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## NOTE

# “PUBLIC CITIZENS” AND THE CONSTITUTION: BRIDGING THE GAP BETWEEN POPULAR SOVEREIGNTY AND ORIGINAL INTENT

*Robert W. Scheef\**

I sincerely congratulate the citizens of America upon the fair prospect which now presents itself to their view; and promises a long reign of virtue, happiness, and glory, as the result of a constitution which is the real *vox populi* so often ardently desired by mankind, in vain, and now, for the first time, discovered by the patriotic sages of America.<sup>1</sup>

### INTRODUCTION

“A Real Patriot’s” congratulatory note to the citizens of America highlights two points regarding the creation of the Constitution. First, it was the people who had the right to establish the fundamental law upon which government was based. As Thomas Jefferson declared in the Declaration of Independence, it was the people’s right “to alter or to abolish” government, and “to institute new government” to secure fundamental rights to “life, liberty and the pursuit of happiness.”<sup>2</sup> Second, the true voice of the people was not directly expressed by the “citizens of America,” but was rather “discovered” by “patriotic sages.” Just as representation was an inherent part of colonial assemblies, state governments, and the Continental Congress,<sup>3</sup> so was

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1. “A Real Patriot,” *Pa. Mercury*, Feb. 26, 1788, *reprinted in* 16 *The Documentary History of the Ratification of the Constitution* 118, 119 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter *Documentary History*].

2. The Declaration of Independence para. 2 (U.S. 1776).

3. The Continental Congress was an assembly of representatives from all the colonies (except Georgia) first organized in 1774 to protest Parliament’s heavy-handed regulation of British America. See Samuel Eliot Morison, *The Oxford History of the American People* 206-11 (1965). The Second Continental Congress assembled in 1775 (this time including Georgia) to continue to protest British policy, and when reconciliation became impossible, to govern the conduct of the war for independence.

it a part of the making of the Constitution. The notion that the voice of the people was “discovered,” however, begs the question of whether the Constitution has any greater claim to being the voice of “We the People”, as the preamble states, than an ordinary piece of legislation.

Originalists think it does. In *The Tempting of America*, Judge Robert Bork argues that “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy. Only that approach is consonant with the design of the American Republic.”<sup>4</sup> The democratic legitimacy of originalism is based on the idea that the Constitution was written and adopted through a process that was more deliberative, and required the approval of a greater majority of the people, than was required from the normal acts of a legislature.<sup>5</sup> Professor Martin Flaherty explained the essential argument:

Since “We the People” ratify constitutional provisions and later generations govern themselves within the framework of that law, these later generations must follow the command of the “People” unless one of those generations successfully amends the Constitution and so acts as the “People” in its own right.<sup>6</sup>

Therefore, until a supermajority of the people once again join to deliberate and change the Constitution, the prior understanding controls. Yet when originalists seek an understanding of the original “We the People”—the generation that adopted the original Constitution and its first ten amendments—they inevitably resort to the writings and recorded speeches of the political leaders and engaged citizens of the period.<sup>7</sup> This is, of course, understandable, because the historical records of the late eighteenth-century do not

*Id.* at 215-23; see also *infra* notes 38-52 and accompanying text.

4. Robert H. Bork, *The Tempting of America* 143 (1990).

5. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1745-46 (1996) (“The most obvious devotion to the past issues from thinkers who stress the Constitution’s commitment to democracy.”); Abner S. Greene, *The Irreducible Constitution*, 7 *J. Contemp. Legal Issues* 293, 295-96 (1996) (characterizing democratic foundationalist theory as focusing on “decisions by the people acting collectively” and citing originalists as supporters of this theory).

6. Martin S. Flaherty, *History in Constitutional Argumentation*, in 3 *Encyclopedia of the American Constitution 1290, 1291* (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

7. Not all originalists go this far. As Professor Flaherty has pointed out, “Americans love to invoke history, but not necessarily to learn it. . . . For better and for worse, a similar theme of allure and apathy characterizes the work of constitutional ‘professionals.’” Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 *Colum. L. Rev.* 523, 523-24 (1995). Some originalists stop at *The Federalist Papers* or the Philadelphia Convention of 1787. Compare *Printz v. United States*, 521 U.S. 898, 910-15, 920-23 (1997) (discussing arguments in *The Federalist Papers* and ratification debates), with *id.* at 971-76 (Souter, J., dissenting) (“In deciding these cases, which I have found closer than I had anticipated, it is *The Federalist* that finally determines my position.”).

extend much beyond these “public citizens.” However, judges, lawyers, and legal scholars are still left with determining the understanding of “We the People” from the records of a political elite. As brilliant as James Madison was, brilliance alone cannot establish that his intent was the People’s intent.<sup>8</sup>

As a participant in both the framing and ratification of the Constitution, Madison might provide a reasonable basis for interpreting the Constitution if what originalism sought was equivalent to legislative intent. Justice Scalia, however, at least implicitly acknowledged that “legislative intent”—that is, the intent of the drafters and ratifiers of legislation (i.e., Congress)—is sufficiently different from the intent of the drafters and ratifiers of the Constitution to repudiate the former and embrace the latter.<sup>9</sup> This distinction raises the question of the nature of popular sovereignty in America. Professor Bruce Ackerman differentiates times when “We the People” set down constitutional, or higher law, from times when through the legislative process elected representatives of the people enact statutory, or ordinary law.<sup>10</sup> He calls this a “dualist democracy.”<sup>11</sup> Ackerman uses this theory to support a broad theory of constitutional lawmaking outside Article V<sup>12</sup> of the Constitution.<sup>13</sup> Yet at all times, during periods of either higher or ordinary lawmaking, the same representatives are acting.

Originalists have been criticized for failing to consider the ulterior

8. Cf. Martin S. Flaherty, *The Practice of Faith*, 65 Fordham L. Rev. 1565, 1573 (1997).

9. Compare *Printz*, 521 U.S. at 910 (discussing *The Federalist* as one “source[] we have usually regarded as indicative of the original understanding of the Constitution”), with *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 622 (1991) (Scalia, J., concurring) (objecting to “the practice of utilizing legislative history for the purpose of giving authoritative content to the meaning of a statutory text”).

10. 1 Bruce Ackerman, “We the People”: Foundations 6-7 (1991). This Note does not suggest that Justice Scalia agrees with Professor Ackerman’s dualist democracy, only that their approaches are similar. See Flaherty, *supra* note 8, at 1568 (“The more one ponders dualist theory, the harder it becomes to distinguish it from the approach claimed, if not practiced, by Antonin Scalia.”).

11. 1 Ackerman, *supra* note 10, at 3.

12. Article V states:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Const. art. V.

13. *Id.*

motives of, and inconsistent arguments made by, the Founders<sup>14</sup> when using the historical record to support a constitutional argument.<sup>15</sup> Ackerman has been criticized for failing to explain his use of the statements of political elites to support his theory of higher lawmaking by populist movements.<sup>16</sup> Both criticisms essentially point to a single problem: the gap between popular sovereignty—the voice of “We the People”, and original intent—the statements of those public citizens who speak for the People. This Note attempts to bridge that gap by defining the role of public citizens in the higher lawmaking process.

Part I examines the history leading up to the drafting and ratification of the Constitution. The focus of this part is twofold. First, it explores the context within which higher lawmaking occurs. Both Revolutionaries and Founders sought higher lawmaking authority from the People only during crises that could not be resolved except through constitutional change.<sup>17</sup> Second, Part I places public citizens within that context to discern what the Founders expected of themselves as “Spokespersons of the People.”<sup>18</sup> It examines separately the Revolution and Independence,<sup>19</sup> the Critical Period,<sup>20</sup> and the early Founding<sup>21</sup> in order to show how the Founders’ views of the people changed due to their experiences under the early governments. Yet the way the Revolutionaries and Founders

14. This Note generally adopts terminology used by Professor Flaherty. “Thus, ‘Revolution’ refers to the late eighteenth-century American struggle, both rhetorical and armed, against British claims of authority over the colonies; ‘Independence’ refers to the successful American assertion of autonomy from Great Britain; ‘Critical Period,’ refers to the era between Independence and the framing of the Constitution.” Flaherty, *supra* note 7, at 527 n.17. This Note diverges from Flaherty in referring, at least initially, to the “Founding” as the period from the drafting of the Constitution in 1787 up to 1800, rather than the period up to the “drafting and ratification of the Federal Constitution.” *Id.*; see 1 Ackerman, *supra* note 10, at 70-73 (discussing the Jeffersonian “Revolution of 1800” and how it “marked the beginning of a very different constitutional dynamic”); see also *infra* notes 300, 325, 333, 338, 369 (discussing 1796 as the end point of the Founding). This Note adopts Professor Flaherty’s use of “Framers” to refer “only to the fifty-five men who participated in the Philadelphia Convention.” See Flaherty, *supra* note 7, at 527 n.17. In this Note, “Revolutionaries” refers to those taking part in the Revolution, “Founders” refers to all those taking part in the Founding and “Ratifiers” refers only to those taking part in the state ratifying conventions. Both Ratifiers and Framers are included as Founders. “Federalists” refers to the supporters of the Constitution, not to the Federalist Party, or “High Federalists,” of the 1790s.

15. Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent 6-7* (1999); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution 15-17* (First Vintage Books ed. 1997).

16. William E. Forbath, *Constitutional Change and the Politics of History*, 108 Yale L.J. 1917, 1923-24 (1999); Jennifer Nedelsky, *The Puzzle and Demands of Modern Constitutionalism*, 104 Ethics 500, 503-04 (1994).

17. See *infra* notes 27-52, 99-124 and accompanying text.

18. See *infra* notes 72-92, 138-98 and accompanying text.

19. For further discussion of the Revolution, see *infra* Part I.A.

20. See *infra* Part I.B.

21. See *infra* Part I.C.

approached constitutional change remained generally the same, even as their experiences with ordinary lawmaking forced them to make drastic changes in the form of the national government, and its relationship to the state governments. Part I demonstrates that the Founders self-consciously believed that consistency, deliberation, and consensus were requirements for legitimizing their claim to act on the higher-lawmaking tier.

Part II places the history in the context of two related contemporary debates—the use of original intent and the possibility of constitutional change outside of the Article V amendment process. In particular, it analyzes Professor Ackerman’s “dualist democracy,” and some of the criticisms of it. Ackerman places popular movements at the forefront of constitutional change.<sup>22</sup> Yet, as his critics point out, the historical record he uses to support his theory is replete with references to the statements of politicians and political actors.<sup>23</sup> Absent are the voices of ordinary citizens Ackerman depends on in constitutional politics. Part II also points out that, contrary to Ackerman’s broad view of popular sovereignty, the Founders expected the People to speak through a “natural” aristocracy, a political elite arising through merit, that would act for the public good.

Part III seeks to extract from the historical narrative the Founders’ view of the role public citizens play both as “Spokespersons of the People” during periods of higher lawmaking, and as ordinary politicians during periods of ordinary lawmaking. It proposes a public-citizen model of higher lawmaking based on the criteria the Founders espoused to legitimate public citizens’ claims to speak for the People. To be a “Spokesperson of the People” a public citizen must respond to a crisis that implicates the ability of government to fulfill constitutionally its necessary function. He or she must argue consistently in favor of a proposal for constitutional reform, and that reform must be for the purpose of resolving the crisis rather than for some ulterior motive. Finally, the public citizen must achieve a consensus in favor of the reform.

The public-citizen model collapses the issues of original intent and amendment outside of Article V into one theoretical framework. Whether one subscribes to the possibility of constitutional transformation outside of Article V, if a public citizen’s writings or speeches are to be taken as authoritative expressions of constitutional law or original intent, that public citizen must meet the criteria that place him or her on the higher-lawmaking tier. Otherwise, the public citizen is operating on the lower tier of ordinary lawmaking, including both commendable and corrupt versions of “politics as usual.” Arguments made on this lower tier should not be controlling, but

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22. See 1 Ackerman, *supra* note 10, at 266.

23. See *supra* note 16 and accompanying text.

could be used as persuasive examples of customary practice.<sup>24</sup> Lastly, Part III argues that the Founders sought to incorporate these criteria in Article V.

### I. THE ROAD TO PHILADELPHIA: 1763 – 1787

Americans experienced two crises of constitutional proportions during this twenty-five year period. The first culminated in the birth of the United States of America in 1776.<sup>25</sup> The second was a reaction to the experiences of the nation's infancy, which led to the adoption of the United States Constitution.<sup>26</sup> The response to both crises was remarkably similar: a patriotic call for fundamental change for the public good, national deliberation on the form of such change, and a requirement for, if not unanimity, a substantial consensus, or supermajority, before action was taken. This consistency suggests the basic elements the Founders viewed as prerequisites for constitutional change.

#### A. *The English Constitution and the Call for Independence:* 1763 – 1776

The Revolution was no mere overreaction to high taxes, but a considered response to repeated and increasing infringements of the colonists' rights as Englishmen. Americans viewed the actions of the British during the 1760s and early 1770s as upsetting the balance between power and liberty.<sup>27</sup> By the time of the Stamp Act Crisis of 1765,<sup>28</sup> Americans realized that the English constitution, as it applied

24. For a discussion of custom in constitutional interpretation, see Larry Kramer, *What's A Constitution For Anyway? Of History and Theory*, Bruce Ackerman and the *New Deal*, 46 Case W. Res. L. Rev. 885, 912-30 (1996) [hereinafter Kramer, *What's A Constitution For Anyway?*]. Professor Kramer critiques Ackerman's dualist democracy theory, noting that "a theory that leaves no other option [other than amendment] because it ignores the full progression and maturation of governmental institutions leaves much to be desired." *Id.* at 930. Professor Kramer's basic point on custom is "that history is essential to constitutional theory because our understandings, our values, and the actual structure of our government are constantly, inevitably, changing." Larry Kramer, *Fidelity to History—And Through It*, 65 Fordham L. Rev. 1627, 1627 (1997). For an instructive judicial use of custom, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597-614, apps. I, II (1952) (Frankfurter, J., concurring) (discussing past examples of presidential seizures).

25. See *infra* Part I.A.

26. See *infra* Parts I.B-C.

27. For general background, see Bernard Bailyn, *The Ideological Origins of the American Revolution* 94-104 (enlarged ed. 1992).

28. The Stamp Act imposed the first tax, other than customs duties, on the American colonies, and taxed almost all paper, from legal documents to liquor licenses to playing cards. See Morison, *supra* note 3, at 185. Riotous opposition to the Act occurred across the British Empire, and particularly in the American colonies. *Id.* at 186-87. The colonists viewed it as a serious infringement on their right to govern the internal affairs of the colonies. *Id.* at 187. The Act instigated the first continent-wide meeting, the Stamp Act Congress, to orchestrate opposition to British policy. *Id.*

to the colonies, was failing.<sup>29</sup> The failure came first in the House of Commons. As the democratic element of the English system, the authority of the Commons was derived from the people.<sup>30</sup> Americans argued that they were not represented in Parliament, because they did not send a representative of their own choosing.<sup>31</sup> Despite this, Parliament continued to exercise its authority as the "Supreme unlimited power of the Nation."<sup>32</sup>

In English mixed government, King, Lords, and Commons represented each stratum of society: royalty, nobility, and commoners.<sup>33</sup> If any part of the system attempted to gain additional power, it would be in the interest of the others to resist. The tripartite design allowed the English system to correct for the periodic loss of "public virtue,"<sup>34</sup> and demonstrates that the English recognized that avarice, party- or self-interest, and expediency—rather than the public good—would control the operation of government.<sup>35</sup> Past struggles for power had resulted in the royal grant of certain liberties to the nobility and particularly to the commoners, which were expressed in Magna Charta and the English Bill of Rights.<sup>36</sup> If King, Lords, or Commons crossed the boundaries of the inalienable rights and privileges of each societal stratum, alarms would sound, and the people could legitimately rise in opposition.<sup>37</sup>

As late as 1775, Americans viewed the English constitution as the proper balance of power and liberty.<sup>38</sup> It was to John Adams "the most perfect combination of human powers in society which finite wisdom has yet contrived and reduced to practice for the preservation of liberty and the production of happiness."<sup>39</sup> As the decade wore on,

29. See Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 17, 35-37 (1969).

30. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 239-40 (1988). This was particularly true in the field of taxation. The tax was considered a gift from the people to the King, who would request funds from Parliament. *Id.* Taxation was not considered a legislative act, but a separate power attributed to the "representativeness" of Parliament. *Id.* As such, a gift of property could only be given with the consent of the property owner, or his representative. *Id.* Since Americans were not represented, Parliament could not raise taxes in the American colonies. *Id.* "[I]t was evident that the right of the members of Parliament acquired by their election in England to pass laws binding upon their electors, does not at the same time give them a right to represent and lay on taxes on those who never invested them with any such power . . ." Wood, *supra* note 29, at 182 (internal quotations omitted).

31. Morgan, *supra* note 30, at 239-40.

32. *Id.* at 242.

33. Bailyn, *supra* note 27, at 70-73; see also Wood, *supra* note 29, at 18.

34. Public virtue is defined as the sublimation of private interest for the public good. Wood, *supra* note 29, at 53.

35. *Id.* at 18-36.

36. Bailyn, *supra* note 27, at 81.

37. See *id.* at 70; Morgan, *supra* note 30, at 105-06; Wood, *supra* note 29, at 23-24.

38. Bailyn, *supra* note 27, at 67; Wood, *supra* note 29, at 44-45.

39. Bailyn, *supra* note 27, at 67 (quoting John Adams).



he would come to view British practice differently. Americans argued emphatically that Parliament's jurisdiction did not extend to the colonies.<sup>40</sup> Rather, the colonial assemblies had power equal to Parliament in all areas relating to the colonies except trade.<sup>41</sup> The King was the colonies' link to Great Britain, whereas the Commons only had power over the people it represented.<sup>42</sup> If, as the colonists believed, they were not constituents of any Member of Parliament, then Parliament could gain no power over them constitutionally, except through the King.<sup>43</sup>

From this leap of logic followed the second failure of the English constitution. If Parliament did not have authority over the colonies, then the King was unconstitutionally acquiescing in these acts at best, and imposing them himself through a corrupted and subservient Parliament at worst.<sup>44</sup> Despite the denunciation by the colonists of Parliament's power to legislate for them, the oppressive Acts of Parliament continued. Even the repeal of the Stamp Act, an apparent victory for the American position, carried with it the declaration that Parliament retained the power to legislate for the colonies in all cases.<sup>45</sup> The Quartering Act of 1765 was followed by the forced suspension of the New York Assembly.<sup>46</sup> With the Stamp Act, Quartering Act, and Tea Act,<sup>47</sup> the imposition of military rule in Massachusetts,<sup>48</sup> and the closing of Boston Harbor,<sup>49</sup> it was clear to the

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40. See Morgan, *supra* note 30, at 243; Morison, *supra* note 3, at 187.

41. Morgan, *supra* note 30, at 243-44. The concession on trade was seen as necessary to permit uniform regulation within the Empire. Wood, *supra* note 29, at 349. Even this concession was eventually repudiated. Morgan, *supra* note 30, at 243.

42. See John Adams, *Novanglus VII* (Mar. 6, 1775), reprinted in 2 Papers of John Adams 307, 313-15 (Robert J. Taylor ed., 1977) [hereinafter *The Adams Papers*]; Thomas Jefferson, *A Summary View of the Rights of British America* (July 1774), reprinted in 1 The Papers of Thomas Jefferson 129 (Julian P. Boyd ed., 1950) [hereinafter *The Jefferson Papers*].

43. Morgan, *supra* note 30, at 243.

44. See Wood, *supra* note 29, at 39-43 (describing American suspicion of conspiracy between King and Parliament).

45. Charles A. Beard & Mary R. Beard, *A Basic History of the United States* 98-103 (1944).

46. The Quartering Act required colonists to house British soldiers in their homes. The New York Assembly was suspended for refusing to enforce the Act. *Id.* at 99-100.

47. The Tea Act of 1773 "removed the duty on tea entering England" without repealing the tax on tea entering the American colonies, which allowed the East India Company to undercut prices even on smuggled tea. Morison, *supra* note 3, at 203. Americans protested the monopoly thus granted to the East India Company; the protests culminated in the Boston Tea Party, when protesters disguised as Indians pitched the tea into Boston Harbor. *Id.* at 203-04. The Boston Tea Party angered King George III to the point that Parliament passed the Coercive Acts—legislation designed to bring Massachusetts in particular, and British America generally, to heel. *Id.* at 204-05.

48. The Government and Administration of Justice Acts, part of the Coercive Acts, made nearly all colonial officials subject to royal dismissal, and prohibited committees of correspondence and town hall meetings. *Id.* at 205-06. Simultaneously,

Revolutionaries in 1776 that King George III preferred to endorse Parliament's power rather than protect American liberty. As Gordon Wood noted, "[w]hatever the actual responsibility of royal authority for the dissatisfactions and frustrations in American society, by 1776 the English Crown had come to bear the full load."<sup>50</sup> With pleas to the Crown going unanswered, particularly the Olive Branch Petition of 1775,<sup>51</sup> the Revolutionaries perceived independence from Great Britain as the only way to restore their rights as Englishmen.<sup>52</sup> The American *theory* of English constitutionalism rejected the British *practice* of English constitutionalism.

Influencing the American reaction were the teachings of both classical philosophers and Enlightenment scholars—the core of the English Whig tradition.<sup>53</sup> The Revolutionary generation drew from ancient history and philosophy an understanding of the trials and tribulations of the first republics, noting in particular the rise and fall of the Roman Republic.<sup>54</sup> In the Roman histories, they saw an ideal beginning, “full of virtue: simplicity, patriotism, integrity, a love of justice and of liberty.”<sup>55</sup> What defeated the Romans was the decay of the moral and political fabric of their society wrought by a love of luxury.<sup>56</sup> The lesson of antiquity, as Wood summarized, was that “the love of refinement, the desire for distinction and elegance eventually weakened a people and left them soft and effeminate, dissipated cowards, unfit and undesiring to serve the state.”<sup>57</sup> For a republic to survive, public virtue was a prerequisite.<sup>58</sup>

If antiquity illuminated how public virtue could control the dangers of power and secure the rights of liberty, the Enlightenment writers searched for a formula to balance them in virtue's absence.<sup>59</sup> These

General Thomas Gage was appointed governor and captain-general of Massachusetts, with a naval squadron and two regiments of British soldiers to enforce the new laws. *Id.* at 206. These actions led to the formation of the Continental Congress and the beginnings of organized resistance. *Id.* at 206-07.

