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Patchwork Republic

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Document Version

Publisher's PDF, also known as Version of record

Publication date:

2014

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Olthof, J. (2014). *Patchwork Republic: The rhetoric of "we the people" in the United States constitutional debates, 1765-1865*. s.n.

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Patchwork Republic

**The rhetoric of “we the people” in the United
States constitutional debates, 1765-1865**

Jelte Olthof

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Introduction

On February 11, 2003, President of the European Convention Valéry Giscard d'Estaing delivered an intriguing speech at the Library of Congress in Washington D.C. In the speech, Giscard d'Estaing directly linked the assignment of the European Convention to draft a constitution for the European Union to that of the founders who created the U.S. Constitution in Philadelphia two centuries earlier. "The European Union now stands at a crossroads, not wholly unlike that of Philadelphia in 1787," he stated, and added: "we have much to learn from the clear prose which flowed from the Philadelphia pens." The European Convention, Giscard d'Estaing hoped, would be Europe's Philadelphia moment and he modestly envisaged his role as that of Europe's Thomas Jefferson.¹

Giscard d'Estaing's speech raises the question why the President of a *European* Convention was talking to an *American* audience about Europe's constitutional future. The answer lies in the irresistible allure that the United States Constitution holds on the supporters of the European project. This goes back much further than Giscard d'Estaing. Many of those who stood at the cradle of European unification admired the United States as an exemplary model.² In the early years of the twenty-first century, this transatlantic admiration reached a peak among European academics and policymakers.³ In some cases, the affinity with America was not matched by a deep familiarity with U.S. history. This was certainly the case with Giscard d'Estaing's speech. The Constitution that the Philadelphia framers "penned" surely was brief—with only 7 articles it was a lot shorter than the 448 articles of the European Constitution—but few today would call its prose "clear." Moreover, when casting himself as a modern-day Thomas Jefferson, Giscard d'Estaing apparently forgot that the Sage of Monticello never attended the Philadelphia

¹ The speech can be found on the website of the European Convention: <http://european-convention.eu.int/docs/speeches/7072.pdf>. For the interview with the New York Times, see: Elaine Sciolino, "United Europe's Jefferson? Giscard d'Estaing Smiles," *New York Times*, June 15, 2003, <http://www.nytimes.com/2003/06/15/world/united-europe-s-jefferson-giscard-d-estaing-smiles.html>.

² Andrew Glencross, "Altiero Spinelli and the Idea of the U.S. Constitution as a Model for Europe: The Promises and Pitfalls of an Analogy," *Journal of Common Market Studies* 47, no. 2 (March 2009): 287–307.

³ The literature citing the United States as a model for the European Union is too vast to cover here, but notable works are: Sergio Fabbrini, "Transatlantic Constitutionalism: Comparing the United States and the European Union," *European Journal of Political Research* 43, no. 4 (June 2004): 547–569. Kalypso Nicolaidis and Robert Howse, eds., *The Federal Vision* (Oxford University Press, 2001). Michael Gehler, ed., *Towards a European Constitution: A Historical and Political Comparison with the United States* (Vienna: Böhlau, 2005).

Convention. Ironically, he spent the summer of 1787 in Paris as the United States' first minister to France. Nevertheless, the American model supplied the terms in which Giscard d'Estaing understood constitutionalization and by naming the body he presided the "European Convention," he hoped that 2005 would become "our Philadelphia."⁴

History, however, had a different fate in store for the European Constitution. In 2005, French and Dutch voters gutted a European Philadelphia moment with their resounding "non" and "nee" in plebiscites organized on the European Constitution. Just like the American Constitution was adopted by "we the people," so too would that of Europe. As the plebiscites illustrated, the very people who had to supply the legitimacy to the constitution had turned against it. European politicians and scholars have struggled to explain this debacle since.⁵ In a recent study of the Dutch case, Jieskje Hollander makes the compelling point that Dutch politicians disregarded their duty as "dike wardens" and allowed "Europe" to seep into the Dutch constitutional order.⁶ The 2005 debacle has sparked a Europe-wide debate on where the Convention had gone wrong. To some, the Constitution for Europe was bound to fail since it tried to turn Europe into something it is not—a federal state with a clearly defined European demos—while others blame the fact that it was not federal enough in its ambition.⁷

Though this is an important debate that needs to take place, it is one-sided in leaving the American model unchallenged. In the wake of the Dutch and French "no" the admiration for the United States as a model for Europe has been called illusionary and misleading, but tellingly, the very idea that there was a Philadelphia moment in 1787 remains unquestioned.⁸ In fact, the belief in an American-style "quick fix" that can produce a "United States in Europe" remains unshaken. In fact, the failure of the Constitution for Europe seems only to have strengthened the resolve of its advocates. Illustrative for this is the ringing manifesto for a United States of Europe *à la américaine*, by Guy Verhofstadt. Like the Americans, Verhofstadt claims, Europeans realize that their present framework of government does not work and requires pushing ahead towards an American style United States of Europe. "It is still obvious today that the [American] decision to go with the federal model was correct," Verhofstadt concludes: "and this

⁴ Quoted in: Jan-Werner Müller, "Our Philadelphia? Understanding the (apparent) Failure of the European Constitution," *Journal of Modern European History* 6, no. 1 (2008): 148.

⁵ An impression of the first reactions can be found in: Rik Peters, "History Decides? Lessons from the Constitutional Debates in the Frankfurt Parliament of 1848," in *The Constitutional Integrity of the European Union*, ed. Fabian Amtenbrink and Peter Arend Jan Van den Berg (The Hague: T.M.C. Asser Press, 2010).

⁶ Jieskje Hollander, *Constitutionalising Europe: Dutch Reactions to an Incoming Tide (1948-2005)* (Groningen: Europa Law Publishing, 2013).

⁷ For a good discussion see: Richard Bellamy, "The European Constitution Is Dead, Long Live European Constitutionalism," *Constellations* 13, no. 2 (June 1, 2006): 181–189.

⁸ A. Moravcsik, "What Can We Learn from the Collapse of the European Constitutional Project?" *Politische Vierteljahresschrift* 47, no. 2 (2006): 220. Karl-Heinz Ladeur, "'We, the European People . . . '—Relâche?," *European Law Journal* 14, no. 2 (2008): 149; Ladeur, especially, is impressed with what he calls the "American performative act," see page 150.

provides a clear hint as to what Europe has to do.”⁹ This argument echoes that of Jürgen Habermas and other advocates of so-called “constitutional patriotism,” who claim that a European Constitution is the first step in creating a common European *demos*—“we the people of Europe.” Just like the founders created the United States people, the argument goes, a European *demos* can also be created by adopting a Constitution.¹⁰

In the wake of this, European leaders are once again dreaming of a Philadelphia moment for Europe. When the German Secretary of State Guido Westerwelle presented the blueprint for the future of Europe in March of 2012, he remarked that: “we have a good treaty, but we need a constitution.”¹¹ Westerwelle’s blueprint—which was signed by the Secretaries of State of the E.U. Member States—provides for a European Union that narrowly resembles the United States. It includes a popularly elected President of the European Commission, a bicameral system where one house represents the “European people” and the other the Member States, and a ratification of future amendments by means of qualified majorities of all Member States.¹² As this blueprint illustrates, the dream of a veritable United States of Europe is still very much alive.

European scholars and policymakers are caught in a perpetual dance with the elusive model America. By not questioning their understanding of America’s constitutional history and continuing to rely on it for inspiration, Europe’s leaders seem headed for another debacle. Instead of focusing only on where Europe went wrong, this study wants to switch perspectives by questioning whether the Philadelphia-style “quick fix” that inspired the European Constitution ever happened in the first place. That there are reasons to doubt this, for example, is clear from the fact that the United States Constitution was also rejected in plebiscite back in 1788.¹³ This illustrates that the view of United States constitutional history as a smooth and painless affair is in need of repair. At a time when the call for a United States of Europe is louder than ever, it is important to realize that the constitutional history in the United States of America was, in fact, a toilsome and contested affair. This study tells the story of this patchwork republic’s past.

⁹ Guy Verhofstadt, *The United States of Europe: Manifesto for a New Europe* (London: Federal Trust for Education and Research, 2006), 47.

¹⁰ Habermas suggests that a European people can be created “by the political will of competent actors,” see: Jürgen Habermas, “Why Europe Needs a Constitution,” *New Left Review* no. 11 (October 2001): 24; For a good examples of the “constitutional patriotism” school as applied to Europe, see: Omid Payrow Shabani, “Constitutional Patriotism as a Model of Postnational Political Association: The Case of the EU,” *Philosophy Social Criticism* 32, no. 6 (September 1, 2006): 699–718; Clarissa Rile Hayward, “Democracy’s Identity Problem: Is ‘Constitutional Patriotism’ the Answer?,” *Constellations* 14, no. 2 (2007): 182–196.

¹¹ “Germany Wants New Debate on EU Constitution,” *Reuters*, March 9, 2012, <http://www.reuters.com/article/2012/03/09/us-eu-constitution-germany-idUSBRE82818020120309>.

¹² “Final Report of the Future of Europe Group,” September 17, 2012, <http://www.auswaertiges-amt.de/cae/servlet/contentblob/626338/publicationFile/171838/120918-Abschlussbericht-Zukunftsgruppe.pdf>.

¹³ In the State of Rhode Island, see: Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon & Schuster, 2010), 223.

The paradox of “we the people”

The challenge facing the framers of the United States Constitution in the late eighteenth century was similar to that of early twenty-first century Europe, namely: how to formulate a new political community consisting of existing states. In one respect, this is a matter of sovereignty and the constitution accounts for it by making clear when, how, and in whose name the central government can claim and exercise power over the member states. Hannah Arendt has called this the “task of foundation,” i.e. the question on what legitimate basis a new constitutional order can be grounded.¹⁴ Without such a legitimizing foundation, she contends, the center cannot make its will binding on the parts and no effective federation can be erected.

The starting point of the *Contested Constitutions* project at the University of Groningen—of which this study forms a part—is that the foundation on which the constitution of a given polity is legitimized is always an expression of that polity’s political identity.¹⁵ Constitutions not only establish a framework of government for the polity—for instance by establishing the different branches of government and regulating interaction between them—but also provide a *raison d’être* as to why its inhabitants should form one political community.¹⁶ In this study, that *raison d’être* will be called the *identity of the polity*. The nature of this identity varies from polity to polity, but it always lies outside the constitution and even outside the sphere of law. After all, if the constitution rests on a higher law, that law would be considered the constitution.¹⁷ Constitutions, in this sense, suffer from the problem of self-reference and need to be based on an extralegal foundation.¹⁸

In the United States, as Arendt and many others have pointed out, this identity of the polity was found by portraying the Constitution as the expression of popular sovereignty. The Constitution, as the famous opening line states, was ordained and established by “we the people of the United States.” The idea that the United States

¹⁴ Hannah Arendt, *On Revolution* (New York: Viking Press, 1963), 38.

¹⁵ The Contested Constitutions project group is funded by the Dutch organization for scientific research (NWO) and led by Professor Laurence Gormley and doctors Peter van den Berg, and Rik Peters. The project aims to shed a new light on Europe’s constitutional future by taking a view from the past. The insights of the various subprojects have appeared in: Peter Van den Berg et al., “Omstreden Grondwetten: Constitutionalisering in Historisch Perspectief,” in *Omstreden Democratie: Over de Problemen van Een Succesverhaal*, ed. Remieg Aerts and Peter de Goede (Amsterdam: Boom, 2013), 49–67; Fabian Amtenbrink and Peter A. J. Van den Berg, eds., *The Constitutional Integrity of the European Union* (The Hague: T.M.C. Asser Press, 2010); Rik Peters, “Constitutional Interpretation: A View from a Distance,” *History and Theory* 50, no. 4 (2011); and Hollander, *Constitutionalising Europe*.

¹⁶ This is sometimes called the “constitutive” function of constitutions, to distinguish it from the instrumental function as laying down the framework for government, see: Dario Castiglione, “The Political Theory of the Constitution,” *Political Studies* no. 4 (1996): 421–422.

¹⁷ Van den Berg et al., “Omstreden Grondwetten,” 51.

¹⁸ Niklas Luhmann, “Verfassung Als Evolutionäre Errungenschaft,” *Rechtshistorisches Journal* 9 (1990): 185–186. See also his: Niklas Luhmann, “The Third Question: The Creative Use of Paradoxes in Law and Legal History,” *Journal of Law and Society* 15, no. 2 (July 1, 1988): 153.

Constitution is an act of “we the people,” who authored and ratified it, has obtained the status of a solid truth in American politics, jurisprudence, and culture.¹⁹ According to most legal scholars, authority in the United States lies with the people, who are both the mainspring of the constitution and ratified it.²⁰ At the same time, most scholars admit that the United States did not form one people prior to 1787 and that, as one historian has argued, the framers of the Constitution were in fact “calling into existence (...) a new people.”²¹ The result is a strange paradox, for the constitution cannot at the same time be the product of the people and the people the product of the constitution.

Recent scholarship on the notion of “we the people” suggests that it must be seen as a legal and political fiction. According to Edmund Morgan, the most outspoken advocate of this view, the idea that the people had a voice in creating the Constitution was a necessary “make-believe” to create a viable form of government. The framers, Morgan argues, called a new people into existence to break the States’ hold on their autonomy prior to 1787: “Madison was inventing a sovereign American people to overcome the sovereign states.”²² In doing so, Morgan seems to agree with Kenneth Burke’s labelling of the people as a political “myth.”²³ In her recent book *Founding Fictions*, Jennifer Mercieca takes this one step further by arguing that constitutions are the codification of a community’s political fictions.²⁴ Constitutions, in this view, are the codification of myth and “we the people” the fiction that sustains them.

This “fictional” or “mythical” explanation in turn has been criticized by scholars who have tried to demonstrate that the people are a more or less tangible actor in American history. Instead of rejecting popular sovereignty as a fictional flourish, these scholars seek to explain how the people collectively acted as a sovereign in history. The best example of this is Bruce Ackerman, who views the founding as an example of higher lawmaking, when the people actively participated in government.²⁵ In such cases, Ackerman argues, the people claim the constituent authority to surpass its representatives and lay down the rules of government. During such rare “constitutional moments,” Ackerman emphasizes: “there is a broad sense, shared by many opponents, *that the*

¹⁹ See for an example: Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005), 7 who argues that the Constitution is “an act of popular will: the people’s charter, made by the people.”

²⁰ Richard S. Kay, “American Constitutionalism,” in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander, Cambridge Studies in Philosophy and Law (Cambridge; New York: Cambridge University Press, 1998), 30.

²¹ Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton, 1988), 270.

²² *Ibid.*, 267.

²³ Herbert W. Simons and Trevor Melia, eds., *The Legacy of Kenneth Burke* (Madison, WI: University of Wisconsin Press, 1989), 267–273.

²⁴ Jennifer R. Mercieca, *Founding Fictions* (Tuscaloosa: University of Alabama Press, 2010), 27.

²⁵ Bruce A. Ackerman, *We the People: Foundations* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), 6–7.

people have spoken.”²⁶ In this view, the United States Constitution becomes a document that, as Christian Fitz puts it, the people by their consent and volition brought into being.²⁷ Following this line of thinking, much recent work has focused on how “the people”—actually or in name—participated in American politics since the founding.²⁸ The Constitution, in this view, is seen as conceived in a moment and the people once more as its enactor.

These studies have greatly increased our understanding of how ordinary citizens—including the poor, women, and (former) slaves—claimed a role in the constitutionalization process as members of “we the people.” Unfortunately, they shed little light on the paradoxical role of “we the people” as both founder and founded. In each case, the legitimacy of the people is accepted at face value. By focusing on if and when the people manifests themselves in politics, these scholars miss the more fundamental point that the notion of “we the people” was in fact a highly contested concept both prior and anterior to the ratification of the Constitution. Instead of the product of a “constitutional moment,” U.S. constitutionalization was a long, piecemeal process with fits and starts. “We the people,” likewise, was not an overnight invention that was accepted outright, but remained a contested concept both before and after ratification. Without a better understanding of how the paradox of “we the people” played out in the United States, people like Verhofstadt and Habermas will continue to rely on a misguided view of the U.S. past to push for a European constitution on account of forming one people, and turning Europe into one people through a constitution.

Scope and Sources

This study proposes to resolve the paradox of “we the people” by approaching it as a rhetorical move in an ongoing debate to define the political identity of the United States. As part of the *Contested Constitutions* project, it seeks to explain “we the people” as the product of a rhetorical process. Constitutions, in this view, are essentially rhetorical attempts to constitute legal and political communities.²⁹ This is clear if we consider that modern constitutions, like that of the United States, are the written residue of a debate between different groups with different, often mutually exclusive views of what the polity should look like. Though the constitution’s clauses are binding on future generations,

²⁶ Bruce A. Ackerman, *We the People: Transformations* (Cambridge, MA: Belknap Press of Harvard University Press, 1998), 409.

²⁷ Christian G. Fritz, *American Sovereigns* (Cambridge; New York: Cambridge University Press, 2008), 1.

²⁸ Two studies worth noting in this respect are: Jason A. Frank, *Constituent Moments: Enacting the People in Postrevolutionary America* (Durham: Duke University Press, 2010); and Benjamin H. Irvin, *Clothed in Robes of Sovereignty: The Continental Congress and the People out of Doors* (New York: Oxford University Press, 2011).

²⁹ James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984), 246.

their meaning is subject of an ongoing debate. A constitution, in this sense, is solidified debate. It reflects the consensus among the majority on the polity's identity at the moment of its ratification. The minute the ink has dried, however, this consensus again becomes contested—or, to extend the metaphor, “liquefied”—when it this identity is challenged in new, unforeseen cases. Thus, as David Zarefsky and Victoria Gallagher have pointed out, a constitution is the product of debate and gives rise to debate; it is produced by persuasion and in turn seeks to persuade.³⁰

This study takes as its research object the constitutional discourse that created and shaped the United States Constitution. The debates on the floor of congresses, courts, and conventions hold the key to understanding how “we the people” could surface as the polity's foundation and to tracing its career once the Constitution was ratified. To do justice to the contested nature or “we the people,” this study takes a long-term approach. The debates studied not only include the speeches, votes, and deliberations in the Philadelphia Convention and the State Ratification Conventions, but also its predecessors, the Continental and Stamp Act Congress, as well as its successor, the United States Congress. Finally, this debate was not confined to congresses but at times also took place in the courts. Consequently, the landmark Supreme Court cases of the antebellum period are also included in the study.

The period covered in this study comprises a century of constitutional debate, from the conflict over the Stamp Act of 1765 to the Confederate surrender at Appomattox one hundred years later. Throughout this period, the question how the sovereign will of the center over the parts could be legitimized constantly took center stage. During the 1760s, the idea of a separate “American” constitution was first raised in response to the supposed tyrannical exercise of power by Great Britain. The 1770s and 1780s witnessed a long struggle to define a new foundation for an American polity, which eventually resulted in the U.S. Constitution of 1787 in which the three branches exercised power in the name of “we the people.” Throughout the next seven decades, this foundation became increasingly contested as the slaveholding states in particular questioned whether the United States really formed one people, with one identity, or several. This question, in the end, was not settled with words, but with the blood drawn on the battlefields of Antietam and Gettysburg. Whereas Americans would continue, and still continue to discuss what the “true” identity of “we the people” is, few to none have been willing to challenge the existence and sovereignty of this people after 1865.

The century of debate studied here is scattered over many different sources. Reliable verbatim records of debate are scarce for the period before 1787. For the deliberation in the Continental Congress, historians have to rely on the concise entries in

³⁰ “The Constitution must serve an identity-building function; it must express both what the nation is and what we believe it ought to be,” see; David Zarefsky and Victoria J. Gallagher, “From ‘Conflict’ to ‘Constitutional Question:’ Transformations in Early American Public Discourse,” *The Quarterly Journal of Speech* 76, no. 3 (1990): 250.

official *Journals of Congress*.³¹ These do not include records of debate, which can fortunately in part be remedied by supplementing it with the *Letters of Delegates to Congress*.³² The creation and ratification of the Constitution has been better documented. The debates in the Philadelphia Convention have been compiled by Max Farrand,³³ while a complete and reliable source for the ratification debates is being published by the University of Wisconsin.³⁴ For the post-ratification records of debate, the study relies on the authorized verbatim reports in the *Annals of Congress*, the *Register of Debates*, and the *Congressional Globe*.³⁵ For the Supreme Court, finally, the official versions of the decisions are consulted. Together, these publications form the main source for the material on which the conclusions of this study are based.

A Rhetorical Approach

To analyze these constitutional debates this study adopts a *rhetorical approach*, since rhetorical theory offers the instruments to analyze discourse. The main hypothesis of the *Contested Constitutions* project is that political language is constitutive for the identity of the polity as it crystallizes out in the polity's constitution. Put simply, the identity of the polity is seen as the product of political rhetoric. Every student of constitutional debates has come across cases where legislators will appeal to the identity of a polity to make their case. By portraying the political community in a certain way—for example: as a single people—the orator serves his or her persuasive goal—for example: uniform taxation. In doing so, the orator shapes the identity of the polity by making a claim about who “we” are—for example: one people. It is important to note that the implications of these claims are not always clear to the orator. For the historical actors, the techniques are a means to a persuasive end. Nevertheless, the rhetoric employed can have unforeseen consequences when other orators seize on the same vision to pursue different goals.

On the basis of this rhetorical approach, this study explores *if and how the rhetoric employed by the various orators in the constitutional debates from 1765 to 1865*

³¹ Worthington C. Ford et al., eds., *Journals of the Continental Congress 1774-1789*, 34 vols. (Washington D.C.: Government Printing Office, 1904).

³² Paul H. Smith, ed., *Letters of Delegates to Congress, 1774-1789*, 26 vols. (Washington D.C.: Library of Congress, 1976).

³³ Max Farrand, ed., *The Records of the Federal Convention of 1787*, 3 vols., Revised Edition (New Haven: Yale University Press, 1966).

³⁴ Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds., *The Documentary History of the Ratification of the Constitution*, 26 vols. (Madison: State Historical Society of Wisconsin, 1976).

³⁵ Joseph Gales, ed., *The Debates and Proceedings in the Congress of the United States: With an Appendix Containing Important State Papers and Public Documents, and All the Laws of a Public Nature*, 42 vols., (Annals of Congress of the United States) (Washington D.C.: Gales and Seaton, 1834). *Register of Debates in Congress: Comprising the Leading Debates and Incidents of Congress*, 14 vols. (Washington D.C.: Gales and Seaton, 1824). Francis Preston Blair et al., eds., *The Congressional Globe*, 46 vols. (Washington: Blair & Rives, 1834).

can account for the paradoxical role of “we the people” as both the author and creation of the United States Constitution.

Since the function of this rhetoric is to construct the polity by inventing an identity which is subsequently employed in legal and political discourse, the century of debate studied here can be divided into two phases. In the constitutive phase, the orators aim to answer the question “who are we?” which according to the German philosopher of history Hermann Lübbe is the essence of identity.³⁶ The answer to this question invariably takes the form of a story—or history—and thus this type of discourse includes the stories orators tell to define what it means to be members of the United States.³⁷ After ratification of the Constitution, the debate enters the applicative phase in which the orators seek to either challenge the constituted identity or make it binding. In the latter case, the aim is to command adherence to a fixed identity: “do this, because you are that.”³⁸ In the former, the aim is inverse: “refuse this, because you are that.”

To analyze the constitutional debates, this study focusses on rhetorical techniques like narratives, dissociations, metaphors, and frames that speakers employ to consciously and unconsciously create, shape, and challenge the notion of “we the people.” Together, these techniques form the framework to discuss how in the constitutional debates the identity of the United States as “we the people” took shape. To explain *how* rhetoric can account for the construction of a polity’s identity, this study relies on the classical Aristotelian conception of rhetoric, and supplements it with insights from modern scholars like Chaïm Perelman, Maurice Charland, and George Lakoff.

For Aristotle, rhetoric is the art of observing in any given situation the available means of persuasion.³⁹ The successful orator, in this view, is one who has perfectly adapted his or her speech’s proofs (ethos, logos, pathos), structure, and style to persuade a particular audience. In this view, as Lloyd Bitzer has pointed out, rhetoric is seen as situational: it depends on the values, premises, and preferences of the audience what will work and what not.⁴⁰ Together, Aristotle and Bitzer supply the instruments to map out what is persuasive in a certain situation. The problem with this view, however, is that rhetorical situations are never “given” but depends on how the audience perceives.⁴¹ Orators can in fact define the situation and reconstitute the audience’s view of the polity

³⁶ Hermann Lübbe, *Geschichtsbegriff Und Geschichtsinteresse: Analytik Und Pragmatik Der Historie* (Basel ; Stuttgart: Schwabe, 1977), 147.

³⁷ See for this in general: Rogers M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge; New York: Cambridge University Press, 2003), 45.

³⁸ See for this: Maurice Charland, “The Constitution of Rhetoric’s Tradition,” *Philosophy and Rhetoric* 36, no. 2 (2003): 129. See also: Kenneth Burke, *A Grammar of Motives* (Berkeley: University of California Press, 1969), 360–362.

³⁹ Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans. George Alexander Kennedy, 2nd ed. (New York: Oxford University Press, 2007), 37.

⁴⁰ Lloyd F. Bitzer, “The Rhetorical Situation,” *Philosophy & Rhetoric* 1, no. 1 (January 1968): 3 According to Bitzer the situation controls the rhetorical response, see page 6.

⁴¹ Richard E. Vatz, “The Myth of the Rhetorical Situation,” *Philosophy & Rhetoric* 6, no. 3 (July 1, 1973): 154, 159.

and even its own identity.⁴² What is needed, in other words, is a theoretical framework that can supplement the classical view and account for *how* rhetoric can define the identity of polity. The instruments for this can be found in the theories of dissociation, constitutive rhetoric, and framing.

One way of altering the way the audience views the situation is through what Chaïm Perelman calls dissociations. Unlike associations—also called *liaisons* by Perelman—which move the audience from an accepted premise to a conclusion, dissociations split a concept into two in order to avoid or overcome an incompatibility.⁴³ An example of this is when someone appeals to the “spirit” of the constitution, if the “letter” does not support his or her case. By claiming that the spirit is more important than the letter, the speaker creates a new way of looking at the constitution, in which what is actually written is disregarded in favor of the spirit evoked by the speaker. All dissociations, Perelman points out, stem from the prototype pair appearance/reality and will seek to associate the negative or insignificant (letter) with the former and the positive or significant (spirit) with the latter.⁴⁴ Thus, dissociations invite the audience to cast away old meanings in favor of new ones. This holds true for how the audience perceives itself as well, since every claim to independence on the basis of forming a separate people in fact relies on a dissociation.

A second way of altering the situation is by means of metaphors. Metaphors, as George Lakoff and Mark Johnson have pointed out, can define situations. By inviting the audience to think of one thing (for example, time) in terms of another (money), the way we think, act, and talk about it is metaphorically structured.⁴⁵ All of a sudden, things “cost” time and we are afraid to “waste” it on “worthless” endeavors. By highlighting one aspect (value) of a concept (time) over others, metaphors can keep the audience from focusing on other aspects that are inconsistent with it (for example, time as the sea).⁴⁶ Perelman calls this *presence*, the drawing of the audience’s attention to what supports the orator’s case.⁴⁷ More recently, Lakoff has reinvented this technique as “framing theory,” by which he means that presenting a case (for example, taxes) through a certain lens or “frame” (affliction) invites the audience to understand it only in that light.⁴⁸ For the purposes of this study, it is important to note that in the U.S. constitutional debates

⁴² Michael C. McGee, “In Search of ‘The People’: A Rhetorical Alternative,” *The Quarterly Journal of Speech* 61, no. 3 (1975): 239–240.

⁴³ Chaïm Perelman, *The Realm of Rhetoric*, trans. William Kluback (Notre Dame: University of Notre Dame Press, 1982), 127–128.

⁴⁴ *Ibid.*, 126.

⁴⁵ George Lakoff and Mark Johnson, *Metaphors We Live by* (Chicago: University of Chicago Press, 1980), 5.

⁴⁶ *Ibid.*, 10.

⁴⁷ Perelman, *The Realm of Rhetoric*, 35.

⁴⁸ See: George Lakoff, *Don’t Think of an Elephant!: Know Your Values and Frame the Debate* (White River Junction, VT: Chelsea Green Publishing, 2004), 3–4.

orators used metaphors to frame the polity in a way—for example as a solar system—that drew attention to its clockwork, rather than its patchwork nature.

Third and finally, to explain how the identity of the audience itself can be shaped rhetorically, this study relies on the theory of constitutive rhetoric as explored by Maurice Charland.⁴⁹ As Charland points out, traditional Aristotelean rhetoric assumes that the identity of an audience is given and therefore extra-rhetorical. A speaker, in this traditional view, can appeal to this identity to persuade the audience, but not alter the identity itself. The starting point of Charland's theory is that rhetoric can indeed produce, shape, and challenge the very identity of the audience. Put simply, the way an audience sees itself is not fixed, but can be shaped by means of rhetorical techniques. The theory of constitutive rhetoric seeks to account for this process. As such, it offers the instruments to explain how a people are constituted and this study aims to explain how the identity of the U.S. polity as "we the people" was rhetorically created.

Constitutive rhetoric, according to Charland, operates through narratives, i.e. stories we tell about who we were, are, and ought to be. Charland provides a good example of how this works from the late 1960s, when the supporters of Quebec independence called into being a *peuple québécois* that could legitimate the constitution of a sovereign Quebec state. By defining the first settlers of the St. Lawrence valley as a separate people—the *Quebecois*—with a distinct identity—French language and culture—and preceding the Canadian federation, the advocates of independence portrayed those living in 1960s Quebec as a separate *peuple* with a right, even a duty, to an independent state. Thus, Charland concludes: "in the telling of the story of a *peuple*, a *peuple* comes to be."⁵⁰ Like every story, a narrative has a plot: it portrays the past to define the present aimed to urge and warrant action to secure a better future. Constitutive rhetoric thus constructs a political subject—the people—by first providing a collective identity for it, then placing it as an actor in history, and finally demand that it act in accordance with this historical identity.⁵¹

This brings to light the fundamental paradox that constitutive rhetoric presumes the very people that it seeks to establish.⁵² It presents as given the very identity it constitutes. This makes constitutive rhetoric a great instrument to explore the paradox of "we the people." It assumes that the identity of a people is not automatically established as a result of the rhetoric, but when the audience affirms its new identity as a people through its actions. The theory, in other words, tells only half the story. As Charland points out, the identity of the people does not become fixed through rhetoric, but remains

⁴⁹ See in particular: Maurice Charland, "Constitutive Rhetoric: The Case of the 'Peuple Québécois,'" *The Quarterly Journal of Speech* 73, no. 2 (1987): 133–150; and Maurice Charland, "Constitutive Rhetoric," in *Encyclopedia of Rhetoric*, ed. Thomas O. Sloane (Oxford: Oxford University Press, 2001), 616–619.

⁵⁰ Charland, "Constitutive Rhetoric," 1987, 139–140.

⁵¹ Charland, "Constitutive Rhetoric," 2001, 617; see also: Charland, "Constitutive Rhetoric," 1987, 145 where he argues that: "past struggles are presented as warranting action in the present."

⁵² Charland, "Constitutive Rhetoric," 1987, 137; Charland, "Constitutive Rhetoric," 2001, 617–618.

open to revision. This means that the question who is included in “we the people” is subject to change.⁵³ This again shows that the legitimizing identity underlying the constitution is not fixed once the constitution is ratified, but needs to be sustained over time by persuading subsequent generations that they indeed form one people. What is needed, in other words, is for the audience to adhere to its identity as “we the people.”

This adherence, Perelman notes, is the heart and soul of rhetoric. Unlike demonstration—which aims to establish the truth on the basis *a priori* universal rules—argumentation aims at persuasion and derives its soundness from the extent to which a given audience concurs in it. Rhetoric, in Perelman’s view, is the study of the discursive techniques that aim “to elicit or increase the adherence of the members of an audience to the theses that are presented to their consent.”⁵⁴ This presupposes what Perelman calls a “meeting of the minds” between speaker and audience; the point where the audience accepts the speaker’s premises.

For the purpose of the study of constitutions, this means that debate is an argument between different representations of the polity, each being pushed by their advocates as the “true.” The only thing we have to go on in terms of deciding which representation is accepted is the expression of adherence by the audience. In debates this can be found in two ways. First, the sense of the majority can be gauged from the votes they take and the declarations they pass. Both are an explicit statement of the consensus at that point. There are many cases, however, in which such convenient explicit statements are lacking. In such cases the student of rhetoric can still gauge the persuasiveness of a statement about the identity by the polity by studying its reception *within* the debate. Unlike speeches, where the audience often is a passive participant to persuasion, debates by nature invite reactions, objections, and refutations. Together, this discursive digestion of persuasive attempts gives us the empirical basis to verify how well it is received by the audience.⁵⁵ Adherence thus illustrates a successful argument as well as what that particular audience in that particular moment considers persuasive.

Patchwork Republic

Following the approach to “we the people” as the product of a rhetorical process, this study will argue that the Philadelphia Convention did not form the endpoint in the debate on the identity of the United States, but rather the continuation of it. Rather than turning the United States into one people with a singular identity, the framers of the Constitution patched together the opposing views of it as both one and thirteen separate peoples at the

⁵³ Charland, “Constitutive Rhetoric,” 1987, 136, 143.

⁵⁴ Perelman, *The Realm of Rhetoric*, 9.

⁵⁵ As David Zarefsky has pointed out, rhetorical criticism relies on the same method of verification to test the quality of claims made about rhetoric, see: David Zarefsky, “Knowledge Claims in Rhetorical Criticism,” *The Journal of Communication* 58, no. 4 (2008): 632.

same time. The result, consequently, was not a clear blueprint, but a sketchy roadmap that committed subsequent generations of politicians to continue to debate what the true identity of this patchwork republic was.

This study starts from the idea that the story of the United States Constitution is an ongoing debate and the argument it makes is structured accordingly. The story begins in 1765, when new tax policies in the Empire spark a constitutional debate in the colonies in which the first claims that American colonists form a separate people are made. The first chapter takes the reader from these initial debates to the Declaration of Independence of 1776. Long hailed as the birth of the United States, this study will argue that the Declaration did indeed claim that “we” Americans were separate from “them” British, but that it was all but clear what united “we” at that time. Chapter 2 analyzes the debates on the Articles of Confederation, in which the former colonists tried to define who “we” was and how it could serve as the foundation for the Confederation. The third chapter takes a closer look at the Philadelphia Convention and argues that, the Constitution that was framed in the summer of 1787 created a patchwork republic that combined two views on the political identity of the United States—as both one and several peoples at the same time—and thus rested the polity on a new patchwork paradox.

The fourth chapter of the study functions as a hinge between the first phase, in which the identity of the polity was created, and the second phase, in which this identity was subsequently interpreted. In the debates discussed in this chapter, the supporters of the Constitution successfully portrayed the ratification conventions as an embodiment of “we the people of the United States,” thus giving rise to the myth that ratification was an “act of the people.” Once the opponents conceded that they formed “we the people of the United States” this allowed the supporters to use this against them in subsequent debates on the feasibility of governing the U.S. as one people.

The final three chapters of this study discuss the constitutional debates from ratification to the Civil War. The starting point of these chapters is that the ratification of the Constitution did not mean the end to the debate on the meaning of “we the people,” but rather the start of a new chapter. The question who the people constituted—either one people or several—was as contested after as before ratification. The patchwork nature of the Constitution provided ammunition for both interpretations, which explains why narratives continued to play a prominent role in these debates. The debates in the fifth chapter, which covers the period from the first Washington Administration up to the Missouri conflict, further examine how the myth of the U.S. Constitution as an “act of the people” was at stake in conflicts over the National Bank, Alien and Sedition Act, and in the jurisprudence of the Marshall Court. Chapter 6 discusses how the divisive issue of slavery burst on the scene and examines the three compromises—the Missouri Compromise, the compromise tariff, and the Compromise of 1850—by which Congress tried to put the patchwork paradox to rest. The final chapter will discuss how the seams of

the patchwork republic came apart in the debate on the Kansas-Nebraska Act and Dred Scott case and will close with the final debate during the secession winter.

Finally, the conclusion will first trace the end of the patchwork Republic in an epilogue. Second, it will discuss the implications of the rhetorical approach this study for how we view the constitutional history of the United States and what this means for the contemporary debate on the constitutional future of Europe.

Chapter 1

A Reluctant Revolution

The founding generation, as historian Jack Rakove has recently pointed out, was not revolutionary by design.¹ Even though the conflict between Great Britain and its thirteen North-American colonies is known as “the American Revolution,” few colonists regarded themselves as revolutionaries. In fact, most colonists claimed to be loyal Britons on the eve of the Revolution who only sought what was due to them under the British Constitution. Even as tensions grew between the colonists and the mother country, it was all but clear from the start this would lead to separation. Yet twelve years later these same colonists adopted the Declaration of Independence which transformed the thirteen British colonies in North America into a new political community, the United States of America. This raises the question how, within little more than a dozen years, a generation of devoted British colonists could turn into the American revolutionaries who launched a bold bid for independence on the claim of forming a separate people.

This chapter addresses this question by analyzing the debates in the colonial assemblies as well as the Stamp Act and Continental Congress. These debates began when Parliament started to impose taxes on sugar and stamps in the mid-1760s and culminated in the Declaration of Independence, twelve years later. It is important to note that the emphasis here is on the *colonial* debate in reaction to Parliament, not on the dialogue between Great-Britain and its colonies. The purpose of this chapter is to inquire what drove the colonists to question their self-image as Britons to and examine what took its place. It addresses the question when, how, and why a political identity of the polity separate of that of British subjects emerged in the debate and what this new “American” identity entailed. Finally, it inquires to what extent this “American” identity formed the legitimizing foundation for the new political community of the United States.

This chapter will trace the debate from the first, hesitant protest to the Stamp Act of 1765 by colonial assemblies who went out of their way to prove their loyalty to Britain, via the ambiguous declarations of Continental Congress which lent a common

¹ Jack N. Rakove, *Revolutionaries: Inventing an American Nation* (London: William Heineman, 2010), 18. Rakove goes on to say that the founders are revolutionaries “by action”—a claim disputed in this chapter. The colonists were not, as Gordon Wood has argued “revolutionaries despite themselves” who “rush[ed] into a revolution even as they denied it,” but rather reluctant reformers who only took the step of declaring independence after a long, unanswered campaign for reconciliation, see: Ibid., 17; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: University of North Carolina Press, 1998), 13.

voice to the colonies, and culminates in the Declaration of Independence by which the colonies proclaimed themselves an independent polity. It will demonstrate how the members of Congress constantly and increasingly struggled to lend uniformity to their thirteen different voices. And most importantly, it will show that, paradoxically, it was the colonists' zealous attachment to what they believed to be the true principles of the British Constitution that led them to viewing themselves as a separate people. Before turning to the debate, however, it is first necessary to take a closer look at the constitutional framework of the British colonies in North America at the end of the eighteenth century which formed its starting point.

Colonists and Britons

The British colonies in America were originally founded by seventeenth-century joint stock companies that operated under royal charters. These charters formed the basis of what was called the "colonial constitution," that is: the whole body of written and customary rules that regulated colonial government.² The charters placed the colonies well inside the British Empire by providing them with a royally appointed governor. At the same time they granted the colonies a considerable amount of self-government through the popularly elected colonial assemblies. Even though Britain recognized the assemblies, it never formally altered its position that these colonial legislatures were privileges granted by the royal prerogative, rather than the inherent right of the colonists.³ This meant that the position of the colonies within the Empire wavered somewhere between dependence and autonomy.⁴ Both Britain and its colonies benefitted from this situation. The distance to London made local involvement in colonial government inevitable, while imperial protection of colonial trade and borders was a precondition to the growing prosperity in the colonies.

For the colonists in British America, the connection with Britain was more than political: it was an important part of who they considered themselves to be. As British colonists, they considered themselves inhabitants of both their particular colony and of Britain at the same time. Accordingly, the colonists saw themselves as full members of the British Empire and referred to themselves as "Britons," albeit Britons overseas. As loyal British subjects, the colonists celebrated the King's birthday and applauded British victories at home and overseas. Colonial patriotism, in other words, was equivalent to

² Gerald Stourzh, "Constitution: changing meanings of the term from the Early Seventeenth to the Late Eighteenth Century", in: Gerald Stourzh, "Constitution: Changing Meanings of the Term from the Early Seventeenth Century to the Late Eighteenth Century," in *Conceptual Change and the Constitution*, ed. Terence Ball and J. G. A. Pocock (Lawrence: University Press of Kansas, 1988), 44.

³ Leonard Woods Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (New Haven: Yale University Press, 1930), 177.

⁴ Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States, 1607-1788* (Athens: University of Georgia Press, 1986), 54.

British patriotism. Benjamin Franklin, when he celebrated the British victory in the Seven Years' War, wrote that he did so: "not merely as I am a colonist, but as I am a Briton."⁵

From the beginning, the identification of the colonists with Britain had an important constitutional dimension, since the colonists regarded their charters as "colonial constitutions." As Bernard Bailyn has pointed out, the correspondence between the colonial constitutions and the British Constitution was "an axiom of political thought" by the late eighteenth century.⁶ The colonists believed that the British Constitution provided the basis for the prosperity of the colonies. For them, the capacity to enjoy the rights and liberties of Englishmen was what set them apart from the Indians and non-British colonists that lived around them.⁷ This sense of belonging to the British Empire and of enjoying English liberties under the British Constitution constituted the most important aspects of the political identity for the inhabitants of the British colonies in North-America. Put differently, by virtue of their membership of the British political community, the colonists claimed to enjoy all the rights and privileges under the British Constitution.

As a result of this, the highest level of community for the colonists was not the North American continent but the Empire.⁸ In fact, the inhabitants of the colonies felt more directly connected to Britain than to their neighbors in the surrounding colonies.⁹ In line with this, each colony had formal political ties with Britain, but none with her sister colonies. To a large extent the colonies were in fact each other's rivals. From the colonists' point of view, intercolonial union threatened local autonomy. Union was associated with losing power, whereas disunion was not seen as harmless, because it was the Empire's responsibility to look after the general interest.¹⁰ All continental issues were considered to be a "national concern," and as such fell to the "nation"—that is, the Empire—and the "national" government in London, rather than those of the colonies combined.¹¹

In this light, it is not surprising that most of the colonists believed that the many differences in laws, interests, and manners between the colonies made any form of union between them impossible.¹² The several instances in which the British government had tried to establish something like a political union between the colonies only confirmed the impossibility of the undertaking. One important attempt in the eighteenth century was the

⁵ Quoted in: Alan Taylor, *American Colonies* (New York: Viking, 2001), 437.

⁶ Bernard Bailyn, *The Origins of American Politics* (New York: Alfred A Knopf, 1968), 60.

⁷ Jack P. Greene, "Empire and Identity from the Glorious Revolution to the American Revolution," in *The Oxford History of the British Empire*, ed. P. J. Marshall (Oxford: Oxford University Press, 1998), 217, 222.

⁸ Colin Bonwick, *The American Revolution*, 2nd ed. (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2005), 75.

⁹ Greene, *Peripheries and Center*, 162.

¹⁰ Harry M Ward, *"Unite or Die:" Intercolony Relations, 1690-1763* (Port Washington, N.Y: Kennikat Press, 1971), 4, 256.

¹¹ For this see: Greene, *Peripheries and Center*, 123.

¹² *Ibid.*, 157.

Plan of Union adopted at the Albany Conference of 1754. The Plan, written by Franklin, sought to unite the colonies in a defensive union against the French and Indian threat, but was rejected by the colonial governments because they feared it would undermine their autonomy.¹³ The fate of the Albany Plan of Union shows that the dreams of a small part of the elite to unite the colonies ran ashore on the refusal of the colonial establishment to surrender power. In short, the idea of an independent “American” polity enjoyed very little appeal before the Revolution and, if it was brought up, this was usually to refute the likelihood of it becoming reality.¹⁴

The failure to establish a lasting form of intercolonial cooperation meant that the ambiguous position of the colonies within the Empire remained unchanged. In the course of the eighteenth century two developments would further complicate the constitutional relations within the Empire. The first took place in Britain in the half century after the Glorious Revolution. There, the steady transition from government by the crown towards government in the name of the crown slowly drew colonial administration out of the King’s hands and placed it into those of Parliament. Matters relating to the colonies were increasingly debated and decided in Parliament and came to be seen as belonging within its sphere of authority, though in name the King remained in charge.¹⁵

A second development took place on the other side of the Atlantic, where the colonial assemblies successfully reduced the power of the royal governor and expanded their power over the purse. Interestingly, the assemblies consciously modeled themselves after the post-1688 Parliament. Just like the British Parliament represented the people of Britain, the colonial assemblies now claimed that they alone represented the peoples of the colonies. The fact that the colonial delegates had close ties with the electorate lent considerable support to this claim. Many assemblies were open to the public and the delegates met their constituents in the taverns and coffeehouses.¹⁶ By claiming to represent the peoples of the colonies, the assemblies consciously assumed the role of Parliament within the colonies.

The implications of these two developments for the constitutional relations within the Empire, however, were far from clear. Did the colonial assemblymen truly occupy the

¹³ Ward, *Unite or Die*, 14–16. It is important to note that Franklin hoped that his Plan of Union would strengthen the Empire in the colonies, see: John E. Ferling, *A Leap in the Dark: The Struggle to Create the American Republic* (Oxford: Oxford University Press, 2003), 9. Finally, as Alison Olson has pointed out, the Plan of Union was unpopular in Britain because its permanent and federal nature threatened Parliament’s authority over the colonies, see: “The British Government and Colonial Union, 1754,” *The William and Mary Quarterly* no. 1 (1960): 33–34.

¹⁴ J. M. Bumsted, “‘Things in the Womb of Time’: Ideas of American Independence 1633 to 1763,” *William and Mary Quarterly* no. 4 (1974): 534.

¹⁵ H. T. Dickinson, “The Eighteenth Century Debate on the Sovereignty of Parliament,” *Transactions of the Royal Historical Society* 26 (1976): 200–201. Richard R. Johnson, “‘Parliamentary Egotisms’: The Clash of Legislatures in the Making of the American Revolution,” *The Journal of American History* 74, no. 2 (September 1987): 342, 346.

¹⁶ Alison G. Olson, “Eighteenth-Century Colonial Legislatures and Their Constituents,” *The Journal of American History* 79, no. 2 (September 1992): 554–555.

same position in the colonies as the members of Parliament did in Britain? If so, then what would happen if Parliament—in line with its newfound authority over colonial matters—started mingling directly in the affairs of the colonies? As long as Parliament did not directly intervene in the colonies’ domestic affairs, however, and as long as the colonial assemblies did not openly challenge Parliament’s authority, these questions remained moot. As a result, the tension between the two foundations from which the colonial assemblies drew their power—that is: from the charter as the peoples of the particular colony, i.e. Virginians or Pennsylvanians, and from the British Constitution as Britons—remained hidden. A constitutional conflict could raise the question whether the colonists were a separate people from their British ancestors, but as long as this was avoided it was possible to assume that they formed one people under one constitution. Thus, the celebrated British writer Arthur Young could still claim in 1772 that colonies and the mother country formed: “one nation, united under one Sovereign, speaking the same language, and enjoying the same liberty, but living in different parts of the world.”¹⁷

In retrospect, the hopes and aspirations of the colonists on the eve of the Revolution can hardly be called revolutionary. The colonists enjoyed being part of the British Empire and proudly bore the title of Britons. More important, this identification had a strong constitutional dimension. It was by virtue of being Britons that the colonists claimed to enjoy the rights and liberties provided by the British Constitution in the first place. There was, in other words, a strong link between membership of the polity—in this case the Empire—and entitlement to constitutional rights—in this case the British Constitution. Instead of dangerously discontent would-be rebels, the colonists looked more like loyal subjects, whose greatest wish was a firm attachment to the Empire. When, in the second half of the eighteenth century, Parliament and the colonies started to quarrel over the issue of taxation, a constitutional debate arose in which this link between Constitution and identity of the polity came under fire. In fact, as the conflict continued and a satisfactory solution failed to appear, the underlying question, whether the colonists were a separate people from the British, started to dominate the debate and made the colonists reflect on their cherished self-image as Britons.

Coming of a conflict

Benjamin Franklin once said that nothing in life is certain but death and taxes.¹⁸ Judged from that angle, the conflict between the colonies and Parliament in the mid-1760s may well have been inevitable. The Sugar Act of 1764 and the Stamp Acts 1765 started a

¹⁷ Morgan, *Inventing the People*, 130–1, 135, 137, 144–145. Arthur Young, *Political Essays Concerning the Present State of the British Empire* (London: W. Strahan and T. Cadell, 1772), 1.

¹⁸ In a letter to Jean Baptiste Le Roy of November 13, 1789, see: Albert Henry Smyth, ed., *The Writings of Benjamin Franklin*, vol. X 1789–1790 (New York: Macmillan, 1907), 69.

constitutional debate that marked the beginning of a long, piecemeal process which would eventually take the colonists from reluctant resistance to outright revolution. The rationale behind both acts was the British view that the colonies should contribute to the protection they enjoyed under the Empire. During the French and Indian War—known as the Seven Years' War in Europe—only the speedy intervention by British troops had saved the colonies from being overrun by their French and Indian adversaries. The British authorities hoped that the huge debts that it had contracted during this operation—which is estimated to have been some 50 million pounds or about a 66% increase—could now be redeemed by the colonies.¹⁹

In the colonies, the new taxes were considered harmful to the fragile postwar economy and were met with outrage. Interestingly, the official opposition to the Sugar and Stamps Acts by the colonial assemblies explicitly focused on the supposed *unconstitutionality* of the measures.²⁰ The Virginia House of Burgesses, in its petition to Parliament on the Sugar Act, argued that it was “a fundamental principle of the British Constitution (...) that the people are subject to taxes but such as are laid on them by their consent.” Because this consent was not granted, the House regarded the Sugar Act as: “inconsistent with the fundamental principles of the Constitution.” By drawing on the rights of Englishmen to consent to taxes, the House placed itself firmly within the British polity. What's more, the members of the House called themselves “British patriots” and regarded the resistance to the “anti-constitutional” use of power by Parliament as their “just and undoubted rights as Britons.”²¹

The Virginian appeal to the British Constitution demonstrates that the colonists observed no marked distance between their colonial charters and the British Constitution. The Massachusetts House of Representatives made the same point when it spoke of rights enjoyed under “the British Constitution, as well as the Royal charter.” The protest against the taxes was not, therefore, seen by the assemblies as an act of disloyalty. This is clear from the many expressions of loyalty that can be found in these petitions. The New York assembly, for example, spoke of their “faith and allegiance” to the King and their “submission to the supreme Legislative power” of Parliament. In similar vein, the Connecticut House spoke of the “surest band of union and confidence” between the colony and Britain.²² The emphasis that the colonial legislatures placed on the shared past of colonists and Englishmen demonstrates that the colonists derived their rights under the

¹⁹ Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution*, New, rev. ed (New York: Collier Books, 1963), 36.

²⁰ Some scholars distinguish between “economic” opposition to the Sugar Act and “constitutional” opposition to the Stamp Act, see for example: Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763-1789*, The Oxford History of the United States (New York: Oxford University Press, 2005), 72, there is nothing in the sources to support this distinction, however.

²¹ Edmund S. Morgan, *Prologue to Revolution; Sources and Documents on the Stamp Act Crisis, 1764-1766* (Chapel Hill: University of North Carolina Press, 1959), 15, 17 The New York assembly makes a similar point in its petition to Parliament, see: 10, 13.

²² *Ibid.*, 56, 61. Morgan and Morgan, *Stamp Act Crisis*, 137.

British Constitution from being members of the British polity. The fact that they were the descendents of Englishmen, in other words, was a necessary precondition for claiming the right under the British Constitution to resist Parliament's taxes.

Among these many attestations of loyalty, one petition stood out for its novel character: the Resolves adopted by the Virginia House of Burgesses in reaction to the Stamp Act. This petition was drafted and submitted to the House on May 30, 1765, by the young lawyer Patrick Henry, who had taken his seat only nine days earlier. According to Henry, the Virginia colonists enjoyed the same rights as Englishmen, because these had been transmitted to them by the settlers who had first set foot on Virginian soil. The first of these rights, he claimed, was the right to be taxed by one's own representatives. This, he emphasized, was the "distinguishing characteristic of British freedom, without which the ancient constitution cannot exist."²³ So far, Henry's Resolves resembled the other petitions against the Stamp Act. His emphasize on colonial ancestors stressed the common past of Britons on both sides of the Atlantic and supported the colonists' claim that they were in fact Englishmen. In similar vein, Henry's mention of the "ancient constitution" was an appeal to restore to the colonists the rights enjoyed by Britons since ancient times. Like the other petitions, Henry's Resolves illustrated the strong link between forming part of the British people and entitlement to the British Constitution.²⁴

Henry's petition, however, went considerably further than that of the neighboring colonies. Because the legitimacy of taxes relied on the consent of the people, Henry concluded, "every attempt to vest such a power in any person (...) other than the general assembly is illegal, unconstitutional, and unjust, and has a manifest tendency to destroy British, as well as American freedom."²⁵ Here Henry introduced a revealing distinction which shows he did not believe the British and colonial interest to be one and the same. According to one eyewitness' account of the speech, Patrick Henry portrayed himself as a "good American" who, like Brutus and Cromwell before him, stood up for "his country's dying liberty."²⁶ Henry, in other words, identified himself as an "American," as well as a British colonist, and it was on this basis that he urged his colleagues to reject the tax. Henry's resolution was novel in that it was the first to speak of the colonists *collectively* as a distinct group, Americans. And though it remained far from clear what he meant by "country"—Virginia or America—by portraying himself as "American," Henry at least opened the door for the colonists to view themselves in a different light than Britons.

The novel character of Henry's speech is clear from the fact that the Speaker of the House of Burgesses felt it went "too far" and even reeked of "treason." Henry's resolutions were debated and adopted the following day and quickly gained fame throughout the colonies as the Virginia Resolves. There is some confusion over whether

²³ Morgan, *Prologue to Revolution*, 47–48.

²⁴ H. T. Dickinson, "The British Constitution", in: H. T. Dickinson, ed., *A Companion to Eighteenth-Century Britain*, Blackwell Companions to British History (Oxford, UK: Blackwell Publishers, 2002), 5.

²⁵ Morgan, *Prologue to Revolution*, 48.

²⁶ "Journal of a French Traveller in the Colonies, 1765, Part I," 745.

Henry's petition was supplemented with another resolution that branded anyone who asserted the constitutionality of the taxes as "enemy to his Majesty's colony."²⁷ Yet even without this last resolve, Henry's speech and petition rank among the first instances in which the colonists formulated a self-image other than that as Britons. In this sense, it constitutes the first step in the long process that would take the colonists to claiming their rights separate from being Britons.

The Virginia Resolves were widely reported and Henry's bravado became the talk of towns all over the continent. This no doubt helped the colonists realize they did not have to face the mother country separately.²⁸ More than three months after Parliament passed the Stamp Act, the assemblies of several colonies decided to meet together to discuss a common approach to the new taxes. The Massachusetts House of Representatives took the lead in organizing this intercolonial assembly. In June 1765, speaker of the House Samuel White sent a circular letter to the other colonial assemblies urging them: "to consult together on the present circumstances in the colonies (...) and to implore relief."²⁹ Nine colonies responded to this call and assembled in New York City's Federal Hall on October 1765 for the Stamp Act Congress.³⁰ Unlike the Albany Conference of 1754, which had been organized by the imperial authorities, the Stamp Act Congress was initiated by the colonists themselves. In a fashion that would become typical in the decade to come, the colonies suddenly fell in with the idea of cooperation when the danger of losing power by the hands of Parliament became greater than that of losing it to each other. The fact that decision making required unanimity and that each colony, regardless of size or population, would cast a single vote shows that the Stamp Act Congress still resembled a league of separate and autonomous polities. Still, it formed a significant first step forward in political cooperation between the colonies.

The delegates of the Stamp Act Congress immediately set to work on an official list of rights and grievances. Unfortunately there are no records of the debates in the Congress, but it is clear that after almost two weeks of discussion, the delegates decided on a joint statement. This "Declaration of Rights and Grievances" neatly set out the line of reasoning behind the famous slogan of "no taxation without representation." First, it invoked the right of the people or their representatives to consent to taxes (article 3), and claimed that this was the right of all Englishmen under the British Constitution. Second, it maintained that the colonies were not and could not be represented in Parliament (article 4) and that this right thus fell to the colonial assemblies (article 5). Since these had not been consulted, however, the Congress concluded that the Stamp Act was: "inconsistent with the principles and spirit of the British Constitution" (article 6).³¹

²⁷ Morgan, *Prologue to Revolution*, 49.

²⁸ Middlekauff, *The Glorious Cause*, 86.

²⁹ *Proceedings of the Congress at New-York* (Annapolis: Jonas Green, 1766), 1.

³⁰ The governors of the absent colonies refused to convene the assemblies to elect delegates, see: Morgan and Morgan, *Stamp Act Crisis*, 139.

³¹ *Proceedings of the Congress at New-York*, 15.

The rallying cry of “no taxation without representation” shows that the opposition of the Stamp Act Congress to the tax measures was once again based on rights claimed *within* the Empire and *under* the British Constitution—that is, on the British concept of liberty, rather than the American. The tone that the members of Congress used in the Declaration served to stress their allegiance to the King and esteem for “that august body the Parliament of Great-Britain.” Paradoxically, then, to express their difference of opinion with Britain, the colonists relied on emphasizing their similarity to Britain. Because their enjoyment of the rights of Englishmen dependent on this similarity, the delegates of Stamp Act Congress wrote that: “it gives us great pain to see a manifest distinction made between the subjects of our mother country.” “We esteem,” they continued: “our connections with, and dependence on Great Britain, as one of our greatest blessings,” and expressed the hope that they would continue to enjoy “the happy fruits of British government.”³²

By branding the Stamp Act as inconsistent with the British Constitution, the delegates of Congress implicitly demonstrated their strong identification as Britons. In its petition to Parliament, Congress stressed that: “it is from and under the English Constitution [that] we derive all our civil and religious rights and liberties; we glory in (...) having been born under the most perfect form of government.”³³ The delegates portrayed themselves as loyal and obedient Englishmen, whose opposition was an act of loyalty to the British principle of no taxation without representation, rather than an act of disobedience to Parliament. In this sense, the colonists considered themselves as more British than the British, since they claimed to have a better understanding of the principles of the British Constitution than Parliament itself.

The Declaration of Stamp Act Congress conveyed the conviction that the conflict with Britain could be settled by pointing out the unconstitutionality of the taxes to the British authorities. Behind closed doors, however, many colonists decided that more vigorous action was required. Across the Atlantic coast, colonists organized themselves in semi-secret militant organization, called the Sons of Liberty, that coordinated the opposition to the Stamp Act across the colonies by frustrating the collection of tax and harassing those who paid it. Despite of their subversive actions, the Sons too claimed to uphold, rather than undermine English Constitution: “[we] are not attempting any change of government,” the New York Sons wrote: “only a preservation of the constitution.”³⁴

As a result of the Sons’ resistance, the conflict between Britain and its North-American colonies shifted from a constitutional debate whether Parliament had the power to raise revenue over the heads of the colonial assemblies, to a test of Parliament’s authority versus that of the assemblies.³⁵ In this stare-off Parliament was the first to blink:

³² Ibid., 22–23.

³³ Ibid., 15, 22.

³⁴ Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776* (New York: Vintage Books, 1974), 93–4, 96.

³⁵ Morgan and Morgan, *Stamp Act Crisis*, 88.

on March 18, 1766 Westminster repealed the Stamp Act, primarily because the opposition of the Sons of Liberty and the ensuing boycott had disastrous effect on the British economy. In order to avoid the impression, however, of ceding to the colonists constitutional views, Parliament accompanied the repeal with an official proclamation of its superiority over the colonies. This so-called Declaratory Act read that:

“the colonies (...) in America have been, are, and of right ought to be, subordinate to, and dependent upon the imperial crown and Parliament [which] had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects to the crown of Great Britain, in all cases whatsoever.”³⁶

This ringing defense of Parliament’s authority to tax the colonies demonstrates that Parliament had a completely different view of the British Constitution than the colonists. To the members of Parliament, the British Constitution was a “living” text that could be changed by it at will, which meant that the Constitution basically said whatever Parliament decided it said. The colonists, on the other hand, considered the Constitution as binding contract. In a letter that circulated between the colonial assemblies in the years following the Stamp Act, it was argued that: “in all free states the Constitution is fixed (...) [and] as the supreme legislative derives its power & authority from this Constitution, it cannot overleap the bounds of it without destroying its own foundation.”³⁷ As this statement shows, the colonists portrayed the Constitution as the expression of a higher law, a binding contract that imposed limits on the power of the legislature.

It turns out, then, that the members of Parliament and the colonists were talking about two different things when they referred to the British Constitution. The difference is best illustrated by the term “unconstitutional,” which made sense as a breach of the contract from the colonists’ perspective, but was foreign to Parliament.³⁸ Since Parliament defined the limits of the Constitution, it could not overstep them. While the colonists saw the conflict in constitutional terms, for Parliament it was merely as political. Since Parliament believed that the colonists were “virtually represented” by it, its decrees were directly binding on the colonies. Moreover, the members of Parliament seemed more aware—or less interested—in the differences that separated them from the colonists. Despite the colonists’ constant emphasis on their similarity and equality to the

³⁶ Jack P. Greene, ed., *Colonies to Nation, 1763-1789: A Documentary History of the American Revolution* (New York: Norton, 1975), 85.

³⁷ *Ibid.*, 134. As may scholars have pointed out, this idea of a “fixed” constitution was taken from the Swiss philosopher Emer de Vattel, see: Thomas C. Grey, “Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought,” *Stanford Law Review* 30, no. 5 (1978): 863, 884.

³⁸ Stourzh points out that the term “unconstitutional” started to “suddenly mushroom as a result of the Stamp Act Crisis,” see: Stourzh, “Constitution: Changing Meanings of the Term from the Early Seventeenth Century to the Late Eighteenth Century,” 45.

mother country, it is clear from the Declaratory Act that Parliament already regarded them as the “people of America,” i.e. a separate, subordinate class of men.³⁹

These subtleties in the Declaratory Act were largely lost on the colonists, for whom the news of the repeal was more important than the British denial of their constitutional claims. After hearing of the repeal of the Stamp tax, the Sons of Liberty stopped their boycott of British goods and dismantled their organization. This collapse of organized opposition after the repeal shows the limited nature of colonial protest in the 1760s. The colonists were satisfied with the repeal of the tax and did not worry about the denial of their constitutional arguments in the Declaratory Act. In order for the resistance to turn into revolution, in other words, Parliament would have to oppose the colonists in action, not solely in words.⁴⁰ With the repeal of the Stamp Act, the underlying question of the position of the colonies within the Empire remained unresolved, and with it the question whether Britons on both sides of the Atlantic formed one people.

In conclusion, it is clear that the taxes on stamps and sugar made problematic the colonial assumption that, as Britons, they enjoyed rights under the British Constitution. After all, two different interpretations of the British Constitution could not be right at the same time, and whereas Parliament claimed to have the authority to impose taxes without the colonists’ consent, the colonial assemblies and the Stamp Act Congress claimed the British Constitution gave them the right to resist taxes they had not consented to. The result was a constitutional conflict that would dominate the next decade. The colonial assemblies reacted by stressing their common ancestry and claiming equal rights under the British Constitution. This claim already betrayed an underlying assumption that Britons on both sides of the Atlantic constituted one single people. Parliament’s reaction in the Declaratory Act of 1766, however, made clear that they and the colonists had an entirely different concept of the Constitution. The only one aware of this was perhaps Patrick Henry, whose distinction between “British and American liberty” at least implied that the colonial interpretation of the Constitution was not necessarily that of the mother country. More important for purposes of this study is that Henry’s Virginia Resolves implied the existence of a pan-colonial political community, “America,” that was distinct from Britain. Even though it is unclear what Henry meant by “country,” by portraying himself as “American” he at least opened the door to viewing the colonists in a different light than just Britons. Finally, the subsequent steps taken by Stamp Act Congress demonstrate the piecemeal character of this process. Most members of the Stamp Act Congress were not prepared to go as far as Patrick Henry and to recognize a fundamental difference between British and American freedom. Their Declaration of Rights and

³⁹ See for this: Linda Colley, *Britons: Forging the Nation, 1707-1837* (London: Pimlico, 2003), 136.

⁴⁰ David W. Conoy, “Development of revolutionary organization, 1765-1775”, in: Jack P. Greene and J. R. Pole, eds., *A Companion to the American Revolution* (Malden, MA: Blackwell Publishers, 2004), 216. Maier, *Resistance to Revolution*, 78.

Grievances again stressed the common past between Britons on both sides of the Atlantic and, in this sense, relied on British freedom alone.

Reluctant revolutionaries: the First Continental Congress

Throughout the early 1770s an unsteady calm reigned between Britain and its colonies in North America and for a while it looked as though this might last. When, however, in the summer of 1773 news arrived of Parliament's adoption of a new Tea Act, this fragile peace soon fell to pieces. The Tea Act was adopted to help out the nearly bankrupt East India Company by giving it the opportunity to dispose of some 17 million pounds of tea in the colonies. By enabling the Company to sell its tea directly to agents in the colonies, the Tea Act eliminated the costs involved in working through British merchants, thus making it possible for the Company to undersell all competitors in the colonial market. As a consequence, the Act created great tension in the colonies and especially in Boston, where the arrival of three ships loaded with untaxed tea resulted in a stand-off between the royal governor and the town people. This conflict escalated on December 16, when local rebels disguised as Indians seized and dumped hundreds of chests of tea into the harbor, the famous Boston Tea Party.

The Tea Party was universally condemned in Britain, even by those sympathetic to the colonists' cause. In response Parliament passed a series of Coercive Acts, intended to restore royal authority in Massachusetts. The most sweeping of these acts was the Massachusetts Government Act of 1774, which declared, that in order to secure: "the just dependence of the said province upon the crown and parliament of Great Britain," Parliament would reduce the powers of the Massachusetts assembly and forbade it to meet without the governor's prior consent. With this radical alteration of Massachusetts' charter, Parliament demonstrated its power to unilaterally change the colonies' charters and to make them: "void and of none effect."⁴¹ The Government Act thus was a clear expression of Parliament's notion of a constitution as a "living" document that could be altered by it at will. This stood in sharp contrast to the fixed view held by the colonists who, as one Massachusetts' writer put it, believed that: "a charter abrogated at pleasure is no charter at all."⁴²

The Coercive Acts led to great anxiety among the colonists of Massachusetts-Bay. The first reaction of the Massachusetts committee of correspondence was to fall back on the proven tactic of the boycott, but it realized that all neighboring colonies would have to support the measure for it to be effective. This support was far from self-evident,

⁴¹ Greene, *Colonies to Nation*, 205–206.

⁴² Quoted in: Marc W. Kruman, *Between Authority & Liberty: State Constitution Making in Revolutionary America* (Chapel Hill: University of North Carolina Press, 1997), 13.

however, because unlike the earlier tax measures, Parliament's Coercive Acts were aimed only at the colony of Massachusetts. The Pennsylvania and New York committees especially considered a boycott as the "last resource," and instead proposed to convene a "general Congress of the deputies of the colonies" to deliberate on a united response.⁴³ Many prominent colonists such as Washington and Franklin condemned the radical step of the Boston Tea Party,⁴⁴ and they hoped that the Congress would prevent such rash and unilateral action in the future. The birth of the Continental Congress—in fact the successor to the Stamp Act Congress—was therefore as much an expression of the colonies' genuine wish to work together in the "common cause," as it was inspired by a desire to curb further rash actions by one of its members.

A total of twelve delegations arrived in Philadelphia in the early fall of 1774 to attended the first Continental Congress. Only Georgia refused to send delegates out of fear of losing the royal government's protection in its conflict with the Creek Indians. As the delegates of the twelve colonies poured into Pennsylvania's Carpenter's Hall on the morning of September 5, most of them were still perfect strangers to each other. The few members with a pan-colonial appeal were Patrick Henry, on account of his oratorical bravado, and George Washington, who had built a reputation as a military hero in the French and Indian War. Many others would make a name for themselves in the months ahead. There was John Adams, a stern lawyer who, together with his second cousins Samuel, worked tirelessly to secure the support of Congress for their embattled colony of Massachusetts. There were also the outspoken James Duane and the principled Joseph Galloway from New York and Pennsylvania who both played a leading role in their colony's protest against Britain, but believed that the final solution to the conflict relied on reconciliation with the mother country. Last, there was the confident John Rutledge, a brilliant lawyer from South Carolina and youngest member of the Stamp Act Congress.

Unaccustomed though they were, together these men were determined to forge one common response to Britain out of twelve separate voices. Each delegation brought its own way of pursuing politics to the table, as well as its own colony's interests and agenda, while each member his own private views on the conflict with Britain. This may have led, as John Adams wrote, to a "fearful, timid, and skittish" political climate, but at the same time the delegates knew they had not come to Philadelphia to make friends, but to lend a common voice to their common cause. Among men so unaccustomed to work together with their neighboring colonies, one delegate wrote, it was only natural that it took some time: "to become so acquainted with each one's situations and connections, as

⁴³ Peter Force, ed., *American Archives*, 4th series (Washington D.C., 1837), I, 341, 297. Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred A. Knopf, 1979), 22.

⁴⁴ David Ammerman, "The Tea Crisis and its Consequences", in: Greene and Pole, *A Companion to the American Revolution*, 197.

to be able to give an united assent tot the ways and means proposed for effecting, what all are ardently desirous of.”⁴⁵

This “ardent desire,” of course, was to bring an end to Parliament’s coercion in Massachusetts, and the colonies only stood a chance of making an impression on Britain if they could find a common voice. This, it turned out, proved quite an ordeal. Like the Stamp Act Congress before it, the authority of the Continental Congress rested entirely on the goodwill of the twelve assembled colonies. Its members realized that they were only the go-betweens for their respective colonial governments, as was clear from the letters of instruction that guided their conduct in Congress.⁴⁶ As such the delegates resembled more the ambassadors of twelve separate nations, rather than representatives of one people in service of a common country. John Adams, for example, in a letter home promised that: “we [the Massachusetts delegation] shall conduct *our embassy* in such a manner as to merit the approbation of our country.”⁴⁷ When the colonists spoke about “country,” in other words, what they first had in mind was their colony, not America.

The voluntary nature of the cooperation meant that the authority of Congress over the colonial legislatures was uncertain and that the delegates could not compel the colonies to comply. South Carolina delegate John Rutledge reminded his fellow members of Congress that: “we have no legislative authority (...) obedience to our determinations will only follow the reasonableness, the apparent utility, and necessity of the measures we adopt.”⁴⁸ Congress’ power, in other words, depended on the need for the colonies to work together, and on the delegates’ ability to convince each other and their home colonies of the need for one common course.

Even though the delegates believed they represented simply the sum of their twelve colonies, by meeting as a *Continental* Congress, they already implied that there existed a continental colonial interest, distinct from that of the British. Moreover, unlike the single issue Stamp Act Congress, the term *Continental* implied a more general, timeless cooperation. By committing themselves to speak with one voice, rather than twelve, the colonies already lent a political form to the nascent idea that, taken together, they formed a distinct people. One illustration of how united the colonies stood internally against Britain’s policy of intervention, was the approval of the Suffolk Resolves in October 1774. On Saturday September 17, news arrived in Congress of a series of resolves adopted by Suffolk County in Massachusetts, in which the conduct of the British government was condemned as an effort to: “enslave America.” The delegates’ reaction to the Resolves demonstrates that they felt as in common cause and were determined to

⁴⁵ Smith, *Letter of Delegates to Congress*, vol. I, 99, 169; the delegate was Sileas Deane from Connecticut.

⁴⁶ These can be found in the first entry of the journals, see: Ford et al., *Journal of Continental Congress*, 15 and onwards.

⁴⁷ Smith, *Letter of Delegates to Congress*, vol. I, 79 Emphasis added.

⁴⁸ Ibid., vol. I, 28; .Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781* (Madison: University of Wisconsin Press, 1963), 56.

see it through together. Congress' official response read that: "this assembly deeply feels the suffering of their *countrymen*," and declared that: "the town of Boston and province of Massachusetts-Bay are considered by *all America*, as suffering in the common cause, for their noble and spirited opposition to oppressive acts of Parliament." "The united efforts of North America," Congress concluded on a hopeful note: "will carry such conviction to the British nation (...) as quickly to introduce better men and wiser policy."⁴⁹

Congress' declaration of support for the Suffolk Resolves was the first statement of united opposition against Parliament in terms that portrayed the colonists as belonging to one "country," America, and Congress itself as spokesperson of this distinct, "American" people. More tellingly, Congress addressed the colonists as "countrymen," which already conferred on them a political identity separate from that as Britons. The significance of this should not be overstated, since neither the Suffolk Resolves, nor the reaction of Congress made the claim that the colonists enjoyed certain right *by virtue* of being Americans. Nevertheless, the use of word "countrymen" to refer to the inhabitants of Massachusetts and "America" to refer to the British colonies demonstrates that a self-image other than that of Britons was gaining ground among the members of Congress. The idea of forming one country was there, but the colonists did not yet act on it. More immediately, the approval of the Suffolk Resolves was a great relief for the Massachusetts delegation. John Adams enthusiastically rejoiced that: "this was one of the happiest days in my life (...) this day convinced me that America will support the Massachusetts or perish with her."⁵⁰

The unanimous endorsement of the Suffolk Resolves demonstrated the resolve of Congress to stand by Massachusetts, but it camouflaged a growing tension that started to dominate the debates within the walls of Carpenter's Hall. The members of Congress were unanimous in their aversion to Parliament's interference in Massachusetts, but this unity fell to pieces when, on the second day of Congress, the discussion turned to the question how to solve this conflict. The delegates agreed that an official declaration of grievances was the best way to inform Britain of their opposition and that a statement on: "the proper means to be pursued for obtaining a restoration" of these colonial rights should be included.⁵¹ On this issue, it turned out, the members were fundamentally divided between a conciliatory wing, which favored a solution *within* the Empire, and a more radical wing, which believed that Britain's treatment of Massachusetts demonstrated the need to start thinking about separation.

For moderate delegates like James Duane, it was self-evident that: "a firm union between the parent state and her colonies ought to be the great object of this Congress,"

⁴⁹ Ford et al., *Journal of Continental Congress*, vol. I, 39, 57 emphasize added. see: Rakove, *The Beginnings of National Politics*, 49, who argues that Congress' reaction to the Resolves helped establish its authority over the colonies.

⁵⁰ Smith, *Letter of Delegates to Congress*, I, 75.

⁵¹ Ford et al., *Journal of Continental Congress*, vol. I, 26.

and that the declaration of rights should therefore convey this “desire of reconciliation.”⁵² The radical members of Congress, however, rejected this conciliatory approach. According to Patrick Henry, the most outspoken of the radicals, Parliament’s violation of colonial rights meant that: “all government is dissolved and [that] we are reduced to a state of nature.” Henry and his close friend Richard Henry Lee, who was also a lawyer and delegate for Virginia, believed that the political union with Britain had always been of a contractual nature. “Our ancestors,” Lee argued: “found no government here, but a state of nature,” and the contract that these settlers had concluded with Britain was now dissolved by Parliament’s intervention in Boston, since: “liberty, which is necessary for the security of life, cannot be given up when we enter into society.” Hence, Lee concluded: “we should lay our rights upon the broadest bottom, the ground of nature,” which came down to a complete denial of Parliament’s authority over the colonies.⁵³

These statements by Henry and Lee were very significant. Here, for the first time, the binding link that the colonists had a claim to rights under the British Constitution by virtue of being Britons was completely denied. Instead of stressing common ancestry, Henry and Lee argued that the colonists had formed a separate political community from the start, that is: as soon as they arrived in the New World. Theirs’ was an appeal to a higher law, the laws of nature, by virtue of which the colonists derived their rights to oppose British taxes.

This radical rejection of the colonists’ British identity shocked the moderate delegates. John Jay, a delegate from New York, asked whether: “we have come to frame an American Constitution, instead of endeavoring to correct the faults in an old one?” Jay’s response is important for two reasons. First, it is the first reference to an “American” Constitution in a debate obsessed with claiming rights under the British Constitution. This shows that Jay was keenly aware that Henry’s and Lee’s views constituted a redefinition of the debate, since it dismissed the identification of colonists as Britons on which the colonists had relied until then to claim their constitutional rights. Second, even though Jay used the term to underline how preposterous he felt the radicals’ views were, his choice of words is significant because it contributed to the idea that, once the link with Britain was severed, an “American Constitution” should take its place. At a time when the colonies were still governed by royal charters, this was a very significant step. Whether willingly or not, Jay’s “American Constitution” formed a powerful frame that defined the conflict as one between the choice for the British and, admittedly still vague, American Constitution.

Jay was certainly not the only delegate who abhorred the radical views of Henry and Lee. “I know of no American constitution,” Pennsylvania delegate Joseph Galloway confessed: “I have looked for our rights in the laws of nature—but could not find them in a state of nature, but always in a state of political society. I have looked for them in the

⁵² Smith, *Letter of Delegates to Congress*, vol. I, 38.

⁵³ Ibid. 28, 30, 46-47.

constitution of the English government and found them there.” John Rutledge even denied that the colonists had a choice in this matter: “the first emigrants did not have a right to set up what constitution they pleased,” because: “a subject cannot alienate his allegiance.”⁵⁴

This heated debate touched on more than just the proper foundation of colonial rights, but makes clear that the moderate and radical delegates increasingly relied on two different historical narratives to present two very different views of the identity of the polity. For the moderates, the British Constitution remained the focal point. They appealed to the ancient liberties that Britons had enjoyed since the days of the early Saxons, and explicitly portrayed themselves as British subjects in order to be able to lay claim to these rights. These delegates, in other words, consciously portrayed themselves as Britons in order to demand a restoration of the rights they once enjoyed under the British Constitution. In short, the moderate delegates were reactionary and not revolutionary. Their view of the colonists’ identity was that of a historically determined privilege that was passively inherited by each subsequent generation.

The radical delegates, however, relied on a more voluntary view of identity and arrived at the opposite position. They denied that the colonists were still bound by the British Constitution, and instead argued that the political ties between the separate colonies and the Empire were dissolved due to Parliament’s violation of the colonists’ inalienable rights. The colonists enjoyed these natural rights, the radicals insisted, simply by virtue of being freemen, not because they were members of the British political community. This is a crucial point, because their line of reasoning meant that the radicals portrayed themselves as other than British. Patrick Henry again was most outspoken in this. He argued that the return to a state of nature meant that: “all America is thrown into one mass [and] the distinctions between Virginians, Pennsylvanians, New Yorkers, and New Englanders, are no more.” “I am not a Virginian,” he insisted, “but an American.”⁵⁵ With this statement, Henry proposed an alternative identity other than that of British colonists, namely that of Americans. And even though it remained far from clear at the time just what being an “American” entailed, Henry’s dissociation between Britain and America formed a significant first step for the development of the idea that the colonists formed a separate people.

For Henry, embracing the self-image as “American” not only undid the British identity that had formed the foundation for the British Constitution, but also had important implications for the way colonies organized their cooperation. A foretaste of what Henry’s “American Constitution” would look like came early on during the meeting, when he challenged the conventional practice of the Stamp Act Congress of voting by colony. This “one colony, one vote” rule was important to the smaller colonies, such as Rhode Island, Delaware, and South Carolina, who gained an equal say to the far

⁵⁴ Ibid.29, 111, 48, 46.

⁵⁵ Ibid.28.

larger colonies of Pennsylvania, Virginia, and Massachusetts by virtue of this rule. When, on September 6, Virginia delegate Patrick Henry suggested that the size of population would be a “more adequate” basis for the number of votes for each colony, he was simply taking his view that the colonists formed one distinct people to its logical conclusion. After all, if the colonists formed one people, then Congressional representation should reflect this. The proposal immediately led to outrage with the delegates of smaller colonies, like Christopher Gadsden from South Carolina, who insisted that there could be no other way of voting: “but by colony.”⁵⁶ To prevent this issue of proportional representation from disrupting Congress before it had even begun, the delegates decided that the lack of reliable information on the population of the colonies forced them to continue the practice of “one colony, one vote.”⁵⁷

This adherence to separate voting was a victory for the view of Congress as a assembly of separate colonies, instead of one country, but the moderates realized that they would have to convince the rest of Congress to recognize Parliament’s authority in some areas before reconciliation would become possible. As Virginia delegate Edmund Randolph put it: “we must acknowledge [Parliament’s] rights, or she will not come to a treaty with us.” The difficulty in this is, James Duane realized was “to establish a principle upon which we can submit this authority to Parliament without the danger of their pleading a right to bind the colonies in all cases whatsoever.”⁵⁸ A complicating factor was that unlike the earlier taxes, the recent Coercive Acts were in fact laws, which meant that the colonists had to find a new principle upon which both taxation and legislation could be denied. On Wednesday 28 September, Joseph Galloway attempted to solve this problem by means of his Plan of Union, which was the most coherent statement of the moderates’ ideas for the future of the colonies within the Empire.

According to Galloway, reconciliation was the only way out of the conflict. If, he said, “we want the aid, assistance, and protection of the arm of our mother country,” Congress would have to admit that these were “reciprocal duties,” which required something in return. His Plan of Union, Galloway maintained, would bring the interest of both the colonies and Britain together, and secure the colonists’ rights and liberties. To this end, Galloway relied on the idea of two spheres of government within the Empire, which foreshadowed the federal nature of the later Constitution. In the internal sphere, Galloway explained: “each colony shall retain its present constitution and powers of regulating and governing its own internal police in all cases whatsoever.” But with respect to the external sphere, which included defense and the regulation of trade, a combined policy was required. The external sphere connected the colonies to each other and to Britain, and to regulate it, Galloway maintained: “there must be a supreme

⁵⁶ Ibid.28-29.

⁵⁷ John Adams noted that the lack of information was explicitly mentioned in the journal: “to prevent its being drawn into precedent”, see note in: Ford et al., *Journal of Continental Congress*, 25.

