradictory form of sovereignty.³³⁵ This was true in more than one respect. First, by giving the majority and the minority the same veto power, the nation had been reduced to consensus lawmaking and frequent deadlock. Second, the states had abrogated national powers when the national government proved incapable of solving problems.³³⁶ Supermajority provisions may have reinforced a strong salutary defense but at the expense of a workable plan of union.

Dropping supermajority requirements in national lawmaking was a superficially minor change relative to the Articles. But dropping them embraced the principle that a majority of states could bind a minority of states

³³² See ARTICLES OF CONFEDERATION of 1781, art. IX.

³³³ See *id.*

³³⁴ See MADISON'S NOTES, *supra* note 1, at 295 (reporting James Madison's argument that the institution of slavery is what most divided the state delegations and that "[t]here were 5 States on the South, 8 on the North side of this line.").

³³⁵ See THE FEDERALIST NO. 15, *supra* note 4, at 93 (Alexander Hamilton); see GALLOWAY, *supra* note 155, at 22; see MADISON'S NOTES, *supra* note 1, at 35 (reporting the views of Gouverneur Morris: "[I]n all Communities there must be one supreme power, and one only."); see *id.* at 133 (reporting the views of Alexander Hamilton: "Two Sovereignties can not co-exist within the same limits.").

³³⁶ See generally James Madison, *Vices of the Political System of the United States*, reprinted in MADISON, THEORY AND PRACTICE, *supra* note 8, at 329 (explaining that states had encroached on federal authority through wars, treaties, and other similar actions).

as the supreme law of the land. That had never been true under the Articles, and nothing like it had existed under the transatlantic constitution either. A salutary defense remained available for any majority of states that successfully coalesced in opposition to a bill. State governments were not defenseless in the event the federal government encroached on their legitimate authority. But whether the actions of the federal government were legitimate or illegitimate was not for regional or other groupings of similarly situated states to determine. It was for the majority of all the states in the union to say whether a proposal was detrimental to their respective public rights. Their veto power in the Senate was absolute—it could not be overridden by a popular majority in the House of Representatives or the president. It did not matter if the underlying legislation was critical for the survival of the nation—that legislation could not pass over the effective opposition of any majority of state legislatures. The national interest had to be pursued in a way that would accommodate the concerns of state governments. Not all of them—most would do.

The delegates retained supermajority requirements in the context of constitutional amendments, though at a less demanding level than under the Articles. Supermajorities of states and members of both houses of Congress were required to propose and ratify constitutional amendments.³³⁷ This meant that a minority of states and members in the minority of both houses of Congress were positioned to torpedo constitutional amendments favored by majorities. The delegates had recreated the problem of national lawmaking under the Articles but restricted its scope to constitutional amendments. Fundamental changes of this kind would require widespread consensus in the national community but not unanimity—with one exception discussed earlier. No amendment could strip states of their equal representation in the Senate without the unanimous consent of every state.³³⁸ This extra layer of constitutional protection ensured that state equality would remain a bedrock principle of Senate organization so long as even one state legislature desired it. This exception also lent credibility to the salutary defense in the Senate, which depended on the principle of equality for its existence. The adoption of proportionate representation in the Senate would have undercut the

³³⁷ U.S. CONST. art. V.

³³⁸ *Id.*

promise that any majority of states could block national laws.³³⁹ Only delegates representing a popular national majority would have enjoyed this power. Given that a popular majority already held this power in the lower house, it is unclear how a redundant power in the upper house would reinforce deliberative bicameralism.³⁴⁰

6. CONCLUSION: A LEGACY OF CONSTITUTIONAL UNION AND POPULAR CONSENT

At the date of the Convention . . . the pol[itical] condition of the U.S. could not but fill the pub[lic] mind with a gloom . . . relieved only by a hope that so select a Body would devise an adequate remedy³⁴¹