49. The Boston Port Act, one of the Coercive Acts, “virtually blockaded Boston until it chose to pay” for the tea lost in the Boston Tea Party. *Id.* at 205.

50. Wood, *supra* note 29, at 82.

51. This was a final attempt at reconciliation that frustrated more impatient Revolutionaries with its gentle tone. See *The Spirit of 'Seventy-Six: The Story of the American Revolution As Told By Participants 277-80* (Henry Steele Commager & Richard B. Morris eds., Da Capo Press 1995).

52. See Wood, *supra* note 29, at 41-45.

53. *Id.* at 6-8. Whiggism was a political theory which emphasized popular consent to government as the source of governmental power, the inclusion of popular will in government as a balance to royal prerogative, and the dangers of imbalance in government leading to tyranny or licentiousness. *Id.* at 18.

54. Bailyn, *supra* note 27, at 23-26.

55. *Id.* at 25.

56. Wood, *supra* note 29, at 35-36.

57. *Id.* at 52.

58. *Id.* at 68.

59. Bailyn, *supra* note 27, at 27; Wood, *supra* note 29, at 6-7, 40-41.

more contemporary lessons were used by eighteenth-century American writers on both sides of the issue of independence.<sup>60</sup>

In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Puffendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.<sup>61</sup>

Power, according to these writers, was necessary to control the vices of individuals to better secure the liberty of the community as a whole.<sup>62</sup> Restrictions on individual liberty were not contrary to republicanism, however, since the goal of the republic "was public or political liberty."<sup>63</sup> The development of the English constitution was a direct, if gradual, result of the struggle to secure English liberty against repeated exertions of power in the absence of public virtue.<sup>64</sup> This security was achieved, however, by pitting the three social classes of British society against each other within the constitutional framework.<sup>65</sup> An American Republic could not benefit from this system since one of the guiding principles of republicanism was the eradication of artificial social distinctions.<sup>66</sup>

Fortunately for America, the experiences of 1774-1776 appeared to demonstrate that Americans were imbued with a degree of public virtue, of patriotism and public spiritedness, sufficient to support a republican form of government. As John Page wrote to Jefferson:

I think our Countrymen have exhibited an uncommon Degree of Virtue, not only in submitting [sic] to all the hard Restrictions and exposing themselves to all the Dangers which are the Consequence of the Disputes they are involved in with Great Britain, but in

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60. Citations to English Whig writers were as common in the writings of American Tories (Americans who remained loyal to Britain) as in those of American Whigs (Americans arguing against British policy and eventually in favor of independence). Bailyn, *supra* note 27, at 28-29.

61. *Id.* at 27.

62. See, e.g., John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* (1690), reprinted in *Treatise of Civil Government and A Letter Concerning Toleration* 3, 56 (Charles L. Sherman ed., 1937) (arguing that people must give up the liberty to do as they choose in order to preserve society); Montesquieu, *The Spirit of the Laws* 44 (Anne M. Cohler et al. trans. & eds., 1989) ("[I]t is a very true maxim that if one is to love equality and frugality in a republic, these must have been established by the laws.").

63. Wood, *supra* note 29, at 61.

64. Bailyn, *supra* note 27, at 79-84 (discussing origins of English constitution in Saxon England and tracing development through Glorious Revolution in 1688); Wood, *supra* note 29, at 260-67 (describing genesis of American preference for written constitutions).

65. See *supra* text accompanying notes 33-36.

66. Wood, *supra* note 29, at 70-73.

behaving so peaceably and honestly as they have when they were free from the Restraint of Laws.<sup>67</sup>

The colonists even obeyed the import prohibitions on British goods that the Continental Congress had established, despite the inability of the provincial assemblies or the Continental Congress to enforce them.<sup>68</sup> While this may not have been surprising in New England, where the British military presence was initially felt, it is significant that American merchants in other major ports—Philadelphia, Baltimore, and Charleston—did not take advantage of the Boston merchants' distress.<sup>69</sup> The Revolution confirmed the Enlightenment vision of America as an energetic, industrious, self-sacrificing nation.<sup>70</sup> For Adams, if a successful republic *could* be established, it would happen in America, for "public Virtue is the only Foundation of Republics," and "[o]ur dear Americans perhaps have as much of it as any Nation now existing."<sup>71</sup>

Early state constitutions emphasized the special character of the American people. The greatest concern at the time was preventing the rise of tyrants.<sup>72</sup> Therefore, power largely was placed in the state legislatures.<sup>73</sup> To ensure that these assemblies accurately and steadfastly would reflect the will of the people, popular elections were

67. Letter from John Page to Thomas Jefferson (Apr. 26, 1776), in 1 *The Jefferson Papers*, *supra* note 42, at 288; *see also* Wood, *supra* note 29, at 102.

Even the Reverend John Witherspoon, who disagreed violently with Paine's optimistic view of human nature and set out in a 1776 sermon to expose the passions and depravity of all men, could not refrain from marveling that "so great a degree of public spirit . . . has prevailed among all ranks of men."

*Id.* at 103.

68. Wood, *supra* note 29, at 102.

69. In fact, other colonies "vied in sending food and money for the relief of the blockaded town." Morison, *supra* note 3, at 206.

70. Wood, *supra* note 29, at 98-103.

71. Letter from John Adams to Mercy Otis Warren (Apr. 16, 1776), in 4 *The Adams Papers*, *supra* note 42, at 123, 124. Adams continued:

But I have seen all along my Life, Such Selfishness, and Littleness even in New England, that I sometimes tremble to think that, altho We are engaged in the best Cause that ever employed the Human Heart, yet the Prospect of success is doubtfull [sic] not for Want of Power or of Wisdom, but of Virtue.

*Id.* at 124-25. In this view, as in many others, Adams was ahead of his contemporaries. *Cf.* Joseph J. Ellis, *Passionate Sage: The Character and Legacy of John Adams* 40 (paperback ed. 1993) ("Adams came to seem more and more like the radical prophet whose predictions kept coming true."); Wood, *supra* note 29, at 568 ("[Adams] came to see, with more speed and insight than most, the mistaken assumptions about their character on which the Americans of 1776 had rested their Revolution.").

72. Wood, *supra* note 29, at 134-36.

73. "The Revolutionary [state] constitution-makers released and institutionalized what had previously been varied and often confused and thwarted attempts by the [colonial] legislatures to assume magisterial responsibilities . . ." *Id.* at 155. To Americans in 1776, the state legislatures "represented more than the supreme lawmaking authority in their new states. They were as well the heirs to most of the prerogative powers taken away from the governors by the Revolution." *Id.* at 162-63.

held regularly.<sup>74</sup> For example, the Pennsylvania Constitution called for annual elections.<sup>75</sup> Since tyranny was only to be feared from the executive, or perhaps an executive council, this design satisfied even radical republican leaders.<sup>76</sup> Although some Revolutionaries recognized the inevitability of factions,<sup>77</sup> the greater virtue of American society was relied upon to avoid anarchy. The prevailing view assumed that factional politics would be kept outside the institutions of government.<sup>78</sup> Even as pessimistic a student of human nature as John Adams<sup>79</sup> “indignantly pointed out, the idea of the public liberty’s being tyrannical was illogical: ‘a democratical despotism is a contradiction in terms.’”<sup>80</sup> Thus, not only could the people be relied upon to place the good of the community over their own personal interest, but also their elected representative would, as Adams put it to James Warren, “know no good, separate from that of his subjects.”<sup>81</sup>

The deliberative process begun in the 1760s drew the colonists slowly, but inexorably, towards independence. Americans, many of whom had emigrated from England to escape civil or ecclesiastical tyranny, were ever vigilant for encroachments on their liberties and rights.<sup>82</sup> As John Dickinson wrote in 1768, the question was “not, what evil *has actually attended* particular measures—but, what evil, in the nature of things, *is likely to attend* them.”<sup>83</sup> In 1775, Edmund Burke echoed this sentiment, noting “that the colonists’ intensive study of law and politics had made them acutely inquisitive and sensitive about their liberties. . . . Americans . . . were anticipating their grievances and resorting to principles even before they actually

74. *Id.* at 165-66.

75. Pa. Const. of 1776, § 9, *reprinted in* 8 Sources and Documents of United States Constitutions 277, 280 (William F. Swindler ed., 1979).

76. For example, Benjamin Franklin, who presided over the assembly which created it, was quite pleased with the Pennsylvania Constitution of 1776. Clinton Rossiter, 1787: The Grand Convention 87 (Mentor Books 1968) (1966).

77. Wood, *supra* note 29, at 59. Madison provides the classic definition of faction: “[A] number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” The Federalist No. 10, at 46 (James Madison) (Clinton Rossiter ed., 1961).

78. Wood, *supra* note 29, at 59.

79. *See infra* text accompanying notes 103-04.

80. Wood, *supra* note 29, at 62-63 (quoting John Adams).

81. *Id.* at 67-68.

82. *See* Bailyn, *supra* note 27, at 83; *see also* Thomas Paine, *Common Sense* (1776), *reprinted in* Thomas Paine Reader 65, 81 (Michael Foot & Isaac Kramnick eds., 1987) (“This new world hath been the asylum for the persecuted lovers of civil and religious liberty from every part of Europe.” (emphasis omitted)).

83. Wood, *supra* note 29, at 5 (emphasis in original) (quoting John Dickinson, *Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies* (1768)).

suffered.”<sup>84</sup> The foresight of the revolutionary leaders was perhaps responsible for the successful drive towards independence, for each new British policy reinforced the tyrannical view of King and Parliament previously argued in pamphlet, newspaper, and speech by the Revolutionaries.<sup>85</sup> The increasing popular opposition to British policy, in part a response to the protests of colonial leaders, led to the Stamp Act Congress in 1765,<sup>86</sup> the First Continental Congress in 1774, the Second Continental Congress in 1775,<sup>87</sup> and finally to the widespread support for independence in 1776.<sup>88</sup>

The ongoing dynamic between local discussion and continental deliberation was designed not only to win over more hesitant members of educated society, but also to inform and convince the general populace—those who would have to take up arms against Britain.<sup>89</sup> The decision-making process on the question of independence was not exercised merely in private letters and diaries, or exclusively in secret meetings of the intellectual and political elite. It took place in pamphlets and newspapers, public speeches and sermons, in town halls and taverns.<sup>90</sup> It was a question, a crisis, which captured the mind of the farmer as well as the statesman. As John Adams argued under the pseudonym “Novanglus,” no popular leader could “persuade a large people, for any length of time together, to think themselves wronged, injured, and oppressed, unless they really were, and saw and felt it to be so.”<sup>91</sup> Only through this searching inquiry did the colonists overcome their customary deference towards England.<sup>92</sup> The American opposition to British policy was a populist movement as much as it was an imperial struggle between thirteen colonial legislatures, and Parliament and the King.

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84. Wood, *supra* note 29, at 4-5.

85. Cf. *id.* at 4 (“It was, said Edmund Randolph, a revolution without an immediate oppression, without a cause depending so much on hasty feeling as theoretic reasoning.” (internal quotations omitted)).

86. See *supra* note 28.

87. See *supra* note 3.

88. See generally 1 *Pamphlets of the American Revolution: 1750-1776* (Bernard Bailyn ed., 1965) (describing major pamphlets of the period and their place in the drive towards independence).

89. “The communication of understanding... lay at the heart of the Revolutionary movement, and its great expressions, embodied in the best of the pamphlets, are consequently expository and explanatory: didactic, systematic, and direct, rather than imaginative and metaphoric.” Bailyn, *supra* note 27, at 19.

90. See *id.* at 19-21 (“The treatises, the sermons, the speeches, the exchanges of letters published as pamphlets—even some of the most personal polemics—all contain elements of this great, transforming debate.”).

91. Wood, *supra* note 29, at 39 (quoting John Adams). In public writings, it was common practice to use pseudonyms to avoid reliance on personal reputation. See Rakove, *supra* note 15, at 136-37. Use of names from classical antiquity, such as “Novanglus” and “Publius” were particularly popular with American eighteenth-century writers. Wood, *supra* note 29, at 49.

92. Wood, *supra* note 29, at 38.

If in 1776 the Revolutionaries were anxious about the prospect of war with the greatest military power of the time, they were confident in their ability to establish governments on the republican ideal made impossible in Europe by corruption and hereditary (and thus arbitrary)<sup>93</sup> distinction.<sup>94</sup> Revolutionary leaders enjoyed broad popular support, including the support of a volunteer army (whose numbers admittedly ebbed and flowed throughout the war, particularly towards the end of 1776).<sup>95</sup> Significantly, the support for independence came from every former colony—the Continental Congress had adopted the Declaration of Independence, and thus a final break with Great Britain, unanimously.<sup>96</sup> It was no accident that the most widely-read work of the period was a compelling and straightforward plea in favor of American independence called *Common Sense*.<sup>97</sup> The Revolutionaries recognized that independence would have been impossible without a popular consensus that included every colony.<sup>98</sup>

### B. *Frailties of Confederacy: The Critical Period from 1776 – 1787*

While the war raged across New Jersey, and up through the South, the Revolutionaries were also establishing state governments and deciding upon a plan of union.<sup>99</sup> The early state constitutions followed a similar pattern of strictly limiting the power of the chief magistrate, or eliminating a magistrate altogether.<sup>100</sup> Even where checks and balances on power were instituted, as in the Virginia Constitution of

93. See *id.* at 78-79 (discussing Whig loathing of political patronage); see also Morgan, *supra* note 30, at 249 (quoting Benjamin Rush as believing there were “natural distinctions of rank in Pennsylvania, as certain . . . as the artificial distinctions of men in Europe”).

94. See Wood, *supra* note 29, at 127-29.

95. See Morison, *supra* note 3, at 228.

96. Edmund Cody Burnett, *The Continental Congress 187* (W.W. Norton & Co. ed. 1964) (1941). New York originally abstained, but subsequently joined in the Declaration on July 15, 1776. *Id.* at 187, 190-91. Though John Dickinson absented himself from Congress rather than sign the Declaration, he still supported his country in the Continental Army and later returned to Congress. *Id.* at 193; Rossiter, *supra* note 76, at 94.

97. Paine, *supra* note 82. An estimated 100,000 copies were sold in 1776 alone. Michael Foot & Isaac Kramnick, *Editor's Introduction* to Thomas Paine Reader, *supra* note 82, at 10. It was immediately translated into French, and became an instant success in Paris. *Id.*

98. See Burnett, *supra* note 96, at 150, 174-75.

99. See Morison, *supra* note 3, at 241-45, 257-61 (describing the military campaign in New Jersey from 1776-1780 and the campaign in the South from 1779-1781); Rossiter, *supra* note 76, at 40 (noting Articles of Confederation proposed in 1777 and finally ratified in 1781); Wood, *supra* note 29, at 132-33 (discussing formation of state constitutions from 1776-1778).

100. Wood, *supra* note 29, at 135-37. Massachusetts, initially operating under its revived Charter of 1691, did not have a governor, though it was understood at the time that the government under the Charter was temporary until a constitution could be drafted and approved. *Id.* at 133.

1776, the legislature controlled the governmental agenda.<sup>101</sup> Thomas Jefferson, who helped draft Virginia's constitution, later conceded that in operation the state's legislators had exceeded the bounds of ordered liberty, and called for a convention to remedy its defects.<sup>102</sup> Revolutionary leaders across the continent shared Jefferson's concerns. To quote John Adams:

The Spirit of Commerce . . . is much to be feared is [sic] incompatible with that purity of Heart, and Greatness of soul which is necessary for an happy Republic. This Same Spirit of Commerce is as rampant in New England as in any Part of the World. . . . While this is the Case, there is great Danger that a Republican Government, would be very factious and turbulent there.<sup>103</sup>

Adams feared "that in every assembly, Members will obtain an Influence, by Noise not sense. By Meanness, not Greatness. By Ignorance not Learning."<sup>104</sup>

The Massachusetts Constitution of 1780, whose principal architect was John Adams,<sup>105</sup> attempted to address the problems which arose under other states' constitutions. Separation of powers was expressly introduced in the Massachusetts Constitution,<sup>106</sup> including tenure and fixed salaries for judges.<sup>107</sup> The executive was strengthened and also given a fixed salary to encourage independence from the legislature.<sup>108</sup> Additionally, the legislature was bicameral, with heightened property ownership requirements for entry to the upper house.<sup>109</sup> These

101. See *id.* at 150-56 (discussing Virginia Constitution and American fears of powerful magistrates in the development of separation of powers).

102. See Thomas Jefferson, *Notes on the State of Virginia* (1787), reprinted in Thomas Jefferson: Writings 123, 235-55 (Merrill D. Peterson ed., 1984). "Ordered liberty" referred to the Whig principle that power and liberty must be balanced for society to prosper. See *supra* notes 27-39, 53-66 and accompanying text.

103. 4 The Adams Papers, *supra* note 42, at 125.

104. Letter from John Adams to James Warren (Apr. 22, 1776), in *id.* at 135, 137.

105. Wood, *supra* note 29, at 568. Adams' pamphlet *Thoughts on Government* was "the most influential work guiding the framers of the new republics." *Id.*

106. Mass. Const. of 1780, pt. I, art. XXX, reprinted in 5 Sources and Documents of United States Constitutions, *supra* note 75, at 92, 96.

[T]he legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

*Id.*

107. Tenure was for the time stated in the judicial commission, but could not extend beyond seven years. Mass. Const. of 1780, pt. II, ch. III, arts. I, III, reprinted in *id.* at 104-05.

108. Mass. Const. of 1780, pt. II, ch. II, § 1, art. XIII, reprinted in *id.* at 103.

109. Mass. Const. of 1780, pt. II, ch. I, § 1, art. I, reprinted in *id.* at 96 (establishing bicameral legislature); Mass. Const. of 1780, pt. II, ch. I, § 2, art. V, reprinted in *id.* at 99 (stating property requirements). Only the richest property owners were qualified for the governorship. Mass. Const. of 1780, pt. II, ch. II, § 1, art. II, reprinted in *id.* at 100 (requiring ownership of a freehold valued at one thousand pounds to qualify).



improvements over earlier constitutions sought to control the factions that had erupted in the lower house, while adding the erudition and experience of the "upper class" to the legislative process.<sup>110</sup> Though the Massachusetts Constitution was deemed the best of the state governmental frameworks, it did not prevent anarchy. Shays' Rebellion in 1787, sparked by heavy taxes and burdensome debt, was a popular uprising in western Massachusetts that "escalated from a concerted effort to close county courts into a military confrontation" between armed farmers and state militia.<sup>111</sup> While the uprising was put down with little violence, it was a clear signal that the political status quo was dangerously unstable.<sup>112</sup> Professor Rakove questioned, as the Revolutionaries must have, "If stable and seemingly well-governed Massachusetts could erupt in popular upheaval, what other state could claim to be more secure?"<sup>113</sup>

Economic instability, scarcity of hard currency and the growing profusion of paper money, closed trade routes (largely due to the British), and high taxes forced upon citizens by even higher debt all contributed to an increase in state action based primarily on the self-interest of a controlling faction.<sup>114</sup> As Clinton Rossiter neatly summarized:

By the middle of the 1780's the unrest in every state had impelled all but the steadiest men in power to act impetuously, all but the luckiest to make mistakes, all but the bravest to turn their backs on hard problems that clamored for attention. Despite official protestations of enduring devotion to the doctrine of the separation of powers, the governments of most states were in the hands of self-willed legislatures. Despite the energetic efforts of the gentry and its political allies, the control of most legislatures fell at one time or another into the hands of a small-farmer class that was chiefly interested in paying off old scores and new debts as speedily as possible.<sup>115</sup>

James Madison, in his "Vices of the Political System of the United States," charged the state governments with seven of his eleven vices.<sup>116</sup> The states were guilty of failing to comply with requisitions of Congress for funding, of violating the Treaty of Paris, of discriminating against the trade of other states, of abridging the liberty

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110. See Morgan, *supra* note 30, at 249-51 (analyzing American attempts to equate wealth with natural merit).

111. Rakove, *supra* note 15, at 33.

112. See Rossiter, *supra* note 76, at 48-49.

113. Rakove, *supra* note 15, at 34.

114. Wood, *supra* note 29, at 403-13.

115. Rossiter, *supra* note 76, at 39-40. Apparently, where the small-farmer class was unable to gain control of the legislature, they resorted to more direct methods of reform, such as Shays' Rebellion in Massachusetts. See *supra* text accompanying notes 111-13.

116. Rossiter, *supra* note 76, at 40.

and property rights of their citizens, of encroaching upon the authority of Congress, and of generally failing to support the Union made “perpetual” by the Articles of Confederation.<sup>117</sup> John Adams seemingly was correct—Americans did in fact have as much virtue as citizens of any nation then existing,<sup>118</sup> which was to say, not much at all. Unless a crisis, such as the British crisis in 1774–1776, convinced them to set aside their interests in support of a common cause, self-interest crept into the operation of these early governments.<sup>119</sup> Democratic despotism, even if it was illogical, as Adams had argued,<sup>120</sup> was not only possible, but was in fact thriving in the uncertainties of the 1780s.<sup>121</sup>

The national scene under the Articles of Confederation was no better, and perhaps even worse. The principal failures of the Articles were the inability of the Confederation Congress to generate revenue without the assistance of the states, and Congress’ powerlessness in foreign affairs to enforce treaty obligations or pay war debts owed to foreign creditors.<sup>122</sup> Failure to abide by the obligations of the Treaty of Paris allowed the British an excuse for retaining their Northwestern forts, a serious impediment to western expansion.<sup>123</sup> It was not simply the problems facing the Confederation that instigated the political crisis of the mid-1780s, but rather the inability of Congress constitutionally to do anything to resolve them.<sup>124</sup>

Initial attempts at reform were unsuccessful. As early as 1781, amendments to the Articles were proposed, but it soon became clear that Rhode Island, if no other state was willing, would block any

117. James Madison, Vices of the Political System of the United States, in 9 The Papers of James Madison 345, 348-57 (Robert A. Rutland et al. eds., 1975) [hereinafter *The Madison Papers*]. Article XIII of the Articles of Confederation states that the “union shall be perpetual.” Articles of Confederation art. XIII, reprinted in Rossiter, *supra* note 76, at 307.