⁵⁸ David Ammerman, *In the Common Cause: American Response to the Coercive Acts of 1774* (New York: Norton, 1975), 55–57. Smith, *Letter of Delegates to Congress*, vol. I, 182, 38.

legislature.” To whom, he asked, could that power be confined? Certainly not to one of the colonies, because its legislative powers extended no farther than its boundaries. Galloway’s preferred solution, then, was to grant the power to a General Council which represented all the colonies and which should legislate in all areas where Great Britain and the colonies, or more than one colony, were concerned, provided that the laws were previously approved by Parliament.⁵⁹

The radical members of Congress, who denied Parliament’s authority altogether, were not enthusiastic about Galloway’s plan to subject the colonies to a deliberative body under British supervision. According to Patrick Henry, the Plan came down to old wine in new bottles: “we shall liberate our constituents from a corrupt house of Commons,” he said: “but throw them into the arms of an American legislature that may be bribed by that Nation.” Henry feared that the Plan of Union would leave the colonists in the same subordinate position and failed to secure their rights. “Before we are obliged to pay taxes as they [Britons] do,” he argued: “let us be as free as they.”⁶⁰

The debate on Galloway’s Plan of Union shows the extent to which the members of Congress were divided over the solution to their conflict with Britain. When the Plan was brought up for vote, a narrow margin of six to five delegates decided to postpone the deliberation on it. This in fact finished the Plan, because it was not taken up again in October, when Congress wrapped up its work.⁶¹ With the tabling of the Plan of Union, the stalemate between the moderates and radicals in the Congress seemed complete. In the face of this opposition, moderates like Duane persisted that nothing short of reconciliation with Britain could stop “the effusion of blood.” Only a petition to Britain, signed by all the colonies, might still avert such a crisis, Duane warned his colleagues, and: “a difference of sentiment will show our weakness and may end in our disunion.”⁶² Duane’s warning, however, fell on deaf ears with the radicals, who by now seemed to prefer war over reconciliation. Patrick Henry believed that: “preparation for war is necessary to obtain peace,” and Richard Henry Lee proposed that the colonies should each appoint a well-armed militia to “defend, protect, and secure themselves.”⁶³

This was still a bridge too far for most delegates, however, and in the end, it seems that a majority decided to heed Duane’s warning not to show internal divisions to the outside world and rallied behind a final text that leaned strongly to the moderate side. This *seems* the case, because very little is actually known about the Declaration of Rights and Grievances that formed the official statement of protest that Congress published on October 27. It is unclear exactly who wrote it, though James Duane and Pennsylvania delegate John Dickinson seem to have made important contributions. Finally, it even

⁵⁹ Smith, *Letter of Delegates to Congress*, vol. I, 109-112, 117-8.

⁶⁰ Ibid. 111.

⁶¹ Ibid. 112, editorial note.

⁶² Ibid., vol. I, 186, 188, 190, 192.

⁶³ Ford et al., *Journal of Continental Congress*, I, 54.

remains unclear when the Declaration was adopted by Congress, which makes it hard to say what might have influenced its eventual adoption.⁶⁴

Whatever the origin of the Declaration may have been, the final text clearly bore the stamp of the moderate wing of Congress. It began with a condemnation of the Coercive Acts as “impolitic, unjust, and cruel as well as unconstitutional” and demanded that all acts of Parliament that violated colonial rights should be immediately repealed. After this, however, the document took a more conciliatory tone. It reassured that the Continental Congress had only been summoned in order to “obtain such establishment” with Britain that the colonists’ “laws and liberties may not be subverted.” Congress insisted that in attempting to vindicate their rights, the delegates acted: “as Englishmen their ancestors in like cases have usually done.” The Declaration, in other words, not only affirmed the moderates’ goal of reconciliation, but also once again identified the colonists as Britons. In fact, when Congress addressed the British people it spoke of: “we, who are descended from the same common ancestors.” This emphasize on a common past served to support the claim that, because they were Britons, the colonists enjoyed the same rights as Englishmen. “Our ancestors who first settled these colonies,” Congress insisted: “were entitled to all the rights, liberties, and immunities of the realm of England (...) and their descendants now are entitled to the exercise and enjoyment of all such of them.” If these rights were restored, Congress argued the: “harmony and mutual intercourse of affection and interest may be restored.”⁶⁵

Based on this strong reaffirmation that the colonists enjoyed their rights as Britons, it appears that the view of the moderate delegates in Congress prevailed in the final text. However, a small but significant concession to the radicals’ point of view appeared when the Declaration stated that colonial rights were drawn from: “the immutable laws of nature, the principles of the English constitution, and the several charters or compacts.” This was the first official declaration of Congress that based colonial rights on a foundation other than forming Britons and as such reflected the growing disagreement within Congress on the question whether the colonists constituted a part of the British people. If the dual nature of this foundation pointed to disagreement among the delegates, the demands that Congress actually made in the Declaration were in line with those of the moderate members of Congress. The Declaration claimed legislative autonomy for the colonies: “in all cases of taxation and internal polity,” but following Galloway and Duane, it promised to “cheerfully consent” to the: “regulation of our external commerce for the purpose of securing the commercial advantages of the whole empire to the mother country.”⁶⁶

⁶⁴ Smith, *Letter of Delegates to Congress*, vol. I, 196 editorial note 4.; James H Hutson, ed., *A Decent Respect to the Opinions of Mankind: Congressional State Papers, 1774-1776* (Washington D.C.: Library of Congress, 1975), 52–53.

⁶⁵ Hutson, *A Decent Respect to the Opinions of Mankind*, 53–5, 23.

⁶⁶ *Ibid.*, 54.

This raises the question why, after the ringing response of the Suffolk Resolves and powerful rhetoric of the radical orators, Congress eventually decided to take a step backwards and embrace the conciliatory tone in their Declaration of Rights and Grievances. The answer lies in the fact that a broadly supported sense of a common identity was still lacking among the members of Congress at this stage of the debate. James Duane reminded his colleagues not to forget that: “we are colonies, that we are indebted to [Britain] for the blessings of protection (...) that we are unable to defend our rights and therefore we must allow them [Great Britain] the right.”⁶⁷ A majority of Congress agreed that the rivalry between the colonies meant that they should confer their external policy to a third party, supervised by Britain. “We are,” Galloway said “disunited among ourselves (...) there is no indifferent arbiter between us.” Tellingly, Duane warned that the colonies stood “at the eve of a civil war,” which of course once again affirmed the idea that colonists and mother country formed one people.⁶⁸ This warrants the conclusion that, at this stage in the debate, the persuasiveness of appeals to a separate, American identity for the polity was still limited, and the existing and tested identity as Britons prevailed.

After more than six weeks of debate, Congress had finally produced a Declaration of Rights and Grievances, but the result was a conciliatory document that hid the internal division among the delegates. With regard to the identity of the polity, the Declaration rested on the moderates’ view that emphasized the common past of the colonists and Britain to stress the firm bond between them. This conciliatory language camouflaged the heated debates within the Congress and overlooked the radical claims to an American identity. It is hardly surprising that the final result did not please the radicals. They insisted on the need for Congress to “speak out” in the resolutions, because “the motion is not sufficiently explicit.”⁶⁹ The disregard for the radical point of view in the Declaration can be seen as a success for the moderates, but for their victory the moderates ultimately relied on a favorable reply from the mother country. Anything other than that would only play into the hands of the radicals.

On 22 October, one of the last days of Congress, the delegates decided to plan another Congress for the following May, unless a complete redress of the grievances submitted to Great-Britain was obtained before that date.⁷⁰ This was an important decision, because it conveyed a sense of continuity to the intercolonial cooperation that was still in its infancy. The Stamp Act Congress had been a once-only experience, after which the colonies reverted to separate pleas for redress. Now, for the first time, the colonists committed themselves to an official recurring intercolonial dialogue.

⁶⁷ Smith, *Letter of Delegates to Congress*, vol. I, 52.

⁶⁸ Ibid., I, 109 (Galloway), 189 (Duane).

⁶⁹ Ibid., vol. I, 144-5.

⁷⁰ Ford et al., *Journal of Continental Congress*, vol. I, 102.

The image that appears from the debates in the Second Congress is that of a gradual, piecemeal process. Congress' response to the Suffolk Resolves was a clear endorsement of America as a separate entity and thus a significant step forward in conceiving the colonies as one community. At the same time, however, the reaffirmation of British identity in the Declaration of Rights and Grievances constituted a clear step back to the notion of the colonists as Britons overseas. Despite this, two important steps with regard to the identity of the polity can be observed. First, by identifying themselves as representatives of their "countrymen," the members of Congress were already implying that they represented something more than twelve, independent colonies. Though to the outside world they still portrayed themselves as part of the British people, internally a growing sense of separateness was stirring. In fact, and this is the second point, the radical members of Congress were prepared to go much further within the walls of Carpenter's Hall than the official documents of Congress revealed. By placing their rights on the laws of nature, Patrick Henry and Richard Henry Lee entirely dismissed the idea that the colonists were Britons and threw out the British Constitution in favor of an, as yet undefined, "American Constitution." Henry even provided further credibility to the idea of America as a political entity by claiming equal representation on the basis of the fact that all colonists formed one people. Even though these ideas found little resonance in the final Declaration of this first Congress, they did constitute an important opening to a conception of the colonies as other than British.

The road to independence: Second Continental Congress

In the six months between the adjournment of the first Congress and the assembly of the second, the relations between Britain and its colonies worsened considerably. Friction between the Boston colonists and the British troops stationed there to enforce the Coercive Acts culminated in open battle at Lexington and Concord in April 1775. The battle was a resounding victory for the colonial minutemen, who succeeded in driving back the British regulars to Boston and subsequently laid siege to the town. The victory at Concord was celebrated throughout the colonies as a blow to British aggression, although many realized this marked the start of open warfare. The outbreak of hostilities were a heavy blow for the cause of reconciliation and in the months ahead each colony would face the tough choice whether to support their neighbors in Massachusetts in its rebellion.

When the freshly arrived delegates for the second Continental Congress assembled in Pennsylvania State House in Philadelphia on May 10, they were confronted with a conflict that was rapidly spinning out of control. The British attack at Lexington and Concord demonstrated that the conciliatory approach of the previous Congress had resorted little effect, and many members of the new Congress were now openly

wondering what plan to pursue. The instructions that the delegates had received from their colonial legislatures implored them to obtain redress of colonial grievances and restore the “harmony” between the colonies and Great-Britain, but they gave no hint of how this should be done. In order to come to a common approach, the Congress decided, on May 15, to discuss the “state of America.”⁷¹

It was during this discussion that John Rutledge first raised the question that would dominate the deliberations in Congress for the year to come: “do we aim at independence or do we only ask for a restoration of rights and putting us on our old footing?”⁷² This question for the first time explicitly reduced the conflict with Britain to a choice for or against Empire. While Rutledge himself strongly opposed the latter option, his question forced Congress openly to discuss the possibility of political separation. This issue had already divided the previous Congress—though the delegates had carefully avoided speaking of “independence”—and as the new Congress was almost entirely made up of the same people, the delegates proved to be equally divided.

The radicals were still resolutely opposed to granting Parliament any power over the colonies. But apart from Patrick Henry and Richard Henry Lee, few considered independence a real option. John Adams, for example, thought that: “independence on Parliament is absolutely to be averred in the Americas,” and believed that: “dependence on the crown is what we own.”⁷³ Their denial of Parliament’s authority over the colonies left the colonists with King George III as the only connection to Britain. Most delegates, even the radicals, believed that the King would stop Parliament from taking harsh measures against the colonies.⁷⁴ With Parliament not backing down, the conciliatory minded colonists now pinned their hope on a favorable gesture from the King.

Notwithstanding the circumstances, many delegates still hoped that reconciliation with Britain could be attained. Pennsylvania delegate John Dickinson was one of the most outspoken defenders of this view. Dickinson had played an important role in the last days of the previous Congress, and was identified as one of the authors of the Declaration of Grievances. Among his peers he chiefly commanded respect as the author of the celebrated “Letters of a Pennsylvanian Farmer” which had strengthened the opposition against Britain throughout the continent in the early phase of the Revolution. Dickinson made no secret of his wish for reconciliation. “I have never had any idea of happiness for these colonies,” he said: “but in a state of dependence upon and subordination to our Parent State.” According to Dickinson, the colonies should “return to the place from which we set off,” and he argued that Congress should pursue a “plan for a reconciliation” to avoid all-out war between Britain and its colonies.⁷⁵

⁷¹ Ibid., vol. II, 14-21, 49.

⁷² Smith, *Letter of Delegates to Congress*, vol. I, 351.

⁷³ Ibid., I, 352.

⁷⁴ Jerrilyn Greene Marston, *King and Congress: The Transfer of Political Legitimacy 1774-1776* (Princeton, N.J: Princeton University Press, 1987), 37.

⁷⁵ Smith, *Letter of Delegates to Congress*, I, 378, 377, 352.

The tension that was growing within the walls of the State House resulted in an ambiguous tone in the official publications of Congress during the summer of 1775. Once again, the advocates of reconciliation imposed their views on Congress, but now there was a threatening ring to it. For example, in the “Declaration of the causes and necessity of taking up arms,” which Congress published on 6 July 1775, the delegates both resolved to arm for defense while at the same time negotiating for peace. The Declaration read that Congress was resolved: “to die free-men rather than to live slaves,” but at the same time it assured that: “we mean not to dissolve that Union which has so long and so happily subsisted between us, and which we sincerely wish to see restored.” Separation was mentioned here only to refute it: “necessity has not yet driven us into that desperate measure.”⁷⁶ By preparing for a defensive war, while at the same time keeping the door open for reconciliation, the delegates postponed their final verdict on the desirability of prolonging colonial allegiance to the British Empire. The Declaration, in short, was neither a clear choice for revolution nor reconciliation and Congress appeared, as John Adams put it: “to hold the sword in one hand and the olive branch in the other.”⁷⁷

A similar reluctance to choose characterized the petition that Congress sent to the King on December 6. In this petition, the British Constitution was still portrayed as: “our best inheritance,” and the opposition to Britain was depicted as loyal because it emanated from this Constitution. Again, the authority of Parliament was rejected using the colonial past as an argument: “we know of no laws binding upon us, but such as have been transmitted to us by our ancestors, and such as have been consented to by ourselves, or our representatives elected for that purpose.” Again, the delegates stressed their common past with Britain and portrayed themselves as Britons, when they spoke of: “this unhappy and unnatural controversy, in which Britons fight against Britons, and the descendants of Britons.”⁷⁸ Again, finally, Congress’ position was ambiguous. With the radical members of Congress still unable to persuade the majority to embrace the identity of Americans as a basis to found a new, independent polity, Congress persisted in portraying itself as a group of loyal Britons whose only object was conciliation with the mother country. This inability to take a clear stance left the initiative to forces outside the Pennsylvania State House and reduced the strategy of Congress to one of wait and see.

During the first half of 1776, the case for independence gathered momentum in the colonies. Two events in particular contributed to this. The first was the news of King George’s opening speech to Parliament of October 26, 1775. In the speech King George condemned as traitors those who incited revolution among “my people in America.” “The rebellious war,” he continued: “is manifestly carried on to establish an independent empire.” Not only did the King openly declare the colonies in rebellion, but he also told

⁷⁶ Hutson, *A Decent Respect to the Opinions of Mankind*, 93, 95.

⁷⁷ Smith, *Letter of Delegates to Congress*, vol. I, 466.

⁷⁸ Ford et al., *Journal of Continental Congress*, vol. III, 410, 412.

Parliament that he would commit land and sea forces to subdue it.⁷⁹ If the King's speech minimized the chance of reconciliation, the publication of Thomas Paine's pamphlet "Common Sense," in January 1776, which was the second event, provided the advocates of independence with a stronger case. The British Constitution, Paine argued, was "fickle" and hardly disguised the tyranny of the "royal brute of Britain." The King's secondary treatment of his subjects in "America" illustrated that: "the little remains of kindred between us and them wears out with every day." Paine's contribution to the debate was to make the colonists aware that Britain was no longer a model to look up to, but that there was everything to gain from separation. "It's time to part," Paine wrote, because: "now is the seedtime of continental union."⁸⁰

Perhaps the best indication for the growing support for independence was that an increasing number of colonial leaders were taking over governing responsibilities from the collapsing British authorities. The first of these was Massachusetts, where the British occupation of Boston left the outlawed colonial assembly with the question in whose name they were to assume power over the surrounding countryside. Because this question: "equally affected our sister colonies," the Massachusetts assembly turned to the Congress in Philadelphia for advice, which can be taken as an implicit recognition of Congress' role as representative of the colonies collectively. Congress advised Massachusetts to organize elections for a new assembly which should assume the powers of government throughout the continuance of the conflict with Britain.⁸¹ When other colonies, such as New Hampshire and Virginia, also asked advice on the formation of a new state government, the delegates in Philadelphia responded in similar fashion. On May 10, 1776, Congress released a report in which it advised the colonies "to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."⁸²

The usurpation of royal power by the colonial assemblies signified their *de facto* independence, and they soon started to call themselves States, rather than colonies.⁸³ The new States claimed to exercise power in the name of the people, and many wrote constitutions saying the same,⁸⁴ which illustrates that the right to self-government was no longer founded on the basis of being Britons, but on account of being Virginians, Pennsylvanians, etc. Even the moderates now seemed to acknowledge that royal power in the colonies had ceased, if not in name, than certainly in practice. For them, however, the temporary and voluntary nature of the usurpation of royal power was crucial in

⁷⁹ Force, *American Archives*, vol. VI, 1.

⁸⁰ Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings*, ed. Mark Philp (Oxford: Oxford University Press, 1995), 19, 34, 20, 24, 45.

⁸¹ Ford et al., *Journal of Continental Congress*, vol. II, 77, 84.

⁸² *Ibid.*, IV, 342.

⁸³ It would take Congress more than a year to officially replace "colony" with "states," see: *Ibid.*, vol. V, 747.

⁸⁴ Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (Lanham, MD: Rowman & Littlefield Publishers, 2001), 56.

supporting the report of May 10. In fact, when the radicals proposed a far-reaching preamble to the report, a heated debate could not be avoided. The contested preamble was written by John Adams and all but forced the colonies to declare independence by saying that: “it is necessary that the exercise of every kind of authority under the said crown should be totally suppressed.”⁸⁵ John’s second cousin and fellow radical Samuel defended the measure by stating that if the King had renounced the colonies: “why should we support a government under his authority?” The moderate James Duane, however, objected that Congress had no power to force the colonial assemblies to independence. According to him, Congress ought not to meddle in colonial government: “you have no right to pass the resolution any more than Parliament has.”⁸⁶

There was no recorded vote on the preamble, but there is evidence that six colonies voted in favor and three against.⁸⁷ Unsurprisingly, the colonies that favored the radical statement were the ones that had already assumed power within their colony, such as Virginia and Massachusetts.⁸⁸ The colonies that voted against it did not dispute the end of royal government, but argued that each should declare its separation from Britain in its own time. They included Pennsylvania, New York, and Maryland—three of the colonies to most fiercely oppose a Congressional declaration of independence in the months ahead. The debate on the preamble demonstrated the growing support for the radicals, who felt strengthened by the colonies’ decision to discard their charters in favor of newly drafted constitutions. At the same time, however, Duane’s warning that, if Congress imposed its will, it was little better than Parliament, confronted the radicals of the danger of marching too far ahead of the troops. Congress’ authority over its members rested on its ability to persuade them to voluntarily unite behind a common course and its authority abroad rested on its ability to speak for the colonies with one voice. A declaration of independence, in other words, would have to be an unanimous affair.

The debate on independence in Congress was initiated from below. On May 15, 1776, the Virginia House of Burgesses sent instructions to its delegates in Congress to move a resolution on independence. On June 7 Richard Henry Lee submitted this resolution which declared that: “that these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved.”⁸⁹ Until now, the issue of independence had remained a debate free of obligations in which both sides could exchange—or rather, persist in—

⁸⁵ Ford et al., *Journal of Continental Congress*, vol. IV, 359.

⁸⁶ L. H. Butterfield, ed., *Diary and Autobiography of John Adams*, vol. II (Cambridge, MA: Belknap Press of Harvard University Press, 1961), vol. II, 238-239.

⁸⁷ Smith, *Letter of Delegates to Congress*, IV, 20, note 3.

⁸⁸ The same was true for South Carolina and New Hampshire. The other two colonies that supported the preamble, Rhode Island and Connecticut, argued that their 17th century charters had always expressed the will of the people instead of the crown, see: Adams, *The First American Constitutions*, 64.

⁸⁹ Ford et al., *Journal of Continental Congress*, vol. V, 425.

views without having to come to a conclusion. By submitting his Resolution of Independence, Lee forced the Congress to speak out on independence.

The debate on the Resolution started the following day, on June 8, and again pitted the radicals and moderates against each other. According to Thomas Jefferson, who made notes of this debate, the moderates Dickinson, Wilson, and Rutledge argued that some colonies were not ready for separation and had failed to instruct or even forbade their delegates to discuss separation. They pointed out that since the colonies were “perfectly independent of each other,” Congress could not declare independence for them, because this would force them to secede the union, and “such a secession would weaken us.” In short, the moderate delegates felt that the decision for independence should be unanimous and insisted that it would be unwise: “to take any capital step till the voice of the people drives us into it.”⁹⁰ The moderates, in other words, wanted to wait until all thirteen state assemblies freed the instructions of their delegates to vote for independence. These delegates no longer argued that the colonists were Britons—in fact they were eager to “join in the general voice of America”⁹¹—but their idea of one people was that it formed the sum of its thirteen parts. Congress, in other words, could only speak for the people—that is, the whole community—when it had the support of *all* thirteen state legislatures.⁹² This meant that, unless the colonies unanimously embraced the Resolution of Independence, the moderates would secede—another clear sign that they considered America as one community. John Dickinson saw no contradiction in this position, and reminded his colleagues that: “Holland acknowledged the king of Spain while arming to dethrone him.”⁹³

The radical delegates like John Adams and Richard Henry Lee, on the other hand, had no intention to wait for the moderates to come around. “The people wait for us to lead the way in this step,” the radicals said: “they are in favor of the measure, though (...) their representatives are not.” As this quote illustrates, the radicals had a completely different concept of the American people, namely one in which they already formed one, single unit. As soon as the majority or “freer part of the people” favored independence, the minority had to follow suit. This presupposed a image of the people as *more* than the sum of its parts, which could in fact force the parts to do its bidding. The radicals were, in other words, prepared to violate colonial instructions and proceed with separation despite the “backwardness” of the reluctant colonies.” “It would be in vain,” they argued: “to wait for perfect unanimity, since it was impossible that all men should ever become of one sentiment on any question.” As soon as the willing colonies would declare independence, the radicals believed, their wavering neighbors would follow suit. They

⁹⁰ Julian P. Boyd, ed., *The Papers of Thomas Jefferson*, vol. I (Princeton N.J.: Princeton University Press, 1950), 309–310.

⁹¹ *Ibid.*, I:309.

⁹² Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Alfred A. Knopf, 1997), 58.

⁹³ Smith, *Letter of Delegates to Congress*, vol. IV, 167.

too pointed to the history of the Dutch Revolt, where at first only three provinces had formed the union against the Spanish King.⁹⁴

As in the first Congress, the difference of opinion between the radical and moderate members of second Congress led them to portray two different views of what the American people constituted. For the moderates, this people formed the sum of its thirteen parts, which meant that independence was only conceivable if there was perfect unanimity among the state legislatures. There could be no talk about a change of government, Dickinson argued: “without the full and free consent of the people plainly expressed.” The radical delegates, on the other hand, denied the necessity of perfect unanimity. The question, they said, was not: “whether, by a declaration of independence, we should make ourselves what we are not, but whether we should declare a fact which already exists.” In their view, independence was something already achieved: “as to the people or parliament of England, we have always been independent of them,” they argued.⁹⁵ Lee’s Resolution of Independence, they implied, merely make official that the colonists were and had always been a separate and independent people.

If the Resolution of Independence was a mere rubber stamp, however, the question rises why the radicals so vehemently urged its adoption. The answer lies in the paradoxical nature of the constitutive rhetoric that the radicals employed. It portrayed as “given” that which it seeks to create and thus wants to turn the colonies into one people while at the same time presuming this to be already given. Thus, the radicals portrayed declaring independence as simply acting on what the colonists always had been—a separate people—but in fact the very act of declaring independence would bring into being this supposedly existing identity as one people.⁹⁶ This explains why the radicals were so keen on Congress adopting the Resolution: it would seal the deal and retroactively constitute the colonies as forming one separate political community.

Congress, however, refused to be urged into one people. After two days of discussion, it was agreed that the delegates whose instructions forbade discussing independence should be given more time to obtain permission from their states and the debate therefore was postponed to early July. It is unclear whether and why the radicals agreed, but since unanimity was a prerequisite to the idea of forming one people, they probably grudgingly complied. Still, the fact that Congress appointed a committee to prepare a declaration of independence in order that no time be lost, shows that momentum was on the side of the advocates of independence. This committee consisted of John Adams, Franklin, and Roger Sherman, but a young delegate from Virginia, Thomas Jefferson, carried most of the burden of writing the Declaration.⁹⁷

⁹⁴ Boyd, *The Papers of Thomas Jefferson*, I:312.

⁹⁵ Smith, *Letter of Delegates to Congress*, vol. I, 161. Boyd, *The Papers of Thomas Jefferson*, I:311.

⁹⁶ See for this also Derrida’s point that “this people does not exist (...) before this declaration,” but: ‘gives birth to itself, as free and independent subject,’ in his: “Declarations of Independence,” *New Political Science* 7, no. 1 (1986): 10.

⁹⁷ Ford et al., *Journal of Continental Congress*, vol. V, 432.

The debate on Lee's Resolution of Independence was reopened on July 1. By that time, all the colonies except New York had broadened their instructions to create a mandate for independence. There are no notes of the debates, but according to John Adams it was: "an idle mispence [sic] of time," because nothing was said that: "had not been repeated and hackneyed in that room before an hundred times, for six months past."⁹⁸ When the vote was taken, the delegates of Delaware proved to be divided and those of Pennsylvania and South Carolina opposed the motion. This meant that nine of the twelve colonies—New York abstained from voting—favored independence, which was a very comfortable majority. Nevertheless, it seems that Congress would not settle for anything less than a unanimous vote and it eagerly jumped at South Carolina delegate John Rutledge's offer to repeat the vote the next day when he promised his colony would: "join in for the sake of unanimity."⁹⁹ That following day, July 2, twelve colonies—New York still abstaining—voted in favor of independence, and two days they would sign their names to the Declaration that would herald this important decision to the world.

Because of the fragmentary documentation of the crucial debates it is very hard to say what the winning argument was, or even if there was a winning argument to begin with. What is clear is that the moderates members of Congress were starting to realize the hopelessness of a conciliatory approach to Britain. Their opposition in the months prior to July 1776 was not so much aimed at blocking independence itself,¹⁰⁰ but concerned the timing and procedure of the act. Moderates like Dickinson and Duane viewed the resolution as premature and lacked the broad, unanimous support of all the colonies which they considered to be crucial for the bid to succeed. In line with their fixed view of identity, they counseled Congress to follow: only when the governments of the colonies were prepared to shed off their ties with Britain should Congress follow suit. The radicals, however, staying true to their volitional view, insisted that the people would follow once Congress declared them a separate and free people. In this, as in all earlier conflicts, the moderates saw their will prevail, and with a unanimous vote, Congress' resolution of independence was approved.

Congress officially announced its bid for independence to the world outside the Pennsylvania State House two days later, on the 4th of July, by adopting the Declaration of Independence. On that day, Thomas Jefferson produced his eloquent defense of the colonies' cause to the members of Congress. The upshot of the Declaration was found in its final paragraph, where the members of Congress renounced their allegiance to Britain and claimed:

"in the name, and by the authority of the good people of these colonies, (...) that these United Colonies are, and of right ought to be free and independent States; that they are

⁹⁸ Smith, *Letter of Delegates to Congress*, IV, 347.

⁹⁹ Ibid., IV, 347; .Boyd, *The Papers of Thomas Jefferson*, vol. I, vol. I, 314.

¹⁰⁰ Evidence for this is the fact that the moderates did not oppose the drafting of a Declaration of Independence before a final decision had been made.

absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be totally dissolved.”

Here, then, after almost a dozen years of debate, was the announcement to the world of the birth of a new political community: the United States of America. With these words, the colonies severed the link that officially bound them to the mother country and cut what little ties of affection and identification they still cherished as members of the British Empire. Thus, the Declaration marked the end to this old colonial self-image as Britons, but did it also form the start of a new identity of the polity?

It is important to note, in this regard, that for the contemporaries of Jefferson and his colleagues, the Declaration’s significance lay first in declaring this political independence from Great Britain. In the words of one scholar, the document only aimed “to end the previous regime, not to lay down principles to guide and limit its successor.”¹⁰¹ Nevertheless, the main function of the Declaration was in fact rhetorical. After all, if the truths asserted by Jefferson and his colleagues were truly “self-evident,” what then was the point of proclaiming them?¹⁰² The purpose of the Declaration, in other words, was not simply to “announce” independence, but to persuade a “candid world” that this act of separation from Britain was morally and legally justified.¹⁰³ The form and substance of the Declaration resembled that of a political speech, and Jefferson clearly had this in mind when he drafted the text.¹⁰⁴

The lion’s share of the Declaration was devoted to justifying the separation from Britain and this forms a first clue as to whether it sought to propose a new identity as foundation for the newborn polity. The famous syllogism underlying the Declaration started from the self-evident truth that since all men were created equal and enjoyed the same unalienable right to “live, liberty, and the pursuit of happiness,” government was a means to secure these rights. As soon as a government, like Britain, violated these rights, the people had the right to abolish it and institute a new one on the basis of “such principles and (...) such forms, as to them shall seem most likely to effect their safety and happiness.” The crucial evidence to back up the claim that Great Britain indeed intended to impose “absolute tyranny” in the colonies was the “long train of abuses” that formed the main part of the text. Here, Jefferson listed 27 grievances that justified the accusation that Britain had indeed violated the natural rights of the colonists.

¹⁰¹ Maier, *American Scripture*, 192. See also: Joseph J. Ellis, ed., *What Did the Declaration Declare?* (Boston: Bedford/St. Martin’s, 1999), 18.

¹⁰² Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Co, 2007), 19–20.

¹⁰³ Stephen E. Lucas, “Justifying America: The Declaration of Independence as a Rhetorical Document”, in: Thomas W Benson, ed., *American Rhetoric: Context and Criticism* (Carbondale: Southern Illinois University Press, 1989), 69. See also: Carl L. Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Harcourt, Brace, 1922), 103.

¹⁰⁴ For this, see: Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language & the Culture of Performance* (Stanford: Stanford University Press, 1993).

At the heart of the Declaration, then, stood the idea that the colonists were a free people that could withdraw their consent from an abusive government and voluntarily erect a new one. It was “in the name, and by authority of” this free people that Congress declared the thirteen colonies independent in the first place. But who was this “people of these colonies?” Did it entail the inhabitants of the former colonies separately, i.e. the sum of the thirteen peoples combined, or collectively? With regard to these questions, the Declaration did not provide a clear answer. The opening paragraph of the Declaration tended to the latter sense, i.e. the people of the colonies collectively. It declared that: “it becomes necessary for one people to dissolve the political bands which have connected them with another.” Here finally, was an unequivocal statement that the colonists actually formed a different people from the one on the other side of the Atlantic. By dissociating “one people” from “another,” Congress affirmed that the colonists were a separate people, distinct and independent from that of Britain. This was a statement of monumental proportion, because it turned the colonists into a single “we,” who could claim self-evident right, but it failed to point out what united this “one people.”

In fact, while the Declaration was explicit in its separation from the British Empire, it was a lot less clear with regard to the *nature* of the union between the new States. Just how “united” would the United States be? Was it an indivisible union between thirteen States, as the reference to “one people” suggested? Or was it a union between separate and independent States, as the constant use of the plural nouns—United *States*, United *Colonies*—and pronouns—*their*, *them*—implied? The text of the Declaration lends itself to either interpretation. It twice refers to the union as consisting of “free and independent States” and the original title of the Declaration spoke of: “the unanimous Declaration of the thirteen united States of America,” i.e. with “united” in small print, which suggest an alliance of independent polities, rather than an indivisible union.¹⁰⁵

Thus, the Declaration announced the birth of a new polity, but did not provide a clear answer to the question on what identity this polity was founded. It proclaimed the colonists to be “one people,” but did not elaborate whether that entailed the people of the former colonies separately or as one whole. In similar vein, just which values united this people remained unclear. The Declaration spoke of the right to establish “such principles and (...) such forms” to render the inhabitants of United States happy, but remained silent on what form this political community should take. Clearly, the new polity would be founded on consent of the governed and respect for their rights, but that still left a lot to be decided. In the end, the Declaration remained silent on all these questions. Its main function, after all, was to formally justify the separation of the thirteen States, not to lay down the rules that would guide the new polity.¹⁰⁶

¹⁰⁵ Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005), 23.

¹⁰⁶ Becker, *The Declaration of Independence: A Study in the History of Political Ideas*, 5.

Conclusion

The Declaration of Independence marked a turning point in the American Revolution. From 1776 on, the thirteen colonies committed themselves to political separation with Great-Britain in favor of a yet undefined and uncertain new confederacy. It is important to note, however, that this turning point was the result of a long process and had been in the making for years. Moreover, the turn was not as sharp as some scholars want us to believe: the colonists were, at best, *reluctant* revolutionaries whose core confidence in the link between constitution and peoplehood remained unaltered throughout the conflict. What changed with the Declaration of Independence was that the colonists renounced their British identity and forfeited the rights in the British Constitution to which this gave them claim. After 1776, no member of Congress would maintain that the colonists were Britons.

As the analysis of the debates in this chapter show, the road from the very first protests against the Stamp Act, in 1765, to the Declaration of Independence, twelve years later, was neither direct nor straight and the path traveled by the colonists was not linear, but curved and full of fits and starts. At least on three occasions—in 1765, 1774, and as late as 1775—the official declarations of Congress confirmed attachment to the identity as Britons, while consensus on the nature of this identity was already falling apart within its walls. In fact, even by declaring their independence, the former colonists did not take the final step in this process but the first. After 1776, the former colonists continued to debate who they were on a new, different level, namely as members of the United States. Americans clearly were not an ancient people who suddenly threw off their crushing shackles, but originated out of the necessity of *not* being Britons.¹⁰⁷ In this sense, independence was more about what the colonists did not want to be, rather than who they were. Exactly what the nature of the union between the former colonies entailed remained unclear. In similar vein, just who the “one people” was that had separated from Britain and in whose name this new republic was established was left in the middle.

This begs the question *whether* a truly separate identity of the polity emerged with the Declaration of Independence in the first place, or rather that it created a polity without a clear unifying identity. What is clear from the debates in Continental Congress is that a first step to establish a common identity for the United States was taken, but what exactly united these united colonists remained unclear. Most important, whether this self-image as Americans could serve as the foundation of the new polity, like that of Britons had done before it, or whether attachment to the newly formed states trumped it remained to be seen. These questions would be raised during the debates on the constitutional form of the new union, and they are subject of the next chapter.

¹⁰⁷ The metaphor is Wood's, see: Wood, *The Creation of the American Republic, 1776-1787*, 3.

Chapter 2

Hanging Together or Separately

The Declaration of Independence heralded to the world the birth of a new political community. Simply stating independence, however, did not make it so. To achieve their goal the newly formed States needed to defeat their former colonizer on the battlefield and the authors of the Declaration realized this depended on the willingness of each State to sacrifice its money, material, and men to the common cause. To organize their collective bid for independence, the members of Congress agreed to write down the terms of their union in what would become the Articles of Confederation. The debates on the drafting, ratification, and implementation of these Articles of Confederation form the subject of this second chapter.

The period of the Confederation, which runs from independence to the ratification of the Constitution, has long held a secondary position in scholarship on the founding. Contemporary America's obsession with the Constitution, one historian puts it, is only matched by its ignorance of the Confederation.¹ As a result of this, the Congressional debates on in the decade following the Declaration have received little attention,² and are often considered, in Gordon Wood's words, as "intellectually insignificant" because of their lack of presenting a "grand design" for the United States.³ The starting point of this chapter, on the contrary, is that the significance of this period lies precisely in this lack of a "grand design." The debates on the Articles of Confederation constitute a heated, ongoing struggle between various designs—great or not—of what the polity should look like. As such, they present an abundance rather than poverty in views, which at the same time demonstrates how contested the polity was in this period.

This casts serious doubts on the idea that the Declaration formed the States into one people. The vow that "these colonies are, and of right should be, free and

¹ Robert W. Hoffert, *A Politics of Tensions: The Articles of Confederation and American Political Ideas* (Niwot: University Press of Colorado, 1992), xiii.

² Many works on the period lack a discussion of the debates on the drafting, ratification, and implementation of the Articles of Confederation: Middlekauff, *The Glorious Cause*; Wood, *The Creation of the American Republic, 1776-1787*. Two notable exceptions to this are: Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781* (Madison: University of Wisconsin Press, 1963); Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred A. Knopf, 1979); More recently there is: David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003).

³ Wood, *The Creation of the American Republic, 1776-1787*, 354, 358.

independent States,” signaled that the States were determined to work together, but it did not say *how* they would unite, nor to what extent. Likewise, the first line of the Declaration had identified the colonists “one people,” separate from the British, but it did not say what this new identity as “Americans” entailed. The drafting of the Articles of Confederation forced the members of Congress to address these questions. The deep divisions that surfaced in the debates revealed that the delegates held very different views on the identity of their new polity. As it turned out, the very nature of the union, i.e. whether the colonists united as one single people, or thirteen separate peoples, was highly contested, even to the point where the feasibility and need for union itself was questioned. Instead, the motto that united the States throughout the period was best captured by Benjamin Franklin’s apocryphal statement at the signing of the Declaration that: “we must all hang together, or assuredly we shall all hang separately.”⁴

A polity in name only?

In the minds of the members of Congress, independence and political union were intimately connected. The war for independence, they realized, could not be won without foreign loans, which in turn could only be contracted by a credible union that foreign creditors trusted to repay its debts. Without a written statement of union, in other words, the United States would remain a polity in name only. Thus, when Richard Henry Lee presented his Resolution of Independence, on June 7, he also urged his fellow-delegates to consider: “whatever measures may be thought proper and necessary by the Congress for forming foreign alliances and a confederation of the colonies.”⁵ No one in Congress objected to: “uniting this continent by a confederacy,”⁶ and while the debate on independence continued, a committee of thirteen delegates—one from each State—was appointed on June 12 to: “prepare and digest the form of a confederation to be entered into between these colonies.”⁷

Throughout the second half of June the members of the committee of thirteen met every spare hour to work on a draft statement of union. Since John Dickinson spearheaded its work, the committee is often referred to as the Dickinson committee and the plan it presented as the Dickinson draft. In light of Dickinson’s stubborn opposition to independence throughout the first half of 1776, his sudden conversion to an ardent advocate for political union in the committee did not speak for itself. It is this conversion,

⁴ There is no official contemporary source that testifies Franklin actually said these words at the signing of the Declaration, though they have long been attributed to him.

⁵ Ford et al., *Journal of Continental Congress*, V, 425.

⁶ Smith, *Letter of Delegates to Congress*, IV, 174.

⁷ Ford et al., *Journal of Continental Congress*, vols. V, 433 The members were Bartlett (NH), Samuel Adams (MA), Hopkins (RI), Sherman (CT), Livingston (NY), Dickinson (PA), McKean (DE), Stone (MD), Nelson (VA), Hewes (NC), Rutledge (SC), and Gwinnett (GA). No delegate for New Jersey was appointed.

as a matter of fact, that forms the key to understanding why Dickinson's draft succeeded where those before it failed even to be discussed by Congress.

Dickinson's draft was not the first plan of union presented to Congress. Since the opening days of the second Continental Congress in May 1775, a growing group of delegates felt the need to record the unwritten rules that had guided Congress' conduct in an official document. When Congress first met in 1774, everyone expected that it would continue business only until reconciliation with Great-Britain had been achieved and therefore no rules other than those to guide the debate were drawn up. When the members decided, however, to continue meeting each year, the question whether this required an official basis received renewed attention. Just as every colony had a charter that contained its rules of government, it was argued, so too the alliance between the thirteen colonies required a written statement of the rules that would guide its conduct.⁸

An early plan for confederation came from Benjamin Franklin, the same man who had proposed the Albany Plan in 1754.⁹ Franklin called his new plan the "Articles of Confederation and perpetual Union," and it provided for a defensive union with the power of war and peace, of making treaties with foreign powers, and of settling disputes between the colonies.¹⁰ When Franklin presented his Articles to Congress in July 1775, he hoped it would strengthen the existing "bond of union" between the States, in order that "each colony might know how far it stood engaged, and for what purpose, and how far it had a right to rely on its sister colonies."¹¹ Franklin's proposal was ill-timed, however, and Congress refused to enter into any consideration of it.¹² Though there are no notes of the debate on this decision, some clue why this happened can be gained from the verdict of the North Carolina Legislature—the only one to discuss the plan—which rejected it as "presently not eligible" and suitable only in case of the "last necessity."¹³ As North Carolina lawyer James Iredell explained, Britain might consider the plan a "scheme of instant independence" which should be averted "until every shadow of a hope of reconciliation is vanished."¹⁴ The moderate delegates in Congress agreed with Iredell. John Dickinson likened premature union to "destroying a house before we have got another."¹⁵ This metaphor vividly captured what the moderates feared most: without an

⁸ See for example Benjamin Harrison's remark that "some treaty of alliance or confederacy (...) should be defined," in: Smith, *Letter of Delegates to Congress*, II, 382. Thomas Paine's *Common Sense* literally spoke of the need to write a: "Charter of the United Colonies" containing the rules that should guide the new polity. Paine, *Rights of Man, Common Sense, and Other Political Writings*, 33–34.

⁹ Other plans, including one by Connecticut delegate Silas Deane, are discussed in: Rakove, *The Beginnings of National Politics*, 139–151.

¹⁰ See articles I and V of the plan: Ford et al., *Journal of Continental Congress*, II, 195–196.

¹¹ Smith, *Letter of Delegates to Congress*, II, 381.

¹² *Ibid.*, vol. II, 381–382.

¹³ William Laurence Saunders, ed., *The Colonial Records of North Carolina* (Raleigh, NC: P. M. Hale, 1886), 192.

¹⁴ Don Higginbotham, ed., *The Papers of James Iredell* (Raleigh, NC: Division of Archives and History, Department of Cultural Resources, 1976), I, 324.

¹⁵ Smith, *Letter of Delegates to Congress*, IV, 355.

overarching roof to keep the colonies together, one of them might broker a deal with Britain and the rest would end up being partitioned between the European powers.¹⁶

When hope of reconciliation with Great Britain was waning by the spring of '76, however, the roof metaphor now rallied the moderates behind confederation.¹⁷ Many now feared that the vacuum following independence would create disunion and partition and urged political union to prevent this. By the end of May, Dickinson admitted to John Adams that his hope for reconciliation had proved in vain, and he was now in favor of “forming a Continental constitution.”¹⁸ In a speech on July 1st, Dickinson urged that a treaty “among ourselves” should precede independence, because “we should know on what grounds we are to stand with regard to one another.”¹⁹ Confederation, in other words, was a guarantee that the former colonies would hang together and prevent them from unilaterally striking a deal with Britain. To the *external* reasons for confederation (i.e. coordinating the war effort and contracting foreign loans) must be added the powerful *internal* reasons of distrust and fear of partition. This clearly shows that, for the moderates at least, it was all but self-evident that the United States would form a unified political community in early 1776 and that without a written statement of union it would remain a polity in name only.

In conclusion, the decision to declare independence not only took away the moderates’ objections—and with that the most important hurdle to debating confederation—but it also gave them a reason to get actively involved in the drafting of the confederation. The committee of thirteen offered Dickinson the opportunity to oversee this process and he seized it with both hands, becoming both the informal leader and driving force behind its work.

The Dickinson committee retained many of features of Franklin’s plan, including the title “Articles of Confederation and perpetual Union.”²⁰ This was an interesting choice of words. Back in 1774, Patrick Henry had been scolded for proposing an “American Constitution,” and hardly two years later the term constitution was still seldom used in Congress to describe union. Instead, the written statement of union was referred to as a “treaty.” Constitutions were compacts that the people of each State (at least in name) gave itself, whereas confederation—which was derived from the Latin “*foedus*,” meaning “treaty”—designated the cooperation between equal states to achieve a common goal.²¹ To distinguish that the United States was composed of member-States, rather than a collective of individuals, the delegates referred to it as the “confederation”

¹⁶ Moderates reminded their colleagues that Poland had suffered a similar fate just three years earlier, see: David Armitage, *The Declaration of Independence: A Global History* (Cambridge, MA: Harvard University Press, 2007), 44–45.

¹⁷ Rakove, *The Beginnings of National Politics*, 136.

¹⁸ Smith, *Letter of Delegates to Congress*, IV, 42.

¹⁹ *Ibid.*, IV, 355.

²⁰ Ford et al., *Journal of Continental Congress*, V, 546.

²¹ S. Rufus Davis, *The Federal Principle: A Journey through Time in Quest of a Meaning* (Berkeley: University of California Press, 1978), 3.

or “confederacy”—a term commonly used in the writings of the time to describe a league of states, such as the Dutch Confederation. In fact, the use of “constitution” was largely confined to those dreaming of a close union between the States which is further proof that the use of “confederation” was deliberate.²² The fact that the term “constitution” was hardly used on the continental level suggests that the States, taken together, were not considered to form one people, or at least that this idea was highly contested.²³

The vast majority of Congress aimed for a defensive alliance that operated as a single polity in external matters, but observed the States’ autonomy over their domestic affairs. John Adams later recalled that no one in Congress seriously believed that the colonies could be consolidated under one central government, and suggested, in June 1775, that Congress should follow the example of the Dutch and the Swiss by forming: “a confederacy of States, each of which must have a separate government.”²⁴ Under a confederation, Adams explained, the States should be left entirely to their own choice for government, and the powers of Congress would be “sacredly confined” to cases of war, trade, and disputes between the colonies.²⁵ This way the union would supplement the States, not replace it. This stress on the limited nature of the confederation was not surprising, considering that the conflict with Great Britain had arisen over the question whether taxation was an internal or external affair. For colonies that freshly parted with British tyranny, the prospect of joining an oppressive confederation had little appeal.

The second article of the Dickinson draft provided exactly for the defensive alliance proposed by Adams. Tellingly, it portrayed the confederation as a “firm league of friendship.”²⁶ This not only gave the union a voluntary character—after all, one chooses one’s friends—but also grounded it on mutual trust—not coincidentally the other meaning of the word “fœdus.” The common goal of the States was to secure their “common defense, security of their liberties, and their mutual and general welfare.”²⁷ This meant that the thirteen friends agreed to pursue a common foreign policy: it handed Congress the power to declare war and peace, and broker foreign treaties. It also meant that the States cast in their lot with each other as to the outcome of struggle for independence. The plan prohibited the States to form peace treaties on their own and tried

²² In fact, Sileas Deane realized that the strong union between the states he favored was only possible in the long run: “one general Congress has brought the colonies to be acquainted with each other,” he wrote to Patrick Henry: “and I am in hopes another may effect a lasting confederation which will need nothing, perhaps, but time to mature into a complete and perfect American Constitution.” Smith, *Letter of Delegates to Congress*, I, 291. John Adams and Josiah Bartlett, who spoke of an American or Continental “constitution,” were also supporters of a strong union between the States. Ibid., IV, 288, 299, 308.

²³ Authors, like Hoffert and Jensen, who portray the Articles of Confederation as the “first constitution” of the United States are not sufficiently aware of the contestedness of the term “constitution” with regard to the union in 1776, see: Hoffert, *A Politics of Tensions*, 81; Jensen, *Articles of Confederation*, 184.

²⁴ Butterfield, *Diary of John Adams*, II:III, 352.

²⁵ “Thought on government”, in: Charles Francis Adams, ed., *The Works of John Adams, Second President of the United States* (Boston: Little, Brown and Company, 1851), IV, 200.

²⁶ Ford et al., *Journal of Continental Congress*, V, 546.

²⁷ Ibid.

to limit the chance of appeasement by Great Britain by forbidding the grant titles or other favors from foreign powers.²⁸ This was the legal embodiment of hanging together.

This part of confederation was undisputed and never seriously questioned throughout the entire drafting period. Every State saw the sense of coordinating the war and foreign policy to attain independence, but this harmony quickly disappeared when the Dickinson draft turned to the domestic affairs of the States. True to his conviction that the former colonies needed a strong arbiter between them, Dickinson sought to create a strong central government that could keep quarreling States apart. His draft provided Congress with the power to settle disputes between the States concerning: “boundaries, jurisdictions, or any other cause.”²⁹ In Dickinson’s view, Congress should be able to intervene in the States when their policies harmed the general interest. Thus while Franklin’s plan read that: “each colony shall retain and enjoy as much of its present laws, rights, and customs, as it may think fit,” Dickinson skillfully added that this would only apply: “in all matters that shall not interfere with the Articles of this Confederation.”³⁰ The result was a Congress that, at least on paper, could make its will heard in the States.

Since the powers of this Congress went even beyond those Great Britain had enjoyed, the Dickinson plan was criticized for seeking to reverse the Revolution by creating a tyrannical central government.³¹ One member of the committee, Edward Rutledge, privately confided to a friend that Dickinson’s plan would spell the ruin of the States. According to Rutledge the plan suffered from the vice of “refining too much,” and “destroying all provincial distinctions [by] making everything of the most minute kind bend to what they call the good of the whole.” Unless it was seriously curtailed, Rutledge predicted that Dickinson’s plan would be rejected by the States, who: “will not be led or rather driven into measures which may lay the foundation of their ruin.”³²

Rutledge’s objection echoed with many of his colleagues. The one thing the States had always dreaded more than being dictated to by Britain was being dictated to by its neighbors. Even though the States had now united against Britain, the jealousy with which they guarded their local autonomy remained unaltered. Each State realized that it stood to lose to its “friends” by confederating: the sparsely populated to the populous States, the agricultural to the commercial, the slaveholding to the non-slaveholding, East to West, North to South, and vice versa. In many cases, their interests united one bloc of States against others with each region hoping to prevent being dominated by the others. Another quote from the Rutledge letter illustrates this, when he writes “I confess I dread their [New England’s] overruling influence in council [and] their low cunning, and those leveling principles which men without character and fortune in general possess.”³³ The

²⁸ Ibid., V, 550, 547.

²⁹ Ibid., V, 550.

³⁰ Ibid., V, 547.

³¹ Jensen, *Articles of Confederation*, 137.

³² Smith, *Letter of Delegates to Congress*, IV, 338.

³³ Ibid.

States' reluctance to give up power had spelled the doom of the Albany Plan in 1754 and now again proved a hard hurdle.

This much was already clear in Dickinson's committee. According to one of the members, Josiah Bartlett, the old question of voting by State or proportionally—that is: each State according to its number of inhabitants—led to some “warm disputes” among the committee members and he feared that it would take some time before this difficulty would be settled.³⁴ This echoed an earlier warning by Patrick Henry that it was best to confine the Confederation to an external alliance, as he had personally experienced that: “a minute arrangement of things (...) such as equal representation &c (...) may split and divide” the States.³⁵ The same was true for the related problem of the question how the union's expenses should be divided between the States. The notes Bartlett used during these debates show that the delegates looked at the Dutch republic and the Albany Plan, but for whatever reason, the committee decided to leave the voting process as it stood and to appropriate expenses according to the number of inhabitants in each State.³⁶ When, in mid-July, the Dickinson draft was sent to Congress, it was already clear that the very issue that had sparked the revolt against Britain—taxation and representation—now threatened to tear asunder the nascent polity.

In conclusion, the drafting of the Articles laid bare how contested the polity was. The eagerness with which John Dickinson and his fellow-moderates urged confederation once the Declaration of Independence was imminent shows that, for them at least, the States were all but one united political community. If unification in the war effort and towards the outside world was undisputed, the quarrels in the drafting committee concerning voting and expenses proved how contested the idea of forming one community *internally* still was. If the former colonies were to become more than a polity in name only, they would have to cast their differences aside and unite as one Confederation.

Hanging in the balance: Congress debates confederation

The final draft of the Dickinson Committee arrived in Congress on July 12. By then, John Dickinson had left Philadelphia to lead Pennsylvania's militia in the war against Britain, thereby robbing the committee of its most important spokesman. The debate in Congress on the draft started ten days later, on July 22, and lasted three weeks before it came to a grinding halt. By then it had revealed such deep divisions among the members of

³⁴ Ibid., IV, 256.

³⁵ Adams, *The Works of John Adams, Second President of the United States*, IV, 201.

³⁶ Smith, *Letter of Delegates to Congress*, IV, 199–200. Ford et al., *Journal of Continental Congress*, V, 548, 550.

Congress, that it dispelled all hopes that confederating would be a short and easy ride. Within weeks of declaring their independence from Great Britain, the political union between the States was seriously hanging in the balance.

The major point of disagreement in the Dickinson draft was the procedure of voting by State. Back in 1774 this had already led to a heated debate when Patrick Henry's proposed to weigh votes according to the size of the colonies' population. The ensuing outrage from the smaller States had led Congress to drop the subject and Henry had grudgingly backed down. As a result, each State could send as many delegates to Congress as it liked but would receive only one vote. This gave small States like Rhode Island, Delaware, and New Jersey an equal say as, and huge edge over, their large sisters Virginia, Massachusetts, and Pennsylvania.³⁷ Although Dickinson's committee had considered several alternatives, it failed to settle on one and as a result article XVII of the draft left the status-quo that: "each colony shall have one vote in Congress" intact.³⁸

The "one State, one vote" procedure was still an eyesore to the larger States in 1776 and sufficed to make the blood of even the most enthusiastic supporters of confederation boil. None other than Benjamin Franklin, the Nestor of American union, led the attack on article XVII. As delegate from the second largest State of Pennsylvania, Franklin objected that his State was expected to contribute more money without having a bigger say in what happened with it. "Let the smaller colonies give equal money and men," Franklin insisted: "and *then* have an equal vote."³⁹ Tellingly, Franklin accused the smaller States of disposing of "*our* money," which showed that for him, the union was still one between "us" and "them." Franklin clearly did not believe that the States shared a sufficiently mutual interest to trust them with spending Pennsylvania's money for it. In fact, he insisted that voting proportional to contribution was a necessary condition for a viable union. "A confederation [based] upon such unreasonable and iniquitous principles" as equal voting, he threatened, "will never last long."⁴⁰

Franklin's attack on the equal voting procedure was a rude awakening for Congress. His blunt and threatening speech set the tone for the debate and confirmed the fears those who, like Samuel Chase, feared that the voting procedure was "most likely to divide us."⁴¹ By framing the debate in terms of "us" versus "them," Franklin went to the heart of the matter, namely how the States would confederate. If the States united as equal partners, why should Pennsylvania contribute more than its neighbors? If, on the other hand, the States united as a common whole, why did they not receive a vote

³⁷ Ford et al., *Journal of Continental Congress*, I, 25. Evarts Boutell Greene and Virginia D. Harrington, *American Population Before the Federal Census of 1790* (New York: Columbia University Press, 1932), 7 give the following estimates for 1775: New Hampshire 100,000; Massachusetts 350,000; Rhode Island 58,000; Connecticut 200,000; New York 200,000; New Jersey 130,000; Pennsylvania 300,000; Delaware 30,000; Maryland 250,000; Virginia 400,000; North Carolina 200,000; South Carolina 200,000.

³⁸ Ford et al., *Journal of Continental Congress*, V, 550.

³⁹ Butterfield, *Diary of John Adams*, II:245.

⁴⁰ *Ibid.*, II:245, 248. Boyd, *The Papers of Thomas Jefferson*, I:324.

⁴¹ Boyd, *The Papers of Thomas Jefferson*, I:323.

proportional to their size? Underlying this problem was the question left open in the Declaration, namely whether the States were united as one people or several. Franklin's speech derives its significance from challenging the very foundation of the union that the delegates were forming and put the identity of the polity at stake in the debate.

In reaction to Franklin's attack, the small States delegates insisted that the States were indeed each other's perfect equals. The most outspoken defender of this view was the New Jersey minister John Witherspoon, who argued that each State was a "distinct person." Congress, Witherspoon insisted, was an assembly of separate communities which should settle their disputes by means of equal vote: "we are now collected as individuals making a bargain with each other." By depicting the States as persons, Witherspoon stressed their independent relation to each other. If each State was a separate individual, with a distinctive identity, the confederation could at best become a union between separate persons, in which each retained its own identity. In this view, Connecticut delegate Roger Sherman explained, the delegates of Congress were the representatives of States, not individuals, and should vote accordingly.⁴²

For the large State delegates, the issue was more of a challenge. The burden of proof clearly lay with them, since they had to convince the majority of Congress to overturn the existing procedure of "one State, one vote." To break the status quo, the larger State delegates could not simply keep repeating their interest; they had to convince Congress that proportional voting better suited the true nature of the union. John Adams took up this challenge by denying that the States were distinct persons, and instead portraying them as one community. In response to Witherspoon, Adams invited his audience to stop thinking about "what we are now," and rather start thinking of "what we ought to be when our bargain shall be made." Instead of separate individuals making a bargain, he argued, "the confederation will make us one individual only [and] will form us, like separate parcels of metal, into one common mass." This metaphor of the States as pieces of metal denied the States the timeless individuality of Witherspoon's person metaphor and instead implied that they could merge into one new alloy. It challenged the idea that the States remained distinct persons after confederating and offered a new vision of the polity as one entity, rather than thirteen. After confederating, Adams concluded: "we shall no longer retain our separate individuality, but become a single individual as to all questions submitted to the confederacy."⁴³

As to the identity of this new community, Adams was very clear: in his view the inhabitant of the States together formed one people. As his good friend and Pennsylvania delegate Benjamin Rush explained: "we are now one people, a new nation (...) our trade, languages, customs, and manners do not differ more than they do in Great-Britain." This vision of polity as one nation was crucial for the claim to proportional representation. Adams' and Rush' appeal was a classic case of constitutive rhetoric, for if the delegates

⁴² Butterfield, *Diary of John Adams*, II:245, 247. Boyd, *The Papers of Thomas Jefferson*, I:324–325.

⁴³ Boyd, *The Papers of Thomas Jefferson*, I:325.

accepted that the States formed one people, it followed that the votes in Congress should be weighted accordingly. “Where it possible to collect the whole body of the people,” Rush argued: “they would determine the question by their majority,” why then should not Congress do the same? In similar vein, Adams argued that “in some States the people are many, in other they are few (...) therefore their vote here should be proportioned to the numbers from whom it comes.”⁴⁴ In portraying the States as forming one people, Adams’ and Rush’ main goal was to convince Congress that proportional voting was American.

The view of the States as “parcels,” clearly challenged that of the States as “persons.” In the former, Congress was no longer a council of ambassadors representing independent nations, but an assembly of representatives of a single American people. The upshot of this view was not to concentrate on what differences existed between the States, but on what united them. “Colony distinctions should be lost here,” Rush argued: “the more a man aims at serving America, the more he serves his colony.” In a stirring peroration, resembling that of Patrick Henry in ‘65, Rush declared that he was not motivated by the interests of his home State, because: “when I entered the door, I considered myself a citizen of America.”⁴⁵ Whether this was simply rhetorical flourish, meant only to secure proportional voting, is beside the point: by urging their colleagues that they were part of a larger community—America—Rush and Adams were lending support to the vision of the polity as forming one American people.

The reaction of the smaller State delegates to these unifying statements was to insist that the differences between the States made such a union impossible, even ruinous. Proportional voting, Witherspoon said, would make the smaller States the slaves of their larger cousins. If the three largest colonies joined hands, he warned, they could dictate their views the rest of the confederation—which would only prove a problem if the States did not share the same views in the first place. Anything other than equal vote, Witherspoon warned, would lead to a hopeless “civil war” and leave the States worse off than they had been under Empire. “The safety of the whole,” Hopkins argued, “depends upon the distinction of the colonies.”⁴⁶ The delegates from larger States, in turn, tried to demonstrate that these fears were unfounded. The small States would never become slaves to the big, Rush soothed, because Virginia, Pennsylvania, and Massachusetts were so “providentially divided” that it was unlikely they would ever join hands. On the contrary, Rush said, the: “variety of interests is an advantage to us [and] points out that heaven intended us for one people.” Any interest that the three could have in common, he insisted, would be the interest of the whole.⁴⁷

In the end, the stalemate in the debate favored the status-quo. Although there are no records that an actual vote was taken after the debate, it is clear that the defenders of

⁴⁴ Butterfield, *Diary of John Adams*, II:247; Boyd, *The Papers of Thomas Jefferson*, I:326, 325.

⁴⁵ Butterfield, *Diary of John Adams*, II:247, 248.

⁴⁶ Smith, *Letter of Delegates to Congress*, IV, 584–585; Butterfield, *Diary of John Adams*, II:248.

⁴⁷ Boyd, *The Papers of Thomas Jefferson*, I:326; Smith, *Letter of Delegates to Congress*, IV, 599.

the status-quo carried the day since no changes were made to the “one State, one vote” procedure. This meant that, despite their passionate pleas, Adams and Rush failed to muster a majority of delegates behind their vision of the polity. The absence of voting records makes it hard to say why this was the case. One possible explanation is that, despite their talk about forming one people, neither Rush nor Adams explained what united them as one. The people of the United States, in their book, was a means to obtain proportional voting and remained an empty concept, which perhaps explains its lack of persuasive power. On the other hand, it is also possible that the conflict over representation itself played a part in this. The clash between the advocates of the union as a collection of persons and parcels made clear how deep the differences between the States ran and how contested the nascent polity still was. This may well have convinced some delegates that, indeed, they did not form a single people. Since “every speck of ground is disputed,” as one delegate put it, it was hard to see how the confederation could become the expression of the will of a single people.⁴⁸

The conflict between the delegates was not only confined to the amount of influence over the common fund of the Confederation, but also touched on how much each State would have to contribute. Taxation was a sensitive subject in Congress and, as the revolutionary war demonstrated, one which the former colonies were willing to die for. To prevent Congress from suffering the same fate as Parliament, article XI of the Dickinson draft placed the authority to levy taxes securely with the State Legislatures. The only influence Congress was granted over taxation was to decide how much money each State would have to contribute. It was the proportioning of the confederate expenses that caused outrage among the delegates.

In their quest for a good distributive criteria the Dickinson committee had settled for the number of inhabitants as the most adequate way to account for differences in size and wealth.⁴⁹ Many southern delegates objected that distributing the burden by population injured their interest because it did not distinguish between free inhabitants and slaves. “Negroes are a species of property, a personal estate,” Maryland delegate Samuel Chase observed, and they should therefore not be counted as inhabitants of the States they lived in. He proposed to amend the article to read that only white inhabitants were counted to proportion the expenses. After all, Chase said, “negroes should not be considered as members of the States more than cattle.” In similar vein Thomas Lynch from South Carolina asked: “our slaves being our property, why should they be taxed more than the land, sheep, cattle, or horse” of the northern farmer?⁵⁰

Benjamin Franklin’s clever reply to Lynch—because unlike slaves “sheep will never make any insurrection”—exposed the ambivalent position of slaves between people and property. Although Franklin never suggested that slaves were actually part of the

⁴⁸ Smith, *Letter of Delegates to Congress*, IV: 637.

⁴⁹ Ford et al., *Journal of Continental Congress*, V, 548.

⁵⁰ Butterfield, *Diary of John Adams*, II:245–246. Boyd, *The Papers of Thomas Jefferson*, I:320–321.

political communities they lived in, he was not about to let his southern colleagues get away with paying less. His objection was not that it was morally wrong to portray slaves as property, but that if slaves were disqualified as inhabitants, their States would carry a significantly larger part of the burden. James Wilson even pointed out that this was only going to get worse, because Chase's plans constituted a "great encouragement to continue slave keeping and increase it." Despite attempts to arrive at a compromise—for example by counting two slaves as one freeman—the Southerners' adamant objection made clear that for them the issue was non-negotiable. "If it is debated whether our slaves are our property," Thomas Lynch warned his colleagues "there is an end of the confederation."⁵¹ Whether sincere or not, Lynch's warning demonstrated that the issue of slavery threatened to tear up the confederation before it was even erected.

On August 1, the question of the quotas for taxation was put to Congress and the Chase amendment was rejected with seven to five votes, with only Delaware, Maryland, Virginia, and North and South Carolina voting in favor, and Georgia left divided.⁵² This vote, for the first time, clearly showed the potential of slavery as a cause of conflict between the New England and middle States of the North, where slavery was marginal to non-existent, and those in the South, where slavery was increasingly seen as an intimate part of a way of life. Just like the debate on voting, this dispute over slavery revealed yet another domestic divisions that pitted the States against each other. Finally, it once again demonstrated the inability of the delegates to arrive at a solution that could carry unanimous approval.

Congress spent three weeks debating the Dickinson's draft when. On August 8, further discussion of the confederation ended without achieving a satisfactory solution to the controversies that divided Congress.⁵³ By then, the only settled question was that the apportionment of the union's expenses would be according to the total number of inhabitants of each State, regardless of whether they were slaves or freemen.⁵⁴ Three weeks of discussion failed to bring the Dickinson to completion. Instead it revealed that the differences in Congress were, as one delegate put it, "very alarming." So alarming, in fact, that some wondered whether the conflicting views and interests could be brought together at all. Such "jarring claims and interest" were being made, according to Connecticut delegate William Williams, that he feared a confederation would never see the light of day.⁵⁵

The debates demonstrate how deep the divisions ran among the delegates with regard to the nature of their political union. The delegates who favored proportional

⁵¹ Butterfield, *Diary of John Adams*, II:245–246.

⁵² Boyd, *The Papers of Thomas Jefferson*, I:I, 323.

⁵³ Ford et al., *Journal of Continental Congress*, V, 639. Smith, *Letter of Delegates to Congress*, V, 20.

⁵⁴ Even this was achieved with only a small minority of seven to five, which did not stop the southern delegates from bringing up the issue time and again afterwards. According to Williams, Chase and others brought up the issue as late as August 12, see: Smith, *Letter of Delegates to Congress*, IV, 667.

⁵⁵ *Ibid.*, IV, 597, 637–638.

voting viewed the States as forming one people, while those who favored equal voting, on the other hand, adhered to the vision of the States as thirteen distinct peoples, each with its separate identity. The debate on voting illustrated that the identity of the polity itself, either one people or several, was highly contested. In fact, the debate on the proportion of confederate expenses demonstrated that even the question who belonged to the peoples of the States—whites, slaves, or both—was contested. In the ensuing stalemate neither vision of the polity (one people or several) received the endorsement of the majority of Congress.

The fact that so few delegates were prepared to reach an agreement on any of the issues, let alone trade them off against each other, was also telling of the stalemate situation in which Congress found itself. It is further proof of the lack of an appealing vision of the polity behind which all parties in Congress could rally. Attempts by individual delegates to reach a compromise on one of the issues, for example by counting two slaves as one freeman, or by confining equal representation to financial matters only, were never seriously considered.⁵⁶ Many delegates complained that their colleagues' stubbornness harmed progress on the draft, but they in turn refused to reconsider their own position. A typical example was Samuel Chase who criticized his colleagues for not "all feeling the necessity of a confederation" during the debate on voting, while at the same refusing to give an inch in the debates on slavery and the regulation of boundaries by Congress.⁵⁷ The sobering yield of three weeks of debate was that, instead of uniting the States behind a written statement pledging their union, the Dickinson draft had demonstrated just how contested the polity really was.

The debate on the Dickinson draft ended on August 20, but few delegates were content with the final result. According to Edward Rutledge, most members of Congress believed that the Articles would never be adopted by the States in their present form: "for we have made such a devil of it already that the colonies can never agree to it."⁵⁸ This assessment was probably right. At least two delegates (Franklin and Lynch) had threatened that the plan was unacceptable to their State, and since unanimous ratification was required for the draft to become binding, the rejection by one invalidated the entire project.⁵⁹ In this hostile climate, the delegates refrained from sending the Articles to the State Legislatures and instead decided, as Josiah Bartlett noted on August 27, that it should: "undergo one operation through Congress more."⁶⁰ More than anything else, this delay spoke volumes of the stalemate at which Congress had arrived. Confederation was truly hanging in the balance.

⁵⁶ The first idea was Harrison's, the second Chase's, see: Boyd, *The Papers of Thomas Jefferson*, I:322–324.

⁵⁷ Smith, *Letter of Delegates to Congress*, IV, 571.

⁵⁸ *Ibid.*, V, 27.

⁵⁹ Ford et al., *Journal of Continental Congress*, V, 554.

⁶⁰ Smith, *Letter of Delegates to Congress*, V, 70.

Delays, revisions, and ratification

It took more than eight months before the Congress would return to debating the Articles of Confederation. Several factors contributed to this. First, the pressing demands of coordinating the war demanded considerable attention, especially after the dramatic defeat at Long Island and Washington's subsequent retreat from New York.⁶¹ Second, the delegates' attendance to congressional meetings began to dwindle after the eventful summer of 1776. Reasons for this varied widely. Some of the veterans of Congress left to pursue a career in State politics, like Patrick Henry and Edward Rutledge, or in the army, like Dickinson and Gadsden. Others were appointed as ambassadors, like Jefferson and Franklin, and still others never bothered to show up after they were appointed to Congress.⁶² As the Articles had to be ratified by all the States, there was little point in discussing it when some were not represented and, consequently, the work stalled for months on end. Even an appeal of Congress to some States to send a full delegation to Congress had little effect.⁶³ But the heart of the matter was that the conflicts over the Dickinson's draft had revealed that no easy solution between the States was to be expected.

In April 1777, after more than eight months of delay, Congress finally obtained a sufficient quorum to resume its discussion on the draft of the Articles.⁶⁴ This new round of debate did little to take away the existing objections to the treaty, but succeeded only in raising new ones. The man mainly responsible for this was Thomas Burke, an Irish-born physician from North Carolina whose strong views conflicted with the Articles as they stood. According to Burke all "sovereign power" in the union lay with the States and Congress had no power to interfere with the so-called "police powers," i.e. the power of States to regulate domestic affairs and enforce order in their own territory.⁶⁵ In the light of these views it is not surprising that Burke regarded the draft Articles as wanting. As it stood, article III guaranteed the States regulation over their internal affairs "in all matters that shall not interfere with the Articles of this Confederation."⁶⁶ Burke feared this phrase could be abused to grant Congress the right to intervene in areas that properly belonged to the States, and argued that nothing stopped the delegates from: "making their own power as unlimited as they please."⁶⁷ To prevent this, Burke proposed an amendment that started from the opposite idea that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation

⁶¹ Ibid., V, 266.

⁶² Paul Smith lists 22 delegates who did not attend in the fall of 1776, a figure that rises to 35 in the first four months of 1777, see: Ibid., V, xvi–xxii and VI, xv–xxiii.

⁶³ Ibid., V, 295. Ford et al., *Journal of Continental Congress*, V, 837.

⁶⁴ Ford et al., *Journal of Continental Congress*, VII, 240. Smith, *Letter of Delegates to Congress*, VI, 666.

⁶⁵ Smith, *Letter of Delegates to Congress*, VI, 672 ("all sovereign power was in the states separately"); ibid., VIII, 419 ("this power (...) excludes all coersive [sic] interposition in the states").

⁶⁶ Ford et al., *Journal of Continental Congress*, V, 675.

⁶⁷ Smith, *Letter of Delegates to Congress*, VI, 672.

expressly delegated to the United States in Congress assembled.” Under this article, Burke told his colleagues, only those cases explicitly enumerated by the States would be exercised by Congress, but: “in all things else each State would exercise all the rights and powers of sovereignty uncontrolled.”⁶⁸

The significance of Burke’s amendment has become the subject of dispute among historians: to one it constitutes the most important revision of the Articles in Congress, whereas another regards it as “supremely unimportant.”⁶⁹ More important for the purpose of this study is that it cast the discussion in terms of a zero-sum game of either retaining or losing State sovereignty. In the decade following the Declaration of Independence, this was the dominant frame in which the members spoke about the power of the States vis-à-vis Congress. As a result of the adoption of Burke’s amendment by Congress,⁷⁰ the pendulum swung to the States and the subordinate position of Congress as the product of the will of the sovereign States was reaffirmed. Apart from this, Burke’s amendment did little to help solve the existing conflicts over voting and tax quotas. Throughout the first half of 1777, the members of Congress again found themselves in the paralyzing situation of being, “anxious for a confederacy,” as one of them put it, but unprepared to surrender any of State’s interest to achieve it.⁷¹

By May 1777, several delegates reported that little progress was being made.⁷² This deadlock was abruptly broken, not by words, but by steel. In the early morning on Friday September 19, the delegates were rudely awoken to the news that enemy troops had arrived at the outskirts of Philadelphia and would be in possession of city before the day was over.⁷³ Upon hearing the news, the delegates gathered their papers and fled to the nearby town of York, some hundred miles inland, where they reconvened on September 30 and remained until summer. The successful escape from enemy hands suddenly made the prospect of “hanging separately” very real to the delegates and seems to have restored their vigor to complete the Articles. “All seem desirous of forming a confederation,” one delegate wrote, and after arriving in York, Congress immediately resumed work on the Articles, meeting twice a day to resolve the lingering disputes.⁷⁴ Unfortunately, no notes of the debates survived, but the voting records demonstrate that major shifts of opinion took place.

The question of representation was resolved when large States began turning against proportional voting. A proposal that referred to Congress as “this national

⁶⁸ Ford et al., *Journal of Continental Congress*, IX, 908. Smith, *Letter of Delegates to Congress*, VI, 672.

⁶⁹ The first view is that of: Rakove, *The Beginnings of National Politics*, 170; The latter that of: David C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003), 134.

⁷⁰ Smith, *Letter of Delegates to Congress*, VI, 672: according to Burke only Richard Henry Lee and James Wilson protested against his amendment. .

⁷¹ *Ibid.*, VII, 463.

⁷² *Ibid.*, VII, 80, 82, 116, 302.

⁷³ *Ibid.*, VIII, 3–4.

⁷⁴ *Ibid.*, VIII, 25, 50.

assembly” and to grant each State one vote for every 50,000 inhabitants was rejected when only Virginia and Pennsylvania supported it. Two other such proposals suffered a similar fate. In both cases, only Virginia supported the amendment—sometimes supported by individual delegates from Massachusetts or North Carolina—and its delegates were furious when a majority of ten to one finally resolved that each State would continue to have one vote.⁷⁵ The conflict over the apportionment of expenses was settled on October 14, when it moved that the quotas would be based on the value of land. This received warm support from the southern States, whose scarcely populated land was worth far less than that of the New England, where it was strongly opposed. With the middle States divided, the amendment passed with the slimmest of possible majorities of five to four.⁷⁶ This could hardly be called a satisfactory compromise, however, since a substantial minority of Congress opposed the measure. James Wilson aptly described it as: “the outcome of the impossibility to compromise,” because in fact, the new article only turned the situation around, with the South now feeling satisfied and the North feeling duped.⁷⁷

In the end it took the delegates only ten days to resolve issues that had divided them for almost one and a half year. Earlier, the delegates felt no need to arrive at compromises, but now the controversies were settled in a matter of days. A renewed sense of the urgency of confederating in the wake of the Philadelphia invasion explains the end to the stalemate. Illustrative is the debate on voting, where the determination of the large State delegations to obtain proportional voting started to crumble. The vote of Pennsylvania was in the hands of only one delegate, the Philadelphian merchant Daniel Roberdeau, whose primary concern seems to have been with the war, and who felt that completion of the confederation was necessary “for our salvation,” and voted against all proposals for a proportional vote. In the Massachusetts delegation the staunch defender of popular representation John Adams was constantly outvoted by colleagues. Among them was Samuel Adams, who believed that a majority in Congress favored equal representation and did not obstruct it, as he too was anxious to have the confederation completed. New York delegate James Duane also supported equal voting because he felt it was the only plan that: “can be reconciled to the majority of the States.” Finally, the North Carolina delegation ended up divided on most votes because John Penn, who favored proportional voting, was obstructed by his colleague Cornelius Harnett, who felt that “the very salvation of these States depend upon” completion of the confederation.⁷⁸

These statements show that many delegates from the larger States ceased their repeated demands for proportional representation only once the future of the union itself

⁷⁵ Ford et al., *Journal of Continental Congress*, IX, 779–782.; Smith, *Letter of Delegates to Congress*, VIII, 108.

⁷⁶ Ford et al., *Journal of Continental Congress*, IX, 801.

⁷⁷ William T. Hutchinson, William M. E. Rachal, and Robert Allen Rutland, eds., *Papers of James Madison* (Chicago: University of Chicago Press, 1962), VI, 402.

⁷⁸ Smith, *Letter of Delegates to Congress*, VIII, 122, 368, 98. For Samuel Adams, see: Ibid., VII, 271–272.

was hanging in the balance. In this new climate, the idea prevailed that completion of the confederation was crucial for the survival of the young States, now that the Congress had received such a delicate blow after being ousted out of Philadelphia by the enemy. Only the fear of losing the war and hanging separately, in other words, in the end proved sufficient for the delegates to close ranks and resolve the conflicts that had delayed the completion of the Articles of Confederation. Despite the many attempt to portray the States as forming one American people, the final version of the Articles united the States as thirteen separate peoples—each with their own vote and identity—rather than as one. As the debate on representation illustrates, fear was the decisive factor in this. In the end, it was not the positive story of what it meant to be an American, but the fear of becoming Britons once again that rallied the delegates behind the Articles of Confederation.

Fear also was the main theme of the circular letter in which Congress urged the State Legislatures to ratify the Articles. The letter confessed that no plan of union between States so different in “habits, produce, commerce, and internal police,” would “exactly correspond with the maxims and political views of every particular State.” Instead, the authors pointed to “the absolute necessity of uniting all our councils and all our strength, to maintain and defend our common liberties” to urge the States to ratify. Here again, fear of disunion, rather than an appealing vision of union, was presented as motive. “Every motive loudly calls upon us to hasten its conclusion,” the letter concluded, as the Articles are: “essential to our very existence as a free people, and without it we may soon be constrained to bid adieu to independence, to liberty and safety.”⁷⁹ In a sense, this last part perfectly captured the essence of the Confederation: exactly because the States wanted to form a “free people”—free from Great Britain as well as each other—they could not bring themselves to present a plan that would turn them into a close union.

The final version of the Articles of Confederation provided for a ratification procedure in which the States’ Legislatures, after approving the treaty, authorized their delegates to ratify it in Congress, which would make the Articles binding on all States.⁸⁰ This straightforward procedure would turn to be everything but the smooth ride that the delegates wished for. Congress had assigned March 10, 1778, as the final date to conclude ratification in Congress, but when that day came, it became clear that only one State, Virginia, was prepared to do so unconditionally.⁸¹ The other States did not share Congress’ sense of urgency concerning ratification and instructed their delegates to amend the Articles before assigning their signature. Many of the amendments addressed the last minute changes that had been made in October.⁸² Several aimed at changing the procedure to apportion confederate expenses, but these rarely gained support outside the

⁷⁹ Ford et al., *Journal of Continental Congress*, IX, 933–934.

⁸⁰ Ibid., IX, 925.

⁸¹ Smith, *Letter of Delegates to Congress*, IX, 258.

⁸² The amendments can be found in: Ford et al., *Journal of Continental Congress*, IX, 628, 631–632, 636–640, 647–656.

State that sponsored them. The fact that not a single amendment was adopted shows how strong the sense of urgency concerning ratification was. According to one delegate, the members of Congress felt: “that a speedy confederation was of more importance than to endeavor further to accommodate the Articles to the opinion and views of particular States.”⁸³

When Congress returned to ratification in July 1778, it turned out New Jersey, Delaware and Maryland had still not ratified the Articles. At this point, the patience of the ratifying State was clearly running out. South Carolina delegate John Matthews feared that unanimous consent of the States would never be achieved and that the union would meanwhile remain a “rope of sand.” This metaphor vividly captured the fear that the union could be torn apart by the slightest gust of wind. Matthews feared that if the States remained unaligned they would fall prey to France and Great Britain, whose favorite maxim was divide and conquer.⁸⁴ When in June of 1780 rumors began to appear that South Carolina and Georgia intended to broker a separate peace with Britain, these fears gained sudden solidity.⁸⁵ Though nothing was heard of this unilateral peace again, many delegates were strengthened in their belief that only ratification of the Articles could defeat “the hope our enemy entertains of dividing us” by “drawing off some of the States, and continue the war another campaign.”⁸⁶ This fear was starting to undermine the tolerance of the ratifying States to wait for the unanimous consent of their neighbors. The Virginia delegation now urged Congress to ratify the Articles “notwithstanding that a part of those named shall decline to ratify the same.”⁸⁷ This attempt to hijack the ratification process by making the Articles binding on those States that had already signed was not followed by Congress, but shows how desperate the situation had become. In order to hasten the confederation, Virginia now even proposed to split the union in two.

By the end of February 1778, Maryland was the only State blocking ratification of the Articles. On several occasions, Maryland made clear that it was more than willing to ratify, provided that Congress would resolve a dragging dispute about land claims that was as controversial as it was old. Based on their colonial charters, the so-called “landed” States like New York and Virginia claimed huge plots of lands right down to the Mississippi River. The “landless” States of Maryland, whose border was fixed by their charters, demanded that the claims would be turned into a common fund, but Congress had repeatedly rejected this.⁸⁸ The members of the Maryland delegation privately admitted that there was little hope Congress would budge, but Maryland’s Legislature

⁸³ Smith, *Letter of Delegates to Congress*, X, 248.

⁸⁴ Ibid., X, 235 Other delegates picked up the “rope of sand” metaphor, see Ibid., 272.

⁸⁵ Ford et al., *Journal of Continental Congress*, XVII, 554.

⁸⁶ Smith, *Letter of Delegates to Congress*, vols. XII, 508. Ibid., XI, 436.

⁸⁷ Ford et al., *Journal of Continental Congress*, XIV, 617.

⁸⁸ Back in 1776 Thomas Stone had argued that native Maryland would have: “no safety if the great colonies were not limited” but to little avail, see: Butterfield, *Diary of John Adams*, II:249. Subsequent attempts by the state to amend the Articles of Confederation all failed: Ford et al., *Journal of Continental Congress*, IX, 636–637, 806, 808.

stood firm.⁸⁹ Just like the attack on Philadelphia had broken the stalemate in Congress, so too Maryland's obstruction only ceased by outside force, in this case after the French protection of its trade was made conditional upon ratification. The French minister to the United States, the Chevalier de la Luzerne, told Maryland in January 1781 that: "on nous fait espérer, que l'hiver ne finira pas sans que votre Etat ait accédé à la confédération."⁹⁰ By the end of the month, Maryland's legislature wrote Congress that since "our accession to the confederation will be acceptable to our illustrious ally," the State of Maryland would ratify the Articles, thus trusting that "the hopes of the common enemy (...) may be totally destroyed."⁹¹ Soon afterwards, New York and Virginia dropped their land claims, thereby taking away the cause for delay.⁹² After three and a half year, nothing now stood in the way of the final ratification of the Articles of Confederation.

The signature of the State of Maryland cleared the way for the ratification of the Articles of Confederation, which finally took place on March 1st, 1781. The shots of thirteen cannons announced the completion of the Confederation followed by festivities and fireworks. These ceremonies marked the end of a five year struggle over the treaty that would govern the United States from now on, but in many ways, the constitutional debate on the true identity of the United States of America had only just begun. First, it was clear that the "firm league of friendship" on which the union between the thirteen States rested formed a weak foundation. In fact, the binding factor throughout the period was the shared fear of Great Britain. Time and again, it was this threat of "hanging separately" that lodged the members of Congress through crucial phases of the debate. In October 1777, it was only after the invasion of Philadelphia by the British that Congress mustered the political will to settle on a final version of the Articles of Confederation. In similar vein, the ratification process only ended when the French ultimatum convinced the stubborn State of Maryland to cease its opposition and sign the Articles into effect. In both cases, it was the fear of becoming Britons again that united the States, which begged the question what would bind the States once their common enemy disappeared.