The Convention delegates pursued a constitutional blueprint that voters in every state could live with, and in this they achieved unqualified success. The voters of every state, through their chosen delegates at state conventions, consented to the Constitution—although voters in some states took longer than others to do so.³⁴² In the end, thirteen different political communities concluded that the terms of union under the Constitution were superior to those offered under the Articles. This amounted to a new consensus in political society that the Convention delegates had done their job well. The national government the delegates designed appeared credible, at least in theory—and theory was all anyone had. The founding generation was devoted to the separation of powers, bicameralism, federalism, and republicanism. The Constitution kept faith with these principles of good government. The primary responsibility for each of the legislative, executive, and

³³⁹ A different problem with proportionate representation in the Senate was that, from the wide disparity in state populations, the chamber would have to be unduly large to ensure representation to every state. See MADISON'S NOTES, *supra* note 1, at 225–26 (reporting the remarks of William Davie). Madison, although he opposed state equality in the Senate, elsewhere conceded that proportionate representation would require a chamber of such size so as to destroy, in large part, the purpose of the body. See *id.* at 83.

³⁴⁰ See *id.* at 82 (reporting the remarks of Hugh Williamson and James Wilson).

³⁴¹ MADISON'S NOTES, *supra* note 1, at 13.

³⁴² See MAIER, RATIFICATION, *supra* note 40, at 430.

judicial powers was assigned to different national institutions. In keeping with bicameralism, the primary responsibility for the legislative power was divided between two chambers, the House and the Senate. The states retained all powers not delegated to the national government. The republican character of the national government was assured through the dependence of members of Congress and the president on regular elections.

These features dominate the constitutional blueprint, so it is quite natural to think of them as the central innovations of the delegates. However, the separation of powers, bicameralism, federalism, and republicanism dominate the constitutional blueprint precisely because Americans valued them before the Constitution delegates put pen to paper. Nearly all the delegates, who largely shared these convictions, knew that a plan of union that did not reflect these principles would fail.³⁴³ If anyone deserves credit for the basic pillars of the American constitutional order, it is American voters. Yet the Convention delegates deserve credit for giving American voters a direct voice in national politics for the first time. American voters had only indirect representation in national councils under the Articles of Confederation. Under the transatlantic constitution, they had no representation of any kind in the imperial layer of government. To accomplish this major transformation of the American nation, the Framers had to cleverly innovate around the variation in state suffrage laws and state control over political rights. Rather than concede everything to the states or seek to coerce them, the delegates tied federal suffrage to state suffrage. They employed the logic of equal protection to accommodate state practice and yet remain relevant in the political lives of every state—and henceforth every American—voter.

The delegates also deserve credit for proposing a credible form of bicameralism that was consistent with republican principles. State experiments tended to emphasize property qualifications. Had wealth been more evenly distributed around the country, it is quite likely that property qualifications would have shaped the selection of members of the upper house in

³⁴³ See MADISON'S NOTES, *supra* note 1, at 59 (reporting the remarks of James Wilson); see *id.* at 64–65 (reporting the remarks of George Mason); see *id.* at 95–96 (reporting the remarks of William Paterson); see *id.* at 158 (reporting the remarks of George Mason); see *id.* at 159 (reporting the remarks of Luther Martin); see *id.* at 230 (reporting the remarks of Gunning Bedford); see *id.* at 358 (reporting the remarks of Elbridge Gerry).

profound ways.³⁴⁴ A sub-electorate of wealthier voters may well have found itself with the power to select representatives from among its own class. Such a class, armed with a share of the national lawmaking power, might well have developed into an aristocracy, perhaps an oppressive one.³⁴⁵ As it was, state variation in both wealth and property qualifications precluded the identification of any national standard.³⁴⁶ With wealth off the table, the delegates chose to represent the state legislatures in the upper house and on the principle of state equality. The only other candidate was proportionate representation in the upper house, but that would simply mirror the lower house.³⁴⁷ Two chambers organized on the same principle destroyed the advantages of bicameralism. On the other hand, a majority of states were capable of opposing a popular majority in the lower house. The support of state majorities for their members promised to fortify senators against national majorities, making such opposition credible in a republic.³⁴⁸