118. See *supra* text accompanying note 71.

119. Cf. Wood, *supra* note 29, at 423-29 (discussing change in American perception of themselves as a virtuous people and the need to compensate for this deficiency).

120. See *supra* text accompanying notes 79-81.

121. “The economic and social instability engendered by the Revolution was finding political expression in the state legislatures at the very time they were larger, more representative, and more powerful than ever before in American history.” Wood, *supra* note 29, at 405.

Americans thus experienced in the 1780’s not merely a crisis of authority—licentiousness leading to anarchy—which was a comprehensible abuse of republican liberty, but also a serious shattering of older ways of examining politics and a fundamental questioning of majority rule that threatened to shake the foundations of their republican experiments.

*Id.* at 411.

122. Rakove *supra* note 15, at 24-28; Rossiter, *supra* note 76, at 37-39.

123. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1115-16 (2000).

124. Rakove, *supra* note 15, at 27.

attempted reform.<sup>125</sup> By 1784, these problems, and the failed attempts to resolve them, generated enough concern that political leaders from several states, including James Madison, Alexander Hamilton and John Dickinson, met in Annapolis to develop a plan of action.<sup>126</sup> The Annapolis Convention called on the Confederation Congress to appoint "commissioners to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union."<sup>127</sup>

Though concern for the continued vitality of the new nation was growing in all parts of the country, many doubted that the situation was truly as bad as the prognosticators were suggesting.<sup>128</sup> A letter in the *South Carolina Gazette and Public Advertiser* challenged the notion of a growing crisis:

In reality . . . though there never was a period in which calamity was so much talked of, I do not believe there ever was a period in which it was so little experienced by the people of this State. If we are undone, we are the most splendidly ruined of any nation in the universe.<sup>129</sup>

Many Americans experienced a period of prosperity in trade and business during the 1780s, and were unaffected by any social upheaval.<sup>130</sup> Even some who were affected considered the next elections as a reasonable remedy.<sup>131</sup> However, even if the social, financial, and political problems of the late-1770s and 1780s were not a crisis calling for a national, constitutional remedy, Washington, Madison, Hamilton, and other leading nationalists refused to view safeguarding the new nation as a purely reactionary process.<sup>132</sup> Many, if not most, of the Federalist leaders (or those who would soon become known as Federalist leaders) were those who in the 1760s and early 1770s protested infringements of their rights before they actually

125. *Id.* at 25.

126. *Id.* at 32-33.

127. The Federalist No. 40, at 215 (James Madison) (Clinton Rossiter ed., 1961) (emphasis omitted) (quoting report of the Annapolis Convention).

128. Wood, *supra* note 29, at 395. Some historians accepted this view of the Critical Period, considering the Federalist movement to be in the nature of a conspiracy of the propertied elite. See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 47-49 (paperback ed. 1961); John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, 55 *Am. Pol. Sci. Rev.* 799, 801 (1961), *reprinted in* *The Formation and Ratification of the Constitution: Major Historical Interpretations* 490, 492 (Kermit L. Hall ed., 1987) (arguing that convincing state ratifying convention delegates that "change was imperative" was the "great achievement" of the Federalists).

129. Wood, *supra* note 29, at 395 (quoting *South Carolina Gazette and Public Advertiser*, May 18-21, 1785).

130. Rossiter, *supra* note 76, at 45.

131. *Id.*

132. *See id.* at 35, 45-46.

suffered.<sup>133</sup> They realized that the nation's short-term problems could prevent it from achieving its long-term potential.<sup>134</sup> The call for a convention to reform the Articles of Confederation was not reached lightly, or in response to petty problems.<sup>135</sup> According to Clinton Rossiter:

Two such gatherings had already taken place in their generation—the Stamp Act Congress in New York in 1765, the Continental Congress in Philadelphia in 1774—and only a powerful sense of misgiving could have forced a third in the face of the localism of many leading politicians, the apathy of most ordinary men, and the inertia built into this as into most political systems.<sup>136</sup>

American political leaders—including John Dickinson and John Rutledge, who had attended both Congresses—recognized, not out of “personal ambition or the hope of gain for state or section,” that another “national deliberation” was needed to achieve what they had envisioned in 1776.<sup>137</sup> The Federalist Revolution had begun.

### *C. Saving America from Itself: The Philadelphia Convention of 1787*

Whatever misgivings some political leaders may have had, Washington caught the mood of most in 1786 when he wrote:

No Morn ever dawned more favourable than ours did—and no day was ever more clouded than the present! Wisdom, [and] good examples are necessary at this time to rescue the political machine from the impending storm.<sup>138</sup>

The delegates to the Philadelphia Convention,<sup>139</sup> the “patriotic sages of America,”<sup>140</sup> met Washington's challenge. Almost every one of the fifty-five delegates to the Convention was a major figure in his state.<sup>141</sup>

133. See *supra* text accompanying notes 82-85.

134. See Rossiter, *supra* note 76, at 45-46.

135. See Wood, *supra* note 29, at 467.

The calling of the Philadelphia Convention in 1787 was the climax of the process of rethinking that had begun with the reformation of the state constitutions in the late seventies and early eighties, a final step taken from the fullest conviction that there was not a better, perhaps no other, which could be adopted in this crisis of our public affairs.

*Id.* (internal quotations omitted).

136. Rossiter, *supra* note 76, at 36.

137. *Id.*

138. Letter from George Washington to James Madison (Nov. 5, 1786), in George Washington: Writings 621, 621 (John Rhodehamel ed., 1997); see also Wood, *supra* note 29, at 471 (“All ‘men of reflection,’ even ‘the most orthodox republicans,’ said Madison, were alarmed by ‘the existing embarrassments and mortal diseases of the Confederacy.’”).

139. The Philadelphia Convention was a national assembly of representatives from each state created to propose changes to the Articles of Confederation. See Rossiter, *supra* note 76, at 47-48.

140. *Supra* text accompanying note 1.

141. “Of all the fifty-five Framers-to-be, only Jacob Broom of Delaware seemed

Many of them, George Washington, Benjamin Franklin, Robert Morris, Robert Livingston, Alexander Hamilton, James Wilson, James Madison, and Charles Pinckney among them, had continental reputations (or world-wide reputations in the case of Washington and Franklin).<sup>142</sup> In addition to serving their states in Congress or the state assemblies, most delegates had served in some capacity in the army or militia during the Revolution.<sup>143</sup> Eight of them signed the Declaration of Independence.<sup>144</sup> Gordon Wood recorded that “[t]he Federalists were astonished at the outpouring in 1787 of influential and respectable people who had earlier remained quiescent.”<sup>145</sup> Edward Carrington wrote to Jefferson, “Men are brought into action who had consigned themselves to an eve of rest.”<sup>146</sup> The public virtue the Revolutionaries had displayed in the previous decade in support of American liberty was rising again in support of American nationalism.

The secrecy rule adopted by the Framers at the opening of the Convention demonstrated their desire for a serious deliberation on the interests of the public good.<sup>147</sup> Secrecy allowed the Framers to debate honestly without fear of misrepresentation in the press.<sup>148</sup> It enhanced their willingness to question what Rossiter called “such sacred cows” as state sovereignty and the “glories of the militia.”<sup>149</sup> By releasing to the public only their finished work, the Framers were able to propose undeveloped solutions and radical changes without

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totally out of place in a gathering of the ‘first characters’ of the land.” Rossiter, *supra* note 76, at 121. Interestingly, he was the only native of Delaware among that state’s delegation. *Id.* at 96. He had been chosen as a delegate to the Annapolis Convention but opted not to attend. *Id.*

142. *Id.* at 121. John Adams later wrote that history would remember the American Revolution as being fought solely by Franklin and Washington: “The essence of the whole will be that *Dr. Franklins* [sic] *electrical Rod, smote the Earth and out sprung General Washington. That Franklin electrified him with his rod—and thence forward these two conducted all the Policy, Negotiations, Legislatures and War.*” Letter from John Adams to Benjamin Rush (Apr. 4, 1790), in *Old Family Letters: Copied from the Originals for Alexander Biddle, Series A*, at 55 (Phila., Lippincott 1892); see also Rossiter, *supra* note 76, at 101.

143. Rossiter, *supra* note 76, at 123-25.

144. *Id.* at 67-121, 124.

145. Wood, *supra* note 29, at 498.

146. *Id.*

147. The rule required “[t]hat nothing spoken in the House be printed, or otherwise published, or communicated without leave.” 1 The Records of the Federal Convention of 1787, at 15 (Max Farrand ed., 1937) (May 29, 1787) [hereinafter *Farrand*]. With the exception of a few minor infractions by the North Carolina delegation and Benjamin Franklin, the Framers strictly adhered to the rule. Rossiter, *supra* note 76, at 143, 286. Franklin permitted his final speech in the Convention to be published. *Id.* at 286. The North Carolina delegation leaked vague information to the governor of their state. *Id.* The Framers did not even break the rule in private letters to their closest friends and allies. *Id.*

148. *Id.* at 142-43.

149. *Id.* at 143.

fearing or pandering to “any gallery save that of posterity, one that usually brings out the best in such men.”<sup>150</sup>

The debate that raged over the summer of 1787 was generally between those with a truly nationalist position, such as Hamilton, Madison and Wilson, and those who more generally sought only a strengthening of the Confederacy, such as Luther Martin, William Paterson and Roger Sherman.<sup>151</sup> The Convention was a meeting of the leaders of a movement in most states for a stronger national government.<sup>152</sup> Significantly, those who would become Antifederalists were left out in the cold.<sup>153</sup> These anti-nationalists would have a chance to defeat the movement’s agenda during the ratification process for, as James Wilson argued on June 16, the Framers were merely proposing to the people and were not deciding anything themselves.<sup>154</sup> Through the Convention they were able to work out their differing views on how the national government should be strengthened and mold them into a single, unanimous proposal.<sup>155</sup> The consensus thus achieved provided a substantial advantage to the Federalists over their opposition.<sup>156</sup> However, few of even the leading Federalists were completely happy with the result.<sup>157</sup>

Nevertheless, Federalists like Wilson, Hamilton, and Madison all advocated strongly in support of the proposed constitution.<sup>158</sup> This

150. *Id.* at 142-43.

151. *Id.* at 49, 131-34.

152. *See id.* at 125.

153. In some cases, this was by choice: Patrick Henry and Richard Henry Lee declined inclusion in the Virginia delegation, and Governor George Clinton of New York decided instead to send Robert Yates and John Lansing as loyal proxies. *Id.* at 80, 108. Examining Clinton’s choice of Lansing and Yates as New York delegates, Clinton Rossiter concluded that they were men “on whom George Clinton could depend for vigilant obstinacy in behalf of New York’s policy of independent anti-nationalism.” *Id.* at 80. Their loyalty to Clinton was probably the only reason Clinton allowed Hamilton to be the third member of the delegation. *See id.*

154. 1 Farrand, *supra* note 147, at 261-62 (June 16, 1787). John Jay also characterized the Constitution as a proposal in *Federalist* No. 2, noting that “this plan is only *recommended*, not imposed.” The *Federalist* No. 2, at 7 (John Jay) (Clinton Rossiter ed., 1961). Madison was in agreement as well. *Id.* No. 40, at 220 (James Madison).

155. *See* Rossiter, *supra* note 76, at 131, 239. Every state delegation voted for the Constitution, but not every state delegate. 2 Farrand, *supra* note 147, at 641-49 (Sept. 17, 1787).

156. Rossiter, *supra* note 76, at 239.

157. Franklin stated in a closing speech that there were “several parts of this constitution which I do not at present approve.” 2 Farrand, *supra* note 147, at 641 (Sept. 17, 1787). Madison complained all summer of certain elements of the Virginia Plan that were removed in the final draft, particularly the elimination of a council of revision and a congressional veto on state laws. Rossiter, *supra* note 76, at 148, 169, 184, 192. For Hamilton, even the Virginia Plan, a far more nationalist document than the Constitution, was not satisfactory. According to Yates’ notes, he described the Virginia Plan as “pork still, with a little change of the sauce.” 1 Farrand, *supra* note 147, at 301 (June 18, 1787) (emphasis omitted).

158. *See, e.g.*, Charles R. Kesler, *Introduction* to *The Federalist Papers*, at xii-xiii

devotion to the Federalist proposal demonstrated a particular kind of public virtue—the sublimation of self-interest and personal opinion to the consensus of the Federalists as a group—that was critical to the successful ratification of the Constitution.<sup>159</sup> Knowing that the compromises agreed to in the Convention were critical to gaining a consensus in all (or at least the necessary nine)<sup>160</sup> states, the Federalists argued in favor of the Constitution with a consistency and energy that the Antifederalists could not match.<sup>161</sup> The Federalist movement was organized across state lines.<sup>162</sup> Crucially, the Constitution had broad support among the engaged citizenry of most states.<sup>163</sup> Rossiter wrote, “[the Federalists] numbered among their leaders an overpowering majority of the word-makers—preachers, teachers, pamphleteers, editors, and lawyers—of republican America.”<sup>164</sup> They also had the support of many political leaders, most notably George Washington.<sup>165</sup> These organizational advantages gave the Federalists one weapon to use in their push for the Convention, and then for ratification of the Constitution: the “effective mobilization of public opinion.”<sup>166</sup>

The Federalists utilized this weapon to great effect. Hamilton began his public argument in support of the Constitution with a plea that the people’s decision “be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good.”<sup>167</sup> Though Hamilton was forced to admit that “this is a thing more ardently to be wished than seriously to be expected,”<sup>168</sup> John Jay hoped that “[e]xperience on a former occasion” would encourage the people to make “those calm and mature inquiries and reflections which must ever precede the

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(1999) (Clinton Rossiter ed., 1961) (“So similar, then, were [Hamilton’s and Madison’s] arguments and writing style in *The Federalist* that their efforts to disguise themselves as Publius must be judged an extraordinary success.”); James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 *Documentary History, supra* note 1, at 167-72.

159. See *supra* notes 155-58 and accompanying text.

160. See U.S. Const. art. VII; see *supra* notes 155-56 and accompanying text.

161. See Wood, *supra* note 29, at 485-86 (describing the disability of the Antifederalists as a group).

162. A critical organizational tool was, ironically, the Confederation Congress (thirty-nine of the fifty-five delegates to the Convention were, or had been, members of Congress). Roche, *supra* note 128, at 492. “[M]embership in the Congress under the Articles of Confederation worked to establish a continental frame of reference, that a Congressman from Pennsylvania and one from South Carolina would share a universe of discourse which provided them with a conceptual common denominator *vis à vis* their respective state legislatures.” *Id.*

163. See Rossiter, *supra* note 76, at 240-41; Wood, *supra* note 29, at 486-87.

164. Rossiter, *supra* note 76, at 240-41.

165. Roche, *supra* note 128, at 492 (describing Washington as one of Federalists’ “great assets”).

166. *Id.* at 491.

167. *The Federalist* No. 1, at 1 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

168. *Id.*

formation of a wise and well-balanced government for a free people."<sup>169</sup> Hamilton and Jay were reminding the people that the "crisis" to which they had come, and which would determine "nothing less than the existence of the UNION,"<sup>170</sup> was not unlike "[the] well-grounded apprehensions of imminent danger [that] induced the people of America to form the memorable Congress of 1774."<sup>171</sup> Here was an attempt to directly link the Federalist proposal to the Revolution. The Continental Congress had "recommended certain measures to their constituents," as the Federalists were doing, and "the event [had] proved their wisdom."<sup>172</sup> Responding to the Revolutionaries' proposals, "the great majority of the people reasoned and decided judiciously," despite attempts by interested men to turn them towards "objects which did not correspond with the public good."<sup>173</sup> "Publius" was imploring the people to respond with virtue and patriotism to, and thus in favor of, the Federalist proposal.

Hamilton's and Jay's hope for public virtue in the people stands counterpoised to Madison's description of faction. In *Federalist* Nos. 1 and 2 the people were asked to rise above self-interest and state prejudices to deliberate on the greater good of the nation.<sup>174</sup> In *Federalist* No. 10, Madison explained that interests contrary to the common good cannot be avoided, and in fact should be embraced in the national government in order to balance them against opposing interests.<sup>175</sup> The three authors' expectations of the people are not contradictory, but rather layered. The Constitution controls faction in order to prevent a recurrence of the majoritarian tyrannies of the Critical Period.<sup>176</sup> But Madison attributes the vices of faction only to the "public administration," not to "[t]he valuable improvements made by the American constitutions."<sup>177</sup> Much as the Revolutionaries continued to value the English constitution as they revolted against the British administration,<sup>178</sup> the Federalists sought to control the ordinary practice of government without restricting the people in the formation of their government.<sup>179</sup> Faction is not a danger during

169. *Id.* No. 2, at 7, 8 (John Jay).

170. *Id.* No. 1, at 1 (Alexander Hamilton).

171. *Id.* No. 2, at 8 (John Jay).

172. *Id.*

173. *Id.*

174. *Id.* No. 1 (Alexander Hamilton), No. 2 (John Jay).

175. *Id.* No. 10 (James Madison).

176. See *supra* Part I.B (describing problems of late 1770s–1780s). John Quincy Adams referred to the 1780s as "'this critical period'" through which America was "'groaning under the intolerable burden of . . . accumulated evils.'" Wood, *supra* note 29, at 393.

177. *The Federalist* No. 10, at 45, 46 (James Madison) (Clinton Rossiter ed., 1961).

178. See *supra* text accompanying notes 38–52.

179. See 1 Ackerman, *supra* note 10, at 190–91 (analyzing *The Federalist Papers* to conclude that "the system ultimately relies on the People's" ability to transcend faction during a crisis).



constitutional crises because many private interests will be harmonized with the public good, and when combined with the public virtue which generally rises in response to crises, the "great majority" will "reason[] and decide[] judiciously."<sup>180</sup>

The delegates to the "national deliberation," having decided unanimously upon the Constitution, began the campaign to increase their support in every state in order to have the best advantage in the elections for the ratifying conventions.<sup>181</sup> They generated enough support prior to most state conventions to win by substantial majorities, and, except in North Carolina, to prevail in every state.<sup>182</sup> Moreover, not only did they win a substantial consensus, they required such a consensus for constitutional change. Article VII of the Constitution required the approval of nine states—three-fourths of the states, not including Rhode Island (and no one wanted to)<sup>183</sup>—before the Constitution would become the supreme law.<sup>184</sup> Significantly, the Federalists expected future constitutional changes to be implemented according to their example. Article V requires a three-fourths majority of states to ratify, as does Article VII.<sup>185</sup> Additionally, Article V demands a two-thirds majority of Congress, or two-thirds of the states, to propose amendments.<sup>186</sup> Though the Framers did not need supermajorities to propose the Philadelphia Convention, the proposal function follows their example in the

180. See The Federalist No. 2, at 8 (John Jay) (Clinton Rossiter ed., 1961).

181. See Rossiter, *supra* note 76, at 240.

182. Delaware, New Jersey and Georgia were unanimous, while the Constitution gained a 76% majority in Connecticut. Pennsylvania was the first state to have a hard-fought contest in a convention, but still approved it by a two-thirds majority. Massachusetts was won by a narrow 53%, but still impressive considering a majority of the convention delegates had originally opposed the Constitution. New Hampshire followed suit with another narrow 55% victory for the Federalists, but only after adjourning from February to June. The Maryland convention, which was dominated by Federalists, ratified next by a whopping 85%—the voters of Maryland were overwhelmingly in favor of the Constitution, even if venerable Samuel Chase was not. South Carolina followed suit in May of 1788, ratifying with a substantial two-thirds majority. Virginia was the ninth state to ratify (by a mere 53%), and the hardest won state. Another bare majority approved the Constitution in New York, with lines drawn, as they are today, between New York City and the upstate counties. Only North Carolina voted against the Constitution, and Rhode Island "refused even to call a convention." Both states did eventually join the Union, North Carolina in 1789 and Rhode Island in 1790. *Id.* at 246-54.

183. The Massachusetts Centinel reported on May 19, 1787, that Rhode Island's absence from the Convention was "a circumstance far *more joyous than grievous*." Rossiter, *supra* note 76, at 75-76 & n.11 (emphasis in original) (summarizing the feeling of most Federalists).

184. U.S. Const. art. VII (stating ratification of nine states required "for the Establishment of this Constitution").

185. *Id.* art. V. The nine states needed to ratify the Constitution were three-fourths of the then-existing states, excluding Rhode Island.

186. *Id.* (stating that Congress may propose amendments when two-thirds of both Houses agree or that Congress must call a convention upon application of two-thirds of the state legislatures).

Annapolis Convention<sup>187</sup> and in the final authorization from the Confederation Congress.<sup>188</sup> As Rossiter argued:

The Framers had no argument with the doctrine of majority rule; they simply wished to insist, as their document still insists today, that the majority be clear-cut and cool-headed on all occasions, *extraordinary on extraordinary occasions*, and powerless on occasions when the consciences of men were at issue.<sup>189</sup>

This two-tiered constitutionalism—a “dualist democracy” in Professor Ackerman’s words<sup>190</sup>—allowed the Federalists to place fundamental law in the hands of the people, in whom the Founders believed the “supreme power resides,”<sup>191</sup> while simultaneously providing enhanced power to a less democratic national government.<sup>192</sup>

In the twenty-five years from Revolution to Constitution, two crises shaped the nature of American government. Independence from Great Britain came only when it became clear to the Revolutionaries that there was no other way to secure their fundamental liberty from exertions of governmental power.<sup>193</sup> The early enthusiasm for American civic virtue was tempered by the realization during the Critical Period that it was the British crisis that had elicited the selfless response the Revolutionaries had admired and relied on in the early state constitutions.<sup>194</sup> The Founders sought drastic constitutional reform only after it became clear that the Confederation Congress was powerless to remedy the problems caused by factional politics in the states.<sup>195</sup> The Federalist solution was to place greater power in the hands of the national government, where factions would be more likely to counteract each other, while simultaneously limiting the extent of that power.<sup>196</sup> The Founders proceeded to adopt the Constitution through deliberative assemblies that represented the people in their capacity as sovereigns, and at each stage of the ratification process the Federalists promoted the proposed

187. The Annapolis Convention was originally an invitation to all the states to discuss the “trade of the United States,” but only five states attended. Morison, *supra* note 3, at 304. It published a report that called for a meeting of all the states to propose changes and improvements in the Articles of Confederation. *Id.* at 305.