Second, despite or perhaps because the States had rallied behind one version of the Articles out of a sense of urgency, rather than conviction, the disputes in Congress over what the union should look like remained very much alive. The circular letter of Congress and subsequent ratification debates testify that the Articles adopted in 1781

⁸⁹ The doubting delegate was John Henry, see: Smith, *Letter of Delegates to Congress*, IX, 258 . The Maryland Legislature told its delegates in Congress to "promote the general welfare of the United States and the particular interest of this state," but only: "where the latter is not incompatible with the former." Ford et al., *Journal of Continental Congress*, XIV, 619.

⁹⁰ The letter can be found in: George L. Sioussat, ed., "The Chevalier de La Luzerne and the Ratification of the Articles of Confederation by Maryland 1780-1781," *Pennsylvania Magazine of History and Biography* 60, no. 4 (1936): 408–409.

⁹¹ *Votes and Proceedings of the House of Delegates, of the State of Maryland* (Annapolis: Frederick Green, 1780), 217–218. For Maryland's ratification see: Ford et al., *Journal of Continental Congress*, XIX, 138.

⁹² Ford et al., *Journal of Continental Congress*, XIX, 208 and further.

were a highly unsatisfactory compromise. Even though Congress decided to maintain equality voting and thus united as thirteen separate peoples, rather than one, this dispute was ready to resurface once the urgency for Confederation had passed. In similar vein, the decision not to consider slaves as members of the polity would resurface in future debates. In short, final version of the Articles had not taken away deep divisions that lurked beneath the surface of their union, but also made them familiar with two contradicting vision of the polity as either a strong, coordinating nation or a gathering of sovereign and independent equals.

The final version of the Articles explicitly embraced the latter vision in Article IV, where it claimed to secure and perpetuate the friendship and intercourse “among *the people of the different States* in this union,” rather than as one, American people. The system of government under the Articles left the States in absolute control of the Confederation. States retained their equal vote and voted by delegation, which made the trading of votes among delegates difficult.⁹³ Moreover, the fact that States could recall their delegates at any time added further to their role as ambassadors of their State, rather than the union, and meant that no one could hold office without approval of his State. Government under the Articles operated to maintain a balance of power between the individual States.⁹⁴ Evidence of this was that important decisions—including war and peace, treaties and expenses—could only be adopted by a qualified majority of nine States. In the case of amendments to the Articles the unanimous consent of all States was required, which meant the union could never move faster than its slowest member.

Scholars have judged the Articles in starkly different terms. For most, the Articles present a cumbersome system of government that made it next to impossible to govern the United States effectively as a nation.⁹⁵ In light of the above, the criticism that the Articles failed to govern the United States as one nation seems misplaced, because its authors did not aim for such a union in the first place. The Articles rested on a set of rule to guide government between States when there was a common interest, but did not provide Congress with the means to dictate a common policy when this was not the case. Recently, scholars have started to show more appreciation of the Articles’ “spirit of cooperation” that required the States to work closely together and form broad majorities which guaranteed that only policies in the interest of all would be carried out.⁹⁶ For the purpose of this study, the type of government provided by the Articles—whether cooperative or obstructing—is only interesting as the procedural backdrop against which

⁹³ Keith L. Dougherty, *Collective Action under the Articles of Confederation* (Cambridge, UK: Cambridge University Press, 2001), 29–30.

⁹⁴ Cathy D. Matson and Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* (Lawrence: University Press of Kansas, 1990), 56.

⁹⁵ Some authors argue that under the Articles of Confederation, the States basically held Congress hostage, see: Wood, *The Creation of the American Republic, 1776-1787*, 467.

⁹⁶ Robert W Hoffert, *A Politics of Tensions: The Articles of Confederation and American Political Ideas* (Niwot: University Press of Colorado, 1992), 40; Hendrickson, *Peace Pact*, 137.

an ongoing debate over the true identity of the polity took place. In this sense, the completion of the Confederation meant the beginning of the next chapter in the ongoing debate in which the different visions on the United States would be put to the test and the debate on what the polity should look like would be resumed.

Hanging together: the Confederation tested

The ratification of the Articles of Confederation coincided with the campaign that would spell the definitive victory for the former colonies. After the surrender of Lord Cornwallis at Yorktown in October 1781, Britain realized that continuation of the war was futile. Peace negotiations started the next year and would lead to the signing of the Peace of Paris on September 3, 1783, in which Great Britain formally acknowledged the independence of the United States of America. Though Yorktown was cause for much celebration in the States, it also spelled the loss of the most important *raison d'être* of the nascent Confederation. Throughout the Congressional debate on the Articles of Confederation the idea of “hanging separately” and of a British partition of the “rope of sand” union had fueled the commitment for the confederation. Now that the war was all but over, this binding threat could no longer be relied on to rally the States behind a common banner. The big question that Congress faced after 1781 was how to keep the young Confederation together after losing the principal reason for its existence.

The lack of interest in the Confederation after Yorktown was clear from the declining attendance rate of the delegates to Congress. Throughout the 1780s, Congress failed to achieve the sufficient quorum of nine delegations to legislate. To tackle the problem, some delegates felt that the rules of debate should be changed to speed up the workings of Congress. In early March 1781, a few days after the ratification of the Articles, a group of delegates including the young Virginia State representative James Madison, proposed that if nine States formed a quorum, five States rather than seven should form a majority. This plan was strongly opposed by Thomas Burke, who was shocked to see: “such a keen struggle to increase the power of Congress beyond what the States intended.” The proposal, he argued: “would put it in the power of a minority of five States, by entering into a junta or cabal, to ruin the majority.”⁹⁷ The vote ended in favor of Burke, showing that a majority of Congress preferred a slow and stumbling Confederation over a smooth and speedy one. Thus, the lack of attendance continued to plague Congress and from 1783 on, the number of letters by the secretary of Congress calling on the States to send delegates became more and more frequent.⁹⁸

In this climate it became increasingly hard to convince the members of Congress of the need to act as one political community. Governance under the Articles rested on

⁹⁷ Smith, *Letter of Delegates to Congress*, 18.

⁹⁸ For example, see: *Ibid.*, XXI, 222, 231, 372.

the twin balance of State sovereignty (article II) and requirement to abide by the determinations of Congress (article XIII).⁹⁹ But with the immediate threat of Great Britain gone, the Confederation threatened to become more and more an afterthought in State politics. Seeking to counter this trend was a small but committed group of union-minded delegates known as the “nationalists.” A whole new generation of politicians had come of age in the decade since Congress first met for whom union was as self-evident as it was necessary. Among them were many of the new and younger members of Congress who, unlike their predecessors, had made their career in continental politics or the army, rather than in their home-State.¹⁰⁰ They included the brilliant Alexander Hamilton from New York, who had been aide to Washington, the shrewd Gouverneur Morris from Pennsylvania, who had been a delegate to Congress since 1778, and finally the pensive James Madison from Virginia, who had submitted the motion for smaller quorums.

Due to their experience in the army or Congress most of these younger delegates regarded the United States as much as their country as their respective States. For them, the interests of the Confederation took precedent over that of any single State, including their own, and as a result they were known as the “nationalist” faction in Congress. They believed that the union between the States was precarious and understood that victory in the war would deprive the Confederation of its most important *raison d’être*. “If ever the enemy should be reduced,” one of them wrote: “a few years will bring on civil contests which will deluge this country in blood [and] something should be done to avert it.”¹⁰¹ The nationalists believed that only a strong union between the States could prevent this from happening. They considered their opponents’ preoccupation with State politics as navel-gazing, and thought that the United States could only hold out in the world if it acted as a single nation. In domestic affairs, the nationalists wanted to reinforce Congress’ position vis-à-vis the States, and in foreign affairs they tried to make the States operate as a single entity. In both fields, the political framework provided by the Articles played to their disadvantage, and this committed the nationalists to a tireless quest to seek amendments to the Articles in order to strengthen Congress’ sway over the States.

The most pressing domestic affair that the Confederation faced by the end of the war was the critical situation of its finances. By 1781, the paper money that Congress had printed and relied on to pay its expenses had depreciated to less than a hundredth of its value and the huge loans that Congress had contracted to cover its deficits during the war were due by the time the war ended.¹⁰² By the end of 1783 the Confederation faced a debt of around 40 million dollars, most of it loans from French and Pennsylvanian bankers. To cover the interest alone, the States would have to supply Congress with 2,4 million

⁹⁹ Hoffert, *A Politics of Tensions*, 30.

¹⁰⁰ Stanley Elkins and Eric McKittrick, “The Founding Fathers: Young Men of the Revolution,” *Political Science Quarterly* no. 2 (1961): 202.

¹⁰¹ Smith, *Letter of Delegates to Congress*, XV, 455. The author was Philip Schuyler of New York.

¹⁰² Elmer James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776-1790* (Chapel Hill: University of North Carolina Press, 1961), 32, 40–41.

dollars each year.¹⁰³ The problem was, however, that the States were too preoccupied with paying off their own debts to supply their quota for Congress. With the war all but over, most States decided that their first priority was to look after their own finances. What little tax money remained, the States handed to Congress, simply telling it how much to deduct from their quota. This way Congress was robbed of the funds as well as of control over what little it did collect in State taxes. Devising a way to collect a permanent source of income to pay off the interest—let alone the debts themselves—proved one of the greatest challenges for Congress in the postwar period and one the nationalists seized with both hands.

The heart of the matter was that Congress could demand contributions from the States, but lacked the means to enforce its decisions. Article XIII of the Confederation only stated that: “each State shall abide by the determinations of the United States” but did not say what Congress was supposed to do if the States failed to meet their obligation. In the area of finances, this meant that States could get away with refusing to pay their quotas simply because there were no repercussions. The nationalists regarded this situation as untenable and on March 6, 1781, just five days after the Articles had been ratified, they started to look for ways to put some flesh on Article XIII in order to allow Congress to force the negligent States to “do their duty.”¹⁰⁴ One of the initiators, James Madison, wrote to Jefferson that: “without such powers (...) the whole confederacy may be insulted (...) and frustrated by the most inconsiderable State in the union.” To obtain compliance, Madison wrote, Congress should not shy away from force: “two or three vessels of force employed against [negligent States] will make it their interest to yield promptly obedience.”¹⁰⁵ The tone of his report to Congress was less bloodthirsty however. It read that an explicit warrant for the use of force against a State was required and therefore advised Congress to amend the Articles to read that the: “United States (...) are fully authorized to employ the force of the United States as well by sea as by land to compel such State or States to fulfill their federal engagements.”¹⁰⁶ The fact that this amendment was never officially proposed to the States but left to die in a subcommittee reveals how little support such plans enjoyed outside the nationalist group.¹⁰⁷

Meanwhile, the growing financial problems had led Congress to appoint the Pennsylvanian banker Robert Morris as superintendent of finance in May 1781. Morris was close to the nationalists and believed that the Confederation’s financial problems could only be dealt with if Congress had a source of revenue that was independent of the States. One look at the Articles of Confederation, however, convinced him that it left Congress with very little means to achieve this. The Articles did not allow Congress to

¹⁰³ Hutchinson, Rachal, and Rutland, *Papers of James Madison*, VI, 160.

¹⁰⁴ Smith, *Letter of Delegates to Congress*, XVII, 66. Ford et al., *Journal of Continental Congress*, XIX, 236.

¹⁰⁵ Smith, *Letter of Delegates to Congress*, XVII, 157.

¹⁰⁶ Ford et al., *Journal of Continental Congress*, XX, 469–470.

¹⁰⁷ See editor’s note in: Smith, *Letter of Delegates to Congress*, XVII, 67.

levy direct taxes to raise revenue, but instead forced it to rely on the States to raise the money for it. In order to raise money by itself, in other words, Congress would have to broaden its powers, which again required an amendment to the Articles.¹⁰⁸

The problem was that in the minds of the State politicians and their electorate, taxes were associated with oppression, and the idea that they had fought a costly war only to surrender tax powers to Congress was unthinkable. The States' unwillingness to cover confederate expenses and their reluctance to grant taxing power to Congress perfectly expressed the "cash value" of the Confederation. Now that independence was achieved, most State politicians' first priority lay with their State, not a distant and costly Congress that had served its purpose. In this sense James Wilson even spoke of a "peculiar repugnance" to taxes which was caused, he said, by the "odious light" in which the colonists had regarded them under British rule.¹⁰⁹

The proposals to grant Congress a power to collect taxes that was reserved to the States did not go down well with the status-quo minded delegates in Congress. Virginia delegate Arthur Lee argued that the motions were "repugnant of the Articles of Confederation." "Placing the purse in the same hands with the sword" he argued, "is subversive of the fundamental principles of liberty." For Lee, clearly, the purpose of the Articles was to check Congress, and to grant it the power to collect taxes flew in the face of its entire *raison d'être*. The amendment was a waste of time, he said, as "the States will never agree to those plans which tend to aggrandize Congress [because] they are jealous of the power of Congress," adding that he did not find this jealousy unreasonable.¹¹⁰ Lee objected to give Congress a power to tax, because he did not identify it as an independent constitutional entity—he tellingly spoke of "repugnance to the Articles" rather than unconstitutionality—but rather as the product of the States.

Madison was clearly abhorred by Lee's view and warned that it boiled down to "erecting our national independence on the ruins of public faith and national honor." In answer to Lee and others, Madison gave his vision of the union, what he called the "true doctrine of the Confederation." His starting point was that Congress was more than "merely an executive body" of the States, since "the federal constitution [is] as sacred and obligatory as the internal constitutions of the several States; and nothing [can] justify the States in disobeying acts warranted by it." By portraying the Articles as the constitution of the union, Madison implied that the States were as bound to it, as the counties were to the constitutions of the States. This did not make Congress the States' subordinate, but its superior in all matters that concerned the Confederation. A strong public credit was such

¹⁰⁸ Article VIII of the Confederation allowed Congress to demand contributions from the states to the proportion of the value of land in each state, but Morris was convinced that Congress would not be able to reach an estimate that would be considered fair by all the states and preferred to circumvent this cumbersome procedure by appealing directly to the states to grant Congress the power to collect taxes, see: Ford et al., *Journal of Continental Congress*, XXII: 440.

¹⁰⁹ Hutchinson, Rachal, and Rutland, *Papers of James Madison*, VI, 134.

¹¹⁰ *Ibid.*, VI, 142, 149.

a common interest, since it was crucial to “our national independence.” Thus, the tax amendments were not harmful to liberty, but a prerequisite to it and therefore not inconsistent with, but rather “in the spirit of the Confederation.”¹¹¹

Madison’s “true doctrine” led to outcries protests from his opponents. Arthur Lee found it: “pregnant with dangerous consequences to the liberties of the confederated States,” and, playing on the popular metaphor to describe the powerless union, he said: “I rather see Congress a rope of sand than a rod of iron.” Lee’s colleague from Virginia, James Mercer, went even further and threatened that, if Madison’s doctrine became law, he would: “immediately withdraw from Congress and do everything in [my] power to destroy its existence.” Mercer’s harsh language was matched by that of his Massachusetts colleague Nathaniel Gorham, who threatened that: “some of the States might be forming other confederacies adequate to the purpose of their safety.”¹¹² As these hostile reactions made clear, Madison’s doctrine of the Confederation as an entity superior to the States went considerably further than the rest of Congress was prepared to support.

Despite the misgivings about Madison’s views, the members of Congress eventually agreed to present an amendment to the Articles to the States that would grant Congress the power to impose taxes in the form of a 5% impost on liquor and other commodities.¹¹³ The ratification by the States was slow and, but by the end of 1782, Rhode Island was the only State that had not yet taken up the issue. On November 30, however, Rhode Island’s legislature rejected the amendment. Rhode Island’s legislators feared the amendment would introduce: “unknown and unaccountable” officials to collect the impost, which was: “against the constitution of this State.”¹¹⁴ Here Rhode Island invoked its constitution as an obstacle to Congress’ legislation, thus raising the question how Articles of Confederation related to constitutions of the several States. The speaker’s letter made clear that Rhode Island’s legislature considered their State constitution as a higher law than the Articles, which challenged the range of Congressional authority.

The Congressional letter of reply, written by Madison and Hamilton, contested Rhode Island’s reading. “The truth is,” they wrote: “that no federal constitution can exist without powers that in their exercise affect the internal police of the component members.” Here again, the nationalists portrayed the Articles as a separate constitutional entity, which they called “federal,” that had its own, superior sphere of power. Without legal grounds to fall back upon to support this view, the two delegates reverted to threats instead. Rhode Island’s dissent was dangerous, they said, because: “the hopes of our enemies [are] encouraged to protract the war, the zeal of our friends [are] depressed by an appearance of remissness and want of exertion on our part, Congress [is] harassed, the national character suffering and the national safety at the mercy of events.” “No State,”

¹¹¹ Ibid., VI, 143–144, 270–271, 146.

¹¹² Ibid., 272–273.

¹¹³ Ford et al., *Journal of Continental Congress*, XIX, 112.

¹¹⁴ Ibid., XXIII, 788.

they continued: “can dispute the obligation to pay the sum demanded without a breach of the Confederation.” In the eyes of Hamilton and Madison, Rhode Island’s rejection of the amendment was not only embarrassing and dangerous, but also traitorous, as it gave the enemy the opportunity to spread division and prolong the war. The tone of the letter, however, could not disguise that there was little Congress could do against Rhode Island’s decision. The conclusion of the letter, which read that the rejection was “extremely painful to Congress,” sounded almost desperate.¹¹⁵

Rhode Island, however, did not reconsider, and the Virginia House of Burgesses followed suit not much later by repealing its earlier support for the impost. That the States were no longer afraid of flying in the face of Congress showed that the appeals to a common enemy no longer helped close the ranks in Congress. By the end 1782, politicians did not fear a British partition of the thirteen colonies, and were no longer susceptible to the politics of fear and danger that had helped to unite the States when the confederation was still under discussion. With the impost debate the nationalists learned that the specter of their common enemy was no longer sufficient to rally the States behind what Congress considered as their common interest. Moreover, it taught them that despite their talk of the union as a separate constitutional entity, the reality of the Confederation was that Congress was depended on the States of which only one sufficed to frustrate any attempt to reform it.

After the failure of the impost, prospects for the nationalists looked bleak. As with the debate on the Articles itself, it was the intervention of external factors that helped spur Congress back to action in 1783. For months veteran officers had petitioned Congress for pay that was still due, and by early March threats of mutiny and violence were being heard. Only the timely intervention of Washington himself, on March 15 1783, prevented escalation, but by then the delegates realized they needed to fix Congress’ fiscal problems in order to prevent further crises. Even James Mercer, who hated the revenue plan, was now: “convinced of the necessity to do something.” Madison too noted that, though with “great reluctance,” most delegates now felt the “necessity of doing something on the subject.”¹¹⁶ By the end of March the so-called Revenue Plan, which combined the impost with a land tax, was sent to the States for approval.

The letter that accompanied the Revenue Plan was written by Madison, Hamilton, and Ellsworth, and breathed the nationalist rhetoric that had characterized most of their earlier proposals. It spoke of the necessity to depart from the “federal constitution,” referred to the public credit as “national debt” and reminded the States of the need to pay the veterans, because “a wise nation will never permit those, who relieve the wants of their country (...) to suffer in the event.”¹¹⁷ This talk of “country” and “nation” shows that the nationalists seized every opportunity to instill their vision of the polity into

¹¹⁵ Ibid., XXIII, 801, ,809, 804, 809 .

¹¹⁶ Hutchinson, Rachal, and Rutland, *Papers of James Madison*, VI, 299, 247.

¹¹⁷ Ford et al., *Journal of Continental Congress*, XXIV, 278, 281, 283.

Congressional legislation. What's more, the nationalists fell back on Adams' vision of the United States as forming one people. "The crisis has arrived," the report read: "when the people of these United States, *by whose will and for whose benefit the federal government was instituted*, must decide whether they will support their rank as a nation (...) or whether (...) they will hazard not only the existence of the Union, but of those great and invaluable privileges for which they have so arduously and so honorably have contended."¹¹⁸ In this report, the people of the United States, rather than the States, were portrayed as both the object and creator of the union. This was nothing short of a redefinition of the very foundation of the Confederation, by replacing the league of friendship between sovereign States with the binding union of one, American people.

As with the other attempts to reform the union, however, the Revenue Plan failed to gather the necessary support from the States. After a long ratification process full of delays, the rejection of the Plan by New York's Senate in 1785 also spelled an end to this amendment. It was the second time that the opposition of just one State frustrated the nationalists' reform plans, and again illustrated how the demand for unanimous ratification of the States, which followed from the vision of the polity as a gathering of perfect equals, meant that the confederation could not move faster than the slowest members. As 1786 drew to a close, their five years of incessant attempts to strengthen Congress' grip over the States left the nationalists with very little to show for.

More alarming still was that Congress was having increasing trouble to make its voice heard in the one area in which its power had always been undisputed: foreign affairs. Here too, Congress suffered from the same problems of being unable to enforce its decision on the States and thus not having the *de facto* exclusive control over foreign relations.¹¹⁹ States openly violated treaties that Congress made with foreign nations, such as the promise made to Britain at the Peace of Paris to redeem confiscated property to loyalists.¹²⁰ At one point during this conflict, members of the Virginia Legislature even denied that their State had "fully parted from the power of peace and war to Congress" and threatened to repeal their "constitutional authority."¹²¹ Such rumors worried the United States' ambassadors overseas. John Adams, writing from Paris, warned his colleagues that "If the United States do not soon show to the world a proof that (...) they can act as one people, as one nation, as one man, in their transactions with foreign nations, (...) instead of being the happiest people under the sun, I do not know but we may be the most miserable."¹²² Adams' warning lent another voice to the swelling chorus that

¹¹⁸ Ibid., XXX, 75. Emphasis added

¹¹⁹ Frederick W. Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (Baton Rouge: Louisiana State University Press, 1973), 13, 47.

¹²⁰ For the details of this controversy, see: Rakove, *The Beginnings of National Politics*, 343–344.

¹²¹ Hutchinson, Rachal, and Rutland, *Papers of James Madison*, VI, 499.

¹²² Francis Wharton, ed., *The Revolutionary Diplomatic Correspondence of the United States* (Washington: Government Printing Office, 1889), VI, 562, 561.

called for an overhaul of the Articles to meet the union's financial and foreign problems.¹²³

The rejection of the Revenue Plan and troublesome implementation of the loyalist paragraph in the Paris Peace Treaty raised the question whether there still was a common interest among the States that Congress could promote, or whether the very success of attaining independence had undermined the *raison d'être* for the union entirely.¹²⁴ The common interest that had sustained the States throughout the war was insufficient to support the nationalists' plans for closer cooperation once peace was signed with Britain in 1783. Meanwhile, the financial situation of the union worsened, and by 1786 the interest on the Dutch loans that had helped postpone bankruptcy had to be suspended. The Confederation, it seemed, was walking on its last legs, and those who wanted to save it started to look for solutions outside Congress.

Conclusion

The somber tone the nationalists struck on the Confederation in 1786 contrasted sharply with the hopeful note on which their predecessors had set out a decade earlier, in 1776. With independence declared, the members of Congress eagerly set to drafting the terms of the union that would help them achieve final victory over Great Britain. Ironically, this attempt to strengthen their union brought to the surface deep division among the States. The heated debates on such issues as voting and taxation pitted large States against small and the slaveholding South against their northern neighbors. The delegates' inability to reach satisfying agreements to these conflicts resulted in a union in which Congress was reduced to a toothless dog—known to bark but not to bite—that relied on the goodwill of the States, which worked only as long as they faced a common enemy. The conclusions that can be drawn from the debates on the Articles of Confederation in terms of the formation of the identity of the polity are sobering.

First, it is clear that despite that the Declaration united the States as one political community, there was still no agreement among the members of Congress *how* the States were united: either as one people or thirteen separate ones. Illustrative is the debate on voting, where two different views emerged of what America constituted. How the delegates viewed the union depended on the interest of their home State. For a small State delegate like John Witherspoon the “one State, one vote” procedure was crucial to maintain influence in Congress and he correspondingly portrayed the union as a gathering of equal “persons.” Large State delegates John Adams and Benjamin Rush, on the other hand, portrayed the States as forming one American people in order to rally their

¹²³ According to Marks, the growing sense of national insecurity as a result of the failing foreign policy was a “major drive wheel” for the Philadelphia Convention: Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution*, 50.

¹²⁴ Rakove, *The Beginnings of National Politics*, 250.

colleagues behind proportional voting. The two views each provided a different answer to the question what the identity of the polity constituted. In this first view, the union was a league between thirteen separate peoples and American was the sum of these thirteen parts. In the latter view, the thirteen States formed one American people whose authority and interests was greater than that of the parts. In short, in the decade following the Declaration of Independence, these debates demonstrate how contested the identity of the polity was.

Second, the thing that united the States more than anything else throughout this struggle to define itself was the fear of their common enemy Great Britain. The deadlock over the proper form of the union was only broken after the British invasion of Philadelphia made the threat of hanging separately all too real. Again, when the ratification of the Articles had all but broken down, only the saber-rattling of France sufficed to make reluctant Maryland sign the Confederation into existence. In both cases it was the threat from outside that sealed the deal. In fact, despite attempts of Adams and Madison to persuade their colleagues to live up to their identity as one American people and act accordingly, the majority of Congress—when forced to decide by the outside pressure—opted to unite as thirteen separate peoples, rather than one. The people of the United States, it turned out, remained an empty concept without de facto unifying force. The rallying cry of the Articles of Confederation was not a positive story of what it meant to be one American people, but the fear of becoming Britons once again. As a result, when the fear of hanging at all subsided after the Paris Peace Treaty of 1783, there was little in the form of a common identity to sustain, let alone strengthen the union between the thirteen separate peoples.

A final conclusion is that the debates on the Articles of Confederation again testify to the piecemeal nature of the constitutionalization process. Both the struggle to define the identity of the polity as well as the need for outside pressure to reach unanimity testify to the fact that Congress did not follow a clear-cut plan towards confederation. Instead, the drafting and ratification of the Articles took place in an ad hoc fashion, mostly dictated by fear of each other and events taking place outside the walls of Congress. Instead of proof of Gordon Wood's assertion of the insignificance of the debates in Congress, this patchwork nature of the Articles of Confederation is all the more reason to take what was said seriously. The mounting financial problems and deteriorating relations among the States and with its foreign creditors by 1786 shaped a political climate in which the old question, what united the States, again became urgent and the old answers gained renewed persuasiveness.

Chapter 3

A Patchwork Solution

The Philadelphia Convention of 1787 is seen by many as a turning point in American history. Yet, as one historian recently noted, it is as if the same story about the Philadelphia Convention is told over and over by every generation.¹ Whether the books are titled *Miracle at Philadelphia*, *Brilliant Solution*, or simply *The Summer of 1787*, each conveys the image of a small group of visionaries who codified the timeless American values in a Constitution that, almost overnight, transformed a rag-tag band of former colonies into one nation.² It is a truism among scholars that the Philadelphia Convention was a watershed moment. Clinton Rossiter, for example, argues in his *Grand Convention* that “there has been no greater happening in American history” than 1787, when “the people of the United States chose to be one nation.”³ Gordon Wood likewise has called the Philadelphia Convention “a political revolution as great as the Revolution a decade earlier.”⁴ Jack Rakove, finally, sees the Convention as a “big break” which brought an end to the gradual reform of the early 1780s.⁵

This chapter takes quarrel with this view of the Convention as a watershed moment. Instead, it will argue that the Convention was a struggle between different visions on the true identity of the polity and ended in a patchwork union of compromises that left the question open whether America formed one people, or thirteen. In this sense, “we the people” was not the expression of a widely shared view that the United States formed one American people, but a rhetorical move that was added only at the very last moment. The chapter will trace the debate on the Convention floor from the decision to organize a meeting in Philadelphia in late February to its conclusion, eight months later.

¹ Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill & Wang, 2007), 4.

² Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention, May to September, 1787* (Boston: Little, Brown, 1966); Carol Berkin, *A Brilliant Solution: Inventing the American Constitution* (New York: Harcourt, 2002); David O. Stewart, *The Summer of 1787: The Men Who Invented the Constitution* (New York: Simon & Schuster, 2007).

³ Clinton Rossiter, *1787: The Grand Convention* (New York: W.W. Norton, 1987), 11.

⁴ Wood, *The Creation of the American Republic, 1776-1787*, 472. This view of the Convention as a revolution is shared by John P. Roche, “The Founding Fathers: A Reform Caucus in Action,” *The American Political Science Review* 55, no. 4 (December 1, 1961): 799; as well as Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2009), 41.

⁵ Jack N. Rakove, “From One Agenda to Another: The Condition of American Federalism, 1783-1787,” in *The American Revolution: Its Character and Limits*, ed. Jack P. Greene (New York: New York University Press, 1987), 83, 94.

The road to Philadelphia

A watershed moment was clearly what the organizers of the Philadelphia Convention had in mind in the fall of 1786. Many of them had earlier felt uneasy about government under the Articles of Confederation, but by 1786 they were getting downright restless. The many attempts of Madison and others to achieve reform had failed to obtain the required unanimous support, often because a single State objected. While this demonstrated that there was broad support among the States for change, it also made painfully clear that a union that rested on the cooperation of every State could never move faster than its slowest member. The failure to amend the Articles from inside out started to undermine the faith of the members of Congress in its ability for self-improvement. As a result, a growing group of reform-minded delegates looked for ways to circumvent the demanding amendment procedure altogether and turned to the less conventional method of a constitutional convention.

On the American continent, the use of specially elected conventions went back to the days of the Sons of Liberty, in the 1760s. More recently, the State of Massachusetts had elected a convention to write its constitution in 1779. While most State constitutions were drafted by the State legislatures as if they were ordinary bills, Massachusetts judged that a legislature, “being the servants of the people, cannot be greater than their masters,” and appointed a special convention for this purpose.⁶ The Massachusetts model appealed to the reform-minded delegates because it offered several advantages over a plenary discussion in Congress. First, as a body separate of Congress, the deliberations of a convention would not be disturbed by the ordinary demands of governing, as had often been the case during with the Articles of Confederation. Second, meeting as a convention gave the delegates the necessary time and seclusion to freely speak their minds without having to worry about their constituents’ sentiments. This reduced the chance of talks breaking down over parts of the plan and increased those of arriving at a balanced compromise—again two things that had been lacking during the deliberation on the Articles. In short, the combination of purpose and seclusion made a convention the ideal platform for a small group to pursue substantial changes to the Articles of Confederation.

The idea to call a convention in Philadelphia was first launched by a small group of reform-minded delegates, including Hamilton and Madison, during a meeting in Annapolis in 1786. The Annapolis meeting itself was aimed as a convention, but since only five of the thirteen States bothered to show up, there was an insufficient quorum to conclude anything. Instead, the official report to Congress, written by Alexander Hamilton, proposed that: “speedy measures be taken, to effect a general meeting, of the States, in a future convention, for the same, and such other purposes, as the situation of public affairs may be found to require.” The delegates at Annapolis wanted to broaden the scope of this convention to address: “all the embarrassments which characterize the

⁶ Adams, *The First American Constitutions*, 85.

present State of our national affairs, foreign and domestic,” and suggested that Congress ask the States:

“to meet at Philadelphia on the second Monday in May next, 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.*”⁷

This choice of words was interesting. First, the phrase “exigencies of the Union,” conveyed a sense of urgency, even crisis, but remained vague enough so as not to scare off those members of Congress who opposed radical reform. Second, and in similar vein, the choice for the word “adequate” left open virtually any type of remedy, including a complete overthrow of the Articles themselves. Finally, by portraying the Articles as the “constitution of the Federal Government,” Hamilton signaled that such an overthrow was precisely what he had on his mind. As discussed in the last chapter, the framers of the Articles referred to it as a “treaty” in order to emphasize its federal nature as a league of States. By calling the Articles as a “constitution” here, Hamilton portrayed it as the framework of government for a single, unified State. That the term was used so prominently in the mandate for the convention suggests that Hamilton was testing the waters to see whether Congress was ready for such a radical reform.

Congress was unresponsive, however, when it received Hamilton’s report in September. Structural underrepresentation once again deprived Congress of the necessary quorum to make decisions, and it took until mid-January 1787 before Hamilton’s report was taken up. This delay illustrated precisely what men like Madison and Hamilton wanted to change about the Confederation, and now it threatened to undermine their hope for reform before it was even underway. When, in late February, Congress finally mustered the quorum to review the Annapolis report, a debate ensued whether to sanction the convention and urge the States to send delegates. While some members of Congress feared that the “extra constitutionality” nature of a convention would deal “a deadly blow” to the Confederation, others hoped it could form the “harbinger of a new Confederation.” All agreed, however, that something had to be done and a majority adopted a resolution which called for a convention with a broad mandate to render the Articles “adequate to the exigencies of government and the preservation of the union.”⁸ One significant limit Congress did set was that the convention’s proposals would have to be adopted by Congress and ratified by the States. Regardless of what happened in Philadelphia, in other words, Congress and the States would have the last word. With this considerable constraint, Congress cleared the way for the Philadelphia Convention.

⁷ Harold Coffin Syrett and Jacob Ernest Cooke, eds., *The Papers of Alexander Hamilton* (New York: Columbia University Press, 1961), III, 688–689.

⁸ Ford et al., *Journal of Continental Congress*, XXXII, 71–74. Smith, *Letter of Delegates to Congress*, XXIV, 108–109.

Meanwhile, the States that favored reform had not been idle. By the time Congress gave the Convention green light, seven States (including Virginia and Pennsylvania) had already appointed their delegates. Apart from Madison, Virginia's delegation included such prominent members as General George Washington, author of the Virginia Bill of Rights George Mason and Governor Edmund Randolph. Pennsylvania's delegation too included prominent men, such as the aged Benjamin Franklin who brought along his talented protégé James Wilson, and the former Finance Superintendent Robert Morris who was accompanied by his shrewd assistant Gouverneur Morris. Washington's and Franklin's names naturally added weight to the Convention, but they were no guarantee for success. When it became clear that New York, South Carolina, Massachusetts, Connecticut, and Maryland would join in Philadelphia it was clear that this Convention would not suffer the same fate as its predecessor in Annapolis. The delegates of these States were less well known, but would make a name for themselves in the coming months. Finally, Rhode Island once again lived up to its reputation of recalcitrance by refusing to send any delegates to Philadelphia.

As important as the delegates that were appointed, were the many influential State politicians that refused to attend the Convention. Several of the heroes of the revolution—like John Adams and Thomas Jefferson—were abroad, but many others like Samuel Adams and Richard Henry Lee simply refused because they considered the business in their home-State more important. Patrick Henry and New York governor George Clinton were elected by their State legislature, but declined in favor of younger colleagues. The fact that the great orators of the revolutionary generation preferred their State business over the Convention was a further sign of the disinterest in continental affairs among those who had help create the United States.

Of all the members of the Convention, none were as thoroughly prepared as James Madison. Madison spent the months between the meetings in Annapolis and Philadelphia to study historical confederations that could serve as a model or warning to the Convention. He collected his findings in two papers, the first of which he titled "Notes on Ancient and Modern Confederacies," in which he assessed past precedents from the ancient Lycian to the Dutch Republic. Madison clearly shared the Enlightenment's belief that study of the past would reveal the universal rules of government, and that its lessons could be made to apply to the United States.⁹ In his notes, Madison lamented the weakness of the historical unions and attributed their downfall to: "defect of subjection in the members to the general authority." In the Dutch republic—to which he devoted most of his energy—Madison regretted the equal vote of the several provinces as a "fatal inconvenience," which fostered jealousy of provincial power and interests at the expense of that of the union.¹⁰ The same combination of equal voting and unanimous consent

⁹ Douglass Adair, "'That Politics May Be Reduced to a Science': David Hume, James Madison, and the Tenth Federalist," *Huntington Library Quarterly* 20, no. 4 (1957): 348, 353.

¹⁰ Hutchinson, Rachal, and Rutland, *Papers of James Madison*, IX, 8, 16–17.

paralyzed politics in United States, but Madison was determined not to let America suffer the same fate.

In the second paper, titled the “Vices of the Political System of the United States,” Madison applied the lessons he took from history to the Articles of Confederation. The “vice” of the Confederation, he argued, was the “mistaken confidence” in the good faith of the States, when it turned out that “a unanimous and punctual obedience of thirteen independent bodies to the act of the federal government, ought not to be calculated on.” Instead of a union of States, which Madison defined as “a league of sovereign powers,” the United States should be united under one “political constitution by virtue of which they [the States] are [to] become one sovereign power.”¹¹ From this, it becomes clear that Madison’s ambition went further than simply making alterations to the Articles: he hoped the Convention would result in a constitution that would create a United States capable of dictating its will to the States.

To realize this, Madison went beyond the political “vices” of past and present. In a series of letters to Jefferson, Washington, and Virginia governor Edmund Randolph, Madison sketched the outlines of how the “new system” would transform the thirteen States into one. First, Madison wanted to get rid of State equality by arguing that representation should be made proportional. The populous North and growing South would support this, Madison expected, and the smaller States “must in every event yield to the predominant will.” Finally and most importantly, Madison realized that this transfer of power from the States to the union required a new ratification procedure, one which would “render it clearly paramount to their [the State’s] legislative authorities.” To achieve this, Madison urged ratification, not by the States, but by the authority of the people, on which that of the States themselves rested. In short, Madison championed a system in which the dominant position of the States as the foundation and actors of the Confederation were traded in for a Union with a strong, central government, whose supremacy rested on the consent of the people.¹²

Madison did not stop at a thorough academic preparation for the Convention, however, he also urged his fellow Virginian delegates to meet him in early May to make a blue-print that could serve as the starting point for the deliberations in Philadelphia. As he explained to Edmund Randolph: “Virginia ought not only to be on the ground in due time, but to be prepared with some materials for the work of the Convention.”¹³ This way, the advocates of a stronger union would be able to seize the initiative and keep a head start in its proceedings. In the end, the Virginian delegation arrived only a few days before the official opening of the Convention, but since it took almost two weeks before a sufficient number of delegates turned up to form a quorum, this still left them with plenty of time to arrange a common plan of action.

¹¹ Ibid., IX, 351–362.

¹² Ibid., IX, 382–385, 318, 352, 369.

¹³ Ibid., IX, 379.

Soon after the arrival of the Virginian delegation, Madison and his colleagues teamed up with the delegates of Pennsylvania to work out a plan that could serve as the basis for deliberation. During these meetings, it became clear that the delegates shared many ideas. Virginian delegate George Mason wrote that: “the most prevalent idea,” among the two delegations was “a total alteration of the present federal system [by making] the several State legislatures subordinate to the national.” This was the basis for the Virginia Plan that would form the starting point for the discussions in the Philadelphia Convention. Mason was thrilled with the new plan, but he realized it would meet with much opposition from the rest of the Convention: “it is easy to foresee that there will be much difficulty in organizing a government upon this great scale (...) yet with a proper degree of coolness, liberality and candor (...) I doubt not but it may be effected.”¹⁴

On both counts Mason would prove prophetic. With regard to the opposition to reform, the first days of the Convention gave a glimpse of what was to come. With the arrival of New Jersey, on May 24, a quorum was present and the Convention could begin. As each delegation produced its credentials, it turned out that most States gave their delegates a virtual *carte blanche* for the negotiations. One notable exception, however, were the instructions of Delaware which forbade its delegates to change the one State, one vote rule.¹⁵ George Read, one of the delegates, seems to have orchestrated this instruction to limit the mandate of the Convention. He had learned at the Annapolis meeting that the large States wanted to dissolve the equal vote in Congress and feared that the small States would be swallowed up by their neighbors. “Such is my jealousy of most of the larger States,” he confessed to John Dickinson, “that I would trust nothing to their candor.”¹⁶ Although it was hardly noticed at the time, Read’s instructions would soon give a taste of the challenge that the reform-minded delegates faced.

The rules and procedures that the delegates adopted to guide the debates of the Convention favored deliberation. They agreed that their proceedings would take place behind closed doors and that nothing that was said within the State House would reach the outside world. This allowed the delegates to speak or change their mind freely, without having to weigh the effect their words would have on the public. This rule of secrecy promoted frank debate among delegates, rather than oratory aimed at the gallery.¹⁷ It was also decided that each State would be granted one vote in resolving disputes, which corresponded with the practice under the Confederation. Gouverneur Morris of Pennsylvania had urged his Virginian colleagues to end equal voting as this would enable the small States to obstruct attempts to establish a proportional system. The Virginians, however, feared that such a move would lead to a “fatal” dispute in the

¹⁴ Farrand, *Records of the Federal Convention*, III, 23.

¹⁵ *Ibid.*, I, 4.

¹⁶ *Ibid.*, III, 574–575.

¹⁷ It has earned the Convention the title of “greatest deliberative assembly in American history” according to: Frank Harmon Garver, “The Constitutional Convention as a Deliberative Assembly,” *Pacific Historical Review* 13, no. 4 (December 1, 1944): 412–414.

Convention, and instead preferred to rely on their persuasive skills to convince the small States to give up their equality “in the course of the deliberations.”¹⁸ From the start, then, the nationalists carried the burden of proof and the success or failure of the Virginia Plan rested on their powers to persuade their colleagues.¹⁹

A complete, compulsive operation

On the morning of Tuesday May 29, the Convention turned to its main business of how to remedy the defects of the Confederation. The Nationalists seized this moment to introduce their blue-print for a new union to the Convention and chose Virginia Governor Edmund Randolph to present their case. Though still in his early thirties, Randolph already stood at the head of the most powerful State in the union and was an able speaker who could give a persuasive defense of the plan.²⁰ The speech that Randolph delivered that day painted a bleak picture of the union. The Confederation, Randolph argued, had failed to fulfill the objects for which it was framed. On the world stage it failed to unite the States—leaving them as ripe pickings for foreign invaders—and closer at home it lacked the “constitutional power” to settle the quarrels between the States. As a result, Randolph concluded, the union was on the “eve of war,” and all eyes were fixed on the Convention to prevent the “prophecies of American downfall” from being fulfilled.²¹

Following this gloomy speech, Randolph presented a list of fifteen proposals to “revise, correct, and enlarge” the Articles of Confederation. Randolph dubbed his plan the “Articles of Union” to emphasize its continuity with the Confederation, but his fellow-delegates referred to it as the Virginia Plan and that name has stuck with historians.²² The Virginia Plan, as Mason had predicted, was a total alteration of the Confederation in a number of ways. First, where the States formed the foundation of the Confederation, the Virginia Plan placed the peoples of the States at the heart of the polity. Instead of State delegations, which formed the principal agents of the Confederate Congress, the lower house of the Plan’s proposed bicameral “national legislature” would consist of representatives appointed by the peoples of the States, in proportion to the number of inhabitants. The prominent position of this popularly elected lower house was clear from the fact that the upper house, the “national executive,” and the “national

¹⁸ Farrand, *Records of the Federal Convention*, I, 11.

¹⁹ A similar point is made by William E. Nelson, “Reason and Compromise in the Establishment of the Federal Constitution, 1787-1801,” *The William and Mary Quarterly* 44, no. 3 (1987): 466; and Jack N. Rakove, “The Great Compromise: Ideas, Interests, and the Politics of Constitution Making,” *William and Mary Quarterly* 44, no. 3 (1987): 427.

²⁰ Madison, in 1833, wrote that: “Mr. Randolph was designated for the task (...) being then the Governor of the State, of distinguished talents, and in the habit of public speaking”, Farrand, *Records of the Federal Convention*, III, 525.

²¹ *Ibid.*, I, 18–19, 24–26.

²² *Ibid.*, I, 18–19, 24, 22.

judiciary”—all foreign to the Articles of Confederation—would be appointed by it. The Plan thus resembled a parliamentary system, with all power emanating from the popularly elected lower house, which nominated all other branches. Second, many powers would be transferred from the States to the central government. The new legislature would have the power to tax, regulate trade, and would legislate: “in all cases to which the separate States were incompetent.” The “national legislature” would also have an absolute veto over the State legislation, making its word paramount to that of the States. Third and final, the last resolution proposed for it to be submitted to the peoples of the States through popularly elected conventions. This way, the nationalists hoped, the plan would rest on the supreme authority of the peoples of the States, rather than that of the State legislatures.

The Virginia Plan unmistakably bore the mark of Madison, whose ideas of a “national” veto and ratification aimed to make the new union paramount to the States. Both ideas were alien to the Confederation, however, and while most members of the Convention recognized that the Articles needed to be revised, it remained to be seen whether they agreed that the Virginia Plan was the best way to do this. The notes of the debate give little evidence of how the delegates received the plan. One observer complimented Randolph’s “force of eloquence and reasoning,” but the silence with which the plan was greeted by the Convention was not necessarily a sign of approval.²³ If Randolph had succeeded in portraying his “Articles of Union” as simply an enlargement of the Confederation for now, the full extent of its revolutionary implications would come to light the following day.

On the morning of Wednesday May 30, the Convention resolved itself into the committee on the whole²⁴ to discuss the Virginia Plan clause by clause. First up was the preamble, which portrayed the plan as simply an enlargement of the Confederation. Before the debate started, however, Pennsylvania delegate Gouverneur Morris rose to urge a replacement preamble that he felt better captured the ambitions of the plan. “A union of the States *merely* federal,” Morris began his speech, “will not accomplish the objects proposed by the Articles of Confederation.” “No treaty,” he continued, “among the whole or part of the States as individual sovereignties would be sufficient,” but instead: “a *national* government ought to be established consisting of a *supreme* legislative, executive, and judiciary.” A federal union like the Confederation was not a real union, Morris argued, but “a mere compact resting on the good faith of the parties.” The national system that he advocated, however, was a true union, as it was based on: “a complete and compulsive operation.” The crucial difference, it followed, rested on the location of sovereignty. In former system it rested with the States, in latter with the central government. If the true goal of the Convention was to establish a more “complete

²³ Ibid., III, 95. New York delegate Robert Yates already disapprovingly recorded in his journal that Randolph’s plan: “[is] not intended for a federal government,” but established, “a strong consolidated union, in which the idea of states would be nearly annihilated.” Ibid., I, 24.

²⁴ The committee of the whole was an informal setting in which the delegates were free to discuss and vote on a wide range of issues without making any permanent decisions.

union,” Morris insisted, sovereignty should rest not with the States but with the national government, for: “in all communities there must be one supreme power, and one only.”²⁵

Why Morris decided to drive this point home, rather than opt for Randolph’s more cautious course is unclear, but his reputation for reckless arrogance may very well have played a part in it.²⁶ In any case, Morris’s substitute preamble made clear that Randolph’s plan went much further than a simple “enlargement” of the Confederation. In fact, it constituted a complete redefinition of the polity in that it made the national government paramount to the States. Under the Confederation, the compliance of the States with the laws of the union was voluntary, and Congress lacked the means to coerce the States when they refused, for example, to pay their share to the public treasury. Under the “complete, compulsive” national system that the nationalists envisaged, this situation would be reversed: obedience to the laws of the union would no longer be left to the States, but actively enforced by Congress. Whereas under a federal system, James Madison explained to his colleagues, Congress depended on the cooperation of the States, under the national system the laws of the union would be implemented “without the intervention of the State legislatures.”²⁷

This revolutionary nature of this substitute preamble was not lost on Morris’ audience. One delegate who immediately understood the implications was Elbridge Gerry, from Marblehead, Massachusetts. According to Gerry, it was questionable whether a Plan so “totally different” did not overstep the mandate of the Convention and thus whether it had to right to pass Morris’ resolutions in the first place. Gerry’s objection was more than procedural, however, as he realized that the Virginia Plan aimed to redefine the union between the States. The implications of establishing a national system of government were far-reaching, Gerry warned, for: “if we have a right to pass this resolution, we have a right to annihilate the Confederation.”²⁸ Gerry, as it turned out, was not alone. His colleague from Connecticut Roger Sherman and Charles C. Pinckney from South Carolina also wondered whether the Convention had the right to discuss a plan so different from the Articles of Confederation.²⁹ Besides lacking a mandate to abolish the Confederation, Sherman pointed out, the Convention would never convince the States to give up the power they enjoyed under the Articles of Confederation.³⁰

In the light of these reactions, it is surprising that the delegates decided to adopt Morris’ preamble calling for the establishment of a supreme “national” government. Nevertheless, Morris’ resolution was passed by a vote of six to one and the Virginia Plan

²⁵ Farrand, *Records of the Federal Convention*, I, 33–34, 38.

²⁶ Beeman, *Plain, Honest Men*, 48–49.

²⁷ Farrand, *Records of the Federal Convention*, vol. I, 37.

²⁸ *Ibid.*, I, 42–3 See also Charles C. Pinckney’s similar comment: I, 39.

²⁹ Like Gerry, Connecticut judge Roger Sherman felt that the Plan made: “too great inroads on the existing system.” *Ibid.*, I, 35. In similar vein, South Carolina delegate Charles Cotesworth Pinckney questioned whether “the act of Congress recommending the Convention (...) authorize the discussion of a system founded on different principles from the federal constitution.” *Ibid.*, I, 34.

³⁰ Farrand, *Records of the Federal Convention*, I, 35.

was taken up as the starting point for the Convention's deliberations.³¹ There are several reasons for this. First, despite their doubts on the Convention's mandate, most delegates did not question the need for a strong central government. Connecticut delegate Roger Sherman, for example, recognized that additional powers for Congress, such as that to collect taxes, were needed, but he warned that the States would never agree to give up these powers.³² Second, the vote concealed lingering doubts and uncertainties that many delegates still had about the Virginia Plan. South Carolina delegate Pierce Butler, for example, confessed that he had not made up his mind on the subject, and was therefore: "open to the light which discussion might throw upon it."³³ Third, the delegates realized their vote was not final since the rules allowed for any votes taken to be revisited.³⁴ The nationalists realized this too. The vote to adopt Morris' preamble was a clear victory for their plan, but it did not win them the war. For this, they would have to dispel the doubts among their colleagues and persuade them that the Convention had the mandate for far-reaching reforms in the weeks ahead.

The question of mandate

With the adoption of Morris' preamble, the way was now paved for the nationalists to expound their vision for the United States. In particular, they had to make clear in whose name the compulsive union would exercise supreme power over the States. The nationalists lost no time to rally their colleagues behind their plan and that very same day, the delegates started debating the Virginia Plan clause by clause. It was during these debates that the national union aspired by the authors of the Virginia Plan began to take a more solid shape. But as the implications of the Plan began to dawn on the members of the Convention, so too doubts about its desirability began to (re)surface.

As Morris' new substitute preamble indicated, the nationalists' plan aimed to redefine the foundation of the United States from a firm league of federated friends to a compulsive national state. Central to this vision for the polity was the proportionally election of the "national legislature." For the Nationalists, the popular election of the central legislature was fundamental to make it truly "national," that is: to guarantee that it would promote the interest of the whole union, rather than the aggregate of the States. As the delegates in the Confederate Congress could be recalled by their States' legislature, the nationalists believed they were slaves to "local prejudice." According to Morris "State attachment (...) have been the bane of this country" that caused "the great objects of the nation [to be] sacrificed constantly to local views" To overcome this, Pennsylvania

³¹ Massachusetts, Pennsylvania, Delaware, Virginia, North Carolina, and South Carolina were in favor, Connecticut voted against and New York was divided: *Ibid.*

³² *Ibid.*, I, 34–35.

³³ *Ibid.*, I, 34.

³⁴ Beeman, *Plain, Honest Men*, 103–14.

delegate James Wilson argued that the authority of national legislature should flow directly from the legitimate source of all power—including that of the State legislatures—which was the people. The people formed the “cornerstone” of the national union, Wilson argued, because they provided the national legislative with a will of its own, as the representatives would be moved by the “sense of the people at large.”³⁵

In the eyes of the nationalists, the central government had to represent the interests of the entire nation—not just the combined local interests of the States. In this sense, their concept of “the people” was more than the sum of the several peoples of the States, but constituted one *national* people that should be represented, not according to States, but as one whole; that is in proportion to the number of inhabitants in each State. More to the point, they considered the inhabitants of the thirteen different States as part of one people with shared interests, shared goals, and a shared identity: as Americans. This, of course, was the same vision advocated by Patrick Henry in 1765, Richard Henry Lee in 1774, and John Adams in 1776. Like these predecessors, the nationalists now invoked this American people as the foundation on the basis of which the national government could claim a higher, independent power vis-à-vis the States. And like their predecessors, the nationalists were not concerned with the welfare of the people as a goal in and for itself, but as a means to establish supremacy over the States. Wilson at one point likened the proposed national government to that of a pyramid, where the people formed the broad and sturdy base on which the tip of Congress rested.

No sooner had the debate on *what* the national plan should look like begun, however, than the first cracks in the ranks of its supporters appeared. The smaller States of Delaware and New Jersey abhorred the loss of power under a proportional representation and were determined not give up their equal vote without a fight. As soon as proportionality was mentioned, George Read rose to object that: “the deputies from Delaware are restrained by their commission from assenting to any change of the rule of suffrage,” and added that he and his colleagues would be forced to leave the Convention if it was decided otherwise.³⁶ Read’s objection froze further discussion on proportionality, but failed to obstruct its adoption in the long run. When, on June 11, the Convention took a vote on proportional voting on the basis of free inhabitants it was adopted by nine States, with only Delaware and New Jersey voting against it.³⁷

The vote of June 11 meant that for the first time, the idea that the inhabitants of the thirteen States formed one American people would find its way in the constitutional framework of the United States. As a result, however, the smaller State delegates were even more determined to secure an equal vote for their States in the upper house. For the delegations from New Jersey and Delaware this position came naturally, convinced as they were that without an equal say in the senate “the large States will crush the small

³⁵ Farrand, *Records of the Federal Convention*, I, 406, 530, 552, 132.

³⁶ *Ibid.*, I, 37.

³⁷ *Ibid.*, I, 195.

ones.”³⁸ They soon found support from Connecticut delegation, which had supported a popularly elected lower house, but now sided with the small States. What these delegates shared was a belief that the States formed one with regard to their common interests, but with regard to their local and domestic issues, they still formed thirteen independent States. Drawing on the familiar person metaphor, Roger Sherman argued that, “each State, like each individual, has its particular habits, usages, manners, which constitute its happiness,” and, just like an individual, it would not yield power over this to others. Only an equal vote in the senate, he concluded, could “secure the rights of the lesser States” since otherwise “three or four large States would rule the others as they please”.³⁹

These objections fell on deaf ears with the Randolph faction, however. When the question of an equal vote for the States was raised on June 11, the Convention turned out to be split almost in half: 6 States were against it and 5 in favor. The three large States of Massachusetts, Pennsylvania, and Virginia were joined by the Deep South, while Connecticut, New York, New Jersey, Delaware, and Maryland found themselves on the losing side.⁴⁰ With this vote, which denied the States an equal vote in the senate, the fate of the States as independent polities seemed all but sealed.

At this point, panic broke out among the opposition as delegates started to wonder whether the Virginia Plan aimed at abolishing the States as political bodies altogether. According to Connecticut delegate Roger Ellsworth, this amounted to the: “razing foundation of building when only the roof needs repairing.” And when the shocked Charles C. Pinckney demanded to know of Randolph whether his plan aimed: “to abolish the State governments altogether,” Randolph’s answer—only as far as the States formed an obstacle to the union—did little to reassure him.⁴¹ The most outspoken defender of State as sovereign polities was William Paterson, a stern lawyer from New Jersey. According to Paterson, each State was sovereign, by which he meant that it was independent and equal to its peers. “Thirteen sovereign and independent States can never constitute one nation and at the same time States.” By destroying State equality, Patterson added, the Virginia Plan not only violated the Articles of Confederation, but the instructions of the State legislatures as well. “The idea of a national government contradistinguishing from a federal one never entered into the minds of any of them” he argued, and therefore: “we have no power to go beyond the federal scheme.”⁴²

Paterson did not stop at questioning the Convention’s mandate, but disputed that an appeal the people was even necessary for a stronger union. The strength of the union, he said, depended solely on its “quantum of power,” and: “by enlarging the powers of Congress (...) all purposes will be answered.”⁴³ To prove his point, Paterson and his allies

³⁸ As Gunning Bedford put it: *Ibid.*, I, 167.

³⁹ *Ibid.*, I, 343.

⁴⁰ *Ibid.*, I, 195.

⁴¹ *Ibid.*, I, 484, 34, 39.

⁴² *Ibid.*, I, 484, 186, 178.

⁴³ *Ibid.*, I, 187, 252.

from five dissenting States, including Sherman, Lansing, Dickinson, and Read, drafted an alternative, “purely federal” plan that he presented to the Convention on June 15. This New Jersey Plan formed a direct attack on its Virginian counterpart. Paterson’s plan encompassed a union founded on States, rather than a union of the people. Instead of a popularly elected bicameral legislature, Paterson proposed to stick to the existing Continental Congress, which would continue to enjoy equal representation. That he relied on the States as the actors in Congress shows that he contested the very notion that the United States formed one people. To remedy the defects of the Confederation, Paterson proposed to grant Congress the power to tax and regulate trade, and stated that the laws of the union from now on would be considered “supreme” and binding on the States, to be enforced by judges all laws of the States notwithstanding.⁴⁴

As the New Jersey Plan illustrated, Paterson and his bystanders shared the idea that the United States required a strong, supreme central government. The debate between the Randolph and Paterson faction, therefore, was not about the extent of the central government’s power, nor whether this power should be supreme. Instead, it was about the more fundamental question of the *foundation* of the union. For Paterson, the union was and remained a gathering of separate States: “we come here,” he told his colleagues, “as States, as equals.” Just like Morris, Paterson believed that: “sovereignty is an integral thing,” but in his view it was located exclusively with the States. He and his colleagues believed that the idea of resting the union on the foundation of the people was “so novel and unprecedented,” that the States would never agree to it. And, as Paterson did not fail to point out, without the consent of the States the Virginia Plan went nowhere. “Let them [the large States] unite if they please,” Paterson concluded: “but let them remember that they have no authority to compel the others to unite” with them.⁴⁵

Paterson’s New Jersey Plan and the objections he raised posed some considerable constraints for the nationalists. After all, if the national plan of union failed to please a considerable minority inside the Convention, how could it hope to be ratified by Congress and the States? Even if the Convention’s mandate said nothing about “national” plans of union, the nationalists had little hope that the States would ever agree to such a scheme. Their last hope now was to show that only a national union could remedy the defects of the union and the only way of doing this was by launching a counter offensive in the hope of regaining the initiative.

This counterattack came the following day, on June 16. The charge was led by Randolph who admitted he was not “scrupulous” on the issue of mandate. Since the salvation of the republic was at stake, he told his colleagues, it would surely be “treason to our trust, not to propose what we found necessary” to save the union. To rely on State appointed legislators, Randolph argued, was folly, because: “they have no will of their own, they are a mere diplomatic body, and are always obsequious to the views of the

⁴⁴ Ibid., I, 240, 242–245.

⁴⁵ Ibid., I, 247, 27, 250, 179.

States, who are always encroaching on the authority of the United States.” A strong government *à la* Paterson was not truly a solution, in other words, but would turn out to be just as dependent on the States. Wilson agreed that the circumstances called for drastic measures and that the debate therefore should not be curtailed. The delegates, he urged, were: “authorized to *conclude nothing*, but to be at liberty to *propose anything*.”⁴⁶

On June 19, it was moved to discard Paterson’s plan in favor of that of Randolph. This was in fact a question of whether the Convention considered itself to have the mandate to discuss plans other than of a “purely” federal nature, and it was affirmed with seven votes in favor and only three against. Delaware and New Jersey were joined in their opposition by New York, but the delegates of Connecticut had again deflected to the other side, while those of Maryland were divided among themselves.⁴⁷ It is hard to say what made these delegates change their mind. There is evidence that some of the sponsors of the Paterson’s plan did not really see it as a viable solution, but supported it simply to warn the Randolph faction they had pushed things too far. Dickinson confined to Madison that these delegates privately supported a strong bicameral legislature, but “would sooner submit to a foreign power, than submit to be deprived of an equality of suffrage.”⁴⁸ Perhaps these delegates changed their mind after hearing the criticism from across the aisle, but more likely they never really intended for the Paterson plan to be more than a scare tactic and abandoned it once they felt their point had been made.

The choice for the Virginia Plan was crucial as it reopened the floor for debate and left the delegates free to explore alternatives to the Confederation. Together with Paterson’s plan, the members of the Convention discarded the doubts about the Congressional mandate that limited the discussion to “amendments of a federal nature.” With this vote the Convention granted itself a mandate to discuss radical reform and affirmed its role as a creative forum, in which new visions on the polity could be brought forward and debated. The rejection of the “purely federal” plan, however, was not an endorsement of a “purely national” plan. Instead, at Wilson’s urging, the delegates now granted themselves the liberty “to propose anything, but conclude nothing,” which meant that the final verdict of whether the Convention had overstepped its mandate was left to a later date. The advocates of a national union realized that, if they did not succeed in convincing their colleagues to place the ratification in the hands of the people, as urged by Madison, their plans for the union would be in serious jeopardy, since the States were not expected to adopt a plan that deprived them of their powers. More than ever, the success of the national plan of union rested on the persuasive powers of its advocates.

⁴⁶ Ibid., I, 255, 253.

⁴⁷ Ibid., I, 322.

⁴⁸ Ibid., I, 242.

Stalemate

The vote to sidetrack the Paterson Plan could not disguise that a considerable number of delegates shared Paterson's worries about the position of the States within the national plan of union. More fundamental than a supposed lack of mandate was their underlying fear that, without an equal say in the senate, the interests of the smaller States would not be guaranteed in the future union. For the advocates of the Virginia Plan, on the other hand, a continuing role for the States as independent polities within the senate was out of the question. Hamilton and Wilson agreed that the States, as independent communities, ought to be abolished, as their only proper role in the national plan of union was that of "lesser jurisdictions."⁴⁹

The proper role of the States in the new union proved the toughest nut to crack in the Convention and continued to dominate the debates in the following four weeks. While the votes in the Convention continued to show a comfortable majority for a popularly elected first branch, the delegates disagreed over whether the people or the States should be represented in the senate. Since the very foundation of the future union rested on the outcome of this conflict, the two factions refused to define the powers of the central government until this fundamental issue was resolved. Both sides were willing to significantly broaden the powers of the union, but neither was prepared to do so unless the framework of the senate fitted its views. Both Wilson and Madison insisted that no power could be "safely" granted to a Congress that "does not stand on the people." As a result, the delegates unanimously decided to postpone further debate on the powers of the central government until the "most fundamental point" of the manner in which the States would be represented in it would be settled.⁵⁰

On 21 June William Samuel Johnson took the floor in an attempt to break the deadlock. With his sixty years Johnson was the senior member of the Connecticut delegation, and he spoke with an eloquence befitting his age. Johnson's speech that day was a challenge to the Randolph faction to address the concerns raised by their opponents. If the Randolph faction could show that the individuality of the States was not endangered by their national plan of union, Johnson suggested, the objections of the small States no doubt would be removed. If, on the other hand, this could not be done, then the demand of equal representation in the senate should be granted. Johnson's challenge to the Randolph faction was to show how the interests of smaller States could be preserved without allowing them an equal place in the union.⁵¹

The Virginia delegates must have felt responsible to meet this challenge, as they had promised their Pennsylvanian colleagues back in May that they would persuade the smaller States to surrender their equal vote. Now, at the height of the dispute, however,

⁴⁹ Ibid., I, 287, 322–323.

⁵⁰ Ibid., I, 551, 253, 436.

⁵¹ Ibid., I, 355, 363. Ibid., III, 88.

this confidence that the smaller States would “yield to the predominant will” proved unfounded. In the heated debate that raged in the Convention throughout the hot days of June, neither side seemed interested in changing their mind. Both Madison and Wilson dodged Johnson’s question by shifting the burden of proof and asking, instead, how the central government could be protected from the “fatal” danger of States, whose jealousy formed a perpetual danger to its authority.⁵² The reaction from the smaller States was predictably to likewise persist in their position. The large States were wrong to expect their smaller neighbors to act in their interest, Bedford said, because they could not expect them to: “act with greater purity than the rest of mankind.” This stalemate situation was complete when, on July 2, the delegates casted tie votes on the question of the equal vote for the States in the senate. The prevailing mood among the delegates was, as Sherman put it, that “we are now at a full stop.”⁵³

The underlying cause of the stalemate seems to have been a genuine inability of the delegates to conceptualize a union comprising both people *and* States. In line with the prevailing view at the time that, in each political community, sovereignty could be vested in one place only, the delegates conceived of the debate as a choice for either a national or federal plan of union.⁵⁴ This applied to both sides in the conflict. Throughout the debate, both advocates of the national and federal plan assumed sovereignty to be an indivisible concept. Morris and Paterson already said so during the debate on the Virginia Plan,⁵⁵ and many of their supporters agreed that there could not be two equal masters in one house. Hamilton, for example, argued that “two sovereignties cannot coexist within the same limits.”⁵⁶ The delegates naturally disagreed on where this absolute sovereignty should lie—with the supporters of Paterson’s plan situating it in the thirteen separate peoples, while those favoring Randolph’s plan attributing it to a single, United States people—but bottom line was that there could be only one sovereign.

In light of these convictions, the reaction of the Randolph and Paterson faction to Johnson’s challenge consisted of trying to persuade the rest of the delegates that their vision for the union—as either constituting one people or thirteen—was the only correct one. For this, some delegates went back to the history and origins of the union. Maryland delegate Luther Martin, for example, zealously defended that the United States had from

⁵² Farrand, *Records of the Federal Convention*, I, 355–357.

⁵³ Ibid., I, 491, 510, 511, Connecticut, New York, New Jersey, Delaware, and Maryland voted in favor, while Massachusetts, Pennsylvania, Virginia, and North and South Carolina voted against; the members from Georgia were divided.

⁵⁴ Davis shows that Madison and others read political history in the same way as Bodin and Pufendorf: Davis, *The Federal Principle*, 81, 85–86.

⁵⁵ Farrand, *Records of the Federal Convention*, I, 43 (Morris: “[I] cannot conceive of a government in which there can exist two supremes”), 27 (Paterson: “sovereignty is an integral thing”).

⁵⁶ Ibid., I, 287. Luther Martin made the same point: “[the] language of the states being sovereign and independent was once familiar and understood, though it now seems strange and obscure,” see: Ibid., I, 468. A final example is Madison who likewise said that “I hold it for a fundamental point that an individual independence of the states is utterly irreconcilable with the idea of an aggregate sovereignty” in a letter to Randolph, see: Hutchinson, Rachal, and Rutland, *Papers of James Madison*, IX, 369.

the start consisted of thirteen separate and sovereign peoples. According to him the Declaration of Independence had created thirteen separate polities, which had entered the Confederation as equals and could not now be robbed of their independence. When they separated from Great Britain, Martin explained, the States were placed in “a state of nature” towards each other until they confederated. The original purpose of the Confederation, Martin claimed, had been “merely to protect and secure the States” in the war against Britain. By trying to destroy the sovereignty of the States in the name of the people, the advocates of the national plan not only turned the union upside down, but flew in the face of history and, with that, the true identity of America as a league of sovereign States.⁵⁷

In reply to Martin, James Wilson relied on the same Declaration of Independence to arrive at the contrary conclusion that the States had proclaimed themselves free and independent, “not individually, but unitedly,” that is: as one nation. The States, he continued, had never been in a state of nature, but had always formed a dependent whole. He reminded his colleagues that the motto of the revolution had been that: “Virginia is no more, Pennsylvania is not more (...) and that we are now one nation of brethren.” Gouverneur Morris, in similar vein, repeated Henry’s famous line that he considered himself “as a representative of America,” rather than of his State. From this angle, the creation of a truly national union was not only in accordance with the spirit of 1776, but had been the very purpose of the Revolution. The national union already conceived in 1776, Charles Pinckney pointed out, had to be established in 1787, because: “the States are more one nation now, than the colonies were then.”⁵⁸

Both Martin and Wilson relied on a different version of the past to portray the Virginia Plan as either hostile or corresponding to the true identity of the United States. The technique on which both men relied was that of constitutive rhetoric, in which the purpose of narratives about the past is to warrant action in the present. Wilson’s and Martin’s view of the *past* of the United States as originally forming either one or thirteen nations supported their advocacy for either the national or federal plan of union in the *present* and imply that only their plan would preserve this original United States for the *future*. Thus, on the basis of the same past the two factions urged that only the choice for their plan would conform to the true, original nature of the union. In Martin’s eyes, a true American could never strip the States of their sovereignty, while for Wilson and Morris only those delegates who recognized the States formed one nation were truly representatives of America.

As the interchange between Wilson and Martin illustrates, the future of the United States was constantly portrayed as a black or white choice for either a purely federal or national union. “The two extremes before us,” Madison told his colleagues, “are a perfect separation and a perfect incorporation of the thirteen States.” In similar vein, Bedford

⁵⁷ Farrand, *Records of the Federal Convention*, I, 324, 437–439.

⁵⁸ *Ibid.*, I, 324, 166 (Wilson), 529 (Morris), 164 (Pinckney).

insisted that “there is no middle way between perfect consolidation and a mere confederation of States.”⁵⁹ Whether these delegates were simply unable to conceive of a compromise or rather presented it as such to force the Convention’s hand is besides the point. Bottom line is that they understood every attempt to ground the union on a mixed foundation as fatal. According to Wilson, if the two houses of the legislature would rest on the different foundations of the people and the States: “dissent will naturally arise between them” that would be fatal to the union. Such a system, Madison and Morris added, would experience such “frequent alterations” as would “undermine” and “annihilate” the central government. For this reason, Wilson concluded, all potential interference and rivalry between the States in the central government should be “obviated as much as possible.”⁶⁰ This explains why the advocates of the national plan were unable to meet Johnson’s challenge in a constructive way: because they believed a union of compromise would inherently go down in political turmoil. This black and white position was not confined to the Randolph faction, as John Lansing likewise admitted that a mixed plan was simply too novel and “no one can conceive what its operation will be like.”⁶¹

Both sides, in short, had no real answer to their Johnson’s concern about the role of the States in the union. Unable or unwilling to conceive of a polity in which two sovereign bodies coexisted rather than collided, they could not bring themselves to compromise on the foundation of the union. Some, like Hamilton and Wilson, openly confessed to be at loss and saw no way ahead.⁶² This illustrates the nationalists’ all or nothing mentality: if the Convention failed to forge a nation out of the United States, it might as well leave in place the Confederation. Their inability to rally a majority of delegates behind their vision of a national union left the nationalists dumbstruck. Despite the rhetorical efforts of Wilson, Madison, and others, the Convention refused to adhere, act, and vote as if it constituted one American people, rather than thirteen separate ones.

The failure to persuade each other and the ensuing deadlock started to seriously test the delegates’ commitment to and faith in debate as the proper means to resolve the conflict. Gouverneur Morris—who doubted the strategy of persuasion from day one—at one point exclaimed that: “this country must be united. If persuasion does not unite it, the sword will.” Many delegates were outraged by this threat of force and the atmosphere reached a low point afterwards. In fact, some delegates even started to wonder whether they were dealing with fellow Americans. “The States,” Morris said, “[have] many representatives on the floor,” but few members would qualify as “representatives of America.” Gerry, in similar vein, lamented that “instead of coming here like a band of brother, belonging to the same family, we seemed to have brought with us the spirit of political negotiations.”⁶³ The time to reach a peaceful solution was running out.

⁵⁹ Ibid., I, 449, 490.

⁶⁰ Ibid., I, 151, 56, 49 (Wilson), 527 (Madison), 483 (Morris).

⁶¹ Ibid., I, 338.

⁶² Ibid., I, 298, 405.

⁶³ Ibid., I, 530, 567 (Morris), 467 (Gerry).

A Patchwork Compromise

With both sides unable to muster the necessary majority behind their vision for the polity, the key to breaking the deadlock resided with those delegates who occupied a middle position in the debate. These middle men, for lack of a better name, rejected both the purely federal vision for the lack of power it placed in Congress and the purely national vision for the threat it posed to the States. What united these delegates, in other words, was a rejection of the zero-sum view on sovereignty as belonging either solely with the people or the States. The group's most prominent speakers included the compromise-minded Connecticut delegates Oliver Ellsworth and Roger Sherman, as well as John Dickinson of Delaware. With tensions flaring between the Randolph and Paterson faction, these middle men seized the opportunity to remind their colleagues of the possibility of a middle road and, in the process, hammering out a compromise that would eventually serve as the foundation for the new union.

To urge compromise, these men sought to steer the Convention away from the extremes of a purely federal or national plan and pushed for compromise by relentlessly urging the added value of the equal representation of the States in the senate. For ardent advocates of State sovereignty like Paterson and Martin, the need for a senate was unclear since the States only needed equal representation in one house. For the nationalists, on the other hand, the added value of an upper house consisted in creating stability, but State equality would upset this. The solution of the middle men was to patch the ideas on the form and function of the senate together to create an upper house in which the States were equally represented and functioned as a force of stability in the union. In their view, the senate would provide the States with a platform on which to voice their concerns on the central level. Through their senators, Roger Ellsworth argued, each State's "particular views and prejudices (...) will find its way into the general council." This way, the "sense of the States," as John Dickinson called it, would enrich the deliberations of Congress and its decisions would be better informed. If the people were represented in one house, and the States in the other, Sherman pointed out, this guaranteed that there was always a majority of both behind the laws of the land.⁶⁴ In short, giving the States influence in the legislative process through the senate was beneficial, rather than harmful, as it produced more balanced legislation.

Unlike the nationalists, the middle men argued that the States, instead of forming an obstacle, would in fact *enrich* the deliberations of Congress and form a necessary check on the first branch whenever it threatened to trample local interest. According to John Dickinson, "the division of the country into distinct States formed [a] principal source of stability [and] ought to be maintained." To preserve a "certain degree of agency" to the States, he continued, "will produce that collision between the different authorities which should be wished for in order to check each other." Sherman, in similar

⁶⁴ Ibid., I, 406 (Ellsworth), 150 (Dickinson), 550 (Sherman).

vein, argued that the senate would preserve the harmony between the national and State governments because it gave them a “mutual interest in supporting each other.” In the eyes of these middle men, the people and the States did not become each other’s mortal enemies, but complementary partners. Like the solar system, Dickinson argued, the union left the States “to move freely in their proper orbits” around the radiant sun of the central government.⁶⁵

The success of this “middle road” rested on turning the *necessity* that neither a purely federal or national union suited a majority of the Convention into a *virtue*. In other words, the fact that Americans formed neither one nor thirteen peoples was what made them unique and should form the foundation of the polity. Instead of providing a stirring narrative of what America was or should be, the middle men urged their colleagues to resign in the dual nature of the identity of the polity. According to John Dickinson, resting the union on the foundation of both the States and people was “unavoidable,” since “we are a nation, though consisting of parts or States.” In similar vein, Roger Ellsworth denied that the Convention’s choice was limited to either consolidation or confederation by claiming that: “we are partly national, partly federal.”⁶⁶ Fuzzy as these statements were, they conveyed the idea that American true identity was that of forming one and thirteen peoples at the same time.

Just how effective the fuzzy logic was as a basis for breaking the deadlock came to light on July 16. On that day, with the barest possible majority of five to four States, the Convention adopted a compromise in which proportional, popular election of the first branch was combined with an equal, State-elected second branch.⁶⁷ Support for the compromise came from small New Jersey and Delaware, as well as Maryland and Connecticut, the home-State of its principal architects. The crucial shift of votes, however, came from Massachusetts and North Carolina. The Massachusetts delegation had consistently voted in favor of a proportional senate, but cast a divided vote on July 16, which deprived the nationalists of a majority. The ardent nationalists King and Gorham were checked by Strong and Gerry, who supported the compromise. In fact, Gerry believed America’s unique identity lay in that “we are neither the same nation nor different nations.”⁶⁸ More important still was the vote by North Carolina, which switched sides to support the compromise plan of union. Hugh Williamson, the senior member of the delegation, had realized weeks earlier that the deadlock threatened to undermine the entire Convention. “If we do not concede on both sides,” he told his colleagues, “our business must soon be at an end.” Here too, the sense of America’s unique double

⁶⁵ Ibid., I, 86, 152–3 (Dickinson), 150 (Sherman).

⁶⁶ Ibid., I, 136, 42 (Dickinson), 468 (Ellsworth).

⁶⁷ Ibid., II, 15: Connecticut, New Jersey, Delaware, Maryland and North Carolina in favor, Pennsylvania, Virginia, South Carolina, and Georgia opposed. Massachusetts was divided.

⁶⁸ Ibid., 532.

identity had its advocates, such as William Davie who literally repeated Ellsworth's notion that: "we are partly federal, partly national in our union."⁶⁹

The vote of July 16 resulted in what is called the Great or Connecticut Compromise—in honor of the State whose delegates formed its principal architects. It broke the deadlock, though not the debate, by patching together the two visions for the union in one legislative assembly. The three million or so inhabitants of the several States would from now on form one single people in one respect, and would be represented as such in the House of Representatives. They would form thirteen separate peoples in another respect, however, and would be represented as forming equal and independent polities in the senate. As the above demonstrates, the compromise rested not so much on a clear and compelling vision for the polity, but on combining the federal and national view into one. This meant that, at the core, the polity rested on a *patchwork* compromise that sewed together the two visions for the union.⁷⁰ As a result of this patchwork, the delegates provided two answers to the question what constituted the identity of the new union: America was to be both one people and thirteen at the same time.

While this patchwork solution was ideal for pushing the debate in the Convention forward, it naturally did not solve the underlying conflict. The "fuzzy" notion that the United States formed both one nation and thirteen at the same time was silent about how a conflict between these two ideas would play out. Dickinson's solar system metaphor actually invited the delegates to assume that, like the planets orbited around the sun, the States would remain in their proper orbits and never collide with Congress. This promise of eternal harmony certainly appealed to the delegates—even Madison at one point likened the union to "the planetary system"⁷¹—but concealed that the patchwork union really provided no *final* solution to the problem of having two masters in control of the same house. Instead, the delegates bricked the perpetuation of this conflict over the identity of the polity into the very foundation of the union. The Connecticut Compromise, in this sense, broke the deadlock but not the debate. In fact, it committed the future generations of leaders to the ongoing debate on the true nature of the union.⁷²

In the end, the patchwork that the Convention adopted with the Connecticut Compromise rested not so much on a clear and compelling vision for the polity, but on combining two of them into one. This compromise was far from what original drafters of

⁶⁹ Ibid., I 515 (Williamson), 448 (Gerry). For North Carolina's change of mind in general see: Beeman, *Plain, Honest Men*, 219.

⁷⁰ This patchwork origin of the Constitution has been noted by other scholars as well. Roche describes the Constitution as "a patch-work sewn together under the pressure of both time and events" see: Roche, "The Founding Fathers," 815. In similar vein, Knupfer calls the Constitution a "patchwork of agreements (...) laboriously cobbled together," see: Peter B. Knupfer, *The Union as It Is: Constitutional Unionism and Sectional Compromise, 1787-1861* (Chapel Hill: University of North Carolina Press, 1991), 30.

⁷¹ Farrand, *Records of the Federal Convention*, I, 165.

⁷² For another view of the Constitution as a deliberative document, see: Joseph M. Bessette, *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994).

the Virginia Plan had hoped to achieve, and has generally been interpreted as a victory for the small and middle States coalition. In fact, Madison felt that the loss of proportional representation in the senate meant that: “no good government could or would be built” on the foundation of the constitution. At the same time, he and Wilson realized that their allies from Massachusetts did not feel as strong about the issue as they did and were not prepared to risk the outcome of the Convention on it.⁷³ In the Paterson faction, on the other hand, the compromise was seen as a victory for the small States. These delegates could go home confident that the small State interests would be secure within the union, and Read could claim to have saved the equal vote as required by Delaware’s instructions. In fact, the euphoria was so great among this group that its leading spokesmen Paterson, convinced that the most important job was done, left the Convention within the week, only to return in time to sign the constitution.⁷⁴

Stocking the arsenal

Now that the foundation of Congress had been settled, the delegates returned to discussing the details of the plan that had been suspended during the deadlock. In the subsequent debates, the Convention hammered out how the different branches of government should function together, and established the basic outlines of federalism. Also, it was during these debates that the delegates confronted another big dividing line between the States: slavery. Finally, the popular ratification of the document was secured and “we the people” was inserted as its author in the preamble.

During the deadlock on the senate, the delegates had agreed to postpone any discussion of the powers that the future Congress would wield. Now that a compromise had been reached, this point was immediately taken up and many delegates grasped that it would decide the true balance of power in the new union. Now that the States would have a continuing influence in the senate, the small State delegates felt more comfortable equipping the central government with broad powers. In fact, it was a delegate from Delaware, Gunning Bedford, who proposed the far-reaching formula that Congress should have the power to make laws: “in all cases in which the States are incompetent.”⁷⁵ The vagueness of this grant immediately led to protests. Interestingly, this opposition came from a different direction. Now that the small State delegates had secured equal voting in the senate, some large State delegates started to fear that a strong central government would undermine their States’ autonomy. Randolph, of all people, was having second thoughts and believed the clause would be used to: “violate all the laws and constitutions of the States, and of intermeddling with their police.” He joined Gerry,

⁷³ Farrand, *Records of the Federal Convention*, II, 20. Beeman, *Plain, honest men*, 221.

⁷⁴ *Ibid.*, I, 18. *Ibid.*, III, 589.

⁷⁵ Farrand, *Records of the Federal Convention*, II, 26.

Martin, and others who insisted that the powers of Congress should be enumerated to prevent Congressional overreach and who did not back down, as will become clear, when this plan was discarded by the Convention.⁷⁶

Meanwhile, the question that occupied the Convention was how the supremacy of the central government's legislation vis-à-vis the States could be guaranteed. All agreed that the laws of the union should be binding on the States, but the delegates disagreed about the way to resolve potential conflicts. Dickinson argued that, "to leave the power [of Congress] doubtful would be opening a spring of discord." Madison, in similar view, argued that as long as the States were free to "pursue their particular interest in opposition to the general interest [they] will continue to disturb the system unless effectually controlled."⁷⁷ One way to prevent this was by giving Congress the power to employ the militia to enforce its resolutions. When Madison had proposed such a measure in 1783 it had been voted down, but now the Convention readily agreed to give Congress the power: "to call forth the aid of the militia, in order to execute the laws of the union."⁷⁸

On July 26, the Convention decided to refer the many resolution that it had made to a committee instructed with the task to report them back in the form of an orderly "constitution." The membership of this Committee of Detail included Edmund Randolph, who had already opposed the vague, unlimited grant of power to the central government and now used his position to substitute it with a list of some eighteen specifically enumerated powers. The other members of the committee, Gorham, Ellsworth, Wilson, and Rutledge, adopted and amended the list, which formed the basis of the discussion.⁷⁹

On top of the powers already enjoyed by Congress under the Confederation, the Committee's list included the power to levy taxes and impost, to regulate foreign and domestic commerce, and to make laws "necessary and proper for carrying into execution (...) all power vested by this constitution in the government of the United States." This "necessary and proper" clause would become the basis on which powers well beyond those enumerated in the Committee's list would be assumed by Congress in the future. The clause did not attract the attention of the members of the Convention, however, as they passed over and adopted the list without much discussion.⁸⁰ The adoption of the list meant a significant increase in the powers for Congress which had seemed impossible to achieve a year earlier. It demonstrated that the delegates considered the States to form a nation in more respects than just to the outside world, and showed their willingness to regulate a part of the domestic policy as one people.