The delegates contradicted decades of constitutional development on both sides of the Atlantic by proposing a unitary national executive. They vested executive power in a single person, who was also commander-in-chief of the armed forces, and gave that one person a share of the national lawmaking power.³⁴⁹ George III did not have these powers, even if he may have possessed them in name.³⁵⁰ Most interestingly of all, the delegates took pains to prevent their unitary executive from becoming a paper emperor like the king.³⁵¹ By precluding members of the legislature from holding executive

³⁴⁴ See MADISON'S NOTES, *supra* note 1, at 219 (reporting the remarks of Abraham Baldwin); see *id.* at 402–03 (reporting the remarks of John Dickinson, Gouverneur Morris, and James Madison); see *id.* at 425–26 (reporting the remarks of Charles Pinckney).

³⁴⁵ See generally *supra* note 177 and accompanying discussion (explaining that placing certain qualifications on officeholders would result in a populist aristocracy).

³⁴⁶ See *supra* Section 3.2.

³⁴⁷ See *supra* Section 3.4.

³⁴⁸ See *id.*

³⁴⁹ U.S. CONST. art. II, § 2; *id.* art. I, § 7.

³⁵⁰ See NELSON, *supra* note 29, at 63 (“[George III] would not attempt to revive prerogatives of the Crown that had gone into abeyance generations earlier (and which he now regarded as straightforwardly unconstitutional) in order to install himself as the sort of king/emperor that the patriots had come to desire.”).

³⁵¹ King George II once quipped, reportedly with a smile, “Ministers are the Kings in this country.” NAMIER, *supra* note 113, at 46. Some Framers, like Gouverneur Morris, showed a keen awareness of the ministry. MADISON'S NOTES, *supra* note 1, at 360

office, the delegates slammed the door on the development of an institution resembling the ministry.³⁵² They envisioned a cabinet, but its members would require the nomination of the president and Senate confirmation, and the price of a cabinet position would be leaving Congress and accepting subordination to the chief executive. Electoral independence, delegates hoped, would ensure that the choices of the president were not those of a legislative selectorate in Congress.³⁵³ The delegates created the Electoral College to provide for the electoral independence of the executive.³⁵⁴ It allowed them to overcome the variation in state suffrage laws that made popular election impractical by awarding states the same share in the choice of the executive as they enjoyed in the two houses of the national legislature.³⁵⁵

Finally, the delegates eliminated the supermajority requirement in the context of national lawmaking. As a result, the Constitution embraced the principle that a majority of states could bind a minority of states.³⁵⁶ That had never been true before. A majority of states could do no more than pass minor legislation under the Articles.³⁵⁷ Under the transatlantic constitution, the colonies had enjoyed no formal representation whatsoever in the imperial layer of government, so no forum existed in which the majority of states could propose to bind the minority. A necessary corollary of this newfound power was that a majority of state legislatures could veto any legislative proposal. If this form of the salutary defense was not as strong as that afforded under the Articles, majoritarian procedures reflected the objective of creating a common political community that respected the public rights of

(Madison reported Gouverneur Morris's view that "[s]ome leader of a party will always covet [the executive's] seat, will perplex his administration, will cabal with the Legislature, till he succeeds in supplanting him. This was the way in which the King of England was got out, he meant the real King, the Minister. This was the way in which Pitt [L. Chatham] forced himself into place."); *see sources cited supra* note 204. The preamble of the New Hampshire Constitution blamed the ministry in particular for the outbreak of hostilities: "[T]o enforce obedience to such acts ['of the British Parliament'] a powerful fleet and army have been sent to this country by the ministry of Great Britain" N.H. CONST. of 1776 pmbl.

³⁵² *See supra* Section 4.3.

³⁵³ *See supra* Section 4.2.

³⁵⁴ *See supra* Section 4.4.