188. Only five states attended the Annapolis Convention—Delaware, New Jersey, New York, Pennsylvania, and Virginia. Rossiter, *supra* note 76, at 46. Seven states—Delaware, Georgia, New Hampshire, New Jersey, North Carolina, Pennsylvania, and Virginia—named delegations to the Convention before the Confederation Congress had even authorized it. *Id.* at 48. Although close, the two-thirds provision would have required eight or nine states, depending on whether Rhode Island was included.

189. *Id.* at 233 (emphasis added).

190. 1 Ackerman, *supra* note 10, at 3.

191. 2 Documentary History, *supra* note 1, at 383 (Nov. 28, 1787) (statement of James Wilson).

192. See Flaherty, *supra* note 7, at 548.

193. *Supra* Part I.A.

194. See *supra* notes 67-81, 102-21 and accompanying text.

195. See *supra* notes 114-37 and accompanying text.

196. See *supra* notes 151-57, 175-79 and accompanying text.

Constitution consistently with the consensus understanding reached in the Philadelphia Convention.<sup>197</sup> To assure that the nation would remain united under the new Constitution, the Federalists required a substantial consensus within the Convention and among the states before it was adopted.<sup>198</sup>

This governmental design, and its impact on the process of higher lawmaking, is the subject of Part II. The history of the Founding has led constitutional scholars, particularly Bruce Ackerman, to view higher lawmaking as a separate, distinct process from ordinary lawmaking. The reliance on popular acclimation of the Constitution has led Ackerman to conclude that popular movements can instigate constitutional transformation. Other commentators have noted that politicians overshadow the role of the citizenry in Ackerman's theory. After discussing Ackerman's theory, Part II considers these criticisms in light of the history outlined in Part I.

## II. DUALIST DEMOCRACY & THE NATURAL ARISTOCRACY

Part I described the problems the Founders reacted to, and how they sought to correct them. Realizing that under normal circumstances elected representatives could not be trusted to act in the public interest, the Founders placed fundamental laws beyond the reach of the ordinary legislative process.<sup>199</sup> Ackerman's dualist democracy best describes this system. This part analyzes Ackerman's theory of higher lawmaking within the dualist democracy, and in particular notes that it fails fully to consider the Founders' expectation that, even though the People ultimately make constitutional decisions in their collective capacity as sovereigns, a select body of citizens, the natural aristocracy, would intervene in the decision-making process as leaders of the popular movements Ackerman describes.

According to Ackerman, "a dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government."<sup>200</sup> The dualist democracy is a two-tiered system of government. On the first, or higher-lawmaking tier, the People express the fundamental law that regulates the power of government.<sup>201</sup> On the second, or ordinary lawmaking tier, representatives of the people conduct the day-to-day business of the nation, but only to the extent permitted by the first tier.<sup>202</sup> The dualist democracy is designed to guarantee liberty by allowing only "We the People", as sovereigns, to limit fundamental public or private

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197. See *supra* notes 151-66, 181-89 and accompanying text.

198. See *supra* notes 181-89 and accompanying text.

199. See *supra* notes 167-91 and accompanying text.

200. 1 Ackerman, *supra* note 10, at 6.

201. *Id.*

202. *Id.*

liberty.<sup>203</sup> Madison distinguished the United States Constitution from its English counterpart by describing the latter as a “charter[] of liberty . . . granted by power,” and the former as a “charter[] of power . . . granted by liberty.”<sup>204</sup> Rather than a King granting rights to his people, Americans, who retained all rights as sovereigns, granted power to their representatives in government. The People’s representatives could only address issues delegated to them by the People, and the framework of the Constitution, the People’s higher law, would restrict the methods they used. Therefore, by restricting access to the higher-lawmaking tier, the mandates of the People would be secure from corruption, tyrannical majorities, or monarchical executives.

The ordinary lawmaking tier was designed to encourage the deliberation and attention to the public good that is required in higher lawmaking. Encouragement was necessary because the Founders viewed decision-making based on self-interest as inevitable.<sup>205</sup> Madison’s concern that “our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority,”<sup>206</sup> generated his desire to obviate the unfortunate evils of faction. The state governments during the Critical Period demonstrated that factions could not be eliminated from government, but by incorporating as many factions as possible within the national government the possibility of any one gaining control would be reduced.<sup>207</sup> The size of the United States would allow a multiplicity of interests to enter the national government. The struggle between these interests would preclude the passage of any legislation not in the national interest, because “[t]he differences of opinion, and the jarring of parties . . . often promote deliberation and circumspection, and serve to check excesses in the majority.”<sup>208</sup> The separation of powers among the three branches, including differing modes of election to office, provided each branch with the political independence needed to prevent power from consolidating in one branch.

To further control abuses of power, each branch of government retained a “partial agency” in the others, in order to act as a check

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203. See 2 Bruce Ackerman, “We the People”: Transformations 6 (1998).

204. Bailyn, *supra* note 27, at 55.

205. See Geoffrey R. Stone et al., *Constitutional Law* 12 (2d ed. 1991) (stating that civic virtue “would be unable to overcome the natural self-interest of men and women, even in their capacity as political actors”).

206. The Federalist No. 10, at 45 (James Madison) (Clinton Rossiter ed., 1961).

207. Stone, *supra* note 205, at 13; see also *supra* notes 175-80 and accompanying text.

208. The Federalist No. 70, at 394-95 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

upon them.<sup>209</sup> The legislative branch, which at the time was considered the most powerful and dangerous part of government,<sup>210</sup> was split into an upper and lower house.<sup>211</sup> The latter reflects the current will of the people, while the former ameliorates popular zeal with experience and a longer-range perspective.<sup>212</sup> The Constitution empowered the executive with a qualified veto on all legislative acts, which the Congress could override by a supermajority.<sup>213</sup> The Senate was granted a veto on Presidential appointments and on treaties.<sup>214</sup> Tyrannical exertions of power by the President would lead to his impeachment and removal from office.<sup>215</sup>

Wary of distant power, the People granted the federal government only those powers enumerated in the Constitution, retaining the remainder of their sovereignty, or granting it to the states.<sup>216</sup> In this way, public citizens furthest from the public would be precluded from consolidating all power in themselves. Federalism was a principal safeguard of liberty.<sup>217</sup> The federal design gave the national government the power to rein the states in from their abuses under the Articles of Confederation, while leaving the states intact as sentinels of the people's welfare.<sup>218</sup> While federalism principles are

209. *Id.* No. 47, at 270 (James Madison) (emphasis omitted).

210. *Id.* No. 48, at 278 (James Madison).

211. U.S. Const. art. I, § 1 ("All legislative Powers . . . shall be vested in a Congress . . . which shall consist of a Senate and a House of Representatives.").

212. The Federalist No. 62 (James Madison) (discussing value of the Senate).

213. This power is contained in the Presentment Clause, which states:

Every Bill . . . shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . . If after . . . Reconsideration two thirds of that House [which originated it] shall agree to pass the Bill, it shall be sent . . . to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

U.S. Const. art. I, § 7.

214. *Id.* art. II, § 2 (requiring "two thirds of the Senators present" to concur in treaties and consent of simple majority for all appointments of "Officers of the United States").

215. *Id.* art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

216. While this was implicit in the original Constitution, see James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 Documentary History, *supra* note 1, at 167, it was made explicit in 1791 through the Bill of Rights. U.S. Const. amend. X.

217. In fact, it was a primary argument against the necessity of a Bill of Rights. Edmund Pendleton argued in the Virginia Convention that the states would preserve, through state bills of rights, "Our dearest rights" of life, liberty and property. See 10 Documentary History, *supra* note 1, at 1199 (June 12, 1788). The federal government's enumerated powers would not reach these subjects. *Id.*

218. On April 9, 1788, the Virginia Independent Chronicle published a lengthy essay by "A Freeholder" in which he argued: "And as to the power of our [state] assemblies being abridged, he will confess that their power to do every possible good remains, and the power of doing mischief alone is taken from them." 9 *id.* at 725. During the Virginia Convention Edmund Pendleton argued that "Our dearest rights—life, liberty, and property, as Virginians, are still in the hands of our State

present in Article V, they are notably muted. A national assembly, either Congress or a constitutional convention, proposes constitutional reform.<sup>219</sup> The role of the states is merely to accept or refuse the proposal.<sup>220</sup>

Perhaps the most innovative counter to faction was the establishment of an independent federal judiciary empowered to review and strike down acts of the political branches that were deemed contrary to the People's will.<sup>221</sup> Judicial review was innovative because it granted to a handful of unelected judges the power to invalidate actions of democratically elected representatives.<sup>222</sup> It was necessary in a dualist democracy because, as

Legislature." 10 *id.* at 1199 (June 12, 1788). Arguing that the Constitution would not consolidate the states, George Nicholas stated,

Every new power given to Congress is taken from the State Legislatures, they will be therefore very watchful over them, for should they exercise any power not vested in them, it will be an usurpation of the rights of the different State Legislatures, who would sound the alarm to the people. . . . Should a struggle actually ensue . . . it would terminate to the disadvantage of the general Government, as Congress would be the object of the fears, and the State Legislature the object of the affection of the people.

9 *id.* at 926-27 (June 4, 1788).

219. U.S. Const. art. V (stating that "Congress . . . shall propose Amendments . . . or . . . shall call a Convention for proposing Amendments").

220. *Id.* (granting power to the states, upon a two-thirds majority, to apply to Congress for a convention and power to ratify proposed amendments, upon a three-fourths majority). This is precisely the same role the states played in ratifying the Constitution.

221. "Limitations" on the legislative authority, wrote Hamilton, "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." The Federalist No. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He went on to write, "If there should happen to be an irreconcilable variance between [an act and the Constitution], that which has the superior obligation and validity ought . . . to be preferred; or, in other words . . . the intention of the people [ought to be preferred] to the intention of their agents." *Id.* at 435. James Wilson agreed, arguing in Pennsylvania that:

[I]t is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when . . . the judges . . . consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.

2 Documentary History, *supra* note 1, at 450-51 (Dec. 1, 1787). Oliver Ellsworth argued similarly in the Connecticut Convention: "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and . . . the national judges . . . will declare it to be void." 3 *id.* at 553 (Jan. 7, 1788). Judicial review was "confirmed" by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The ratification debates illustrate that judicial review was an inherent part of the Federalist proposal, and not a creation of an "activist" Chief Justice.

222. One scholar has noted:

This ultimate power [of judicial review] is radically inconsistent with the unwritten English constitution, which vested Parliament with ultimate authority to enforce constitutional principles. Likewise, the power is at first

Ackerman pointed out, the “President and Congress normally do not have the *considered* support of the American people in assaulting the principles established by past successes in constitutional politics.”<sup>223</sup> Absent such a mandate, the Supreme Court must strike down the act of the President or Congress, and thereby protect those past successes of “We the People” embodied in the Constitution.<sup>224</sup> Even considering this potentially vast power, the judiciary was the “least dangerous” branch in Hamilton’s view,<sup>225</sup> because of “its total incapacity to support its usurpations by force.”<sup>226</sup>

Ackerman admits that there is a downside to the Court’s role in the dualist democracy, stating, “[t]he good news about the Court is that it is interpreting the constitutional principles affirmed by the American people at times when their political attention and energy was most focused on such matters; the bad news is that the Americans who made these considered constitutional judgments are dead.”<sup>227</sup> During periods of ordinary lawmaking elected representatives impose their will on the people—through higher taxes, penalties for certain conduct, restrictions on trade and business, and so forth—because the people do not have time to concern themselves with these issues on a daily basis.<sup>228</sup> As Ackerman puts it, the simple truth is that “during normal politics, the People simply do not exist; they can only be represented by ‘stand-ins.’”<sup>229</sup>

To the extent that Article V governs the higher-lawmaking tier, the dualist democracy is not particularly controversial.<sup>230</sup> The controversy begins, however, with the question of whether the Founders proclaimed the Article V amendment procedure to be the *only* method by which the People could change their higher law.<sup>231</sup> While

glance inconsistent with the theory of government prevalent in the late eighteenth century, which saw the representative legislative branch as the ultimate guarantor of constitutional government.

William R. Casto, *The Supreme Court in the Early Republic* 214 (1995).

223. 1 Ackerman, *supra* note 10, at 262 (emphasis in original).

224. *Id.* at 262-63.

225. *The Federalist* No. 78, at 433-34 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

226. *Id.* No. 81, at 453 (Alexander Hamilton).

227. 1 Ackerman, *supra* note 10, at 263.

228. “For most citizens, the benefits of political participation do not exceed the costs. Hence, it would be ‘irrational’ for them to engage in political action.” James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. Pa. L. Rev. 287, 291 (1990) (describing public choice theory in political participation).

229. 1 Ackerman, *supra* note 10, at 263.

230. See Kramer, *What’s A Constitution For Anyway?*, *supra* note 24, at 886 n.5 (stating that dualist concept of lawmaking “has been a universally accepted truism throughout American history”). Ackerman does discuss two other schools of thought he terms “monistic democracy” and “rights foundationalists.” 1 Ackerman, *supra* note 10, at 7-16.

231. Compare 1 Ackerman, *supra* note 10 (arguing a populist theory of constitutional transformation outside Article V based on popular movements creating

the answer to this question is beyond the scope of this Note, it does stress one point in the debate. The doctrine of *expressio unius est exclusio alterius*<sup>232</sup> seems, in this case, to be inapplicable because it requires the People to accept *one* method of fundamental change, which is inconsistent with the concept of popular sovereignty.<sup>233</sup> If “We the People”—in our collective capacity as sovereigns—today can be bound by “We the People” two hundred years ago, how can “We the People” still be sovereign?

As Ackerman and others have argued, an exclusive view of Article V is inconsistent with the Founding history.<sup>234</sup> The Founders themselves refused to be curtailed by a prior expression of constitutional procedure.<sup>235</sup> Article XIII of the Articles of Confederation required the approval of every state in order to amend.<sup>236</sup> The Framers readily admitted that they violated this mandate in drafting the ratification procedure in Article VII of the Constitution.<sup>237</sup> As noted above, the Framers, in drafting the Article V amendment procedure, generally followed the process they had used to draft and ratify the Constitution.<sup>238</sup> Notably, therefore, the

interbranch struggle in federal government); and 2 Ackerman, *supra* note 203 (applying theory to Reconstruction and New Deal); and Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum. L. Rev. 457 (1994) (advocating constitutional amendment by simple majorities of the people), with Henry Paul Monaghan, “We the People”[s], *Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121 (1996) (rejecting Amar’s historical justification for amendment outside Article V on federalism grounds).

232. “A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” Black’s Law Dictionary 602 (7th ed. 1999).

233. Ackerman discusses this doctrine as well. 2 Ackerman, *supra* note 203, at 75-77.

234. See, e.g., *id.* at 71-81; Amar, *supra* note 231, at 458-61.

235. See 1 Ackerman, *supra* note 10, at 167-68. But see Stephen Markman, *The Amendment Process of Article V: A Microcosm of the Constitution*, 12 Harv. J.L. & Pub. Pol’y 113, 115 (1989) (“It is logical and persuasive to argue that the Framers of the Constitution intended a single method of altering the document, and . . . also [that] a positive case [can] be made for the proposition that Article V is the exclusive method of amendment . . .”) (arguing that judicial interpretation cannot lead to constitutional amendment).

236. Articles of Confederation art. XIII, reprinted in Rossiter, *supra* note 76, at 301, 307 (“[N]or shall any alteration at any time hereafter be made in any of [the Articles]; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.”).

237. The Federalist No. 40 (James Madison). During the Convention, Edmund Randolph simply argued that “[t]here are certainly reasons of a peculiar nature where the ordinary cautions must be dispensed with.” 1 Farrand, *supra* note 147, at 255 (June 16, 1787). The call for a convention in Congress limited the scope of the Convention’s authority to “the sole and express purpose of revising the Articles of Confederation,” and required its proposals to be agreed to by Congress in addition to the states. Rossiter, *supra* note 76, at 48. These instructions clearly implicated the amendment procedures of Article XIII. 1 Ackerman, *supra* note 10, at 41.

238. See *supra* notes 183-89 and accompanying text.



Framers themselves considered “We the People” unrestrained by textual limitations.

Bruce Ackerman suggests one theory of higher lawmaking outside the confines of Article V.<sup>239</sup> Ackerman proposes a five-stage process—signaling, proposing, triggering, ratifying, and consolidating—through which populist movements achieve constitutional change.<sup>240</sup> When a movement has garnered sufficiently broad and deep support among the citizenry, it gains a constitutional “signal” and thereby earns the constitutional authority to place its reform agenda at the center of sustained public scrutiny.<sup>241</sup> Ackerman’s primary modern signal is the Presidency, but at the Founding was the Philadelphia Convention.<sup>242</sup> In the proposing phase, the higher lawmaking system encourages the movement to “focus its rhetoric into a series of more or less operational proposals for constitutional reform.”<sup>243</sup> These proposals confront opposition organizing in support of the present, unchanged Constitution.<sup>244</sup> The institutions opposing constitutional reform threaten the movement’s ability to succeed through textual procedures.<sup>245</sup> This institutional struggle forces the movement to bypass the amendment procedure, relying on popular support to legitimate its “illegal” method.<sup>246</sup> Continued popular deliberation and scrutiny, along with further promotion by reform leaders, forces the intransigent institutions to acquiesce to the constitutional reform.<sup>247</sup> After this period of

239. See 1 Ackerman, *supra* note 10, at 266-94.

240. 2 Ackerman, *supra* note 203, at 66. This five-stage process is a modification of Ackerman’s original theory, which outlined a four-stage process: signaling, proposing, mobilized deliberation, and codification. 1 Ackerman, *supra* note 10, at 266-67. The underlying theory is essentially the same.

241. 1 Ackerman, *supra* note 10, at 272-75. Ackerman defines the depth of public involvement needed for higher lawmaking as equal to the consideration given to important personal decisions, such as buying a home. *Id.* at 272-73. Breadth refers to the extent of public support a constitutional proposal receives, which Ackerman assumes must be at least twenty percent of private *citizens* and thirty-one percent of *private citizens*. *Id.* at 274-75. Ackerman examines the varying degrees of public engagement through the difference between *private citizens*—those citizens concerned with the public good but rarely making an effort to deliberate carefully, and *private citizens*—those citizens who make informed judgments about the public good. *Id.* at 230-31, 236-43. He suggests two extremes as well that should be distinguished. The “perfect privatist” considers the public interest as equivalent to self-interest. *Id.* at 233-34. The public citizen looks “upon citizenship as a higher calling, the source of the deepest values to which men and women can ordinarily aspire.” *Id.* at 232. Ackerman assumes that a majority of the national population consists of *private citizens*. *Id.* at 243.

242. *Id.* at 278; 2 Ackerman, *supra* note 203, at 39.

243. 1 Ackerman, *supra* note 10, at 266.

244. *Id.* at 266-67.

245. *Id.*

246. See 2 Ackerman, *supra* note 203, at 49-50. The Federalists anticipated the opposition of state legislatures to the Constitution, and in it included a new ratification procedure, Article VII. *Id.*

247. *Id.* (arguing that although the Federalists sought to circumvent state

sustained deliberation, the movement emerges from the ratification process with even deeper and broader support, and moves to consolidate its constitutional transformation by persuading the remaining dissenters to accept the legality of the change.<sup>248</sup>

Ackerman's theory has its historical foundations in Federalist constitutional theory—best enunciated in the *Federalist Papers*.<sup>249</sup> As precedent for his theory of constitutional amendment outside of Article V, he uses the Article VII ratification procedure used to adopt the Constitution, which flagrantly breached the requirements of the Articles of Confederation.<sup>250</sup> He then adds the irregularities inherent in the ratification of the Thirteenth and Fourteenth Amendments<sup>251</sup> to support his theory for legitimizing the constitutional transformation—without any pretext of written amendments—that occurred during the New Deal.<sup>252</sup> According to Ackerman, understanding the modern Constitution requires an interpretive synthesis of the textual and non-textual changes made during the three “constitutional moments” of American history: Founding, Reconstruction, and New Deal.<sup>253</sup>

A dualist democratic theory of higher lawmaking without written amendments presupposes the possibility of capturing the intent and purpose of “We the People” in order to understand the transformed Constitution. In constructing and applying his theory, Ackerman turns to the documentary record of the debates, speeches, and actions of the political actors and engaged citizens, whom Ackerman dubs “public citizens,” involved in the constitutional struggle.<sup>254</sup> This assumes that there is no difference between the statements of public citizens and the intent of the People.

Professor Ackerman's theory has been criticized for failing to address this point. Professor William E. Forbath wrote, “Ackerman asserts rather than demonstrates an equivalence between the outlooks of reform elites and those of popular movements. The latter are the seedbed of new constitutional visions in Ackerman's theory, yet we

legislatures through the use of state ratifying conventions they still had to persuade state legislatures to call for conventions).

248. *Id.* at 64-65 (pointing to final consolidation of the new Constitution when North Carolina and Rhode Island ratified in 1789 and 1790, respectively).

249. 1 Ackerman, *supra* note 10, at 165-99.

250. 2 Ackerman, *supra* note 203, at 71-85.

251. For example, Southern states were not permitted to send delegates to Congress until their state legislatures had adopted the Fourteenth Amendment. *Id.* at 110-11. This coercive ratification procedure “made hash of Article Five.” *Id.* at 111.