Besides expressly granting new powers to Congress, the Committee of Detail also endeavored to limit its powers in other areas. Section four of the article prohibited Congress to levy a duty on the export from any of the States, including the slave trade, it

⁷⁶ Ibid. For Gerry, Martin, and Wilson see: Ibid., I, 551, 439, 137.

⁷⁷ Farrand, *Records of the Federal Convention*, I, 167. Ibid., II, 27.

⁷⁸ Farrand, *Records of the Federal Convention*, II, 390.

⁷⁹ Ibid., II, 128, 181–182, 305. Beeman, *Plain, Honest Men*, 274.

⁸⁰ Farrand, *Records of the Federal Convention*, II, 308, 345.

forbade Congress to prohibit the importation of slaves in the future, and required a 2/3rd majority in Congress for laws concerning trade routes, the so-called “navigation acts.”⁸¹ The goal of these resolutions was to protect the southern economy—which consisted mainly of the cultivation of cash crops like tobacco and indigo and relied heavily on the forced labor of slaves. The clauses were added by the Committee’s chair, the wealthy South Carolina planter John Rutledge, who wanted to safeguard the slave States’ interests in a union that he believed was growing more and more hostile to slavery.

The need for these safeguards had first become clear to the Rutledge during the debate on voting. As with the debate on the Articles eleven years earlier, the question whether slaves were property or citizens, that is whether they were a part of “the people,” again flared up. The Convention adopted a compromise of counting slaves as three-fifths of free inhabitants for the purpose of determining the number of seats, which considerably increased the number of Southerners in the House.⁸² This compromise, however, drew heavy fire from the North, most notably Morris, who denied that slaves should be represented at all, let alone at three-fifths. Not only was the idea of putting slaves on the same footing with free citizens “revolting,” Morris said, but the compromise itself was inconsistent. “If slaves are to be considered as inhabitants,” he argued, “they ought to be added in their entire numbers [but] if as wealth, then why is no other wealth but slaves included?” In the end, Wilson replaced the word slaves with the euphemism “other persons,” which he hoped would take away the offense and objections against the compromise. The debate nevertheless demonstrated that sectional interest in slavery posed a serious threat to unity. Charles C. Pinckney confessed to be “alarmed” by what had been said and warned the members of the Committee of Detail that should they fail: “to insert some security” to protect slavery: “I shall be bound by the duty to my State to vote against their report.”⁸³ The safeguards that John Rutledge secured in the Committee served exactly this purpose.

The debate on Rutledge’s safeguards in the Convention only confirmed the southern fears that their “peculiar institution” needed protection from the North. On August 8, it was again Morris who condemned slavery as “the curse of heaven on the States where it prevailed.” The protections on slave trade did not only maintain the status quo, he argued, but also stimulated slavery where it already existed. They implied, he told his colleagues, that a citizen of South Carolina, who: “goes to the coast of Africa and, in defiance of the most sacred laws of humanity, tears away his fellow creatures from their dearest connections and damns them to the most cruel bondage,” would hold more votes in Congress than a citizen from Pennsylvania who condemned this. Morris’ indignation at this injustice was such that he claimed he would rather pay a tax for all Negroes than:

⁸¹ Ibid., II, 183.

⁸² Ibid., I, 120. For the origins and evolution of the three-fifths clause see, Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson* (Armonk, NY: M.E. Sharpe, 1996), 9–16.

⁸³ Farrand, *Records of the Federal Convention*, I, 581–583, 604, 592–593. Ibid., II, 95.

“saddle posterity with such a constitution.”⁸⁴ Morris found an unlikely bystander in his colleagues from the upper South, who had more than enough slaves and feared that their value would decrease once new slaves were shipped over. Mason—himself owner of three hundred slaves—called slavery an evil institution that brought the judgment of heaven on the States. Slavery was harmful to a man’s morals, Mason continued, as: “every master of slaves is born a petty tyrant.” Mason did not say how these problems should be addressed, but he did argue that the central government should be granted the power to stop the slave trade.⁸⁵

Rutledge replied to this criticism in Machiavellian fashion; telling his colleagues that slavery was a matter of interest, not ethics. “Religion and humanity have nothing to do with this question,” he argued: “interest alone is the governing principle with nations.” Since slavery was a vital interest of the South, the true question was not if slave trade was morally permissible, but whether the South could be part of the union without it being protected. If the northern States would look past their moral indignation, he continued, they would realize that it was in their interest to protect slavery, as it were their ships that sailed the southern crops to the markets in Europe. This appealed to some Northerners, especially the delegates from Connecticut. Echoing Rutledge, Roger Ellsworth argued that the “morality or wisdom of slavery are considerations belonging to the States themselves,” whereas the products that enriched the parts, enriched the whole.⁸⁶

On the basis of this mutual interest the delegates from Connecticut and South Carolina were able to create a “dirty compromise” in which slave trade was to be left untouched by Congress before 1808 and the southern States would agree to pay taxes for all slaves imported. It is important to realize that, by postponing the prohibition of slave trade, the Convention did indeed imply that Congress had the power to legislate on the issue of slavery in the first place. This is relevant, as many of the delegates, both from the North and the South, agreed with Ellsworth that slave trade was a matter belonging to the States in which Congress should not “intermeddle.” Baldwin, delegate from Georgia, insisted that slavery, as a “local matter,” had no place in a Convention concerned with “national objects.” In similar vein, Sherman argued that the “public good” did not require abolishing the importation of slaves. Only a few delegates believed that slave trade was an issue that concerned all parts of the union. Dickinson, for example, felt that slave trade concerned the national happiness and therefore was a question that ought to be settled to by the national government, not the States particularly interested. Mason agreed to this: “the present question concerns not the importing States alone, but the whole union.”⁸⁷

Ironically, the delegates that regarded slave trade as a “local matter” were the ones pushing for constitutional safeguards which made it an issue of general concern and

⁸⁴ Farrand, *Records of the Federal Convention*, II, 221–223.

⁸⁵ Ibid., II, 370, 364. See: Forrest McDonald, *We the People: The Economic Origins of the Constitution* (Chicago: University of Chicago Press, 1958), 72, 70 for the number of slaves.

⁸⁶ Farrand, *Records of the Federal Convention*, I, 364, 371.

⁸⁷ Ibid., II, 400. 369–372.

part of the foundation of the union. By including the three-fifths clause and other protections for slavery in the constitution, the founders made sure that the issue would continue to haunt debates for decades to come. Morris correctly predicted this when he pointed out that slave trade and the three-fifths clause encouraged slavery, rather than maintaining it. Far from preserving a status-quo, therefore, the constitution actually encouraged slavery. Under the constitution, it was in the interest of the South to acquire as many slaves as possible, as this augmented their numbers in Congress.⁸⁸ The Convention, in short, created a pro-slavery document that encouraged and rewarded the States holding slaves.

The question remains why the northern delegates agreed to all this. Any answer should begin by pointing out that for the southern delegates slavery was such a vital interest to their economy that they were only interested in joining the union if they were certain that this interest was secured. A harder question is how the two States in the Deep South, Georgia and South Carolina, succeeded convincing the rest of the Convention. Here, it seems, the commercial interest of the North played an important role. Though most of northern States abolished slavery before the turn of the century, they were happy to tolerate it in the South when this meant they could profit from the trade in its products. If Morris was the most severe critic of slavery, he also the first to suggest that a compromise should be reached between the slave and trade States.⁸⁹ Perhaps these delegates really believed that slavery would remain a “local issue” and saw no harm in adding several constitutional safeguards.⁹⁰ In any case, the adoption of the slave clauses assured that slavery would become a national issue.

After the slavery compromise had been made, one important issues still remained to be settled by the Convention: the procedure by which it would be ratified. Even before the Convention began, James Madison had realized that a new plan of union would only achieve a legitimacy superior to that of the States if it was rooted on an authority that transcended that of the State legislatures. Madison, of course, had found this in the “supreme authority of the people themselves”⁹¹ and the original Virginia Plan had urged ratification through popularly elected conventions of the States, rather than through the State legislature. The advocates of the new constitution quickly grasped that ratification by the people would circumvent the State legislatures which they feared would oppose any plan that corroded their power.

During this debate, the delegates that opposed ratification by the people pointed out that the Congressional resolution invoking the Convention called for the unanimous

⁸⁸ Finkelman, *Slavery and the Founders*, 31–32.

⁸⁹ Farrand, *Records of the Federal Convention*, II, 371, 364, 373–374.

⁹⁰ Fehrenbacher argues that the members of Congress “believed or hoped that somehow in the flow of time, slavery would disappear,” see: Don Edward Fehrenbacher, *The Slaveholding Republic: An Account of the United States Government’s Relations to Slavery* (New York: Oxford University Press, 2001), 29.

⁹¹ Farrand, *Records of the Federal Convention*, I, 123.

ratification by the States, as was required by the last article of the Confederation. The Convention had no legal right to overstep this mandate, Ellsworth argued, and it made him suspect that: “a new set of ideas seems to have crept in since the Articles of Confederation were established.” To this Morris replied with what would eventually become the nationalists’ winning argument: that the authority of the United States people surpassed that of the States and Congress alike. “In case of an appeal to the people of the United States, [which is] the supreme authority,” Morris argued: “the federal compact may be altered by a majority of them.”⁹² This argument ultimately hinged on what is called a *liaison*:⁹³ if sovereign power in the States rested with the people of that State and allowed them to replace the constitution any time they liked—something no one in the Convention denied and was explicated in both the Declaration of Independence and many State constitutions⁹⁴—it followed that sovereignty in the union rested with the people of the United States, who then had a similar right to replace the Confederation if they wished. Ellsworth, of course, correctly pointed out that the Confederation was formed as a league of States, not as one people, but according to Morris, this mistakenly assumed that “we proceed from the basis of the Confederation,” whereas: “this Convention is unknown to the Confederation.”⁹⁵

While the nationalists had been defeated in their attempts to make the “people of the United States” the sole foundation for the new plan of union, on this crucial question of ratification they succeeded in rallying the majority behind them. An important reason for this was that it circumvented the question of the Convention’s mandate. The delegates had cast this issue aside on June 19, and now that the Convention drew to a close many delegates hoped to silence it permanently. As Massachusetts delegate King pointed out, a reference to the authority of the people expressly delegated to the Convention was “the most certain way of obviating all disputes and doubts concerning the legitimacy of the new Constitution.” Here again, the *liaison* argument was put into place: ratification through popular elected conventions would guarantee that the plan (indirectly) rested on the supreme authority of “we the people.” Moreover, since it was immaterial to the

⁹² Ibid., II, 92.

⁹³ For more on liaisons, see: Perelman, *The Realm of Rhetoric*, 49.

⁹⁴ Among the state constitutions that mentioned the right to alter government are that of Massachusetts (1780) (“the people alone have an incontestable unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity, and happiness require it”); Pennsylvania (1776) (“the people have a right, by common consent to change it [government], and take such measures as to them may appear necessary to promote their safety and happiness”) and Virginia (“a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it”). That of New York literally quoted the Declaration of Independence, see: Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and the Organic Laws of the State, Territories, and Colonies Now or Heretofore Forming the United States of America* (Washington D.C., 1909), 1890, 3081, 3831, 2625–2626.

⁹⁵ Farrand, *Records of the Federal Convention*, II, 92.

people who exercised power—the States or the union—King believed they formed a truly impartial judge of where power should be placed within the union.⁹⁶

James Madison also pointed out that, since “the people were in fact, the fountain of all power (...) by resorting to them, all difficulties were got over.” For Madison, the method of ratification was what made the proposed constitution paramount to the States. According to him, ratification by the people was what set this “constitution” apart from a “treaty between independent States,” such as the Articles of Confederation. Whereas under the Confederation, the States had adopted legislation contrary to those of the union: “a law violating the constitution established by the people themselves, would be considered by the judges as null and void.”⁹⁷ This too, proved a winning argument with the Convention. Despite the biting criticism of Gerry of “the pernicious tendency of dissolving in so slight manner, the solemn obligation of the Articles of Confederation,” the Convention rejected Ellsworth’s motion in favor of ratification by popularly elected State conventions.⁹⁸ Thus, by invoking the supreme authority of the United States people, the delegates simultaneously circumvented ratification by State legislatures *and* resolved the longstanding question of its mandate to dissolve the Confederation. They, members of the Convention, could suggest the course of action, but only the sanction of the people, the supreme authority, could make it binding on the States.

The advocates of popular ratification, however, were not satisfied with bypassing the States, but insisted, as Morris had said, that a simple majority, rather than unanimity, should suffice. No doubt remembering the tiresome ratification of the Confederation, Wilson proposed that seven States would suffice to make the constitution binding on those that sanctioned it. This deviated from the unanimity required by the Articles and was more stubbornly opposed by Gerry and Sherman who called into question its “propriety.” In the light of this opposition Mason proposed a compromise of nine States, which: “had been required in all great cases under the Confederation,” which was subsequently adopted by the Convention.⁹⁹ This was a significant decision, as it affirmed that a qualified majority of the people had the right to abolish the Confederation which had been unanimously ratified by the States. Although the delegates probably were more concerned with avoiding a wearisome ratification process and wanted to prevent a single State from holding the rest hostage, the message again was that the sovereignty of “the people” trumped that of the States.

This point was even more forcefully made by a small but significant change that was made to the opening lines of the constitution by Morris, four days before the Convention dissolved. Randolph is credited with writing the first version of the preamble

⁹⁶ Ibid. Ibid., I, 123 James Wilson makes a similar observation on 133.

⁹⁷ Farrand, *Records of the Federal Convention*, II, 476, 93.

⁹⁸ Ibid., II, 561 (Gerry), 93, 563.

⁹⁹ Ibid., II, 468–478, 475, 559.

to back in early August. The initial lines of this preamble identified the thirteen separate peoples of the States as the authors of the constitution:

“We the people of the States of New Hampshire, Massachusetts, Rhode Island, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, do ordain, declare, and establish the following Constitution for the government of ourselves and posterity.”¹⁰⁰

The final version of the preamble is credited to Morris who, as member of the Committee of Detail, changed it to read:

“We the people of the United States, in order to form a more perfect Union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.”¹⁰¹

In Morris’ version, “the people of the United States” suddenly became the authors of the constitution. The significance of this change lies in the fact that it created an entity, “we the people of the United States,” that had never been officially recognized prior to the Philadelphia Convention, and presented the constitution as ordained and established in the name it. By reducing the preamble from many peoples to one, Morris created a powerful but elusive opening statement. Powerful, because it brought the constitution full circle: the people figured at the beginning (authors), at the center (basis of the House) and at the end (ratification). Elusive, because it remained unclear to whom “we the people” referred: either the people in its capacity of the peoples of the several States or in its capacity as citizens of a new nation called the United States?¹⁰² This elusive character allowed each delegate to read into the preamble whatever he liked, which probably explains why the preamble was adopted without debate. As with the Connecticut Compromise, the question who exactly constituted this “people of the United States” and what united them would be left to future debate.

Now that the former advocates of the purely federal or national plan had buried their conflict and resigned to the patchwork compromise, the small group around Randolph argued they could not bring themselves to support the constitution. Randolph himself already admitted of having second thoughts about the extent of federal power and feared that his home-State of Virginia would never agree to this. Unless the States would be allowed to make amends to the plan in a second convention, Randolph said: “it will be impossible for me to put my name to this instrument.” George Mason also objected to the all-or-nothing style of ratification, saying that: “it is improper to say to the people, take

¹⁰⁰ Ibid., II, 177.

¹⁰¹ Ibid., II, 591.

¹⁰² Beeman, *Plain, Honest Men*, 348.

this or nothing.” He insisted that the constitution should secure the rights of the people by means of a Bill of Rights and also proposed a second convention elected by the people: “to provide a system more consonant with it.” The final dissident, Elbridge Gerry, objected to the duration of office of Senators, the power of Congress to regulate trade, and many other things and felt bound to withdraw his support from the constitution during the final days of the Convention.¹⁰³

These pleas for a second convention gave some taste of what was to come in the ratification debates, where the question whether the State conventions could suggest amendments to the constitution would play an important role. In Philadelphia, however, a motion from Mason and Randolph to this effect stood no chance. As Pinckney pointed out, “conventions are serious things and ought not to be repeated.” The authority of the Convention to propose comprehensive reform was due to its special character as an extra-parliamentary deliberative body. Another Convention, Pinckney argued, would raise different objections which would, in turn, require others without any hope of ever settling on a constitution. When the motion was put to the vote, none of the States supported the motion for a second convention.¹⁰⁴

On the last day of the Convention Benjamin Franklin made a stunning speech in which he admitted his dislike of some parts of the constitution, but added that his experience of old age had taught him to doubt his own judgment. “I agree to this constitution with all its faults,” he told the Convention: “because I expect no better, and because I am not sure that it is not the best.” He ended with the an emotional appeal to his colleagues: “I wish that every member of the Convention who may still have objections to it [the constitution], would with me, on this occasion doubt a little of his own infallibility and, to make manifest our unanimity, put his name to this instrument.”¹⁰⁵ After this speech, Alexander Hamilton announced that he would sign the constitution, though he confessed that: “no man’s ideas were more remote from the plan than mine.” Morris too admitted that he had his objections, but that he considered: “the present plan as the best that was to be attained” and would take it with its faults.¹⁰⁶

Conclusion

The Constitution that the remaining delegates signed in September was unlike what anyone of them had in mind when they arrived in Philadelphia five months earlier. As is want with compromises, few were immediately satisfied with the final result. This was particularly true for the nationalists like Hamilton, who had grudgingly signed the Constitution. Madison too was all but satisfied. As late as September 6, he wrote to

¹⁰³ Farrand, *Records of the Federal Convention*, II, 561, 564, 631–633.

¹⁰⁴ *Ibid.*, II, 631–632.

¹⁰⁵ *Ibid.*, I, 643.

¹⁰⁶ *Ibid.*, II, 645–646.

Jefferson that “the plan (...) will neither effectually answer the national object nor prevent the local mischief.”¹⁰⁷ This illustrates that “father of the Constitution,” as Madison has been termed, was deeply unhappy with the offspring to which the Convention had given birth. Both Hamilton and Madison, however, would go on to become the two most ardent supporters of Constitution during ratification as coauthors of the *Federalist Papers*. In this sense, they should actually be seen as the “step-fathers” of the constitution.

Madison and Hamilton’s change of mind was the result of a gradual understanding that the mixed foundation of the union on the people as well as the States was in fact a blessing in disguise. It was true that only one part of the Virginia Plan ended up in the Constitution, but this already was a huge improvement over the Articles of Confederation. Sure, the States retained parts of their power, but the new Constitution provided the nationalists with an entirely new arsenal to combat what they saw as “State provincialism.” Madison’s and Hamilton’s passionate defense of the Constitution in the *Federalist Papers*, in this sense, was based on the fact that it did *not* mean the end to the debate on the true nature of the Union, but gave them considerable grounds to claim expansive powers for the central government in the future.

Few legal and political scholars take the nationalists’ change of heart into account, and therefore mistake the end for the beginning. In this view, the coherent vision that the Madison and Hamilton later set out in the *Federalist Papers* is taken as the intention of the framers from day one. As James Hutson has demonstrated, this practice of assuming that the *Federalist Papers* explains the Philadelphia Convention is as old as it is deceiving.¹⁰⁸ It overlooks the crucial fact that the papers were written *after* the Convention and not aimed as commentary but as propaganda. Moreover, it lends coherence to the Constitution that it never had in the Convention itself. A closer look at the debates in the Convention demonstrates that the final text of the Constitution was not built on a coherent vision, but on a patchwork compromise. On the basis of the analysis of those debates, this chapter tells a different story about the Philadelphia Convention:

First, the framing of the Constitution was not a straightforward codification of a pre-existing plan of government, but a long back-and-forth struggle between rival visions of the United States of which the outcome was all but certain. The lack of mandate, violation of instructions and, above all, the prospect of State ratification all formed serious constraints on deliberation that had to be overcome. Finally, the rules of debate in general and the commitment of the delegates to deliberation as the means to solving the indifferences on the Convention floor encouraged debate as a means of solving the differences between the delegates.

Second, the debates demonstrate how contested the identity of the polity still was. For weeks, the advocates of the Randolph and Paterson plan insisted that the United

¹⁰⁷ Hutchinson, Rachal, and Rutland, *Papers of James Madison*, X, 163–164.

¹⁰⁸ James H. Hutson, “Riddles of the Federal Constitutional Convention,” *The William and Mary Quarterly* 44, no. 3, Third Series (July 1, 1987): 420.

States formed one or thirteen peoples, depending on whether they supported the national or federal plan of union. Despite the countless speeches, the oratory of Morris and Paterson, and the powerful storytelling of Wilson and Martin, neither side was able to persuade the majority of the Convention of their vision. From a rhetorical point of view, the debates demonstrated the limits of constitutive rhetoric. For, in the end, it was not the compelling vision or image of the community that swayed the Convention, but a patching together of the two visions that would form the foundation of the polity. Instead of a purely federal or national union, in other words, the United States would form a union of compromise. The enduring conflict over the true nature of the union—whether it either formed one people or several—was thus bricked in the foundation of the polity.

This means, thirdly, that contrary to what many scholars claim, the Constitution was not the final answer to the crucial question who was ultimately master of the house: Congress or the States.¹⁰⁹ Instead, as Joseph Ellis has pointed out, the delegates had declared the question of sovereignty “unresolvable” and had decided that leaving it open was the only workable solution. As a result, Ellis notes, Constitution thus engaged Congress and the States in ongoing negotiations for supremacy that formed an “argument without end.”¹¹⁰ Rather than providing a final solution to the conflict over the true nature of the union—i.e. either one people or several—the Constitution perpetuated it and committed future generations to debate it over and over again. This, in turn, means that the Convention did not so much constitute a turning point in American history, but a new chapter in an ongoing debate on the identity of the polity. It left the final verdict on what the true the nature of the republic was to be debated and decided at a future date. Instead of creating a blueprint for the United States, the Founding Fathers provided it with a road map. The first land mark on this road was that of ratification.

¹⁰⁹ Middlekauff argues that the Convention “solved the problem of power” in the union: Middlekauff, *The Glorious Cause*, 661. Greene, in similar vein, considers the “invention” of dividing the sovereignty of “the people” between the States and Congress as the final solution to the rivalry between local and national power: Greene, *Peripheries and Center*, 205. Anderson, finally, notes that with the Connecticut Compromise: “the most divisive of all issues in the Convention was thus resolved,” see: Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress* (University Park, PA: Pennsylvania State University Press, 1993), 66.

¹¹⁰ Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic*, 1st ed (New York: A. A. Knopf, 2007), 91, 110. Knupfer points out that compromises by nature do not entail a “final settlement” of a conflict, but are viable only for as long as the parties involved are willing to live by them, see: Knupfer, *The Union as It Is*, 12.

Chapter 4

“Acts of the People:” Ratification and the Bill of Rights

On September 17, as is often pointed out, the constitution¹ was still merely an “opinion”—it required the sanction of Continental Congress and the States to become the supreme law of the land.² The debate on the proposed constitution in Congress and the State ratification conventions, as well as the ensuing debate on whether it should be supplemented by a bill of rights, are the subject of this chapter. Together, the two debates play an important role as a hinge between the constitutive debates in which the constitution was formed, and the applicative debates, in which it was interpreted. In the State conventions, the opponents’ severe criticism of unclear and contested clauses of the constitution prompted the supporters to explain how the constitution worked and why it was desirable. As a result, the ratification debates occupy an interesting position as both essential to putting the constitution into effect as well as a first instance to determine its meaning. The same can be said of the debate on the Bill of Rights, in which concerns that were left implicit by the Constitution were addressed and thus interpreted.

As a result, many legal scholar and historians consider the debates on ratification and the Bill of Rights as part of the founding period and study them as an indispensable guide to the true understanding of the framers’ intentions.³ As soon as we know what “we the people” originally meant when they signed the Constitution, the reasoning goes, the original meaning of its clauses can be determined. Apart from the static approach to history this entails—why should the opinions of eighteenth-century men be binding on us today?⁴—what is interesting from the point of view of this study is that it takes literal the idea that the Constitution was ratified by “we the people of the United States.” According

¹ Throughout this chapter, the plan proposed by the Philadelphia Convention will be referred to as the “constitution” with a lower case “c” and once adopted, it will be referred to with a capital “C”. This way, the position of the plan prior to ratification, when it was still only an “opinion” and adoption was uncertain, is at any time clear. The same is done for the bill of rights, which becomes the Bill of Rights after adoption.

² Maier, *Ratification*, ix. Beeman, *Plain, Honest Men*, 370.

³ See for example: Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York : London: Free Press ; Collier Macmillan, 1990).

⁴ See for an interesting discussion of this: Peters, “CONSTITUTIONAL INTERPRETATION.”

to this view, the process by which the Constitution became the supreme law of the land was a genuine act of “we the people of the United States.”⁵

This chapter will take a contrary approach and argue that this view rests on a myth. A closer look at the ratification debates demonstrates that one group of orators portrayed the ratification conventions as “we the people” to overcome the paradox of the people forming both the author and product of the Constitution. Strictly speaking, ratification was only remotely the people’s affair, since the decision to ratify or reject was delegated to the members of the State conventions who were—by today’s standards, though not necessarily those of the eighteenth-century—elected only by a very limited part of the population. In fact, the most compelling argument that the constitution did not rest on the people’s consent was that in the only State that actually consulted its population in a referendum, Rhode Island, the constitution was rejected by a sizeable majority.⁶ This chapter will explore how the myth of the Constitution as the act of the people was first raised in the ratification debates and how it began to take on a life on its own starting with the debate on the Bill of Rights. Throughout, the focus will be on how the contested identity of the patchwork polity designed in Philadelphia infused the ratification debate and the need for the Bill of Rights, once the Constitution was ratified.

“Act of the People:” the Ratification Debate

An account of the ratification debates on the constitution should begin by defining the participants. With regard to the ratification debate, however, this is problematic. Traditionally, historians have labeled the supporters of the constitution “Federalists” and their adversaries “Anti-Federalists.” Both terms, however, were the product of a brilliant framing effort by which the nationalists hijacked the term “federal”—which was associated with a loose union of States like that of the Articles of Confederation—and started to use it for the closer union of their Philadelphia plan. By claiming the name “Federalists” for their new plan, the supporters of the constitution stole a march on their opponents, who were stuck with the label of “Anti-Federalists.” Many contemporaries already found fault with this labeling, which essentially inversed the meaning of the term “federalism.” As Luther Martin pointed out “*now*, they who advocate the system pretend to call themselves *federalists* [but] in the [Philadelphia] Convention the distinction was quite the reverse.”⁷ Elbridge Gerry, in a particular vindictive moment, argued that the “rats and anti-rats” would suit better.⁸

Despite these objections, the labels have stuck, which attests to the success of the framing effort. Even though historians universally acknowledge the unsuitability of

⁵ Ackerman, *We the People: Foundations*, 6.

⁶ Maier, *Ratification*.

⁷ Farrand, *Records of the Federal Convention*, III, 195.

⁸ *Annals of Congress* I, 759.

“Federalists” and “Anti-Federalists”—after all, it was not federalism that the opponents opposed, but (parts of) the constitution—those same historians continue to use the labels to refer to the two sides in the debate. To escape this problem, this chapter will refer to supporters or advocates of the constitution on the one hand, and its critics or opponents on the other. This also prevents an oversimplification of the debate by suggesting that the supporters and opponents of the constitution were homogenous parties.⁹ Many contemporaries already understood there were no stereotype advocates or critics. In December 1787 Oliver Ellsworth observed that “in the different States where the opposition rages the most, their [the participants’] principles are totally opposite to each other and their objections discordant and irreconcilable.”¹⁰

This lack of unity is often seen as problematic for the opponents of the constitution, since it left them without a clear alternative behind which they could rally their colleagues. “Immensely powerful in their own back yard,” the historian Robert Rutland writes: “the Anti-Federalists seemed unsteady when they ventured forth on national concerns.”¹¹ What united the opponents, in other words, was their dislike of the constitution and little else.¹² However, it is important to keep in mind that for the opponents it was enough to show that the constitution was too flawed to ratify, not to defend an alternative. Moreover, as historian Herbert Storing has pointed out, lack of unity also applied to the supports of the constitution.¹³ The argument that won ratification in a State like Delaware (i.e. equal representation in senate) sometimes harmed its prospects in large States like Massachusetts or Virginia.

This raises the question whether the debate on the constitution can be considered as a “national discussion,” as is often done,¹⁴ or should rather be seen as “thirteen different stories.”¹⁵ Scholars have long pointed out that the debates in the separate State conventions revolved around similar issues such as whether the constitution aimed to turn the States into one nation, whether this would work, and whether this required further safeguards in the form of a bill of rights.¹⁶ One reason for this is that both supporters and opponents in some States kept in contact with their likeminded colleagues in other parts of the United States and provided each other with arguments, pamphlets, and the latest news. One well-known example is the *Federalist Papers*, a series of newspaper

⁹ Maier, *Ratification*, 94.

¹⁰ Quoted in: Robert Allen Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787-1788* (Norman: University of Oklahoma Press, 1966), 76.

¹¹ Ibid., 209. Pauline Maier points out the opponents included those who wanted to keep the Confederation as well as those who were prepared to adopt the constitution if it was amended: *Ratification*, 93.

¹² Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (Chapel Hill: University of North Carolina Press, 1999), 22, 27.

¹³ Herbert J Storing, *What the Anti-Federalists Were For* (Chicago: University of Chicago Press, 1981), 5.

¹⁴ Most notably by Isaac Kramnick in: “The ‘Great National Discussion:’ The Discourse of Politics in 1787,” *The William and Mary Quarterly* 45, no. 1 (1988): 3–32; See also: Maier, *Ratification*, 68.

¹⁵ Beeman, *Plain, Honest Men*, 370.

¹⁶ See for more a comprehensive discussion of the issues that were debated throughout the States: Cornell, *The Other Founders*, 30–31; and Storing, *What the Anti-Federalists Were For* in general.

commentaries on the constitution which were the united effort of (mainly) the Virginian Madison and New Yorker Hamilton. The press offered isolated politicians the opportunity to reach fellow-supporters or opponents in other the States, and in some cases even reported records of the convention debates to neighboring States.¹⁷

While the above seems to justify a characterization of the debates as a “national” affair, the ratification debate of each State also had its own, unique dynamic. The relative weight of issues differed according to State interests and existing tension between political parties played a far larger role in some States than others. The course and content of the ratification debates, in other words, was a combination of both general issues that were of concern to all the States, as well as local factors. In this sense, the ratification debate breathed the same patchwork atmosphere as the constitution itself: constituting both one and thirteen separate debates at the same time. On the one hand, the constitution would be debated in directly elected conventions and, with some exaggeration, could be claimed to be ratified by “we the people of the United States” itself. At the same time, the delegates in the conventions were appointed by the peoples of the several States and met separately in each State, rather than as one American convention. In other words, the same fuzzy foundation that underlay the union of compromise created in Philadelphia prevailed in the entire ratification process.

The focus of this section will be on the debates between the delegates in the State conventions. A thorough analysis of the role of the press in the debate lies outside the scope of this study. This aspect has already been covered in other studies, which have found the contribution of the press to the ratification debate hard to verify.¹⁸ The ability of reprinted speeches, pamphlets, and newspaper articles—including the *Federalist Papers* itself—to shape the opinion of the delegates on the convention floor often remains questionable.¹⁹ In what follows, the discussion of the constitution in the Continental Congress will be analyzed first. Subsequently, the debates on the constitution in the conventions will be treated by focusing on aspects relevant from of view of the identity of the polity as well as on those conventions where the struggle was most uncertain.

First stop: Continental Congress

In the days after the members of the Philadelphia Convention finished their work, many of them were already making their way to New York to take their seat in the Continental

¹⁷ Maier, *Ratification*, 70, 166, 170.

¹⁸ See in particular chapter 4 “A War of Printed Words” in: Maier, *Ratification*; See also: Cornell, *The Other Founders*, 42. Cornell has included an appendix of the number of reprints that were made of commentaries on the constitution but does not discuss how they shaped the debate in general.

¹⁹ As Maier points out, most articles were seldom reprinted and not as easy to access as they are today, see: *Ratification*, 83–85.

Congress and oversee the ratification of the constitution by that body.²⁰ The Congress received an official copy of the constitution on September 20 together with a recommendatory letter signed by Washington. In his letter, the president of the Convention acknowledged that, among States so different in size, habits, and particular interests, it was impossible “to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all.” Nevertheless, he continued, a “spirit of amity” had prevailed in the Convention and as a result, the constitution secured “the greatest interest of every true American, the consolidation of our Union, in which is involved our prosperity, felicity, safety, perhaps our national existence.”²¹ Washington’s letter clearly illustrates the prevailing mood in the Convention that the United States’ fate as a nation depended on ratification of the constitution. As one of them wrote, on this question depended: “whether we shall become a respectable nation or a people torn to pieces by intestine commotions and rendered contemptible for ages.”²² Faced with such a choice, the argument was, how could any “true American” refuse to ratify?

The advocates hoped for a swift and smooth ratification by Continental Congress. They came armed with a resolution that recommend, first, to submit the constitution: “to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its legislature, for their assent and ratification”, and second, to organize elections for the new Congress and President: “as soon as the conventions of nine States shall have ratified this constitution.”²³ Since the “real” debate on the constitution should take place in the State conventions, the advocates wanted to keep debate in Congress to a limit in order not to give their opponents a platform to voice their objections.²⁴ The debate in Congress was the first *public* discussion of the constitution and therefore also the first opportunity for its critics to attack it. By swiftly lodging the plan through Congress without debating or amending its specifics, the advocates hoped to catch their opponents in the States flat-footed.

Two major obstacles threatened a swift passage through Congress. First, it was clear that opponents of the constitution were going to give the advocates a hard time. For the majority of the 33 delegates present for the debate, this was the first time they read the constitution and their reactions were mixed.²⁵ One observer noted that many delegates warmly recommended the constitution, but that the New York delegation was spreading the seed of opposition and found able allies in Virginia delegates Richard Henry Lee and

²⁰ Ten members who signed had a seat in Congress: Langdon, Gilman, Gorham, King, Johnson, Madison, Blount, Butler, Few, and Pierce, see: Beeman, *Plain, Honest Men*, 369.

²¹ Ford et al., *Journal of Continental Congress*, XXXIII, 502.

²² New Hampshire delegate to the Convention Nicholas Gilman in a letter home upon leaving the Convention, see: Smith, *Letter of Delegates to Congress*, XXIV, 430.

²³ Ford et al., *Journal of Continental Congress*, XXXIII, 501.

²⁴ “A lukewarmness in Congress,” Virginia delegate Edward Carrington wrote: “will be made a ground of opposition by the unfriendly in the States,” see: Smith, *Letter of Delegates to Congress*, XXIV, 435.

²⁵ The Convention succeeded in keeping its deliberations within doors until the very end of its session.

William Grayson.²⁶ Second, these opponents seemed bent on exploiting the unclear role of Congress in the ratification procedure. Back in February 1787, it had been decided that the Convention's proposals should be "agreed to in Congress and confirmed by the States."²⁷ This suggested a simple up or down vote in Congress, but it was already clear that critics such as Richard Henry Lee were planning to propose major changes to the constitution.²⁸ This raised the question whether Congress could debate and amend to the Convention's plan, which would seriously slow down the ratification process. What's more, the February resolution said nothing about ratification by "we the people" through the State conventions, which had only later been devised in Philadelphia. The opponents would certainly challenge this idea as well and refer the plan to the State legislatures where it most certainly would die. Together, the two obstacles meant that the debate in Congress was a make or break moment for the advocates of a swift ratification.

Congress took up the constitution on Wednesday 26 September. The records of the debates are few and sketchy, but we know the debate lasted two days.²⁹ There are no notes of the first day of the debate, but on September 27, Richard Henry Lee rose to speak out against the constitution. Congress, Lee argued, had no right to recommend the plan to the States because it violated Article XIII of the Confederation by making it binding after the consent of only nine States, instead of the required thirteen. Lee clearly grasped that the ratification procedure would in itself destroy the State equality under the Confederation and instead moved that, since: "the late Convention [has] been constituted under the authority of twelve States in this Union," the constitution should be sent to the State legislatures, rather than the State conventions, for approval.³⁰ This motion was a clear attempt to undermine ratification by "we the people." Richard Henry Lee not only questioned the Convention's mandate to propose an entirely new system of government, but also claimed that the appeal to "we the people" by which the advocates sought to overcome the mandate, was illegal.

The supporters of the constitution immediately rose to answer. Henry Lee, a former army officer and distant cousin of Richard Henry Lee, responded by claiming that an appeal to the paramount power of "we the people" surpassed the requirements of Article XIII. "We have a right to decide", Henry Lee claimed "from the great principle of necessity or the *salus populi*," which was a reference to the maxim that the welfare of the

²⁶ Smith, *Letter of Delegates to Congress*, XXIV, 435–436. The observer was Edward Carrington of Virginia.

²⁷ Ford et al., *Journal of Continental Congress*, XXXII, 74.

²⁸ Smith, *Letter of Delegates to Congress*, XXIV, 435.

²⁹ Ford et al., *Journal of Continental Congress*, XXXIII, 488 note 2; There is some evidence in the *Journal of Congress* of the different motions that were made: Ibid., XXXIII, 540–544. Also, there are the notes in shorthand by New York delegate Melancton Smith for the debate on September 27: Smith, *Letter of Delegates to Congress*, XXIV, 438–444.

³⁰ Smith, *Letter of Delegates to Congress*, XXIV, 438; Ford et al., *Journal of Continental Congress*, XXXIII, 540–541.

people served as highest law.³¹ In rhetorical terms, Lee was employing a dissociation in which ordinary laws such as Article XIII of the Confederation became inferior to the higher law that the people always had the right to alter, abolish, and replace the government.³² Lee was in fact arguing that the welfare of the people had driven the Convention to the necessity of abolishing the Confederation in favor of a new plan of union that better addressed their needs.

It turned out to be a winning argument. Richard Henry Lee protested that “the doctrine of *salus populi* [is] dangerous [and] has been in the mouths of all tyrants,” and warned that it put Congress on a slippery slope: “if men do as they please from that argument, all constitutions are useless.”³³ His pleas fell on deaf ears with the members of the Congress, however, who embraced the idea that the higher law of “we the people” trumped the requirements in the Articles of Confederation. None other than James Madison, who only three weeks earlier had expressed grave doubts about the constitution, now argued that, since the Convention’s plan would better promote the welfare of the people it should be adopted.³⁴ Madison brushed aside his earlier reservations and came to the conclusion that even a patchwork union was preferable to the Confederation. What’s more, he succeeded in convincing his colleagues in Congress to do the same and cast aside Richard Henry Lee’s attempt to blockade the constitution in Congress. On September 27, Lee’s motion was rejected in favor of one that recommended ratification through the State conventions. Only the delegates of New York voted for Lee’s motion—even Lee’s own colleagues of the Virginia delegation voted against him.³⁵

Undeterred by this defeat, Lee persisted in his opposition and turned his sights next on the advocates’ insistence that the constitution be voted up or down in Congress. “[I] do not see the necessity of presenting this [constitution] without amendments” he told his colleagues, unless one supposed “all wisdom centers in the Convention.” There were many good things in the constitution, Lee admitted, but also many bad and “if it is amended it will be more likely to succeed as capital objections will probably be removed.” Following this speech, Lee presented a bill of rights that called for, among others, an explicit recognition of the freedom of press and religion, trial by jury, and increase in the number of representatives to better secure the people’s rights. Surely, Lee concluded, Congress would seize this opportunity to secure these important civil liberties to the people, because to insist that it go ahead without amendments was “like presenting a hungry man [with] 50 dishes and insist he should eat all or none.”³⁶

³¹ Smith, *Letter of Delegates to Congress*, XXIV, 440.

³² Madison in *Federalist* 40 cites the same line to argue that the Philadelphia Convention had the right to replace the Articles of Confederation with the proposed constitution.

³³ Smith, *Letter of Delegates to Congress*, XXIV, 440.

³⁴ *Ibid.*

³⁵ Ford et al., *Journal of Continental Congress*, XXXIII, 542.

³⁶ Smith, *Letter of Delegates to Congress*, XXIV, 443, 441, 442; The proposed bill of rights can be found on: *Ibid.*, XXIV, 452–453; Evidence that Lee presented his bill of rights on the floor of Congress can be found in a letter from James Madison, see: *Ibid.*, XXIV, 456.

Again, Richard Henry Lee's intervention posed a formidable threat to a smooth ratification by suggesting that Congress debate the plan clause by clause and amend it by means of a bill of rights. Again, however, the advocates parried the challenge with a dissociation. The constitution, they reminded their colleagues, was not an ordinary plan of union but a genuine *act of the people* and therefore outside the reach of Congress. "The Convention was not appointed by Congress," James Madison pointed out: "but by the people from whom Congress derives its power." This was a highly questionable point—the Convention, after all, was set up by Congress with the States only appointing its members—but no one seems to have protested it. Since it was written by "we the people", Madison concluded, Congress could only "concur" to the constitution, because by altering the plan, it would no longer be an act of the people, but of Congress.³⁷

Once again, Madison brought the supposed supremacy of "we the people" to bear against their opponents. This time, however, more practical arguments also played a role. Since the opponents of the Constitution objected to different parts of it for different reasons, Madison argued, they would never agree over how it should be amended. This would mean, that "there will be two plans: some will accept one and some another [and] this will create confusion."³⁸ Together, the practical objections and special nature of the constitution as act of the people convinced majority of supporters to prevent an extensive debate on possible alterations of the constitution. Lee's bill of rights was cast aside and the mention of it even deleted from the Journal and Congress.³⁹

After this second defeat, the opponents gave in. "If the gentlemen wish it should go forth without amendments," Richard Henry Lee conceded "let it go with all its imperfections." Lee said he saw no point in pressing his bill of rights in Congress, but signaled that he would continue his fight in Virginia's convention and declared that "the conventions (...) have the liberty to alter". Lee's friend and supporter William Grayson also gave up, but suggested Congress take itself entirely out of the equation. "If we have no right to amend, then we ought to give a silent passage," Grayson argued, "for if we cannot alter, why should we deliberate?" In Grayson's view, Congress should forward the constitution without reflection or recommendation and leave the final verdict entirely to the State conventions. Grayson's point was readily adopted by the majority of Congress, which preferred a silent recommendation over an outspoken one, and, as one of them put it, thought it was "best to agree to send it out without agreeing."⁴⁰

Thus, the following day, Congress settled for what was called a "neutral" resolution of ratification which stated that, since "Congress cannot with propriety proceed

³⁷ Smith, *Letter of Delegates to Congress*, XXIV, 442–443 Samuel Johnson, in similar vein, argued that "Congress [is] not to judge in the last resort, but the people, and therefore it must be approved or disapproved in the whole."

³⁸ Ibid.

³⁹ Ibid., XXIV, 440.

⁴⁰ Ibid., XXIV, 442, 441, 443 The last point (to agree without agreeing) was made by New Jersey delegate Abraham Clark.

to examine and alter the constitution (...) and the members of Congress not feeling themselves authorized (...) to express an opinion” it was decided that the constitution was to be submitted to the States: “in order to be submitted to a convention of delegates chosen in each State by the people thereof in conformity to the resolves of the Convention.”⁴¹ With this, the constitution was transmitted to the States and a new phase in the ratification debates entered: that by the State conventions.

The outcome of the debate in Congress was inconclusive. By denying itself the authority to amend the constitution and by neither approving nor disapproving it, Congress left the final verdict on the constitution to the State conventions. More important, from the advocates’ point of view, was the sanction of popular ratification. Richard Henry Lee’s objection that the Convention had no right to destroy the Confederation had been silenced with an appeal to the *salus populi* and his demand that the constitution needed a bill of rights discarded on the basis that an act of the people could not be tinkered with by Congress. In both cases, the idea that United States formed one people and the constitution reflected their will could count on the support of Congress. In fact, by going ahead with ratification in State conventions, even the opponents implicitly recognized that “we the people” had the right to abolish the Confederation. Still, Lee’s objections made clear that the constitution was contested and that the question whether it could be amended was all but settled. In fact, Lee circulated his bill of rights among other critics in the hope that the State conventions would also urge amendments. This probably explains why Lee was optimistic about his chances in the Virginia convention: he hoped that thorough reflection on the document would demonstrate its fallacies and address them.⁴² The fight over the constitution, in other words, had only just begun.

Act of the people: the debate in the conventions

When the debate on the constitution started in Pennsylvania on November 20, 1787, there was every reason to believe that its supporters would get the smooth ratification process they hoped for. After the unanimous ratifications by Delaware, New Jersey and Georgia, the first State in which the opponents of the constitution succeeded in giving the supporters a run for their money was Pennsylvania. Although it eventually endorsed the constitution by a comfortable 46 to 23 vote, the fierce opposition in Pennsylvania would soon inspire likeminded delegates in the other large States. After Pennsylvania, the supporters of the constitution continued their streak of victories in the smaller States like New Jersey, Connecticut, and New Hampshire—where it was believed that the

⁴¹ Ford et al., *Journal of Continental Congress*, XXXIII, 543, 549; The suggestion for a “neutral” transmission to the States was first suggested by Massachusetts delegate Nathan Dane, see: Smith, *Letter of Delegates to Congress*, XXIV, 440.

⁴² See Lee’s letter to Mason: Smith, *Letter of Delegates to Congress*, XXIV, 459.

constitution would stimulate and revitalize commerce—and in southern States like Georgia, Maryland, and South Carolina—which feared to end up isolated outside the union. Nevertheless, it was clear that, without the larger States of Massachusetts, Virginia, and New York—who all still had to ratify the constitution- there would be no union to speak of.

This section will focus on the ratification debates in the four States where the debate on the constitution was most fierce and the outcome most uncertain: Pennsylvania, Massachusetts, Virginia, and New York. The debates in these four States yield more in terms of what parts of the constitution were contested and why, and also forced the supporters to greater lengths to counter these objections. Because of its small size and recalcitrant reputation, the rejection of the constitution in the referendum in Rhode Island did not deter the advocates of the constitution for long. In the case of North Carolina, its rejection of the constitution after eleven of its neighbors had ratified put it in complete isolation.⁴³ By contrast, the debates in the four competitive States threw ratification in doubt and thus threatened to undo the earlier victories. The debates here captured the attention of the entire continent as the fate of the constitution rested on their outcome.

The analysis of the debates in the four competitive States below will focus on those aspects that deal with contested identity of the polity underlying the Philadelphia plan. Many excellent studies have been written that deal with all the wide-ranging objections that were leveled against the constitution in the many conventions.⁴⁴ This section will focus on three related challenges to the patchwork nature of the proposed union as forming both one people and several at the same time. The first challenge was whether the Convention had a right to overthrow the Confederation and erect a new constitution on the basis of “we the people” in its stead. The second, whether the United States could be governed as one people. The third and final, whether by putting two masters in charge of the same house, the proposed constitution carried within itself its own doom. Together, these three debates are telling of how different the constitution was interpreted and illustrate how contested the identity of the polity was.

The first and most important objection that almost all the opponents of the constitution leveled against it was that it constituted an illegal usurpation of the power. The Philadelphia Convention, they argued, had clearly violated its mandate by proposing a plan that went considerably further than simple amendments to the Articles of Confederation. Like the Paterson faction before it, the opponents in the State conventions

⁴³ The relative unimportance that has been attributed to the rejection by Rhode Island and North Carolina certainly is an important reason why a comprehensive and annotated record of the debates in both States has not yet been published in *The Documentary History of the Ratification of the United States Constitution* series of the Wisconsin Historical Society. The decision of the editors to publish these records last has been a complicating factor for studying the debates in Rhode Island and North Carolina in this study.

⁴⁴ A good starting point is: Maier, *Ratification*; A good and comprehensive account of the opponents’ objections and the philosophy behind it is: Cornell, *The Other Founders*.

questioned the mandate because they feared the Philadelphia plan would abolish the States. Instead of fixing the problems among the several States, the opponents claimed that the constitution would “consolidate”—that is a merge—they into one new State. The only *legal* way to amend the Articles of Confederation was by unanimous consent of the States, and not the mere nine that the proposed constitution required.⁴⁵ The constitution, Pennsylvania delegate Robert Whitehill pointed out, was itself an “*unconstitutional* and unwarrantable abandonment of the nature of and obligation of the union of 1776.”⁴⁶ It was an illegal usurpation of powers belonging to the States on the basis of an entity—“we the people”—that was not even recognized under the Articles of Confederation.

The preamble in particular drew a lot of fire from the opponents, who felt it symbolized this unconstitutional usurpation. The most outspoken critic was Virginia’s revolutionary champion Patrick Henry, who asked his colleagues: “What right had they [the Philadelphia Convention] to say, *We the people?* (...) Who authorized them to speak the language of *We the people*, instead of *We, the States?*” According to Henry, the States formed the “characteristic and the soul of a confederation,” and by substituting them for the people it was clear that the constitution aimed at creating “one great, consolidated, national government, of the people of all the States.” Henry fully understood that the advocates hoped to overcome the questionable mandate of the Convention by directly appealing to the higher authority of “we the people,” and challenged the very right to do this by a body appointed by the States. “The people gave them [the Philadelphia Convention] no power to use their name,” he insisted: “that they exceeded their power is perfectly clear.”⁴⁷

Henry was not alone in his critique of the preamble. In Massachusetts, Samuel Nasson said of the preamble: “if this does not go to an annihilation of the State governments, and to a perfect consolidation of the whole union, I do not know what does.” Robert Whitehill, speaking to the Pennsylvania convention, also argued that “We the people of the United States is a sentence that evidently shows the old foundation of the Union is destroyed (...) and a new unwieldy system of consolidated empire is set up upon the ruins of the present compact between the States.” To him it was evident that the constitution was “incontrovertibly designed to abolish the independence and sovereignty of the States individually.” It could not be pretended, Whitehill continued, that the Philadelphia Convention was called together by the people: “for till the preamble was produced, it never was understood that the people at large had been consulted upon the occasion.” He repeated Henry’s question by asking: “what right indeed have we in the manner here proposed to violate the existing Confederation?”⁴⁸

⁴⁵ Hendrickson, *Peace Pact*, 245. See for an example of this William Findley in the Pennsylvania convention: Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, II, 504.

⁴⁶ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, II, 393 my emphasis.

⁴⁷ *Ibid.*, IX, 930–931.

⁴⁸ *Ibid.*, VI, 1397; *ibid.*, II, 393, 395.

It is clear from these objections that the opponents were keenly aware of the preamble's potential to constitute the inhabitants of the United States into one people. This made many opponents anxious, since they strongly identified with their States as autonomous polities whose sovereignty had to be safeguarded at any cost. Patrick Henry told his fellow-delegates that their first priority was not to erect a new union, but: "to preserve the poor Commonwealth of Virginia." In New York, for example, Melancton Smith spoke of his home-State as his "country" and claimed that he was willing to sacrifice anything but its liberty to save the union. In Massachusetts, William Thompson told his colleagues that "we are a nation of healthy strong men" that could survive on its own outside the union in the comfort that it had not acted unconstitutionally.⁴⁹ The very fact that the opponents judged the preamble unconstitutional, illustrates that they reasoned from a constitutional reality where the United States still formed a union of States first and regarded the debate as the final chance to save it from annihilation.

With this in mind, the opponents did not shun from portraying the constitution as a fundamentally un-American document. In their eyes, the constitution was a barely disguised attempt to turn the clock back on the revolution. Massachusetts delegate Amos Singletary, for example, claimed that the supporters of the constitution sought to do the same as Britain in 1775, that is to "bind us in all cases whatever." In similar vein, his colleague Nathaniel Barrell argued that "as it now stands, Congress will be vested with more extensive power than ever Great-Britain exercised over us."⁵⁰ The narrative, in both cases, was the same: a vote for ratification in the present would surrender the States to a worse fate in the future than it had liberated itself from in the past. By seeking to consolidate the States into one nation, the supporters were flying in the face of the historical identity of the United States as a union of sovereign States.

The portrayal of the constitution as a fundamentally un-American document served the opponents' point that United States had always been and should remain a union of sovereign States. In doing so, they presented themselves as the stewards of the true revolutionary heritage, which was helped by the fact that many (though far from all) of the constitution's critics belonged to the generation that had achieved independence.⁵¹ The most prominent among them, Patrick Henry, used his position to contrast the present with the past. "When the American spirit was in its youth," Henry told the Virginia convention, "the language of America was different. Liberty, was then the primary object, but now the American spirit (...) is about to convert this country into a powerful and mighty empire."⁵² The opponents thus not only challenged that the Confederation could not be replaced with an appeal to the people, rather than the States, but insisted that

⁴⁹ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, IX, 952 (Henry); XXII, 1712 (Smith); VI, 1316 (Thompson).

⁵⁰ *Ibid.*, VI, 1345 (Singletary); 1448 (Barrell).

⁵¹ Many have pointed to the "generational difference" between the supporters and opponents of the constitution, see: Maier, *Ratification*, 268.

⁵² Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, IX, 959.

anything other than a union between sovereign States was illegal, unconstitutional, and fundamentally un-American.

The most elaborate response from the supporters to this challenge came from James Wilson in the Pennsylvania convention. Wilson simply denied the relevance of the question. “I think the late Convention has done nothing beyond their powers,” he argued, since: “they have exercised no power at all.” The only thing the Convention had done, Wilson continued, was to *propose* the constitution, and “I have never heard before that making a proposal was an exercise of power.” The Convention did not speak for the people, Wilson admitted, but by now presenting it to the people of the United States for their approval, it could retroactively claim to be authored by them. “By their fiat,” Wilson argued “it will become of value and authority; without it, it will never receive the character of authenticity and power.” The sanction of the people, in other words, trumped paper barriers such as Article XIII, and turned the constitution into a veritable “*act of the people*.”⁵³

The persuasiveness of this argument rested on the prior approval that there existed a “people of the United States” and that its authority surpassed that of the States collectively. With regard to the first point, the existence of a United States people, there seems to have been no denial from the opposition. None of the opponents challenged the idea that “the people” had a right to alter or abolish a government when they saw fit and to institute a new one in its place. In fact, by denying that the Philadelphia Convention had the right to speak for “we the people,” Henry not only recognized the existence of a “people of all the States,” but also acknowledged it to have an authority superior to that of the States. What Henry *did* deny was that the people were the “proper agents” to “enter into leagues, alliances, or confederations.” What he challenged, in other words, was not whether a United States people existed, but whether “the people therefore in their aggregate capacity [are] the proper person to form a Confederacy?”⁵⁴

In reaction to this challenge, the supporters of the constitution insisted that it was the people of the United States, and not the States collectively, who had a right to ordain a new constitution. The reference to “we the people” in the preamble was highly proper, they argued, because the proposed constitution would not operate merely on the States, but on the people as well. As George Nicolas put it: “it [the constitution] is submitted to the people, because on them it is to operate.”⁵⁵ This *ex-post facto* logic seemed inescapable: because the constitution would make the United States one people, it *had* to be sanctioned by that people. This certainly convinced some opponents, like Edmund Randolph, who agreed that “if the government is binding on the people, are not the

⁵³ Ibid., II, 483–484, 384 emphasis added.

⁵⁴ Ibid., X, 958.

⁵⁵ Ibid., IX, 999.

people the proper persons to examine its merits or defects?”⁵⁶ A closer look at the argument reveals that this *ex-post facto* reasoning rested on a fundamental paradox.

As Wilson had acknowledged, “we the people of the United States” had never been consulted in creating the constitution. In fact, the ratification of the Philadelphia plan was the first time that “we the people of the United States” was asked to consider a founding document of the United States. The advocates thus had to constitute the very people in the name of whose authority they claimed the constitution could be sanctioned. This reveals the inherent paradox of constitutive rhetoric: it assumes the entity it seeks to establish. The State conventions together had to act as the United States people in order to create the United States people. In this view, the constitution could at the same time be “an act of the people,”⁵⁷ and an act “which will make us one people.”⁵⁸ It could turn the United States into one nation,⁵⁹ and ratification could be portrayed as essential to remaining a nation.⁶⁰

As a result this reasoning, the role of the State conventions became that of the bodies through which “we the people” acted. The ratification conventions spoke for the people, and according to some even constituted the people themselves. As Benjamin Rush pointed out to his colleagues in Pennsylvania: “we sit here as representatives of the people—we were not appointed by the legislature.” Others portrayed the people as a more distant, timeless entity, whose fate was directly decided by the convention. James Wilson, for example, argued: “we are representatives, sir, not merely of the present age, but of future times.” In similar fashion, Massachusetts delegate William Heath, argued that the convention decided: “not only for the people of the Commonwealth of Massachusetts only—not for the present people of the United States only—but (...) for millions of people yet unborn.”⁶¹ The people, in this sense, became an elusive entity that comprised all those living in past, present, and future. It was an open concept in which each could read whatever he liked.

Even if the supporters of the constitution varied in their ideas of how the ratification conventions related to “we the people,” the implicit point was that they spoke for the people. Having established this, the advocates challenged their opponents to deny its authority to overthrow the Confederation. “Who shall dare to resist the people?” Pendleton asked his colleagues: “who but the people can delegate powers? Who but the people have a right to form government? What have the State governments to do with it?” In similar vein, James Wilson argued that the unanimity requirement of Article XIII of

⁵⁶ Ibid., X, 936.

⁵⁷ “This constitution is an act of the people,” James Wilson argued: *ibid.*, II, 384.

⁵⁸ As Francis Corbin argued in the Virginia convention: *Ibid.*, IX, 1011.

⁵⁹ “By adopting this system we become a nation,” Wilson argued: “at present we are not one,” see: *Ibid.*, II, 581.

⁶⁰ As James Innes argued in the Massachusetts convention: “does not our existence as a nation depend on our union?” see: *Ibid.*, VI, 1512.

⁶¹ *Ibid.*, II, 457 (Rush); II, 477 (Wilson); VI, 1377–1378 (Heath).

the Confederation were of no concern to the debate. “The people have a right to do what they please with regard to government,” he boasted, “[they] fetter themselves by no contract.” The States, he continued, were created *for* the people, not the other way round, and he cited the Declaration of Independence in support. So even if the people wanted to consolidate the States into one nation, there was nothing the States could do against it. “How comes it,” he demanded of the opponents: “that these State governments dictate to their superiors, to the majesty of the people?”⁶²

The bottom line of the supporters’ argument was that the opponents relied on an outdated vision of the polity as a union of States. In reality, the supporters argued, the United States was preordained to become one people. “Providence,” Wilson claimed, “has designed us for a united people under one great political compact.” The constitution, as a result, was not an un-American document, but the sacred text by which the United States would finally live up to its true identity as forming one people. The most outspoken advocate of the constitution sacredness was Benjamin Rush, who insisted that it was ordained “from heaven” and that the “hand of God was employed in this work.” For him, the message to the State conventions was clear: “thou shalt not reject the new federal government.”⁶³ By reducing the choice for ratification to a religious duty, Rush stood at the cradle of what would soon become the “constitutional faith” of America.⁶⁴

In conclusion, the debate on the preamble of the constitution clearly demonstrates how contested the identity of the United States as forming one people was. It laid bare a fundamental difference in understanding of the words “we the people of the United States.” While until then many delegates assumed it simply referred to the peoples of the States collectively—the sum of the parts, in other words—the supporters exploited the ambiguity of the phrase in their favor. In their reading, “we the people of the United States” was larger than the sum of its parts and constituted an entity that had the right to overrule the Articles of Confederation—which was merely a covenant between its “servants” the States. As a result of this reasoning, the unanimity requirement of Article XIII ceased to be an obstacle. Crucial to this line of reasoning, of course, was the belief that the conventions spoke for “we the people.” In short, the debate on the preamble not only gave rise to two differing interpretations of “we the people of the United States”—including one in which it constituted the United States into one single people—but also gave rise to the argument that the ratification conventions, together, constituted the voice of the people. Both points would continue to play a prominent role in the interpretation of the constitution in the decades to come.

⁶² Ibid., IX, 946 (Pendleton); II, 383, 556, 472–473, 449 (Wilson).

⁶³ Ibid., II, 346 (Wilson); 593, 595 (Rush).

⁶⁴ See for this Sanford Levinson, *Constitutional Faith* (Princeton, NJ: Princeton University Press, 1988), 5 in which he analyses the Constitution’s role as the “constituent agent of our identity as Americans.”

Though none of the opponents challenged whether the United States formed one people, many challenged the idea whether it could be governed as such. In fact, most of the opponents' criticism of the constitution can be traced back to their core belief that a distant group of out-of-touch lawmakers could not be trusted to adequately represent the varying interest of *all* inhabitants of the States. The United States Congress, New York Governor George Clinton argued, "will be totally unacquainted with all those local circumstances of any particular State, which mark the proper objects of laws, and especially of taxation." The conflict with Britain had demonstrated how dangerous this was. A tax suitable for a so-called "productive State" like Virginia, could be very harmful to a commercial "carrying State" like Massachusetts. It was therefore indispensable, George Mason argued: "that our people should be taxed by those who have a *fellow-feeling* for them."⁶⁵ Since delegates from other States would not be acquainted with the situation of their neighbors, Congress was unfit to levy fair taxes. "Sixty-five members [of the United States Congress] cannot possibly know the situation and circumstances of all the inhabitants of this immense continent," Edmund Randolph argued, so:

"why leave the manner of laying taxes to those, who (...) cannot be acquainted with the situation of those on whom they are to impose them, when it can be done by those who are well acquainted with it? (...) by those who have a *fellow-feeling* for us?"⁶⁶

The key-word for the opposition was *fellow-feeling*—the idea that local representatives would instinctively feel how taxes, or any legislation for that matter, would affect his constituents. True representatives, Randolph said "ought to mix with the people, think as they think, feel as they feel, ought to be (...) thoroughly acquainted with their interests and condition." They should, Melancton Smith summarized, "resemble those they represent; they should be a *true picture of the people*."⁶⁷ As the French scholar Bernard Manin has observed, this insistence that only those electors who closely resembled the electorate were capable of representing them adequately was one of the most striking features of the opponents' criticism.⁶⁸

That the opponents of the constitution regarded the future Congress as a distant, foreign body again illustrates how contested the idea was that the States formed one people. For them, the differences between the States in custom, climate, and interest made it impossible to view the United States as one nation with one identity. The constant use of words like "us" and "our" by Mason and Randolph in the quotes above, illustrates that for many opponents their home-State, and not America, was the primary

⁶⁵ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, XXII, 1785 (Clinton); X, 1156–1157 (Mason, my emphasis).

⁶⁶ *Ibid.*, X, 938 my emphasis.

⁶⁷ *Ibid.*, X, 938 (Randolph); XXII, 1750 (Smith) my emphasis.

⁶⁸ Bernard Manin, *The Principles of Representative Government* (Cambridge; New York: Cambridge University Press, 1997), 109–111.

political community. In similar vein, Patrick Henry's assertion that "*those* who have no similar interest with the people of this country, are to legislate for *us*," illustrates this point.⁶⁹ Most opponents of the constitution felt that a polity required similarity of interests, manners, and sentiments and these only existed on the level of the States.⁷⁰

From across the aisle, the advocates of the constitution responded by rejecting their opponents' objections as narrow-minded and outdated. Hamilton argued that fellow-feeling would only incline representatives to "prefer the particular before the public good," whereas their duty was to serve "the general interest of each State, so far as it stands in relation to the whole." The opponents' fixation on "local prejudices" demonstrated that they still regarded the members of Continental Congress as ambassadors of the States, whereas under the new constitution they would be the representatives of the entire American people. The supporters of the constitution tried to persuade their colleagues that they and their neighbors indeed formed one American people and could be governed as such. In their eyes, the differences between the States were overshadowed by their shared background. "From New-Hampshire to Georgia," Hamilton argued: "the people of America are as uniform in their interests and manners, as those of any established in Europe." In similar vein, New York delegate Robert Livingston pointed out that the inhabitants of the United States "speak the same language, profess the same religion," and, what he deemed most important, they shared "the great principle of government—a principle, if not unknown, at least little understood in the old world—that all power is derived from the people."⁷¹

By focusing on what the States had in common and by contrasting this favorably with Europe, the supporters tried to prove there was indeed a unique American identity that the peoples of the States shared. Consequently, the future Congress did not consist of distant aliens, but fellow Americans who shared the same hopes, dreams, and interest. Why, the Massachusetts delegate Samuel Stillman asked, "speak of Congress as some foreign body [which] will seek every opportunity to enslave us?" The future members of Congress, he assures his colleagues, "*are ourselves*, the men of our own choice whom we can confide [and] whose interest is inseparably connected to our own." And since the future Congressmen would legislate for the United States as a nation, Wilson argued, "it is of more consequence to know the true interest of the people than their faces."⁷²

In conclusion, the debate on representation again revealed the contestedness of the patchwork notion of forming one nation and several at the same time. Most opponents regarded the United States primarily as a league of separate peoples and insisted that

⁶⁹ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, X, 1210. See for this in general: Rutland, *The Ordeal of the Constitution: The Antifederalists and the Ratification Struggle of 1787-1788*, 28–29.

⁷⁰ Kramnick, "The 'Great National Discussion,'" 10.

⁷¹ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, XXII, 1791, 1790, 1789 (Hamilton); 1682–1683 (Livingston).

⁷² *Ibid.*, VI, 1458 (Stillman); II, 489 (Wilson).

some powers, like that of taxation, could not be safely handed to Congress and should rest with the States. Randolph and Mason pled for this and were joined by New York delegate John Lansing, who argued that “as the State governments will always possess a better representation of the feelings and interest of the people at large it is obvious that those powers can be deposited with much greater safety with the State, than the general government.”⁷³ The supporters, on the other hand, argued that the States could be ruled as one nation, since they all shared a common American identity. In their view, Congress could legislate for the States as forming one people in matters of general interest—which included taxes and imposts—but the States kept control over their local affairs.

This last point sparked a third interesting debate over federalism—the idea that power in the union could be divided between Congress and the States. Many of the most outspoken defenders of the Constitution had been its fiercest critics in the Philadelphia Convention. Alexander Hamilton, for example, had argued that “two sovereignties cannot coexist within the same limits” a year earlier,⁷⁴ but now claimed that the idea “that two superiors cannot act together is false.” “They are inconsistent only,” he argued: “when they are aimed at each other, or at one indivisible object.” But since the constitution left the States and Congress each supreme in their separate sphere they could operate side by side: “without clashing [and] with perfect harmony.”⁷⁵ Like Hamilton, Edmund Pendleton agreed there was no danger since Congress ruled supreme in “great national concerns, in which we are interested in common with other members of the Union” and the State legislature in “our mere local concerns.” If each power confined itself to its “proper bounds,” Pendleton said: “an interference can never happen. Being for two different purposes, as long as they are limited to their different objects, they can no more clash, than two parallel lines can meet.”⁷⁶ As these quotes illustrate, the supporters of the constitution had fully embraced Dickinson’s metaphor of the solar system: if each planet stuck to its proper orbit, all could safely revolve around the sun eternally.

Ironically, many of the opponents distrusted this reasoning for the same reason the nationalists had in the Philadelphia Convention: they could not conceive of a political community in which two masters were put in charge of the same house. The idea of coordinate sovereignty was “unprecedented,” they said, and formed a “solecism in politics.” Also: it defied reason. “We have thirteen distinct governments, and yet they are not thirteen governments, but one,” Robert Livingston said, and it required “the ingenuity of St. Athanasius to understand this political mystery.” Not only was this unfathomable, it was also dangerous. By splitting sovereignty between Congress and the States, Melancton Smith argued: “the two governments would be rivals (...) they must be hostile, and one or

⁷³ Ibid., XXII, 1705.

⁷⁴ Farrand, *Records of the Federal Convention*, I, 287.

⁷⁵ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, XXII, 1960.

⁷⁶ Ibid., X, 1199.

the other must be finally subverted” In similar vein, John Smilie argued that the two houses of Congress, resting on different foundations, would turn against itself and that “one branch of the legislature can and will destroy the balance intended by the other.” The idea of dual sovereignty, to sum up, was not only an unprecedented political faux pas, but was beyond understanding and carried within itself the doom of the union.⁷⁷

The supporters’ reassurance that everything would be fine as long as the State and Congress stuck to their proper sphere of authority did little to comfort these opponents. The problem, Melancton Smith pointed out, was *how* and *where* to draw the line between the States’ and United States’ sphere of power. “The line of jurisdiction should be accurately drawn,” Smith argued, because otherwise “constant interference” as a result of “perpetual differences” would be the result. The question was, in other words, how to discern to what extent the United States would operate as *one* people and to what extent as *thirteen*. Some system of accommodation was required, Smith concluded, otherwise “there will be no possibility of preventing the clashing of jurisdictions.” In Pennsylvania, Smilie also urged that “some criterion needs to be established by which it could be easily and constitutionally ascertained how far our governors may proceed.”⁷⁸

By now, the debate had turned from *whether* the States collectively formed one nation and one people to the *extent* to which it did. The real debate, as historian Saul Cornell points out, was not about a black and white choice between either consolidation or confederation, but the degree to which the United States would be “nationalized.”⁷⁹ In this debate, the opponents were keenly aware of the flexibility of the constitution and warned that some clauses could be used to usurp virtually all of the States’ powers. The supporters, in turn, argued that the constitution already contained sufficient barriers by only granting Congress those powers which were explicitly enumerated. The best safeguard against usurpation, they argued, was the fact that the United States constituted both one and several nations at once.

Like Hamilton before him, James Madison now argued that it was precisely the patchwork nature of the union that prevented abuse of power. The proposed plan did not establish a purely federal or national government, Madison argued, but one of “a mixed nature.” Had it aimed at consolidation, the senate would have been chosen by the people and not the States. Consequently, power could safely be trusted to Congress, since the States themselves would oversee that only those powers explicitly enumerated in the constitution would be exercised. As the supporters pointed out time and again, the defining feature of this mixed polity was that the United States formed both one and thirteen peoples at the same time. “The people of America are one people” Henry Lee told his colleagues in the Virginia convention, but also thirteen different peoples. “In local matters I shall be a Virginian,” he said, and “in those of a general matter, I shall not

⁷⁷ Ibid., XXII, 2051 (Livingston); 2033 (Smith); II, 466 (Smilie).

⁷⁸ Ibid., XXII, 1922 (Smith); II, 385 (Smilie).

⁷⁹ Cornell, *The Other Founders*, 64.

forget that I am an American.” James Wilson agreed: “I consider the people of the United States, as forming one great community, and I consider the people of the different States, as forming communities again on a lesser scale.” Unless this double view of the people was recognized, he concluded, the constitution could never be understood.⁸⁰

Few opponents were convinced by this, however, and demanded that additional safe-guards against Congressional overreach be added to the constitution. The call for amendments in the form of a bill of rights was taken up, particularly in the Virginia convention. James Monroe admitted he was in favor of a firm central government, but argued that it could only be trusted not to “endanger our liberties” if, like the Virginia constitution, the United States constitution would be “guarded and checked by a Bill of Rights.” George Mason, who had drafted the Virginia Bill of Rights, wholeheartedly agreed and added that he only asked for “such amendments as will point out what powers are reserved to the State governments, and clearly discriminate between them, and those which are given to the general government, so as to prevent future disputes and clashing of interests.”⁸¹

The debate on a bill of rights seriously put the supporters on the defensive. Many of them openly admitted that the constitution was flawed—though they could not see how a better one could be written under the circumstances—and therefore sympathized with the idea of a bill of rights. The Continental Congress, of course, had not resolved the question which left it up to the individual States to determine whether amendments could be proposed. And, as some opponents pointed out, if the people were the fountain of all power in the union, surely the convention, as its representative, had the right to amend the constitution. “We are convened in right of the people,” Massachusetts delegate Charles Jarvis pointed out, so: “if we have a right to receive or reject the constitution, surely we have an equal authority to determine in what way this right shall be exercised.”⁸² This left the supporters with little more than the argument that the only proper means of amendment was through Article V of the constitution, i.e. after it was adopted. Otherwise, they argued, each State would adopt a different version of the constitution and all were at loss which one was binding.

Surprisingly, this argument worked. All eight States that adopted amendments—the list would exceed two hundred alterations—made them unconditional of ratification. The content of the amendments will be discussed in the next section, for now it is important to point out that this meant that for many opponents, the decision to ratify the constitution had turned into a vote of confidence in the future Congress to adopt their amendments. Decades ago, Cecilia Kenyon portrayed the opponents as “men of little faith,” whose fear of losing local prestige and power led them to vote against

⁸⁰ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, IX, 995, 996 (Madison); 1074 (Lee); II, 472 (Wilson).

⁸¹ *Ibid.*, IX, 1112 (Monroe); 1162 (Mason).

⁸² *Ibid.*, VI, 1424.

ratification.⁸³ Recent scholarship may have rehabilitated the opponents as co-founders of the republic,⁸⁴ but it cannot be denied that in telling their adversaries to ratify the constitution with the promise of future amendments, the supporters were asking them to take a leap of faith. It is hard to say why some opponents chose to make the leap while others did not, but a lack of faith in the unprecedented constitution that would leave two masters in charge of the same house certainly played a part in it.⁸⁵

The advocates believed that the end of a strong union was worth the sacrifice of State sovereignty. According to Massachusetts delegate Fisher Ames “The union is the vital sap that nourishes the tree. If we reject the constitution, to use the language of the country, we girdle the tree, its leaves will wither, its branches drop off, and the moldering trunk will be torn down by the tempest.”⁸⁶ This is not to say that the supporters of the constitution found no fault with it, but simply that they considered any union better than none at all. Charles Turner argued that he never expected to see “a constitution free from imperfections,” but taking into consideration “the great diversity of local interests, views and habits [and] the unparalleled variety of sentiments among the citizens of the United States, I despair of obtaining a more perfect constitution than the present.” John Hancock, the president of the Massachusetts convention, had opposed the constitution at first, but now supported it on the basis of the same reasoning. The constitution, he argued, had defects because it represented “an entire union of sentiments” rather than just his own, but argued that the delegates could at least agree that a union was: “indispensably necessary to save our country from ruin” and therefore supported the constitution.⁸⁷

For other opponents of the constitution, the flaws were too many to vote in favor. Patrick Henry’s priorities, for example were the inverse of those of Hancock. “The first thing I have at heart is American liberty,” he said: “the second thing is American Union” In similar vein, George Mason said: “I hope that it is not to the name, but to the blessings of Union that we are attached.” He continued: “the security of our liberty and happiness is the object we ought to have in view in wishing to establish the Union. If instead of securing these, we endanger them, the name of Union will be but a trivial consolation.” Lansing too, concluded that: “however much I may wish to preserve the Union, apprehensions of its dissolution ought not to induce us to submit to any measure, which may involve in its consequences the loss of civil liberty.”⁸⁸ In the end, these men voted against the constitution, but they proved unable to stop its adoption.

⁸³ Cecelia M. Kenyon, “Men of Little Faith: The Anti-Federalists on the Nature of Representative Government,” *The William and Mary Quarterly* 12, no. 1 (January 1955): 4–43.

⁸⁴ See in particular: Storing, *What the Anti-Federalists Were For*, 6; Cornell, *The Other Founders*.

⁸⁵ Davis, *The Federal Principle*, 109.

⁸⁶ Jensen, Kaminski, and Saladino, *Documentary History of Ratification*, VI, 1447.

⁸⁷ *Ibid.*, VI, 1471 (Turner); 1475–1476 (Hancock).

⁸⁸ *Ibid.*, X, 962 (Henry); 1160–1161 (Mason); XXII, 1707 (Lansing).

The ratification debates illustrate how the myth that the Constitution was an act of the people was a born out of a rhetorical constraint. Patrick Henry's objection that the preamble constituted an illegal and unconstitutional usurpation of powers that only the States—as the proper agents of the Confederation—could renounce was brushed aside by supporters who claimed that the authority of the people was fettered by nothing. Crucial in this line of reasoning was the idea that the Constitution formed the act of and by the people and the conventions the bodies through which “we the people” acted. That the supporters pulled this off was largely due to the fact that no one in the debate questioned the authority of the people to dispose of one government and institute a new one in its place.

This, of course, had been the crucial syllogism underlying the Declaration of Independence twelve years earlier, and the supporters of the constitution now cleverly employed in the ratification debate. It was the *liaison* between this revolutionary principle in 1776 that was applied to the ratification debates of the late 1780s. If the people of each colony possessed the right to replace their government in the past, the argument ran, then the same was true for the United States people in the present. The *liaison*, of course, rested on the prior assumption that there existed such an entity as the “people of the United States,” but this crucial point was never challenged by the opponents in the debate. Thus, the Constitution could paradoxically be presented as both created by “we the people” as well as creating “we the people.” The closest the opponents came was when Patrick Henry argued that the States, not the people, were the proper agents to found a new union. He too, however, did not deny the existence of a “people of the United States,” and how could he, when he was one of the first to claim to be an American back in 1765. The fact that his constitutive rhetoric was now used against him is telling of the flight that the concept of an American people had taken in the intermediate decade.

Once the opponents conceded that they formed “we the people of the United States” this allowed the supporters to use this against them in every subsequent debate. Whether the objections concerned representation or federalism, the supporters constantly dissociated the *old reality* of assuming that the United States still formed only a union of States from the *new reality* that it formed a union of the people as well. By stressing “local prejudices” and the impossibility of putting two masters in charge of the same house, the supporters argued that their adversaries were clinging to outdated ideas to criticize their new patchwork solutions. What remained entirely unclear, however, was how the United States could form both one and thirteen peoples as the same time. “We the people,” in other words, remained paradoxical concept in which everyone could read what they wanted. In this sense, the ratification of the constitution did not mean that any consensus on its meaning was reached. In fact, the debates on representation (whether the House represented the peoples of the States or of America) and federalism (what would happen if the views of one State clashed with those of the union?) each demonstrated that

the answer to the question “who are we?” was still essentially contested. The debate on the true identity of America, in other words, had only just begun.

Supplementing “the act of the people:” the debate on the Bill of Rights

When the first United States Congress elected under the now ratified Constitution convened in New York’s Federal Hall on Wall Street on March 4, 1789, many of its 81 members were already well acquainted. In the House the former members of the Convention, James Madison, Roger Sherman, Elbridge Gerry, and others would continue their discussion on the Constitution, and in the Senate the same was true for Oliver Ellsworth, George Read, and Pierce Butler. The first elections put a strong majority of former supporters of the Constitution in place that would soon start to call themselves the Federalist Party. A small minority of former opponents—who would start calling themselves Democratic-Republicans—had also obtained seats and would constantly remind the Federalists that, even though the Constitution was ratified, many States still demanded the addition of a bill of rights.⁸⁹ The Federalists’ handling of the broad call for a bill of rights was the first test to keep the diverse parties who stood at the cradle of the patchwork republic aboard.

Three months after Congress first convened, James Madison began a tireless campaign to supplement the Constitution with a bill of rights. At the end of this campaign, in December 1791, ten amendments had been added to the Constitution, which constituted the single greatest addition in the United States constitutional history. Moreover, since only two other amendments were added until the outbreak of the Civil War, the Bill of Rights entailed the lion’s share of the changes adopted to the Constitution during the period covered by this study. The debate on the Bill of Rights provided the first opportunity for the new Congress to reflect on the Constitution and gave rise to a number of interesting debates relating to the position of the Constitution as the act of the people and the position of House representatives as both assembly of one people and its thirteen separate peoples.

The debate on a Bill of Rights was the direct result of the demands made in some of the convention during the ratification debates. At the end of the summer of 1788 eleven States had ratified the Constitution, leaving only North Carolina and Rhode Island outside the new union. More than half of the States that had ratified the Constitution had committed their future delegates to Congress to “exert all their influence and use all reasonable and legal means” to obtain ratification of the proposed amendments to the

⁸⁹ Elkins and McKittrick identify 11 representatives and 2 senators as opponents to the Constitution, *The Age of Federalism* (New York: Oxford University Press, 1993), 32–33.

Constitution.⁹⁰ Together these conventions produced more than a two hundred revisions to the Constitution, ranging from the right to assembly to an increase in the number of House representatives. In their lists of demands, the ratification conventions made no distinction between civil rights of private citizens and what can be termed the political rights of States. In the minds of the opponents of the Constitution, both were connected: the limits on federal government served to protect individual liberty.⁹¹ For example, the wish to deny the federal government the right to raise a standing army was believed to protect private citizens from military tyranny.

The push for additional amendments to the Constitution in the House came from James Madison who, if only the stepfather of the Constitution, can justly be said to have fathered Bill of Rights. Madison was an unlikely advocate for the project, as he had strenuously opposed it in Virginia's ratification convention. His sudden change of mind was the result of a promise to his constituents to introduce a bill of rights in order to secure his election to the House.⁹² Madison himself explained his change of heart as a matter of timing.⁹³ A second glance, however, reveals that Madison's conversion from a strenuous opponent to a strong supporter of a bill of rights coincided with growing efforts of the opponents of the Constitution to push for a second convention to revise the Constitution. Article V of the Constitution allowed for a bottom-up procedure in which two-thirds of the States could install a convention to amend the Constitution. On May 5, 1789, a resolution was submitted to the House calling for: "a convention (...) with full power to take into their consideration the defects of this Constitution (...) and report such amendments thereto as they shall find best suited to promote our common interests."⁹⁴ The very next day a similar application from New York was submitted.⁹⁵ The support for a second convention was clearly growing and if Madison wanted to obtain amendments on his own terms, he could not wait indefinitely to act. The draft bill of rights that he sought to present a month later must be seen first and foremost as an attempt to curb this movement for a second convention.⁹⁶

Madison realized he would have a hard time getting the House's attention for his plan. On June 8, in the middle of a debate on the collection of revenue on trade, Madison

⁹⁰ These states were: Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, and New York, see: Bernard Schwartz, *The Bill of Rights: A Documentary History* (New York: Chelsea House Publishers, 1971), II, 713, 735, 757, 845, 914–915.

⁹¹ Cornell, *The Other Founders*, 33.

⁹² Madison ran in Spotsylvania county, whose delegates to the ratification convention, James Monroe and John Dawson, both voted against the Constitution. Monroe was also Madison's contender for the seat in the House.

⁹³ See his letter to a resident in Spotsylvania Country in: Hutchinson, Rachal, and Rutland, *Papers of James Madison*, XI, 428.

⁹⁴ *Journal of the House of Representatives of the United States* (Washington, n.d.), 29.