³⁵⁵ *See id.*

³⁵⁶ *See supra* Section 5.3.

³⁵⁷ *See supra* Section 5.2.

constituent states. It was not for individual states or regional groupings of states to determine whether their public rights were threatened; such states would need to persuade others of the validity of their claims and seek recourse through the majoritarian political process.³⁵⁸ In that the federal government could not pass legislation without the consent of most state legislatures, it was unlikely to abuse public rights in any event.³⁵⁹ This form of the salutary defense hailed a healthier alignment of federal and state governments.

6.1. Delegates Proposed a Plan to Realize the Potential of a Confederate Republic and Establish Security for Republican Government

There are other reasons to believe the Convention delegates succeeded in laying the foundation for a confederate republic that was enduring and capable of matching the strength of a large empire. At 238 and counting, the Constitution has lasted longer than the combined duration of the Articles of Confederation and the transatlantic constitution.³⁶⁰ The Constitution has changed in many ways over the years, through both amendment and judicial interpretation, but most of the innovations of the Framers have endured down to the present. Two exceptions are the representation of state legislatures in the Senate and the salutary defense this provided any majority of state legislatures against national laws. The 17th Amendment took the choice of senators away from state legislatures and gave it to the people of the states instead.³⁶¹ From that point forward, the state legislatures stopped being constituents of the national government. Their salutary defense vanished at one and the same time. Most American voters desired this change, which they brought about through perfectly constitutional means. It is not

³⁵⁸ See *supra* Section 5.3.

³⁵⁹ See *id.*

³⁶⁰ The transatlantic constitution was in effect on the Atlantic coast of North America between 1607 and 1775. See BILDER, *supra* note 6, at 1–2. The Articles of Confederation were formally adopted in 1781 and replaced seven years later; the Continental Congress accepted the Articles and recommended that states ratify them in November 1777. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION* 181–84 (1970).

³⁶¹ U.S. CONST. amend. XVII.

terribly surprising that federalism faded markedly in subsequent years.³⁶² Its enforcement became dependent on a Supreme Court whose Justices were confirmed by a Senate in which state legislatures no longer had a voice. Yet this history suggests the efficacy of the original Constitution in defending the public rights of states when the salutary defense was embedded within it.

The triumph of Union forces in the Civil War is perhaps the clearest evidence that the original Constitution fostered a meaningful confederate republic. The eleven confederate states represented a regional bloc that was committed not only to the maintenance of slavery within their respective borders, but to its spread.³⁶³ They were outnumbered by northern and western states.³⁶⁴ Under the Articles of Confederation, the southern states would have been numerous enough to prevent the Continental Congress from passing any important legislation negatively affecting their interests. But, under the Constitution, they did not have the numbers to prevent legislation from passing in the Senate. The Compromise of 1850 was reflected in a series of ordinary statutes, quite vulnerable to Republican attack.³⁶⁵ Rather than be bound by the majority, the confederate states seceded. And rather than allow secession to succeed, the Union raised an army in which more than two million men served and, at ineffable cost, defeated the rebellion.³⁶⁶ By winning the war, the national government proved that it was capable both of exercising the strength of a large empire and enforcing bedrock constitutional principles. These capabilities dwarfed those of the Continental Congress, which could not put down a rebellion in western Massachusetts. But they also

³⁶² Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the 17th Amendment*, 73 OR. L. REV. 1007, 1009 (1994); see also, e.g., JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS 13–15 (2018).

³⁶³ ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* 80–86 (Oxford Univ. Press 1995) (1972); MICHAEL A. MORRISON, *SLAVERY AND THE AMERICAN WEST* 31–38 (1997).

³⁶⁴ See JOSEPH C. G. KENNEDY, *POPULATION OF THE UNITED STATES IN 1860*; COMPILED FROM THE ORIGINAL RETURNS OF THE EIGHTH CENSUS, at iv (1864) (noting that by 1860 the United States consisted of 34 states, from which 11 later seceded).