252. 1 Ackerman, *supra* note 10, at 47-50.

253. *See id.* at 132.

254. Ackerman describes public citizens as “high-minded men and women who disdain high salaries to work eighty-hour weeks in crummy offices in Washington and many other places across the nation.” *Id.* at 233. They view “citizenship as a higher calling, the source of the deepest values to which men and women can ordinarily aspire.” *Id.* at 232. This Note defines public citizens in essentially the same way, though Ackerman focuses more on those outside elected office. *Id.* (citing Ralph Nader as example).

never glimpse them or their visions in his narratives."<sup>255</sup> Even Ackerman concedes "that the voices of ordinary men and women are oddly muffled in [his] book."<sup>256</sup>

This lack of focus on the populist aspect of the constitutional movement is understandable since once the movement reaches the signaling phase, Ackerman's focus shifts entirely to the institutional struggle between the President, Congress and the Supreme Court.<sup>257</sup> In this struggle, public citizens, the actors on Ackerman's constitutional political stage, merely represent the institutional offices they inhabit: "I am not interested in the hidden wellsprings of their private motives, but in the constitutional meaning of their public actions."<sup>258</sup> Yet if, as Ackerman explains, "our normally elected representatives are only 'stand-ins' for the People and should not be generally allowed to suppose that they speak for *the People themselves*,"<sup>259</sup> there must be some criteria that public citizens must meet in order to gain access to the higher-lawmaking tier, and legitimately claim to be spokespersons of the People.

The background history developed in Part I demonstrates that the Founders self-consciously expected and desired public virtue and deliberation from themselves and their peers.<sup>260</sup> The Revolutionaries had based the state constitutions on the expectation of public virtue in Americans, an expectation the Framers recognized as unsound except during periods of crisis such as 1774-1776 and 1787-1788.<sup>261</sup> The proposal and ratification process required repeated deliberation on the principles embodied in the Constitution by multiple assemblies of public citizens.<sup>262</sup> It also reveals that they actively sought, both in Philadelphia and from among the state ratifying conventions, a consensus on the proposed constitutional changes.<sup>263</sup> They further recognized that a political elite would be required to act on behalf of the People, even as they adhered to the concept of popular sovereignty.<sup>264</sup> Writing to Edmund Randolph, Madison stated:

255. Forbath, *supra* note 16, at 1923.

256. Bruce Ackerman, *Revolution on a Human Scale*, 108 Yale L.J. 2279, 2292 (1999).

257. 2 Ackerman, *supra* note 203, at 20-21 (describing basic process of constitutional change and including popular movements only through the "electoral mandate").

258. *Id.* at 343 (arguing that the personal motives behind Justices Hughes' and Roberts' switch from opposition to support of New Deal legislation is irrelevant).

259. 1 Ackerman, *supra* note 10, at 236.

260. See *supra* notes 53-81, 138, 158-73 and accompanying text.

261. See *supra* notes 72-81, 99-121 and accompanying text.

262. See *supra* notes 147-73 and accompanying text; *infra* text accompanying note 341; see also 2 Ackerman, *supra* note 203, at 57-64 (discussing ratification strategies of Federalists and Antifederalists); Rossiter, *supra* note 76, at 256-57.

263. See *supra* notes 156-66, 181-84.

264. See Markman, *supra* note 235, at 115-16 (noting state ratification of the Constitution and amendments gained only through state legislatures or conventions, not through popular referendum).

Whatever respect may be due to the rights of private judgment, and no man feels more of it than I do, there can be no doubt that there are subjects to which the capacities of the bulk of mankind are unequal, and on which they must and will be governed by those with whom they happen to have acquaintance and confidence. The proposed Constitution is of this description. The great body of those who are both for & against it, must follow the judgment of others not their own. Had the Constitution been framed & recommended by an obscure individual, instead of a body possessing public respect & confidence, there can not be a doubt, that altho' it would have stood in the identical words, it would have commanded little attention from most of those who now admire its wisdom. . . . I infer from these considerations that if a Government be ever adopted in America, it must result from a fortunate coincidence of leading opinions, and a general confidence of the people in those who may recommend it.<sup>265</sup>

Professor Rakove uses this statement to argue that "it takes some stretching of the political imagination to understand how Madison's sentiments can be reconciled with" Ackerman's appeal to the people for constitutional change.<sup>266</sup> Madison seems to confirm a skeptical view of a "recurrence to the people" in *Federalist* Nos. 49 and 50.<sup>267</sup> Rakove points out that Madison criticized Jefferson's proposal in *Notes on the State of Virginia*<sup>268</sup> for "frequent appeals" to the people for constitutional change on three grounds.<sup>269</sup> First, such appeals would "deprive the government of that veneration which time bestows on every thing."<sup>270</sup> Second, "future occasions were likely to be less favorable to the process of constitutional revision that Americans had recently (and presumably still) enjoyed."<sup>271</sup> Third, "public discussion and decision of a constitutional dispute" would turn on the influence of "persons of distinguished character and extensive influence in the community. It would be pronounced by the very men who had been agents in, or opponents of, the measures to which the decision would

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265. Letter from James Madison to Edmund Randolph, in 10 *The Papers of James Madison* 355-56 (Robert A. Rutland et al. eds., 1977) (persuading Randolph against advocating for a second constitutional convention).

266. Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism*, 108 *Yale L.J.* 1931, 1955 (1999) (analyzing Ackerman's theory of a "dualist Constitution").

267. See *The Federalist* Nos. 49, 50 (James Madison); see also Rakove, *supra* note 266, at 1955-56 (discussing Madison's criticisms of Jefferson's proposal).

268. Jefferson was proposing a new constitution for Virginia, which included a provision authorizing the calling of a convention whenever two of the three branches of government concur. See Jefferson, *supra* note 102, at 235-55.

269. Rakove, *supra* note 266, at 1955-57.

270. *Id.* at 1956 (quoting *The Federalist* No. 49).

271. *Id.*

relate."<sup>272</sup> The passions of the people, rather than reason, would guide the decision.<sup>273</sup>

Madison's cautionary note does not present a complete picture, however, for in discussing the state constitutions, Madison wrote:

We are to recollect that all the existing constitutions were formed in the midst of a danger which repressed the passions most unfriendly to order and concord; of an enthusiastic confidence of the people in their patriotic leaders, which stifled the ordinary diversity of opinions on great national questions; of a universal ardor for new and opposite forms, produced by a universal resentment and indignation against the ancient government; and whilst no spirit of party connected with the changes to be made, or the abuses to be reformed, could mingle its leaven in the operation.<sup>274</sup>

Thus, as Ackerman noted, Madison did not believe situations such as existed in 1776 would recur with great frequency, and only during such a crisis would the passions be repressed.<sup>275</sup> The problems that resulted from the state constitutions stemmed from their formation during a time when it was commonly believed that the public virtue demonstrated by the People in 1774-1776 was a natural quality of the American character.<sup>276</sup> Once this was disproved by events of the 1780s,<sup>277</sup> Madison realized that constitutional "experiments are of too ticklish a nature to be unnecessarily multiplied."<sup>278</sup> Resort to the higher-lawmaking tier should be had only when necessary.

Rakove explained that in *The Federalist* No. 49, Madison was "[f]ixated . . . on the belief that the interested, opinionated, and impassioned impulses of the people would be the preponderant sources of constitutional disequilibria" in future attempts at constitutional change.<sup>279</sup> According to Rakove, the idea that "the people [should] ever be called upon to speak [as] vigorously [as they did in 1787 and 1788] again" was furthest from Madison's mind.<sup>280</sup> Rakove concluded that Madison's recognition that political leaders would have to decide constitutional questions for most of the people raised doubts as to Ackerman's reliance on the Founding to support his normative theory of higher lawmaking: "A historical account of either Madison's thinking in particular or Federalist theory in general

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272. *Id.* (quoting *The Federalist* No. 49).

273. *Id.*

274. *The Federalist* No. 49, at 283 (James Madison) (Clinton Rossiter ed., 1961).

275. 1 Ackerman, *supra* note 10, at 175-76.

276. *See supra* text accompanying notes 67-81.

277. *See supra* Part I.B.

278. *The Federalist* No. 49, at 283 (James Madison) (Clinton Rossiter ed., 1961). Ackerman makes a similar point based on this passage. 1 Ackerman, *supra* note 10, at 177 (arguing that Philadelphia Convention joined four features—"formal illegality, mass energy, public-spiritedness, and extraordinary rationality"—that overcame the hazardous nature of higher lawmaking (emphasis in original)).

279. Rakove, *supra* note 266, at 1957.

280. *Id.*

should seek a way either to reconcile these tensions or examine their incompatibility."<sup>281</sup>

The idea that a "deliberative body of citizens" was necessary to decide issues for the People was commonly held.<sup>282</sup> The Federalists, and the Revolutionaries before them, vehemently opposed hereditary or arbitrary distinctions, believing in the basic social equality of all people (or at least of all white, male people).<sup>283</sup> Nevertheless, they still believed that a natural aristocracy existed, and that from this pool of candidates the ruling elite would arise.<sup>284</sup> As Gordon Wood noted, the social equality desired by the Founders was an equality of opportunity, where merit and ability would command the distinctions of rank and respectability.<sup>285</sup> "Even the reins of state . . . may be held by the son of the poorest man, if possessed of abilities equal to that important station."<sup>286</sup> "The question," as Edmund Morgan articulated it, "was how to identify this aristocracy of talent and merit, and . . . convey to it the authority that flowed now from the whole people."<sup>287</sup>

The Federalist proposal, which was accepted by the People through state conventions, was, Rakove wrote, "framed, in the first instance, by the intervention of a deliberative body of citizens."<sup>288</sup> That the state delegates were viewed as speaking for the People is clear for, as Madison reminded the House of Representatives in 1796, the Constitution was "nothing but a dead letter, until life and validity were breathed into it by the *voice of the people, speaking through the several State Conventions*."<sup>289</sup> Professor Joseph Ellis neatly made the point: "Though the American republic became a nation of laws, during the initial phase"—a higher lawmaking phase—"it also had to be a nation of men."<sup>290</sup>

This part analyzed the dualist concept of lawmaking, and the role of public citizens within that framework. Ackerman's theory neatly explains the Founders' concept of popular sovereignty by separating the role of government from the role of the People, but does not adequately describe the role the Federalist leadership played on the higher-lawmaking tier. Rakove and Forbath, though they recognize the shortcomings of Ackerman's theory on this point, fail to appreciate in their criticisms that the Founders understood that the

281. *Id.*

282. Wood, *supra* note 29, at 480.

283. Morgan, *supra* note 30, at 249; Wood, *supra* note 29, at 479.

284. Morgan, *supra* note 30, at 249-50; Wood, *supra* note 29, at 479-80.

285. Wood, *supra* note 29, at 478-79.

286. *Id.* at 479 (internal quotations omitted).

287. Morgan, *supra* note 30, at 249 (discussing the requirements for the upper house of early state legislatures).

288. Rakove, *supra* note 15, at 56 (internal quotations omitted).

289. 5 Annals of Cong. 776 (Apr. 6, 1796) (emphasis added). Madison was of course reiterating a point argued during the Philadelphia Convention and during the ratification process. See *supra* note 154 and accompanying text.

290. Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* 17 (2000).

natural aristocracy would provide leadership in constitutional politics as well as in normal politics. The public-citizen model developed in Part III attempts to discern when public citizens are merely “stand-ins,” and when they are “Spokespersons of the People.”

### III. THE PUBLIC CITIZEN IN HIGHER LAWMAKING: BRIDGING THE GAP BETWEEN POPULAR SOVEREIGNTY AND ORIGINAL INTENT

This part argues that if one is to determine the People’s intent from documentary records of public citizens, indeed, if the idea of popular sovereignty is to be more than a pleasant fiction, those public citizens claiming a right to the higher-lawmaking tier must have a demonstrable, legitimate claim to be “Spokespersons of the People.” By analyzing the actions and attitudes of the Founders—the natural aristocracy and the original public citizens—a framework can be developed to demonstrate and legitimate this claim. Under the Founding precedent, a popular movement seeking the higher-lawmaking tier must meet certain fundamental requirements in order to succeed. First, the movement’s public citizens must respond to a crisis that cannot be solved without constitutional reform. Second, they must propose constitutional reform and throughout their deliberations remain consistent with that concept of the public good. Third, they must pass through a period of sustained deliberation on the constitutional proposal. In order for these deliberations to reflect the popular understanding of the reform, public citizens cannot deliberate with some ulterior motive in mind. Fourth, public citizens must reach a substantial consensus in favor of the proposed constitutional reform.

#### A. *Constitutional Crisis*

In order for a constitutional movement to begin, there must be some event, or series of events, generating discontent with the status quo.<sup>291</sup> During periods of ordinary lawmaking, or “politics as usual,” the People are not paying significant attention to the workings of government. Work, family, and friends take precedence over, or are at least as important as, the issues being decided by our elected officials.<sup>292</sup> In essence, most people are normally too preoccupied with

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291. For the series of events generating the British crisis, see discussion *supra* notes 44-52. Wood points out that independence from Britain was not a foregone conclusion, but rather became the only solution to the crisis as it developed. Wood, *supra* note 29, at 43-44. The Founding presents another example of crisis leading to the development of a constitutional movement. See discussion *supra* Part I.B (examining the events of the Critical Period). Crisis seems to be implicit in Ackerman’s model because two of the three constitutional moments he describes, Founding and Reconstruction, followed on the heels of war. See 1 Ackerman, *supra* note 10, at 81-82, 87; 2 Ackerman, *supra* note 203, at 6.

292. 1 Ackerman, *supra* note 10, at 273.

their own lives to worry about the public good. Precisely because of this preoccupation, the People delegate responsibility for the public good to their representatives, but only within the confines of constitutional safeguards against misuse of this delegated authority.<sup>293</sup> Times of crisis shake the People loose from their normal routines to address the serious problems that ordinary lawmaking has been unable to resolve.<sup>294</sup> Crisis is thus a precondition for public citizens to attain the higher-lawmaking tier, and that crisis must be one that can only be resolved through constitutional reform.

The scope of higher lawmaking also suggests that it should only be used in times of crisis. For example, Article V states that amendments, either proposed by Congress or a Constitutional Convention, "shall be valid to all Intents and Purposes."<sup>295</sup> Allowing the possibility of such sweeping reform would only be necessitated by grave circumstances. Moreover, an amendment would only be necessary when the government is unable to resolve the crisis with its current powers, or when fundamental rights are not sufficiently secured against governmental encroachment.

The great constitutional movements of American history have been triggered by varied crises. The Revolutionaries responded to the failure of English constitutionalism.<sup>296</sup> The Federalist movement developed as a reaction to the political crisis of the Critical Period as a result of the inefficacies of the Articles of Confederation and the unexpected combination of "majoritarian tyrannies" and anarchy that had developed in the states.<sup>297</sup> The social struggle over slavery generated the constitutional movement led by the Reconstruction Republicans after the Civil War.<sup>298</sup> The economic crisis of the Great Depression led the New Deal Democrats to revolutionize the role of government in regulating the economy.<sup>299</sup> In each case, the then-current Constitution did not permit the national government to adequately deal with the crisis. In such circumstances, the crisis becomes one of constitutional proportions.<sup>300</sup>

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293. *Id.* at 6; 2 Ackerman, *supra* note 203, at 6.

294. *See* 1 Ackerman, *supra* note 10, at 230-65.

295. U.S. Const. art. V (emphasis added). Article V provides only two exceptions to this scope: equal suffrage in the Senate and the slave trade guarantee. *Id.*

296. *See supra* Part I.A.

297. *See supra* Parts I.B-C.

298. 2 Ackerman, *supra* note 203, at 180-81.

299. *Id.* at 7-8.

300. Whether a triggering event rises to the level of a constitutional crisis can be difficult to discern at times. For example, the international crises surrounding the Jay Treaty controversy in 1796 do not clearly constitute a constitutional crisis. App. at 2252-54. First, the Framers had secured the nationalization of foreign affairs in the Constitution. *See generally* Golove, *supra* note 123 (discussing removal of states from treaty-making). Second, the Constitution expressly granted the President the power to make treaties with the advice and consent of the Senate, U.S. Const. art. II, § 2, though the Republican opposition had repeatedly attacked Washington's foreign



Ackerman argues that “[d]uring normal politics, no ‘public interest’ grouping is powerful enough to force its agenda to the center of political concern, to make normal politician/statesmen treat *its* questions as *the* critical questions they *must* answer if they hope to continue to represent the People.”<sup>301</sup> What makes a movement powerful enough to accomplish this feat? When a movement has garnered support among the people with sufficient depth and breadth to attain a constitutional “signal,” its proposal is moved to the forefront of the government agenda.<sup>302</sup> Such broad and deep support, from active as well as passive citizens, can be attained only when the citizenry has turned its attention away from self-interest to consider the best interests of the community at large.<sup>303</sup> A crisis is the only thing that generates such support from anyone other than public citizens. A public citizen may recognize early on the problems which lead to crisis, but his or her support will only grow as the nation draws closer to the climax.

Professor Rakove was correct to note that Madison, if not Federalists generally, feared a continual “recurrence to the People.”<sup>304</sup> However, the fear was based in part on the rarity of constitutional crises.<sup>305</sup> Madison must have viewed himself and his peers as “patriotic leaders” in the “midst of a danger” in whom the people could justifiably have an “enthusiastic confidence.”<sup>306</sup> Both Framers and Ratifiers were unquestionably “agents in, or opponents of, the measures to which the decision would relate.”<sup>307</sup> Significantly, Federalists relied on the reputation and influence of the members of the Philadelphia Convention to persuade the people to accept the

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affairs powers. See Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 375-77 (1995) (discussing debate over presidential capacity to declare neutrality); Jerald A. Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* 74-81 (1970) (examining debate over commercial retaliation against Great Britain).

As a question of interpretation—the interaction of the treaty power with the Congressional power to regulate foreign commerce—the case for a House role in treaty-making is stronger, because the issue had not arisen under such controversial circumstances before. See app. at 2252-53. However, as Madison’s arguments suggest, the issue had been debated in the Philadelphia Convention and during ratification, and thus the proponents of a House role in treaty-making could not argue adequately that the interpretive question remained open. See *id.* at 2252-62. Nevertheless, considering the policy and ideological issues in dispute and the relative lack of precedent for the Founders to follow, this Note will assume that the crisis was of constitutional proportions. *Id.* at 2253-54.

301. 1 Ackerman, *supra* note 10, at 270.

302. *Id.* at 272.

303. See *supra* note 241 and accompanying text.

304. See *supra* text accompanying notes 265-73, 279-81.

305. See *supra* text accompanying note 271.

306. The Federalist No. 49, at 283 (James Madison) (Clinton Rossiter ed., 1961).

307. *Id.* at 285. Almost all of the Framers and Ratifiers were members of Congress or of state governments. See *supra* Part I.C.

significant changes they proposed.<sup>308</sup> The gentle lobbying that occurred to influence Washington's decision to attend is evidence supporting this conclusion.<sup>309</sup> Yet one must infer from his actions that at no time was Madison concerned that the Federalists themselves were playing on the passions of the people. Thus, once a crisis reaches constitutional proportions, public citizens may legitimately seek the higher-lawmaking tier, as had the Federalists.<sup>310</sup>

Crisis as a precondition to higher lawmaking is implicit in the Article V procedure because, as Professor John Vile stated, "the Founders clearly viewed the constitutional amending process as an alternative to violent change."<sup>311</sup> Politicians in Congress or in state legislatures will not propose amendments unless they believe an extremely strong chance exists for their passage. Issues that would garner the support of two-thirds of both Houses must be serious indeed to hope for success. Similarly, state legislatures will not instigate the burdensome process to call for a Constitutional Convention unless the matter at issue seriously affects a supermajority of states, and thus more than one region of the country.<sup>312</sup>

### B. Consistency

Once the constitutional crisis has awakened the public spiritedness of the citizenry that, for most people, lies dormant during normal politics,<sup>313</sup> public citizens must propose measures for constitutional reform that address the public good. The dualist democracy recognizes that public virtue is usually in short supply, but relies on it during periods of higher lawmaking to assure that decisions are made in the public interest.<sup>314</sup> Without the restraints placed on public citizens in ordinary lawmaking, public virtue is a critical safeguard. The constitutional movement, forming as the crisis builds, focuses public concern on its agenda for constitutional reform. This focus transforms public concern to public virtue by offering a method (the movement's agenda) through which citizens, public and private, may deliberate upon the public good.<sup>315</sup> In other words, public citizens, in

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308. Rossiter, *supra* note 76, at 239-40 & n.

309. See 3 Farrand, *supra* note 147, at 22; Rossiter, *supra* note 76, at 102.

310. See *supra* text accompanying notes 274-76.

311. John R. Vile, *Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions 1* (1994).

312. U.S. Const. art. V (requiring Congress to call a Convention on application of two-thirds of state legislatures).

313. "Americans can be expected to transcend factional politics only 'in the midst of a danger which repress[es] the passions.'" 1 Ackerman, *supra* note 10, at 176 (alteration in original) (analyzing Madison's *Federalist* No. 49).

314. See *supra* notes 274-78 and accompanying text.

315. Cf. 1 Ackerman, *supra* note 10, at 287 (discussing the increased deliberative response to a constitutional proposal).

proposing constitutional change, define the “public good” for purposes of public debate, and the degree to which they adhere to their definition—their reform proposal—will affect the People’s ability to resolve the crisis.

Consistency of message is thus crucial to developing the consensus among the public and private citizenry necessary in higher lawmaking. If public citizens do not remain true to their proposals for constitutional reform, the citizenry sought to be mobilized in its support will become confused as to the ultimate goal, resulting in factional disputes both inside and outside the movement. The burden to maintain the consistency of the movement’s message, and thereby public virtue, rests on the public citizens leading the movement. As Ackerman stated, “There can be no substitute for leadership if the movement’s initiative isn’t to disintegrate into ideological chaos at the very moment it comes to the forefront.”<sup>316</sup> Federalists demonstrated the value of consistency in constitutional politics during the ratification debates.<sup>317</sup>

The Founders demanded consistency in the Article V process by making constitutional proposals in written form. Written amendments provide a focal point for public debate.<sup>318</sup> They highlight the changes to be made, and allow public citizens to elaborate a relatively consistent understanding of the text. Written proposals make it possible for multiple assemblies of public citizens to debate and adopt the *same* constitutional change. Without the advanced communication technologies of today, written amendments were the only way to achieve this consistency at the Founding.