⁹⁵ Joseph Gales, ed., *Annals of Congress* (Washington: Gales and Seaton, 1834), I, 260. *Journal of the House of Representatives of the United States*, I, 30.

⁹⁶ Robert A Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* (Washington, D.C.: AEI Press, 1997), 78.

mounted the House's rostrum to propose his plan for a bill of rights. By means of this plan, he said "our constituents may see we pay a proper attention to a subject they have much at heart."⁹⁷ In his speech, Madison emphasized how it could help to suppress the new movement for a second convention. A bill of rights, Madison said: "will render it [the Constitution] as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them," and would "give satisfaction to the doubting part of our fellow-citizens" by demonstrating that friends of the Constitution were "sincerely devoted to liberty and a republican government."⁹⁸ The bill of rights, in other words, would function as a beacon which would rally the reluctant part of the people to the Constitution. Having secured the interest of the House, Madison's next hurdle was to distinguish these "doubting fellow citizens," from the opposition ringleaders, who aimed at structural changes to the Constitution:

"There is a great body of the people falling under this description, who at present feel much inclined to join their support to the cause of Federalism, if they were satisfied on this one point. We ought not to disregard their inclination, but (...) conform to their wishes, and expressly declare the great rights of mankind secured under this Constitution (...) There have been objections of various kinds made against the Constitution. Some were leveled against its structure (...) but I believe that the great mass of the people who opposed it disliked it because it did not contain effectual provisions against the encroachment on particular rights."⁹⁹

By separating a minority obsessed with *structural revision* to the Constitution (which would actually change its meaning) from a majority in favor of amendments in the form of a *bill of rights* (which would merely make explicit what was already implied) Madison legitimized his total neglect the first in favor of the latter:¹⁰⁰

"If we can make the Constitution better in the opinion of those who are opposed to it, without weakening its frame or abridging its usefulness, in the judgment of those who are attached to it, we act the part of wise and liberal men to make such alterations."¹⁰¹

This was a shrewd move. After all, the House of Representatives consisted mainly of supporters of the Constitution for whom structural revisions were taboo.¹⁰² By merely seeking to make explicit what was already in the Constitution, Madison's plan remained acceptable to the House while at the same time stealing the opposition's thunder. The single issue that united the opponents of Constitution after ratification was the lack of a

⁹⁷ Gales, *Annals of Congress*, 1834, I, 444.

⁹⁸ *Ibid.*, I, 448–449.

⁹⁹ *Ibid.*, I, 449–450.

¹⁰⁰ Goldwin, *From Parchment to Power*, 69, 81.

¹⁰¹ Gales, *Annals of Congress*, 1834, I, 459.

¹⁰² Goldwin, *From Parchment to Power*, 82.

bill of rights. His plan, Madison boasted: “will kill the opposition, everywhere, and by putting an end to disaffection to the government itself.”¹⁰³ Madison’s aim with the amendments, then, was not to revise the meaning of the Constitution, but to rally the former opponents behind the new union. Madison wanted his bill of rights to make the Constitution acceptable for that part of “we the people” that had opposed it in the ratification conventions.

The amendments that Madison presented consisted of a list of additions and clarifications that would be edited directly in the original text at nine different places. The bulk was made by civil rights that today can be identified as the core of the Bill of Rights and that were to be added to the ninth section of the first article that dealt with the limits on Congress’ power. It included freedom of speech, freedom of conscience, the right to bear arms, the right to a fair trial by jury, the freedom from searches and from quartering of troops, and more.¹⁰⁴ All these rights had been championed in the State convention, but Madison was careful to select only those amendments that did not “weaken its frame,” i.e. would not affect Congress’ power. More important than what he did adopt, it follows, is what Madison chose to leave outside his draft bill of rights because it could affect the power of the new government. Excluded from the list were calls for to prohibit or restrict the levy of direct taxes, to forbid the formation of a standing army, and to restrict the jurisdiction of the Supreme Court. All of the nine articles that he proposed were *additions* to the Constitution, rather than *revisions*.

As a result of Madison’s one-sided selection of civil rights, however, many of former supporters of a bill of rights now turned against the project. By excluding every provision that would limit the power of the national government, Madison brought on himself the opposition of former opponents of the Constitution. When it became apparent that Madison’s amendments would change nothing to the consolidating tendencies of the Constitution, the former supporters began to vote for amendments, while the former opponents, who had campaigned so vigorously for a bill of rights, voted against them.¹⁰⁵ Elbridge Gerry declared that, if the House failed to consider the revisionary amendments made by the States, he would make a motion for taking them up.¹⁰⁶ Gerry’s motion naturally jeopardized Madison’s convenient disregard for amendments that would actually change the meaning of the Constitution, and was a resolute attempt to extend the debate to the structural amendments made in the State conventions. “What will these States feel,” Gerry asked: “if the subject is discussed in a select committee and their recommendations [are] totally neglected?” If the House failed to address all the State amendments, Gerry argued, it would achieve the opposite of what Madison had in mind and give the States: “no small occasion for disgust.”¹⁰⁷

¹⁰³ Madison to Richard Peters, Hutchinson, Rachal, and Rutland, *Papers of James Madison*, XII, 347.

¹⁰⁴ Gales, *Annals of Congress*, 1834, I, 451–453.

¹⁰⁵ Goldwin, *From Parchment to Power*, 90–91.

¹⁰⁶ Gerry makes three of such demands: on 21 July (687), August 15 (768) and August 18 (786).

¹⁰⁷ Gales, *Annals of Congress*, 1834, I, 687.

This caused serious commotion among the representatives. Gerry's colleague from Massachusetts, Fisher Ames, opposed the motion because it would result in a reconsideration of the entire text, which would turn the House into a new constitutional convention. He feared it would submit the government to "another ordeal," because the new amendments would be introduced to: "tear the frame of government to pieces." This, he argued: "would be like a dissection of the Constitution, it would be defacing its symmetry, laying bare its sinews and tendons, ripping up the whole form, and tearing out its vitals." To this, Gerry simply replied by asking if the representatives were: "afraid to meet the public ear on this topic? Do they wish to shut the gallery doors?" "Let us not be afraid," he said "of full and public investigation."¹⁰⁸ When the motion was brought up to close the debate and to refer the proposal to a select committee, it was carried with 34 votes against 15. The majority of the House clearly did not want to jeopardize the compromises in the Constitution by opening the debate to revisions, and preferred to fix the content of the bill of rights behind closed doors. Madison led the committee, which consisted almost entirely of supporters of the Constitution, and the draft it presented to the House on July 28 did not differ much from the original proposal.¹⁰⁹

Throughout the debate in the House, a majority of the members saw to it that the discussion remained limited to civil rights. Despite repeated attempts by Gerry and others to extend the debate to structural revisions of the Constitution—like a term restriction for Representatives and annual election of senators—the Federalist majority time and again succeeded in keeping the debate from turning into a genuine criticism and reflection on the framework of government in the Constitution.¹¹⁰ Confident of speaking for the majority, Madison dryly pointed out that there was no place for motion seeking to "change the principles of the government" as there was "little prospect" of obtaining the support of the House or three-fourths of the States for them.¹¹¹

Even without additional revisions, however, the debate on the draft bill of rights gave rise to a number of interesting debates on the Constitution. The first of these addressed the *form* of making amendments, rather than their content. It was instigated by Connecticut representative Roger Sherman, who questioned the appropriateness of inserting the changes directly into text, rather than adding them as supplements at the end. "It is questionable," he argued:

"whether we have a right to propose amendments in this way. *The Constitution is the act of the people*, and ought to remain entire. But the amendments will be the act of the State government. All the authority we possess is derived from that instrument; if we mean to

¹⁰⁸ Ibid., I, 688–690.

¹⁰⁹ This draft is not printed in the Annals of Congress but can be found in: Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* (Saint Paul: West Pub. Co, 1990), 433–434.

¹¹⁰ See: Joseph Gales, ed., *Annals of Congress* (Washington D.C., 1834), I, 687, 768, 786 (Gerry on July 21, August 15, and 18); 790–791 (Tucker on August 18); 797 (Burke on August 21).

¹¹¹ Gales, *Annals of Congress*, 1834, I, 775.

destroy the whole, and establish a new Constitution, we remove the basis on which we mean to build.”¹¹²

The original “act of the people” should stand apart from the subsequent, presumably less authoritative amendments so that it would forever remain clear what the people had approved. To mix the two would be like putting the government on the same footing as the sovereign people which, according to Sherman, was: “destructive to the whole fabric.”¹¹³ Sherman’s point was that, since the Constitution was the act of the people, only the people could change the original text, and Congress could only add amendments.¹¹⁴ At first glance this seemed a debate on form. After all there was no qualitative difference between amendments placed within the document or at the bottom of it as it would be equally valid in both cases. A closer look, however, reveals that the interesting point here was the interpretation of the Constitution as the *act of the people*. This idea, already suggested by the opening words “we the people,” was now invoked to confer a different status and authority to the original text, which was the genuine “act of the people,” as opposed to the later amendments, which were supplemented by the government and could not claim to come from the people.

In making this distinction, Sherman reinforced the myth that the ratification conventions had actually constituted “we the people of the United States,” even though they consisted elected delegates, just like those in the House of Representatives. By insisting that the original “act of the people” should not be contaminated with the lesser acts of the States, Sherman reinforced this myth, first established by Morris in the Philadelphia Convention, that it was “we the people” that had written and ordained the Constitution for the United States. By virtue of this method, Pennsylvania representative George Clymer insisted, the Constitution: “will remain a monument to justify those who made it; by a comparison, the world will discover the perfection of the original, and the superfluity of the amendments.”¹¹⁵

The House spent considerable time debating this issue; itself already a clear sign that it considered it more than a matter of form. It turned out the House was divided by Sherman’s motion, and some members feared that adding the amendments at the bottom of the Constitution instead of in the text would make the document incomprehensible. Delaware representative John Vining was afraid that subsequent amendments would read as: “an act entitled an act to amend a supplement to an act entitled an act for altering part of an act entitled an act for certain purposes therein mentioned.” Elbridge Gerry also feared that Sherman’s motion would: “[wrap] the Constitution in a maze of perplexity,”

¹¹² Ibid., I, 735 my emphasis.

¹¹³ Ibid., I, 734–735; see also representative Livermore from New Hampshire, who makes the same point based on the fact that Congress derives its power from the people through the Constitution, on 736.

¹¹⁴ See also Maryland delegate Michael Stone: “the constitution of the Union has been ratified and established by the people; let their act remain inviolable,” on: Gales, *Annals of Congress*, 1834, 742.

¹¹⁵ Gales, *Annals of Congress*, 1834, I, 742, 737.

after which it would: “take a week or a fortnight study to ascertain the true meaning of the Constitution.” More importantly, Gerry also criticized Sherman’s motion for granting an aura of sacredness to the Constitution: “I am not one of those blind admirers of this system, who thinks it all perfection; nor am I so blind to see its beauties (...) in it is blended virtue and vice, error and excellence.” He denied that the changes proposed by the House would have a different status than the original, claiming that: “the legislatures [of the States] are elected by the people. I know no difference between them and [ratification] conventions.”¹¹⁶

There were also many members of the House who readily accepted the fiction that the Constitution was the act of “we the people.” Representative Samuel Livermore from New Hampshire, for example, shared Sherman’s view that the authority of the House was subordinate to that of “we the people.” “We are a mere Legislative body,” he argued, and the amendments adopted by the House: “ought to stand separate from the original instrument.” James Jackson of Georgia also argued that the special character of the Constitution also set it apart from House legislation. He believed that: “the Constitution of the Union has been ratified and established by the people; let their act remain inviolable.”¹¹⁷

When Sherman’s motion was brought up for vote it was defeated before it was finally adopted, a week later.¹¹⁸ What exactly proved to be the winning argument is hard to say, as the second debate on the motion was not recorded. The important point with regard to the identity of the polity is that Sherman speech was one of the first to identify the Constitution as the timeless, sacred act of “we the people of the United States.” It declared the original text of the Constitution as whole, near perfect, and outside the reach of Congress. This was a very different tone than the widespread criticism of the Constitution as a flawed document during the ratification debates. In this sense, the debate on Sherman’s motion was at the root of the sacralization of the United States Constitution. By adopting Sherman’s motion, Congress reinforced the interpretation of the preamble as constituting the United States into one, single American people. The consequences this could have are illustrated by a second interesting debate.

This debate dealt with what would eventually become the First Amendment, which protected, among other things, the freedom of speech. The debate took a sudden turn when South Carolina Representative Thomas Tucker moved to add to the proposed rights of free speech and assembly the right of the people to instruct their representatives.¹¹⁹ Tucker’s motion challenged the idea that the members of the House were supposed to represent the interest of both their constituents and the people as a whole at the same time.¹²⁰ During the ratification debates, the supporters had argued that

¹¹⁶ Ibid., I, 737 (Vinning); 739, 462, 743–744 (Gerry).

¹¹⁷ Ibid., I, 736, 742.

¹¹⁸ Ibid., I, 744, 795.

¹¹⁹ Ibid., I, 761.

¹²⁰ Morgan, *Inventing the People*, 14–15 and more generally chapter 9.

members of the House would represent the entire American people, and Tucker's motion threatened once again to reduce the representatives to mouthpieces of the States. The Federalists in the House were determined, therefore, to reject Tucker's motion.

Those who supported the motion presented it as the logical outcome of the theory of popular sovereignty. "The friends and patrons of this Constitution," Gerry argued: "have always declared that the sovereignty resides in the people, and that they do not part with it on any occasion." Therefore, Gerry concluded: "to say the sovereignty vests in the people, and that they have not a right to instruct and control their representatives, is absurd to the last degree." Instructions, according to Gerry, were the perfect method to keep a representative sensitive to his constituents' wishes. "We cannot," he said: "be too well informed of the true state, condition, and sentiment of our constituents, and perhaps this is the best mode in our power of obtaining information." Underlying this view was the idea that the constituents were actually a better judge of their interest than those who represented them, for, as Gerry said: "I hope we shall never presume to think that all the wisdom of this country is concentrated within the walls of this House."¹²¹

On the other side of the aisle men like Massachusetts representative Theodore Sedgwick insisted that this problem belonged to the past now, as: "we stand not here the representatives of the State legislatures, as under the former Congress, but as the *representatives of the great body of the people*," and claimed: "I consider myself as the representative of the whole Union." For Sedgwick and his supporters, the Constitution had turned the States into one, single people whose interest should be the sole subject of debate. As Thomas Hartley of Pennsylvania pointed out "the great end of meeting is to consult for the common good." Local instruction, he added, frustrated the debate on the common good, rather than aiding it. This was also the opinion of George Clymer who argued that: "when the people have chosen a representative, it is his duty to meet other from the different parts of the Union, and consult, and agree with them to such acts as are for the general benefit of the whole community. If they were to be guided by instructions, there would be no use in deliberation." Therefore, he argued: "the right of the people to consult for the common good can go no further than to petition."¹²²

The debate on Tucker's motion once again illustrates how contested the notion that the United States now formed one American people was. The patchwork solution devised in Philadelphia assumed that the House would represent the United States as a single people, but the supporters of Tucker's motion continued to assume that the Representatives' first priority was still to their constituents in their home-State. In their eyes, the right to instruct delegates was the essence of democracy, for as Virginia Representative John Page pointed out: "under a democracy, whose great end is to form a code of laws congenial with the public sentiment, the popular opinion ought to be

¹²¹ Gales, *Annals of Congress*, 1834, I, 762–765.

¹²² *Ibid.*, I, 771, 761–762, 763–764.

collected and attended to.”¹²³ For the opponents of instructions, however, the United States now formed one, single American people and representing the “general benefit of the whole community” was more important than that of its parts. Thus, whereas the former considered themselves primarily as representatives of the American people, the latter regarded themselves first and foremost as spokesmen for their constituents.

The debate on instructions demonstrated a fundamental difference between the Federalists and the opposition with regard to the role of “we the people” under the Constitution. Whereas Gerry assumed that the people would continue to guide its Representatives on how the Constitution had to be interpreted, Madison argued that its moment had passed. “My idea of the sovereignty of the people,” Madison pointed out “is that the people can change the Constitution if they please; but while the Constitution exists, they must conform themselves to its dictates.” The people, in other words, had played its part in ratifying the Constitution, but were now bound by it. This was also greeted by jeers of derision from Gerry, who criticized the idea that: “sovereignty existed in the people previous to the establishment of this government.” If this was true, he said “this will be ground for alarm (...) but I trust too much to the good sense of my fellow-citizens ever to believe that the doctrine will generally obtain in this country of freedom.”¹²⁴ In the end, Tucker’s motion was defeated by a large majority, but it had sparked a controversy that would continue to haunt Congress in future debates on the true meaning of the patchwork Constitution.

The final version of the bill of rights, containing twelve amendments, passed the House on August 24, 1789, and was taken up in the Senate the next month. Little is known about the debates in the Senate as it convened behind closed doors. The journals of the Senate show that the former opponents of the Constitution tried to add amendments to the bill similar to those proposed by Gerry and Tucker in the House. A motion to enlarge the House failed to obtain support, as did a motion to limit direct taxation and to add “expressly” to the tenth amendment.¹²⁵ The bill of rights finally passed the Senate without significant changes on September 8, 1789. President Washington officially transmitted the twelve proposed amendments to the States on October 2 of that same year. Like the debate in the Senate, that of the ratification of the bill of rights in the States is equally difficult to reconstruct as none of the State legislatures kept any records of the debates.¹²⁶ In December 1791, the ten amendments of the Bill of Rights officially became part of the Constitution when Virginia became the eleventh State to ratify them.

In conclusion, the debate on the Bill of Rights, two important conclusions can be drawn. First, the support for Sherman’s motion to make amendments “supplements” to the

¹²³ Gales, *Annals of Congress*, 1834, I, 762.

¹²⁴ Gales, *Annals of Congress*, 1834, I, 767, 769.

¹²⁵ *Journal of the Senate of the United States of America* (Washington, D.C.: United States government printing office, n.d.), I, 70, 72–73.

¹²⁶ Farber and Sherry, *A History of the American Constitution*, 243.

Constitution demonstrates how widespread the idea that it formed the “act of the people” was. Second, the debate on Tucker’s motion to grant the people the right to instruct their representatives immediately illustrated that the members of Congress entertained very different views of what was to be understood by “we the people.” Cloaked in the language of popular sovereignty and democracy, the advocates of instructions argued that the members in the House were still representatives of their States first, and of the nation second. Moreover, by claiming the right to continue to instruct their agents, Gerry and his supporters were claiming an active role for the people in the future interpretation of the Constitution. The opponents of Tucker’s motion, Madison in front, insisted that the members of the House represented the American people, rather than the States, and denied that it could make itself heard outside its representatives. Thus, the conflict over Tucker’s motion illustrated, the debate on the “true” identity of the polity—i.e. what it meant to be American—was far from over. The Constitution, in other words, had done little more than solidify a debate that was immediately resumed once it had been ratified.

Conclusion

The ratification of the Constitution filled its supporters with euphoria. Benjamin Rush, for example, exclaimed: “tis done! We have become a nation.”¹²⁷ As the analysis of the debates in this chapter illustrates, this was premature. The successful ratification of the Constitution all but silenced the debate on its true meaning. In fact, the debates on whether the United States could be governed as one people and how this could be done illustrated how little consensus there was among the participants. The debate on the Bill of Rights too demonstrated that, the moment the Constitution became of force, its true meaning was disputed and its opponents organized to replace it. In short, even before the constitution became the supreme law of the land, its meaning was already contested. In this sense, ratification was not the end of the debate on the Constitution, but a taste of what was to come.

This again illustrates the hinge function that the debates on ratification had: it was essential in establishing the Constitution as the supreme law of the land and at the same time formed a first discussion between the many different interpretations to which it gave rise. In the case of the debate on representation and federalism, the disputes in the ratification conventions would continue to engage the very first United States Congress when it discussed the need for a bill of rights. Yet, by far the most interesting debate from the point of view of the identity of the polity was that on the mandate of “we the people” to erect a new union. Here, it turned out that the true identity of the United States was highly contested and the meaning of the patchwork union still remained to be settled. In the end, the supporters not only secured the ratification of the Constitution by portraying

¹²⁷ Quoted in: Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution*, 207.

it as both authored by the people as well as creating it, but also planted the seed for the myth that it was the “act of the people.”

The fact that many opponents chose to ratify the Constitution despite their reservations, meant that they did not yet consider the debate on what kind of polity it would establish as over. Since the Constitution was a patchwork of two visions on the United States, the debate on which one would prevail was only just begun. What kind of polity America would become would depend on how future generations would resolve the constitutional conflicts to which the Constitution would give rise. John Mercer already understood this back in August 1787, “It is a great mistake to suppose that the paper we are to propose will govern the United States. It is the men whom it will bring into the government and interest in maintaining it that is to govern them. The paper will only mark out the mode & the form—men are the substance and must do the business.”¹²⁸

¹²⁸ Farrand, *Records of the Federal Convention*, II, 289.

Chapter 5

Renegotiating the Patchwork

Ratification of the Constitution did not mean the end to the debate on the identity of the polity. The question who “we the people of the United States” constituted—either one people or several—was as contested after as before ratification. The patchwork nature of the Constitution provided ammunition for both interpretations, which explains why narratives continued to play a prominent role in these debates. Whether intentionally or not, the speakers in these debates shaped Congress’ view of what the “true” identity of the polity was and how it should act to affirm that identity. This resulted in different answer to the question who “we the people of the United States” were—including the flat denial that such an entity even existed.

The period covered in this chapter roughly coincides with what historians term the First Party System in United States which lasted from 1789 to 1824. The two political factions that dominated this period were the elitist and commercial-orientated Federalists and the more egalitarian, agricultural-minded Democratic-Republicans.¹ Since the Federalists were the heirs of the advocates in the ratification debates, their program was to use the integrative potential of the Constitution to strengthen the grip of Congress over the States. The Republicans, on the other hand, formed a new coalition of former opponents as well as advocates who opposed further centralization. Each side, it is important to note, portrayed the Constitution as favoring their vision for the Union. Despite the stinging criticism in the ratification debates, however, no Anti-Constitution party emerged after ratification.² One reason for this was that the Bill of Rights—even though it failed to address the structural objections of most opponents—robbed the opponents of rallying point and undermined their hopes for a second convention.³ More important, however, was that the Constitution provided the supporters of limited government ample ammunition to stop centralization. Because it was not simply a “national” plan but a patchwork, many of the former opponents believed they could protect their local interests more effectively by resting their case on the Constitution,

¹ It is important to note that the Federalists and Republicans did not constitute political parties in the modern sense of the word, but rather state-centered organizations that formed a loose coalition on the national level, see: Elkins and McKittrick, *Age of Federalism*, 515.

² Cornell, *The Other Founders*, 170; Lance Banning, “Republican Ideology and the Triumph of the Constitution, 1789 to 1793,” *The William and Mary Quarterly* 31, no. 2 (April 1, 1974): 167–168. According to Banning: “the quick apotheosis of the American Constitution was a phenomenon without parallel in the western world. Nowhere has fundamental constitutional change been accepted with so much ease.”

³ Cornell, *The Other Founders*, 170.

rather than by challenging the legitimacy of that document. As a result, the conflicts between the Federalists and Republicans did not concern the desirability, but the “true” meaning of the Constitution.

The debates discussed below share that they challenged the patchwork foundation of the union. At the center of each is the allocation of power between Congress and the States. The Constitution, as the members of Congress soon realized, only provided rough guidelines for establishing where a certain competence lay and, more often than not, was open to differing and mutually exclusive interpretations. In such cases, the members of Congress invariably employed a rhetorical arsenal to demonstrate that their interpretation was the only one in line with the “true” identity of the polity. What further characterizes the debates in this chapter is the recurring question whether “the people” had a continuing role to play in the polity after ratification. Tied to this question was the interesting and highly contested question who got to say what the Constitution actually meant. This is why, apart from the early debates in Congress, this chapter will also focus on the Supreme Court as an arena where the identity of the polity is shaped.

The value of Union: the debate on the National Bank

The first federal elections of 1788 placed the control of Congress and the Presidency in the hands of the Federalist Party. To head the new government, George Washington was unanimously elected the United States’ first President, with John Adams serving as Vice-President. His reputation as a retired military hero made Washington acceptable to both advocates and opponents of the Constitution, and a unitary figure, a man who stood above the parties and thus symbolized the union.⁴ Washington believed that the role of the President was to execute laws, and not to make them.⁵ As a result, he left actual policy making to his Secretaries: Henry Knox of War, Thomas Jefferson of State, and—above all—of the Treasury: Alexander Hamilton.

Alexander Hamilton, the closest confidant of Washington and also the most ambitious. Now that the Constitution had been ratified, Hamilton felt its success rested on a return from turmoil to order. If the new framework of government was to succeed where the Confederation had failed, Hamilton thought, it would have to cease its dependence on the States for its revenue and payment of the debt. Hamilton’s financial vision for the United States combined these two goals. By stimulating investors to buy U.S. bonds, the moneyed class would literally become interested in the prosperity of the union, while at the same time providing the government with an independent source of

⁴ Joseph J. Ellis, *His Excellency: George Washington* (New York: Alfred A. Knopf, 2004), 184.

⁵ Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford: Oxford University Press, 2009), 65, 86.

income. The cornerstone of Hamilton's plan was the creation of a National Bank which would supervise the issuing of bonds and secure U.S. credit by auditing the State banks.⁶

This novel idea could not count on everyone's support. Few creditors lived below the Mason-Dixon Line, which was dominated by an agricultural economy of farmers and planters. Many Southerners mistrusted the Bank as a means to concentrate power and money in the hands of wealthy elites.⁷ Their fear of a common enemy in the shape of Hamilton drove many former supporters of the Constitution wary of centralization in the hands of former opponents who saw their fears of a consolidated republic justified in Hamilton's plan.⁸ Led by none other than Thomas Jefferson and James Madison, these men would soon organize themselves in the Democratic-Republican Party. United by their strict interpretation of the Constitution, they argued they were the true supporters of the idea of limited government.

Though the opposition's objections to the Bank primarily stemmed from its supposed anti-agrarian and anti-republican tendencies, they framed their objections in strict constitutional terms. Their argument, in other words, was not simply that the Bank was dangerous, but that it was unconstitutional, since the Constitution did not provide the government with the necessary power to authorize the creation of banks. Historians disagree over whether these constitutional concerns were genuine or not,⁹ but they miss the more important point that, by resting their case on the Constitution, many of the former opponents during the ratification debates now embraced it as the source of their political convictions.¹⁰ Despite their earlier reservations, these men now joined advocates like Madison and Jefferson in arguing that the Constitution embodied the political principles of liberty that they held so dear and even served as its safeguard. In doing so, they no longer objected to the Constitution itself, but to the "false" interpretations of it.

The opposition in the House was led by James Madison who delivered a long speech on February 2, 1791, arguing that the House lacked the constitutional powers to establish a National Bank. The federal nature of the union, Madison argued, was that "powers not being enumerated in the Constitution can never have been meant to be included in it." To claim that the power to establish a National Bank could be inferred from the Constitution was "a forced construction (...) not implied by the Constitution itself," and destroyed this "essential characteristic" of limited government. Hamilton's

⁶ For Hamilton's report on the Bank to Congress see: Gales, *Annals of Congress*, 1834, II, 2082 and further. For his views on finance and the National Bank's place in it see: Elkins and McKittrick, *Age of Federalism*, especially chapter 2. Also: John C. Miller, *The Federalist Era, 1789-1801* (New York: Harper, 1960), 14, 37, 55; Wood, *Empire of Liberty*, 103-105.

⁷ The fact that the Bank would only invest in commercial enterprises and not in the (more risky) land speculation of farmers was seen as a further proof of this Wood, *Empire of Liberty*, 99, 100-101.

⁸ Cornell, *The Other Founders*, 165, 168-169.

⁹ Kenneth R. Bowling, "The Bank Bill, the Capital City, and President Washington," *Capitol Studies* 1 (1972): 5; Benjamin B. Klubes, "The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation," *Journal of the Early Republic* 10, no. 1 (April 1, 1990): 22.

¹⁰ Zarefsky and Gallagher, "From 'Conflict' to 'Constitutional Question,'" 249.

plan, Madison continued, would “interfere with the rights of the States to establish banks on their own.” This meant, Madison concluded, that the bill established a precedent for unconstitutional assumption of power which leveled “all barriers which limit the power of the general government, and protect those of the State governments.” Thus, the Bank bill threatened to “destroy the main characteristic of the Constitution,” and thereby the Constitution itself.¹¹

Madison’s position rested on a strict reading of the Constitution as intended to establish a limited government of enumerated powers. This, Madison argued, was the sense in which the advocates had explained the Constitution during the ratification debates and he read aloud notes of the debates of several State conventions as proof.¹² Moreover, as Madison pointed out, the still pending Tenth Amendment reaffirmed his reading that: “the power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” All these sources demonstrated, according to Madison, that the true meaning of the Constitution was crystal clear: Congress could only exercise power explicitly granted by “we the people” and that all others were retained by the peoples of the States. The very “silence of the Constitution,” he said, condemned the Bank bill and he hoped it would receive its “final condemnation” from the House.¹³

The most outspoken advocate of Hamilton’s plan in the House was Massachusetts Representative and staunch Federalist Fisher Ames. According to Ames, the federal government could “scarcely proceed” without assuming “plainly implied” powers from time to time, as the framers could not be expected to have anticipate all the contingencies the future would bring. “To declare in detail,” Ames said: “everything that government may do cannot be performed, and has never been attempted. It would be endless, useless, and dangerous.” According to Ames, the Constitution was not originally intended to completely fix the future Congress’ freedom to act, but left it to the House to judge its scope. Whether the Bank bill was constitutional, in other words, would be decided by the outcome of the debate in the House, and in this debate, Ames reminded his opponents, Madison’s interpretation of the Constitution was just another opinion.¹⁴

Ames of course believed his position to be the more “reasonable construction” and listed a number of clauses in the Constitution that justified the creation of a National Bank. Most important was the eighth section of the first article, which declared that Congress had the power: “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States.” This so-called “necessary and proper clause,” Ames argued, established the doctrine of “implied powers” and extended

¹¹ Gales, *Annals of Congress*, 1834, II, 1947, 1946, 1951, 1952.

¹² See for this: *Ibid.*, II, 1951.

¹³ *Ibid.*, II, 1947, 1951, 1952.

¹⁴ *Ibid.*, II, 1954–1955, 1958.

Congress' power to regulate trade to include the establishment of a National Bank. Against Madison's criticism that a chain of implied powers would destroy the Constitution, Ames placed the contrary notion that, without implication the Constitution was already a "dead letter." As a rule, Ames argued, "Congress may do what is necessary to the end for which the Constitution was adopted," provided it did not violate the powers prohibited to it or explicitly reserved to the States.¹⁵

As this interchange between Madison and Ames illustrates, both men had a fundamentally different understanding of the original meaning of the Constitution and accused the other of seeking to destroy its "true" purpose. Madison's strict interpretation evoked an image of the Constitution as a fixed contract set in stone. He presented the letter of the Constitution as binding on Congress, which served his aim of preserving the status-quo between the State and federal governments. Ames, on the other hand, argued that it was a "safe rule of action to legislative beyond the letter of the Constitution" and instead relied on its implied "spirit" to defend the Bank bill.¹⁶ It is clear that both sides in the debate relied on a different conception of the spirit of the Constitution to arrive at its "true" meaning.

Since the advocates of the Bank relied on the necessary and proper clause for their position, the only relevant question for them was whether banks were a proper means to achieve the goals for which the union had been erected. This put the identity of the polity at the heart of the debate, since it begged the question what type of polity the founders had sought to create with the Constitution. For this, New Jersey Representative Elias Boudinot relied on the preamble which expressly declared that the purpose of the union was "insurance of domestic tranquility, provision for the common defense, and promotion of the general welfare." By providing the government with loans in times of war and the entrepreneurs with capital in times of peace, Boudinot argued, the National Bank was a "necessary means, without which the end could not be obtained."¹⁷

The opposition was outraged by this. According to Madison, the supporters of the bank invoked the preamble as a "new mine of power," whereas: "the preamble only states the objects of the Confederation, and the subsequent clauses designate the express powers by which those objects are to be obtained." In similar vein, a furious Michael Stone, who represented Maryland, objected that this doctrine would reduce the Constitution to the preamble. "Then where is your Constitution?" he asked rhetorically: "is it written? No. Is it among the archives? No: it is found in the sober discretion of the legislature—it is registered in the brains of the majority!"¹⁸ This created a situation in which the Constitution meant whatever a majority in Congress said it meant—just like in the British system that the revolutionaries had sought to escape in 1776.

¹⁵ Ibid., II, 1959, 1956.

¹⁶ Ibid., II, 1954.

¹⁷ Ibid., II, 1972, 1974.

¹⁸ Ibid., II, 2009, 1981, 1987.

Clearly, the opposition viewed the Constitution in light of the revolution of 1776 and identified its original meaning as preventing tyranny. The willingness of Ames and his supporters to extend the powers under the necessary and proper clause confirmed the opposition's suspicions that the administration was prepared to violate the idea of limited government that many in the opposition considered: "the great distinguishing characteristic of the free constitutions of America, as compared with the despotic governments of Europe." Strict adherence to the settled limits, in other words, was what made the Constitution uniquely American. Stone therefore concluded that the House did not only differ in their ideas of government, but also in "our sense of the *sacredness* of the written compact." While one side respected the sacred obligation to abide by the Constitution's limits, Stone concluded, the liberal construction by the others would "sting and poison the Constitution."¹⁹

If 1776 formed the point of reference in the opposition's understanding of the identity of the polity, the political crisis of 1786 was that of the supporters. According to Ames, the Constitution was created to remedy the weakness of the Confederate Congress and "to place national affairs under a federal head." Limiting the powers of Congress, he argued, ran against this goal and by doing so: "we may reason away the whole Constitution."²⁰ Ames' view was shared by Elbridge Gerry, who argued that the necessary and proper clause was crucial in giving the new Congress the necessary energy and vigor that the old one lacked. The House, he insisted, had the choice to listen to the words of Madison and his allies who argued "that this Constitution has not more energy than the old [and] leave the union as it was under the Confederation, defenseless (...) or shall we, by a candid and liberal construction of the powers expressed in the Constitution, promote the great and important objects thereof."²¹

When it came time for the House to choose between these two options, a solid two-thirds majority of the House voted in favor of the Bank bill: 39 votes in favor and 20 against.²² It is hard to say what formed the winning argument. The vote was highly sectional: only one member from the northern States voted against the measure and only six Southerners in favor.²³ If this is to be taken as an expression of a "southern" consciousness of forming a fully defined region among its representatives in Congress, however, the interesting thing is that they voiced their opposition to the Bank not primarily in sectional terms (i.e. harmful to southern way of life) but as a violation of the Constitution. The important point here is not whether the opposition to the Bank was inspired by the sectional interest of protecting the southern agricultural economy, but that it was built up around a presumed status-quo in the Union between Congress and the

¹⁹ Ibid., II, 2009, 1981–1982, 1987, 1993.

²⁰ Ibid., II, 1959, 1956.

²¹ Ibid., II, 2002.

²² Ibid., II, 2012.

²³ Miller, *Federalist Era*, 57, 59.

states.²⁴ This view rested heavily on the “federal patch” of the Constitution, which assumed “we the people” to form the sum of the peoples of the States.

The debate in the House was far from the last word on the constitutionality of the Bank bill. The issue was also starting bringing to light some cracks in the administration itself. Uncertain how to proceed after the polarized debate, President Washington turned to his cabinet for their advice on the bill constitutionality. At this point Secretary of State Thomas Jefferson openly turned against the plan. Jefferson’s written advice read as a copy of Madison’s speech. According to Jefferson, the foundation of the constitution rested on the idea, expressed in the now familiar Tenth Amendment, that the United States government was one of limited and enumerated powers. “To take a single step beyond the boundaries thus specially drawn around the powers of Congress,” Jefferson insisted: “is to take possession of a boundless field of power, no longer susceptible of any definition.” Finding no constitutional grounds on which Congress could establish a National Bank, Jefferson concluded that the bill was unconstitutional and urged Washington to use his veto to protect the Constitution from the “invasion” of Congress.²⁵

Hamilton’s opinion on the constitutionality reached the opposite conclusion. He repeated Ames’ argument that the only rule to establish the constitutionality of the bill was whether the National Bank was a necessary and proper means to the “general principles and general ends of government.” He went on to demonstrate that the power to tax, to borrow money, and to regulate trade all could be extended to imply a necessary and proper power to establish a national bank. In giving such “liberal latitude” to the exercise of power, Hamilton argued he was only following the intention of the Philadelphia Convention. In fact, he said, the restrictive construction of Jefferson and Madison was: “an idea never before entertained.” All reasonable constructions of the Constitution, Hamilton concluded, would point out that the measure was perfectly within the powers of Congress.²⁶

With these two opinions before him, Washington now had to make a decision. His quill wavered between the bill and the veto.²⁷ In the end, Washington stood by his ambitious Secretary of Treasury, and attached his signature to the bill establishing a Bank of the United States. Thus the debate ended in a victory for Hamilton, but at a cost. The immediate effect of the Bank debate was that it brought to light the disagreement between the Administration and opposition on what kind of polity the framers had tried to create. Though both sides recognized that the Constitution contained the answer to this problem,

²⁴ Lance Banning demonstrates that Madison and Jefferson considered this equilibrium between nation and states as a necessary condition for the stability and viability of the Union, see his: “Republican Ideology and the Triumph of the Constitution, 1789 to 1793,” 180.

²⁵ M. St. Clair Clarke and D. A Hall, eds., *Legislative and Documentary History of the Bank of the United States: Including the Original Bank of North America* (Washington, D.C.: Printed by Gales and Seaton, 1832), 91, 94.

²⁶ *Ibid.*, 96, 98–99, 106–108.

²⁷ The veto was written by Madison: Hutchinson, Rachal, and Rutland, *Papers of James Madison*, XIV, 395–396.

each turned out to have different view of what it said. When the strict interpretation of the opposition gave way to the more liberal view of the Federalists, this outraged those in Congress who considered the Constitution as a sacred document. As a result, the debate on the Bank consolidated the opposition against the Federalists: Jefferson and Madison would soon institutionalize their protest into the Democratic-Republican Party. In this sense, the debate on the Bank bill gave a taste of what was to come.

The debate on the Bank illustrates two important points with regard to the identity of the polity. First, it illustrates the contentedness of the Constitution persisted after the ratification phase. The patchwork nature of the Constitution left open to dispute whether the United States formed primarily one or several peoples, and controversial issues like the National Bank immediately led to conflicting claims regarding the “true” identity of the polity. In this debate, secondly, the fact that the former opponents of the Constitution rallied behind it once the new federal government was up and running must be noted. Theirs’ was a remarkable transformation from critics to self-proclaimed defenders of the “true” meaning of the Constitution. The patchwork nature of the Constitution allowed these former opponents to continue to hammer home that the United States formed a union of States, rather than of a single people, in the post-ratification period. Together with Madison, they now claimed that the Bank violated the “sacredness” of the Constitution.

“Fitter for Algiers than America:” the debate on the Alien Acts

The growing hostility between the Federalists administration and the opposition did not only drive a wedge between Hamilton and the inseparable Madison and Jefferson, but it also left its marks on their mutual “father” George Washington. In 1792, when his first term was about to end, Washington privately declared he would not seek reelection, but was persuaded by Jefferson that the union would not “hang together” unless the General sought reelection.²⁸ The relation between Washington’s former lieutenants worsened during this second term, however, and when the aged General retired in 1796, this heralded in a period of unprecedented fractional politics. The two factions in Congress, Federalists and Republicans, had of course been at each other’s throats since the Bank conflict, but after 1796 an open conflict between them ensued.

The elections of 1796 became a contest between two old friends who sought to succeed Washington: Vice-President John Adams, who considered himself the heir apparent of the Federalist faction, and former Secretary of State Thomas Jefferson, who

²⁸ Ellis, *His Excellency*, 220.

ran as the Republican candidate after encouragement by Madison.²⁹ The bitter campaign that followed ended in a close victory for Adams, who won with a margin of only three electoral votes. Although Jefferson resigned himself quietly to the Vice-Presidency, tensions mounted between the two factions in Congress. The fight was not confined to words alone: early in 1798, a shouting match between Republican Representative Matthew Lyon of Vermont and his Federalist colleague Roger Griswold of Connecticut got out of hand. After Lyon had covered his opponent with tobacco spit, the two soon rolled over the House floor in a fist-slinging frenzy, cheered on by their colleagues.³⁰

In this increasingly hostile climate, John Adams sought new ways to secure his victory. It was clear to him that he was more vulnerable than his predecessor, whose popularity he lacked.³¹ Conscious of his limited mandate, Adams introduced a number of policies that would undermine the opposition and bolster his reelection prospect: the notorious Alien and Sedition Acts of 1798. The Alien Act was a body of bills aimed to make it harder for immigrants—who felt more at home with the egalitarian platform of Jefferson’s Republicans than the well-to-do elitism of Adams’ Federalists—to become citizens.³² It also gave the President the power: “to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States (...) to depart out of the territory of the United States.”³³ The Sedition Act targeted United States citizens who, to be sure, could not be deported but could be silenced by allowing Congress to punish “any person [who] shall write, print, utter, or publish (...) any false, scandalous and malicious writing (...) against the government of the United States” with a fine of two thousand dollars and two years of imprisonment.³⁴

The Republican opposition in Congress was outraged by the Alien and Sedition Acts and immediately drew a battle plan to kill the bills in the House of Representatives. Unlike the Senate, where the Federalists held an absolute majority and the debate was not recorded by the press,³⁵ the Federalists commanded a majority of only six—56 seats against the Republicans’ 50—in the House. If the opposition, in other words, could convince even a handful of Federalists of the undesirability of the Acts, Adams’ anti-opposition train could still be derailed. One factor that worked in the opposition’s favor was the public nature of House debates, which were recorded by reporters and published

²⁹ Susan Dunn, *Jefferson’s Second Revolution: The Election Crisis of 1800 and the Triumph of Republicanism* (Boston: Houghton Mifflin Company, 2004), 74, 76, 79.

³⁰ Robert Vincent Remini, *The House: The History of the House of Representatives* (New York: HarperCollins, 2006), 62.

³¹ Wood, *Empire of Liberty*, 257.

³² James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956), 22–23.

³³ Richard Peters, ed., *The Public Statutes at Large and Treaties of the United States of America*, vol. 1 (Boston: Little, Brown and company, 1845), 571.

³⁴ *Ibid.*, 1:596–597. See also: David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* (University Of Chicago Press, 1997), 260.

³⁵ Even though the Senate ceased to debate public affairs behind closed doors after 1795, there are no records what was said in the senatorial debate on the Alien and Sedition Acts in the *Annals of Congress*.

in major newspapers. This way, the Republican orators could reach the wider audience of the literate electorate and mobilize them against the bill. Even if the Acts passed the House, the Republicans could still hope to move the voters to return a strong Republican majority in the midterm elections of 1798.

The Republican faction in the House boasted several eloquent speakers that were up for the task. Most outspoken were the Swiss-born Representative Albert Gallatin from Pennsylvania and his eloquent ally Edward Livingston of New York. Together, Gallatin and Livingston worked tirelessly to stop the Alien and Sedition Acts by framing them as a deliberately vague, unnecessary, and unconstitutional usurpation of power. Since both Acts required the suspect to prove he was not guilty, Gallatin argued it instituted “a new crime (...) which is that of being a suspected person.”³⁶ Since the suspects were not officially charged it was impossible to determine what they stood accused of, let alone to prove their innocence.³⁷ Even more worrisome, Livingston added, was the fact that one could unknowingly act suspicious: “a careless word, perhaps misrepresented, or never spoken, may be sufficient evidence; a look may destroy, an idle gesture may inspire punishment.” While the Alien Act targeted foreigners, the opposition was acutely aware that the Sedition Act could target anyone in the United States, including the members of the House themselves.³⁸

The Republicans’ main objection, however, was that Congress lacked the constitutional power to pass the Alien and Sedition Acts. The Federal Government, Gallatin pointed out, was one of enumerated powers, none of which allowed Congress to give the President the power to deport aliens or curb the freedom of speech. Following the Tenth Amendment, which stated that powers not granted rested with the States or the people, these powers clearly rested with the States, not the Federal Government. By placing this power in the hands of the President, Livingston argued, the Federalists were transforming the Federal Government into an “engine of oppression.”³⁹ The Republicans emphasized the *federal* nature of the Constitution and portrayed it as a contract fixing the competences between Congress and the States. By claiming powers belonging to the

³⁶ Joseph Gales, ed., *The Debates and Proceedings in the Congress of the United States: With an Appendix Containing Important State Papers and Public Documents, and All the Laws of a Public Nature; with a Copious Index; Compiled from Authentic Materials (Annals of Congress Vol. 8)*, vol. VIII (Washington, D.C.: Gales and Seaton, 1834), 1789.

³⁷ See for this: Currie, *The Constitution in Congress*, 1997, 255 who argues that the bill shifted the burden of proof, since the President’s “reasonable grounds to suspect” was sufficient to expel any alien without wrongdoing and without a trial.

³⁸ Gales, *Annals of Congress*, 1834, VIII:2011 (Livingston); Joseph Gales, ed., *The Debates and Proceedings in the Congress of the United States: With an Appendix Containing Important State Papers and Public Documents, and All the Laws of a Public Nature; with a Copious Index; Compiled from Authentic Materials (Annals of Congress Vol. 9)*, vol. IX (Washington, D.C.: Gales and Seaton, 1834), 2435 (Gallatin).

³⁹ Gales, *Annals of Congress*, 1834, VIII:1955 (Gallatin), 2010 (Livingston).

States, they concluded, the Alien and Sedition Acts constituted a “gross violation” of the constitutional contract.⁴⁰

The defense of the Acts was headed by the sizable Federalist delegation from Massachusetts. In answer to the criticism that the Republicans leveled against the Alien Act, the Boston lawyer Samuel Sewall employed a frame of his own. The Alien Act, he told the House, was not a usurpation of power, but a necessary and constitutional measure to provide for the public safety of the United States. “In the event of war with France,” he pointed out, “all her citizens will become alien enemies.” In such a scenario, Sewall argued, the President should have at his disposal whatever measures necessary to dispose of the threat these aliens posed to the United States.⁴¹ Sewall’s frame provided the Alien and Sedition Acts with the sense of urgency and justification and was quickly adopted by other Federalists. Harrison Gray Otis, the unofficial leader of the Massachusetts delegation, argued the Acts were necessary since America found itself “in a time of war.” “The times are full of danger,” Otis told the House, “and it would be the height of madness not to take every precaution in our power.”⁴²

For the Federalists, in short, the Alien and Sedition Acts were a matter of public safety. In their view this constituted a higher law than the personal liberty of aliens and seditious citizens. The question was not, as one Federalist speaker put it, of danger arising from the government having too much power, but from its want of power. And the Federalists orators had no doubt that the Constitution provided the necessary power. Both Sewall and Otis pointed out that the power to protect the United States against threats, foreign and domestic, was implied in the preamble, which stated that the Constitution had been established to “provide for the common defense.” That this power belonged to Congress alone was “extremely clear” according to Otis, since it was also listed in the enumerated powers in Article I.⁴³ The Federalists thus emphasized the *national* nature of the Constitution to portray it as “coat of mail” to protect the Union. It was common sense, South Carolina Representative Robert Harper argued, that this was an exclusive power of Congress, for: “if the safety of the Government of the Union is to depend upon the discordant will of sixteen States, deplorable and debased indeed would be its situation.”⁴⁴

The debate on the Alien and Sedition Acts demonstrates how conflicting the interpretations of the patchwork nature of the Constitution were. That members of the House dwelled so long on the constitutionality of the Acts is understandable, since Congress was still considered the judge of this. Bills that passed Congress were presumed to be in accordance with the Constitution, because the members of Congress supposedly

⁴⁰ Ibid., VIII:1974 (the words are Gallatin’s).

⁴¹ Ibid., VIII:1790.

⁴² Ibid., VIII:1791 (Sewall), 1962 (Otis).

⁴³ Ibid., VIII:2016 (the unidentified speaker is John Kittera), 1957 (Sewall), 1959 (Otis). See: US Constitution, Article I, Section 8: “Congress shall have the power to lay and collect taxes (...) to pay for the debts and provide for the common defense and general welfare of the United State.”

⁴⁴ Ibid., VIII:1990, the “coat of mail” quote was also Harper’s and can be found on 2156.

understood the limits to their power well enough not to overstep them.⁴⁵ Many representatives realized this was hardly a foolproof test since in the hands of politicians, as John Kittera observed, the Constitution “is like polemics in the hands of divines: it was made to prove everything or nothing”⁴⁶ This did not mean that the delegates believed the issue of constitutionality to be trivial. On the contrary, many members of the House assumed there was only one correct interpretation of the Constitution.⁴⁷ What it does demonstrate is the need for members to prove the credibility of their own interpretation of the Constitution, and expose the falsity of that of their opponents. To achieve this, each side tried to demonstrate that its reading of the Constitution was in line with the “spirit” of the document and the “true” identity of the polity. The speakers used different stories, or narratives, about the past to demonstrate their interpretation adhered to the original meaning of the document. Each of these narratives was very revealing with regard to what both sides understood the identity of the polity to be.

As in the Bank debate, the Republican narrative drew on the revolution of 1776 to move Congress to vote against the Alien and Sedition Acts. According to Gallatin, the experience under British rule had taught the framers the value of limited government. The Alien and Sedition Acts were a clear sign that the Federalists were acting in violation of this legacy since they were “calculated to eradicate from our minds the principles of the Revolution and to concentrate power in the Executive.” The Federalists were assuming the role of oppressors themselves, Gallatin argued, for “instead of being bound by the Constitution [they] claim the omnipotence of a British Parliament.” This way, the function of the Constitution as a binding contract was “completely annihilated.”⁴⁸ By asking the House to pass the Acts, in other words, the Federalists were turning Congress itself into a part of their “engine of oppression,” and, as Livingston pointed out: “if we exceed our powers, we become tyrants.”⁴⁹ By casting the Federalists as heirs to Britain, the Republicans portrayed the Alien Act as *un-American*. Livingston warned the House that the adoption of the Alien and Sedition Acts would constitute the “sacrifice of the first-born offspring of freedom (...) by those who gave it birth.” It would be absurd, he insisted, “to call ourselves *free and enlightened*, while we advocate principles that would have disgraced the age of Gothic barbarity.” This made the Acts, as one Republican member of the House put it “fitter for the code of Algiers than of America.”⁵⁰

⁴⁵ North Carolina representative Robert Williams understood this well enough: “if a law was passed, it was immediately presumed it was according to the Constitution; as it was supposed Congress understood their power too well to pass a law which the Constitution did not give them authority to pass,” in *ibid.*, VIII:1964.

⁴⁶ *Ibid.*, VIII:2016.

⁴⁷ Robert Williams, for example, concludes that if the Alien Act is adopted: “Your Constitution is only a dead letter; it may be warped any way; it forms no settled principle for your guide,” see *ibid.*, VIII:1995.

⁴⁸ Gales, *Annals of Congress*, 1834, IX:2900, 2996.

⁴⁹ Gales, *Annals of Congress*, 1834, VIII:2014.

⁵⁰ *Ibid.*, VIII:2015 (Livingston), 1999 (the unidentified speaker is Thomas Claiborne).

By portraying the bill as fit for foreign despots, the Republicans depicted the Acts as alien to the United States' "true" identity as a free country built on the principles of liberty and limited government. In this light, the Alien and Sedition Act became a measure intended to destroy the *American* spirit of the Constitution.⁵¹ Livingston's fear that the adoption of the Acts would mean the end to the "sacredness" of the Constitution demonstrates the mythical underpinnings of the narrative.⁵² By casting the Federalists as the successors of the British tyrants that their forefathers had fought so hard to get rid of, the Republicans turned the opposition against the Alien Act into a sacred duty. In order to uphold the true legacy of the Revolution, the members of Congress were duty-bound to vote down the Alien and Sedition Act to prevent a political take-over *à l'Anglais*.

Two, however, could play at this game, and the Federalists again evoked the crisis of 1786 in their narrative to support their reading of the Constitution. Their view was, simply put, that the framers could never have intended to establish a regime that carried its own destruction within itself. As Harrison Otis pointed out, the main concern of the members of the Philadelphia Convention had been to remedy the paralyzing respect for the sovereignty of the States that had become fatal to the Confederation in 1786. The Constitution they had created sought to prevent this from happening again. As such, Otis refused to consider the debate as a choice between violating the Constitution or protecting the country. "If this is the dilemma into which we are reduced by the Federal compact," he insisted: "it might as well have never been made, for a Government that is prevented from exercising an authority which may be necessary to its existence, is not better than no Government at all." It would mean, Otis concluded, that "the present Constitution would have no advantage over the old Confederation."⁵³

In this narrative, the Alien and Sedition Acts were not violations of the Constitution, but rather a reinforcement of its fundamental principles by preventing history from repeating itself. From this angle, it was the Republican faction that squandered the true legacy of the Revolution and tried to destroy the identity of the polity. South Carolina representative Robert Harper proclaimed that he would consider himself "the worst of traitors and assassins to his country" if, by his opposition to the Acts, he would "bind us hand and foot, until the enemy comes upon us."⁵⁴ Far from an un-American measure, in other words, the Alien and Sedition Acts were patriotic measures to protect America against its subversive enemies. In the Federalists' view, the Republicans were the ones out of touch with the public: they were the true traitors to their country. The true legacy of the Revolution, they said, was that of 1787, and by voting for the Alien and Sedition Acts, Congressmen were only fulfilling the promise of providing for the common defense ordained in the Constitution's preamble.

⁵¹ Gallatin spoke of "exotic doctrines" which would "overshadow and smother every plant of American growth," see: Gales, *Annals of Congress*, 1834, IX:2996.

⁵² Gales, *Annals of Congress*, 1834, VIII:2014.

⁵³ *Ibid.*, VIII:1987.

⁵⁴ *Ibid.*, VIII:1992.

In the end, after seven weeks of passionate debate, the Federalist interpretation of the Constitution carried the day. The Alien Act was adopted on June 21, with 46 votes in favor and 40 against⁵⁵ and the Sedition Act passed on July 10 with an even closer vote of 44 against 41.⁵⁶ Both votes were strictly partisan—only two Federalists strayed from the flock to vote aye⁵⁷—which suggests that the Federalists carried the day simply by virtue of their numerical majority. Despite their every effort, the immediate result for the Republicans was defeat. For the purpose of this study, however, the debate is very informative in providing a deeper understanding of how the views on the constitutionality of the Acts reveal a deeper conflict over what it meant to be “American.”

Viewed in this light, the debate on the Alien and Sedition Act demonstrates the importance of the narratives to support a certain reading of the Constitution. The past—or rather, a certain portrayal of the past—functioned as the first, crucial step in the three stage narrative argument that conferred a (historical) identity on the present in order to motivate a certain action in the future.⁵⁸ Adherence to the “true” American identity as freemen,⁵⁹ moved Republicans to vote against the Alien and Sedition Acts, while adherence to that as guardians against subversive enemies motivated Federalists to support them. The debate on the Alien and Seditions Acts thus illustrates how each narrative emphasized one side of the patchwork Constitution. The Republican narrative framed the Constitution as the continuation of the union of 1776 and preached a strict adherence to the contract between the parties as the only way to prevent tyranny. The Federalist narrative, on the other hand, painted a bleak picture of the union before 1787 to frame the Constitution as a response in favor of orderly and assertive government.

Thus far, the opening words of the preamble played only a subordinate role in the debate on the Alien and Sedition Acts, but “we the people” would occupy center stage when the debate took a sharp turn through the involvement of Jefferson and Madison. Like many of their Republican allies, both men showed an unwillingness to reconcile themselves with the verdict of Congress which was undoubtedly inspired by the sacred regard for (their interpretation of) the Constitution. Consequently, as soon as the Alien and Seditions Acts cleared the House, the two founders of the Democratic-Republican Party launched a movement for their repeal in Virginia and Kentucky. The two States each produced official protest, written by Madison and Jefferson respectively, in which the Acts were condemned as violations of the Constitution. These Kentucky and Virginia

⁵⁵ Ibid., VIII:2028–2029.

⁵⁶ Ibid., VIII:2170–2171.

⁵⁷ These were George Dent of Maryland, who voted against the Alien Act and was joined by Stephen Bullock from Massachusetts in voting against the Sedition Act, see: Ibid., VIII:2028, 2171.

⁵⁸ See for more on this: Jelte Olthof, “History as Our Guide?: The Past as an Invisible Source of Constitutionality in the Legislative Debates on the Alien Act in the United States (1798) and the Émigrés Problem in France (1791),” *Saint Louis University Law Journal* 57, no. 5 (2013): 377–405.

⁵⁹ This was literally the term used by Nathaniel Macon, see: Gales, *Annals of Congress*, 1834, VIII:2106.

Resolutions, as they were called, once again put the question who “we the people of the United States” were at the heart of the debate.

The two Resolutions were written as official protests against the Alien and Sedition Acts, but also conveyed a clear message of how the Republican leaders viewed the identity of the polity. Madison’s Virginia Resolution began by stating that it was each State’s duty “to watch over and oppose every infraction of those principles which constitute the *only basis* of [our] union.”⁶⁰ Here again, the contract nature of the Constitution as the means to safeguard liberty was present. What exactly these principles entailed was not clarified, but it certainly included the idea that the powers of Congress were strictly limited by the Constitution. Thus far, Madison’s reasoning followed that his allies in the House, but it took a sharp turn when he claimed that:

“in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right, and *are in duty bound, to interpose*, for arresting the progress of the evil.”⁶¹

If, in other words, Congress willfully exceeded its powers (whatever one considered them to be), then Madison insisted that each State had the duty to obstruct compliance to the unconstitutional laws within its own borders. In similar view, Jefferson’s Kentucky Resolutions argued that, whenever the general government “assumes undelegated powers, its acts are unauthoritative [sic], void, and, of no force.”⁶²

This radical claim put the States, rather than Congress, in charge as the final arbiters of the constitutionality of the acts of Congress. The Resolutions challenged the notion—championed by Madison himself in 1787—that the decision of Congress formed the supreme law of the land, and replaced it with the idea that the several States could decide whether to execute laws or not. Clearly, for both men, the United States formed a union of States, rather than one people. Each State, Jefferson argued, was “an integral party” to the union and had: “an equal right to judge for itself, as well of infractions as of the mode and measure of redress.” Since the Constitution acknowledged “no common judge,” and the branches of the federal government could not judge “the extent of power delegated to itself” as this would make “its discretion, and not the Constitution, the measure of its power,” it was left solely to the States to determine the constitutionality of federal laws.⁶³ There was no reference to “we the people of the United States” in either Resolution and where they did mention “the people” it referred to that of the State—“the good people of this commonwealth” of Virginia for example.⁶⁴ In the minds of the

⁶⁰ Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Washington, 1836), IV, 528.

⁶¹ *Ibid.*, IV, 528.

⁶² *Ibid.*, IV, 540.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, IV, 529, 540.

Madison and Jefferson, “the people of the United States” formed the sum of the peoples of the States.

The Kentucky and Virginia Resolutions heralded in a new phase in the debate in which the role of “we the people” took center stage. Inspired by the Madison and Jefferson, the constituents of Republican counties across the country began to petition Congress for repeal of the Alien and Sedition Acts.⁶⁵ The Republican members of the House seized these petitions to cloak themselves as popular tribunes by portraying the petitions from their constituents as the voice of “the people.” Drawing on the idea in the Resolutions that (the peoples of) the States formed the final arbiter of the Constitution, the Republican orators argued that the rejection of the Alien and Sedition Act by “the people” sealed its fate. “The people of the country,” one orator claimed, had condemned the Acts “in a voice of thunder.”⁶⁶ “Have not,” Livingston asked, “the people a right to say to Congress: ‘you have done wrong, you have exceeded your power?’”⁶⁷ Only the people, Livingston concluded, were the highest judge of the constitutionality of the laws: “we are their servants, when we exceed our powers, we become their *tyrants*.”⁶⁸ The Republican’s portrayal of “the people” as the sole and final judge of the law naturally found its origin in the myth that the Constitution was an act of “we the people.” If that same people now ordained that the Alien and Sedition Acts were against their will, this meant they had to be repealed.

The Federalists in the House now faced the challenge to reject the petitions without undermining the underlying idea that the Constitution itself rested on “the will of the people.” They achieved this by dissociating the petitioners from the “honest part of the people.” Massachusetts Representative George Thatcher argued that the members of the opposition: “commit a great mistake when they say that these petitions are from ‘the people’ of the United States.” The petitions were only the work of a few individual demagogues and were “like a drop compared with the ocean.”⁶⁹ John Allen made a similar distinction: “the people,” he said: “I truly venerate, they are truly the sovereign; but a section, a part of the citizens, a town, a city, or a mob, I know them not; if they oppose the laws, they are insurgents and rebels; they are not the people.” For Allen “the people” were the honest, law-abiding part of the population, and he hoped they would: “rise and throw off these people as so many morbid excrescences on the body politic.”⁷⁰ Finally, in an official reply to the petitions, the Federalists framed the objections to the Alien and Sedition Acts as “innocent misconceptions of the American people” who were

⁶⁵ For petitions see: Gales, *Annals of Congress*, 1834, IX, 2798–2799, 2884, 2957.

⁶⁶ Gales, *Annals of Congress*, 1834, X, 923 (the unidentified speaker is Joseph Nicholson of Maryland).

⁶⁷ *Ibid.*, IX, 2800.

⁶⁸ *Ibid.*, VIII, 2014. See also John Randolph of Virginia, who said he had “a still higher tribunal to appeal to—one higher than they [Congress] could produce: (....) the American people.” *Ibid.*, X, 920.

⁶⁹ Gales, *Annals of Congress*, 1834, IX, 2899.

⁷⁰ *Ibid.*, VIII, 2096. *Ibid.*, IX, 2800.

misled by those who “assume the guise of patriotism to mislead the affections of the people” in order to upset public order and stir up rebellion.⁷¹

From these quotes it becomes clear that the two sides in the debate had a contrasting idea about who “the people” were and what their role in the post-ratification debate was. Whereas Federalists like Allen viewed “the people” as a passive, anonymous mass of law-abiding folks, his Republican colleagues entertained a much more dynamic view. Nathaniel Macon, Representative of North Carolina, insisted that, unlike the servile subject in Europe, “the people of this country” cherished their liberties and would: “much sooner discern and repeal any encroachments upon their liberty of which they, as freemen, ought to be extremely jealous.” In similar vein, Gallatin pointed out that America never was a country of passive and obedient people and had once before, in 1776, asserted the right to resist tyrannical laws. It was a right they once used, he added, and: “it is a right to which they may, perhaps, in the course of events be again obliged to resort.”⁷² The Federalists insisted that such an “insurrection” should be avoided at all cost, for as Allen asked: “do we want another revolution in this country?”⁷³

The revolution dreamed of by Gallatin and dreaded by Allen never materialized, in part because the elections for the Sixth Congress in 1798 returned a stronger Federalist majority to the House. Several Federalists gleefully pointed out this meant “the people” approved of the Alien and Sedition Act.⁷⁴ Though this may have silenced the opposition at the time, the importance of the debate on the petitions is that it illustrates how the myth of “we the people” could just as easily be used to support a limited government. Since the word “people” could signify both an actual group, like the petitioners, as well as the abstract idea of “we the people,” the opposition forced the Federalists to dissociate the petitions from the “real” people, who were reduced to an indemonstrable group, whose voice could only be known through elections. By virtue of this dissociation, the Constitution now became the act of a timeless, mythical people and the Alien and Sedition Acts remained unaffected by the Republican petitions. This readjusted myth would continue to play an important role in the interpretation of the Constitution, but the Acts would finally be repealed after the Republicans seized control of Congress in 1802.

Summing up, the debate on the Alien and Sedition Act demonstrated how constitutional conflicts turned into debates on the identity of the polity. During the initial debate Congress, the Federalists and Republicans each employed familiar narratives to demonstrate that their interpretation of the patchwork Constitution was in line with the “true” identity of the polity. The subsequent debate on the petitions shows that each narrative entailed a different answer to the question whether the Constitution had turned

⁷¹ Gales, *Annals of Congress*, 1834, IX, 2992.

⁷² *Ibid.*, VIII, 2106 (Macon), 2111 (Gallatin).

⁷³ *Ibid.*, VIII, 2096.

⁷⁴ See for this the comments by Robert Harper and Henry Lee: Gales, *Annals of Congress*, 1834, X, 939, 962.

the United States into one single or rather several peoples. In the eyes of the Federalists, the Constitution provided Congress with the power to protect the unique American way of life from alien disorder and subversion. The Republicans, however, argued that to protect them from tyranny, the Constitution denies Congress the right to assume powers to silence and deport its citizens and provides the States with the means to interpose.

The debate on the Alien and Sedition act differed from that on the Bank in that it sparked an interesting discussion on who “we the people” were and what their role in the post-ratification period was. The debate on the first question illustrates the impossibility of forming a consensus on this. The Federalists adhered to a passive view of the people that—to quote Rousseau—only existed when they cast their votes in an election. In their view, the sovereign people were an entity that could never materialize bottom-up and remained an anonymous mass. The Republicans saw a reasonable portion of their constituents as “the people.” Since the Republicans, insisted that they protected the “sacred” original meaning of the Constitution, they refused to surrender when the Alien and Sedition Acts were passed by Congress and claimed, in the two Resolutions, that “the people,” as the highest tribunal, had the right to nullify the Acts. In this sense, the Resolutions reinforced the myth that the Constitution was the act of “the people,” yet the Federalist supplied another part of the myth by claiming that this act was a unique moment in time that could never be repeated as its authority rested, in no small part, on being unique. This way, the myth was used to freeze history.⁷⁵

The Constitution in the Marshall Court

The federal elections of 1800 marked a turning point for the United States. That year, despite—or perhaps thanks to—the Alien and Sedition Acts, President John Adams was defeated by his former Vice-President Thomas Jefferson. It was a devastating defeat for the Federalist Party, who not only lost the White House, but also their majority in the House of Representatives, where they were reduced to some 40 seats against the more than 60 occupied by the Republicans. Further defeat in by-elections also meant that the Federalists lost their majority in the Senate after 1801. After twelve years, the Federalists’ domination of the federal government came to an end, and a new Democratic-Republican period began that would last for almost three decades, until Andrew Jackson was elected to the White House in 1828. For the Federalists, the defeat was devastating. Though this was far from obvious at the time, the Federalists would never recover from this defeat and slowly became a marginalized force in politics, ever more confined to New England.

⁷⁵ See for this: Roland Barthes, *Mythologies*, trans. Annette Lavers (Frogmore: Paladin, 1973), 129.

The Republicans stayed more or less true to their strict interpretation of the Constitution throughout the presidencies of Jefferson and Madison.⁷⁶ The Federalist opposition in Congress allowed a much broader interpretation of the Constitution and only incidentally challenged the constitutionality of the proposed legislation. As a result, Congress ceased to be the primary arena where the Constitution was debated. Instead, the Supreme Court, which remained a Federalist stronghold throughout the first decades of the nineteenth century, took on an active role in hearing and deciding cases which further challenged the contested compromise underlying the Constitution. It is fair to say, therefore, that during the first two decades of the nineteenth century, the Supreme Court became the center stage on which the Constitution was contested, and that the debate on the identity of the polity shifted from Congress to the Court.

The dominating figure in the Supreme Court throughout the Republican period was its ambitious Chief Justice John Marshall, who was appointed by Adams in 1801 just before he left office. In a string of landmark decisions, beginning with the famous case of *Marbury v. Madison*, Marshall claimed for the Court the power to determine what the Constitution said, and used this to uphold the supremacy of the federal government within the union and to strengthen its sway over the States. Throughout these decisions, Marshall insisted that the inhabitants of the United States formed one people, and the union one nation, and that the interest and well-being of this American people preceded that of its parts. On the institutional level, the decisions of the Marshall Court turned the Court itself into an independent and influential branch in the federal government, with the final say over the Constitution. In this way, Marshall succeeded in transforming the Supreme Court from the “least dangerous branch”—as Hamilton had put it in *Federalist* 78—to an authoritative tribunal that had to be reckoned with.

In the following section, the beginnings of the Court prior to the Marshall period are briefly examined, after which attention will turn to the most celebrated case before the Marshall Court, *Marbury v. Madison*. The final part of this section discusses a string of important decisions by the Marshall Court and their implications for the formation of the identity of the polity.

The least dangerous branch: the pre-Marshall Court

The Supreme Court of the United States was officially created by Congress in the Judiciary Act of 1789 and heard its first case two years later. The Act determined that the Court would consist of one Chief Justice and five Associate Justices. For this first office

⁷⁶ An important exception was the incorporation of the Louisiana Territory which was purchased from France in 1803. Despite his doubts on the constitutionality of this step (the Constitution was silent about acquiring territory) Jefferson decided that this deal, which more than doubled the size of the United States at the time, was too good to be true and went through with it, see: David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801-1829* (Chicago: University of Chicago Press, 2001), 97–98.

Washington selected former Secretary of State John Jay, an ardent Federalist who had helped lodge the Constitution through his home-State of New York. Washington's choice for Associate Justices included Federalist old hands James Wilson and John Rutledge. It was decided that the Court would only meet twice a year in a backroom of the Senate's chambers in Philadelphia, and that the justices would spend the rest of the year travelling between the district courts to hear cases. Bad roads and heavy weather made this "circuit riding" very tiresome and uncomfortable, but many Federalists hoped that it would carry the law, as Senator William Paterson put it, "to [the people's] homes, to their doors," so that: "we shall think, and feel, and act as one people."⁷⁷ Clearly, the Federalists believed that the judiciary had its part to play in forging the States into one nation.

The Court certainly played the part in the most important decision it pronounced before the Marshall era, which was the 1793 case of *Chisholm v. Georgia*. In this case, Alexander Chisholm, a South Carolina merchant, sued the State of Georgia for failing to pay for services that he had supplied during the revolutionary war. Georgia tried to dodge its creditor by claiming immunity as a sovereign State and refusing to appear before the bench. The Supreme Court nevertheless decided to hear the case and, as was customary at the time, each of the five Justices gave a separate opinion, with the majority ruling in favor of Chisholm.

The opinions of Wilson and Jay both stand out as far-reaching statements of the extent to which the Constitution had formed the States into one nation. Both Justices relied on the preamble to argue that Georgia could not claim immunity, because sovereignty in America exclusively belonged to the people. In Jay's reading of the past, the inhabitants of the thirteen colonies had always constituted one people. After the Revolution, he argued, sovereignty in America had passed from the crown to the people who, even though they were divided in thirteen separate States, continued to consider themselves as one from a "national point of view." It was in this collective and national capacity, Jay argued, that the people, "acting as sovereigns of the whole country" had established the Constitution of the United States by which the States were bound. The preamble showed, Wilson added, that: "the people of the United States intended to form themselves into a nation," and that the sovereignty in this nation rested with the people of the United States, not the States. Georgia, in other words, could not claim immunity because, Wilson said: "as to purposes of the union, Georgia is not a sovereign State."⁷⁸

The Court's decision in *Chisholm* demonstrated the integrative potential of the preamble that Morris had succeeded in writing into the Constitution at the Convention. In the hands of creative justices like Jay and Wilson, the first seven words of the preamble could be used to strip the States of the immunities that they had enjoyed under the Confederation. Wilson's statement, that Georgia was not a sovereign State in its relation to the union, would have simply been unthinkable five years earlier. Now, the Court

⁷⁷ Quoted in: Wood, *Empire of Liberty*, 414.

⁷⁸ *Chisholm v. Georgia* (1793) 2 U.S. 419, at 470-471, 465, 457.

claimed that the Constitution expressed the will of “we the people of the United States,” which surpassed that of the States and bound the latter to the dictates of the former.⁷⁹ In *Chisholm*, the Court determined that sovereignty no longer rested with the States, but with “the people of the United States,” who could distribute it between the union and the States in any way they wanted.

If, however, the *Chisholm* case demonstrated the extent to which the preamble of the Constitution could be used to further a nationalist agenda, its aftermath demonstrated that this certainly had its limits. The fierce reactions to the *Chisholm* decision from across the aisles clearly showed that the Court had broken away from the rest of the flock. State governments were outraged by the decision and feared that it would prompt other creditors to also take their case to the Court. In Georgia, State legislators adopted a resolution which declared the Court’s decision as unconstitutional and therefore not binding.⁸⁰ But outrage over the decision was not confined to Georgia. In Massachusetts, governor John Hancock condemned the decision as a “consolidation of all the States into one government,” and called for an amendment to the Constitution to secure to the States: “that share of sovereignty which it was intended they should retain and posses.”⁸¹ This call would cumulate in the Eleventh Amendment, ratified in 1795, which guaranteed that States could not be sued by citizens from other States. This was the first instance in which an amendment was adopted to reverse an opinion of the Supreme Court and it demonstrated that the States were not powerless to act against unpopular decisions.

The *Chisolm* case and its aftermath demonstrate how contested the integrative reading of the patchwork Constitution by the Jay Court was. Few outside the Court shared Wilson’s view that the United States formed one sovereign people only, and not a union of States as well. The Court’s one-sided approach to the patchwork nature of the Constitution was, at that point, a bridge too far. Even though the Eleventh Amendment did little to clarify the underlying question to what extent the United States formed one people, it did constitute a return to the patchwork assumption that the United States formed both one and several peoples—each with its own sovereign sphere and accompanying immunities. The aftermath of the *Chisholm* case was a blow to the Supreme Court’s authority from which Chief Justice Jay never recovered. When he resigned to become governor of New York, two years later, Jay seemed glad to leave the Court which he believed lacked: “energy, weight, and dignity.”⁸² When Marshall

⁷⁹ *Chisholm* 2 U.S. 471: “it was their [the people’s] will that the state governments should be bound, and to which the state constitutions should be made to conform.”

⁸⁰ Julius Goebel, *Antecedents and Beginnings to 1801* (New York: Macmillan, 1971), 734.

⁸¹ “Speech of His Excellency the governor to both branches of the legislature of the Commonwealth of Massachusetts, at their sessions began and held in Boston, September 18, 1793,” in: *Early American Imprints*, Series 1 no. 25790.

⁸² Quoted in: L. A. Scot Powe, *The Supreme Court and the American Elite, 1789-2008* (Cambridge, Mass: Harvard University Press, 2009), 28.

assumed the office six years later, he seized one of the very first cases before him to rectify this situation.

Marbury v. Madison

Also known as the case of the midnight judges and the case of the missing commissions, *Marbury v. Madison* is considered Chief Justice John Marshall's most significant decision in his thirty-five years on the bench. In *Marbury* Marshall established the practice—not the idea—that the Supreme Court should judge whether or not federal legislation violated the Constitution.⁸³ This practice, which would become known as “judicial review,” naturally entailed that the Supreme Court had a right to say what the Constitution actually meant, something that—at least on the federal level—had until then been the province of Congress.

The framers in Philadelphia had not resolved the question who had the power to determine exactly what the Constitution said. Most delegates seem to have assumed that the courts would play a role in invalidating State legislation that violated federal laws, but the final version of the Constitution remained silent about the question who would be the final arbiter of what that document said.⁸⁴ As a result, it was basically left to Congress to determine the constitutional limits of its legislative power. If the Constitution comprised the will of the people, who else but the people's representatives should determine what they willed? When the administration and the opposition clashed over the constitutionality of legislation such as the Bank Bill or the Alien and Sedition Acts, it was assumed that a majority of the House and Senate decided whether this fell within the constitutional power of Congress. If a bill was adopted, it was assumed to be constitutional. The significance of the *Marbury* case was that it signaled the arrival of another player on the stage: the Supreme Court.

The *Marbury* case originated in the President Adams' attempt to save as much political influence as he could after the Republican takeover of 1800. When the lame duck Congress approved a new Judiciary Act which created a host of new district courts, Adams immediately seized this opportunity to appoint loyal Federalists. Since judges were appointed during good behavior, they remained outside Jefferson's sway, which guaranteed that the Judiciary would remain a Federalist stronghold for times to come. Their hasty appointment earned these magistrates the title of “midnight judges,” and one of them was William Marbury, whose commission was signed by Adams on the night before he left the White House. Unfortunately for Marbury, however, his commission never reached its destination. Marbury subsequently asked the Supreme Court to force the

⁸³ Friedman, 65

⁸⁴ A comprehensive account of the mentioning of judicial review in the Convention can be found in: John R Vile, *The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding* (Santa Barbara: ABC-CLIO, 2005), 388–393.

new Secretary of State, James Madison, to hand over his commission, by means of a so-called writ of mandamus. John Marshall, whose appointment as Chief Justice to the Court had been another last-minute appointment by President Adams, seized this unlikely case as an opportunity to consolidate the Supreme Court's position within the hostile Republican climate.⁸⁵

Though Marshall did not share Adam's fears concerning Jefferson's ascent to power, he was shocked that the Republican dominated House began putting Adam's midnight judges out of office by abolishing entire courts. The independence of the Judiciary was a priority for Marshall, who understood that only impartial judges could hope to earn the respect of the public. As Chief Justice, Marshall broke with his predecessors' habit of mixing their judicial activities with politics—to the extent that some of them openly campaigned for Adams' reelection—and tried to establish a more independent position for the Supreme Court. He also broke with the justices' habit of each giving separate, so-called *seriatim*, opinions, and established the practice of speaking with one voice, with one judge writing for the (majority) of the Court. A charming and persuasive speaker, Marshall saw to it that the majority shared his opinion and he wrote more than half of all the decisions that the Court reached during the thirty-five years that he was on the bench.⁸⁶

More than anything else, Marshall boosted the Supreme Court's influence by the way he operated in *Marbury*. The case confronted Marshall with an awkward predicament. On the one hand, the Chief Justice assumed that Secretary Madison would not execute a writ of mandamus issued by him, and he believed this would seriously damage the Supreme Court's reputation. On the other hand, he did not feel like letting the administration get away with withholding the commission, because this would paint the Court as slavishly obedient to the executive.⁸⁷ The solution that Marshall adopted in the decision, and in which his fellow justices concurred, was to decide in *Marbury's* favor without forcing the administration to remedy the problem with a writ of mandamus.

In the decision, Marshall found that *Marbury* indeed had a right to his commission, and also had a right to be compensated, but he avoided a clash with the Executive branch by arguing that the Supreme Court could not provide this remedy. In a twist of logic that was questionable legal reasoning at best, Marshall explained that the Court lacked jurisdiction. *Marbury* had relied on section thirteen of the Judiciary Act of 1789, which he argued gave the Court *original* jurisdiction over his case, but Marshall concluded that this violated article III, section 2 of the Constitution, which provided only

⁸⁵ For the background of the case see: John A. Garraty, "The Case of the Missing Commissions", in: John A. Garraty, *Quarrels That Have Shaped the Constitution* (New York: Harper & Row, 1964), 2–8.

⁸⁶ Wood, *Empire of Liberty*, 438.

⁸⁷ *Ibid.*, 441.

appellate jurisdiction in the case.⁸⁸ Apart from giving him a way out of the predicament, Marshall's insistence on a conflict between the Judiciary Act and the Constitution provided him with an opportunity to elaborate on the position of the Court with regard to the interpretation of the Constitution. In fact, Marshall only used the issue of jurisdiction in *Marbury* as a pretext to make a more fundamental point on the position of the Supreme Court as steward and final arbiter of what the Constitution said.⁸⁹

For the purpose of this study the judicial quality of the decision is less important than the way Marshall justified his conclusion that the Court possessed the power to review laws. Marshall's starting point was that the Constitution was the supreme law of the land and that all acts contrary to it were void. To arrive there, he relied on what he called "long and well established" principle, which he took from the preamble, that the Constitution was established by "original and supreme will" of the people, who alone had the original right to lay down the fabric of government. The "original and supreme will" of the people, Marshall argued, had been to establish a system of government in which: "the powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written."⁹⁰ At the core, Marshall's decision thus relied on the myth, established in the ratification debates, that the Constitution expressed the will of "the people."

After establishing that the people, as highest lawgivers, had created a limited government for the United States, Marshall concluded that acts of Congress that violated the Constitution were void, because otherwise the Constitution would be reduced to "from without substance"⁹¹ and the will of the people to a mere opinion that could be discarded by its representatives in favor of their own. Marshall raised the point that someone somehow should be able to bind Congress to the Constitution. This brought Marshall to the real issue that he wanted to deal with in the *Marbury* case, namely that the Supreme Court had to guard these limits and got to decide when Congress overstepped the bounds laid down by the people in the Constitution.

Before Marshall turned to the Court, however, he needed to explain why the people, who had ordained the Constitution, could no longer be counted on to exert their sovereign power to guard the limits of the Constitution. This led him to reflect on the role of the people in post-ratification politics. According to Marshall, the exercise of this original right of the people was a "great exertion," that should not be frequently repeated.⁹² Like Sherman before him, in the debate on the Bill of Rights, Marshall understood that the myth of the Constitution as the genuine act of the people could only

⁸⁸ *Marbury v. Madison* (1803) 5 US 137, at 167-168; for the comment on Marshall's questionable logic see: Garraty "The Case of the Missing Commissions", 11 and David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago: University of Chicago Press, 1985), 68.

⁸⁹ *Ibid.*, 74.

⁹⁰ *Marbury* 5 U.S. 177, 176.

⁹¹ *Marbury* 5 U.S. 174.

⁹² *Marbury* 5 U.S. 176.

retain its appeal if it was not repeated and remained unique. A repetition of the procedure would only erode the Constitution's legitimacy by opening the door to endless calls to consult "the people." Instead of turning to "the people" to review if Congress overstepped its constitutional power, Marshall argued that this should be left to the Court:

"It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each."⁹³

The Court, Marshall argued, was to examine the Constitution and uphold it when acts of Congress violated it. In this sense, the Court was to keep Congress to the limits imposed by the Constitution and to point out whenever the federal legislators did something expressly forbidden to them.⁹⁴ Here, then, Marshall said that the Court had the right—he called it the "judicial duty"—to test laws against the Constitution, and claimed the power for the Supreme Court to determine the true meaning of the Constitution.

Today, the *Marbury* case is often considered the most important decision of the Marshall Court because it offered a judicial justification for judicial review, which is often regarded as: "the most distinctive feature of the American constitutional system."⁹⁵ Even though the Court would only once⁹⁶ nullify an act of Congress for violating the Constitution before the Civil War, the Court would use its the power of judicial review in a string of cases during the first decades of the nineteenth century, to expand the powers of Congress by upholding the constitutionality of federal legislation. The more immediate significance of *Marbury* was its importance in establishing the Supreme Court as a more important—and dangerous—branch of government. By maintaining that judges, like legislators, were bound by the Constitution and had a duty to explain what it said, Marshall signaled the arrival of the Supreme Court as a serious and authoritative player on the field of constitutional interpretation. Marshall of course did not claim an exclusive right for the Court to interpret the Constitution, and at the time it was clearly understood that Congress had an equal right to do so. Nevertheless, by stating that the Court could review Congress Marshall did imply that the Justices were the final arbiter of what the Constitution said—until Congress decided to amend this, of course.