³⁶⁵ See HOLMAN HAMILTON, *PROLOGUE TO CONFLICT* 168–70 (2005) (describing the northern and southern reaction to the Compromise of 1850, especially the Fugitive Slave Act); STEPHEN E. MAIZLISH, *A STRIFE OF TONGUES* 221–23 (2018) (describing southern anxiety about northern opposition to the Fugitive Slave Act of 1850).

³⁶⁶ JAMES W. GEARY, *WE NEED MEN: THE UNION DRAFT IN THE CIVIL WAR* 85 (1991); see also HERMAN HATTAWAY & ARCHER JONES, *HOW THE NORTH WON: A MILITARY HISTORY OF THE CIVIL WAR* 440 (1983).

towered over those of British Parliament under the transatlantic constitution, which similarly found itself unable to suppress rebellion in one of its parts.

6.2. Delegates Chose Institutions that Accommodated Both Variation in State Law and the Future Democratization of Society

The legacy of the Convention was a constitutional union founded on an appeal to reason and the consent of American voters in every state. Its legacy was not the political equality of all persons or universal suffrage, or the radical reinterpretation of individual rights. Just as clearly, slavery was not its legacy. The institution of slavery predated the Convention, and the delegates did not have the power to force the abolition of slavery on any state.³⁶⁷ That said, the existence of slavery did shape some of their innovations. The disenfranchisement of enslaved persons was one reason why rights of suffrage could not be as extensive in southern states as northern states. This fact influenced the incorporation of provisions in the Constitution tying federal suffrage to state suffrage and establishing the Electoral College. These institutions certainly accommodated southern states, but it is a mistake to equate that accommodation with support for slavery. For one thing, it is not difficult to imagine institutional arrangements that would have provided stronger security for southern states. What if the delegates had left federal suffrage up to state law? The southern states could then have given their state legislatures a voice in the lower house.³⁶⁸ What if the delegates had given the choice of chief executive to the Senate? Such a rule would have allowed the southern states to maximize their influence in the executive branch.

It matters that the delegates chose accommodationist institutions that were capable of adapting to a more democratic future—including one in

³⁶⁷ MADISON'S NOTES, *supra* note 1, at 355 ("General Pinckney reminded the Convention that if the Committee should fail to insert some security to the Southern States against an emancipation of slaves . . . he should be bound by duty to his State to vote against their Report . . .").

³⁶⁸ See *supra* note 182 and accompanying text.

which slavery would not exist.³⁶⁹ Tying federal suffrage to state suffrage guaranteed that national elections would liberalize as states liberalized their own election laws. The Electoral College, which gave indirect representation to American voters through state legislatures, would also become more representative of the population as states liberalized their laws. These changes would be self-enforcing in that Congress would not need to take any action to make them binding, and in that states were accountable to their electorates for their electoral institutions. Consider that the original Constitution made no classifications based on sex, race, wealth, or religion, such as were common in state constitutions of the time. That the document was written to translate into a more democratic age appears quite purposeful. It imposed no impediments on further efforts at democratization in each state,³⁷⁰ and placed the power to make constitutional amendments squarely in the legislative corner.³⁷¹ The Constitution did not force democratization on the states, however. Whether and when American society made political equality and universal suffrage the law of the land was not up to the Convention delegates; it was up to American voters.

³⁶⁹ Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?*, Speech at Glasgow, Scotland (Mar. 26, 1860), reprinted in 1 *THE GREAT AMERICAN MOSAIC* 110, 110–12 (Gary Y. Okihiro, Lionel C. Bascom, & James E. Seelye, Jr. eds., 2014); DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC* 299–301 (2001); see also MADISON'S NOTES, *supra* note 1, at 503 (“[Roger Sherman] observed that the abolition of Slavery seemed to be going on in the U.S. & that the good sense of the several States would probably by degrees compleat it.”).

³⁷⁰ The Constitution requires only that the states adopt some form of republican government. U.S. CONST. art. IV, § 4.

³⁷¹ *Id.* art. V.