The debate within the Federalist camp largely ended in the Philadelphia Convention. In his final speech, Benjamin Franklin expressed the position advocated by many Federalists during ratification:

I confess that there are several parts of this [C]onstitution which I do not at present approve, but I am not sure I shall never approve them . . . .

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316. *Id.* at 281.

317. *See supra* notes 158-62 and accompanying text.

318. At least one scholar has argued that Article V is the method of constitutional change used by “ordinary government,” and that the People may change the Constitution by simple majority using any method they choose. Amar, *supra* note 231, at 460-64. While this does explain some amendments, such as the eighteenth Amendment, even an ill-considered change establishing Prohibition cannot succeed without some popular support. A better view, with a firmer grip on popular sovereignty, allows the People a choice of what method to use to change constitutional law, but still requires the support of a populist constitutional movement. Prohibition is better explained as a popular movement gaining the higher-lawmaking tier without the broad and deep support of the citizenry. Professor Ackerman calls this phenomenon a “false positive.” *See* 1 Ackerman, *supra* note 10, at 278-79.

... Thus I consent, Sir, to this Constitution because I expect no better, and because I am not sure, that it is not the best. The opinions I have had of its errors, I sacrifice to the public good— I have never whispered a syllable of them abroad— Within these walls they were born, and here they shall die.<sup>319</sup>

Here was the preeminent Franklin subtly telling his peers that they must speak in one voice when they present the Constitution to the people. *The Federalist Papers* are perhaps the best example of this consistency of message from the Federalists, coming as they did from three writers, two of whom ultimately would espouse markedly different visions of the Constitution.<sup>320</sup>

Not everyone will share the movement's understanding of the public good. For example, American Loyalists did not view British actions in the same light as the Revolutionaries.<sup>321</sup> During the ratification debates, Antifederalists argued that the Constitution was contrary to the public good as strenuously as Federalists argued that it promoted the public good.<sup>322</sup> Even without considerations of self-interest, ambition or greed, the public good is something that can be vigorously debated. Gordon Wood commented that "[n]o phrase except 'liberty' was invoked more often by the Revolutionaries than 'the public good.'"<sup>323</sup> The "spirit of '76," as Madison recalled, arose due to a crisis and prevented a "spirit of party connected with the changes to be made, or the abuses to be reformed," from mingling "its leaven in the operation."<sup>324</sup> Thus, public citizens must define the public good, through their proposal for constitutional reform, for public debate.<sup>325</sup>

319. 2 Farrand, *supra* note 147, at 641-43 (Sept. 17, 1787).

320. Kesler, *supra* note 158, at xii-xiii; see also *supra* text accompanying note 158 (noting conformity of James Wilson despite his desire for more nationalistic government). The 1790s would find Madison and Hamilton on opposing sides of many constitutional debates, notably over the National Bank and the Jay Treaty. Rakove, *supra* note 15, at 350-65; see also app. at 2255-56, 2257-62.

321. Wood, *supra* note 29, at 3-4.

322. See "Brutus", No. I (Oct. 18, 1787), reprinted in *id.* at 269, 270-71, 276; "Brutus", No. VI (Dec. 27, 1787), reprinted in *id.* at 280, 284-85; "Centinel", No. I (Oct. 5, 1787), reprinted in *id.* at 227, 230; "John DeWitt", No. II (Oct. 27, 1787), reprinted in *The Anti-Federalist Papers and the Constitutional Convention Debates* 194, 196 (Ralph Ketcham ed., 1986).

323. Wood, *supra* note 29, at 55.

324. *The Federalist* No. 49, at 283 (James Madison) (Clinton Rossiter ed., 1961).

325. The debates on the Jay Treaty reveal three points on the issue of consistency. First, by proposing a role for the House in treaty-making, the Republicans were arguing inconsistently with the Federalist movement. App. at 2258-63. While this demonstrates that they were not continuing the Federalist period of higher lawmaking, it still raises the possibility that they were presenting a new proposal for constitutional reform and in effect attempting to gain the higher-lawmaking tier in their own right. *Id.* at 2262-63. For further discussion on this point, see *infra* notes 333, 369 and accompanying text.

Second, Washington and the Federalist party, while arguing consistently with the Federalist movement, were not proposing new reform. Rather, they were defending a

### C. Deliberation

The considered judgment of decision-makers clearly should be a necessary element of all lawmaking. Deliberation can mean many things in ordinary lawmaking. A representative (for the People do not make the decisions directly in ordinary lawmaking) might consider his own interest, his constituents' interest, or his party's interest.<sup>326</sup> His decision is rarely made, however, after deliberation on the present and future national interest—what Ackerman refers to as “the rights of citizens and the permanent interests of the community.”<sup>327</sup> As discussed above, if his decision is contrary to those rights or those permanent interests, the Constitution protects the People from that decision.<sup>328</sup> In higher lawmaking, deliberation becomes two-fold, requiring the considered judgment of the People, the ultimate decision-makers, and those public citizens claiming to speak for the People.

While the People spoke through the state conventions, it must be remembered that the delegates themselves provided a filter through which the voice of the People had to pass which had the potential to distort or misrepresent the People's true intent.<sup>329</sup> The public citizen's

prior mandate of the people. Professor Lynch argued that, in the national bank and spending power debates, the Federalists had argued “for a construction of the Constitution that would in their view take care of the practical needs of the nation.” Lynch, *supra* note 15, at 155. During these earlier debates, “a broad construction of the Constitution clearly advanced the good of the country, [while] a strict construction would have unduly constricted governmental or presidential operations.” *Id.* In the Jay Treaty debates, the broad construction offered by Madison and the Republicans did not provide the “public good” sought by the Federalist movement in 1787-88, and again in 1793—efficiency and secrecy in the conduct of foreign affairs—that was achieved by the placement of the conduct of foreign affairs with the President and the Senate. See The Federalist No. 64, at 360 (John Jay) (Clinton Rossiter ed., 1961) (“It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite.” (emphasis in original)); see also *id.* No. 70, at 391-92 (Alexander Hamilton) (“[A]ll men of sense will agree in the necessity of an energetic executive [and] [t]hat unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of [a unitary executive].”); 5 Annals of Cong. 760 (1796) (message of Pres. Washington) (stating need for secrecy in foreign negotiations).

Third, the Federalist party had no proposal for constitutional reform, mainly because they were satisfied with the operation of the Constitution. The Jay Treaty was approved by two-thirds of the Senate, and ratified by the President. App. at 2263, 2266. The position taken by Washington was consistent with a prior *decision* of “We the People”, as opposed to a prior *proposal* of “We the People”. Thus, the Federalists were no longer acting as “Spokespersons of the People,” but rather as their normal representatives.

326. See 1 Ackerman, *supra* note 10, at 243-50 (discussing various organizational pressures on politicians during “normal politics”).

327. *Id.* at 231, 235, 352 n.4. Madison referred to “the rights of other citizens” and “the permanent and aggregate interests of the community.” The Federalist No. 10, at 46 (Clinton Rossiter ed., 1961).

328. See *supra* text accompanying notes 200-29.

329. Cf. Forbath, *supra* note 16, at 1924 (“The election returns are no substitute for

purpose in deliberating upon the movement's constitutional proposal must be the adoption of the proposal. If his or her purpose is something other than the attainment of the movement's goals, the public citizen is not speaking for the People. Madison addressed this possibility in considering the failures of the state constitutions. Rakove summarized Madison's point:

Artful legislators "with interested views" could always find ways to sacrifice "the interest, and views, of their Constituents" for their own purposes, and then to have their "base and selfish measures, masked by pretexts of public good and apparent expediency." Even "honest" representatives would often fall prey to "a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence."<sup>330</sup>

The same could be said of public citizens in higher lawmaking. Mere professions of the public good in the service of selfish ends should not be legitimated as deliberations on "the rights of citizens and the permanent interests of the community."<sup>331</sup> That said, it is entirely legitimate when self-interest coincides with the movement's agenda. Indeed, self-interest is often what instigates a movement's early adherents. As the crisis builds, that self-interest becomes the public interest, and those who are not directly affected by the crisis join the movement for the public good. Thus, for example, while some of the Framers stood to benefit from a stronger national government because of their speculation in western lands, or their purchase of public securities, this interest did not detract from their claim to speak for the People because their interest coincided with the Federalist proposal, and the public good.<sup>332</sup> Clinton Rossiter, commenting on the hard bargaining that occurred over the issue of representation during the Convention, stated, "we must remember that no true exercise in constitution-making can be entirely rational and non-political."<sup>333</sup>

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examining how popular ideas . . . are tallied and translated or suppressed and erased in relations among social movements [and political actors].")

330. Rakove, *supra* note 15, at 49.

331. See *supra* note 327 and accompanying text.

332. Clinton Rossiter notes that twelve of the fifty-five Framers were speculating in western lands, and approximately two dozen owned state or national securities. Rossiter, *supra* note 76, at 122-23.

333. *Id.* at 157. But it must at least be largely rational and non-political. For example, the Republican opposition's argument in 1796 that the House of Representatives must have a voice in the treaty-making process was made in order to place Jay's Treaty at the forefront of public debate in the upcoming presidential election. App. at 2263-66. The coincidence of an initially unpopular treaty and the retirement of George Washington, who would have retained the presidency with ease if he had so desired, enticed the Republicans into a constitutional proposal intended to encourage voters to dislodge the Federalist party from the loci of foreign affairs power—the executive branch and the Senate. *Id.* at 2264-66. It was not a deliberative attempt to reform the Constitution, but rather a means by which the Republicans sought to control foreign policy—by placing Jefferson in the White House. *Id.* at

In a nation based on popular sovereignty, any change in the Constitution is a change in the amount of power delegated by the People to the government.<sup>334</sup> Such a delegation must be a deliberative one; otherwise it should not override the prior considered judgment of the People that it now seeks to amend. Fortunately, crisis not only breeds public virtue, but also public discourse.<sup>335</sup> The media would cover the crisis, and any proposal for constitutional reform would only increase that coverage.<sup>336</sup> The difficulty, and thus the value, of greater deliberation in higher lawmaking lies in the movement's ability to sustain that public discourse long enough to successfully navigate the higher-lawmaking tier.<sup>337</sup>

Public citizens claiming to be "Spokespersons for the People" lead the public discourse and transfer it into the institutional arena—Congress, the President, the Supreme Court, and the state governments.<sup>338</sup> Article V makes this clear by requiring Congress and every state legislature to consider a proposed amendment and voice its opinion.<sup>339</sup> They must encourage the public debate in order to gain

2265-66.

It was a means, in fact, that President Jefferson and Secretary of State Madison readily abandoned in 1803 in the Louisiana Purchase. Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* 248-50 (First Vintage ed. 1998). "John Quincy Adams, one of the few senators to oppose the legislation, observed that Jefferson would possess 'an assumption of implied power greater . . . than all the assumptions of implied powers in the years of the Washington and Adams administrations put together.'" *Id.* at 249-50 (alteration in original). In Jefferson's defense, he remained convinced that the purchase of foreign territory required an amendment to the Constitution. When the possibility that Napoleon would change his mind arose, however, Jefferson decided that "the less that is said about my constitutional difficulty, the better; and that it will be desirable for Congress to do what is necessary *in silence*." *Id.* at 249 (emphasis in original) (quoting Letter from Thomas Jefferson to Thomas Paine (Aug. 18, 1803)).

334. James Wilson, in his *Law Lectures of 1790*, described popular sovereignty as the "one great principle . . . animat[ing] all the others . . . that the supreme or sovereign power of the society resides in the citizens at large; and that, therefore, they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient." 2 Ackerman, *supra* note 203, at 79 (alteration in original) (quoting 1 *The Works of James Wilson* 79 (Robert McCloskey ed., 1967)).

335. Consider the drastic increase in conversation during the weeks following the 2000 Presidential election about both the Twelfth Amendment and the Electoral College relative to, say, the last century.

336. See Vile, *supra* note 311, at 103 (noting "attendant publicity likely to surround" the amendment process). In addition to the modern concept of media, the newspapers and pamphleteers of the eighteenth century are included as well.

337. 1 Ackerman, *supra* note 10, at 285-88.

338. For example, Madison brought the issue of the House of Representatives' role in treaty-making into the Virginia legislature in 1795, which triggered a round of resolutions on a proposed constitutional amendment expressly giving the House a role. See app. at 112-13. The amendment was supported by five states, including Virginia, but rejected by nine others. See app. at 113. Other Republicans subsequently brought the issue before the House itself. App. at 103-04.

339. U.S. Const. art. V; see also Vile, *supra* note 311, at 103 (noting that "measures

additional support, as well as to motivate their established base of supporters. Further, deliberation is necessary to achieve the consensus necessary to transcend faction; to gain Madison's "universal ardor for new and opposite forms" on the "great national question[]" at hand.<sup>340</sup> The model for deliberation of this kind is the Convention. As Washington informed the Confederation Congress in his letter accompanying the proposed Constitution:

In all our deliberations on this subject we kept steadily in our view, that which appears to us the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid on points of inferior magnitude, than might have been otherwise expected; and thus the Constitution, which we now present, is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.<sup>341</sup>

This purpose-oriented approach to deliberation was critical to the success of the Federalist movement.

The purpose of the Philadelphia Convention was the resolution of the crises of the 1780s.<sup>342</sup> The solution, at least from the Federalists' perspective, was a stronger, more energetic national government (with the necessary restraints on power to preserve liberty, of course).<sup>343</sup> The danger of deviating from this goal arose in the Convention over the issue of slavery.<sup>344</sup> On August 21, 1787, Luther Martin proposed a change to the Constitution allowing a prohibition or tax on the importation of slaves.<sup>345</sup> Martin argued that the three-fifths clause<sup>346</sup> would encourage importation, that continued importation would increase the risk of slave uprisings that would force the Union to come to that state's defense, that slavery was inconsistent with the principles of the Revolution, and that slavery's inclusion in the Constitution was dishonorable to the American character.<sup>347</sup> John Rutledge of South

are unlikely to be incorporated into the fundamental law without due 'deliberation and consideration'" (quoting *Hawke v. Smith*, 253 U.S. 221, 226 (1920)).

340. The Federalist No. 49, at 283 (James Madison) (Clinton Rossiter ed., 1961). For further discussion, see *supra* note 274 and accompanying text.

341. Letter of the Convention to Congress (Sept. 17, 1787), in Rossiter, *supra* note 76, at 342.

342. See *supra* Parts I.B-C.

343. See Rossiter, *supra* note 76, at 45-49.

344. See generally Ellis, *supra* note 290, at 17-18 (arguing that removing slavery from the political debate helped secure the "fragile union").

345. 2 Farrand, *supra* note 147, at 364 (Aug. 21, 1787).

346. The three-fifths clause allowed three-fifths of all slaves in each state to be counted in determining the apportionment of seats in the House of Representatives. See U.S. Const. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers . . . by adding to the whole Number of free Persons . . . three fifths of all other Persons.").

347. 2 Farrand, *supra* note 147, at 364 (Aug. 21, 1787).



Carolina responded that “[t]he true question at present is whether the South[ern] States shall or shall not be parties to the Union.”<sup>348</sup> The line in the sand had been clearly drawn. Gouverneur Morris of Pennsylvania had earlier declared that “[h]e would never concur in upholding domestic slavery.”<sup>349</sup> Charles Pinckney had flatly declared that South Carolina would “never receive the plan if it prohibits the slave trade.”<sup>350</sup> Both North and South had said “never,” but both sides knew that the purpose of the Convention was the crafting of a stronger national government, not the abolition or guarantee of slavery.<sup>351</sup> A committee decided the issue over the next two days, with the result being a twenty-year slave trade guarantee for the South, and the ability to tax such importations for the North.<sup>352</sup> The issue of slavery tragically would not be resolved for another eighty years, but the compromise developed in Philadelphia allowed the Framers to complete their work.<sup>353</sup>

#### D. Consensus

Consensus among public citizens operates as a barrier in higher lawmaking to the politics of faction. While separation of powers, federalism, judicial review, and other restraints in the Constitution seek to alleviate the influence of faction in normal politics, these safeguards are largely absent in higher lawmaking.<sup>354</sup> By requiring a

348. *Id.*

349. *Id.* at 221 (Aug. 8, 1787).

350. *Id.* at 364 (Aug. 21, 1787).

351. Madison recorded that “Mr. King . . . had not made a strenuous opposition to [the admission of slaves] heretofore because he had hoped that this concession would have produced a readiness . . . to strengthen the Gen[eral] Gov[ernment].” *Id.* at 220 (Aug. 8, 1787). Roger Sherman “regarded the slave-trade as iniquitous; but the point of representation having been Settled after much difficulty [and] deliberation, he did not think himself bound to make opposition.” *Id.* at 220-21. The Connecticut delegation consistently worked towards compromise on the sectional disputes which arose. See Rakove, *supra* note 15, at 86.

352. U.S. Const. art. I, § 9; see also Rossiter, *supra* note 76, at 185-87.

353. Rakove, *supra* note 15, at 58. Both sides of the debate realized that an attempt at resolving the issue of slavery could have threatened the existence of the Union, the very thing they had come to Philadelphia to strengthen. *Id.*; Rossiter, *supra* note 76, at 186. “The underlying reason for this calculated orchestration of non-commitment was obvious: Any clear resolution of the slavery question one way or the other rendered ratification of the Constitution virtually impossible.” Ellis, *supra* note 290, at 93.

354. Federalism does play a role in Article V, but the states are limited to approval or rejection of the proposed amendment, and cannot modify or change the proposal. See U.S. Const. art. V; see also *supra* notes 216-20 and accompanying text. Separation of powers is absent from the Article V process, only Congress and state legislatures have a role. U.S. Const. art. V; see also *supra* notes 207-15 and accompanying text (discussing the mechanics of the separation-of-powers doctrine). Ackerman replaces federalism principles with separation of powers principles in his theory. See 1 Ackerman, *supra* note 10, at 259-61. As for judicial review, the Supreme Court cannot review the constitutionality of a constitutional amendment. Ackerman’s theory incorporates a major role for the Supreme Court in higher lawmaking, but the

supermajority to support the movement's proposal,<sup>355</sup> the Founders required more support than any one faction can bring to bear. The Federalist movement was a combination of many interests. As Clinton Rossiter points out, even the Framers were a fairly diverse group—farmers, doctors, lawyers, merchants, plantation owners and tradesmen.<sup>356</sup> From all regions of the nation, a variety of religions,<sup>357</sup> and a range of economic positions (though tending towards the high end),<sup>358</sup> the Framers highlighted the diversity of social and cultural backgrounds in America. Perhaps most divisive of all, the Framers came from large and small states, and some were slave owners and some decidedly were not.<sup>359</sup> This diversity merely confirms the plethora of interests encompassed by the Federalist movement.

As a crisis develops, public citizens will propose many possible remedies. Through the deliberative process these diverse possibilities are molded into a common proposal around which a consensus may be built.<sup>360</sup> This process was critical to the Federalist movement, and though many voices and ideas were heard prior to 1787, it began in earnest with James Madison early in that year.<sup>361</sup> Madison privately circulated his summary of the problems then plaguing the nation in his "Vices of the Political System of the United States."<sup>362</sup> While awaiting the arrival of a quorum of delegates in Philadelphia, and once his fellow Virginians were privy to his view of the political crisis, he convinced them to meet "two or three hours every day, in order to form a proper correspondence of sentiments."<sup>363</sup> Through these meetings Madison, Washington, Randolph, and the other Virginia delegates formed the Virginia Plan, which they would jointly propose.<sup>364</sup> Entering the Convention with a relatively unified group, and a concrete proposal, gave the Virginians the initiative.<sup>365</sup> To this

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role is in codifying the constitutional changes, not in reviewing them. *See id.* at 263-64. Judicial review, according to Ackerman, safeguards *prior* acts of higher lawmaking from the vicissitudes of normal politics, and is not in itself an avenue to higher lawmaking. *Id.* at 261-63 (rejecting Alexander Bickel's "countermajoritarian difficulty"); *see also supra* notes 221-26 and accompanying text (discussing the purposes of judicial review).

355. The Founders did this quite clearly in Article V by requiring supermajorities even to propose an amendment, and by requiring approval of three-fourths of the state legislatures to ratify. U.S. Const. art. V.

356. Rossiter, *supra* note 76, at 67-134.

357. *Id.* at 126.

358. *See id.* at 122-23.

359. *Id.*

360. 1 Ackerman, *supra* note 10, at 281.

361. Rossiter, *supra* note 76, at 107-08.

362. Wood, *supra* note 29, at 406.

363. Letter of George Mason to George Mason, Jr. (May 20, 1787), in 3 Farrand, *supra* note 147, at 23.

364. Edmund Randolph, as Governor of Virginia, actually proposed the Virginia Plan on the floor of the Convention on May 29, 1787. Rossiter, *supra* note 76, at 144.

365. *See id.* at 146.

plan were added Charles Pinckney's plan,<sup>366</sup> the New Jersey Plan,<sup>367</sup> and other ideas, views and opinions throughout the Convention, but it was not until they had reached a substantial consensus on the final version of the Constitution that the Framers adjourned to present the plan to Congress and the People.

Consensus among public citizens legitimates the claim that they act on behalf of "We the People". It also provides a safeguard against unwarranted attempts to act on the People's behalf.<sup>368</sup> The conclusion of the Jay Treaty debates is an example of how this safeguarding function operates. While the public citizens involved in the debates over Jay's Treaty split nearly down the middle on the constitutional issue—the House's role in treaty-making—the Federalists assembled a sufficient consensus to block the Republican attempt to gain the higher-lawmaking tier with their proposal for reform.<sup>369</sup> The failure of either Federalists or Republicans to gain a consensus reveals that the Federalist movement had lost the higher-lawmaking tier, and that the Republicans had not yet attained it.