It might seem strange, from today's point of view, that Congress decided to let Marshall get away with this claim to judicial review. It is not unlikely, however, that the significance of *Marbury* was lost on most contemporaries. After all, Marshall only claimed the power for the Court to invalidate Congressional legislation, and did not force

⁹³ *Marbury* 5 U.S. 177.

⁹⁴ *Marbury* 5 U.S. 178-179.

⁹⁵ As Edward Corwin famously put it, see: "Judicial Review," in *Encyclopedia of the Social Sciences*, ed. Edwin A. Seugman, vol. VIII (London: Macmillan, 1932).

⁹⁶ This was in the 1857 case *Dred Scott v. Sandford*, see chapter 7.

the administration to act upon it.⁹⁷ In fact, Marshall's decision would have attracted a lot more attention if he had concluded that *Marbury* not only had a right to his commission but that the Jefferson administration was obliged to see to his appointment. Instead, by insisting that the Court could not provide a remedy, Marshall offered both himself and Jefferson a way around a full-blown conflict. The result was that Marshall's decision went unchallenged, where Jay's and Wilson's had been reversed.

The decision in *Marbury* signaled the Supreme Court's arrival as another platform where the political debate on the Constitution, and thus claims about the true identity of the polity would be made. Whoever had the right to judge the constitutionality of legislation, also had the right to say what the Constitution said, which in turn implied the power to shape what the polity should be. Statements on constitutionality, in short, implicitly contain statements about the identity of the polity as well. Although Marshall was more concerned with establishing the Court as the guardian of "the people's" will, rather than determining what its identity was, the decision in *Marbury* still forms an important contribution to this latter debate. Marshall reaffirmed the myth that the Constitution was an act of "we the people," but his' was a people that could no longer (be allowed to) speak for itself. This passive view of "we the people" allowed the Marshall Court to actively flesh out its view of the true identity of the polity in its post-*Marbury* decisions. Thus, *Marbury* formed the upbeat for a series of cases that would redefine the patchwork foundation of the union.

The Marshall Court after Marbury

In the more than thirty years that Marshall presided over and dominated the Supreme Court after *Marbury*, it produced a series of decisions in which the Court's position as arbiter of the meaning of the Constitution was reaffirmed. The cases reviewed in this section include many of the important decisions that Marshall made in this period: *Fletcher v. Peck* (1810), *Martin v. Hunter's Lessee* (1816), *McCulloch v. Maryland* (1819), *Cohens v. Virginia* (1821), and *Gibbon v. Ogden* (1824). The decision in these cases were all unanimous, with the exception of *Fletcher* where one of the Justices dissented. Moreover, Marshall wrote all the opinions with the exception of *Martin*, when Justice Story wrote the opinion. The discussion in this section will first consider the role that "the people" played in the Marshall Court's conception of the polity. Here the concern will not be with the background of the cases, but with the vision of the polity that emerges from the decisions. Second, the discussion will demonstrate how the Marshall Court relied on this vision of the United States as forming one people to establish the

⁹⁷ Barry Friedman, "The Myths of *Marbury*," Mark V. Tushnet, ed., *Arguing *Marbury* versus *Madison** (Stanford: Stanford University Press, 2005), 65.

supremacy of the federal government and use the integrative potential⁹⁸ of the preamble to forge the peoples of the several States into one. In this way, the Marshall Court contributed to the debate on identity of the polity.

As in the *Marbury* case, Marshall invoked the people in his later decisions to serve as the foundation for his judgments. His observations on the formative role of the people in the creation of the Constitution are often situated in the first pages of the decision and form basis upon which the decision rests. Throughout his decisions, Marshall laid down a vision of the people's role in the creation of the Constitution from which he derived certain rules and principles concerning the nature and relation of power between the federal and State governments in the union. By combining the scattered observations on the polity it is possible to gain an insight into the notion of "the people" on the Marshall Court relied.

The "people of the United States" played a prominent role in the decisions of the Marshall Court. Marshall and Story saw the Constitution as the act of the people. Before ratification, the Constitution had been a "mere proposal" of the Philadelphia Convention. After the people had given their assent to it, however, the Constitution became, as Justice Story put it: "the voice of the whole American people solemnly declared."⁹⁹ As a result, Marshall wrote that: "the government of the Union (...) is, emphatically and truly, a government of the people." "In form and in substance," he argued, "it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit."¹⁰⁰ For Marshall then, the people of the United States formed the beginning and end of the polity; there was no need to refer to anything outside of the people to explain the creation and continuing supremacy of the federal government.

This foundation of the union on the will of the people was also what set the Constitution apart from Confederation that preceded it. As Justice Story pointed out, the creation of the Constitution was the first occasion on which the people of the United States took the formation of the government in their own hands. The people's Constitution established a completely new government. Whereas the Confederation was a "compact between States," Story argued, the new "national government" was "an act of the people of the United States to supersede the Confederation, and not to be engrafted on it, as a stock through which it was to receive life and nourishment." As a result of this, Marshall argued, the whole character of the union between the States underwent a change. The basis of the union no longer was a league of States, assembled in a "congress of ambassadors," but a united people, assembled in the United States Congress.¹⁰¹

⁹⁸ For the integrative function of Constitutions in general see: Amtenbrink and Van den Berg, *The Constitutional Integrity of the European Union*, 14.

⁹⁹ *McCulloch v. Maryland* (1819) 17 U.S. 316, at 403; *Martin v. Hunter's Lessee* (1816) 14 U.S. 304, at 328.

¹⁰⁰ *McCulloch* 17 U.S. 404-405.

¹⁰¹ *Martin* 114 U.S. 332; *Gibbons v. Ogden* (1824) 22 U.S. 1, at 187

The Marshall Court had a solid conviction that the inhabitants of the different States formed one single and supreme American people. Only rarely did it dwell on the problematic aspects of this conviction. In the *McCulloch* case, Marshall reflected on the fact that the Constitution had been presented to the people in their separate States, rather than as one whole, which begged the question of how these thirteen separate peoples were in fact one and the same. It was true, Marshall admitted, that the people of the United States assembled in their separate State conventions, rather than in one, but according to him this was the only way they could “safely, effectively, and wisely” act. “No political dreamer,” he argued: “was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.” When the people act, Marshall maintained, they act in their State, but this did not mean that the act thereby ceased to be “of the people themselves.”¹⁰² This statement illustrates two further points with regard to Marshall’s vision of the role of the people in the polity.

First, the statement again shows that Marshall believed that this role had ended with the ratification of the Constitution. The people, Marshall argued, had an unmistakable right to make and unmake the Constitution—though he did not say how they could do this—but once it was into place, they could only act through their representatives and were equally bound by the laws that these made.¹⁰³ Marshall’s vision of the people, then, was that of an abstract and impotent fountain of power which could neither organize itself, nor speak out. Second, the quote illustrates the subordinate role of the States in Marshall’s vision of the polity. Unlike many of the supporters of States’ rights who pleaded before the Court, the original thirteen States played little to no role in Marshall’s view of how the union was first created, and they played only a subordinate role once it was in place. The States, in Marshall’s view, were not separate parties in the contract, but were bound by the will of the people. Once the people had established that the Constitution was the supreme law of the land, they had effectively invested the federal government with “large portions” of the sovereignty that had belonged to the States. This sovereignty could not be resumed, Marshall emphasized, because the will of whole people trumped that of the part of it. The people, he added, had a right to make and unmake the government, but the United States had an equal right to “preserve itself against a section of the nation acting in opposition to the general will.”¹⁰⁴

It was this vision of a united people that the Marshall Court invoked in its decisions to serve as a motor for the integration of the States into one nation. Although the cases discussed below deal with different aspects of the Constitution (namely the distribution of powers between the States and federal government, the position of the Supreme Court vis-à-vis State courts, and the constitutional limits of Congressional

¹⁰² *McCulloch* 17 U.S. at 403.

¹⁰³ *Cohens v. Virginia* (1821) 19 U.S. 264, at 390; *Fletcher v. Peck* (1810) 10 U.S. 87, at 133.

¹⁰⁴ *McCulloch* 17 U.S. at 404, 428-429; *Cohens* 19 U.S. 380, 390.

power) the Court's position in each case was to make the most of the integrative potential of the Constitution, especially the preamble, to redefine the patchwork compromise of the Philadelphia Convention. Marshall understood that in a "complex system" of government such the United States Constitution, in which the precise line between the powers of the general and State government was not always clear, conflicts concerning these respective powers was inevitable.¹⁰⁵ The Marshall Court seized every opportunity to point out that the Supreme Court was the arbiter in these disputes which determined what the Constitution actually said.

In the case of *Fletcher v. Peck*, which the Court heard in 1810, Marshall reaffirmed¹⁰⁶ that judicial review also applied to the governments of the several States. In *Fletcher*, Marshall repeated that the States, as members of the "American union," were bound by the words of the Constitution and that the authority of the peoples of the States was subordinate to that of the whole people of the United States.¹⁰⁷ A more serious threat to the Marshall Court came from State judiciaries who refused to uphold and execute its decisions. In two important cases, *Martin v. Hunter's Lessee* (1816) and *Cohens v. Virginia* (1821), the Marshall Court established the Supreme Court's supremacy over the State courts. In the *Martin* case, Justice Story argued the Supreme Court had the right to guard uniform interpretation of the Constitution by lower courts, since the people, when they ordained the Constitution, had created the Supreme Court to "expound" federal laws.¹⁰⁸ This decision caused alarm among the advocates of State sovereignty, and the Virginia judges tried to challenge it the *Cohens* case. This time Marshall wrote for an unanimous Court and upheld the idea that the "American people" invested the union with large portions of the State's sovereignty when they created the Constitution and that it made the Supreme Court the arbiter of what the Constitution said.¹⁰⁹

Finally, in *McCulloch v. Maryland*, the Marshall Court established that it was the final arbiter of whether or not an act of Congress fell within its constitutional power. The plaintiff in *McCulloch* challenged whether the National Bank fell within Congress' constitutional powers. In his opinion, Marshall retrospectively confirmed the constitutionality of Hamilton's conduct by arguing that the people had created the Constitution for their benefit. Consequently, they could never have intended to "clog and embarrass" Congress by withholding powers necessary to the government to secure the general well-being. This, Marshall argued, was why the people had ordained that Congress could use all the necessary and proper means to perform the "high duties" they had assigned to it in the Constitution.¹¹⁰ The Bank, in other words, was a constitutional

¹⁰⁵ *Gibbons* 22 U.S. 204-205

¹⁰⁶ This had earlier been established in *Ware v. Hylton* (1796) 3 U.S. 199.

¹⁰⁷ *Fletcher* 10 U.S. 139, 136.

¹⁰⁸ *Martin* 14 U.S. 345, 348, 344, 329.

¹⁰⁹ *Cohens* 19 U.S. 380, 377.

¹¹⁰ *McCulloch* 17 U.S. 405-406, 408, 421.

exercise of “implied powers.”¹¹¹ Moreover, Marshall argued that “this tribunal alone” could answer the question whether Congress possessed the constitutional power to charter a bank, which made the Supreme Court the *final* arbiter of what the Constitution said.¹¹² Fourteen years after *Marbury*, Marshall felt confident enough to claim this right exclusively for the Supreme Court and in this sense *McCulloch* formed the culmination of Marshall’s career.

In conclusion, it becomes clear that the decisions of the Marshall Court relied on the integrative potential of the preamble to limit the freedom of the State legislative and judiciary to decide for themselves whether they should comply to the dictates of the union. As Marshall put it in *McCulloch*: “the nation, on those subjects on which it can act, must necessarily bind its component parts.”¹¹³ According to Marshall, in *Cohens*, the preamble made clear that the United States formed one people with regard to defense, commerce, and other areas listed in the Constitution. “America,” he concluded: “has chosen to be, in many respects, and to many purposes, a nation, and for all these purposes, her government is complete.”¹¹⁴ Clearly, as this and earlier quotes illustrate, the Marshall Court relied the myth of “we the people” as the authors of the Constitution to further its own integrative agenda. What united this people, other than a supposed wish unite the States into a closer union, remained unclear. For the Marshall Court, in other words, the people were largely an empty concept in whose mouth it could put its vision for the United States and on the basis of whose authority it redefined the terms of the patchwork Constitution.

Conclusion

The debates discussed in this chapter demonstrate the continued contestedness of the Constitution after ratification. Instead of ending the debate on the identity of the polity, the patchwork Constitution gave ample opportunity and ammunition for a continuation of it. In the first three decades after ratification, the question what the identity of “the people of the United States” was—either one single or the sum of several peoples—and what their role in the post-ratification constitutional debate was dominated the debate in Congress as well as the Supreme Court.

In these debates, the continuing role of narratives stands out. The past, or rather views of the past, played an important role in the narrative reasoning that members of

¹¹¹ *McCulloch* 17 U.S. 424; as Marshall put it: “Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional,” see: *Ibid.*, 421

¹¹² *McCulloch* 17, U.S. 401.

¹¹³ *McCulloch* 17 U.S. 405.

¹¹⁴ *Cohens* 19 U.S. 413-414.

Congress and Supreme Court Justices employed to demonstrate that a certain reading of the Constitution was either in line or a violation of the “true” identity of the polity. The two recurring narratives that came to dominate the debate in this period relied on a different reading of the past to portray the United States as either a union of several peoples or of one, single people. Interesting is that in both cases, the myth that the “we the people of the United States” had created the Constitution was uncontested. But whereas Hamilton, Marshall, and the Federalist members of Congress used the myth to urge further integration, the Republican members of Congress employed it to frame a grass-root petition movement as the voice of “the people.” While for the Federalists, “the people” were an anonymous and abstract mass whose role had ended after ratification, the Republicans argued that “the people” (of each State) continued to have the right to decide what the Constitution it supposedly had enacted really said.

Chapter 6:

Union of Compromise

The year 1820 forms of a puzzle to historians of Antebellum America. It marks, on the one hand, a period of unpartisan politics known as the Era of Good Feelings. Following the United States' victory over Britain in the War of 1812, American politics had virtually turned into a one party affair. The struggling Federalist Party seized a series of humiliating defeats to vent a number of grievances—including protest against the domination of the Presidency by Virginians—in Hartford, in 1814. When the fortunes of war turned in favor of the United States after General Jackson's victory in New Orleans, this Hartford Convention became synonymous with treason and spelled the end of the Federalist Party on the political stage. In the wake of the Federalists' demise, the Democratic-Republicans' power reached its peak, best symbolized by James Monroe's unopposed election to the presidency in 1820—the last time this happened in U.S. history. The year 1820, on the other hand, also marks the height of the debate on slavery's position in the West that would rip the Union apart before the century's end. In this sense, 1820 would give a taste of what was to follow in the next three decades.

The year 1820 forms the starting point of this chapter, which deals with the debates from the admission of Missouri to that on the Compromise of 1850. This period roughly coincides with what historians have termed the Second Party System in United States which was dominated by the Democratic Party—founded in 1828 by Andrew Jackson and the successor to Jefferson's Democratic-Republicans—and the so-called Whig Party that arose in opposition to it. While both parties were “national” in outreach and were organized across States in all four corners of the Union, the two most important issues that divided them were not. The question whether the United States should expand west and how (which was the dominant issue in the debates on Missouri in the early 1820s and New Mexico and California in 1846 and 1850) and if the agricultural southwest should contribute to the protectionist tariff for the industry of the northeast (which was the dominant issue in the Nullification debate of the 1830s) split the States across sectional lines. Both begged the fundamental question whether the United States should expand and protect its economy as one people or several. In both cases, it became clear that the two views of the polity—as constituting one people or several—were increasingly confined to respectively the northern and southern part of the United States.

The constitutional debates discussed in the period covered here are characterized by a willingness to put the underlying problem of the patchwork paradox to rest by means of compromise. The three compromises discussed in this chapter—that on Missouri, on

the Nullification Crisis, and of 1850—all allowed the political parties to remain intact and prevented a split across sectional lines. Ultimately, however, this strategy only succeeded in kicking the can further down the road. Rather than focusing solely on how these compromises came about and what their immediate political effects were, this chapter will focus on the implications for the identity of the polity: how was the polity represented in these debates, how did the views of it develop during the debates, and what were their implications for the patchwork solution underlying the Union?

Conflict and compromise: the debate on the admission of Missouri

The end of the War of 1812 with the Peace of Ghent of 1815 heralded in an unprecedented period of growth and prosperity for the United States. In the six years following the war, a total of six new States entered the Union, which greatly increased its size and population. This rapid westward expansion, with its promise of cheap land and unlimited opportunity proved irresistible to many and set in motion a wave of immigrants who wanted to try their luck on the other side of the Mississippi river. The westward expansion of the United States took place in pairs; first with States formed from the territory ceded by the States at the time of the Confederation, and with those formed in the territory purchased from France in 1803. For every new State prohibiting slavery, another permitting it entered the Union. Beginning with Vermont and Kentucky in the early 1790s, this idea paired together the admission of Tennessee and Ohio at the turn of the century, and that of Louisiana, Indiana, Mississippi, and Illinois thereafter.

The harmonious westward expansion came to a screeching halt with the admission of Missouri as the twenty-fourth State to the Union. In the case of Missouri, the issue of slavery decidedly burst on the national theatre. As the 1820 census illustrated, the “peculiar institution” was definitively not a dying institution that some of the framers of the Constitution had considered it to be. The census office counted 1,5 million slaves that year, an increase of almost 30% compared to ten years earlier.¹ This proved that, even without the Atlantic slave trade—which had been prohibited in 1808—the number of slaves in the union would continue to double every twenty year.² Since the market in the slaveholding States was long saturated, southerners were eagerly looking for new territories to sell their surplus slaves. The admission of Missouri provided the first opportunity to extend slavery inlands across the Mississippi river, and southern members

¹ George Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010), 150.

² This natural growth of the slave population was a unique feature of American slavery. By 1865, more than 99% of all Southern slaves were born in the United States, see: Peter Kolchin, *American Slavery, 1619-1877* (New York: Hill and Wang, 1993), 38.

of Congress seized it with both hands. Many northerners, on the contrary, opposed the extension of slavery across the Mississippi. These two views collided in the debate on the admission of Missouri and the result was a fierce conflict.

The Missouri debate would occupy Congress for three years, from 1819 to 1821, covering hundreds upon hundreds of pages in the *Annals of Congress*. It was the most candid discussion on slavery ever to take place on the floor of Congress, unhindered by the later gag rules—imposed to prevent violent outbursts over slavery like the ones in the Missouri conflict—and took place at a time when the dominant Democratic-Republican party was starting to fall apart and failed to get its members in line.³ As its size indicates, it was complex debate with many sides to it. At first glance, the conflict revolved around the question whether Congress could and should impose a restriction on slavery as a condition to the admission of Missouri. Fuelling this constitutional conflict was a fundamental disagreement on the proper place of slavery in the Union. Behind this disagreement, finally, lurked a more fundamental disagreement about the “true” identity of the polity. Southern slaveholders argued that, since the United States formed a collection of separate peoples, each State had the right to decide whether it wanted to institute slavery. Many Northerners, on the other hand, claimed that the United States constituted one single people and thus slavery was a concern of all.

Once again, this placed the patchwork paradox at the heart of the debate and raised the question if the United States could form one and several peoples at the same time. When the two sides of Congress—slaveholding and non-slaveholding—proved unable to resolve their conflict, the question whether they still had a common future together became more and more acute. In this sense, the Missouri conflict was not simply a “referendum on the meaning of America,” as the historian Robert Forbes argued, but actually questioned the very existence of “America” to begin with.⁴ During the Missouri conflict the very notion of forming one people would become contested. In what follows, attention first will turn to John Tallmadge’s restrictive motion which set the debate in motion. Next, the constitutional arguments presented by both sides will be analyzed to demonstrate that at the heart of the debate were two conflicting views of the “true” meaning of “republican government” that sprang from a different understanding “we the people.” The final section will discuss how the Missouri Compromise was reached and analyzes how it addressed the underlying conflict over the identity of the polity.

³ Robert Pierce Forbes, *The Missouri Compromise and Its Aftermath: Slavery & the Meaning of America* (Chapel Hill: University of North Carolina Press, 2007), 5, 36.

⁴ *Ibid.*, 43.

Opening salvo: the Tallmadge restriction

Saturday February 13, 1819, was the exact date that the Missouri question turned into the Missouri conflict. On that day John Tallmadge, the New York representative who had earlier and unsuccessfully sought to prohibit slavery in Illinois,⁵ threw down the antislavery gauntlet by proposing a motion that made the prohibition of “the further introduction of slavery or involuntary servitude” in Missouri a condition for its admission to the union.⁶ Tallmadge’s motive for proposing the restriction was not so much a concern with the plight of the slaves, but rather with its supposed damaging effects to the entire Union. Slavery was “a national weakness,” Tallmadge claimed and he feared the end of the Union if it was allowed to spread to the West. “Extend slavery (...) over your extended empire and you prepare its dissolution,” he said and urged his colleagues that: “it is our business (...) to control this evil (...) to fix its limits.”⁷

For passionate advocates of restriction such as Tallmadge, the fate of Missouri was intimately connected with the future of the entire Union. In fact, for Tallmadge, calling a halt to slavery was more important than maintaining the Union. This much became clear during a violent argument between Tallmadge and Thomas Cobb, a fierce opponent of restriction from Georgia. In the eyes of Cobb and his fellow-Southerners, Tallmadge’s motion was just the type of meddling that encouraged slaves to rise up against their masters, Cobb warned that the southern States would not submit to a motion “pregnant with danger,” and told the advocates that: “you are kindling a fire which all the waters of the ocean cannot put out, which seas of blood can only extinguish.”⁸ To this Tallmadge replied that the “glorious cause” of “setting bounds to a slavery the most cruel and debasing” was worth more than peace with the South:

“If a dissolution of the Union must take place, let it be so! If civil war must come (...) let it come! (...) If blood is necessary to extinguish any fire which I have assisted to kindle, I can assure gentleman, while I regret the necessity, I shall not forbear to contribute mine [for] I shall at least have the painful consolation to believe that I fall, as a fragment, in the ruins of my country.”⁹

The violent nature of this confrontation between Tallmadge and Cobb was unprecedented on the floor of Congress and shocked both sides of the House. If this willingness to sacrifice the Union for an abstract principle alarmed the members of the House, however, they were about to get another shock, because at the end of his stirring speech,

⁵ Gales, *Annals of Congress*, 1834, XXXIII, 306, 311.

⁶ Ibid., XXXIII, 1166, 1170.

⁷ Ibid., XXXIII, 1206, 1210–1211.

⁸ Ibid., XXXIII, 1437.

⁹ Ibid., XXXIII, 1204–1205.

Tallmadge's restrictive motion was put to vote and passed with 87 to 76 votes.¹⁰ More so than Tallmadge's threats, the adoption of his restriction signaled that the time of northern restraint towards slavery was over. Even though Tallmadge's restriction was discarded by the Senate,¹¹ the stage was now set for a stalemate debate on the future of the Union.

The adoption of Tallmadge's restriction raises the question why the admission of Missouri was different to him and his supporters from that of earlier slave States like Kentucky or Mississippi. The northern States enjoyed a majority in the House on account of their larger population, but until 1819 the southern members had been able to count on the middle States—especially New York and Pennsylvania—to support the admission new slave States.¹² This time, however, more than two-thirds of the New York delegation and all of Pennsylvania supported the Tallmadge restriction. The remarkable thing about Tallmadge's restriction was not, as one historian writes, that it “summoned the South into being,”¹³ but, on the contrary, that it received such broad support in the North.

The reason why lies in the many Northerners who shared Tallmadge's view that southern slavery was tolerated by the “original compromise” of 1787, but that Missouri fell outside this deal. “Willingly I submit to an evil which we cannot safely remedy,” Tallmadge said, yet: “all these reasons cease when we cross the banks of the Mississippi.” Here, Tallmadge argued, was a territory not included in the compromise at the adoption of the Constitution, a territory: “acquired by our common fund, [that] ought justly to be subject to our common legislation.”¹⁴ Missouri, unlike Mississippi, did not self-evidently belong to the South.¹⁵ On the contrary, New York Representative John Taylor pointed out that Missouri's “soil, productions, and climate are the same,” as the North, and therefore: “the same principle of government should be applied to it.”¹⁶ Missouri was different because it was claimed by both the North and the South.¹⁷ In this view, Missouri simply lay too far north to enter the Union as a slave State.¹⁸

The defeat of Tallmadge's motion in the Senate did not mean the end of the Missouri conflict. The members of the sixteenth Congress, who replaced their predecessors in December of 1819, showed no sign of wanting to lay the conflict at rest. On the contrary, one of the first actions of the Speaker of the House, Henry Clay, was to make the unrestricted admission of Missouri a condition for the admission of the non-

¹⁰ Ibid., XXXIII, 1214. The second part of the motion, demanding the freeing of existing slaves at the age of 25, was adopted with the smaller margin of 82 to 78 votes.

¹¹ Ibid., XXXIII, 279.

¹² When Tallmadge had introduced his earlier prohibition of slavery in Illinois, for example, the middle state men had helped the South to obtain a majority to reject it.

¹³ George Dangerfield, *The Era of Good Feelings* (New York: Harcourt, Brace, 1952), 204.

¹⁴ Gales, *Annals of Congress*, 1834, XXXIII, 1203.

¹⁵ According to David Morrill of New Hampshire, Missouri did not belong to this “original compact,” *ibid.*, 139, 153.

¹⁶ Ibid., XXXIII, 1172.

¹⁷ Van Cleve, *A Slaveholders' Union*, 232.

¹⁸ Matthew Mason, *Slavery and Politics in the Early American Republic* (Chapel Hill: University of North Carolina Press, 2006), 184.

slaveholding State of Maine. If Missouri was not allowed to enter as a slave State, Clay told his northern colleagues, the South would block the admission of Maine. This type of political blackmail did not go down well, but proved effective to keep Missouri on the legislative agenda.¹⁹ Despite Clay's hostage-taking of Maine, the advocates of restriction showed no sign of wanting to strike a deal. Tallmadge had not sought reelection, but his friend and colleague from New York John Taylor renewed the motion prohibiting slavery in Missouri.²⁰ The result was a debate which pitted the northern and southern wings of Congress against each other on the issue of the true identity of the polity.

At the heart of the debate was the question whether slavery was a domestic issue, like education, that each State could settle for itself, or whether it was a "national" issue that concerned the entire union—including the non-slaveholding States—and should therefore be regulated by Congress. This was a patchwork issue *pur sang* for it begged whether the Constitution had created the United States as one or several peoples with regard to the expansion of slavery. The southern members of Congress in particular were keen to change the subject from the desirability of slavery to the constitutionality of the Tallmadge restriction. According to Virginia representative Philip Barbour, the question was not: "whether slavery is, in itself, an evil, but whether supposing it so be such, we have the power to correct it, in relation to Missouri." His brother, James Barbour, took a similar line in the Senate. The real question in the debate, James argued, was not between slavery and freedom, but: "shall we violate the Constitution, by imposing restrictions on the people of Missouri."²¹

To this the advocates of restriction replied that the third section of article IV, which said that "new States may be admitted by Congress into this Union," empowered Congress to condition the admission of Missouri on the prohibition of slavery. "If Congress has the power of altogether refusing to admit new States," Taylor argued: "much more has it the power of prescribing such conditions of admission as may be judged reasonable."²² This, many southerners objected in turn, was a discretionary power indeed, for it meant, as Christopher Rankin of Mississippi pointed out, that the right to admit a man to your house meant: "you may compel him to enter the window, or come down the chimney." In other words, the power to impose certain conditions, did not include that of imposing conditions that violated the Constitution. If Congress could condition Missouri's admission on the abolition of slavery, it could in fact regulate everything else in that State.²³ This, Representative James Pindall argued, would:

¹⁹ John Holmes, native of Maine, said he would rather give up statehood than forfeit his opinions on slavery. Gales, *Annals of Congress*, 1834, XXXV, 832, 834.

²⁰ *Ibid.*, XXXV, 947.

²¹ *Ibid.*, XXXV, 947, 1220, 315.

²² *Ibid.*, XXXIII, 1172.

²³ Currie, *The Constitution in Congress*, 2001, 236, 241.

“obliterate the great line of demarcation” between the federal government and the States, and tended to tyranny.²⁴

In the end the constant repetition of the same clauses on the basis of which the restriction was found either constitutional or not, did little to bring the debate forward. Instead, the debate clogged down fast. As in the earlier debates on the Bank and the Alien and Sedition Acts, the members of Congress found themselves in a stalemate where both sides could quote relevant clauses of the Constitution to buttress their point and neither seemed prepared to leave their position. Like the earlier debates, the speakers turned to circumstantial evidence outside the Constitution to demonstrate their interpretation of it was the only correct one. In the case of the Missouri conflict this boiled down to an endless bickering over the precedents. Both sides could cite earlier cases of admission to their advantage. According to the advocates of restriction, the adherence to article 6 of the North-West Ordinance of 1787—which prohibited slavery in the area above the Ohio River—in the admission of Ohio, Indiana, and Illinois showed that Congress had on earlier occasions prohibited slavery in new States. Opponents, however, denied that the Ordinance was binding on the present Congress since it had been enacted by its predecessor, the Continental Congress, and further pointed towards the unconditional admission of Kentucky, Mississippi, Alabama, and Louisiana as proof that slavery was not found reason to stop States from entering before.²⁵

Far more interesting for the purpose of this study is the debate in Congress on whether the Tallmadge restriction was in line with the United States’ professed identity as a “republican” government. This debate centered on another section of Article IV of the Constitution, which said that: “the United States shall guarantee to every State in this Union a republican form of government.”²⁶ This clause was the Constitution’s equivalent of the right of “the people” of the States to alter and abolish their government if it violated the rights first guaranteed by the Declaration of Independence.²⁷ The central question in the Missouri conflict was whether this right belonged to the people of each State, or to the United States as one, single people only. To answer this question, each side in the debate evoked a different meaning to the term “republican,” and relied on a different account of the meaning of the Declaration of Independence to demonstrate what the “true” meaning of the Constitution was.

To support their view that republican government excluded slavery, the advocates of restriction portrayed the very idea of enslaving another human being as contradictory to the principles of 1776. According to Massachusetts Representative Timothy Fuller, slavery violated the Declaration of Independence—which he called “an authority admitted in all parts of the union [as] a definition of the basis of republican

²⁴ Gales, *Annals of Congress*, 1834, XXXVI, 1338–1339 (Rankin), 1275 (Pindall).

²⁵ For a detailed discussion of precedents see: Currie, *The Constitution in Congress*, 2001, 235 ff.

²⁶ U.S. Constitution, Article IV, Section 3.

²⁷ Amar, *America’s Constitution*, 279–280.

government”—since it established the equality of man as a self-evident truth.²⁸ Others joined Fuller in calling slavery “contrary to the genius of our government.”²⁹ By relying on the Declaration, the advocates wanted to demonstrate that their antipathy against slavery was not “a very late discovery,” as one Southerner put it, but had been shared by the founding generation.³⁰ “In proposing the present measure,” William Plumer of New Hampshire claimed; “we are only doing what is expected from us by the founders of the republic.”³¹

The southern members of Congress were embarrassed by the charge of violating the Declaration of Independence which enjoyed an enormous authority within their ranks. The Declaration had been written by the most prominent southern intellectual and founder of the Republican Party, Thomas Jefferson, whose northern disciples now used his master’s words against their slaveholding fellow-party members. To escape the interpretation of the Declaration’s as calling for equality, many southerners now adopted a dissociation between the principles in the Declaration on the one hand, and its constitutional function of separating the colonies from Britain on the other.³² According to Delaware Senator Nicholas Van Dyke, the Declaration’s was not an interpretive key to the Constitution, but merely a “recital of abstract theoretical principles,” not intended to abolish or alter any law then in existence. The framers were not the “visionary theorists” that the advocates held them for, Van Dyke argued, but “men of sound, practical, common sense” seeking only to justify their claim to self-government. The only “efficient parts” of the Declaration, Kentucky representative Benjamin Hardin claimed, were those “which declare our dependence upon Great Britain to be at an end.”³³

What these statements show is that southern members of Congress were all too willing to distance themselves from the Declaration once parts of it were invoked to threaten slavery. The only part of the Declaration with any force and effect, these Congressmen insisted, was that declaring the separation from Britain—the rest was just abstract metaphysics. By this reasoning, Jefferson’s justification of the Revolution on the grounds of the laws of nature in the Declaration’s preamble was reduced to just another set of opinions, with the same force and effect as the next declaration.³⁴ As Maryland Senator William Pinkney put it: “the self-evident truths announced in the Declaration of Independence are not truths at all, if taken literally [and] were never designed to be so

²⁸ Gales, *Annals of Congress*, 1834, XXXIII, 1180–1181.

²⁹ By New Hampshire Senator Morril *ibid.*, XXXV, 298.

³⁰ The unidentified speaker was Representative Benjamin Hardin of Kentucky, see; *Ibid.*, XXXV, 1071.

³¹ *Ibid.*, XXXVI, 1438.

³² Ironically, in a time in which the Declaration began to receive increasingly popular attention, Southern Congressmen were turning away from this founding document. Maier, *American Scripture*, 175. As Maier notes on page 169, the Southern stance basically was the general attitude towards the Declaration in the first fifteen years after its adoption.

³³ Gales, *Annals of Congress*, 1834, XXXV, 301–302 (Van Dyke), 1071 (Hardin).

³⁴ These were the words of Representative Alexander Smyth of Virginia, see; *Ibid.*, XXXV, 1004.

received.”³⁵ The Declaration, in short, could never be and never was intended to bring about the emancipation of slaves.

The advocates of restriction were in turn outraged by the lack of respect that their adversaries demonstrated for what they regarded as the “original charter on which all our other institutions are based.” “Are we willing,” John Taylor asked his colleagues, “to pronounce the Declaration, for the support of which the fathers of our Revolution pledged their lives and fortunes, a flagrant falsehood (...) a solemn mockery?” For Taylor and other ardent supporters of restriction, the Declaration’s promise of liberty and equality for all was not some abstract reasoning, but rather continued to be a “binding pledge” on the members of Congress.³⁶ The portrayal of the Declaration as a binding pledge reveals its cornerstone function in the advocates’ portrayal of the “true” identity of the United States as a free country where slavery could not be abided. Since the Constitution implicitly recognized the existence of slavery, the advocates relied on the self-evident truth that “all men are created equal” as proof that the United States had been founded as free and equal polity. Slavery naturally denied this promise of liberty to those in bondage, and the advocates thus argued it was incompatible with the ends of the union. A “true republican” government, in other words, was incompatible with slavery. “No *American* statesman,” Taylor pointed out, had ever defended the: “anti-republican doctrine that man cannot be free without possessing a power to enslave his fellow-man.”³⁷

As Taylor’s comment illustrates, the advocates’ equation between republicanism and equality boiled down to the idea that slavery was an *un-American* institution. The advocates constantly assumed that the people of the United States formed one, single body with one single identity, which excluded slavery. With the adoption of the Constitution, Henry Storrs argued: “we have become emphatically one people, under one national government (...) citizens of one country (...) truly brethren of the same family.” The very fact that the United States formed one “federal family” was what made the spread of slavery unacceptable.³⁸ Time and again, the advocates pointed out that the entire Union suffered from slavery’s march to the West. If Missouri allowed slavery into their State, Pennsylvania Representative William Darlington argued, “the evil (...) will not merely affect themselves, but the whole Union.” This again explains Missouri’s symbolic status for the advocates: for them the future happiness of the Republic depended on, as Ohio Representative Benjamin Ruggles said, populating the West with “free people.”³⁹

³⁵ Ibid., XXXV, 405.

³⁶ Ibid., XXXVI, 1396 (Representative Charles Rich of Vermont); XXXV, 958 (Taylor), 1035 (New Hampshire Representative Clifton Clagett)).

³⁷ Ibid., XXXV, 959.

³⁸ Ibid., XXXVII, 535 (Storrs), 568 (the term “federal family” comes from New York Representative James Strong) .

³⁹ Ibid., XXXVI, 1380 (Darlington); XXXV, 286 (Ruggles).

Confronted with the contrast between their portrayal of the United States as the land of the free and the reality that it was home to more than one and a half million slaves, many advocates lost no opportunity to point out the hypocrisy that a polity founded on the self-evident truth of equality continued to keep one sixth of its population in bondage. “We boast of our liberties,” senator David Morrill of New Hampshire said, “we call ourselves a nation of freemen [but] the goddess of liberty, [which adorned the hall of the House of Representatives] is looking down with a frown on representatives of a nation of freemen legislating to extend and perpetuate slavery.” To Pennsylvania representative John Sergeant this paradox was a perversion of words that the Constitution: “framed to secure, to preserve, and to extend the blessings of liberty, itself rests upon a principle so impolitic and so indefensible as this [slavery].”⁴⁰ By calling the institution of slavery a “hypocrisy,” the advocates were in fact saying that the slaveholding South was not living up to the “true” republican principles in the Constitution and that the very existence of slavery was a mockery.

Next to “hypocrisy,” many members of Congress, advocates and opponents alike, also regarded slavery as an “original sin” of their forefathers. But whereas some argued that this sin could only be redeemed through general emancipation, most members of Congress agreed with Georgia representative Robert Reid that slavery was a “fixed evil, which we can only alleviate.”⁴¹ It is important, at this point, to emphasize that the majority of the advocates did not flirt with the idea of emancipation of slavery. This was also the way in which John Tallmadge had framed his restriction: “confine it [slavery] to the original slaveholding States,” he insisted: “and you stand acquitted of all imputation.”⁴² Instead of seeing it as a sin, many advocates preferred the metaphor of disease to emphasize need for its confinement. Slavery, they argued, was a “cancer in our breast,” a “plague” even, and a “pestilence.” Spreading the disease of slavery to the “uncontaminated” soil of Missouri, in this view, would only aggravate the evil and weaken the patient, i.e. the Union.⁴³ By describing slavery as a disease, the advocates of restriction not only once again made clear that its extension to Missouri would affect the entire Union, but also implied that it had no future in the United States. The South in this metaphor, became a contaminated area dangerous to the entire Union.

All of this, the charges of hypocrisy and framing as slavery as a disease within the federal family, conveyed a strong sense of intolerance on the part of the North for slavery. While the advocates of restriction insisted they only wanted to confine slavery to its existing borders and were not interested in emancipation, their rhetoric clearly gave rise to southern suspicions that their goal was the abolition of slavery itself. As mentioned earlier, the charge of hypocrisy already implied that slave-ownership was a violation of

⁴⁰ Ibid., XXXV, 149 (Morrill), 1189–1190 (Sergeant).

⁴¹ Ibid., XXXV, 1024 (Reid).

⁴² Ibid., XXXIII, 1211.

⁴³ Ibid., XXXIII, 1206; XXXV, 148, 1110; XXXIII, 1174; XXXV, 253.

the “true” republican heritage of 1776 and thus had no place in the United States. Likewise, by portraying slavery in terms of disease evoked a powerful image of the slaveholding South as an infected part of the union that should be contained and contaminated by curing the cause. Finally, if the United States formed one federal family with one identity as freemen, the expansion of slavery was a *national*, rather than a *domestic* issue. This discrepancy between the rhetoric of the advocates and their message of confinement, likely fed the existing suspicions the opponents harbored of the true intention behind the Tallmadge restriction.

Many southern members of Congress were outraged and offended by their adversaries’ rhetoric—which William Pinckney criticized as “pomp.” Few attempts to counter the metaphor were made, however, as many Southerners in fact admitted that slavery was an evil, though few were convinced it could be alleviated by stopping slavery’s advance in the West. Only James Barbour seemed to understand the potential of the disease metaphor and tried to use it against the advocates when he stingingly observed that: “it is the doctor [i.e. Congress] not the disease we dread.”⁴⁴ Barbour’s reaction was exemplary for the strategy of the southern members of Congress to shift the focus of the debate from the desirability of slavery’s expansion to Missouri to the unconstitutionality of the Tallmadge restriction. The opponents also relied on the Declaration of Independence for their reading of the meaning of “republican.” The opponents argued that the Declaration’s core value entailed that every people, including that of Missouri, had an inalienable right to institute, alter, and abolish their own government.⁴⁵ Representative Louis McLane from Delaware, for example, portrayed the Declaration as the basis “upon which the people of Missouri claim their right to make their own constitution.” For the opponents, the Declaration of Independence comprised a principle that they held dear above all other, namely the *freedom of self-government*. This was the rock on which they built their resistance to the Tallmadge restriction. As Mississippi Representative Christopher Rankin pointed out, the Declaration had established the political maxim that: “every people have a right to adopt their own government and laws.” Yet, he told his colleagues, by imposing abolition as a condition to admission: “do you not deny this privilege to the people of Missouri?”⁴⁶

As these statements illustrate, the opponents viewed the United States primarily as a union of States and with the right of “the people” draft their own constitution, they clearly meant the peoples of the several States. Slavery, in this view, was a *domestic* affair that the people of each State should decide for itself to adopt or reject without concern for the feelings and interests of the rest of the union. States, according to Virginian Representative Philip Barbour, possessed the sovereignty as independent political communities to decide on the matter of slavery, since that power was not

⁴⁴ Ibid., XXXV, 394 (Pinckney), 174 (Walker).

⁴⁵ See for example Kentucky Representative Richard Anderson: Ibid., XXXV, 1257.

⁴⁶ Ibid., XXXV, 1155 (McLane), 1334 (Rankin).

expressly given to Congress by the Constitution. In similar vein John Tyler, who also represented Virginia, insisted that: “the nature and spirit of our institutions (...) are founded on the great principle that man is capable of self-government.” For staunch State’s rights men like the Virginians Barbour and Tyler, slavery literally was a domestic affair and Congress meddling constituted “foreign interference.” With regard to slavery, Barbour argued, Congress was “as alien a government, in relations to the States, as is the British government.” A State, Tyler added, required “no foreign aid in regulating his domestic concerns,” and, he added: “our revolution was founded on this principle.”⁴⁷

Barbour and Tyler portrayed the Tallmadge restriction as an illegal interference in an area that belonged solely to the sovereignty of the State. Their labeling of the motion as a “foreign intervention” was especially telling for it perfectly captured the idea, entertained by many opponents, that northern advocates of restriction had no right to meddle with the institution of slavery which was alien to their part of the union and in which they had neither interest nor experience.⁴⁸ The idea, that slavery should be left to the people of Missouri themselves, also squared perfectly with the notion of popular sovereignty. No doubt, Christopher Rankin said, everyone in Congress agreed that: “in our government (...) sovereignty resides in all the people,” yet: “if (...) gentlemen who advocate this restriction are correct, Congress possesses absolute sovereignty, and the people are their servants.” Nicholas Van Dyke, the junior Senator from Delaware, pointed out that such an unlimited power was “not compatible with American politics,” which was firmly based on limited powers. According to him, slavery was a “domestic concern,” not a national one.⁴⁹

These statements show that self-government was essential to the opponents of the restriction. In fact, if there was one thing that separated the United States from the rest of the world, Nathaniel Macon argued, it was: “the great *American* principle, that the people can govern themselves.” It is no exaggeration, then, to State that for many of the opponents of restriction, self-government constituted the essence of what it meant to be American. It was all the more painful, therefore, that this right, which they considered as “the birthright of all Americans,” would now be withheld from the people of Missouri. The restriction of slavery, Philip Barbour argued, would render Missouri “less sovereign” than the other States in the union.⁵⁰ Mississippi Representative Rankin evoked the familiar narrative of the colonial past and asked: “have we so soon forgotten that our fathers resisted similar usurpation of powers attempted by England?” Colonial history also served as a threat to take the complaints seriously. Nathaniel Macon warned

⁴⁷ Ibid., XXXIII, 1185 (Barbour); XXXV, 1383 (Tyler), 1233, 1220 (Barbour), 1383 (Tyler).

⁴⁸ See, for example, Virginia representative James Pindall who distrusts: “the eager solicitude of gentleman from one half of the Union, to legislate upon a subject in which neither themselves nor their constituents have any interest,” *ibid.*, XXXV, 1266.

⁴⁹ Ibid., XXXV, 1333 (Rankin), 304, 308 (Van Dyke).

⁵⁰ Ibid., XXXV, 221 (Macon), 1090 (the unidentified speaker is Benjamin Hardin of Kentucky), 1187 (Barbour).

Congress that if they continued to treat Missouri like Great Britain had treated them, they could expect a similar reaction. His fellow senator from Delaware, Van Dyke, made a similar point: “the same spirit that resisted British tyranny will resist usurpation (...) from an American Congress.”⁵¹ In short, the southern position in the Missouri debate was that restriction was unjust, unconstitutional, tyrannical, and even un-American.

Summing up, the Missouri conflict reveals two fundamentally opposed visions on the “true” meaning of Article IV’s guarantee of “a republican form of government” which drew on two different views of the polity as either forming one people or a union of States. The advocates of the Tallmadge restriction portrayed slavery as the antithesis of the republican heritage in the Declaration of Independence that declared “all men are created equal.” The opponents, on the contrary, argued that the right to adopt or reject slavery was the very essence of the republican principle of self-government established by the Declaration. Underlying this conflict on the “true” meaning of republicanism were two different conceptions of who “the people of the United States” were. For the opponents, this was the *sum* of the peoples of the States: every people in the United States, i.e. that of Virginia as well as Missouri, was truly free only if it could determine for itself whether to institute slavery without the “foreign” intervention of Congress. The opponents, in other words, relied on the familiar view United States as forming a union of States to reduce slavery to a domestic affair that is of no concern to the rest of the union. The advocates of restriction, however, relied on the view of the United States as forming one, single people to justify a Congressional ban on slavery in Missouri. In doing so, the advocates evoked the argument previously used by Henry, Adams, and Marshall, but used it in a new fashion: forming a single people implied that there could only be a single identity. As a free people, they argued, the United States could not accept slavery’s expansion to Missouri, not simply because it violated the Constitution, but because it harmed the entire union since the United States formed one people and one “federal family.” Slavery, here, became a “national” concern which could not be left to the States, but had to be resolved by Congress.

Towards Compromise

In light of this clash over Missouri, the fact that the debate resulted in a compromise has puzzled historians ever since and has given rise to a number of different answers. According to the historian Glover Moore party politics were the main driving force behind the compromise. Northern Republicans, he argues, feared that the Federalists would use the issue of slavery to create a new anti-slavery party and dropped the

⁵¹ Ibid., XXXVI, 1342 (Rankin); XXXV, 223 (Macon), 310 (Van Dyke).

restriction to prevent this.⁵² George van Cleve has argued in similar vein that the debate was about a “deeper game” of long-term control of the federal government and that Northerners voted for the compromise, because they thought the restriction was “tainted by political bias” and formed the ideal campaign platform for the Federalists to reclaim the federal government.⁵³ Robert Forbes, finally, argues that others have overemphasized the political considerations in the coming about of the compromise, but goes on to offer yet another version of this type of explanation, casting president Monroe in the role of compromiser.⁵⁴

This study is not primarily concerned with how compromise was achieved, but will focus mainly on its implications for the discussion on the identity of the polity. In the end, the members of Congress achieved compromise not by resolving the underlying patchwork paradox of how the United States could form both one and several peoples at the same time. In fact, a compromise on this level of the identity of the polity could never be reached, since the two conflicting views (one and several peoples) could not *both* be true with regards to the expansion of slavery at the same time. The “solution,” if it can be called that, that the members of Congress adopted was to sidestep the paradox by not choosing either vision, but a little of both at the same time.

The Missouri Compromise was in fact a set of two compromises. The First Compromise of 1820 concerned the extension of slavery beyond the Mississippi and established the notorious 36° 30’ compromise line (see map below). The Second Compromise of 1821 was the result of a conflict over a questionable provision in Missouri’s State constitution which barred free people of color from entering the State. In each case, the final compromise and the way in which it was reached are very interesting. In what follows, the creation of both compromises and their implications for the identity of the polity will be discussed.

The First Missouri Compromise originated in the Senate, whose members were more inclined to strike a bargain on the admission of Missouri. The most important reason for this was that the opponents were much stronger in the Senate. In contrast to the 180 seats in the House that were dominated by the more populous North, the 44 seats in the Senate were evenly divided between the slaveholding and non-slaveholding States. As a result, it was harder for the advocates of restriction to obtain a majority in the Senate. Thus, when a version of the Tallmadge restriction was put to vote, it was defeated with an overwhelming 16 to 27 votes.⁵⁵ This defeat, however, did not result in an outright victory for the opponents either, since the House would never unconditionally admit Missouri to the Union. What was needed, Senator William Pinkney of Maryland urged, was a “conciliatory compromise (...) by which, as is our duty, we might reconcile

⁵² Glover Moore, *The Missouri Controversy, 1819-1821* (Lexington: University of Kentucky Press, 1953), 106.

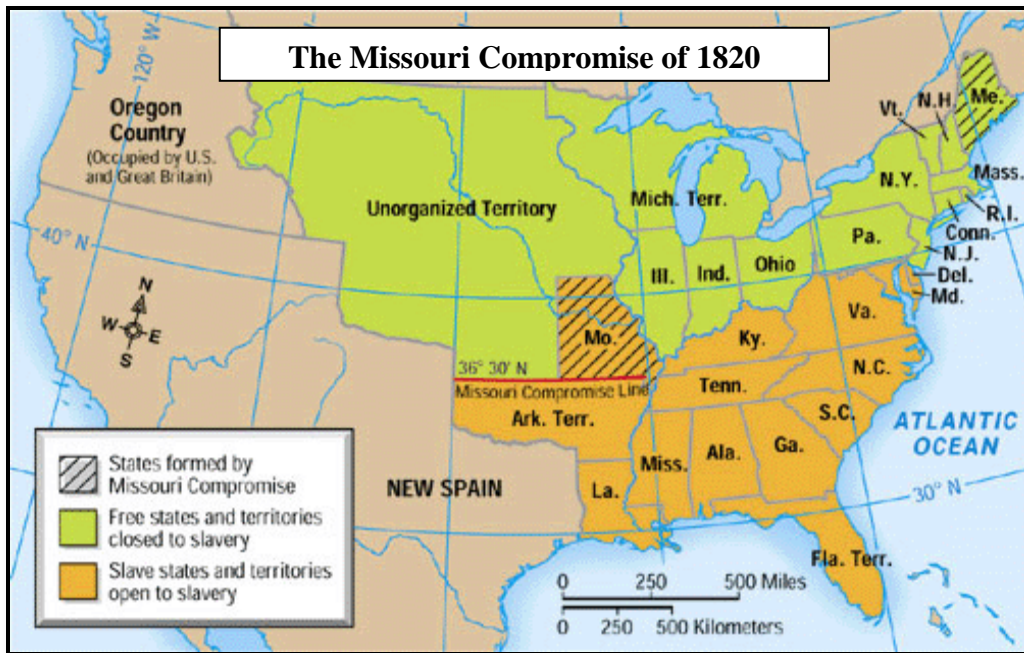
⁵³ Van Cleve, *A Slaveholders’ Union*, 237, 239–240.

⁵⁴ Forbes, *The Missouri Compromise and Its Aftermath*, 63, 69.

⁵⁵ Gales, *Annals of Congress*, 1834, XXXV, 359.

the extremes of conflicting views and feelings, without any sacrifice of Constitutional principle.”⁵⁶ As Pinkney’s remark suggests, many senators regarded the reaching of such a compromise their *raison d’être*.⁵⁷ The smaller size of the Senate and the longer six year terms of its members contributed to an atmosphere better suited for political deal-making. As a result, a more businesslike attitude towards the Union prevailed among the senators. As John Elliott of Georgia pointed out: “no confederation can long outlive the occasion which gave birth to it, unless it is the interest of all the parts to continue united.” The Union was “a *means* not an *end*,” Pinkney pointed out, and “by requiring greater sacrifices of domestic power, the end is sacrificed to the means.”⁵⁸

Unlike many of their northern colleagues in the House, these southern senators advocated a businesslike attitude towards the Union which downplayed the sacred status of the Constitution to an instrument (means) protecting domestic self-government (end). If their interest of allowing Missouri itself to adopt or reject slavery was met, these senators were ready to discuss bringing a halt to the spread of slavery to other parts of the Union. This businesslike attitude created a window of opportunity to settle the Missouri conflict in a mutually satisfactory way. Illinois senator Jesse Burgess Thomas seized this opportunity to propose a compromise in which Missouri would be allowed to enter as a slave State, and slavery would be prohibited northwest of the 36° 30’ line in the territory belonging to the Louisiana Purchase of 1803.⁵⁹ This proposal proved an effective way of settling the conflict without having to address the underlying problem what the “true”



⁵⁶ Ibid., XXXV, 390.

⁵⁷ Virginia senator James Barbour argued that the framers’ had created the Senate with this purpose in mind: “To us the Constitution looks in the moment of popular excitement,” Barbour argued, “the time has arrived which brings to the test the theory of the Constitution,” see: Ibid., XXXV, 107.

⁵⁸ Ibid., XXXV, 107 (Barbour), 133 (Elliott), 408 (Pinkney).

⁵⁹ Ibid., XXXV, 426–427.

identity of the polity was. Thomas' compromise asked of the advocates of restriction to concede that slavery could expand to Missouri and across the Mississippi below the 36° 30' line in exchange for which the opponents had to accept that future States above that line would not have the right to institute slavery within their borders. In both cases, only a couple of senators on both sides took a principled stand against compromise and it was carried with 34 to 20 votes.⁶⁰

The vote in the House was more complicated. There, a breakthrough was achieved by separating the vote on the Tallmadge restriction—which many Northerners felt obliged to support—from that on the compromise.⁶¹ On March 2, a motion to strike out the Tallmadge restriction was adopted by a small minority of 90 to 87 votes.⁶² A total of fourteen representatives from northern States voted with the South against restriction and supplied the crucial votes to pave the way for the adoption of the Thomas compromise. Since all fourteen of these “northern men with southern principles”—or “doughfaces” as they would soon be called⁶³—were members of the Republican Party, rumors of southern “buying” their votes with patronage soon circulated. Regardless of their private motives, the public explanation that these “doughface” members of Congress gave for their votes are telling of their views of the polity.

Two of the fourteen “doughfaces,” Charles Kinsey of New Jersey and James Stevens of Connecticut, explained their change of heart in speeches aimed at winning over fellow northern Republicans. Both speakers employed a conciliatory style of rhetoric that de-emphasized ideals and principles and instead focused on a common past and shared interest to present mutual sacrifice as necessary to preserve the Union.⁶⁴ First, they portrayed the compromise as a justifiable deal to the North. The South, Kinsey argued, only claimed 1/10th of the Louisiana Purchase to be opened for slavery and: “*they* have agreed to fix an irrevocable boundary, beyond which slavery shall never pass.” To reject “so reasonable a proposition,” Kinsey said, “*we* must have strong and powerful reasons.”⁶⁵ As his use of “*they*” and “*we*” shows, Kinsey clearly regarded the North and South as separate rather than one, while at the same time imploring both to strike a deal to prevent the Union from falling apart. To this end, second, the “doughface” orators portrayed the principled stand of the North on restriction as missing its mark. A rejection

⁶⁰ Only four senators can be said to be “men of principle” who consistently voted for or against the expansion of slavery: the two senators from Indiana Noble and Taylor consistently opposed attempts to allow slavery in Missouri, while Macon of North Carolina and Smith of South Carolina consistently opposed any type of condition on the future of slavery in the West, see: *Ibid.*, XXXV, 428.

⁶¹ Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York: Norton, 2005), 233.

⁶² Gales, *Annals of Congress*, 1834, XXXVI, 1586–1587.

⁶³ The term coined by John Randolph, see: Moore, *The Missouri Controversy, 1819-1821*, 104.

⁶⁴ See for a discussion of a conciliatory style of rhetoric: Peter B. Knupfer, “The Rhetoric of Conciliation: American Civic Culture and the Federalist Defense of Compromise,” *Journal of the Early Republic* 11, no. 3 (October 1, 1991): 317.

⁶⁵ Gales, *Annals of Congress*, 1834, XXXVI, 1579.

of the deal, Kinsey argued, “will not cure your wounded conscience [and] I much doubt whether justice or humanity will be served by [it].”⁶⁶

Third and final, the orators portrayed compromise as *American*. According to Stevens, compromise had been the very basis of the Union: “you hold your seats by the tenure of compromise,” he said: “the Constitution is a creature of compromise (...) and has existed ever since by a perpetual extension and exercise of that principle, and must continue to do so as long as it lasts.” By striking a deal, in other words, Congress was acting in the “true” spirit of the Constitution. Stevens called to mind that the founders too had agreed to disagree and implored the House: “let us not separate because we cannot think precisely alike.” Drawing on the “federal family” metaphor, Kinsey sought to sweeten the sacrifice by asking: “to whom do we concede it, but to our brothers?” The members of the House, he concluded, had to act in the interest of the Union, rather than that of their section, which meant that: “we ought to be ready to sacrifice our prejudices, our popularity, nay our life itself, on the altar of our country’s good.”⁶⁷

Stevens’ and Kinsey’s conciliatory rhetoric implied a give-and-take attitude towards the Union similar to that of the southern senator in which each section sacrificed something to the other in the interest of preserving the Union. This implied, however, that the United States consisted of two parts, North and South, which at the same time formed one. Unlike those orators who presumed a *singular* identity for the entire polity as either a union of States (and the choice for slavery as “self-government”) or one free people (and slavery as its antithesis), Stevens and Kinsey portrayed the United States as one family with different views. Their plea to preserve unity by accepting each others’ diversity calls to mind the fuzzy logic which supplied the mainstay for the Constitution. In many ways, Stevens and Kinsey were trying to square the same circle as the framers, by advocating a compromise that denied that the United States was one people with regard to the expansion of slavery (why else allow Missouri to choose for itself?) but not several peoples either (how else could Congress deny the future States carved from the Louisiana Purchase the same right?). To preserve the idea of a United States that formed one people, in other words, Stevens and Kinsey saw themselves forced to first accept that it was divide into two.

It is hard to say whether the speeches of Kinsey and Stevens swayed the fourteen “doughface” members of Congress, yet immediately after they had finished speaking, the House rejected the Tallmadge restriction. This opened the door to the Thomas compromise, which was subsequently adopted by a significant majority of 134 votes in favor against 32, mostly southern, objections.⁶⁸ With this vote, the 36° 30’ compromise line had been adopted in both houses of Congress and the First Missouri Compromise

⁶⁶ Ibid., XXXVI, 1580–1581.

⁶⁷ Ibid., XXXVI, 1584, 1585 (Stevens), 1582–1583 (Kinsey).

⁶⁸ Ibid., XXXVI, 1587–1588.

was born.⁶⁹ The immediate impact of the Compromise was to pave the way for the admission of Maine to the Union as a free State in 1820, immediately followed by Missouri as a slave State in 1821. The balance of the two sections, North and South, in the Senate was thus maintained. Even though the first Compromise succeeded in taking away the immediate source of tension by admitting Missouri to the Union, it did not address the underlying conflict over the patchwork paradox that had caused it. In this sense, the first Compromise was the blueprint for the way Congress would “solve” conflicts over the identity of the polity throughout the period covered in this chapter.

The first opportunity for this turned up within less than a year in the debate over the second Missouri Compromise. This time, controversy arose over the third article of Missouri’s proposed constitution, which granted the general assembly the power to pass laws: “to prevent free negroes and mulattoes from coming to, and settling in, this State, under any pretext whatsoever.”⁷⁰ Many members of Congress believed this clause violated the U.S. Constitution’s “privileges and immunities” clause that granted citizens the right to travel in and out of any State in the Union.⁷¹ Once again, Congress found itself bogged down over the question whether it could require Missouri to delete the clause from its constitution as a condition to being admitted to the Union. In the end, Speaker of the House Henry Clay orchestrated the adoption of a motion that approved Missouri’s constitution upon the condition that its third article: “shall never be so construed to authorize the passage of any law (...) by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled.”⁷² By means of this “Pontius Pilates Proviso,” as one scholar aptly dubbed it, Congress washed its hands clean and could unconditionally admit Missouri to the Union without taking responsibility if it started barring free blacks.⁷³ Like its predecessor, this Second Missouri Compromise was achieved by avoiding the underlying question whether the United States constituted a single people or not in favor of a fuzzy proviso that raised more questions than it settled.

The debate on the Missouri Compromise brought to light the explosive potential of slavery in debates on the identity of the polity. At the time of the “dirty compromise” over slavery in 1787, some delegates of the Convention still believed that slavery was a dying institution, but the Missouri conflict illustrated not only slavery’s steady march west, but also the extent to which the South had become committed to its “peculiar

⁶⁹ Ibid., XXXVI, 1586–1588.

⁷⁰ See: Currie, *The Constitution in Congress*, 2001, 246.

⁷¹ U.S. Constitution, Article IV, Section 2: “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

⁷² Gales, *Annals of Congress*, 1834, XXXVII, 1228.

⁷³ The scholar is Glover Moore, see: *The Missouri Controversy, 1819-1821*, 144; The “Pontius Pilates” proviso was first introduced by Senator John Eaton of Tennessee: Gales, *Annals of Congress*, 1834, XXXVII, 41.

institution.” As a fundamental part of their way of life, many southern members in Congress were deeply insulted by the anti-slavery rhetoric of Tallmadge, Taylor, and others. In turn, the northern members were outraged by their southern colleagues’ incessant demand for the westward expansion of an institution that they regarded as a stain on the fabric of the Republic. So diametrically opposed did the members of Congress seem, and so hostile the rhetoric, that Timothy Fuller of Massachusetts feared it threatened: “our existence as a free and united people.”⁷⁴

Fuller’s claim came close to the truth. For even though the Missouri Compromise succeeded in laying to rest the passions in Congress and kept the Democratic-Republican Party intact for the time being,⁷⁵ it failed to address the underlying issue. In fact, it only succeeded in sowing the seeds for future conflict. By splitting the Union in two geographical sections along the 36° 30’ line, the Missouri Compromise officially acknowledged that the slaveholders and non-slaveholders could not coexist. From the perspective of the identity of the polity, the Compromise line officially consolidated the division of the United States in two opposing parts, North and South, each with its own identity and vision of the polity. Whereas the northern Congressmen increasingly identified the United States as one American people, with one, free identity, their colleagues in the South stressed that the Union was one of separate peoples, each with a right to self-determination. The Missouri Compromise line may have kept these two opposing views of the Union together, but ironically it required dividing “we the people of the United States” into two separate parts in order to keep them united.

The Nullification Crisis

The Missouri Compromise made politicians across the country realize the explosive potential of slavery and helped silence the debate on the subject in the following decades. Despite this Congress again found itself in a major political crisis in the early 1830s, though this time it was only indirectly related to slavery. Like the debate on the Bank of the United States before it, this Nullification Crisis was a conflict over the proper spheres of power for the federal and State governments. It again raised the question, addressed in *Marbury v. Madison*, where the final verdict of contested constitutional legislation should lie. Unlike the earlier debates, however, the views on both sides were more radical, and their determination to prove them right so persistent, that for a moment at least, the republic seemed to heading towards military conflict.

Monroe’s unopposed reelection as president in 1820 confirmed that the United States really had only one party and that the Federalists had ceased to be a force to be

⁷⁴ Gales, *Annals of Congress*, 1834, XXXVI, 1471.

⁷⁵ For this, see: Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 155.

reckoned with. Just as soon as the Democratic-Republicans dominated the federal government, however, the first cracks in their ranks began to appear. Any party as big as the Democratic-Republican, which united politicians from industrious New York City to the frontier town of St. Louis and from the cotton plantations in the Mississippi delta to the textile mills on the shores of Maine, was necessarily home to different, sometimes conflicting interests. As the 1820s progressed, tensions grew between the traditional agrarian supporters of the party from the southwest and the new-coming capitalists and manufacturers from the northeast. While the first group generally favored a limited government that would confine itself to defense and foreign relations, the latter desired an assertive government that would stimulate transportation and protect their industries. One way of keeping these different interests under one roof was through Speaker Henry Clay's ambitious "American System," which was an economic program under which each section could improve itself and the country at the same time.⁷⁶ By connecting the different the sections of the country and making them economically co-dependent, Clay believed his program would strengthen the bonds of Union and further integrate the republic, hence the name "American" System.

Though President Monroe shared Clay's views, he believed that the federal government lacked the constitutional power to realize internal improvements and vetoed every canal and turnpike bill that passed Congress.⁷⁷ By the time Monroe left office, however, many ambitious men with less constitutional scruples—including Henry Clay—stood ready to succeed him. The presidential election of 1824 was the beginning of the end for the Republican Party. All four candidates were Democratic-Republicans and the difference between them more personal than political. The lead contender was John Quincy Adams, the oldest son of the second president, who left his father's party to pursue a career as Monroe's Secretary of State. His main rival was Andrew Jackson, the hero of the Battle of New Orleans and first term Senator for Tennessee.⁷⁸ Though he was the outsider, Jackson carried twelve States for a total of 99 electoral votes, not enough to get elected outright, but more than Adams, who finished second with 84 electoral votes. Jackson's positioning as an outsider brought him close to the presidency, but it also cost him his victory when, as the Twelfth Amendment prescribed, the outcome of the election fell on back-room dealing in the House of Representatives.⁷⁹ After a private meeting, Speaker of the House Clay threw his support behind Adams and helped him become the sixth President of the United States. When Clay was subsequently appointed Secretary of State in Adams' cabinet, many suspected a foul deal. Jackson and his supporters swore

⁷⁶ Ibid., 270–271.

⁷⁷ Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* (Lawrence: University Press of Kansas, 2000), 91.

⁷⁸ Wilentz, *The Rise of American Democracy*, 248.

⁷⁹ Amendment XII to the U.S. Constitution: "(...)if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President (...)"

revenge for this “corrupt bargain,” and the Congress subsequently broke in two factions: pro-Adams and pro-Jackson. Out of these emerged the Whig and (Jacksonian) Democratic parties that dominated the Second Party System.

Unlike his predecessor, Adams embraced the American System and devoted his entire administration to improving the country. His ambitious program included canals in the Ohio and Chesapeake areas, as well as a federal road linking Washington D.C. and New Orleans. As a result, the federal government had become the leading entrepreneur by 1826.⁸⁰ Though these improvements were popular, another pillar of the American System, the protective tariff, drew increasing fire from the South. The support of southern legislators ended when Congress decided to raise the tariff in 1828. Opposition was strongest in South Carolina, where the cotton-dominated economy had never recovered from a post-war depression. Many blamed the tariffs for this, claiming that the duties robbed planters of their profit. A growing group of extreme States’ rightists, aptly named the Radicals, were openly discussing secession if the duties were not lowered.⁸¹ One of their leaders, Thomas Cooper, warned that if no redress was offered: “we shall, before long, be compelled to calculate the value of our Union; and to inquire of what use to us is this most unequal alliance.”⁸² Underlying this view was, once again, the business-like attitude to the United States as a means to an end, which implied that States could leave the Union once membership no longer in their interest.

The same attitude underlay the so-called nullification doctrine cherished by many Radicals: the idea that each State could block the execution of unconstitutional acts of Congress within its borders. This doctrine was most clearly expounded by John Calhoun, Vice-President and native-son of South Carolina. Nullification, Calhoun explained, was a remedy to a crucial problem in politics that the interest of the majority of the Union could become destructive to that of the minority.⁸³ This was the case with the tariff, which according to Calhoun was: “an instrument for rearing up the industry of one section of the country on the ruins of another.” The South’s climate, habits, and “peculiar” labor force of slaves were adapted to agriculture only, and the tariff, by raising the price of imports and reducing the volume of export, harmed the South to the extent that “ruin must follow.”⁸⁴ The remedy, Calhoun, claimed resided in the right of each State to judge the constitutionality of federal laws and issue a veto whenever these laws destroyed its interests. Such a veto, he later admitted, was not in the letter, but in the spirit of the Constitution. The nature of the Union, Calhoun claimed following Madison’s and

⁸⁰ Howe, *What Hath God Wrought*, 254.

⁸¹ *Ibid.*, 396.

⁸² Cited in: William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Harper & Row, 1966), 130.

⁸³ Lacy K. Ford, “Inventing the Concurrent Majority: Madison, Calhoun, and the Problem of Majoritarianism in American Political Thought,” *The Journal of Southern History* 60, no. 1 (February 1, 1994): 44. Wilentz, *The Rise of American Democracy*, 319–320.

⁸⁴ Robert Lee Meriwether, ed., *The Papers of John C. Calhoun* (Columbia: University of South Carolina Press, 1959), X, 445–447, 487, 461, 451, 475.

Jefferson's Resolutions, was that of a compact between sovereign States.⁸⁵ This meant, he wrote, that the States retained the right to nullify those laws which violated that compact—and in his view the unconstitutionality of the tariff was beyond dispute.⁸⁶ If the tariffs were not reduced, Calhoun threatened, it would be South Carolina's "sacred duty to interpose" her veto.⁸⁷

Despite their fiery rhetoric and bold claims, the Radicals failed to rally the southern States behind their proposals. Most Southerners were still confident that their protests would be heard and pinned their hope on Andrew Jackson, who took revenge for the corrupt bargain by defeating Adams for the Presidency in 1828. Despite the hope that Jackson would reduce the tariff, Congress's Tariff of 1832 failed to satisfy the cotton States. South Carolina again took the lead and decided to suit action to words. On October 20, 1832, Governor James Hamilton announced that a convention would meet in the State's capital Columbia to discuss whether the tariffs should be nullified. To give this Nullification Convention an air of legitimacy, its election procedure was made identical to that which had ratified the Constitution in 1788. This could not disguise, however, that calling a State convention was an unprecedented, if not illegal, step, since the Constitution only authorized the assembly of a new Philadelphia-style convention if two-thirds of the States applied for one.⁸⁸ By electing the convention, as Governor Hamilton realized, South Carolina was bringing the conflict to a head. "The die has been cast," he said.⁸⁹

When the Nullification Convention met on November 24, it was clear that the Radicals outnumbered the Unionists five to one. As a result, its official resolutions breathed the air of defiance. The Convention's key-document was the Nullification Ordinance, in which the tariffs of 1828 and 1832 were formally declared: "null, void, and no law, nor binding upon this State, its officers, or citizens." It offered Congress a final chance to reduce the duties before the deadline of February 1, 1833, after which the collection of duties in the State would be prohibited. The final paragraph warned that the use of force to submit the State, would be considered as "inconsistent with the longer continuance of South Carolina in the Union," and would impel her to absolve the "political connection with the people of other states" and form a separate government.⁹⁰

⁸⁵ Ibid., X, 490, 492, 496, 500.

⁸⁶ The power to lay duties, Calhoun argued, was granted only for the purpose of collecting revenue, not for protectionism. This view rested on a close reading of the eighth section of article I, which said that: "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." According to Calhoun, the second part of the sentence formed a restriction on the first, meaning that Congress could only collect duties for defense and welfare, and that a protectionism was unconstitutional.

⁸⁷ Meriwether, *The Papers of John C. Calhoun*, X, 530.

⁸⁸ Article V, see also: Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 397.

⁸⁹ *Register of Debates in Congress* (Washington, D.C.: Gales & Seaton, 1825), IX appendix, 174.

⁹⁰ Thomas Cooper, ed., *The Statutes at Large of South Carolina* (Columbia: A. S. Johnston, 1836), 329–331.

Despite these threats of secession, the Convention insisted that its intentions were peaceful, and that it merely sought to remedy a problem which the framers had failed to resolve and on which the Constitution was “designedly silent.” The Convention justified nullification as the constitutional right of every sovereign State whose interests were violated. This view rested on the idea that the Constitution, as a compact, was created by sovereign States, not the people. In fact, the members of the Convention denied that the Constitution had ever made one people out of the several States, for: “there did not exist then, nor has there existed at any time since, such a political body as the people of the United States.” Thus, when the Convention presented itself as “we the people of the State of South Carolina,” it not only denied the patchwork nature of the Constitution, but reduced the preamble to stating merely a collection of peoples, rather than one.⁹¹

The Union, in this vision, was not a binding contract between a higher entity, whose authority surpassed that of the several States, but: “a moral obligation alone, which each State has chosen to impose upon herself.” Allegiance to the Union was a matter of choice, a “rational devotion,” not the “blind and idolatrous” attachment that Webster had advocated in his famous duel with Hayne.⁹² “Constitutional liberty is the only idol of our political devotion,” the Convention wrote: “and to preserve that, we will not hesitate a single moment to surrender the Union itself, if the sacrifice be necessary.” The Union, in this pragmatic view, was a means to an end, and as soon as it started to threaten the end, it ceased to be a blessing. This was why the members of the Convention could state, without blinking, that: “it is our honest and firm belief, that nullification will preserve, and not destroy, this Union.”⁹³

Nullification in practice thus meant both a plea to Congress to relieve the situation as well as a threat of secession, and even civil war. It is striking that the Convention, having ordained nullification, left it to the federal government to decide the next step. This ambiguity between defiance in theory and reluctance in practice would characterize the entire nullification effort. The Convention was calling Washington’s bluff by asking Congress whether it would continue to refuse altering a tariff that many, even outside South Carolina, regarded as unequal, and by challenging the President to force the collection of duties he never wholeheartedly supported. The success of the threat of nullification was thus left to others, especially the other southern States, which the Convention hoped would rally to its cause. Robert Hayne admitted as much when, in his inaugural as the new governor of South Carolina, he said that: “it is for her sister States now to determine what is to be done in this emergency.”⁹⁴

Ironically, South Carolina’s firm stance on nullification robbed her of many of her initial sympathizers. On 10 December Jackson issued a proclamation, drafted by his

⁹¹ Ibid., 341–342, 335, 329, 346.

⁹² See for this: Jelte Olthof, “Een Retorisch Duel in de Amerikaanse Senaat: De Noodzaak van Politieke Unie in Het Hayne-Webster Debate van 1830,” *Historisch Tijdschrift Groniek* 44, no. 192 (2012): 225.

⁹³ Cooper, *The Statutes at Large of South Carolina*, 336, 352, 343.

⁹⁴ *Register of Debates in Congress*, IX, appendix, 176.

Secretary of State Edward Livingston, in which he declared nullification incompatible with the existence of the Union contradictory to the letter and spirit of the Constitution. According to Jackson, South Carolina's reasoning rested on the false assumption that the States were once independent, whereas he believed they had always been part of one whole. In 1776, Jackson argued: "we declared ourselves a nation by a joint, not several acts," and since then: "we consider ourselves in [no] other light than as forming one nation." Even under the Confederation, he continued, no State could legally annul the decisions of Congress, surely then a system intended "to form a more perfect Union" could never allow this? Instead of a compact between States, Jackson relied on the myth that the Constitution was a "binding obligation" formed by the people of the United States. In becoming part of the more perfect Union, Jackson said, the States surrendered many essential parts of sovereignty, including the right to leave it. Secession, he concluded, was simply treason, because: "to say that any State may at pleasure secede from the Union, is to say that the United States are not a nation."⁹⁵

The proclamation was the most elaborate statement of his views on the nature of government that Jackson ever made, and it put him squarely in the anti-nullification camp. An ardent advocate of States' rights, Jackson nevertheless believed that the general good, however harmful, always trumped that of the particular States. Against the nullifiers' "rational devotion," Jackson placed a lengthy, pathos-filled defense of the Union. The Constitution, he said, we have always been regarded with awe as the anchor of our rights, but South Carolina now tells us this devotion was in vain. "Did we pledge ourselves to support an airy nothing," Jackson asked indignantly: "[to] a bubble that must be blown away by the first breath of disaffection?" No, his answer sounded, "we did not err. Our Constitution does not contain the absurdity of giving power to make laws, and another to resist them." "The Constitution is still the object of our reverence, the bond of our Union," and: "the sacrifices of local interest, of State prejudices (...) will again be patriotically offered for its support."⁹⁶ In the last part of the speech, Jackson addressed the people of South Carolina directly, warning them that they were being deceived. You are not, he said, an oppressed people, on the contrary, you are members of a flourishing and happy nation: "look on this picture of happiness and honor, and say—we too are citizens of American." And as American citizens, Jackson added, one's first duty was to obey the Constitution, and one's first allegiance to the United States government. Discard that name, he threatened, and the consequences of that treason would be terrible.⁹⁷

The clash between Jackson and the nullifiers was a classic patchwork feud in that it challenged the assumption that the United States formed both one and several peoples at the same time. According to the members of South Carolina's Nullification

⁹⁵ Ibid., XI, appendix, 182, 184–185.

⁹⁶ Ibid., IX, appendix, 183. Major L. Wilson, "'Liberty and Union': An Analysis of Three Concepts Involved in the Nullification Controversy," *The Journal of Southern History* 33, no. 3 (1967): 351, doi:10.2307/2204863.

⁹⁷ *Register of Debates in Congress*, I, appendix, 185.

Convention, the true identity of the United States was a union of separate States, each with the right to nullify acts it deemed unconstitutional. The Union, in this view, was nothing more than the sum of its parts. The Ordinance was one of the first documents to explicitly deny the existence of a “people of the United States,” thereby acknowledging the very entity it sought to refuse. In this sense, it is telling of the appeal of the myth of “we the people” that the nullifiers felt the need to deny it. In similar vein, the fact that the myth formed the foundation of Jackson’s proclamation—coming from an ardent States’ rights President—is equally telling. In Jackson’s view, the United States formed one people that was more than the sum of its parts. Its will was paramount to that of the separate States and could not be opposed without committing “treason.”

The nullification conflict was different from earlier conflicts in that both sides refused to back down. Unlike Kentucky and Virginia in the 1790s, South Carolina actually enforced its Nullification Ordinance by requiring its State officials to take an oath in order to ensure their loyalty. The Jackson administration was equally determined to execute the tariff and preserve the “sacred Union, and the blessings it secures to us as one people,” peacefully if possible, by force if necessary.⁹⁸ Thus, Jackson did not rely on soft words alone to persuade South Carolina to back down, but also prepared a big stick to back them up. On Monday January 28, four days before the Convention’s deadline expired, the aptly named Force Bill was presented on the Senate floor which allowed the president to call in the militia and navy to enforce the collection of duties.⁹⁹ This was an unprecedented step. The Force Bill was the first instance in which the federal government considered the use of force to impose its will on an unwilling State.¹⁰⁰ Though the Constitution explicitly permitted Congress to call: “forth the militia to execute the laws of the Union,” this was a clear deviation of the founders’ commitment to debate to solve the problems between the Union and the States.

Jackson’s Force Bill brought the nullification conflict into the halls of Congress. The heated debate lasted for four weeks, with major contribution from seventeen speakers, and threatened to split the Senate in two. It was a test case both for the nullifiers, who relied on the appeal of their doctrines outside the bastion of South Carolina, as well as for Jackson, who relied on the Senate’s willingness to allow the use of force to command obedience to federal laws. The issue at stake in the debate was whether South Carolina could unilaterally declare the tariff void and—if this was not the case—whether the Force Bill was the appropriate way to respond to its disobedience.

Opposition to the bill was led by ardent States’ rights advocates, all of them from the South, who believed that the use of force meant, as Mississippi Senator George Poindexter put it: “[that] the very idea of State sovereignty will be treated as a vision of

⁹⁸ Cooper, *The Statutes at Large of South Carolina*, 330. *Register of Debates in Congress*, IX, appendix, 187.

⁹⁹ *Register of Debates in Congress*, IX, 244.

¹⁰⁰ The militia had used before to suppress local insurrections, like the Shay and Whiskey rebellion, but never against an entire state.

the imagination—a tale of by-gone days.” The most outspoken defender of this group was Calhoun who set out to defend his native State’s conduct. According to Calhoun, the Force Bill rested on a false assumption that States were obliged to obey unconstitutional laws. Sovereignty, Calhoun maintained, was in its nature indivisible and could therefore only rest in one place, and in the United States this was the people. Not the people as a whole, however, for Calhoun believed that: “no such community ever existed as the people of the United States, forming a collective of individuals in one nation,” but in the peoples of the several States, who could operate their sovereignty through a convention. In 1788, the people of South Carolina had organized such a Convention to ratify the Constitution. The Constitution, it followed, was a *compact* between the States, and the final article of the Constitution explicitly recognized this, when it said that it would be established: “between the States ratifying the same.” But since sovereignty was by nature indivisible, the States had only *delegated* the exercise of parts of their sovereignty to the Union, and reserved the right to take this back when it felt that the compact was violated, as South Carolina had done in the Nullification Ordinance.¹⁰¹

Calhoun clearly believed that the ratification of the Constitution had not fundamentally altered the union between the States. The founders might have adopted a new form of government in 1787, but the basis remained the changeless union between the sovereign States of 1776.¹⁰² The United States, in other words, was a *union of choice*; it rested on the voluntary consent of the parties and to try and preserve it with force was to invert the very basis on which it rested.¹⁰³ Like the authors of the Nullification Ordinance before him, Calhoun denied the patchwork nature of the United States: it had only ever been a union *between* peoples, never *of* one people. It followed that the Union was simply the sum of the aggregate interests, ideas, and identities of the separate parts, and never more than that. The States formed a nation only in respect to their common interests and remained separate with regard to everything else.

The defense of the Force Bill was led by nationalists, all of them Northerners, who believed that nullification simply was: “secession in disguise” and bordered on, or even equaled, treason.¹⁰⁴ Massachusetts Senator Daniel Webster was the most outspoken defender of Jackson’s Bill. According to him, the divisibility of sovereignty was a peculiar American invention, unknown to Europe. It meant that power could be divided between two governments, each sovereign in its proper sphere. The Constitution, in this view, was the product of the will of the people of the United States, whose power was paramount as the “whole surpasses the parts.” In Webster’s view, the authority of the whole people of the United States was more than just the sum of its twenty-four parts. As a consequence, the Union created by the Constitution was not free from obligation, but

¹⁰¹ *Register of Debates in Congress*, IX, 181, 188, 537, 189.

¹⁰² Paul C. Nagel, *One Nation Indivisible. The Union in American Thought, 1776-1861* (New York: Oxford University, 1964), 47.

¹⁰³ *Register of Debates in Congress*, IX, 539.

¹⁰⁴ *Ibid.*, IX, 422; The words are Dallas’.

had fundamentally altered the relation between the States. It had created an paramount general government which, far from being merely the agent of the States, had a will of its own. The Constitution was a binding contract on the States which could not be violated. For Webster, then, the Union was a permanent association of the people of the United States, and should be preserved at any cost.¹⁰⁵

On the basis of their respective vision of the Union as either one or several peoples Calhoun and Webster arrived at a different conclusion to the desirability of the Force Bill.¹⁰⁶ For Calhoun, obviously, the States retained the right to declare void those acts which it believed to violate the original contract and there was nothing Congress could do against it. For Webster, on the other hand, Congress itself retained the right to fix its own limits and, as representative of the people of the United States, could impose its will on the States.¹⁰⁷ Between these two ideas—that the Union formed one people that could impose its will on the parts and that the Union consisted of separate peoples who were the final arbiter of the law—the advocates and opponents of the Force Bill forced their colleagues to choose.