#### CONCLUSION

Questions of original intent and higher lawmaking depend upon a correlation between the understanding of the People and the expressions of public citizens speaking for them. The public-citizen model proposed in this Note provides an interpretive method through which that correlation can be verified. Requiring a constitutional crisis as a precondition to higher lawmaking corresponds to the Founders' view of when higher lawmaking is appropriate. It also demands an examination of the context in which public citizens are acting, providing a deeper understanding of the issues and avoiding the use of history "lite."<sup>370</sup> Crisis alone, however, merely creates a need for constitutional change; it does not provide a basis for *particular* citizens—public or private—to adopt such change. The Founders realized that in a republic, particularly in one as large as the United States, decisions had to be made by representatives, even on

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366. Pinckney's plan for a new federal government was submitted on May 29 and largely ignored, *id.* at 145, though this did not prevent him from claiming a leading role as a Framers. In 1819, then-Secretary of State John Quincy Adams requested a copy of Pinckney's plan to include in the Journal of the Convention, which Adams planned to publish. *Id.* at 286 n. Pinckney submitted what was later found to be a preliminary draft of the committee of detail, but Adams unwittingly included it in the Journal anyway. *Id.*

367. William Paterson introduced the New Jersey Plan on June 15, 1787, the principal feature of which was equal suffrage for each state in both houses of Congress. *Id.* at 147-50.

368. *Cf.* 1 Ackerman, *supra* note 10, at 272-75 (requiring "extraordinary support" among populace before a public citizen may claim to speak for the People).

369. *See id.* at 2266-67.

370. *See* Flaherty, *supra* note 7, at 523-25 (discussing misuses of history).

questions of fundamental law. The public-citizen model here articulated utilizes the criteria the Founders themselves accepted as necessary, through their actions if not through their text. Proposing reform, maintaining consistency of message, reappraising through deliberation their proposal, and consensus building were all important steps in the constitutional transformations that occurred during the Revolution and in the Constitution. By utilizing these criteria, the public-citizen model retains a focus on the public citizens that Ackerman's theory recognizes as important but fails to critique. Most importantly, the proposed public-citizen model reinvigorates the idea of popular sovereignty in a dualist representative democracy by legitimating the public citizen's claim to speak for the People.

## APPENDIX\*

### THE JAY TREATY OF 1795

This Appendix provides supporting history to the application of the public citizen model outlined in Part III. For ease of reference, it is structured to correspond generally with the model's criteria.

A controversy developed over America's first major treaty under the Constitution—the Treaty of Amity and Commerce with Great Britain commonly referred to as the Jay Treaty or Jay's Treaty, after its negotiator John Jay.<sup>1</sup> Although Jay had completed negotiations in 1794,<sup>2</sup> and the Senate consented to the treaty in June of 1795,<sup>3</sup> it was not until April of 1796 that the House passed an appropriations bill for the money necessary to carry the treaty into effect.<sup>4</sup> The controversy centered on the House's role in treaty-making, particularly in reference to treaties covering issues which are the subject of Congress' enumerated powers, such as declaring war and regulating foreign commerce.<sup>5</sup> The Jay Treaty debates have been used to support arguments for and against congressional-executive agreements,<sup>6</sup> and the question of whether treaties are self-executing.<sup>7</sup>

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\* Appendix to Robert W. Scheef, Note, "Public Citizens" and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent, 69 Fordham L. Rev. 2201 (2001).

1. Stanley Elkins & Eric McKittrick, *The Age of Federalism* 415 (1993).

2. *Id.* at 410.

3. *Id.* at 417-19.

4. *Id.* at 449.

5. U.S. Const. art. I, § 8 cl. 3, 11.

6. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799, 916-19 (1995) (noting the constitutional objections to and debate over the constitutionality of congressional-executive agreements—international agreements "ratified" by simple majorities in the House and Senate); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995) (challenging Ackerman and Golove's view that congressional-executive agreements are consistent with the text of the Constitution).

7. John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 2074-75, 2080-86 (1999) (using Jay Treaty debates to support conclusion that treaties are not self-executing); see also Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 Colum. L. Rev. 2095 (1999) (responding to Yoo's historical claims through period of ratification but not into the 1790s).

The status of 1795-96 as a period of higher or ordinary lawmaking is thus relevant to these contemporary debates.

### A. *The Foreign Affairs Crisis in the 1790s*

While the critical issue of 1787-88 was the adoption of the Constitution, the critical problem of the 1790s was its operation.<sup>8</sup> The political leaders of the time had vast experience at their disposal, but nevertheless were bereft of any precedents for deciding issues under the new Constitution.<sup>9</sup> This problem was felt nowhere more keenly than in the area of foreign affairs.<sup>10</sup> The problems that faced the United States during the 1780s—the failure of American debtors to pay British creditors as required by the Treaty of Paris, and the continued British occupation of the forts along the Great Lakes<sup>11</sup>—still existed as Washington assumed the Presidency.<sup>12</sup> Additionally, Algerian pirates and the British Navy were interrupting American commerce in the Atlantic and Mediterranean, the latter adding insult to injury by impressing American seamen.<sup>13</sup> To the joy of Americans, the French Revolution erupted in 1789, signaling the spread of republicanism to Europe.<sup>14</sup> When France declared war on Great Britain (and most of Europe) in 1793, American involvement on the side of France was implicated by the terms of the Treaty of Alliance of 1788.<sup>15</sup> To the west, access to the Mississippi River, considered vital to southern interests and western expansion, remained uncertain unless an agreement could be reached with Spain.<sup>16</sup> Thus, America was

8. See Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 Yale L.J. 1959, 1960 (1999).

9. In analyzing Ackerman's work, Professor Freeman has argued that "in the Founding period . . . there was neither a single defining 'constitutional moment' nor a prolonged period of 'normal politics.' . . . With the Constitution yet untried and untested, 'normal' was a relative term, and any political controversy had potential constitutional significance." *Id.*

10. See Joseph Charles, *The Origins of the American Party System* 6 (Harper Torchbook ed. 1961); Joseph M. Lynch, *Negotiating the Constitution: The Earliest Debates over Original Intent* 114 (1999).

11. See Scheef, *supra* note \*, at 2217.

12. See Jerald A. Combs, *The Jay Treaty: Political Battleground of the Founding Fathers* 15-16 (1970).

13. Americans viewed the British as responsible for Algerian attacks on American shipping. *Id.* at 116; Elkins & McKittrick, *supra* note 1, at 378. Impressment of American seamen became more serious later in the decade, but the practice had begun in British ports prior to 1794, and would later expand onto the high seas. Combs, *supra* note 12, at 155 (discussing John Jay's failure to include article in Jay Treaty banning impressment).

14. Elkins & McKittrick, *supra* note 1, at 308-11.

15. See Lynch, *supra* note 10, at 114-15 (discussing debate over Washington's response to war in his Proclamation of Neutrality).

16. Elkins & McKittrick, *supra* note 1, at 439 (discussing settlement with Spain in 1796 of "everything [Americans] had been vainly demanding since the end of the Revolution" including free navigation of Mississippi River); see also Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 43 (First

literally surrounded by foreign problems—the British to the north and northwest; the Spanish to the west and south; and the French, British, and Barbary pirates to the east.

With Republicans in overwhelming control of the House of Representatives, this opposition had the potential to disrupt the operation of American foreign policy in a way that had serious constitutional implications.<sup>17</sup> Though Washington, with the consent of the Senate, had previously entered into treaties, none had such far-reaching consequences as did Jay's Treaty.<sup>18</sup> At stake in the Jay Treaty was America's role in the spread of republicanism internationally, and its role in the ongoing struggle between France and Great Britain.<sup>19</sup> These were much more serious issues than the previous treaties had implicated. For many Americans at the time, they struck at the core of republican principles, and the meaning of the American Revolution.<sup>20</sup> For Jefferson at least, the idea that the "least democratic" branches of government—the Executive, with its hints of monarchy, and the Senate, representative of state interests—would decide these issues was antithetical to the Revolutionary legacy.<sup>21</sup> When Washington placed the treaty before the House in March of 1796 for the appropriations necessary to carry it into effect, Congressional Republicans forced the issue of the treaty power in a final attempt to block Jay's Treaty.<sup>22</sup>

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Vintage Books ed. 1997) (remarking on Madison's concern for access to Mississippi as impetus for revision of Articles of Confederation).

17. Republicans controlled almost two-thirds of the seats in the House of Representatives in the Fourth Congress. Charles, *supra* note 10, at 94 (showing chart of party-line voting).

18. 5 Annals of Cong. 780-81 (1796) (statement of Rep. Madison) (distinguishing Jay Treaty from Treaty with Algiers and several Indian Treaties).

19. Elkins & McKittrick, *supra* note 1, at 415; Joseph J. Ellis, *American Sphinx: The Character of Thomas Jefferson* 188-89 (First Vintage ed. 1998) ("It bet, in effect, on England rather than France as the hegemonic European power of the future.").

20. As Jefferson wrote:

A bolder party-stroke was never struck. For it certainly is an attempt of a party which finds they have lost their majority in one branch of the legislature to make a law by the aid of the other branch, & of the executive, under color of a treaty, which shall bind up the hands of the adverse branch from ever restraining the commerce of their patron-nation.

Letter from Thomas Jefferson to James Madison (Sept. 21, 1795), in 16 *The Papers of James Madison* 88-89 (J.C.A. Stagg et al. eds., 1989) [hereinafter *The Madison Papers*]. The Jay Treaty was "really nothing more than a treaty of alliance between England and the Anglomen of this country against the legislature and people of the United states [sic]." Letter from Thomas Jefferson to Edward Rutledge (Nov. 30, 1795), in 28 *The Papers of Thomas Jefferson* 542 (John Catanzariti et al. eds., 2000).

21. "The Anglomen have in the end got their treaty through, and so far have triumphed over the cause of republicanism." Ellis, *supra* note 19, at 193 (quoting Letter from Thomas Jefferson to James Monroe (July 10, 1796)).

22. Lynch, *supra* note 10, at 144-45.

B. *Consistency: Hamilton, Washington & The Federalist Defense*

On April 1, 1796, Representative Thomas Blount proposed the following resolution:

*Resolved*, That, it being declared by the second section of the second article of the Constitution, "that the President shall have power, by and with the advice of the Senate, to make Treaties, provided two-thirds of the Senate present concur," the House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress. And it is the Constitutional right and duty of the House . . . to deliberate on the expediency or in expediency of carrying such Treaty into effect, and to determine and act thereon, as, in their judgment, may be most conducive to the public good.<sup>23</sup>

The resolution passed on April 7 by a vote of fifty-seven to thirty-five, with eleven members absent.<sup>24</sup> Madison supported the resolution, and had advocated this position during the month-long debate in the House over the constitutionality of the Jay Treaty.<sup>25</sup> Madison's opposition to a commercial alliance with Great Britain forced him to argue a position inconsistent with the Federalist proposal, not to mention with his own previous statements.<sup>26</sup>

Though Madison was generally viewed as the leader of the Republicans,<sup>27</sup> particularly in Congress, the opening moves against the Jay Treaty were made by Edward Livingston of New York and Albert Gallatin of Pennsylvania.<sup>28</sup> Livingston proposed a resolution requesting Jay's negotiating instructions from Washington "together with the correspondence and other documents relative to [the Jay] Treaty," predicating his resolution on the possible unconstitutionality of the Treaty.<sup>29</sup> In response to demands for reasons for such a request, Livingston raised the House's power of impeachment, but said his "principal reason . . . was a firm conviction that the House were vested with a discretionary power of carrying the Treaty into

23. 5 Annals of Cong. 771 (1796) (statement of Rep. Blount). This resolution was accompanied by a second stating that the House may request information from the President without stating its purpose for the application. *Id.* at 771-72.

24. *Id.* at 782-83. The final vote was recorded as sixty-three to thirty-six, with six absent members recorded as voting for the resolution "had they been present," and one absent member "probably against the resolution." *Id.* at 783.

25. *Id.* at 782 (listing Madison among the "yeas" on the resolution).

26. Rakove, *supra* note 16, at 364-65.

27. Joseph J. Ellis, *Founding Brothers: The Revolutionary Generation* 149 (2000) (noting that "Federalists referred to Madison as 'the general' . . . calling Jefferson, his mentor secluded at Monticello, 'the generalissimo'").

28. Lynch, *supra* note 10, at 145 (remarking on Madison's caution in making constitutional arguments over the Jay Treaty and the willingness of younger Republicans to make them).

29. 5 Annals of Cong. 426 (1796) (statement of Rep. Livingston).



effect, or refusing it their sanction."<sup>30</sup> Madison was reluctant to make this argument, but as the Republican leader in Congress, and as one of the foremost authorities on the Constitution, his silence would have spoken volumes.<sup>31</sup> His remarks were principally, though not explicitly, directed at countering the arguments made by Hamilton in his public essays as "Camillus," and by Washington in his response to the House's request for papers relating to the Jay Treaty.<sup>32</sup> Because Washington's and Hamilton's positions remained consistent with the Federalist position, it is easier to comprehend Madison by examining Washington and Hamilton first.

The House voted sixty-two to thirty-seven in favor of Livingston's resolution on March 24, and Washington's response arrived six days later.<sup>33</sup> Washington refused to turn over papers relating to the Jay Treaty, emphasizing that if the Constitution placed upon him such a duty he would have readily complied.<sup>34</sup> He further addressed the incidental question of the House's role in treaty-making:

Having been a member of the General Convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject . . . that the power of making Treaties is exclusively vested in the President, by and with the advice and consent of the Senate . . . and that every Treaty so made, and promulgated, thenceforward becomes the law of the land.<sup>35</sup>

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30. *Id.* at 427-28. The inclusion of the House's impeachment power as a reason for the resolution was a tactical mistake by Livingston, for it placed the Republicans in the position of tacitly implicating Washington—the most popular and respected person in the country—personally, and the public response in favor of Washington's refusal was the result. See Lynch, *supra* note 10, at 156; Charles, *supra* note 10, at 47.

31. Lynch, *supra* note 10, at 149 (remarking on necessity of Madison's participation as "his party's resident constitutional expert"); Rakove, *supra* note 16, at 358 (noting "Madison had misgivings about [the Republican] strategy").

32. Hamilton's essays, collectively entitled *The Defence*, were published during late 1795 through January 1796. His arguments in support of the treaty on constitutional grounds were published in the last three essays. See Alexander Hamilton, *The Defence Nos. XXXVI-XXXVIII* (Jan. 1796), reprinted in 20 *The Papers of Alexander Hamilton* 3, 13, 22 (Harold C. Syrett et al. eds., 1974) [hereinafter *The Hamilton Papers*]. Washington transmitted his response to Livingston's resolution on March 30, 1796. 5 *Annals of Cong.* 760-62 (1796).

33. 5 *Annals of Cong.* 759-60 (1796).

34. Washington pointedly stated that he had, in fact, complied with that duty by laying the treaty papers before *the Senate* when the treaty was presented "for their consideration and advice." *Id.* at 760-61.

35. 5 *Annals of Cong.* 761 (1796) (message of Pres. Washington). By referring to Washington's use of the debates in the Convention, this Note does not argue an "original understanding" of the treaty power. Rather, it demonstrates Washington's consistency with the Federalist movement's proposal. Of course, within the context of the Founding, the original understanding in the Philadelphia Convention and in the ratification debates, and the Federalist proposal are essentially the same.

Washington also argued that this interpretation was in keeping with the view of the State Conventions.<sup>36</sup> In particular, he noted that the Antifederalists took this view, for they had objected that the approval of a treaty of commerce should require the consent of two-thirds of the whole Senate, rather than two-thirds of the Senators present.<sup>37</sup> Further, Washington pointed out that the exclusion of the House from the treaty power had been a concession to the smaller states, which in the Senate would have an equal voice in approving treaties.<sup>38</sup> Finally, the “Journals of the General Convention” recorded that a proposal “that no Treaty should be binding on the United States which was not ratified by a law” was “explicitly rejected.”<sup>39</sup> The President concluded that “a just regard to the Constitution and to the duty of my office . . . forbid a compliance with your request.”<sup>40</sup>

While Washington’s message to the House was a serious blow to the Republican leadership,<sup>41</sup> it was by no means the first.<sup>42</sup> Hamilton’s *The Defence*, written under the pseudonym “Camillus,” was one of the earliest, most influential, and most extensive series of editorials in support of the Jay Treaty.<sup>43</sup> Hamilton argued that the treaty power was plenary, except that a treaty cannot change the Constitution.<sup>44</sup> He also distinguished between the legislative power, vested in Congress, and the power to make treaties, vested in the President and Senate.<sup>45</sup> He emphasized that the President was empowered to *make* treaties (as opposed, perhaps, to a power merely to *negotiate* treaties).<sup>46</sup> Hamilton argued that the treaty power was not legislative in character, because legislative acts were “rules binding upon all persons and things over which the nation has jurisdiction.”<sup>47</sup> Treaties, rather, were agreements “establishing rules binding upon *two or more* nations.”<sup>48</sup> Legislation could not bind other nations, or regulate Americans when they trade in another nation’s jurisdiction.<sup>49</sup> Congress’ power to regulate trade with foreign nations allowed it to

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 762.

41. Combs, *supra* note 12, at 177 (discussing Federalist party and Republican reactions to message).

42. *Id.* at 163 (discussing Federalist party response to Republican criticism once treaty was made public in July of 1795).

43. *Id.* Hamilton was assisted by contributions from Rufus King. *Id.*

44. Hamilton, *The Defence No. XXXVI, supra* note 32, at 6. Hamilton also noted a “natural” exception, “which respects abuses of authority in palpable and extreme cases,” but noted that this exception did not relate to the separation of powers issue. *Id.* at 7 (emphasis omitted).

45. *Id.* at 8-10.

46. *Id.* at 6.

47. *Id.* at 8.

48. *Id.* (emphasis in original).

49. *Id.*

establish regulations respecting trade only within United States territory.<sup>50</sup> “[T]he proposition that the legislative powers of Congress” were limitations on the President’s and Senate’s power to make treaties, Hamilton concluded, was a “fallacy.”<sup>51</sup>

Hamilton attacked the Republican opposition with arguments made by Antifederalists during ratification. The Antifederalists had argued that the treaty power should be vested in the legislative authority, or that treaties should not be “supreme laws.”<sup>52</sup> Federalists had denied that the treaty power should be vested in the legislature, but rather argued that the House “might check by its *influence* the President and Senate on the subject of treaties.”<sup>53</sup> Hamilton also noted that the Articles of Confederation had restricted the Confederation Congress from entering into commercial treaties that restricted the states from imposing imposts or duties.<sup>54</sup> Since the Treaty Clause contained no such proviso, he reasoned, it “is more comprehensive . . . and is fortified by the express declaration that its acts shall be valid notwithstanding the constitution or laws of any state.”<sup>55</sup>

On March 10, 1796, Madison offered his first constitutional arguments against the Jay Treaty.<sup>56</sup> Madison reasoned that, although the House was not seeking to encroach upon the constitutional authority of the President and Senate, it must retain its discretion and judgment when considering a treaty that encompasses powers expressly delegated to the legislative branch.<sup>57</sup> Only this construction “would best reconcile the several parts of the [Constitution] with each other, and be most consistent with its general spirit and object.”<sup>58</sup> The

50. *Id.* at 9.

51. *Id.* at 10.

52. Hamilton, *The Defence XXXVIII*, *supra* note 32, at 22, 23 & n.4, 24 & n. (emphasis omitted) (referencing *The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents*, George Mason’s *Objections to The Constitution of Government*, and the debates in the Virginia Convention). Mason’s *Objections* were published in Virginia, Massachusetts, and Connecticut, though each printing was not identical. 3 *Documentary History of the Ratification of the Constitution* 487 (Merrill Jensen et al. eds., 1978) [hereinafter *Documentary History*]. The version in the *Connecticut Courant*, published on November 26, 1787, drew a response by “A Landholder” similar to Washington’s argument in support of the treaty.

Mr. Mason deems the President and Senate’s power to make treaties dangerous because they become laws of the land. If the President . . . had this power . . . alone, as in England and other nations is the case, would the danger be less? Or is the representative branch suited to the making of treaties which are often intricate and require much negotiation and secrecy? “A Landholder”, *No. VI* (Dec. 10, 1787), *reprinted in* 3 *id.* at 487, 490.

53. Hamilton, *The Defence XXXVIII*, *supra* note 32, at 24 n. (emphasis in original).

54. *Id.* at 26.

55. *Id.*

56. Rakove, *supra* note 16, at 358.

57. 5 *Annals of Cong.* 487-88 (1796) (statement of Rep. Madison).

58. *Id.* at 488.

Supremacy Clause,<sup>59</sup> he argued, bound the states to obey treaties, but did not bind the Congress.<sup>60</sup>

The force of this reasoning is not obviated by saying, that the President and Senate would only pledge the public faith, and that the agency of Congress would be necessary to carry it into operation. For, what difference does this make, if the obligation imposed be, as is alleged, a Constitutional one; if Congress have no will but to obey, and if to disobey be treason and rebellion against the constituted authorities?<sup>61</sup>

Madison was broadly construing the text and structure of the Constitution, and did not refer to the debates either in Philadelphia, the state ratifying conventions, or the *Federalist*.<sup>62</sup> The reason for this was obvious in light of Hamilton's arguments in *The Defence*.<sup>63</sup> When Washington's message refusing to produce Jay's instructions and correspondence was reported to the House, the full implications of Madison's arguments became clear.

Washington's refusal cheered Federalists while demoralizing many Republicans.<sup>64</sup> Madison's early hesitancy, however, rather than increasing, was removed.<sup>65</sup> "The effect of this reprehensible measure," Madison wrote Jefferson, "is not likely to correspond with the calculation of its authors."<sup>66</sup> The President's message pushed Madison to orchestrate the two resolutions introduced by Representative Blount, which reaffirmed the House's power over treaties and its authority to request documents from the President

59. The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

60. 5 *Annals of Cong.* 488 (1796) (statement of Rep. Madison). Madison begs the question if a treaty is ratified, but the House refuses to accept it, are the states still bound to comply with the treaty's terms?