Though some northern and all southern senators agreed or sympathized with South Carolina's objection to the tariff, few of them considered nullification as a legitimate method of opposition. In fact, apart from a handful of exceptions, most of them condemned South Carolina's decision to nullify as "rash and uncalled for."¹⁰⁸ Though these senators abhorred the idea of using force, they also felt that the Palmetto State went too far by calling a convention to nullify the tariff. Many moderate senators, both from the North and South, found themselves right in the center of the nullification conflict, caught between the rock of the Force Bill and the hard place of supporting a radical position on a cause they sympathized with.

What troubled many of these senators about nullification was that it challenged the patchwork paradox that the United State could form both one and several peoples at the same time. They drew on John Dickinson's metaphor of the Union as a solar system which had helped secure the compromise of a mixed foundation of government in the summer 1787. As long as the planets stuck to their proper orbit, Fredrick Frelinghuysen of New Jersey said, there could be no collision. "It is only when States, urged on by an aspiring ambition to thrust their heads against the federal government," he continued: "that the door is opened for collisions."¹⁰⁹ Frelinghuysen clearly blamed South Carolina for failing to remain in its proper orbit by claiming an absolute sovereignty that was in

¹⁰⁵ Ibid., IX, 564, 587.

¹⁰⁶ Ford, "Inventing the Concurrent Majority," 34.

¹⁰⁷ *Register of Debates in Congress*, IX, 571.

¹⁰⁸ Ibid., IX, 422, 333.

¹⁰⁹ Ibid., IX, 324 In similar vein, Virginia Senator John Tyler argued: "it is impossible for them [States] to come into collision either with the government, or with each other, so long as they are confined within their proper orbits," see Ibid., 370.

fact divided between itself and the Union.¹¹⁰ Viewed in this light, the nullification conflict was a conflict of appearances, since both the nullifiers and the administration insisted on one side of what in reality was the same coin. It reminded Pennsylvania Senator George Mifflin Dallas of a tale of two knights, who were debating whether a sculpture that stood between them was black or white until they submitted their case to a humble hermit, who showed them that it was both black and white by letting them take each other's place. "Let the Constitution of our government undergo a similar trial," Dallas told his colleagues: "and the result will be similar; they [the two parties] would ultimately agree that it is not wholly what either represents it to be, and yet that it possess the properties which both ascribe to it."¹¹¹

Both the Nullification Ordinance and the Force Bill were an outright attack on this view, as they showed that States and the general government could disagree on what their "proper orbits" were. In this sense, Stephen Miller of South Carolina pointed out, Dallas' story offered no solution. The real question was, he said: "which knight ought to have surrendered his opinion, if the hermit had not interposed."¹¹² This was a crucial observation, because it illustrated that the United States lacked an independent hermit-arbiter who could decide the conflict. The nullifiers, of course, rejected the jurisdiction of the Supreme Court because, as a branch of the federal government, its authority was subordinate to that of the States that had created it.¹¹³ It is hard to see how the Supreme Court could have resolved the conflict, when one of the parties denied its legitimacy even before a decision was reached. But the Jackson administration too hesitated to leave the matter to the courts.; why else, Calhoun asked, did they not sue South Carolina?¹¹⁴ With both parties in the conflict refusing to bring their case before a court, it was hard to see how a stand-off could be avoided.

Thus, the nullification conflict painfully exposed the limits of the solar system metaphor. The Nullification Ordinance and the Force Bill threatened to tear the Union apart by forcing the senators to a test of allegiance. As a result of the Force Bill, George Bibb of Kentucky explained: "the plain, peaceable (...) citizens [are put in] the sad alternative of committing treason and crime, either against their State government, or against the federal government." Many moderate senators agreed with Tennessee Senator Felix Grundy, that "we owe double allegiance," and that: "no citizen will ever be embarrassed, if the two governments will confine themselves within their constitutional

¹¹⁰ The comment by Virginia Senator William Rives that sovereignty did not reside in either the States or the federal government, but in "that great community or body politic, called the United States" can be viewed in a similar light, see: *Ibid.*, IX, 497.

¹¹¹ *Ibid.*, IX, 423.

¹¹² *Ibid.*, IX, 450.

¹¹³ Calhoun explicitly ruled out an appeal to the Supreme Court which, as a part of the government created by the States, could not be "raised above the sovereign parties, who created the Constitution," see: Meriwether, *The Papers of John C. Calhoun*, X, 501.

¹¹⁴ *Register of Debates in Congress*, IX, 535.

limits.”¹¹⁵ For them, the debate was a rude awakening indeed. Both South Carolina’s defiant stance in the Ordinance, and that of the Jackson administration in its Force Bill left no room for double obedience and forced the senators to choose. It seemed it had become impossible to serve two ideals and two masters at the same time

Unlike their moderate southern colleagues, for most Northerners the choice in this test was easy since allegiance to the federal government did not ask of them to sacrifice the interests of their constitution. In fact, by forcibly implementing the tariff which benefitted the industry in their home-States, these senators were actively pursuing their constituents’ interest. The same was not necessarily true for the nullifiers, who were having more trouble defining their position. Men like Calhoun were careful not to be depicted as rebellious traitors. Their position was that allegiance to the federal government was only due because one was a citizen of one of the States first. As Virginia Senator Tyler put it: “my State requires me to render such obedience (...) it is because I owe allegiance there, that I owe obedience here.” When pressed on the question, Tyler admitted to being a citizen of the United States, but not of its government. Calhoun too used this distinction, saying that allegiance was due to the several States and to the States united, but not to the general government. Both men, it seems, did not deny being members of a larger political community, but insisted that the State, and not the nation, still came first in their hearts. Mississippi Senator Poindexter summed up the position: “I owe primary allegiance to the State which affords protection to my life (...) and I owe obedience to the Constitution and the laws of Congress made in pursuance thereof.” But he immediately added this excluded obedience to unconstitutional laws, like the tariff.¹¹⁶

The final vote on the Force Bill followed on February 21, when 31 senators voted in favor and only one, John Tyler of Virginia, against. This vote seems to reflect a strong majority in favor of the use of force, but a closer look reveals it is somewhat deceiving. First, fourteen southern senators including Calhoun and Clay decided not to cast a vote. The Bill still passed with considerable support—including many members from the political center and the Upper South—but it is hard to say, second, to what extent the vote for or against the Force Bill reflected support of rejection of the doctrine of nullification itself. In fact, it is even harder to say to what extent it was a vote for or against the use of force. As Richard Ellis has pointed out, the Force Bill vote came nine days after Henry Clay first proposed a compromise tariff and thus might have rallied senators behind it who already anticipated an end to the conflict and never thought the Force Bill would ever be used.¹¹⁷ For Calhoun and other firm objectors to the use of force, the decision to pass on the vote signaled their willingness to compromise. For those in the middle, a vote for

¹¹⁵ Ibid., IX, 268 (Bibb), 668–669 (Grundy) In similar vein, William Wilkins of Pennsylvania said: “we owe allegiance both to the United States and to the State of which we are citizens,” see: Ibid., 257.

¹¹⁶ Ibid., IX, 365, 398, 766, 643.

¹¹⁷ Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States’ Rights and the Nullification Crisis* (Oxford University Press, 1989), 171–172.

the Force Bill mattered little as long as a compromise could be made which would make the use of force unnecessary.

Clay first presented his compromise tariff on February 12. It entailed a gradual reduction of the 1832 tariff which would decrease the burden on the South, while giving the North the necessary time to prepare their manufacture for business without the aid of protectionism. This compromise, Clay told his colleagues, would restore harmony to Congress and: “remove that alienation of feeling which has so long existed between certain parts of this widely spread confederacy.” “The people of the United States,” he continued: “are brethren, made to love and respect each other. Momentary causes may seem to alienate them, but, like family differences, they will terminate in a closer and more affectionate union than ever.” His aim with the compromise, he said, was to “reconcile a divided people,” which clearly showed that it was aimed at laying the conflict at rest. “Let us,” he said: “pursue the example of our fathers, who, under the influence of the same spirit, in the adoption of the Constitution of the United States, determined to ratify it.”¹¹⁸ Like the dough-face orators during the Missouri conflict, Clay employed conciliatory rhetoric to focus on what united the senators, rather than what divided them. His use of the family metaphor shows he assumed the United States formed one (divided) people without concluding that this meant that Jackson was right. In this sense, Clay’s compromise asked neither nullifiers nor nationalists to surrender their principles, but to make them subordinate to the preservation of unity itself.

Clay’s conciliatory compromise worked because a majority of senators were very willing to lay the conflict at rest. For Calhoun, the compromise offered an opportunity to terminate the conflict without having to surrender his principles and meant that he could leave the field with his head held high. “He who loves the Union,” he told the Senate: “must desire to see this agitating question brought to a termination,” and after he finished speaking, a sigh of relieve went through the public galleries and cries of approval prevented the debate from being resumed.¹¹⁹ The men of the center too favored a compromise, as it extended the idea that a divided sovereignty could endure. The only ones to oppose the compromise, then, were Webster and his supporters. The compromise deprived them of the opportunity to settle, once and for all, the supremacy of the Union over the States. Webster expressed doubts about the constitutionality of the compromise as well, but he could not prevent it from being adopted, with 29 votes to 16.¹²⁰

The outcome of the nullification crisis thus was a great anti-climax. Clay’s compromise aimed only at laying the underlying cause of conflict at rest, but did nothing to resolve the pending problem of sovereignty in the Union. President Jackson, careful not to lose face, decided to sign both the tariff compromise and the Force Bill into law, though he never

¹¹⁸ *Register of Debates in Congress*, IX, 462, 481, 737–738.

¹¹⁹ *Ibid.*, 477–478.

¹²⁰ *Ibid.*, IX, 808.

called the militia into action. South Carolina, equally determined not to be seen as the losing side, symbolically nullified the Force Bill, but left the Ordinance to die a silent death. The outcome of the constitutional question therefore was a stalemate, as each side surrendered none of its principles. Clay's compromise allowed the United States to move on without confronting the patchwork paradox that it constituted both one and several peoples and prevented an escalation, and possibly outright civil war. By leaving the underlying question of the true identity of the polity unresolved, however, it was only postponing the confrontation to a later hour.

Uneasy peace: the Compromise of 1850

Before and after the Nullification crisis, Congress carefully kept the issue of slavery outside its halls simply by refusing to address it. Both the Democratic and Whig parties had a clear interest in doing so, since too frank a discussion of slavery threatened to alienate the northern and southern wings of the party from each other. Where the self-restraint of the parties fell short, Congress prevented discussion by means of the "gag rule," which prohibited members from discussing and from bringing petitions critical of slavery before the House.¹²¹ Despite these efforts, however, slavery once again came to dominate the deliberations of Congress in the late 1840s, and once again the debate produced a bitter conflict on the identity of the polity. This time the question revolved not only around admitting new slave States but also around the constitutional position of slavery in the (newly acquired) territories, yet the underlying problem remained the same, namely whether the Constitution had created the United States as one people or several with regard to slavery. Twice, in 1848 on the so-called Wilmot Proviso and in 1850 on a host of slavery-related issues, the debate brought Congress to the brink of dissolution.

Wilmot Proviso

Like the Missouri Compromise before it, the debates on the Wilmot Proviso in the late 1840s sought to address the lingering dispute on slavery's place in a Republic that was rapidly expanding westward. The American push towards the Pacific coast was encouraged in the Democratic Party, where the term "Manifest Destiny" was coined to capture the supposedly divinely-inspired inevitability of expansion. The Whig Party, on the contrary, was more interested in (industrial) development of the existing States. Territorial expansion thus formed one of the key differences of opinion between the Democrats, who were more interested in spreading American institutions over the map,

¹²¹ For a detailed discussion see: William Lee Miller, *Arguing about Slavery: The Great Battle in the United States Congress* (New York: A.A. Knopf, 1996).

and the reform-minded Whigs, who wanted to develop these institutions within their existing borders.¹²² The ensuing argument between the two parties quickly turned into a conflict over the different conceptions of the identity of the polity when westward expansion raised the question of the constitutional position of slavery in the territories.

An uneasy peace reigned in Congress in the wake of the Missouri Compromise. Since Missouri had been admitted in 1821, six more States had been added to the Union. More than ever, the sectional balance on the Senate floor dictated the pace of the expansion. Congress ensured that States were admitted in pairs, one free State for every slave State. In this way Michigan and Arkansas were admitted in 1836 and 1837, and Iowa and Wisconsin joined the Union to restore the balance after the admission of Florida and Texas as slave States in 1845. Thus, with the admission of Wisconsin in May 1848, the thirty States that made up the Union could be neatly divided in fifteen free and fifteen slave States. For some time it seemed as if the debate over the identity of the Union was put to rest. The conflict over slavery, however, soon shifted to the phase anterior to statehood—i.e. that of territorial government—and the man responsible for stirring up the hornet’s nest was the ambitious Democratic President James K. Polk.

Despite two decades of service in the House and his home-State of Tennessee, Polk was considered a dark horse candidate when he narrowly defeated Henry Clay for the Presidency in 1844 on a platform embracing Manifest Destiny. One of Polk’s major goals in office was to secure the United States’ expansion towards the Atlantic coast—one that eventually led to war with Mexico which raised the problematic issue of slavery in the territories. The cause of this war was a border dispute. The Mexican government had never recognized the annexation of Texas in 1845 and felt provoked when President James Polk dispatched General Zachary Taylor to secure the Rio Grande as the southern border of the United States. The war that broke out after skirmishes near that river, in the spring of 1846, was a outstanding success for the United States Army which soon occupied the entire area west of Texas, known as Nuevo México, all the way to the Californian coast. President Polk sought to consolidate these gains by offering the Mexicans peace and \$2 million in exchange for the occupied territory.

When Polk’s \$2 million appropriation bill arrived in Congress, it ignited the smoldering embers of the Missouri Compromise. The Whig opposition immediately grasped the explosive potential of the issue and tried to table it. “No man is so absolutely blind,” Senator Reverdy Johnson of Maryland pointed, “as not to see that there are questions which arise on the acquisition of any new territory which will certainly cause the Union to totter to its foundations.” When an attempt to dismiss the issue by prohibiting Polk to annex new territory to the United States was defeated by the Democratic majority in Congress, there was no way back.¹²³ Radical Whigs began charging Polk—a Tennessee slaveholder—with having staged the war for the sole

¹²² Howe, *What Hath God Wrought*, 583, 706.

¹²³ Blair et al., *Congressional Globe*, 29th Congress, 2nd session, 337, 310, 545.

purpose of expanding slavery.¹²⁴ Once the link with the slavery was established, the party dispute quickly became a conflict over the identity of the polity.

The spark followed on August 8, 1846, when Representative David Wilmot of Pennsylvania offered an amendment to the appropriations bill that prohibited slavery in the conquered territory. This “Wilmot Proviso,” as it was soon called, raised the question whether Congress had the constitutional right to prohibit slavery in newly acquired territories. The advocates of the Proviso claimed it did since Article IV, section 3 of the Constitution gave Congress the right to acquire territory and “to make all needful rules and regulations respecting the territory or other property belonging to the United States.” The opponent, however, claimed this authority was confined to actual government property (such as forts) and left the territories completely free to determine the fate of slavery within their borders.¹²⁵ More interesting than this back and forth argument over Article IV are the attempts of the speakers to prove that the spirit of that Constitution was on their side and only their interpretation was in line with America’s true identity.

Support for the Proviso was exclusively confined to the northern Congressmen, but the motives for doing so differed substantially. For Wilmot and his fellow-sponsor Preston King of New York,¹²⁶ a desire to abolish slavery played no role. In fact, Wilmot took great pains to explain that his aim was not to abolish slavery where it existed—“I would never invade one single right of the South,” he said—but to “preserve the integrity of the free territory against the aggression of slavery.” He and King believed that slavery threatened the competitiveness of free laborers. White laborers, King pointed out, were degraded by slavery and “cannot and will not eat and drink, and lie down, and rise up with the black labor of slaves.” The mere presence of slavery, he claimed, excluded whites from the territories as it degraded the condition and respectability of labor. Wilmot insisted the only thing he wanted was the neutrality of the government on the issue of slavery. By preventing slavery from establishing a foothold there, the settlers of the territories remained free to prohibit or allow slavery once they decided to draft a State constitution.¹²⁷

Others supporters of the Proviso were not so tolerant of slavery and regarded it as a stain on the polity. Ohio Representative Joshua Giddings declared that: “slavery and freedom are antagonisms, they must necessarily be at war with each other.” Giddings voiced the opinion of a small but growing group of northern Congressmen for whom the

¹²⁴ Howe, *What Hath God Wrought*, 739, 767; Ohio Representative Joshua Giddings, for example, insisted that the \$2 million appropriations bill left no doubt that the ulterior motive for war was acquisition of further slave territory, see: Blair et al., *Congressional Globe*, 29th Congress, 2nd Session, 421.

¹²⁵ For an exhaustive overview of the debate on the constitutionality of the Wilmot Proviso under Article IV, section 3, see: David P Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829-1861* (Chicago: University of Chicago Press, 2005), 138–143.

¹²⁶ The Wilmot Proviso failed to pass the Senate before the first session expired but was renewed by Wilmot’s friend and colleague Preston King when the 29th Congress reconvened in January 1847, see: Blair et al., *Congressional Globe*, 29th Congress, 1st Session, 1217, 1221; and 2nd Session, 105.

¹²⁷ *Ibid.*, 29th Congress, 2nd session, 353–354, 114.

evils of the “peculiar institution” were too great to be settled by compromise. As Giddings put it: “there can be no compromise between right and wrong or between virtue and crime.”¹²⁸ This radical protest against slavery was not confined to its expansion in the territories, as in the case of Wilmot and Preston. Rather, this view of slavery as the antithesis of America meant that its very existence in *any* part of the Republic was seen as injurious to the entire polity. A clear example of this came from Vermont Senator William Upham, who argued: “I regard the States of this Union as members of one family and subjects of one common destiny,” adding:

“One member of the family cannot receive an injury or an insult without inflicting pain upon the other members of the family. Slavery is repugnant to the feeling of the people of the free States. They regard it as a great evil and feel themselves under the highest obligation, as Christians, as philanthropists, and as statesmen, to oppose its extension.”¹²⁹

Upham’s use of the “family” metaphor portrayed slavery as harmful to the entire Union and allowed him to brush aside the objection that non-slaveholding States should not meddle with an institution they did not share and therefore did not understand. By portraying slavery as a disgrace to the entire family, Upham justified the Proviso as the moral duty of the North to bring their southern brothers back on the right track. For the radicals, the moral stain of slavery was intolerable and either slavery or the Union had to give out. “I would rather see this Union rent into a thousand fragments,” Joshua Giddings argued: “than have my country disgraced, and its moral purity sacrificed, by the prosecution of a war for the extension of human bondage.”¹³⁰ The use of this integrative metaphor of the Union as one family rested on the view of the polity as forming one people with one identity of which slavery could not and should not be a part.

To the southern members of Congress, Wilmot’s Proviso came as a slap in their face. In sharp contrast to the uncompromising rhetoric of the radicals, many southern Congressmen were very much inclined to strike a Missouri-style compromise on the fate of slavery in the new territories. Though most southern members of Congress by now believed the original Missouri Compromise to be unconstitutional because it recognized the power of Congress to prohibit slavery, this did not stop them from strongly urging its extension to the Pacific coast. Even the South Carolina delegation, in the person of Representative Amistead Burt, favored compromise.¹³¹ “It is due to the South,” Burt said: “that we should have a renewal of the compromise—a fresh understanding of the bargain—and that we should have it this day—this hour.” The support for compromise among Southerners was broad, Georgia Representative Howell Cobb said: “the South is prepared to meet the North on this question in the spirit of the utmost liberality.” “We ask

¹²⁸ Ibid., Appendix of 29th Congress, 2nd session, 403.

¹²⁹ Ibid., 29th Congress, 2nd session, 546.

¹³⁰ Ibid., Appendix of 29th Congress, 2nd session, 403.

¹³¹ Calhoun later revealed this was done on his own urging, see *ibid.*, 29th Congress, 2nd session, 454.

of you [the North],” he continued: “to come up to the spirit of the Constitution of the country, to abide by its compromises”.¹³²

The remarks by Burt and Cobb betrayed a very different attitude towards the issue than those of the northern colleagues. Burt’s insistence on a “bargain” illustrated both an awareness of a difference as well as the need to reach a mutually satisfactory agreement. In contrast, the radicals’ condemnation of slavery as incompatible with freedom resulted in an indivisible identity that the slaveholders needed to acquiesce to. In similar vein, Cobb’s depiction of the Constitution as an exemplary body of compromises contrasted with Giddings’ claim that no compromise between slavery and freedom was possible. In short, while the southern speakers were conscious that their way of life and views on the Constitution represented that of only a part of the Union, the radical Northerners saw their views as fixed and applying to the entire “family.” Cobb and Burt claimed to speak for “the South,” not “the North,” which already assumed that the United States consisted of two peoples. It seems that, because the South was conscious of forming a minority within the Union, its representatives were more inclined to a partition of territory between the sections than the North, where this consciousness of a separate identity did not prevailed and the Union was considered as one indivisible whole.

Despite southern willingness to substitute principle for pragmatism, the extension of the compromise line to the Pacific failed. It turned out that only a handful of northern Democrats supported the compromise in the House.¹³³ When extension of the Missouri Compromise was moved on January 14, it was rejected with 82 to 113, and a month later, on February 15, the margins stayed more or less the same: 82 to 115.¹³⁴ The Wilmot Proviso, on the other hand, *was* adopted with 115 votes against 105.¹³⁵ For the southern members of Congress, the defeat of the compromise was embarrassing. Many had stuck their necks out for a solution they deemed unconstitutional but preferable, only to find the vast majority of their northern colleagues to persist in a complete prohibition of slavery. This rejection stung the Southerners, prone as they were to view politics in terms of honor.¹³⁶ More than once they had pointed out that, in demanding the right to bring slaves into the territories, Southerners were only seeking to be treated as equals. The adoption of the Proviso, in this light, proved that the North regarded them as inferiors—a grave insult. To preserve the Union, South Carolina Senator Andrew Butler said he was willing to except any terms “except dishonor.” In similar vein, Senator Walter Colquitt of Georgia

¹³² Ibid., Appendix to 29th Congress, 2nd session, 188. Ibid., 29th Congress, 2nd session, 361–362.

¹³³ On January 14, when individual votes were recorded, these were Douglas and Smith of Illinois, Cunningham and Parrish of Ohio, Hastings of Iowa and Charles J. Ingersoll of Pennsylvania, see: Blair et al., *Congressional Globe*, 29th Congress, 2nd session, 187.

¹³⁴ Ibid., 29th Congress, 2nd session, 187, 424.

¹³⁵ Ibid., 29th Congress, 2nd session, 425.

¹³⁶ See: Bertram Wyatt-Brown, *The Shaping of Southern Culture: Honor, Grace, and War, 1760s-1890s* (Chapel Hill: University of North Carolina Press, 2001) especially chapter 8.

stated that: “the South is prepared to sacrifice everything but honor.”¹³⁷ Insulted by what the northern rejection of their offer, many southern member of Congress now turned their back on compromise.

Led by South Carolina’s Senator John C. Calhoun, many southern Congressmen began to take an uncompromising stand on slavery. Calhoun argued that the House vote was possible because the South—which he constantly referred to as “we”—formed a minority there. In fact, he continued, she was a minority everywhere, with the exception of the Senate. Without this balance of power on the Senate floor, Calhoun said: “we shall be at the entire mercy of the non-slaveholding States.” The day this would happen, he warned: “is a day that will not be far removed from political revolution, anarchy, civil war, and widespread disaster.”¹³⁸ This remark is telling because it not only shows that for Calhoun the ways of life of the free and slaveholding States were incompatible, but it reduced politics to a zero-sum game in which the rise of one necessarily had to lead to the fall of the other.

Calhoun urged his colleagues that the time for compromise was done. He confessed that he too had been: “willing to acquiesce in a continuance of the Missouri Compromise, in order to preserve (...) the peace of the Union,” but now that compromise had been rejected, the South could only find security by relying on a higher authority. “A compromise is but an act of Congress,” he told the Senate: “it may be overturned at any time. It gives us no security.” The Constitution, on the other hand, he regarded as: “stable. It is a rock. On it we can stand.” “Let us be done with compromise,” Calhoun concluded: “let us go back and stand upon the Constitution!”¹³⁹ Thus, Calhoun signaled a retreat of the southern Congressmen from compromise to the uncompromising position that Congress never enjoyed a right to prohibit slavery in the territories and that the Wilmot Proviso was a violation of the Constitution because it deprived the inhabitants of the territories of the right to determine for themselves whether to institute slavery.¹⁴⁰

For Calhoun, these rights formed a line in the sand and had to be yielded to the South in order to keep membership of the Union rewarding. Here again, the business-like approach of South Carolina to the Union was visible. In this view, a balance between North and South formed the core of the original Constitution, and the Wilmot Proviso a violation since, as Butler pointed out: “the South did not come into the Confederacy on such terms.”¹⁴¹ For Calhoun, the right of the territories—not Congress—to decide whether to adopt slavery was not merely a question of policy, but rather of “self-preservation”.¹⁴² Tellingly, the term self-preservation illustrates that Calhoun viewed the

¹³⁷ Blair et al., *Congressional Globe*, 29th Congress, 2nd session, 544, see for the inferiority remark, 448. Ibid., Appendix to 29th Congress, 2nd session, 401.

¹³⁸ Blair et al., *Congressional Globe*, 29th Congress, 2nd session, 453–454.

¹³⁹ Ibid., 29th Congress, 2nd session, 454.

¹⁴⁰ Ibid., 29th Congress, 2nd session, 455.

¹⁴¹ Ibid., 29th Congress, 2nd session, 544.

¹⁴² Ibid., 29th Congress, 2nd session, 358.

debate on the Proviso not as a difference of opinion among one people, but as an existential struggle for a southern way of life in an increasingly northern Union.

Now that the House had rejected a renewal of the Missouri Compromise in favor of the Proviso, the question turned on the Senate. When the appropriations bill was brought up for a vote there on March 1, the southern senators, aided by a handful of northern Democrats, succeeded in voting down the Wilmot Proviso, and the Senate returned the appropriations bill to the House without any mention of slavery.¹⁴³ Two days later, the House surprised everyone by crossing out the Proviso from the bill by a slim vote of 97 to 102 and subsequently passing the appropriation without any mention of slavery.¹⁴⁴ A total of 21 Northerners, five of whom had supported the Proviso earlier, now sided with the South.¹⁴⁵ They gave varying explanations. Some of them claimed that agitating the domestic slave question could foster the hope of Mexico to still win the war and trouble the peace negotiations.¹⁴⁶ Others simply felt it was too premature to settle the question of slavery in the new territories. New York Representative William Woodworth, for example, said he did not oppose the Proviso in principle, only its “expediency.” The question of slavery’s expansion, he said, could be met when a territorial government was formed, and had no connection with this appropriations bill. “The interest of the country requires peace and humanity demands it,” he concluded: “It is, therefore, with the hope of consummating peace that I vote for this peaceful measure.”¹⁴⁷

This, in the end, was the escape that Congress opted for to side-step the debate on the expansion of slavery into the southwest. Rather than siding behind either the Proviso or the Compromise line, a majority of Congress decided to postpone a verdict on slavery’s place in the new territories and not to address the question at all. In this it followed the position that Maryland Senator Reverdy Johnson had put forward early on in the debate. “There is but one way to obviate it [fight over slavery],” Johnson said: “and that way is open to us; it is a way which has hitherto made us a happy, powerful, and united people. It is by keeping the question out.”¹⁴⁸

The debate on the Wilmot Proviso made clear that Congress could no longer reach a compromise on slavery like it had in 1820. Whereas the southern members, including Calhoun, urged the renewal of the Missouri Compromise by extending the 36°30′ line to the Pacific, the majority of Northerners opposed this. As the Wilmot Proviso was, in turn,

¹⁴³ The Northern senators who voted with the South were Lewis Cass of Michigan, the two members from Indiana, Jesse Bright and Edward Hannegan, Sidney Breese from Illinois, and Daniel Dickinson of New York, see: *Ibid.*, 29th Congress, 2nd session, 555.

¹⁴⁴ *Ibid.*, 29th Congress, 2nd session, 573.

¹⁴⁵ These were: Edsall (NJ), Garvin (PA), Henley (IN), Russell (NY), James Thompson (PA), and Robert Smith (IL).

¹⁴⁶ Dickinson of New York argued this, see: Blair et al., *Congressional Globe*, Appendix to 29th Congress, 2nd session, 445.

¹⁴⁷ *Ibid.*, Appendix to 29th Congress, 2nd session, 439.

¹⁴⁸ *Ibid.*, 29th Congress, 2nd session, 338.

unacceptable to the South, Congress reached a stalemate on the territorial question. Both sides refused to sacrifice their principles to reach a compromise. With regard to the identity of the polity, the debate contributed to a consolidation of views. First, the vision of the polity as forming one people was coupled to an increasingly interventionist agenda in the North. Though a minority, the radicals' view of slavery as an immoral insult to the entire family of the Union gave a taste of the ultimate consequence of "we the people" with regard to slavery. Second, the defeat of a renewal of the Missouri Compromise convinced many Southerners, led by Calhoun, to discard political deal-making and adopt an uncompromising position that southern rights were etched in the marble of the Constitution. The refusal of the North to discuss a political deal led many compromised-inclined Southerners straight in the arms of radicals like Calhoun, whose position left little room for political wheeling and dealing. Thus, by postponing its verdict on the territorial question Congress may have bought time, but no one was foolish enough to believe that by closing their eyes the problem would go away. "I fear," Daniel Webster said ominously: "we are not yet arrived at the beginning of the end."¹⁴⁹

The Compromise of 1850

Webster's words proved prophetic when little over two years later, in 1850, the territorial question again dominated Congress. The political landscape had changed significantly by then. The White House changed into Whig hands when Louisiana planter and military hero Zachary Taylor defeated the Democratic nominee, Michigan Senator Lewis Cass. The participation of a third candidate for the Free Soil Party ensured that the campaign was dominated by the territorial question. The Free Soilers wanted to abolish slavery in the territories and campaigned under the telling title: "'87 and '48 (...) No compromise."¹⁵⁰ Cass proposed to leave the question of slavery to the settlers in the territories themselves—an option he liked to call "popular sovereignty—which attracted the support of most western States. Taylor, however, remained vague on the subject, saying he would leave it to Congress, which helped him carry the northeast as well as large parts of the South, where he was popular for being a slave-owner. Taylor won 163 electoral votes against Cass' 127 and was sworn in as the twelfth President of the United States on March 4, 1849.

The thirty-first Congress to which Taylor promised to leave the territorial question was dominated by the Democratic Party, which had a majority in both the House and Senate. As the debate on the Wilmot Proviso and the Missouri Compromise had demonstrated, however, party differences were of secondary importance when slavery

¹⁴⁹ Ibid., 29th Congress, 2nd session, 556.

¹⁵⁰ Wilentz, *The Rise of American Democracy*, 625–626. Wilentz argues that most in the Party leadership were not abolitionists, but simply wanted to protect free, white labor.

was at stake. This was not the case with the members of the Free Soil Party, however, for whom both were the same thing. Though the Free Soilers failed to obtain a single vote in the Electoral College, they did send six representatives and two senators to Washington, which was quite a feat for a newcomer in a two party system. These Free Soil Congressmen, most notably Senators Salmon Chase of Ohio and William Seward of New York, vowed to stop slavery in the territories when they took their seat in December 1849. Within two months they were served with an opportunity to suit action to word.

Again, the actions of a president brought slavery back on Congress' agenda. This time President Taylor had allowed the inhabitants of the California territory to draft a State constitution in 1849 which explicitly forbade slavery. The California constitution became all the more pressing when its delegates arrived at the doors of Congress in early January with the request to be admitted to the Union. Southern Congressmen were outraged by the prohibition of slavery, believing as they did that this deprived them of an equal share of the Pacific coast. More injuring still was that, with California now seeking admission to the Union as the sixteenth free State, there was no obvious candidate to restore sectional balance on the Senate floor. One solution was to divide California in two States, one slave and one free, but it was strongly opposed by the North and stood little chance to pass Congress. Alternatives could not easily be found. The remote Deseret territory east of California (which included the later States Utah, Nevada, and Arizona) was deemed unsuitable for slavery or, as its name implied, anything else for that matter. The southern gaze therefore drifted to the New Mexico territory obtained in the late war and slaveholders pinned their hope on extending slavery there.

With these interests in the back of their mind, the members of Congress prepared for another round of debate on the place of slavery in the Union. As the earlier debates on the admission of Missouri and the Wilmot Proviso had demonstrated, this problem involved two diametrically opposed visions of the polity with two mutually incompatible conceptions of its identity. Now, in 1850, these two visions again clashed on the subject of expanding slavery to the southwest. Congress again faced the challenge of having to improvise a compromise, if a showdown on the subject was to be prevented. "We cannot," Virginia Senator Robert Hunter pointed out: "live together (...) unless something is done to settle these differences." The question was, as William Seward sharply pointed out, whether "we [are] to be one people?" or whether the time had arrived for the United States to part in two separate ways.¹⁵¹ As these quotes illustrate, the members of Congress were keenly aware that 1850 was a make or break moment. The future of the Union rested on the ability to repeat its feat of 1820 and agree on a compromise that could lay the dispute to rest. Nevertheless, the struggle to reach a compromise took more than eight months and at one point it seemed that the Union would be torn apart before a deal could be reached.

¹⁵¹ Blair et al., *Congressional Globe*, Appendix to 31st Congress, 1st session, 375, 262.

As in 1821 and 1833, the debate over a compromise was led by Henry Clay who again claimed a prominent role as its lead architect in 1850. On Tuesday January 29, Clay arrived in the Senate to present a “great national scheme of compromise and harmony.” It entailed, among others, a proposal to admit California as a free State, while establishing territorial governments for New Mexico and Utah *without any restriction* with regard to slavery.¹⁵² Clay’s speech in defense of his compromise was a fine display of conciliatory rhetoric. For him 1850 was 1821 all over. “Now, as then,” he said: “if we will only suffer our reason to have its scope and sway, and if we will still and hush the passion and excitement,” the difficulties that divided Congress: “will be more than half removed.” In a dramatic moment near the end, Clay produced a fragment of George Washington’s coffin as a “warning voice” to the senators: “to beware, to pause, to reflect before they lend themselves to any purpose which shall destroy that Union which was cemented by his [Washington’s] exertion and example.”¹⁵³ Like the founding generation, Clay basically sought to pass on the troubling problem of the central government’s power with regard to slavery in the territories over to the next generation.¹⁵⁴

Clay’s plan drew heavy fire from both the southern and northern sides of the Senate. Their reactions displayed stark differences in how they viewed the Constitution. To begin with the southern members, many of them felt that the proposal had so little to offer, that it could not be considered a compromise. The biggest eyesore was that California statehood robbed them of access to the Pacific. Slaveholders, Georgia Senator John Berrien pointed out, had an equal right to the territories, which were a common fund for the benefit of all. “We are a portion of the American people,” he continued: “we have equal rights with you in this territory.” There was little hope of reaching a sustainable compromise, his Texan colleague Thomas Rusk pointed out, if half of the Union’s constitutional rights were encroached for the peace-offering.¹⁵⁵ The attack against the compromise was led by Mississippi Senator Jefferson Davis. As a military man turned politician, Davis approached the debate as defender of the “cause of the Constitution against its aggressors.” The admission of California, he told the Senate, hastened the day when the North would be able to revoke the compromises of the Constitution, which was the only bulwark against the “might flood of anti-slavery fanaticism.” If this happened, he warned, the South could no longer be expected to stay in the Union:

“when you take from the people of this country the confidence that this is their government, that it reflects their will, that it looks to their interests, the foundation upon which it was laid is destroyed and the fabric falls to the ground.”¹⁵⁶

¹⁵² Ibid., 31st Congress, 1st session, 244–246.

¹⁵³ Ibid., Appendix to 31st Congress, 1st session, 125. Ibid., 31st Congress, 1st session, 246.

¹⁵⁴ Blair et al., *Congressional Globe*, 31st Congress, 1st session, 249.

¹⁵⁵ Ibid., 31st Congress, 1st session, 251, 203, 205, 247.

¹⁵⁶ Ibid., Appendix to 31st Congress, 1st session, 149–150.

Davis warned that anti-slavery policies would alienate the South to a point that it could no longer identify itself as part of the United States. The only way to prevent this from happening, Davis continued, was to institutionalize the balance of power between the two sections by splitting the territory between them. “This common territory,” he argued, “which it seems cannot be enjoyed in peace together, should be divided”. For this purpose, Davis proposed to extend the Missouri compromise line to the Pacific and explicitly allow slavery south of the line.¹⁵⁷ Davis was not alone in proposing a renewal of the Missouri Compromise, many other senators offered it as well.¹⁵⁸ The idea of splitting the territory in two illustrates that the southern Congressmen considered that it could only be enjoyed as one country if it was split between the two peoples—North and South—that inhabited it.

One senator who refused to join the call for an extension of the compromise-line was John Calhoun. The gaunt Senator from South Carolina was in his seat, but his frail health forced him to ask a younger colleague to read his speech. Calhoun began by claiming that a balance of power between the North and South had formed the groundwork of the Union, but that this had been destroyed by the Missouri Compromise. The only remedy, Calhoun insisted, to restore the equilibrium was by giving the South an equal share to the territory and by ceasing to agitate the slave question. The means for this was a constitutional amendment “which will restore to the South in substance the power she possessed of protecting herself before the equilibrium between the sections was destroyed.”¹⁵⁹ The significance of the proposed amendment for the identity of the polity lies, first, in the fact that it was a departure from the idea that the inhabitants United States formed one people, and replaced it with the concurrent idea—first implied in the Missouri Compromise—that the Union consisted of two separate peoples, one North, one South. By explicitly ordaining a balance between the two, Calhoun was saying that the interests of both sections were not only opposed, but harmful to one another and required constitutional safeguards. Calhoun believed that without such an amendment, the South would perish. In this sense, his call for an amendment was an attempt to fix the existing status-quo between North and South and place it outside the dynamics of change. It was a desperate attempt of the veteran senator to consolidate the equal position of the South by freezing the current balance on the Senate floor. It would be Calhoun’s last act; he died of tuberculosis several weeks after his speech. Though his death was mourned across the aisles, his legacy would continue to divide the Senate long after he was gone.

Many senators were outraged by Calhoun’s portrayal of the Union as consisting of two peoples, instead of one. Illinois Senator Stephen Douglas said Calhoun’s amendment rested on the error of supposing that sections had a right to part of the

¹⁵⁷ Ibid., Appendix to 31st Congress, 1st session, 152, 150, 154–155.

¹⁵⁸ These were among others Foote, Clemens, and Soulé, see; Ibid., 31st Congress, 1st session, 247, 948; Ibid., Appendix to 31st Congress, 1st session, 968.

¹⁵⁹ Blair et al., *Congressional Globe*, Appendix to 31st Congress, 1st session, 454.

territories, whereas: “the territories belong to the United States as one people, one nation.” Each State, he pointed out, had the right to a vote in forming the rules and regulations for the government of the territories, but: “the different sections—North, South, East, and West—have no such right.” In similar vein, Missouri Senator Thomas Benton confessed that: “I know no North, and I know no South; and I repulse and repudiate, as a thing to be forever condemned, this first attempt to establish geographical parties in this Chamber.”¹⁶⁰ If little else, Calhoun’s amendment showed how strong the commitment to the identity of the United States as one people was among the northern Congressmen. Roger Baldwin from Connecticut was most outspoken: “the Constitution regards this nation as one people,” he said: “we are legislating not for sections, but for one people.”¹⁶¹

The most outspoken critics of Calhoun’s plan were a handful of northern senators who were equally critical of Clay’s compromise plan for *not* prohibiting slavery in the southwest territories. These men were the political heirs of James Tallmadge and David Wilmot for whom calling a halt to slavery’s spread was a question of principle which “does not admit of compromise.” Like Calhoun, these men preferred a solution by means of government intervention, but in this case it meant prohibiting slavery in the territories. Salmon Chase, the Ohio Senator representing the Free Soil Party, believed that slavery could take root in every climate, and that only government intervention could prevent it from doing so. For Chase, the debate was a “contest between the despotic principle—the element and guarantee of slavery—and the democratic principle—the element and guaranty of liberty,” which started with the arrival of the first slaves and was continuing till that day.¹⁶² Free Soil Senator William Seward of New York argued that the framers of the Republic had originally recognized the equality of man in the Declaration and that it was an anomaly in the Constitution as well. The preamble, Seward argued, listed as one objective of the Union to secure the blessings of liberty, not slavery, and did not mention the “peculiar institution” by name.¹⁶³

To summarize, the reactions of both North and South to Clay’s compromise plan invoked a different view of the Constitution. For Davis and Calhoun, the Constitution was as bulwark against North, based on presupposition of a sectional balance. For Chase and Seward, the Constitution was an (admittedly incomplete) moral compass, and should be read in the light of the Declaration of Independence. Strictly speaking, both views only implicitly rested on the Constitution, which neither spoke of a sectional balance (or of a right of slave-owners to settle in the territories, for that matter) nor of equality of man (or the right of Congress to forbid slave-owners from settling in the territories). In this sense, the silence of the Constitution forced politicians to draw on sources outside the document

¹⁶⁰ Ibid., Appendix to 31st Congress, 1st session, 369, 683.

¹⁶¹ Ibid., Appendix to 31st Congress, 1st session, 414.

¹⁶² Ibid., Appendix to 31st Congress, 1st session, 417 (the quote on not allowing compromise is from Roger Baldwin of Connecticut), 478, 469.

¹⁶³ Ibid., Appendix to 31st Congress, 1st session, 1023, 265.

to justify their point. The important point, from the perspective of the identity of the polity, is that both sides used these sources to confirm that the Constitution supported their position and used them to bolster its authority rather than undermine it. Even Calhoun's proposal to amend, not reject, the Constitution can be seen as recognition of the Constitution's undisputed status.¹⁶⁴

If Clay's compromise hardly received the endorsement that its author had hoped for, neither did any of the alternatives. The record of the many ballots that were cast throughout the eight months of debate demonstrate that neither side of the Senate, pro- or anti-slavery, could muster the necessary votes to get their preferred solution (the Proviso or the Compromise line) adopted. Of the four times that the motion to apply the Missouri Compromise line to California was submitted, a 32 to 24 defeat was the closest it came to being adopted.¹⁶⁵ Not a single northern vote was cast in favor of the idea, and among the Southerners, the principled opposition consisted of the maverick Missouri Senator Thomas Benton, as well as Clay, his colleague Underwood from Kentucky, and the two senators for Delaware, Spruance and Wales. The two motions to apply the Wilmot Proviso to the territories, both made by Ohio Senator Chase, fared somewhat better with a 25 to 30 defeat, but also failed to obtain a majority.¹⁶⁶

As these votes show, both sections had no hope of obtaining their favorite solution in the territorial stand-off. The refusal of this handful of senators on both sides of the Senate to rally behind their sections' preferred interventionist solution, forced the Senate as a whole to settle the problem by compromise. The two champions of this cause were Senate veterans Webster and Clay. Webster's speech was a model of conciliatory rhetoric. "I wish to speak," he started: "not as a Massachusetts man, nor as a northern man, but as an American." "I speak, he continued: "for the preservation of the Union."¹⁶⁷ Webster branded those who criticized Clay's compromise as radicals who were "apt, too, to think that nothing is good but what is perfect, and that there are no compromises or modification to be made in submission to difference of opinion." In his opinion the whole country would gain by a final adjustment of the slavery question and he told his colleagues to follow his lead and promised: "I shall stand by the Union and all who stand by it (...) I shall act for the whole country in all I do (...) I shall know but our country. (...) I was born an American, I live an American, and I shall die an American."¹⁶⁸

Inspired by these words, Clay made a final push for compromise on May 8, when he proposed to merge the different resolutions into one "omnibus bill" to secure their

¹⁶⁴ Only Seward at one point argued that a "higher law" than the Constitution existed, see: Ibid., Appendix to 31st Congress, 1st session, 265. The outrage that followed this statement only confirmed the undisputedness of the Constitution (for this see Ibid., 295, 387, 477).

¹⁶⁵ Ibid., 31st Congress, 1st session, 1314. Ibid., Appendix to 31st Congress, 1st session, 1504, 1532, 1522.

¹⁶⁶ Blair et al., *Congressional Globe*, 31st Congress, 1st session, 1134, 1585, 754.

¹⁶⁷ Ibid., Appendix to 31st Congress, 1st session, 269.

¹⁶⁸ Ibid., Appendix to 31st Congress, 1st session, 1270.

mutual adoption.¹⁶⁹ This meant that the bills for the admission of California the New Mexico and Utah territories were combined into one, so that senators would be forced to support their opponent's resolutions in order to secure their own. The strategy clearly was to hold the sections hostage to one another. Only if both sides agreed to hand something to the other could they secure their own interests. "As nothing human is perfect," Clay said: "for the sake of that harmony so desirable in such a Confederacy as this, we must be reconciled to secure as much as we can of what we wish, and be consoled by the reflection that what we do not exactly like is a friendly concession, and agreeable to those who, being united with us in a common destiny, it is desirable should always live with us in peace and concord."¹⁷⁰ As these words illustrate, Clay saw his compromise not as a deal between two peoples, but as a "friendly concession" among brothers.

Despite these appeals, however, the omnibus bill failed. With the benefit of hindsight, the teaming up of the resolutions in one bill did the compromise effort little good. Rather than rallying support for a compromise, the omnibus only succeeded in uniting the opposition against it. The final deathblow to the omnibus was struck on the last day of July, when James Pearce of Maryland moved to strike out the resolutions concerning New Mexico. Both northern and southern interventionists, even those that earlier supported non-intervention in the last months, seized this opportunity to bury the compromise in the hope of having their preferred solution (either the Wilmot Proviso or Missouri Compromise line) adopted instead.¹⁷¹ Mississippi Senator Foote warned that Pearce's motion meant the end of the compromise bill, but to no avail. The motion received the support of 32 senators, with 22 clinging to the omnibus bill.¹⁷² "The omnibus is overturned," Benton dryly pointed out: "all the passengers are spilled out."¹⁷³

The defeat of Clay's compromise illustrated that Congress would no longer be moved by conciliatory rhetoric to reach a compromise. For many Southerners the compromise settled too much. The Clay plan, Louisiana Senator Pierre Soulé said, came down to: "the South gives, the North *takes*." "Will the South, think you, be satisfied with such a piece of patchwork as this?" he asked, and answered: "never!" For Northerners like William Dayton of New Jersey, on the other hand, the compromise offered too little. "My great objection to this scheme is that while it is called a compromise for all conflicting questions, it, in fact, will finally settle little and compromise less." This, he concluded, was not sufficient to justify: "the sacrifice the North is called upon to

¹⁶⁹ Ibid., 31st Congress, 1st session, 944.

¹⁷⁰ Ibid., Appendix to 31st Congress, 1st session, 945. My emphasis.

¹⁷¹ In the North, with the exception of Bright, Norris, and Whitcomb, all those who supported the Wilmot Proviso on June 6 now supported striking out New Mexico from the omnibus. In the South the picture is less clear. Of the 23 senators that supported the extension of the Missouri Compromise before, eleven voted for the Pearce motion, eleven against, and one was absent. It is possible that those who voted against Pearce's motion feared that the territorial government would prohibit slavery.

¹⁷² Blair et al., *Congressional Globe*, Appendix to 31st Congress, 1st session, 1479.

¹⁷³ Ibid., Appendix to 31st Congress, 1st session, 1484.

make.”¹⁷⁴ In the end, the Clay compromise failed because neither side was prepared to sacrifice their principles to achieve a solution. In this sense, the defeat of the omnibus bill illustrated how entrenched each side had become. Suddenly, the prospect that the United States would part as two peoples seemed very real.

The exhausted and disillusioned Henry Clay certainly seemed to believe this was the case when he spoke to a packed Senate the following day to admit his defeat. He blamed “extremists” on both sides of the Senate for the defeat of the omnibus bill and warned them that, if one or more States decided to raise arms against the Union, the United States government should meet them head-on. “I am for trying the strength of the government,” Clay said defiantly: “I want to know whether we are bound together by a rope of sand, or an effective, capable government, competent to enforce the powers therein vested by its Constitution of the United States.” The prospect of a civil war no longer seemed to scare Clay, in fact he welcomed it. I would not, Clay said: “be alarmed or dissuaded from any such course by intimations of the spilling of blood,” for this blood would be on the hands of the opponents of the omnibus bill.¹⁷⁵

These remarks clearly show that Clay had lost his belief in a peaceful settlement of the conflicts before the Senate. The fact that even the pragmatic Great Compromiser saw no way out of the political crisis is telling of its significance. While Clay’s speech was greeted with rounds of applause from the galleries, many of his colleagues were shocked by his sudden lust for blood. John Berrien of Georgia warned Clay that display of force would escalate, rather than solve the conflict. “I do not desire to test the physical strength of this government,” he said: “it has a moral strength, founded upon the ties which unite us, a sense of common interest, a recollection of a common glory in the past, and the assured hope of a common and glorious destiny in the future.” James Mason of Virginia believed that if the federal government should ever enforce obedience to the Union as paramount to that of the State: “you will have the whole tier of southern States and I believe a large portion of the northern States, denying it.”¹⁷⁶

The fate of compromise never looked gloomier than in the wake of Clay’s speech, but again Congress stepped away from the abyss just in time to avoid escalation. With Clay gone, Stephen Douglas, the chairman of the committee on the territories, seized the opportunity to pass a compromise by separating the resolutions, instead of presenting them as one omnibus bill. This way, Douglas was able to find a majority for each without jeopardizing the others. On August 13 he achieved a breakthrough when the Senate decided to admit California as a free State. Territorial governments for New Mexico and Utah soon followed, and in both cases the permission or prohibition of slavery there were left to be decided by the settlers when they applied for statehood. Together with, among

¹⁷⁴ Ibid., Appendix to 31st Congress, 1st session, 635, 812.

¹⁷⁵ Ibid., Appendix to 31st Congress, 1st session, 1486, 1490.

¹⁷⁶ Ibid., Appendix to 31st Congress, 1st session, 1489.

others, a new, stricter fugitive slave law these resolutions formed the Compromise of 1850, which forced a breakthrough in the stalemate.

Douglas' compromise failed to satisfy everyone, of course. No sooner was California admitted, then the southern radicals sprang into action. On August 14, ten southern senators offered a petition of protest that claimed the vote unconstitutional. The protest repeated the familiar argument, coined by the late Calhoun, that the South, as a constituent part of the Union, had an equal right to the common property of the United States, and that the prohibition of slavery in the new State of California amounted to a discrimination against slave property and trampled southern rights. The petitioners saw their protest as a wake-up call from the South to the North. "If it [can] make the people of the North realize the condition in which they have placed this country," South Carolina Senator Andrew Butler said, the protest would have achieved its aim.¹⁷⁷ With their protest, the southern radicals were de facto denying that the United States formed one people, which outraged other members of Congress. Roger Baldwin of Connecticut insisted that a law, once passed: "should go forth to the people as the expression of the will of the entire body," since Congress expressed "the will of the *American* people," not one section of it. Southerners too agreed to ban the protest for the same reason. By challenging the idea that Congress spoke with one voice, Thomas Benton of Missouri said: the petitioners aimed at the "dissolution of the Union." How divided the Senate was over the issue was clear from the close vote of 22 to 19 by which it decided to table the petition.¹⁷⁸ With that the matter was laid to rest—for the moment.

When the bargain was finally made, many hoped that, like its predecessor of 1820 the Compromise of 1850 would usher in decades of peace and quiet. Stephen Douglas, the man who worked hardest to bring about the compromise, proclaimed it to be the "final settlement" of the sectional discord.¹⁷⁹ But Douglas optimism proved premature. In fact, the Compromise of 1850 settled little and even this it did without much thought about the future. The admission of California as a free State upset the sectional balance, and the prospects for future admission of slave States looked bleak. Even more worrisome was the decision for the newly formed territories of New Mexico and Utah which simply postponed a final verdict on slavery's status there to a later date. By leaving this decision to the inhabitants of the territories Congress might have found an elegant way to buy time, but it was clear that bringing this "popular sovereignty" in practice would prove a lot harder and, more importantly, was bound to upset one section, regardless the outcome. Washington might have been jubilant of having forever settled their disputes, but Salmon

¹⁷⁷ Ibid., 31st Congress, 1st session, 1578. Hunter's cosignatories were his Virginia colleague Mason, South Carolina's Butler and Barnwell, Turney from Tennessee, Soulé from Louisiana, Atchinson from Missouri, Morton and Yulee of Florida, and Davis of Mississippi.

¹⁷⁸ Ibid., 31st Congress, 1st session, 1579 (Baldwin). Ibid., Appendix to 31st Congress, 1st session, 1546 (Benton). Ibid., 31st Congress, 1st session, 1588 (final vote).

¹⁷⁹ Quoted in: Wilentz, *The Rise of American Democracy*, 643.

Chase was probably closer to the truth when he concluded that: “the question of slavery in the territories has been avoided. It has not been settled.”¹⁸⁰

With regard to the identity of the polity, it is important to point out that the joy that the members of Congress felt in reaching a compromise could not hide the growing centrifugal forces that were pulling at the idea of the patchwork Republic. The radicals on both sides of the slavery question increasingly embraced a vision of the polity that excluded each other. In the North, Free Soilers like Chase and Seward defined the purpose of the Union to guarantee the blessing of liberty to all, including slaves. The Constitution, they argued, had formed the States into one, free and equal people with one, slave-free identity. In the South, a similar hardening of positions took place. Calhoun’s amendment to formalize the sectional balance between North and South may have been ridiculed, but its underlying idea that the Union consisted of two, rather than one people, was widespread. Calhoun’s death did little to discourage this idea, as his protégés (most notably Jefferson Davis) immediately reinforced it in their protest against California’s admission. Thus, the question whether the territories could be enjoyed as one or two peoples remained hovering above the 1850 Compromise, and the question of the true identity of the United States with it.

For those in the center, poised between these radicals, the Compromise of 1850 brought only fleeting hope. The exhaustive debate had demonstrated that both sections became increasingly unwilling about leaving the patchwork paradox open, and began to doubt whether the two could still be combined. The failure of conciliatory rhetoric to rally Congress behind a compromise raised the question whether there was still place, in the patchwork Republic, for a Union of one and several peoples at the same time. Whether the Compromise of 1850 would succeed in laying that question to rest, depended on the future. With Calhoun’s death and that of Webster two years later, a new generation of politicians was now in charge of preserving the Union. How they fared will be the subject of the last chapter.

Conclusion

The three compromises discussed in this chapter together span more than thirty years. For clarity’s sake, this conclusion will summarize the most important developments by returning to the three questions posed at the start of the chapter. With regard to the first and second question—how the polity is represented in the debates and how these views changed throughout the debates—three points can be made. The first is the considerable continuity with the debates discussed in the previous chapter. As each debate touched on the patchwork nature of the polity, the same fundamental dispute over whether the United States formed one people or several constantly arose. Whether the debate concerned the

¹⁸⁰ Blair et al., *Congressional Globe*, 31st Congress, 1st session, 1859.

supposedly “republican” character of the Constitution, if States had a right to nullify federal tariffs, or who got to decide the future status of slavery in the territories, each time Congress split along the lines of those who argue that the United States formed *one* people first—and consequently that Congress has the final say—and those who claim it is in fact a union of several peoples—each with a surpassing right at self-government. In this sense, the debates in this chapter repeated the familiar dispute over whether “we the people” formed the sum of the peoples of the State or constituted more than that.

Second, unlike earlier chapter, the conflict over the identity of the polity increasingly became of a geographical, rather than an ideological nature. Since the conflicts concerned slavery itself or the agricultural economy built around it, the debates constantly pitted northern and southern Congressmen against each other, which had important implications for the way both viewed the polity (see below). Both sections had passionate views on the place of slavery in the Union which only deepened as time went by. While both northern and southern Congressmen overwhelmingly saw slavery as sinful starting from 1820, those in the South more and more regarded it as a wholesome way of life. Their increasingly business-like attitude towards the Union emanates from a unwillingness to defend this way of life to the North. In turn, the number of northern Congressmen who initially support the admission of slavery in Missouri in 1820 fades and the number that sees the “peculiar institution” as a threat to the entire “federal family” grows as the debates progress.

This strongly relates to the third point, namely that the visions of the polity on both sides became increasingly entrenched and the room for compromise, and even debate, shrank accordingly. The case of conciliatory rhetoric illustrates this more than anything else. Whereas this style was successfully employed in the 1820 debate on Missouri to build support for compromise, subsequent attempts to do the same in the 1830s and 1840s led to dodging the question at best, and absolutely nothing at worst. The unwillingness after 1820 to put a principled stand on the Constitution aside for compromise was complemented with an increased willingness to resort to violence—at least in words. The Force Bill is a case in point, but the open speculation of the dissolution of the Union and ensuing civil war—which started in 1820 with Tallmadge and runs all the way to the Southern protestors in 1850—indicates at least a psychological preparation for armed conflict.

Finally, with regard to the third and final question—what the implications of all this is for the identity of the polity—it is clear that the years 1820 to 1850 marked the arrival and maturation of an issue with the potential to rip the patchwork republic apart. Unlike the Bank debate, or that on the Alien and Sedition Act, the conflicts fueled by slavery refused to be put to rest. The compromises that were reached offered a way out of the fundamental question whether the United States formed one people or several, and even though they kept the Union together for the time being, they achieved little else. In fact, in most cases they actually sowed the seeds for bigger problems in the future. By

splitting the Union along the 36°30' line, Congress recognized in 1820 that it could only keep "we the people" together by dividing them into two parts. Thus, it officially acknowledges the sectional divide and encouraged Congressmen to view the opposition as the southern or northern, rather than part of one American people. In similar vein, the 1850 compromise on California only helped deteriorate existing fears in the South of becoming a helpless minority. Even in the case of the Nullification Crisis of the 1830s, the solar system metaphor was the first victim of those who wanted to settle once and for all what the true identity of the polity entailed. The net result of the debates discussed in this chapter is that, even in seeking to prolong its existence, they put greater strain on the patchwork fabric of the polity.

Chapter 7

A House Divided Coming Down

Things looked bright for the Union in the first few years of the 1850s. After more than ten years of intense sectional quarreling that had put a great strain on the idea that North and South were part of the same political community, many in the capitol were now happy to believe that the Compromise of 1850 had restored unity. President Millard Fillmore was the first to term the Compromise a “final settlement of the dangerous and exciting” subject of slavery in his annual message to Congress of 1850.¹ Other soon joined in the chorus. Stephen Douglas agreed with the president: “let us cease agitation, stop the debate, and drop the subject (...) a final settlement is not open for discussion.”² The members of Congress also pledged solemnly, though not unanimously, to adhere to the Compromise as “a definitive settlement of the questions growing out of domestic slavery.”³ For the time being, it seemed the United States closed ranks as if they truly formed one people.

The victory of 1850 was a huge success for the compromise-minded moderates in the Union. For the moment at least, radical forces on both sides were losing ground to the center. In the South, the secessionist movement lost support in the States where it was strongest: Mississippi, Georgia, and South Carolina. Supporters of the Compromise defeated the southern Rights Democrats in Georgia and threatened to isolate the movement elsewhere. On the other end of the political spectrum, the antislavery forces were losing ground as well. In the aftermath of the Compromise, many Free Soilers returned to the Democratic Party. Those remaining continued to agitate against the Compromise, especially the Fugitive Slave Act, but failed to attract attention to it outside their bastions of power in Massachusetts and Ohio.⁴

The hope, that America could resume politics as usual soon proved to be an illusion, however. Events outside the capitol soon caught up with the Washington hopefuls. Violent protests against the Fugitive Slave Act, as well as a bloody conflict over Kansas statehood and the radical abolitionist John Brown’s failed attempt to start a slave uprising from Virginia all revealed the shaky ground on which the new consensus rested. This final chapter will trace how in the constitutional debates in Congress and the

¹ Millard Fillmore: “First Annual Message,” December 2, 1850. Online: Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=29491>

² Blair et al., *Congressional Globe*, Appendix to 32nd Congress, 1st session, 68.

³ See: Ibid., 32nd Congress, 1st session, 35 for the motion on the Compromise.

⁴ David Morris Potter, *The Impending Crisis, 1848-1861* (New York: Harper & Row, 1976), 126–127. Wilentz, *The Rise of American Democracy*, 659, 661.

Supreme Court the uneasy peace of the 1850 was dislodged. The first section analyzes the adoption of the Kansas-Nebraska Act of 1854, which repealed the Missouri Compromise and opened the two territories to slavery. The second examines the attitude of the Supreme Court towards slavery. Most attention here is focused on the infamous *Dred Scott* case, which sealed the fate of all African-Americans, free or slave, as subordinate beings. Finally, the third section explores the final debate in Congress over the true identity of the polity on the eve of the Civil War.

Raising a Hell of a Storm: the debate on the Kansas-Nebraska Act

The Kansas-Nebraska Act has been called the single most important event that brought about the American Civil War.⁵ At stake in the debate was a bill written by Illinois Senator and chairman of the Committee of Territories, Stephen Douglas, which would create two territorial governments (Kansas and Nebraska) in the remaining part of the Louisiana Purchase. Douglas' motives for pushing the bill were probably financial—he hoped to profit from the pacific railroad that would run through the territories—but it mostly succeeded in reopening the wound of the territorial question only three years after the 1850 Compromise. Unsurprisingly, Douglas' bill was defeated in the Senate by the southern senators who, as one put it, would rather see Nebraska “sink in hell” before allowing slavery to remain banned there.⁶ The Southerners had their own motives for agitating the territorial question: they were eager to increase their numbers in Congress and desperately looked for new turf to claim as slave States. New Mexico, of course, had been opened to slavery, but it would be long before its sparse population could file for statehood.⁷ A bold scheme to annex Cuba as a slave State failed when the expedition was crushed by Spanish troops. The only way to prevent slavery from being built in from all sides, many Southerners believed, was to push north into the Nebraska Territory. Slavery of course had been prohibited here by the 36° 30' line, but Southerners increasingly viewed the Missouri Compromise as an unconstitutional abridgement of their rights and realized that their only hope to expand slave power was to urge its repeal.

To tout the much needed southern support for his bill, Douglas agreed to let the territorial governments decide for themselves whether or not to allow slavery—the so-called “non-intervention” policy. His substitute bill created two territories, Kansas and

⁵ Michael F. Holt, *The Fate of Their Country: Politicians, Slavery Extension, and the Coming of the Civil War* (New York: Hill and Wang, 2004), 6. James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (New York: Oxford University Press, 1988), 121.

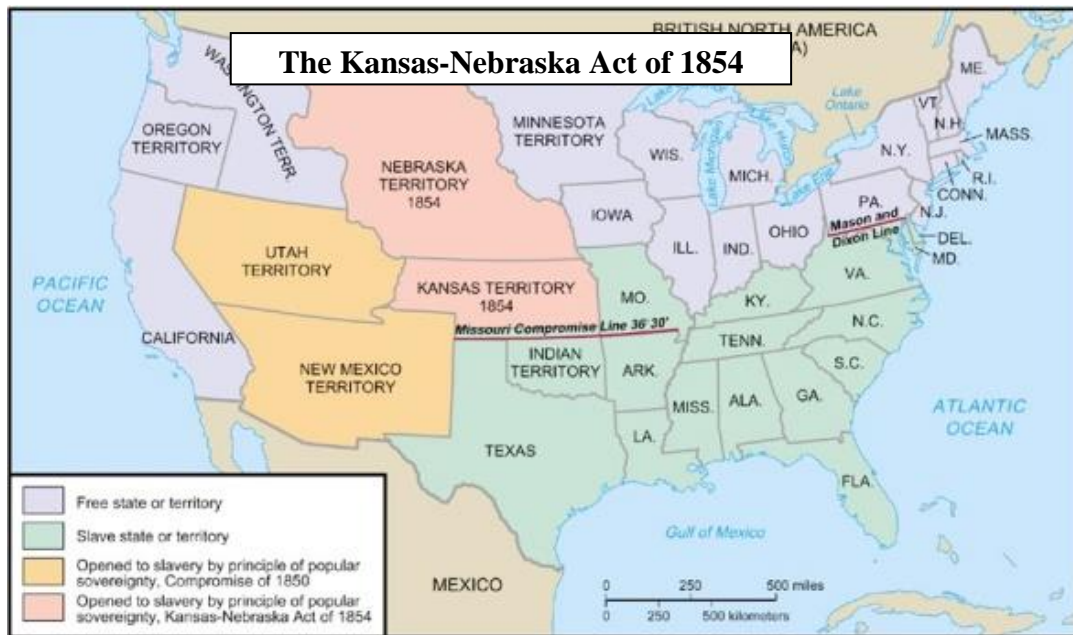
⁶ The quote is from Missouri Senator David Atchison, quoted in: Wilentz, *The Rise of American Democracy*, 672.

⁷ The 1860 census moreover showed that no slaves resided in New Mexico at that time, McPherson, *Battle Cry of Freedom*, 76.

Nebraska, and incorporated an explicit repeal of the Missouri Compromise in favor of the policy of non-intervention as formulated in the 1850 Compromise. “All questions pertaining to slavery,” the bill read: “are to be left on the decision of the people residing therein.” It also added that the Missouri Compromise: “which was superseded by the principles of the legislation of 1850, commonly called the compromise measure, and is declared inoperative.” This new substitute bill pleased the South since it gave slavery a fighting chance in the new territories.⁸

Douglas’ proposal constituted a major redefinition of Congress’ conduct towards slavery in the territories. It meant the repeal of the Missouri Compromise by which Congress had surveyed the peaceful division of the Midwest between the two sections, and sought to replace this with an absolute commitment to the ambiguous principle of “non-intervention.” Because it neither specified who (pro- or antislavery advocates) would be able to call the territories their own, nor when this decision would have to be made (before or after the request for statehood), non-intervention vague enough to draw support from across the aisles. Southerners liked the idea because it gave them a chance to extend slavery to the northwest, whereas the “Missouri restriction” gave them none. It was clear, however, that many Northerners would be harder to warm up to the idea. To the amazement of many, contemporaries and historians alike, Douglas pulled this off, and by May 1854, the Kansas-Nebraska bill had become an Act.

Considering the impact that the adoption of the Kansas-Nebraska Act had, many historians have wondered why and how this commitment to non-intervention (including the repeal of that interventionist landmark, the Missouri Compromise) was brought about.



⁸ Blair et al., *Congressional Globe*, 33rd Congress, 1st session, 175, 222,. Senator Archibald Dixon of Kentucky, who first suggested repealing the Missouri Compromise, said he was “perfectly satisfied” with the new bill, see: *Ibid.*, 240 .

Curiously, there has been little attention from historians as to how Douglas and his associates in the House succeeded in obtaining a majority for the bill in the Congressional debate. Most historians point out that the proponents of the bill relied on patronage as well as “whip and spurs” to see the bill through Congress and offer this as an exhaustive explanation for the repeal of the Missouri Compromise.⁹ This explanation implies that Douglas’ bill lacked any inherent persuasiveness and fails to recognize that even with force or bribery the proponents of the bill still required a convincing story to justify the drastic step of repealing the Missouri Compromise. In this section it will be argued that Douglas and his associates not only used money and threats to rally support behind their position, but also had the more persuasive argument that convinced Congress that non-intervention was in line with the identity of the polity, and the Missouri Compromise was an un-American anomaly. Consequently, Douglas’ rhetorical effort to portray the bill as truly “American” played a crucial role because, even if it failed to convince some to join his cause, it handed them a justification as to why they changed their minds.

To explain how Douglas and his supporters succeed in getting his Kansas-Nebraska bill adopted, this section will first explore the formidable obstacles that the opposition succeeded in leveling against the bill. It will be argued that the opposition’s increasing identification of the Missouri Compromise as the only constitutional, final, and even sacred solution to the slavery question prompted the proponents to formulate a counter-narrative to rally support for the bill. In the final part of the section, the important consequences that the act had for both the political landscape in Congress and the bloody settling of Kansas will be examined.

The Kansas-Nebraska bill was sent to Congress in January of 1854 and was debated there until the end of May. Douglas kicked off the debate on Monday January 30, in a long speech in which he defended the bill on the basis of two pillars. First, he emphasized that the bill did not necessarily open the northwest to slavery, but simply left the matter to be decided by the future inhabitants of the territories. This brought him to the second pillar: the virtue of self-government. Douglas not only thought that federal intervention could not solve the slavery question (quoting Illinois as a case in point, where slavery was introduced in spite of being north of the 36° 30’ line), but he also emphasized that the Compromise of 1850 forbade direct intervention by Congress. According to Douglas, the principle of non-intervention in that Compromise was understood to apply to *all* the territories, not just New Mexico and Utah. The Missouri Compromise, as a result, was: “superseded (...) and we are bound to apply those principles in the organization of all new Territory.”¹⁰

⁹ See for example: McPherson, *Battle Cry of Freedom*, 125. Wilentz, *The Rise of American Democracy*, 675.

¹⁰ Blair et al., *Congressional Globe*, 33rd Congress, 1st session, 278.

From the start, it was clear that this defense of the bill would meet stiff resistance from the northern members of Congress, who overwhelmingly objected to the repeal of the Missouri Compromise. Douglas himself recognized this when he mentioned that it would “raise one hell of a storm.”¹¹ Already, six Free Soil Congressmen¹² published a ringing attack against it that was soon picked up by newspapers all over the country. Posing as “Independent Democrats,” the petitioners appealed to their colleagues not to lift the ban on slavery in the new territories. Douglas’ bill, they argued, was a criminal betrayal of the Missouri Compromise’s promise of freedom in the northwest, by applying to it the Compromise of 1850’s idea of non-intervention that was only intended for the southwest. Douglas, as a result, was singled out as an “architect of ruin” who sought to convert the free soil of the northwest into a “dreary region of despotism, inhabited by masters and slaves.” This, the petitioners warned, should never be allowed to happen, and they conclude by vowing to oppose the bill with every means possible.¹³

The Appeal of the Independent Democrats is considered a masterstroke since it framed the debate on the Kansas-Nebraska bill as a choice for or against slavery.¹⁴ To muster votes against the bill in the North, its anti-slavery opponents were determined to portray it as a product of aggressive Slave Power. “It is slavery that renews the strife,” William Seward emphasized: “It is slavery that again wants room.”¹⁵ In doing so, the petitioners hoped to cut the ground from under Douglas’ feet by back-grounding his argument that the principle of non-intervention did not automatically condemn the new territories to a State of slavery, but simply left the choice with the local inhabitants. To vote for Douglas’ plan, they argued, was to condemn the northwest to slavery.

In raising this specter of Slave Power, the petitioners took care not to look like radical abolitionists. In the world of 1850s politics, slavery *within* the southern States was an uncontested fact of life. While some radical opponents would condemn slavery in harsh terms, none proposed to abolish the “peculiar institution” where it already existed. The idea of a black man being equal to a white was so unconceivable to the majority of Congressmen, that even raising the idea was cause for laughter.¹⁶ History furnished no example of a successful multi-ethnic state to use as guidance. “All history and all experience have shown,” Indiana Senator John Pettit said: “that two distinct and separate races cannot live upon the same territory, under the same government on an equality.”

¹¹ Quote in: Wilentz, *The Rise of American Democracy*, 672.

¹² They were Senators Salmon P. Chase of Ohio (who did most of the writing) and Charles Sumner of Massachusetts as well as Representatives Gerrit Smith and Alexander De Witt of New York, and Joshua Giddings and Edward Wade of Ohio, and.

¹³ Blair et al., *Congressional Globe*, 33rd Congress, 1st session, 281–282.

¹⁴ Wilentz, *The Rise of American Democracy*, 673–674.

¹⁵ Blair et al., *Congressional Globe*, Appendix to 33rd Congress, 1st session, 151.

¹⁶ See for example how South Carolina Senator Butler refuted his Ohio colleague Wade’s assertion that black were equal in their right to “life, liberty, and the pursuit of happiness”, *ibid.*, Appendix to 33rd Congress, 1st session, 311. This did not discourage some Senators like Pettit and Wade to claim equality for blacks in the debate, see: *Ibid.*, 263, 311.

And while the Free Soilers faced the challenge of making conceivable the unconceivable, the advocates of slavery could simply point to the supposedly terrible consequences of emancipation. “If we turn them loose,” Senator Dixon of Tennessee asked: “are you going to give them the privilege of freemen?” Knowing full-well that this was a bridge too far, even for many of those unsympathetic to slavery, Dixon concluded that: “we must wait for the day Providence, in good time, sets slaves free.”¹⁷ This last statement shows that, despite countless indications that slavery was still a growing institution, some Congressmen preferred to believe it would disappear by itself.

Even if abolition of slavery within the States was too extreme for many Northerners, all the opponents of the bill agreed that further extension of slavery in the territories should be opposed. As the Appeal already made clear, the challenge that Douglas faced was daunting. Opponents of the bill not only questioned its constitutionality but also the expediency and consequences of writing it into law. Underlying these objections was a vision of the polity that regarded the Missouri Compromise line as a sacred compact that allowed free and slave States to coexist.

The first objection, the supposed unconstitutionality of slavery in the territories, had of course been seriously contested in Congress since 1819 and has been treated in depth above. It is important to point out that many Senators relied on a specific understanding of the history of the Constitution to define its meaning. This spirit of the Constitution turned out to be as contested as the letter. Opponents of the bill maintained that the Constitution was essentially an anti-slavery document. Had the founders wanted to sanction slavery, Representative Thomas Davis of Rhode Island argued, the preamble should have read: “to secure the blessings of slavery to ourselves and our posterity,” rather than of liberty. His colleague from South Carolina, Laurence Keitt, however, arrived at the opposite conclusion on the reading of the same text. If Congress had power to legislate over slavery, Keitt insisted, the South was deprived of the blessings promised in the preamble and were made to trade places with their slaves. “The parchment on which the Constitution is written remains,” he said: “but its spirit is fast decaying.”¹⁸

These conflicts over the right interpretation of the Constitution show the extent to which the power of Congress with regard to slavery had become essentially contested. The views and arguments that had been cited in support since 1819 had become carved in stone three decades later. Neither side’s citing of the letter or understanding of the spirit of the Constitution seems to have swayed many minds. In fact, when first-term Senator from Maine William Fessenden set out to explain how the Constitution was the act of the people collectively, his South Carolina colleague Andrew Butler considered it a sufficient rebuttal to sigh: “I have no hope for you.”¹⁹ This reaction demonstrates that the views on who “we the people” constituted had totally deadlocked.

¹⁷ Blair et al., *Congressional Globe*, Appendix to 33rd Congress, 1st session, 212, 144.

¹⁸ *Ibid.*, Appendix to 33rd Congress, 1st session, 639, 267, 465, 467–468.

¹⁹ *Ibid.*, Appendix to 33rd Congress, 1st session, 321.

The second major objection leveled to the bill in Congress was that the principle of non-intervention did not apply to the northwest. According to many opponents, the idea that the 1850 Compromise superseded its Missouri counterpart was novel for it never had been intended to extend to the northwest. In defense, the advocates of the bill repeatedly quoted the vows of both Whigs and Democrats in the elections of 1852 to abide by the Compromise of 1850 as the final solution to slavery in *all* the territories. In a series of rhetorical questions, Douglas sought to establish non-intervention as the uncontested new adagio of the Republic. “When we pledged our President to stand by the compromise measure,” Douglas asked the Senate: “did we not understand that we pledge him as to his future action?” “Was it,” he continued:

“our object simply to provide for a temporary evil? Was it our object just to heal over an old sore, and leave it to break out again? Was it our object to adopt a mere miserable expedient to apply to that territory, and that alone, and leave ourselves entirely at sea without compass when (...) new territorial organizations were to be made?”²⁰

This cunning sequence of questions served two goals. First, it created a feeling, *pathos*, of indignation and even outrage, among senators who refuse to believe that the measures of 1850 were for naught. Surely, Douglas concluded, the venerable Clay did not sacrifice his last energies for such a temporary solution? Second, the nature of a rhetorical question is that it invites the answer to the listener (negative, in this case) and thereby establishing adherence to the underlying idea that, indeed, the Compromise of 1850 was intended as the “final adjustment” of the slavery question and thus superseded that of 1820. “They say my bill annuls the Missouri Compromise,” Douglas concluded: “if it does, it had already been done before by the act of 1850.”²¹

The idea was that the Compromise of 1850 had been intended to solve the problem of slavery “finally and forever”—as Tennessee Senator Archibald Dixon put it—and therefore extended to every territory of the United States.²² This sparked an interesting debate about the finality of compromises in general. The opponents of the bill demonstrated that two could play that game by claiming a *concurrent finality* for the Missouri Compromise. After all, was that law not also intended as the final settlement? The Missouri Compromise constituted a “solemn obligation,” Charles Sumner insisted, and: “has been accepted as final down to the present session of Congress.”²³ Before long, the supposed finality of the Missouri Compromise became a third ground on which the opponents of the bill made their stand against Douglas. The opponents of the bill took this argument to a higher level when they claimed that the Missouri Compromise was sacred. They claimed it was a “sacred landmark” that contained a “moral force and

²⁰ Ibid., 33rd Congress, 1st session, 278.

²¹ Ibid., 33rd Congress, 1st session, 277–278.

²² Ibid., Appendix to 33rd Congress, 1st session, 142.

²³ Ibid., Appendix to 33rd Congress, 1st session, 263, 268.

obligation” which the advocates of the bill could not cast aside. This depiction of the Compromise as a “solemn compact” conferred an aura of divine respect which made it a holy duty to observe it and blasphemous sacrilege to repeal it. The sanctity of the Compromise, William Seward argued, made it: “irrepealable [sic] and unchangeable, without a violation of honor, justice, and good faith.”²⁴

While the immediate object of this claim to sacredness was to frustrate the passing of the Kansas-Nebraska bill, it also reflected a deep felt respect for the “blessings” it had bestowed on the Republic. By restoring good faith between the sections, Representative Theodore Hunt of Louisiana claimed, the Compromise had performed a “holy work of pacification and union.”²⁵ In this sense, the sacred role that many of the opponents of the bill bestowed on the Missouri Compromise was intimately tied to the way they viewed the polity as a whole. The aura of sacredness they claimed for the Missouri Compromise made it more than an ordinary piece of legislation by putting it on the same level as a religious vow and making adherence to it a sacred duty.

The most dedicated opponents of the Kansas-Nebraska bill believed that the Missouri Compromise line was essential for the two sections to coexist within the Union. This view was expressed by some of the most ardent critics of slavery, like William Seward. According to him, a line of demarcation between slavery and freedom was “indispensable” because the two were antagonists and could not coexist together otherwise. The Compromise of 1820, he believed, had created a “just equilibrium” between North and South that would keep the Union safe so long as it existed. Charles Sumner in similar vein contended that the Missouri Compromise reflected the original idea of the founders that slavery should be confined to the States. “This is the common ground upon which our political fabric was reared,” he told the Senate: “it is the only ground on which it can stand in permanent peace.” Some Southerners too rallied to the Compromise line’s defense. Texas Senator Samuel Houston viewed it as a “wall of fire” against the northern agitation, and thus as a guarantee for slavery. “Repeal it,” he warned his colleagues: “and there will be no line of demarcation (...) there will be a knife to the throat of the South, and it will be drawn.”²⁶

Whereas Houston’s plea was outright southern—“I claim the Missouri Compromise in behalf of the South,” he said—that of his colleagues had a more integrative ring to it. Charles Sumner stressed that, despite the diversity of opinions: “we are all representatives of thirty-one sister republics, knit together by indissoluble tie.” Both North and South, he claimed, could unite “according to the sentiments of the fathers” that slavery was an evil institution and rally behind “the true spirit of the Constitution, in declaring Freedom and not Slavery *national*, while Slavery and not

²⁴ Ibid., Appendix to 33rd Congress, 1st session, 281–282, 268, 861, 152.

²⁵ Ibid., Appendix to 33rd Congress, 1st session, 436.

²⁶ Ibid., Appendix to 33rd Congress, 1st session, 154, 267, 206.

Freedom shall be *sectional*.”²⁷ To be sure, the United States continued to constitute one people in this view, but a people that had to be separated by a firewall to secure its continued existence. In the House, Louisiana Representative Theodore Hunt spoke in similar vein for the handful of Southerners that objected repeal. His vision of the polity was akin to that of Sumner in that he believed the South only had a future within the Union: “American liberty is inseparable to American Union,” he said, and to this extent the United States formed “one people, and have one destiny.” The permanency of the Union, however, depended on the Compromise line, and if it were repealed: “I fear, Representatives, that the days of our liberty will be numbered.”²⁸

To sum up the position of the opponents: the Missouri Compromise was the crown on the founding, because it allowed the two sections of the Union to exist side by side without being torn apart by the question of slavery. If the Missouri Compromise, the idea that the United States people had to be divided by a geographical line in order to be able to coexist, was truly who Americans were, then violation of it was went against the identity of the polity, and Douglas’ bill was an un-American act. The sanctity argument, in other words, put a strong constraint on the wisdom and appropriateness of Douglas’ proposed repeal of this sacred American law. It was an obstacle that had to be addressed by the proponents in a way that would take away the doubts about its unsuitability for the United States.

Most advocates did not concern themselves much with the sanctity of the Missouri Compromise. It was an act of ordinary legislation, they pointed out, and could be repealed accordingly. “It has nothing sacred to me,” John Pettit of Indiana argued: “I venerate things not simply on account of their age.”²⁹ This rebuttal no doubt convinced those already in favor of Douglas’ bill, but the question was whether it could change enough minds to forge a majority in the House. The sanctity argument ran deep and respect for precedents resonated loud with the opposition members of Congress. In order to secure a majority for his bill, Douglas and his supporters would have to identify the concurring principle of non-intervention as truly American to strip the Missouri Compromise of its aura of sacredness. To do this, Douglas presented his bill as the expression of a more ancient American principle, namely that of self-government.

Against the idea of a beneficial dividing line Douglas raised the idea of a unifying principle that cut across sectional lines. Instead of having the question of slavery decided

²⁷ Ibid., Appendix to 33rd Congress, 1st session, 206, 262, 270.

²⁸ Ibid., Appendix to 33rd Congress, 1st session, 206, 414–415, 438 Not all the opponents of the bill took such a conciliatory line towards slavery. Representative Edward Giddings of Ohio argued that the United States had a choice between: “liberty for the slave, or slavery for the free laborer.” Either the North or South had to budge, or else they should: “part like friends rather than live together as rival enemies, in a hopeless and embittered struggle to harmonize systems so utterly, fatally, irreconcilable, as liberty and slavery.” Unlike most of his Congressmen, Giddings saw no future for an American where two opposing vision of the polity remained united as one people. For him the choice was clear: “liberty must triumph, and slavery perish.” See: Ibid., 666 668.