61. *Id.* at 491.

62. Rakove, *supra* note 16, at 358-59.

63. See *supra* text accompanying notes 48-55.

64. Combs, *supra* note 12, at 177.

65. *Id.* According to Professor Ellis, Jefferson later concluded that Jay's Treaty had passed "because of the gigantic prestige of Washington, 'the one man who outweighs them all in influence over the people.'" Ellis, *supra* note 27, at 138. Jefferson "quoted a famous line from Washington's favorite play, Joseph Addison's *Cato*, and applied it to Washington himself: 'a curse on his virtues, they've undone his country.'" *Id.* at 138-39. Jefferson wrote to James Monroe in July of 1796 that, though the High-Federalists had succeeded in the Jay Treaty controversy, "nothing can support them but the Colossus of the President's merits with the people, and the moment he retires . . . his successor, if a Monocrat, will be overborne by the republican sense." *Id.* at 143 (quoting Thomas Jefferson).

66. Letter from James Madison to Thomas Jefferson (Apr. 4, 1796), in 16 *The Madison Papers*, *supra* note 20, at 286.

without specific reasons.<sup>67</sup> Madison did not respond to the substance of the issue, but repudiated (respectfully) Washington's reliance on (1) his memory, (2) the Journals of the Convention, and (3) the records of the state conventions.<sup>68</sup> Madison stated that it was impossible for one member of the Philadelphia Convention to recall the intentions of the whole, and pointed out that some Framers viewed the Jay Treaty as unconstitutional.<sup>69</sup> Admitting that the Journals were a more reliable source, he argued that the understanding of the Convention should not persuade, because the Constitution was "nothing but a dead letter, until life and validity were breathed into it . . . through the several State Conventions."<sup>70</sup> Madison argued that the debates in the state conventions demonstrated that the treaty power was understood as analogous to the design in Great Britain.<sup>71</sup> In any case, the debates "as published . . . contained internal evidence in abundance of chasms and misconceptions of what was said."<sup>72</sup> Madison admitted that the amendments proposed by the state conventions were "better authority."<sup>73</sup> However, he used these amendments, amendments that were proposed but *never adopted*, to support the Republican position.<sup>74</sup> In particular he stressed a proposal that stated "[t]hat all power of suspending laws, or the execution of laws, by any authority, without the consent of the Representatives of the people in the Legislature, is injurious to their rights, and ought not to be exercised."<sup>75</sup> The state conventions had placed the proposed amendment in a "Declaration of Rights," which to Madison indicated that the conventions "considered it as a fundamental, inviolable . . . principle . . . that no power could supersede a law without the consent of the Representatives of the people in the Legislature."<sup>76</sup> Yet there was one power that could, and Madison had argued as much—the people were the supreme power, and it was their "voice" which had

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67. *Id.* at 286, 287 n.6 (describing Madison's motivations); *see supra* notes xxiii-xxv and accompanying text.

68. 5 *Annals of Cong.* 774-80 (1796) (statement of Rep. Madison). Madison was careful to stress that it was regrettable "that the existing difference of opinion [between the President and the House] had arisen," and that the "most respectful delicacy" was due the "other constituted authority." *Id.* at 772.

69. *Id.* at 775-76.

70. *Id.* at 776.

71. *Id.* at 777. However, Madison demonstrated this point through analogy to the pardoning power—a wholly irrelevant argument that suggests Madison's uneasiness with the issue. *See Rakove, supra* note 16, at 363.

72. 5 *Annals of Cong.* 777 (1796) (statement of Rep. Madison).

73. *Id.*

74. *Id.* ("The amendments proposed by the several [State] Conventions . . . would be found, on a general view, to favor the sense of the Constitution which had prevailed in this House."). The same or similar language was used in amendments proposed by Virginia, North Carolina, and Maryland. *Id.* at 777-78.

75. *Id.* at 778 (quoting Declaration of Rights proposed by Virginia Convention).

76. *Id.*

spoken through the state conventions.<sup>77</sup> Further, Madison dismissed the fact that these amendments were deemed necessary to correct deficiencies in the Constitution itself, and that these amendments were never adopted.<sup>78</sup> The inconsistencies in Madison's arguments, however, did not stop there.

Prior to this debate, Madison had been fairly consistent in advancing narrow constructions of the Constitution, and often relied on the records of the debates for support.<sup>79</sup> As a leading member of both the Philadelphia Convention and the Virginia Convention, and as a Representative who had frequently turned to the records of those conventions, Madison was the last person in Congress who should have been repudiating those records.<sup>80</sup> The embarrassment Madison felt over the inconsistencies was significant, and contributed to his decision to leave Congress.<sup>81</sup>

Madison's arguments suggest that he was attempting to gain a higher lawmaking tier on behalf of a Republican movement. In Blount's resolution, the Republicans had declared a proposal for constitutional reform. Rising to support it, Madison "hoped that it would be discussed on both sides without either levity, intemperance, or illiberality"<sup>82</sup>—in other words, with deliberation.

If there were any question which could make a serious appeal to the dispassionate judgment, it must be one which respected the meaning

77. See *id.* at 776.

78. See Rakove, *supra* note 16, at 363-64.

79. See Lynch, *supra* note 10, at 155 (discussing debate over national bank and spending power); Rakove, *supra* note 16, at 350-56 (discussing debate over Bank of United States and Washington's neutrality proclamation of 1793). The debate in 1793 over the extent of presidential powers in foreign affairs is particularly relevant. When France declared war on Great Britain in 1793, the question regarding American obligations under its Treaty of Alliance with France arose. Lynch, *supra* note 10, at 114. Jefferson, favoring France but accepting the necessity of American neutrality, suggested to Washington that Congress should declare the nation at peace. *Id.* at 114-15. The problem was that Congress was not in session. *Id.* at 115. Hamilton favored an immediate proclamation American neutrality by the President, which Washington eventually agreed to and issued. Elkins & McKittrick, *supra* note 1, at 338-39. The proclamation was not immediately popular, because Americans still resented Great Britain—a remnant of the Revolution—and favored France, due both to French assistance in the Revolution and the popularity of the French Revolution. Lynch, *supra* note 10, at 114. Hamilton argued as "Pacifcus" in favor of broad presidential powers in foreign affairs, despite Congress' express power to declare war and its implicit companion, the power to decide not to declare war. *Id.* at 116-19. At Jefferson's prompting, Madison answered Hamilton in his "Helvidius" essays, in which he argued for a strict construction of the Constitution, which would have required congressional approval for any military action, including a determination of a state of war or peace. *Id.* at 121-23. However, because the decision had to be made while Congress was out of session (and before it could be called into an emergency session), a strict construction of the Constitution was impractical. *Id.* at 115, 121-23.

80. See Lynch, *supra* note 10, at 159 (noting that Madison had "almost work[ed] himself to death, to preserve the debates of the Constitutional Convention[]").

81. *Id.* at 159-60; Rakove, *supra* note 16, at 364.

82. 5 Annals of Cong. 772 (1796) (statement of Rep. Madison).

of the Constitution; and if any Constitutional question could make the appeal with peculiar solemnity, it must be in a case like the present, where two of the constituted authorities interpreted differently the extent of their respective powers.<sup>83</sup>

If the President and Congress could not resolve their disagreement, there were two possible remedies:

[I]f the difference cannot be adjusted by friendly conference and mutual concession, the sense of the constituent body, brought into the Government through the ordinary elective channels, may supply a remedy. And if this resource should fail, there remains . . . that provident article in the Constitution itself, by which an avenue is always open to the sovereignty of the people, for explanations or amendments, as they might be found indispensable.<sup>84</sup>

Madison asked for popular support for the resolution during the next elections as a remedy on the "Constitutional question," not simply on the question of the Jay Treaty. Notably, the possibility of amendment via Article V had already been raised by Virginia (at Madison's prompting), and rejected by nine other states.<sup>85</sup> The only avenue remaining for the Republicans was the Presidency.

### C. *The Veil of Deliberation and Consensus: Jay's Treaty, Party Politics, and the Election of 1796*

While party politics played a significant role in American foreign policy during the 1790s, it is more accurate to state that foreign policy played a significant role in party politics.<sup>86</sup> Both perspectives have a claim to legitimacy in the Jay Treaty controversy. Republican opposition to Jay's Treaty was strong because they disagreed on principle with a policy drawing America closer to Great Britain, and thus away from republican France.<sup>87</sup> The instigation of the constitutional crisis in the House, however, was not a principled attempt to change the constitutional process of treaty-making.<sup>88</sup> Madison and Jefferson understood, because they had helped make it happen, that the key to control over foreign policy was control of the

83. *Id.*

84. *Id.*

85. See *infra* notes 98-102 and accompanying text.

86. See Charles, *supra* note 10, at 122 (noting "events growing out of our foreign relations had a decisive influence in determining the course of the two parties"); Combs, *supra* note 12, at 172 (discussing effect of the Jay Treaty on "party development"); Elkins & McKittrick, *supra* note 1, at 415 ("The outpouring of popular feeling over the Jay Treaty . . . was more directly responsible than anything else for the full emergence of political parties in America . . .").

87. See Elkins & McKittrick, *supra* note 1, at 441-42; Ellis, *supra* note 19, at 188-89 ("[A]s Jefferson saw it, the Jay Treaty was a repudiation of the Declaration of Independence . . .").

88. See *infra* text accompanying notes civ-cxiii (discussing Republican motivations for House debate).

presidency.<sup>89</sup> The Jay Treaty presented an opportunity to rally popular support around a pro-France party platform in the presidential elections in late 1796.<sup>90</sup> Once the Senate consented to and the President ratified the treaty, the only forum from which to build that support was the House.

Jefferson and Madison were concerned about the foreign policy of the Washington administration, which in their view was connecting America with Britain and distancing it from France, America's ideological ally in Europe.<sup>91</sup> Beginning in 1789, Madison lobbied for retaliatory measures against Great Britain.<sup>92</sup> For example, the tariff and tonnage bill introduced in 1789 would have taxed at a higher rate ships from nations without a commercial treaty with the United States than American ships paid.<sup>93</sup> The most important of these was Great Britain.<sup>94</sup> Madison intended to use commercial pressure to persuade Britain toward a more favorable treaty.<sup>95</sup> These attempts to injure Britain through trade were stymied principally by the opposition of Hamilton and Washington. Professor Joseph Charles related that "Hamilton cemented the Federalist group in Congress, and gave it such a pointed efficiency that even when the majority was in fact made up of Jeffersonians, he was able to dominate it and manoeuver it, as is proved by the long discussions and final votes on the Jay treaty."<sup>96</sup> "From that point forward," Professor Lance Banning stated, "[Madison] was more and more inclined to use the legislatures of the states, as well as public meetings, Congress, and the press, as instruments for shaping and enforcing popular opinion."<sup>97</sup>

Madison's attempt to block the Jay Treaty through the Virginia legislature failed. The Senate ratified the treaty on June 24, 1795, but rejected one article that granted American ships limited access to the

89. The expansion of presidential powers began during Washington's first term, when Jefferson was Secretary of State and Madison his ally in Congress. Madison's assistance came in the removal debate, where he argued that the President has the power to remove executive officers. Rakove, *supra* note 16, at 347-50. Jefferson had advised Washington that the House was obliged to pass appropriations necessary to carry into effect the treaty with Algiers, though out of practicality Jefferson had advised Washington to obtain the House's consent prior to ratifying the treaty. Lynch, *supra* note 10, at 143.

90. Elkins & McKittrick, *supra* note 1, at 441-42; Lynch, *supra* note 10, at 146; *see also* Ellis, *supra* note 19, at 188-89 (stating the Jay Treaty "endorsed a pro-English version of American neutrality, just the opposite of Jefferson's pro-French version of 'fair neutrality'").

91. Elkins & McKittrick, *supra* note 1, at 316-17.

92. Combs, *supra* note 12, at 31.

93. *Id.*

94. *Id.*

95. *Id.*

96. Charles, *supra* note 10, at 115-16 (internal quotations omitted).

97. Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 380 (1995).



British West Indies.<sup>98</sup> Assuming that the Senate would be required to approve the treaty again once the British had learned of the conditional ratification, Republicans began a petition drive, hoping that popular disapproval would convince Washington or the Senate to refuse the treaty.<sup>99</sup> Madison drafted petitions to the Virginia legislature seeking its condemnation of the treaty "in virtue of their constitutional right of appointing Senators."<sup>100</sup> The Republican-controlled Virginia legislature proposed several constitutional amendments, one of which would have required approval by the House of all treaties.<sup>101</sup> Combs explained the effect:

The Republican campaign backfired. South Carolina, Kentucky, and Georgia did pass resolutions similar to those of Virginia, but nine other states including Republican North Carolina rejected them. The Federalists were elated. "That a great change has been brought in the public mind, with respect to this Treaty within the last two months, is apparent to every one," Washington wrote.<sup>102</sup>

The British approved the Senate version of the Jay Treaty (without Article 12) and returned it to Washington, who declared it in effect February 29, 1796, without reconsideration by the Senate.<sup>103</sup> Madison's gambit in the Virginia legislature was moot. The only avenue remaining to attack the Jay Treaty was the House, and the only way to raise the question in the House was to trigger the constitutional crisis.

By continuing the debate over the Jay Treaty, Republicans were attempting to keep the issue of American foreign policy before the people. Washington's retirement was widely anticipated by the

98. Combs, *supra* note 12, at 161.

99. Popular disapproval of the treaty began even before its terms were known. *Id.* at 159-60. Republicans encouraged this discontent through petitions, pamphlets, and public meetings. Charles, *supra* note 10, at 108. The popular campaign had little influence on Washington, however, who withheld the treaty for four months before submitting it to the Senate. Combs, *supra* note 12, at 160. Washington responded to public addresses asking him to refuse the treaty dismissively, if at all. Banning, *supra* note 97, at 381. Moreover, public sentiment slowly shifted in favor of the treaty, partly as a result of Washington's endorsement of it, and partly due to fortuitous events. *Id.* The economy was improving in 1796. Lynch, *supra* note 10, at 144. Anthony Wayne's victory over the Indians at the Battle of Fallen Timbers made settlement of the Northwest Territory much safer if the British left the northwestern forts. Elkins & McKittrick, *supra* note 1, at 438-39. Finally, Spain, concerned about the commercial alliance the Jay Treaty potentially implied, agreed to grant Americans free navigation of the Mississippi River. *Id.* at 439-40 (discussing Treaty of San Lorenzo). Despite the growing popular acceptance of Jay's Treaty, Republicans apparently still believed the majority of Americans favored their position since they continued to oppose the treaty in the House even after Washington's message refusing to comply with the House's request for papers. Lynch, *supra* note 10, at 158.

100. Banning, *supra* note 47, at 381 (quoting Madison).

101. Combs, *supra* note 12, at 172.

102. *Id.*

103. *Id.* at 174. Washington had received copies of the British ratification in January, but refused to lay it before the House until he received the originals. *Id.*

political leadership in both parties.<sup>104</sup> Republicans wanted to associate the anti-British sentiments of the people with the proponents of the Jay Treaty in the hopes that the Federalist party would pay the price in the 1796 election.<sup>105</sup> Madison had reason to expect such a result in late 1795, when he wrote to Jefferson that the Pennsylvania state elections turned on a treaty/anti-treaty division, and the anti-treaty candidates were the winners.<sup>106</sup> Similarly, Madison reported that Republicans had gained a two-thirds majority in both houses of the Delaware legislature.<sup>107</sup> The popular support the Republicans enjoyed in 1795, however, had cooled considerably by February of 1796.<sup>108</sup>

The reason the Republicans failed to recognize, or ignored, this change in attitude was the unifying effect the Jay Treaty had on the Republican party.<sup>109</sup> As Elkins and McKittrick argued:

Opposition to the treaty had become a party commitment and had taken on a life of its own, in some degree independent of the ebb and flow of popular sentiment, even though a great billow of popular sentiment was what had ratified the commitment in the first place. Nothing up to then had brought such a unifying surge; public feeling and the partisan impulse had seemed in total harmony in the summer of 1795. And for the spokesmen of Republicanism it was pure principle, as pure as such things could be.<sup>110</sup>

An issue that forged sectional interests into a national foundation for the Republican party was a difficult one to discard. Madison had attempted to create such a unified opposition in early 1794 when he proposed discriminatory measures against Great Britain.<sup>111</sup> With the unity provided by the Jay Treaty:

[T]here was something else, something few quite knew how to manage even in their own minds, so novel and hitherto so remote an idea had it been: the possibility of taking actual control of the national government. The Federalists . . . were not really wrong in claiming that the real issue taking shape in the House . . . was whether the Republican party, without "the vital nourishment it

104. Washington had written to Hamilton in June of 1796 that his decision to retire was "very well understood, and is industriously propagated, *privately*." Letter from George Washington to Alexander Hamilton (June 26, 1796), in 20 *The Hamilton Papers*, *supra* note 32, at 239 (emphasis in original).

105. Ellis, *supra* note 19, at 189-90; Lynch, *supra* note 10, at 160.

106. Letter from James Madison to Thomas Jefferson (Oct. 18, 1795), in 16 *The Madison Papers*, *supra* note 20, at 105.

107. *Id.* Federalist Gunning Bedford, however, had been elected governor. *Id.*

108. *See supra* note 99 (discussing events that changed public opinion).

109. Elkins & McKittrick, *supra* note 1, at 441-42.

110. *Id.*

111. Charles, *supra* note 10, at 99 ("The Republicans regarded his resolutions as an effort to regulate commerce with an eye to the economic interests of every section."). The resolutions were "sidetracked," but gained enough support in New England and the mid-Atlantic states to encourage the Federalists to resolve the trade issues with Great Britain by treaty, thus taking the issue out of the House of Representatives. *Id.* at 101-03. Or, at least, so they thought.

derived from a deadly, implacable, and everlasting enmity to . . . [Britain] would be able to sustain itself," or in hinting . . . that the Republicans' not-too-distant object was to bring Thomas Jefferson to the presidency.<sup>112</sup>

Thus, Thomas Blount's resolution on the House's discretionary authority over treaties touching upon Congressional powers can be seen as a political tactic to throw the Jay Treaty into the 1796 elections, just as Madison expressly urged in his supporting speech.<sup>113</sup>

That "spirit of amity" and "mutual deference and concession," referred to by Washington in his letter to the Confederation Congress in 1787,<sup>114</sup> and necessary in achieving the consensus required in higher lawmaking, was sorely lacking in the Fourth Congress. Professor Combs wrote:

Peace, trade expansion, and favorable borders—these were the goals that united the decision-makers of post-revolutionary America.

But these leaders remained united only so long as they could avoid assigning priorities to their foreign policy goals. . . . Since the Articles of Confederation left the United States without the power to achieve any of these goals, there was no need to choose between them.<sup>115</sup>

Under the Constitution, it became possible to achieve these goals, and the consensus slowly fell apart. According to Professor Charles, party regularity increased from fifty-eight percent in 1790 to ninety-three percent in 1796.<sup>116</sup> Though party loyalty could have achieved the consensus higher lawmaking requires, the Republicans achieved consensus not on the merits of the constitutional proposal, but on the party interest in capturing the presidency in order to control national policy on the struggle between France and Great Britain.

In the constitutional debate over the House's role in treaty-making, the Federalists had retained the approval of nine states, those that refused to consider Virginia's proposed amendments,<sup>117</sup> and the support of two-thirds of the Senate,<sup>118</sup> in addition to the weight of

112. Elkins & McKittrick, *supra* note 1, at 442 (footnotes omitted).

113. See *supra* text accompanying notes 23, 84.

114. Letter of the Convention to Congress (Sept. 17, 1787), in Clinton Rossiter, 1787: The Grand Convention 342 (Mentor ed. 1966). Washington also referred to it in his message to Congress refusing to turn over the Jay Treaty papers. 5 Annals of Cong. 761 (1796) (message of Pres. Washington).

115. Combs, *supra* note 12, at 16.

116. "The increasing sharpness of the party division stands out most clearly if we measure it by showing the decline of no-party voting." Charles, *supra* note 10, at 93. In a footnote, Charles explained, "These are the figures if we regard voting with one party 66 2/3% of the time as the test of party regularity. If to be a regular party man a member must have voted 75% of the time with one party, the figures [for no-party voting] are 54% to 14% for the same sessions." *Id.* at 93 n.2.

117. See *supra* text accompanying notes 100-02.

118. The senate narrowly approved the Jay Treaty, by twenty to ten, along party

Washington and Hamilton (who according to Jefferson was also a “colossus”<sup>119</sup> in his own right). The Republicans gained the support of the four states that proposed amendments similar to the House resolution,<sup>120</sup> and nearly two-thirds of the House of Representatives.<sup>121</sup> The public citizens involved in this constitutional debate were nearly split, which reflected the results in the presidential election of 1796. John Adams, the Federalist party candidate, beat Jefferson by three electoral votes.<sup>122</sup> However, Jefferson garnered more votes than the Federalist candidate for Vice-President, Charles Pinckney.<sup>123</sup> Thus, the leader of the Republican party became the Vice-President under Federalist President Adams.

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lines. Rakove, *supra* note 16, at 356-57.

119. Jefferson wrote to Madison about the “Camillus” essays, “Hamilton is really a colossus to the antirepublican party. Without numbers, he is an host within himself.” Letter from Thomas Jefferson to James Madison (Sept. 21, 1795), in 16 *The Madison Papers*, *supra* note 20, at 88-89.

120. *See supra* text accompanying notes 101-02.

121. *See supra* notes 23-24 and accompanying text. When the treaty appropriations bill was finally voted on, the Republicans lost that majority. The appropriations bill passed the Committee of the Whole by a split forty-nine to forty-nine vote, which was broken in favor of the treaty by Republican Speaker of the House Frederick Muhlenberg. The House then implemented the Jay Treaty by a vote of fifty-one to forty-eight. Combs, *supra* note 12, at 186-87.

122. Elkins & McKittrick, *supra* note 1, at 518-19.

123. *Id.* at 519.

*Notes & Observations*