²⁹ Ibid., Appendix to 33rd Congress, 1st session, 220.

by “an arbitrary geographical line” he argued it should be decided on the basis of “the great principle of self-government.” This, he said, “was the original principle upon which the colonies separated from the crown of Great Britain (...) and upon which our republican system was founded.” Congressional intervention with slavery, he reminded his colleagues, was “the same doctrine that the British Government attempted to enforce by the sword upon the American colonies.” In this light, the interventionism of the Compromise of 1820 became a deviation, rather than the crown on the founding, because it violated the first political principle of American self-government. “Let all this quibbling about the Missouri Compromise (...) be cast behind you,” Douglas said: “for the simple question is, will you allow the people to legislate for themselves upon the subject of slavery? Why should you not?” The rhetorical questions again served the goal of bringing his audience around to his point of view. Douglas reduced his bill to a choice for or against self-government, saying: “if that principle is wrong, the bill is wrong. If that principle is right, the bill is right.”³⁰ In the principle of self-government, then, Douglas found the anvil with which he could shatter the hammer of sanctity that the opponents had made of the Missouri Compromise.

The success of this speech was clear from the fact that it was taken up by other members of Congress. Senator William Dawson of Georgia was immediately charmed by Douglas’ suggestion. “Will anyone dare to rise here today and say,” he asked: “that the principle of the bill is not the American principle (...) upon which our whole system of government is based—the right of the people to govern themselves?” Senator Moses Norris of New Hampshire, in similar vein argued that: “it [the Kansas-Nebraska bill] will bring us back to and reasserts the original and true principles (...) that every State and organized community has the sole right to ordain and establish its own local domestic institutions (...) because it affirms this great principle of self-government.”³¹ Senator Toucey of Connecticut also applauded the return to: “the early policy” of self-government that worked wonders for the country: “from the landing at Plymouth Rock down to the present moment.” “What right have we, in these Atlantic States, over the people of the remote territories to dictate law to them?” he asked. Was not this same power invoked by Great-Britain to reduce the American colonists to slaves? For, he asked, have: “these people (...) ceased to be Americans?” Here, the union between self-government and American identity that Douglas brought about was complete.³²

In the House, Douglas’ idea also was also taken up by members eager for a way to justify their support for the bill. Representative John Taylor of New York invoked Douglas’ identification of an interventionist Congress with Great Britain: “shall the doctrine of the American Congress be that of the British Parliament, or that of the Colonies they sought to oppress?” he asked rhetorically. His colleague John Breckinridge

³⁰ Ibid., Appendix to 33rd Congress, 1st session, 275, 337, 280, 278.

³¹ Ibid., Appendix to 33rd Congress, 1st session, 304, 310.

³² Ibid., Appendix to 33rd Congress, 1st session, 318–319.

of Kentucky also sided with Douglas. Self-government, he said, truly was an “American principle,” whereas the “abolitionism” of the opposition flew in its face and tried to substitute self-government with “despotism.”³³

As these examples illustrate, Douglas’ portrayal of his bill as a truly American solution resonated with the members of Congress. By identifying the right of self-government of the inhabitants of the territories with that of the eighteenth century American colonists, Douglas compared Congressional intervention to Great Britain’s tyranny and praised his bill as a return to the “truly” American principle that had guided the Republic since its earliest days. This argument shared took the form of a narrative argument: the ideals of the colonial *past* formed the only answer to the *present* problem in Kansas-Nebraska territories that could guarantee a viable solution in the *future*. Douglas encouraged his colleagues to act in accordance with the spirit and principle that guided their forefathers. In this sense, he succeeded in convincing his audience that his Kansas-Nebraska bill was more in line with the “true” identity of the polity than the Missouri Compromise. That this narrative indeed convinced Congress can be judged from the many times it was adopted by Douglas’ colleagues. It clearly succeeded in rallying many members of Congress to Douglas’ cause, but it is much harder to prove that it helped change Congressmen’s mind from opponent to supporter. What can be said, however, is that the narrative furnished a justification for those members of Congress who, for whatever reason—loyalty to the Democratic Party, personal profiteering, or fear of retribution—inclined towards supporting the bill. Thus Douglas rid himself of the formidable obstacle that the Missouri Compromise posed to his plan.

The Senate passed the Kansas-Nebraska bill on March 3, little over a month after the debate started. The final vote shows how successful Douglas was in rallying his northern party members behind the bill. Of the 37 senators that supported the bill all fourteen Northerners belonged to the Democratic Party. In fact, only four northern Democrats voted against the bill (three others were absent). As for the Whig Party, all six members from the North opposed the passing of the bill. In the South, support for the bill was even more overwhelming and all but two southern senators supported the bill. The fourteen senators that opposed the bill included one southern Whig, John Bell of Tennessee, and one southern Democrat, Samuel Houston of Texas.³⁴

In the House, where their short terms made northern Democrats more prone to resist the Party line out of fear of reactions from their constituents, the struggle to pass the bill was much tougher. The main sponsor of the Senate bill in the House was in the hands of William Richardson, a fellow Illinoisan and, like Douglas, chairman of the Committee on Territories. Although the opponents succeeded in burying the bill under other legislative business, which effectively stalled any decision on it for weeks, Richardson and his ally Alexander Stephens from Georgia, resumed an iron grip on the debate.

³³ Ibid., Appendix to 33rd Congress, 1st session, 597, 442.

³⁴ Ibid., 33rd Congress, 1st session, 532.

Representatives had to limit their speeches to ten minutes (five in case of an amendment). The opponents were outraged by this. “It is a breach of the liberty of Parliament and our right in a free and glorious country,” Theodore Hunt of Georgia protested: “I appeal to every American on this floor (...) to protest against it.” Thing went for the worse when, after a 36 hour marathon session in which the opposition used every trick in the book to stall the discussion, and several members climbed their desks to protest their frustration.³⁵ Richardson and Stephens stood their ground, however. “We shall pass this bill,” Richardson said: “settle a great principle, and so settle it that in all future time we can sustain it.” The stalling tactics of the opposition no longer held out and Richardson and Stephens led the House through a maze of adjournment and substitutes until, on May 22, the final vote recorded a 113 against 100 votes in the affirmative. It was a close call, but the Kansas-Nebraska bill finally passed Congress and was signed into law by President Pierce a week later. Judging from the reactions on the House floor feelings were mixed, for alongside “prolonged clapping of the hands,” the secretary also noted: “hissing both in the House and galleries.”³⁶

The debate on the Kansas-Nebraska Act illustrates three important points with regard to the central theme of this study. First, and perhaps most obvious, the debate demonstrates the importance that both sides attached to the Constitution as *the* source for their vision on the polity. By portraying the Missouri Compromise and the Compromise of 1850 as final and inviolable act, each side in the debate attempted to confer this sacredness of the Constitution to their cause. Second, the speeches by Douglas and others demonstrate how rhetoric functions as a tool to break a deadlock on the “true” meaning of the Constitution. By means of narrative reasoning, Douglas tried to restructure of the present in which his audience perceived his bill on the basis of a certain reading of the past and allowed him to offer a view of how Congress should conduct itself as “true Americans” in the future.

Third and most important, as a result of this rhetorical effort, the members of Congress convinced themselves that in order to act in accordance with who they truly were as Americans (i.e. their identity) the Kansas-Nebraska bill had to be adopted. The subject of territorial slavery was of course painstakingly avoided by earlier Congresses or, when it was debated, only addressed in compromises that sought to appease both sides by avoiding construing the Constitution in favor of either the slaveholding or non-slaveholding part of the Union. Douglas’ proposed a third-way alternative on the basis of an “American” principle that, in theory, united both sides: self-government. On the surface, this proposal removed the tension that resulted from having two visions on who the people of the United States were (freemen and slaveholders) by offering a third option based on mutual respect for each other’s right to decide the slavery-question for oneself.

³⁵ Ibid., 33rd Congress, 1st session, 700, 1155, 1183.

³⁶ Ibid., Appendix to 33rd Congress, 1st session, 795–796. Ibid., 33rd Congress, 1st session, 1254.

What united the peoples of the States, in other words, was adherence to the right of self-government for all and respect for the choices, however different, of others.

In terms of identity of the polity, this was a significant step as it proposed to substitute diversity for uniformity. The Missouri Compromise allowed for two opposing visions of the polity (and two views of the Constitution, history, identity, and what it meant to be American) to *coexist* without forcing a split of the patchwork Union into two polities. It was now replaced by Douglas' non-interventionist alternative of leaving slavery to the territories themselves. Thus, instead of letting two visions on the polity coexist, Douglas' bill pushed for a single interpretation of what the people of the United States shared. Moreover, it declared as unconstitutional the idea that Congress could decide the fate of slavery in the territories, stating that this was "inconsistent with the principle of non-intervention" as recognized by the Compromise of 1850 and was therefore: "declared inoperative and void."³⁷

With the Kansas-Nebraska Act Congress recognized its own inability to solve the constitutional question of slavery in the territories. By repealing the Missouri Compromise, the Kansas-Nebraska Act in fact took the decision whether territories should be slave or free out of the hands of Congress, and placed in those of the inhabitants of the territories. Congress *de facto* recognized that the United States consisted of two peoples that could not be reconciled and ceded its role as the forum where both should look for a common interest to unite behind in favor of open competition between slaveholders and freemen in the territories. The sacrifice of the Missouri Compromise on the altar of non-intervention meant that slavery could now be introduced or prohibited in *every* territory of the United States, including those already formed.

The Kansas-Nebraska Act was one ripe with consequences. The most immediate one was that the principle of non-intervention (or self-government) now placed the precarious question of slavery's future in the northwest in the hands of the inhabitants of the territories. The Act did not, however, give any guidance as to how the inhabitants should reach their decision, but wanted: "to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." As a result, the new territory of Kansas quickly became a battle ground between pro- and antislavery forces that were both determined to see their vision prevail in the local constitution. Before the year was out, thousands of armed sympathizers from North and South flocked to Kansas to secure it as a free or slave State. Within two years, two rival governments were established in Kansas, one slave the other free, and the first blood was drawn in skirmishes between proslavery

³⁷ *The Statutes at Large and Treaties of the United States of America* (Boston: C.C. Little and J. Brown, 1845), X, 283.

“Border Ruffians” from Missouri and Abolitionist militants from the North. The violence dragged on for years and before it stopped, almost 60 people had been killed.³⁸

Far from settling the discussion, the Kansas-Nebraska Act reopened the old wound of slavery. There is no doubt that “Bleeding Kansas” radicalized both North and South. Kansas was fast becoming a competition between the two sections, much like William Seward predicted after the Act had been adopted. “Come on then, gentlemen of the slave States,” he said: “since there is no escaping your challenge, I accept it on behalf of the cause of freedom.” “We will”, he continued: “engage in competition for the virgin soil of Kansas, and God give the victory to the side which is strongest in numbers as it is in right.”³⁹ Bleeding Kansas proved the naiveté of the idea that non-intervention would peacefully settle the slavery question in the territories and would unite the people of the United States behind one banner. In this sense, Kansas drowned the short-lived advent of self-government as the panacea for the country’s problem in the blood of dozens slain. Ironically, Kansas only increased the attention for slavery, by firing up the base of radicals in both sections. In doing so it undid the fragile balance created in 1850.

The Taney Court on Slavery

When John Marshall died in 1835 he had served as Chief Justice for more than thirty years and left a long list of milestone decisions that forever changed the face of constitutional law. The man that President Jackson picked to succeed Marshall was fifty-eight years old Roger Brooke Taney, a lawyer from Maryland. Taney’s judicial views differed substantially from those of Marshall, which was why Jackson nominated him in the first place. Where Marshall was a committed nationalist and construed the law to increase the federal government’s sway over the States, Taney championed a more limited interpretation of the Constitution and was more sympathetic to States’ rights.⁴⁰ Whether Taney’s term was a significant change from Marshall is subject of debate. On the one hand, his Court formed a counterweight to the national activism that characterized Marshall’s term. It did not, on the other hand, constitute a revolutionary turnover, for the Court never gave up its power of review.

The most important cases before the Taney Court in light of the subject of this study were those about slavery. Since the debates in Congress yielded very little in terms of a solution to this question, it is not surprising that slaveholders and abolitionists alike were actively trying to get the Supreme Court to weigh in on these issues. The crucial

³⁸ See: Nicole Etcheson, *Bleeding Kansas: Contested Liberty in the Civil War Era* (Lawrence: University Press of Kansas, 2004).

³⁹ Quote in: Wilentz, *The Rise of American Democracy*, 677.

⁴⁰ For example, in *New York v. Miln*, the first major commerce-clause case before the Taney court, the new Chief Justice and his colleagues justified state regulation of passengers within their jurisdiction on the basis of state “police powers” see: *New York v. Miln* (1837) 36 U.S. 102.

question underlying these cases was whether the Constitution recognized slavery as a State or as a national institution. Everyone agreed that the framers permitted the peculiar institution, for even if they preferred to call them “persons held in service” rather than slaves, the three-fifths clause (Art. I, sec. 2), the prohibition on a foreign slave trade ban (Art. I, sec. 9), and the fugitive slave clause (Art. IV, sec. 2) all recognized slaves as property. The controversy between pro- and antislavery forces was whether this meant that United States, as a nation, was either a slaveholding Republic or the land of the free. Thus, the slave cases before the Court constantly challenged the patchwork nature of the Union by begging the question whether the true identity of the polity was that of a single people—free or slave—or several.

The Marshall Court had always been reluctantly to address issues that touched on slavery and aware of limitations of judges to solve such potentially explosive political questions. Even though Chief Justice Marshall owned a handful of slaves throughout his life, he had little love for slavery and at one point called it an “evil” institution. As a Virginian, however, Marshall accepted slavery as a fact of life and applied slave laws rigorously while trying to evade the constitutional controversies involved. As judge, he took the position that morals and law should be separated, arguing that: “whatever might be the answer of a moralist to his question, a jurist must search for its legal solution in (...) the national acts.” Consequently, the Marshall Court consistently refrained from peering into the constitutional niceties of the slavery-related cases heard by it and decided no significant cases with regard to domestic slavery.⁴¹

In contrast, the Taney Court was more inclined to hear slavery-related cases and stepped in on more than one occasion to settle the slave-related disputed. Although the Taney Court dodged the question of slavery’s status within the patchwork Union in its earlier cases on the *Amistad*⁴² and the domestic slave trade,⁴³ it made consequential contributions to the debate on the status of slavery in the territories in the infamous *Dred*

⁴¹ R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 326, 329, 423. Evil institution quote in: Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: H. Holt & Co, 1996), 489. Moralist/jurist quote from: *The Antelope* (1825) 23 Us 66, at 121. Earl M Maltz, *Slavery and the Supreme Court, 1825-1861* (Lawrence: University Press of Kansas, 2009), 3.

⁴² This case revolved around the African captives aboard the schooner *Amistad* who were to be sold at the Cuban slave market but overtook the vessel and, after ending up in Connecticut, sued for their freedom. The Court argued that it had been sufficiently proven that the Africans had been kidnapped and therefore were not even considered slaves under Spanish law and should be freed. See: Maltz, *Slavery and the Supreme Court, 1825-1861*, 54, 50 And: *United States v. Amistad* (1841) 40 U.S. 518, at 595-596.

⁴³ The most important case here is *Grover v. Slaughter*, in which the question was whether a clause prohibiting the importation of slaves for merchandise in the Mississippi Constitution of 1832 was a violation of the federal government’s exclusive power to regulate interstate commerce. Marshall had dodged this question in his famous 1824 *Gibbons v. Ogden* case and the Taney Court did the same by arguing that discarding it on the technical grounds that the importation ban in Mississippi’s Constitution was not self-executing and therefore void. See: David L. Lightner, *Slavery and the Commerce Power: How the Struggle Against the Interstate Slave Trade Led to the Civil War* (New Haven: Yale University Press, 2006), 67–69 And: *Groves v. Slaughter* (1841) 40 U.S. 449, at 503 .

Scott case. Since this last case is the most revealing in terms of identity of the polity, it will be the main focus of this section.

Dred Scott

Dred Scott was and is undoubtedly the most infamous decision of the Supreme Court in the antebellum period. Dred Scott was a Missouri slave of the U.S. Army surgeon John Emerson whose career took him to the free State of Illinois and the free territory of Wisconsin before they returned to Missouri. When Emerson died, in 1842, ownership of Scott eventually fell to his wife's brother, John Sanford. In April 1846, Scott sued for freedom, claiming that his residence on free soil made him a free person. While a local court granted Scott his freedom on account that once free meant always free, a subsequent appeal by Sanford to the Missouri Supreme Court reversed the verdict. Stating that "times now are not as they were," these justices set aside the "once free, always free" rule and claimed that Scott's voluntary return to Missouri "reattached" him to his former slave State.⁴⁴ Scott now took his plea to the federal district and, eventually, to the Supreme Court where a clerk mistakenly added a "d" to the defendant's name, immortalizing the case as *Scott v. Sandford*.⁴⁵

Dred Scott combined two key questions that had been on everyone's lips for the past four decades. First, did the Constitution consider slaves (or broader: blacks) merely as property in persons, or also as citizens that formed a constituent part of the United States people? And second, did Congress have the constitutional power to prohibit slavery in the territories? Sanford's attorneys rested their case on two separate grounds. On the level of standing, they denied that blacks could claim citizenship of the United States and, as a result, that Scott had no right to sue in a federal court. On the level of the merits of the case, they argued that the Constitution protected private property in slaves and that the Missouri Compromise under which Scott sued for freedom was therefore unconstitutional. Scott's lawyers relied on the "once free, always free" dictum and argued that Scott had become a free man after entering free territory and had a right to seek this freedom in the Court.

Considering the political delicacy of the questions before the Court, it is no wonder that most of the Justices' first inclination was to dodge the constitutional questions by denying the Supreme Court had jurisdiction. In a case three years earlier, *Strader v. Graham*, Taney had even provided a precedent for this step. That case concerned three Kentucky slaves who, like Dred Scott, had traveled to free soil but had

⁴⁴ *Scott v. Emerson* (1851) 15 Missouri Reports 576, at 586.

⁴⁵ For a detailed analysis of the facts see chapters 9 to 11 in Don Edward Fehrenbacher, *The Dred Scott Case, Its Significance in American Law and Politics* (New York: Oxford University Press, 1978). My short overview is based on Mark A Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge, New York: Cambridge University Press, 2006), 18–19.

escaped to Canada. When the Kentucky courts determined that the fugitives were still in fact property of their master, sympathizers appealed to the Supreme Court. In *Strader* Taney argued that every State had the right to determine the status of persons within its jurisdiction within the limits provided by the Constitution, which he did not further specify, and since: “there is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject (...) we have no jurisdiction over [it].”⁴⁶

At first, it seemed likely that the Supreme Court would follow the similar course in *Dred Scott*. In fact, the opinion written by Justice Samuel Nelson—which was initially intended to become the opinion of the Court—avoided the question of black citizenship and the constitutionality of the Missouri Compromise all together. Citing *Strader*, Nelson argued that States decided the status of those within their jurisdiction, and that the decision of the Missouri Supreme Court’s was therefore final. Now that Congress itself had proclaimed the unconstitutionality of the Missouri Compromise in the Kansas-Nebraska Act, there seemed no need for the Supreme Court to review the issue.⁴⁷ The Court, however, changed its mind and decided to meet the constitutional questions head on. In the private conference a group of five Justices including Chief Justice Taney, John McLean and Benjamin Curtis abandoned Nelson’s opinion. The reason for this change of heart remains hard to explain. McLean and Curtis were both avidly opposed to slavery and probably wanted to come out strong against it, as they did in their final opinions. Taney seems to have become more and more inclined over the years to speak his mind on the proper place of slaves, or blacks in general, in the United States. Whatever the reason, with this decision, the Justices abandoned the path of judicial restraint and forced the Court to speak out in *Dred Scott*. The final decision followed in March 1857, when with a vote of 7 to 2 (with McLean and Curtis in dissent) the Court determined that Scott was to remain a slave. The margin of the vote disguises how divided the Justices were, which becomes clear from the highly unusual fact that every Justice published a separate opinion.

In discussing the opinions of the Justices the concern here will not be with the historical correctness of their claims. Others have sufficiently pointed out where their claims missed the mark.⁴⁸ The concern here is how the view of the past, correct or not, serves to create an identity of the polity which, in turn, is used to justify the constitutionality of black citizenship and Congress’ power to prohibit slavery. For this purpose, two opinions in particular stand out to demonstrate the difference of opinions and opposing views on the identity of the polity within the Court, namely that of Taney for the majority, and that of Curtis in dissent. In this section the opinion of Taney will first be analyzed, after which Curtis’ criticism will be treated. Finally, the significance of

⁴⁶ *Strader v. Graham* (1851) 51 US 82, at 93-94.

⁴⁷ *Scott v. Sandford* (1857) 60 U.S. 393, at 464-466; Fehrenbacher, *The Dred Scott Case*, 390, 197.

⁴⁸ See for this Fehrenbacher’s discussion of the opinions in his: *The Dred Scott Case*.

the *Dred Scott* case for the debate on the identity of the polity will be discussed in the concluding section.

Chief Justice Taney wrote the majority opinion for the Court, a 54-page document in which he sought to answer the two questions raised by the Sanford's attorneys: could Dred Scott (or other blacks for that matter) be considered a citizen of the United States, and was the Missouri Compromise constitutional. Taney addressed the first question by means of a long historical reflection on the position of blacks within the political community since the founding to arrive at the conclusion that blacks were an inferior class of beings, unsuited for citizenship. While this could have settled the matter, Taney chose to address the pending question whether Scott's travels across the Missouri Compromise line left him a free man, and concluded like Douglas that this was an unconstitutional and un-American assertion.

The first question before the Court, Taney wrote, was: "can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community (...) a portion of this people, and [a] constituent member of this sovereignty." This, he admitted, was a "very serious question," which had never before been addressed by the Court, but Taney seemed determined to solve it: "it is our duty to meet it and decide it," he said. To answer that question, Taney set out on a historical inquiry. The Court was not concerned with present-day morals, Taney argued, since those decisions belonged to lawmakers. The duty of the Court, he insisted, was to interpret what the Constitution said: "with the best light we can obtain on the subject, and to administer as we find it, according to its true intent and meaning when it was adopted." As this statement reveals, Taney portrayed his role as simply handing down the original intent of the framers and admitted no formative role on his part in reconstructing the historical meaning of the Constitution.⁴⁹

Taney relied on a specific, handpicked reading of history to arrive at his conclusion. He reviewed the laws in several colonies to conclude that a "perpetual and impassable barrier" between blacks and whites was a "fixed opinion" at the time. This barrier he then used to claim that open concepts like "one people," "mankind," and "all men" in the Declaration, as well as "we the people of the United States" in the Constitution's preamble, did not include blacks but solely referred to whites and their descendants. He refuted the counter-argument that the framers might aspire to true equality with the claim that their greatness made them: "incapable of asserting principles inconsistent with those on which they were acting." In other words, the fact that the signers of the Declaration and Constitution held slaves or permitted others to do so ruled out that their words could have meant to include slaves.⁵⁰

In order to be able to maintain that the views of the framers still prevailed, Taney relied on a complete marginalization of the antislavery sentiments that had already been

⁴⁹ *Scott* 60 U.S. 403-405.

⁵⁰ *Scott*, 60 U.S. 408-409, 410-411

ventilated in the Convention and passed into legislation after ratification. Abolition of slavery in the North, Taney maintained, was due to its unfavorable climate, not any change of opinion towards keeping blacks in bondage. But he went even further and claimed that: “no one, we presume, supposes that any change in public opinion or feeling in relation to this unfortunate race (...) should induce the Court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed.” The views of the framers, in other words, was fixed and with his characteristic certainty Taney dismissed all other views as “inadmissible.”⁵¹

On the basis of this historical inquiry Taney concluded that slaves and their descendants, whether free or not, had never been considered part of “we the people.” Blacks had never been included as “citizens,” he concluded, as: “citizenship at the time was perfectly understood to be confined to the white race.” Dred Scott, in conclusion, was not a citizen of Missouri, and therefore not of the United States, and as such not entitled to sue in district or federal courts. The Supreme Court, in other words, had no jurisdiction and the Circuit Court had erroneously overturned the opinion of the Missouri Supreme Court that Scott was still, in all respects, a slave.⁵²

Taney was aware, of course, that a refusal to hear the case on the basis of Scott’s lack of standing in federal courts allowed him to disregard the merits of the case itself. Yet he seemed bent to put in his two cents on the constitutionality of the Missouri Compromise and therefore argued that it was his duty to examine the whole case as presented to him. Not surprisingly, Taney concluded that the Constitution did not give Congress the authority to prohibit slavery in the territories. The power to make “needful rules and regulations,” he argued, was limited to the territory that, at the time in 1787 belonged to the United States and had no influence on territory acquired afterwards. This provision was added, Taney claimed, to give the new government sufficient power to deal with the grant by the States under the Confederation. “It was a new political body, a new nation,” Taney said of the government created by the Constitution: “it had no right, as its successor, to any property (...) and was not liable for any of its obligations.” To him, the words “*the* territory of the United States” clearly meant a territory in existence and excluded future possessions. Since there was nothing in the Constitution expressly granting Congress power over individuals in the territories, Taney concluded, there was no constitutional foundation for the Compromise of 1820.⁵³

But Taney was not content with saying that Congress lacked the power, he claimed that such a power was in fact contrary to the identity of the polity. Echoing Douglas, Taney asserted that: “citizens of the United States who migrate to a territory (...) cannot be ruled as mere colonists.” The Union, Taney claimed, was a union of “sovereign and independent States (...) bound together as one people.” The peoples of these

⁵¹ *Scott*, 60 U.S. 426.

⁵² *Scott*, 60 U.S. 404, 407, 419-420.

⁵³ *Scott*, 60 U.S. 428, 432, 436, 441.

sovereign States conferred enumerated and restricted powers on the federal government, and: “a power (...) to obtain and hold colonies and dependent territories over which they might legislate without restriction would be inconsistent with its own existence in its present form.”⁵⁴ By insisting that Congressional power over the territories was like reducing them to colonies, Taney drew on the time-tested indignation that followed from equating the federal government with the tyranny of Great Britain. Since this was a gross violation of everything the framers had fought for, no true Americans could allow the territories to be degraded to the status of colonies by imposing on them whether slavery was allowed there or not. On the basis of this Taney concluded that slavery was outside the reach of the government of the United States. Taney’s Constitution was an openly proslavery document that protected slavery as a national institution both in the States and territories. The Missouri Compromise, as a result, was unconstitutional and neither Dred Scott, nor any other slave, had been made free simply by moving across the 36°30’ line.⁵⁵

Taney’s opinion, though not his views,⁵⁶ were concurred in by six of his colleagues and therefore represented the majority opinion of the Court. There was, however, strong disagreement among the nine Justices and the mosaic of opinions in *Dred Scott* demonstrates that it was increasingly difficult for the Justices to speak with one voice, even when they agreed. It marked the new style of leadership of Taney, who broke with Marshall’s discouragement of dissent as undermining the Court’s authority. Instead, Taney tolerated dissenting opinion even though this meant that the Court started to sound as divided as the members on the floor of Congress.⁵⁷ Unlike the Marshall Court, Taney’s Justices hardly spoke with one voice.

Open criticism of Taney’s reasoning came from Justice Benjamin Curtis in his dissenting opinion. According to Curtis, Taney overlooked the fact that many free colored persons were indeed citizens in several States before and after the ratification of the Constitution. These persons of color, Curtis argued: “were not only included in the body of “the people of the United States” by whom the Constitution was established but, in at least five States, they had the power to act (...) upon the question of its adaptation.” Thus Curtis claimed that the Constitution was not established for white people only, but also for blacks and their posterity and he concludes that Dred Scott could not be denied citizenship solely on the color of his skin. Like Taney, Curtis agreed that the merits of the case warranted review, but here again he arrived at the opposite position that slavery was a local creation and that the Constitution did indeed give Congress the power to regulate *all* aspects of territorial government, including slavery.⁵⁸

⁵⁴ *Scott*, 60 U.S. 448-449.

⁵⁵ *Scott*, 60 U.S. 451-452.

⁵⁶ See for this: Fehrenbacher, *The Dred Scott Case* chapter 14.

⁵⁷ William M. Wiecek, “Slavery and Abolition before the United States Supreme Court, 1820-1860,” *The Journal of American History* 65, no. 1 (1978): 52-53.

⁵⁸ *Scott*, 60 U.S. 576, 582, 588, 590, 621, 624.

In short, the difference of opinion between Taney and Curtis shows that, just like the members of Congress, both Justices arrived at two fundamentally opposed interpretations of who constituted “we the people” on the basis of two different narratives. In this sense, the *Dred Scott* case added little to the debate that had been raging in the first branch since 1820. What it did demonstrate, however, was the extent to which the Justices had become caught up in the polarized politics of the time. If the Court had a role to play in bringing the country closer to resolving its disputes about slavery—as both Taney and Curtis seemed to believe when they voted to tackle the constitutional questions in *Scott*—the diametrically opposed opinions among the Justices did not offer a clear way forward. Unlike the Marshall Court, which had often unanimously come out in favor of an integrative reading of the Constitution in earlier conflicts, the Taney Court’s open disagreement made clear it no longer spoke with one voice. Just like the politicians on Capitol Hill and the inhabitants of the country as a whole, the Court was deeply divided over the question of slavery and only demonstrated, in *Dred Scott*, its own inability to serve as the final arbiter on the Constitution.

In conclusion, Taney’s opinion in *Dred Scott* was a sweeping condemnation of all blacks as inferior beings who neither were nor could become members of the political community. Taney’s “we the people” was a lilywhite community in which there was no place for the free black man. But even if Taney views corresponded with how the vast majority of his countrymen, both North and South, viewed things, his decision in *Dred Scott* went a step further. Taney not only observed that this was the *proper* way blacks should be treated, but that it also was the only *American* way. Contrary to the prevailing opinion among moderates that slavery was a local institution, Taney identified slavery as a national institution, guaranteed and protected by the Constitution, and considered the absence of slavery in the North, not its presence in the South, as the exception to the rule.

The fact that Taney’s opinion spoke for the majority meant that the Supreme Court now openly favored a proslavery reading of the Constitution. The *Dred Scott* case came as a shock to northern abolitionists who, after Congress’ adoption of the Kansas-Nebraska Act and President Pierce’s unbending execution of the Fugitive Slave Acts, now also saw the third branch throw its weight behind slavery as a national institution. The fate of Dred Scott, a free man banished back into slavery, made many Northerners realize that despite their numerical majority, their views were not being heard in Washington. Taney’s opinion, far from settling the problematic question on the status of territorial slavery, probably only helped rally voters above the Mason-Dixon to a party committed to calling a stop to the spread of the peculiar institution and drove them into the hands of a tall Illinois lawyer by the name of Abraham Lincoln.

Requiem for a Patchwork Union: the Last Debate

On November 6, 1860, Abraham Lincoln was elected sixteenth President of the United States on the Republican Party ticket. Public outrage followed in the South in the days after the election results became clear. Within days of Lincoln's victory, the two Senators for South Carolina resigned their seats, and within a week, the Palmetto State passed a resolution calling for the election of a convention to discuss the possibility of secession. Within months, one State after the other slipped from the Union and joined the newly formed Confederate States of America. By then, the election of 1860 had brought the country to the brink of civil war and past it. It set in train a series of events that would end with the bombardment of a federal fort in Charleston harbor and all-out war. To understand how Lincoln's election could be ripe with such consequences, it is helpful to take a closer look at the events in the final years of the patchwork republic.

In the handful of years leading up to his election as President, Abraham Lincoln had skillfully built up a reputation in American politics. His background as a circuit-riding lawyer and one-term Congressman for his home-State of Illinois were not the best credentials for the Presidency, but Lincoln stood out by the way he dealt with the issue of slavery. What Lincoln thought exactly of slavery has remained a mystery to most historians, but on one issue he was crystal clear: it should not be allowed to spread into the territories. In 1858, Lincoln decided to challenge the architect of the Kansas-Nebraska Bill, Douglas, when his seat in the Senate was up for election. In the famous Lincoln-Douglas debates that ensued all over the Prairie State, both men had the most candid discussion about slavery the country had seen in years. Though Lincoln lost the election, his duel with veteran Senator Douglas brought him countrywide attention. Soon, Lincoln took to the stump for the newly-formed Republican Party—a coalition of former Whigs, disgruntled Democrats and Nativists. In 1860, Lincoln secured the presidential nomination for his party and in November of that year he was elected President.

Lincoln's election came as a shock to many in the South. Since Lincoln was elected without a single electoral vote south of the Mason-Dixon Line, Southerners now realized that a solid North could dominate federal politics. Many feared the consequences this could have for their "peculiar institution." The Republicans had always denied wanting to abolish slavery where it existed, but this hardly reassured Southerners. Had Lincoln not claimed in 1858, that: "A house divided against itself cannot stand (...) I believe this government cannot endure, permanently half *slave* and half *free*?" Did this not mean, as Douglas had pointed out in the debates, that if Lincoln did not want slavery to spread to the North, it would have to be stopped in the South?⁵⁹ For many Southerners, Lincoln and his "Black Republican" Party were simply abolitionists in disguise. Like John Brown—the radical abolitionists who had unsuccessfully tried to stir up a slave

⁵⁹ During the second debate in the town of Freeport, see: Roy Prentice Basler, ed., *The Collected Works of Abraham Lincoln* (New Brunswick, NJ: Rutgers, 1953), III, 67.

rebellion in Virginia, a year earlier—the Republicans wanted to “bring an inferior race in a condition of equality, socially and politically, with our own people” and unless they were stopped would turn the whole South into a “mongrel race.”⁶⁰ Rather than wait for what was coming, many States in the Deep South set the wheels in motion to secede from the Union. Congress suddenly found itself in the position of having to ward off a civil war. Thus, the final debate commenced.

By the time the members thirty-sixth Congress had convened in Washington for its final session, the legislatures of five Deep South States, had already taken the first steps towards secession. With their successors already appointed in the same election that produced Lincoln as President, it came down to this lame-duck Congress to find an answer to the mounting crisis. In the likely case that one or more of States would resign their ties with the United States before the year was out, the members of Congress were confronted with the immediate question of how to respond. As many realized, their options were basically limited to a peaceful concession or forceful response.⁶¹

Those who looked for guidance to the Commander-in-Chief were likely to be disappointed. At the end of his first and only term, President James Buchanan came across as more lame-duck than the Congress itself. With the end of this term only three months away, Buchanan exerted very little influence over his divided and defeated Democratic Party. Apart from that, Buchanan seemed uninclined to meet the crisis head-on, rather preferring to leave it in the hands of Congress until Lincoln was inaugurated to relieve him. Although he strongly condemned the idea of secession as “utterly repugnant of the principles upon which the General Government is constituted,” he also made clear that, unlike Jackson, he would not resort to force to suppress it. In short, Buchanan would watch the store, but left it up to Congress to find a way out of the crisis. “We are in the midst of a great revolution,” he wrote to Congress on January 8: “I commend the question to Congress, as the only human tribunal under Providence, possessing the power to meet the existing emergency.” Even Buchanan’s fellow-Democrat Jefferson Davis felt this message left Congress “drifting loosely, without chart or compass.”⁶²

Thus, Buchanan placed the fate of the Union squarely in the hands of the senators and representatives of the thirty-sixth Congress. Already, the two Senators from South Carolina, James Hammond and James Chestnut, had resigned their seats within days of Lincoln’s election and signs were abundant that the Palmetto State’s delegation to the

⁶⁰ The quote is from Senator Robert Toombs of Virginia, see: Blair et al., *Congressional Globe*, 36th Congress, 2nd session, 270.

⁶¹ As Louisiana Senator Judah Benjamin put it after South Carolina had seceded: “we representatives of those remaining States, stand here today, bound either to recognize that independence, or to overthrow it (...) that is the sole issue.” Ibid., 36th Congress, 2nd session, 212.

⁶² The condemnation of secession was taken from a speech by Jackson during the Nullification crisis, see: Ibid., Appendix to 36th Congress, 2nd session, 2. Ibid., 36th Congress, 2nd session, 295 (Buchanan message of January 8), 307 (Davis) 307. Potter, *Impending Crisis*, 521–522.

House would soon follow suit. In this frantic atmosphere, with the Union seemingly falling to pieces around them, the members of Congress started what would be the final debate on the patchwork union. In the House, where the Republicans dominated—though not controlled—the floor, a compromise seemed hard to orchestrate. The Senate, however, where the Democrats still outnumbered the opposition by some ten seats and which was the body where the major compromises had originated that many believed had saved the country from civil war before, seemed uniquely qualified to play a leading role. It was here, in the arena where Clay and Calhoun had sparred before, that the debate on the fate of the Union would take place.⁶³

For three long months, from the beginning of December to that of March, the members of Congress debated what to do. With the Union slowly falling to pieces around them and one delegate after the other bidding farewell to Capitol Hill, the remaining Congressmen frantically sought a solution that would restore calm to the country. It was a debate that would be characterized by many genuine attempts at reconciliation and compromise which would invariably be met by long and bitter speeches seeking to justify or condemn secession which, would in turn, give rise to pointless personal bickering. Within days of its opening session, the members of Congress found themselves completely pinned down on the question of the legitimacy of secession. Even though the first State still had to retreat from the Union, Congressmen from every faction were eager to make their thoughts known on the matter.

Though many senators—with the exception of those from the Deep South—agreed that secession was premature and uncalled for, opinions varied on its constitutionality. Opponents of secession such as Douglas denied that there was any basis for secession in the Constitution, since it was silent on the matter. Supporters such as Davis replied that in a truly federal republic, as the United States claimed to be, “all that is not granted in the Constitution belongs to the States.”⁶⁴ But, the opponents objected, the Constitution explicitly proclaimed federal legislation to be the “supreme law of the land” in Article VI, and thus could not be voided by any member of the Union. To this the advocates replied that, by seceding, the States denied to be part of the “land” and claimed to be a “foreign country” after secession and therefore the supreme law did not affect them any longer.⁶⁵

This quoting, back and forth, of constitutional articles in defense or against secession did little to settle the matter and less to reach a compromise. As one senator pointed out, “the Union cannot be saved by proving that secession is illegal or unconstitutional.”⁶⁶ If it could be saved at all, this would require a compromise able to

⁶³ As a result of the lack of a truly “national” press service this Congress was, as Potter puts it “the only agency that held national affairs in any kind of national focus” at the time, see: *Impending Crisis*, 517.

⁶⁴ Blair et al., *Congressional Globe*, Appendix to 36th Congress, 2nd session, 40 (Douglas). Ibid., 36th Congress, 2nd session, 308 (Davis).

⁶⁵ Blair et al., *Congressional Globe*, 36th Congress, 2nd session, 341 (Seward) and 487 (Davis).

⁶⁶ Ibid., 36th Congress, 2nd session, 341 The senator was Seward from New York.

ease the growing tensions. The one man who formed a constant, often lonely voice for moderation and compromise in the debate was Kentucky Senator Crittenden. Like no other senator, he tried to remedy the legislative deadlock and clung to a series of conciliatory resolutions, soon called the Crittenden Compromise, as a way to settle the dispute. The aim of this section is not to discuss why a compromise failed in Congress that winter, but by taking a closer look at the fate of the compromise measures, the significance of the identity of the polity in this final debate can be better brought to light.

The Crittenden Compromise comprised a series of constitutional amendments, the most prominent of which called for the reinstatement of the Missouri Compromise line in all present and future territories, with an explicit guarantee that “in all territory south of the said line of latitude, slavery of the African race is hereby recognizes as existing, and shall not be interfered with by Congress, but shall be protected as property.”⁶⁷ It is telling of the power of more than half a century of constitutive rhetoric that the most compromise-inclined senator’s conception of saving the Union from breaking in two was to divide it into two equal sections again.

To persuade his fellow-senators of the plan, Crittenden employed classic conciliatory rhetoric. First, he tried to persuade his audience of the seriousness of the situation. “We are in the presence of great events,” he said: “the life, the existence of our country, of our Union, is the mighty question [and] I hope, therefore, gentlemen will be disposed to bring the sincerest spirit of conciliation (...) to adjust all these differences.” This spirit of conciliation, it turned out, was mostly aimed at the North. After first rebuking the Republicans for hiding their party interest behind the “principles of humanity,” Crittenden then pointed out that this stubborn clinging to principle would only result in the South taking the territories with them out of the Union. Nothing was more American than compromise, Crittenden, argued. “I am here as the advocate of the Union, honestly, sincerely, and zealously,” he continued, “I appeal to you as my countrymen (...) as American statesmen, as Americans, having an interest throughout this whole great continent, are not these motives sufficient to induce you to make, if necessary, a compromise?” Like Clay and Webster before them, Crittenden implored the Republicans to yield party interest before that of the Union. “History is to record us,” Crittenden dramatically concluded: “is it to record that when the destruction of the Union was imminent, we stood quarreling about points of party politics (...) can it be that our name is to rest in history with this everlasting stigma and blot upon it?”⁶⁸

It was a powerful appeal, and for a while, it seemed Congress might rally behind Crittenden’s plan. The Senate referred Crittenden’s plan to a special committee of thirteen for deliberation which included the most important leaders of the various factions

⁶⁷ Ibid., 36th Congress, 2nd session, 114 The other amendments forbade Congress to meddle with the domestic slave trade and to abolish slavery on federal property within slave states, including Washington D.C. unless Virginia and Maryland had abolished it first. Finally, it also included a compensation for owners of fugitive slaves. .

⁶⁸ Ibid., 36th Congress, 2nd session, 113–114, 266.

on the floor: Seward for the Republicans, Davis for the secessionists, Crittenden for the Border States and Douglas for the northern Democrats. All seven Democrats on the Committee supported the Compromise and together with Crittenden, this made a majority. Without support from the Republicans, however, the proposal had little hope of persuading the rest of the Senate, let alone the House. The Republican members, however, all objected to the extension of the Missouri Compromise line, which flew in the face of their number one priority to stop slavery's extension into the territories. On December 28, a host of other alternatives were defeated and the Committee, after having been in session for only 6 days, had to signal its defeat. Chairman Powell reported to the full Senate three days later that: "the committee have not been able to agree upon any general plan of adjustment." A similar committee in the House reached the very same conclusion two weeks later. The compromise effort had failed.⁶⁹

The answer to the question why the compromise effort failed must be traced back to the underlying conflict over the true identity of the polity. Although many scholars agree that it was unclear from the start whether the Crittenden plan would suffice to stall secession—let alone reverse its course—very often the Republicans are blamed for the failure of compromise and subsequent collapse of the Union.⁷⁰ It is undeniable that the Republicans were resolutely opposed to compromise. Though Seward seems to have courted the Crittenden plan for a while, Lincoln was unprepared to yield. In letter from Springfield marked "private & confidential," Lincoln wrote to Seward that "on the territorial question, I am inflexible." "I am for no compromise," he added, since the result of Crittenden's plan would be "to put us again on the high-road to a slave empire."⁷¹ A compromise, in other words, never stood a chance within Republican ranks

The same determination could be found across the aisle with the supporters of secession. On December 13, nine days after Congress started deliberations on the crisis, a total of thirty southern Congressmen signed a manifesto saying: "the argument is exhausted. All hope of relief in the Union, through the agency of committees, Congressional legislation, or constitutional amendments, is extinguished." "We are satisfied the honor, safety, and independence of the southern people are to be found only in a southern Confederacy," the manifesto concluded: "and that the sole and primary aim of each slaveholding State ought to be its speedy and absolute separation from an

⁶⁹ William J. Cooper, *We Have the War upon Us: The Onset of the Civil War, November 1860-April 1861* (New York: Alfred A. Knopf, 2012), 106, 109, 155. Blair et al., *Congressional Globe*, 36th Congress, 2nd session, 211 (Powell), 378 (Corwin in the House).

⁷⁰ A good example is Potter, who argues that, despite the fact that we have no idea whether the Crittenden compromise would have cured secession fever, the Republican's "inauguration first, adjustment afterwards" attitude blocked any attempt to save the Union, see: Potter, *Impending Crisis*, 553, 550–551. For the contesting view that compromise with the Deep South was never possible from the beginning see: McPherson, *Battle Cry of Freedom*, 254–255.

⁷¹ Don Edward Fehrenbacher, ed., *Speeches and Writings, 1859-1865: Speeches, Letters, and Miscellaneous Writings, Presidential Messages and Proclamations*, The Library of America 46 (New York, NY: Viking Press, 1989), 197.

unnatural and hostile Union.”⁷² In strong language, these Congressmen made clear that compromise was never a viable option for them either and that the South—once again portrayed as forming a separate people—had no business in the Union any longer.

These two examples, as well as countless remarks on the floor of Congress, made clear that a satisfactory compromise between the supporters and opponents of secession was probably never likely.⁷³ The support for compromise seemed to chiefly rest with members from the Border States, who found themselves squeezed between the supporters and advocates of secession.⁷⁴ Far more interesting than the question *if* a compromise could be reached and whose fault it was that it failed, is the question *why* both sides were so determined not to yield. This leads us to the underlying conceptions of the identity of the polity that fueled the conflict. A closer inspection of the debate in the Senate demonstrates that signs were abundant that neither side was willing to settle for anything less than its own view of the true nature of the Union. Ultimately, the conflict between advocates and opponents of secession boiled down to a dispute over the nature of the Union between the States, which it turned out the Congressmen could no longer bridge.

From the perspective of the identity of the polity, the debate on the constitutionality of secession formed the culmination of the conflict over the true nature of the Union that had begun even before the ratification of the Constitution. It was one long procession of the best speakers in Congress lamenting the degeneration of what they regarded as the true spirit of the Union. It truly was, for both sides, a requiem for the Union. Not for the same Union, however, but rather two separate ideas of what it was.

That Union, as far as most southern members of Congress understood it, was and always had been a compact between the States as sovereign political communities. “The individuals who live between the two oceans, and between the Gulf and the lakes, do not compose a single political community,” Senator Louis Wigfall of Texas argued: “but (...) are States, separate, distinct, political communities, that have ratified a compact which is binding between them.” In the eyes of the supporters of secession, the claim by many northern members that these sovereign States could not unilaterally resign from the

⁷² The manifesto can be found in: Edward McPherson, ed., *The Political History of the United States of America, during the Great Rebellion*, 2nd ed. (Washington, D.C: Philp & Solomons, 1865), 37 It was signed by members from Alabama, Georgia, Florida, Arkansas, Mississippi, North Carolina, Louisiana, and Texas.

⁷³ The feeling that compromise was unattainable was shared across the board and its adherents far outnumbered those who believed the Union could still be saved by Congress. New Hampshire Senator Hale, for example, wondered if “this Congress can do anything, this controversy will not be settled here.” In similar vein, Representative Montgomery from Pennsylvania thought that “there is not the slightest probability that a constitutional majority can be obtained for any proposition which will restore the harmony and peace to our distracted country.” Not surprisingly, members from the Deep South shared this opinion. “All hope for that [a change of mind] is gone,” Senator Benjamin of Louisiana claimed: “the day for adjustment has passed.” See: Blair et al., *Congressional Globe*, 36th Congress, 2nd session, 116 (Hale), 531 (Montgomery), 217 (Benjamin).

⁷⁴ Apart from Crittenden and his colleague from Kentucky, Lazarus Powell, one of the few senators to express confidence in a settlement was Andrew Johnson from Tennessee, see: Ibid., 36th Congress, 2nd session, 143 (Johnson), 158 (Powell).

Union was a blatant display of ignorance. So was the idea that the Union was preceded the by States—according to Georgia Senator Robert Toombs: “[The] thirteen colonies originally had no bond of union whatever; no more than Jamaica and Australia have today. They were wholly separate communities, independent of each other.”⁷⁵

In this view of the Union, the people was not a single entity, but referred simply to the several peoples of the States. The Constitution, Jefferson Davis maintained: “was not adopted by the mass of the people, as we all know, historically; it was adopted by each State, each States voluntarily ratifying it, entered the Union” and the contrary was too absurd even to phantom. In similar vein, James Mason argued that “when the people are spoken of in the Constitution, it means the people of each State *separatim*, as a separate independent political community, each State being sovereign.” According to him, “the Constitution never contemplated that the people of the United States, as a mass, a homogenous mass, should be the parties to the Federal Government” and that as a result of this, it would turn into a “consolidated Government.”⁷⁶ The fact that the supporters of secession felt the need to repudiate the idea of “we the United States people” again shows how embedded it had become since the Constitution had been adopted. By denying the existence of “we the people” as a single entity, it seems that Davis and Mason, like Patrick Henry before them, were only lending credibility to the idea.

Having, in their eyes, established the true spirit of the Constitution and with that the true nature of the Union as a compact of States, rather than one people, the supporters of secession did not attribute the present crisis to any flaw in the fabric of the Constitution, but rather to its perversion by their opponents. Jefferson Davis, the influential senator from Mississippi and soon-to-be President of the Confederate States of America, was the most outspoken advocate of this idea. According to Davis, the Constitution created “the best government which has ever been instituted by man” and in order to end the present unrest: “it only requires that it should be carried out in the spirit in which it was made” The sole cause of the crisis, he argued, was “a perversion of the Constitution” by substituting its eternal principles of government with moral indignation about slavery.⁷⁷ In this light, the denial of the opponents of secession to recognize the true nature of the Union was no longer a sign of ignorance, but a willful squandering of the true revolutionary heritage. In counseling the use of force against seceding States, Davis argued, these Congressmen proved themselves unworthy of the legacy of the framers of the Constitution. The founders, Davis argued, “did not look to its preservation [of the Union] by force; but the chain they wove to bind these States together was one of love and mutual good office” “Their sons,” he continued, referring to the opposition “will be

⁷⁵ Ibid., 36th Congress, 2nd session, 12 (Wigfall), 269 (Toombs).

⁷⁶ Ibid., 36th Congress, 2nd session, 307 (Davis), 405 (Mason).

⁷⁷ Ibid., 36th Congress, 2nd session, 29, 310.

degenerate indeed if, clinging to the mere name and forms of government, they forge and rivet upon their posterity the fetters which their ancestors broke.”⁷⁸

Having established the “true” identity of the United States as a voluntary compact between the States, Davis now implored his fellow-senators to act in accordance with it. “Will you fold your arms,” he asked his colleagues “the degenerate descendants of those men who proclaimed the eternal principle that government rests on the consent of the governed; and that every people have a right to change, modify, or abolish a government when it ceases to answer the ends for which it was established, and permit this government imperceptibly to slide from the moorings where it was originally anchored, and become a military despotism?” Such a perversion of the original compact between the States could not be allowed to happen unopposed, Davis argued indignantly, for it would turn the Union into a consolidated government. “That was not the government instituted by our fathers (...) not the Union to which we were invited,” Davis concluded: “and against it, so long as I live, with heart and hand, I will rebel.”⁷⁹

Rather than urging conciliation and compromise, Davis’ message to his fellow-senators was to take a principled stand for what he argued was the original understanding of the Union and against the “perversion” that the “degenerate” Republicans tried to make of it.⁸⁰ True American statesmen, in his view, would try everything, including secession, to save the Union from consolidation. In fact, as Davis pointed out more than once, seceding States like his native Mississippi were only acting in the footsteps of the framers when they broke with Britain in 1776. “We but tread on the path of our fathers when we proclaim our independence,” Davis said: “If I must have revolution, let it be a revolution such as our fathers made when they were denied their natural rights.”⁸¹

Davis’ call to live up to his concept of the true identity of America was not received unopposed across the aisle. The most outspoken opponent of secession in the Republican wing of Congress was New York Senator and soon to be Secretary of State William H. Seward. Against Davis’ view of the Union as a compact between the States, Seward mounted the familiar adagio that the Union was in fact an act of the people of the United States. Consequently, if it could be dissolved—and Seward refused to believe it

⁷⁸ Ibid., 36th Congress, 2nd session, 29.

⁷⁹ Ibid., 36th Congress, 2nd session, 29, 306.

⁸⁰ Davis was not alone in his belief that the present generation of Congressmen had degenerated from the founders’ true vision of the polity. Louisiana Senator Benjamin in similar vein wondered: “since when has the necessity arisen of recalling to American legislators the lessons of freedom taught in lisping childhood by loving mothers; that pervade the atmosphere we have breathed from infancy; that so form part of our very being, that in their absence we would lose the consciousness of our own identity?” In the House, Louisiana Representative Taylor recalled to his colleagues that the framers “believed in the right of every distinct people to govern themselves” and wondered whether the American people had forgotten this, see: Ibid., 36th Congress, 2nd session 722 (Benjamin), 754 (Taylor).

⁸¹ Ibid., 36th Congress, 2nd session, 487, 309 See also: Louisiana Senator Benjamin who argued: from the time that this people declared its independence from Great Britain, the right of the people to self-government in its fullest and broadest extent has been a cardinal principle of American liberty,” see Ibid., 212].

could—it was not by secession, but “only by the voluntary consent of the people of the United States, collected in the manner prescribed by the Constitution of the United States.” To what constitutional procedure Seward referred was left unclear by him, but it certainly ruled out the kind of unilateral actions that South Carolina and other States in the Deep South entertained. It was clear that for Seward the Union, if not indivisible, had forged the States into one single people with one identity and fate. “We have, practically, only one language, one religion, one system of Government, and manners and customs common to all,” Seward asked his colleagues, “why, then, shall we not remain, henceforth, as hitherto, one people?”⁸²

Like his colleague from Mississippi, Seward went out of his way to demonstrate that his position not only was supported by the letter, but also in line with the true spirit of the Constitution. He claimed that the framers regarded the Union not merely of “American interest,” but intended for the United States to play a unique, leading role for the rest of the world by demonstrating “whether societies of men are really capable of establishing good government upon reflection and choice.” In this light, secession was not only unconstitutional, but a “calamity to mankind.”⁸³

For Seward, again like Davis, the present crisis demonstrated how far the United States had strayed from what he believed to be its true identity. “Has the Constitution lost its spirit, and all at once collapsed into a lifeless letter?” he asked rhetorically, answering that “No (...) the Constitution is even the chosen model for the organization of the newly rising confederacies.” The cause of the crisis was that one side in the debate had forgotten that the framers believed the “common *prestige* of the Union,” could only be enjoyed together. “Perhaps it [this prestige] is to be arrested because its sublimity is incapable of continuance,” Seward mused, “let it be so, if we have indeed become degenerate” from founders such as Washington, Adams, and Jefferson. It was not, however, the fate that the framers had envisaged for the United States, and it was a perversion of what it truly meant to be American. “Have the American people, then, become all of a sudden unnatural, as well as unpatriotic?” Seward asked: “and will they disinherit their children of the precious estate held only in trust from them, and deprive the world of the best hopes it has enjoyed since the human race began its low and painful, yet needful and wisely-appointed progress?”⁸⁴ The answer, again, was of course no and Seward’s speech rivaled that of Davis in urging the Senate to act in accordance with what he and his Republican colleagues advocated as the true spirit of the Constitution.

As the speeches by Davis and Seward demonstrate, the conflict over the constitutionality of secession by now had turned into a contest between whose understanding of the origins of the Union (and with that its “true” nature) was most persuasive. Davis’ and Seward’s insistence that their views were in line with those of the

⁸² Ibid., 36th Congress, 2nd session, 341.

⁸³ Ibid.

⁸⁴ Ibid., 36th Congress, 2nd session, 342–343.

framers betrays a willingness to cast the other as acting contrary to the real identity of the polity. What's more, their obsession with viewing their opponents as "degenerate"—i.e. not living up to the original creed of the framers—has several interesting implications for this study. First, it means that both men claimed the Constitution itself was perfect and beyond dispute. As we have seen, Seward and Davis both insisted the problem was not the Constitution, but the mistaken construction of it by the other side. As a result, little was expected of the many amendments that were offered since the real problem lay elsewhere. Since the present Constitution was perfect, Senator James Green of Missouri pointed out, "a thousand amendments will not make it more effective."⁸⁵

A second implication of the professed belief that the United States had degenerated was its tendency to view history as the only true source of political insight and disregard attempts to breach the gap to the opponents. If only the revolutionary generation understood the true purpose and nature of the Union, then only a return to that original thought could save the Union and all those who refused to conform to it were indeed degenerate and beyond redemption. In such a case, it no longer seemed worthwhile to pursue conciliation, since a watering-down of the original idea would never suffice to resurrect the true Union. The only feasible scenario—apart from conceding one's loss—was to suppress the other side or resign.

The latter was precisely what happened. Starting with South Carolina on December 20, State after State in the Deep South resigned from the Union. Whereas the South Carolinians left only a factual statement that the people of their State "have resumed the sovereign power heretofore delegated by them to the Federal Government," many of the senior members of Congress felt obliged to address their former colleagues in an official farewell speech. Some, like Senator Benjamin from Louisiana, used the opportunity to justify secession one last time. Against the charge that Louisiana's resignation amounted to treason, Benjamin replied that: "the people of the South imitate and glory in just such treason (...) as leaped in living flame from the impassioned lips of Henry; just such treason as encircles with a sacred halo the undying name of Washington!" Drawing an analogy between the southern States and the colonies in 1776, he told his colleagues that: "history gives you the lesson. Profit by its teachings."⁸⁶

Others, like Davis, remained principled to the bitter end and portrayed their resignation as the consequence of the alienation of Congress with the "true" conception of the Union as a collection of sovereign States. "There was a time none denied it," Davis argued, referring to the original Union, and "I hope the time may come again, when a better comprehension of the theory of our Government, and the inalienable rights of the people of the States, will prevent anyone from denying that each State is a sovereign, and thus may reclaim the grants which it has made to any agent whomsoever." Until that time

⁸⁵ Ibid., 36th Congress, 2nd session, 379.

⁸⁶ Ibid., 36th Congress, 2nd session, 722.

arrived however, Davis concluded: “it only remains for me to bid you a final adieu.”⁸⁷ With that, Davis’ proud career in national politics was over. Within four weeks, he would find himself standing on the steps of the Alabama State Capitol in Montgomery, being sworn in as the first President of the Confederate States of America.

Thus, with more and more seats emptying around them, the remaining members of Congress kept addressing an ever smaller audience about how to meet a crisis that was clearly overtaking them. With the deadline of March 4—when the thirty-seventh Congress would be installed to relieve them—fast approaching, the members suddenly found the urge to act. The “compromise” measure around which this last-minute conciliatory spirit centered was a constitutional amendment that stated: “No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.” It was a symbolic gesture, though not without implications. The Republicans had always denied wanting to affect slavery where it existed and this amendment gave official notice to that promise. As a result, Lincoln gave it his approval and a sufficient number of Republican Congressmen could be found to pass it through both houses of Congress with the required two-thirds majority. The amendment settled little in terms of the territorial question, however, and came too late to make an impression on the secessionists.

What this, the original “thirteenth amendment,” did settle, however, was that the crisis of 1861 was not squarely about slavery. Without denying slavery’s huge role in bringing the two sections of the Union in collision, the language of the amendment suggests that Congress believed the United States could remain half slave, half free. It was not, in other words, the presence of slavery that was at stake in the debate, but its future within the Union. The difference of opinion that winter, like so many seasons before it, was whether the United States could remain a patchwork of both one and several (slaveholding and non-slaveholding) peoples. Slavery was, metaphorically, the tear at the seams of the patchwork; the driving wedge between the two visions of the identity of the polity. Like many of his contemporaries, Jefferson Davis recognized this explosive potential of the slavery in the Union. Drawing on Dickinson’s old solar system metaphor, he concluded the different opinions about slavery in North and South “disturbed these planets in their orbit; [and] threatens to destroy the constellation.”⁸⁸ With the former harmony in the Union thus disturbed, Davis and his secessionist colleagues decided to create a new constellation of their own.

⁸⁷ Ibid., 36th Congress, 2nd session, 487.

⁸⁸ Ibid., 36th Congress, 2nd session, 310.

Conclusion

The title of the last section in this chapter, *Requiem for a Union*, is fitting in more than one way. It describes the lament of both sides in the debate of the perversion of the “true” understanding of the Union caused by the “degenerate” sons of the framers. The same can also be said of the supporters of compromise, however. In the face of the unwillingness of their colleagues to consider compromise, many in the center lamented how the Congressmen of old had set aside their principles and party allegiance to save the Union from destruction. Veteran Representative William Cobb of Alabama, for example, called to mind some of the “brightest names in our country’s history—a Clay, a Webster, a Calhoun,” with whom he served and concluded: “if we had them with us today, probably we might save this great and once happy country, by a settlement of these present difficulties.” In similar vein, William Montgomery of Pennsylvania grieved that that unlike their predecessors: “in devoting to our party we seem to forget that we have a country.”⁸⁹ This too was a requiem—not for one conception of the “original” Union, but of the supposedly compromise-minded spirit that had sustained it in the past.

Interestingly, scholarly criticism on the failure of the compromise measures in the secessionist winter also often starts from the juxtaposition of the supposedly superior statesmanship of the generation of 1787 and of the Golden Age in the U.S. Senate with the feeble efforts of the thirty-sixth Congress. Men like Madison, Hamilton, Clay, and Webster were able to keep the Union together, the argument runs, by setting aside their interest in favor of political union.⁹⁰ However, far from sacrificing their interest, we have seen that Madison and Hamilton were out-voted and out-schemed in 1787 and only reluctantly came around to the union. Far from the being the architects of visionary compromises, Clay, Douglas, and Webster at best succeed in kicking the can further down the road

What had changed by the winter of 1860-1861 was not the attitude of Congressmen—the clinging to what they understood to be their constituents’ interest was what had brought about the endless crisis on slavery starting in 1819—but the fact that there was no longer any direction for Congress to kick the can of slavery down. It must be noted, however, that the secessionists flew in the face of the patchwork commitment for enduring debate by unilaterally resigning from the discussion. Even Calhoun, at the height of the Nullification crisis 29 years earlier, had retained his seat in the Senate and had died there, defending what he believed to be the true legacy of ’87. It is hard to conceive how Congress could have managed to defuse the secession crisis and postpone

⁸⁹ Ibid., 36th Congress, 2nd session, 645 (Cobb), 531 (Montgomery) .

⁹⁰ See for this Cooper, who blames the Republicans for bringing an end to the “great American political tradition” of reaching compromises and states that they thus squandered the legacy of the Philadelphia Convention: Cooper, *We Have the War upon Us*, 209.

the issue of territorial slavery, let alone create a meaningful compromise, with one group refusing to debate in the first place.

The concern in this study is not with laying the blame of a failed compromise that might have never been, but with explaining the secessionist crisis from the point of view of the identity of the polity. In this light, it is clear that the winter of 1860-1861 was the culmination of a long debate on the true identity of the patchwork union that started even before the ink of the first copy of the Constitution had dried. How the United States could at the same time be one nation and thirteen and whether it was to be more one nation or thirteen separate ones had been contested from the start. It had been at stake in the ratification debates and a host of different controversies, ranging from banks, tariffs, and the territories. With every debate, this question—i.e. who Americans truly were—was raised again and another piece of the answer was provided. Often, this answer satisfied only a few, usually, it only begged the original question—i.e. no answer was provided, only the promise of one in the future. This future was 1860, when one group of participants in the debate—the secessionists—no longer believed they could influence the outcome of the debate and with that the question what the identity of the United States should be. Convinced that the Union was no longer a patchwork, but turned into a vehicle for “Black Republican” despotism, they turned their back on it.

Conclusion

This conclusion aims to do three things. First, it will complete the story of the last chapter in an epilogue that deals with what happened up to 1865, the year that marked the end of the patchwork republic. Second, it will discuss the implications of the seven chapters for our view of United States constitutional history. Finally, the conclusion will conclude with a “lessons learned” section that discusses the implications of this study for the idea of a United States of Europe.

Epilogue: End of the Patchwork Republic

The 36th Congress was the last to debate the patchwork union. The members that remained after the farewells from the Deep South officially resigned on March 4—inauguration day—and, in many cases, resumed their seats as the 37th Congress for a special session on July 4. By then, the United States was already at war with itself. On April 12, South Carolina troops opened fire on the federal fort Sumter in Charleston harbor and reduced it to ruins after 34 hours of shelling. In reaction, President Lincoln issued a call to arms and within months thousands volunteered to recapture Sumter from the “rebels.” By then, the Confederates already had some 60,000 men under arms, eager to defend their homes from “Yankee aggression.” Within weeks of Congress’ closing session, the entire country was on the highroad to war. Decades of debating within the walls of Congress had proved insufficient to turn the tide and suddenly the entire Union, North and South, was eager to submit words to warfare.

Few historical events can rival the Civil War when it comes to their significance for the history of the United States. This war, which would claim an estimated 600,000 casualties after four years of bitter fighting, is still the most destructive conflict in U.S. history in terms of human life. The blow was the hardest for the South, which not only suffered a much higher losses to its population—Confederate soldiers died at a rate three times that of their Yankee adversaries—but whose infrastructure, cities, and slave economy were also completely devastated by the end of the war. The photos of the endless number of wounded, maimed, and slain, however, made a profound impression

on both sides. The four years of unprecedented slaughter would transform the patchwork republic into a shared republic of suffering.¹

The Civil War, however, was significant for more than just the sheer amount of death and destruction it unleashed. On top of being the deadliest conflict—and, in part, as a result of it—the American Civil War must also be credited with redefining America. The States that reunited after Lee’s surrender at Appomattox Courthouse in April 1865 did not form the same country as when hostilities had started four years earlier. In fact, as this study has demonstrated, it is highly questionable whether the United States prior to 1865 was even one country, let alone one people, to begin with. The ordinances in which the southern States justified secession illustrate the contestedness of a shared peoplehood on the eve of the Civil War. South Carolina, the first to secede, claimed to do so as a sovereign State and by authority of “the people of the State of South Carolina.”² A constant recurring idea in the ordinances in which the States justified secession was that the Constitution was compact between the States, rather than an act of the people of the United States. Rather than identifying with “we the people of the United States,” the secessionists distinguished themselves from “the people of the North,” who had forgotten that the Union was “established exclusively by the white race.” The “people of the South,” in other words, would be a white, slaveholding people, in which the “inferior and dependent (...) African race” had no place but as slaves.³

Following the pattern established in 1776, the seceding States immediately assembled a Convention at Montgomery, Alabama, to draft a new constitution to consolidate their claim to peoplehood. At every step, the secessionists insisted only to follow in the footsteps of their revolutionary forefathers. In revolting against a government dominated by a party whose views were “hostile to slavery [and] to the South,” the secessionists pointed out they were only following the example that the framers had set in 1776.⁴ It was not against the legacy of framers, in other words, that the Southerners rebelled, but against the abomination that the degenerate North made of it.⁵ The new constitution that the seceding States framed in Montgomery is a good example of this. The Constitution of the Confederate States of America was almost identical to that of 1787, but the editing was telling of the southern idea of the true identity of America. The new preamble established the new union in the name of “we, the people of

¹ Drew Gilpin Faust, *This Republic of Suffering: Death and the American Civil War* (New York: Alfred A. Knopf, 2008), xi, xv.

² McPherson, *The Political History of the United States of America, during the Great Rebellion*, 15.

³ See for an example of compact theory the Mississippi’s Ordinance and that of Texas for the quote on the African race as inferior and dependent.

⁴ Quote from South Carolina’s ordinance: McPherson, *The Political History of the United States of America, during the Great Rebellion*, 16.

⁵ An example of this can be found in Mississippi’s ordinance: “For far less cause than this [loss of slave property], our fathers separated from the Crown of England. Our decision is made. We follow their footsteps.” Also see: Emory M. Thomas, *The Confederacy as a Revolutionary Experience* (Englewood Cliffs, NJ: Prentice-Hall, 1970).

the Confederate States, *each State acting in its sovereign and independent character.*” In similar vein, it would establish a “permanent *federal* government,” rather than a perfect union. It was clear that this would no longer be a patchwork republic, but a union of several people organized in separate, sovereign States.

While this drew on the “federal” patch of the Constitution, the other side of patchwork—that of the United States as forming one, indivisible people—clearly prevailed in the reactions to secession in the North. Many in the North regarded secession as anarchy and the attack on fort Sumter as an open act of rebellion. But while many felt that Sumter could not be left unanswered, not everyone agreed that it required coercing the secessionist States back in the Union by force. Why could the republic not split into a free northern and slaveholding southern nation that lived side by side in peace? The reason was that decades of constitutive rhetoric had shaped the northern understanding of the patchwork republic as forming one indivisible people. As Lincoln put it in his message to Congress of July 4, “our people have already settled the successful establishing, and the successful administering of it [the government],” and it now had to be maintained against “a formidable internal attempt to overthrow it.”⁶ On this basis Lincoln arrived at conclusion that secession destroyed the entire republic, rather than merely splitting it in two. For Lincoln, this question surpassed the United States: “it presents to the whole family of man, the question, whether a constitutional republic, or a democracy—a government of the people, by the same people—can or cannot, maintain its territorial integrity, against its own domestic force.”⁷ If the United States constituted one people with one single identity, as Lincoln claimed, then secession threatened to undermine the very foundation of the Union. This view was shared by many in the North, especially among those who would soon shed their blood on the battlefield.⁸

The reactions to and justifications of southern secession formed the culmination of the positions taken up in the decades of debates that preceded it. While the declarations of secession rested on the view of the United States as several peoples, the reactions of Lincoln and many of his bystanders relied on the myth that the Constitution had been an act of the people and transformed the polity into one indivisible whole. Thus, the secession crisis forced an unequivocal answer to the question which had been built into the patchwork republic back in 1787: namely, whether the United States formed one or several peoples. In the end, this issue would not be decided by words, but by force. The most immediate consequence of the Civil War was to settle—once and for all, as it turned out—the question whether the United States formed one indivisible people.

In the end, then, the constitutionality of secession was decided with force. The same was true for the question of the true identity of the polity. The military victory of

⁶ Fehrenbacher, *Speeches and Writings, 1859-1865*, 260.

⁷ *Ibid.*, 250.

⁸ James M. McPherson, *What They Fought For, 1861-1865* (Baton Rouge: Louisiana State University Press, 1994), 30–32.

Union forces was paired with the intellectual triumph of the idea that the inhabitants of the indivisible United States formed one single American people. In this sense, the war constituted a redefinition of the identity of the polity by stating that the United States formed one people first, and several later. Never again would a State exercise the supposed right as sovereign people to secede from the Union. The bombs that silenced the rebel yell also provided the final answer to debate on the true identity of the polity. The defeat of the South also meant the end to the patchwork republic. From now on, the United States would self-identify as one nation, forming one united, indivisible people.

Apart from bringing an end to the patchwork republic, the war also demonstrated the transforming power of the view of the United States as one people, with one identity, when applied to the issue of slavery. Historians nowadays more or less agree that the Civil War started as a dispute over secession and only gradually tilted more and more towards a dispute over the place of slavery within the Union. As the hopes for a swift 90-days conflict was gradually replaced by the trench warfare at Vicksburg and Fredericksburg, the aim of the war slowly shifted from suppression of a rebellion to liberation of an enslaved people. The change is clear from Lincoln's speeches during the war. In his Inaugural Address of 1861, Lincoln still maintained that:

“I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so.”⁹

Less than three years after speaking these words, Lincoln found himself signing the famous Emancipation Proclamation that freed all slaves in Confederate-held territory. The intervening years of conflict and bloodshed had made him realize that the United States could not carry on as it had before the war. In his view the institution of slavery—which had so often been at the root of the conflict over the true identity of the patchwork union—no longer had a place in the postbellum United States. On November 19, 1863, several weeks before he signed the Proclamation, Lincoln gave an eloquent statement of his change of heart while commemorating those fallen at Gettysburg:

“we here highly resolve that these dead shall not have died in vain—that this *nation*, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.”¹⁰

⁹ Fehrenbacher, *Speeches and Writings, 1859-1865*, 215. As David Zarefsky has pointed out, Lincoln regarded his victory in 1860 as a mandate for tolerating slavery where it existed and stopping its spread. This statement, as Zarefsky points out, is entirely in line with that conviction, see: David Zarefsky, “Philosophy and Rhetoric in Lincoln’s First Inaugural Address,” *Philosophy and Rhetoric* 45, no. 2 (2012): 174–175.

¹⁰ Fehrenbacher, *Speeches and Writings, 1859-1865*, 536.

As the words *new birth of freedom* implied, Lincoln envisaged a rebaptism of the old eighteenth century Constitution that would rid the new nation from the original sin of slavery.¹¹ More importantly, it announced the redefinition of identity of the polity as slave-free. To be American meant to be free, not enslaved. And if the United States truly formed one, indivisible people with one shared identity, this meant that there could be no slavery anywhere in the United States—North, South, and even West of the Mason-Dixon line. The Thirteenth Amendment to the Constitution that was eventually ratified in 1865 in place of Crittenden’s slavery-saving compromise formed the endpoint of this journey. It was the first to mention the word slavery in the Constitution but only to outlaw its existence anywhere in the United States or its territories.

The end of the Civil War and the adoption of the Thirteenth Amendment form a fitting end to this story of the patchwork republic. By 1865, a century of debate on whether “we the people of the United States” existed had ended and another on who would be part of this people was about to begin. In hindsight, 1865 formed a turning point. Never again would the view of the United States as forming one single people be seriously challenged and never again would there be any doubt that this view of the polity trumped that of a union of several peoples. Still, 1865 was hardly the end to the enduring debate on the identity of the polity. In fact, it was the start of a new chapter in which the question *who* belonged to “we the people” would be raised and that would take at least another hundred years to answer and is still contested today. Four years of bloody fighting may have transformed the United States in ways unimaginable in the preceding decades of debate, but the debate on who the American people are endures to this day.

Conclusion

What can the century of constitutional debates studied in this book tell us about how we should understand the process of constitutionalization in the United States? This section aims to bring together the conclusions of the seven chapters and discuss their implications for the way present scholarship explains and understands the role of “we the people” in antebellum America. This study set out to answer the question how a rhetorical approach to the United States constitutional debates from 1765 to 1865 can account for the paradox of “we the people” as both the author and product of the Constitution. The answer to that question lies in viewing constitutionalization as a rhetorical process and calls for a new understanding of the role of “we the people” in this process. Rather than a “fiction” or the result of a “constitutional moment,” the concept of “we the people” must be seen as the result of a series of rhetorical moves in an ongoing struggle to formulate an identity for the United States polity. Throughout the period studied in this book, “we the people of

¹¹ See for this: Garry Wills, *Lincoln at Gettysburg: The Words That Remade America* (New York: Simon & Schuster, 1992), 37–38.

the United States” was the expression of a wish, rather than a reality. The central claim of this study is that “we the people” remained a contested concept in the first century of constitutional debate and that the constitutional discourse in this period must be seen as the creation of, and the subsequent struggle to come to terms with, a patchwork republic based on the assumption that the United States formed both one and several peoples at the same time.

In hindsight, the century of debate on “we the people” consists of two phases, constitutive and applicative, that are linked by the ratification debates in which “we the people” is embraced as the foundation of the polity. At every step in these hundred years of debate, however, “we the people” was contested. During the constitutive phase, orators struggled to “we the people” as the foundation of the polity and in the applicative phase that followed, the notion of forming one people was constantly challenged. Each chapter in this study explores a different stage in this process and explains how the rhetoric employed shaped the debate.

The first three chapters cover the constitutive phase, in which the orators tried to provide the new United States polity with an identity. The debates in this phase illustrate that “the people” was far from the self-evident foundation for the polity, but remained highly contested. The reluctant American Revolution discussed in Chapter 1 is a case in point. The representatives of the thirteen American colonies never set out to write an “American” Constitution, but rather appealed to rights they claimed to enjoy under the British Constitution. The vast majority did not consider themselves Americans, but Britons. The rhetoric in this phase was dominated by conciliation that only at the very end changed places with separation. Attempts by congressmen like Patrick Henry and others to define the United States as one American people remained contested and unsuccessful and the official proclamations of the Continental Congress to the outside world gave no trace of the debates that took place within its walls.

By 1776, the rhetoric of conciliation lost ground to calls for separation. More and more, the colonists identified themselves as separate, and sometimes even better, than the British. This process of self-identification eventually culminated in the Declaration of Independence. The Declaration justified the separation from Britain and creation of a new polity, the United States, and rather expressed what the colonists did *not* want to be—i.e. Britons—rather than what they *did* want to be. On the one hand it spoke of “one people [who] dissolve the political bands which have connected them with another.” The Declaration was the first instance that an official declaration spoke of America as forming a distinct people. It announced a dissociation between the “we” who claimed self-evident truths, and the “them” that violated them. On the other hand, the Declaration also spoke of “the *united* States of America” and the necessity to attain independence as “free and independent States.” Along these lines, the polity was seen as a collection of separate States and the people as the sum of the parts. This paradoxical idea that the United States formed both one people as well as thirteen separate peoples illustrates how contested the

idea of the people still was and set the stage for future debates on the identity of the polity. It would be at the root of the many decades of debates to come.

The American Revolution created a “we,” but failed to make clear what its identity was. Many orators attempted to supply a foundation for the polity in the debate on the creation and ratification of the Articles of Confederation discussed in Chapter 2. Constitutive rhetoric dominated these debates as speakers used mutually exclusive metaphors of the States as “persons” and “parcels” to evoke the two views on the identity of the polity as a union of a single people or separate peoples. Attempts to define the United States as one people by men like John Adams and Benjamin Rush time and again ran ashore. Instead of “we the people” the Continental Congress ordained the Articles of Confederation defines the United States as a “firm league of friendship.” This choice was mostly born out of necessity. Throughout the period prior to the Philadelphia Convention, the common enemy Great Britain and the fear of “hanging separately,” rather than the idea of forming one people, supplied the unity between the States.

When the common enemy disappeared with the signing of the Peace of Paris in 1783, the *raison d'être* of the Confederation went with it. Immediately, the debate on the “true doctrine of the Confederation,” as James Madison called it, was resumed between the advocates of a centralized union and those of a looser connection between separate States. In the course of these debates it became clear that States like Rhode Island were no longer susceptible to the threat of “hanging separately” and no longer afraid of breaking ranks with the rest of Congress. Without a common enemy to fall back on, “nationalists” like Madison and Alexander Hamilton employed constitutive rhetoric to redefine the Confederation as created for and by “the people of the United States” to urge their centralizing policy through Congress. This did not resonate with the members of Congress—in fact, the policies were met with outrage—and few members of Congress were persuaded by the nationalists’ constitutive rhetoric that portrayed the United States as one, single people in the 1780s.

In the debates in the Philadelphia Convention covered in Chapter 3, the conflict over the identity of the polity continued. It is here that the conflict over the identity of the United States came to a head and new metaphors and narratives were introduced to frame the identity of the polity. Both the advocates of a “national” union (Randolph faction) and the status-quo “federal” union (Paterson faction) employed rival narratives to tell two very different stories about the true identity of the polity. In the Luther Martin’s reading of the past, independence had created thirteen sovereign States, and any attempt to hammer them into one nation flew in the face of the true identity of America, while in that of James Wilson the States had always been independent “unitedly” and formed a “one nation of brethren.” The ensuing stalemate was broken by those who argued that the fuzzy foundation of forming both one (national) and thirteen (federal) peoples at the same time was what made America unique. “We are neither the same nation, nor different nations,” Elbridge Gerry proclaimed to his colleagues. Like the solar system, Dickinson

argued, the two patches—i.e. the governments of the States and the Union—could work together without colliding. In the end, this formed the foundation underlying the United States Constitution.

The Constitution thus was the product of more than one narrative. By resting the Constitution on two visions of the polity the framers bricked in a perpetual debate on the true identity of the polity. In this sense, the success of the Philadelphia Convention consisted in continuing the debate on what kind of polity the United States should be rather than providing a final answer to it. Instead of performing a “miracle,” the framers of the Constitution reached a compromise between two visions on the polity. America, it was decided, would become a patchwork republic that formed both one people and thirteen separate peoples at the same time. Even in 1787, in short, the notion of the people was still contested. The opening line “we the people of the United States” was added to the Constitution as an afterthought, when the patchwork foundation was already in place. It was an attempt by Gouverneur Morris to lend more credibility to the idea of the United States as forming one people, but could and would be construed to refer to thirteen separate peoples as well.

Together, the debates in the constitutive phase discussed in the first three chapters demonstrate the limited success of the orators’ use of the constitutive rhetoric to define the identity of the United States as either one people or several peoples. Initially, there was no consensus in the Continental Congress that a separate American people even existed and, tellingly, the Articles of Confederation was defined as a league of separate peoples. In the Philadelphia Convention, however, the persistent claims that the U.S. formed one people by the likes of Henry, Adams, and Madison bore fruit—if not in the way these orators hoped for. The preamble to the Constitution illustrates that, for the first time, “we the people of the United States” was officially recognized to exist, even though there was no consensus on what it entailed. It follows, then, that the 1787 was not a turning point—or “constitutional moment”—but the culmination of a long, piecemeal controversy. The framers, finally, did not provide a blueprint of what the United States should be, but committed future generations to an unending debate on the true nature of the union.

The ratification debates discussed in Chapter 4 form the hinge between the constitutive and applicative phase. The paradox of “we the people” as both author and product of the Constitution was most pressing here. The supporters of the Constitution explicitly framed it as an act of the people to legitimize it in response to the denial of the opponents that “we the people of the United States” had never sanctioned the Convention and it therefore had to be unanimously agreed to by the States. The supporters argued that the Constitution had to be sanctioned by “the people”—meaning the ratification conventions—because it would turn them into one people. By means of this ex-post facto reasoning, the supporters in fact constituted the very people in whose name the Constitution would be sanctioned. This is constitutive rhetorical feat of presenting as

given the very people they sought to establish worked for the supporters since none of the opponents were willing to deny the *existence* of “we the people of the United States” nor its authority to abolish the form of government and replace it as it saw fit. Thus, the myth of the Constitution as a genuine act of “we the people” was born, yet it was hardly the end to the debate on the true nature of the identity of the polity. In fact, ratification only succeeded in solving the paradox of author and product, not the patchwork paradox of the U.S. forming one and several peoples at the same time.

By virtue of this patchwork paradox, future orators were able to claim that the Constitution was ratified by one people and thirteen peoples separately. The orators that defined the ratification debates as an “act of the people” utilized the integrative potential of the preamble’s open concept of “we the people.” In subsequent debates many occasions followed in which the supporters of the Constitution—which by now included the previously disappointed Madison, Hamilton, and Wilson—made the most of the patchwork foundation to justify ratification. Since the proposed Constitution did not establish a purely federal or national union, but a mixed patchwork republic, the argument ran, neither side had anything to fear of the other. Consolidation could be checked in the Senate and provincialism in House of Representatives. This position relied on the idea that the true identity of the polity would remain contested and subject of debate. In this sense, ratification was not an end to the debate, but a new beginning. It would be left to future generations to determine the extent to which the Union was one of a single people or rather thirteen different ones.

In the applicative phase studied in the final three chapters, the issue in the debate no longer was to invent an identity for the polity, but whether the United States really formed one single “we the people of the United States.” In all the debates discussed in this phase, the question was constantly how a certain problem—whether it concerned banks, tariffs, or slavery—should be addressed: as one single people (i.e. by Congress) or thirteen or more separate ones (i.e. by the States). The rhetoric employed in these debates was no longer aimed at creating an identity, by applying and extending the existent metaphors and narratives invented in the constitutive phase to challenge, affirm, and define the meaning of “we the people.”

As the debates in Chapter 5 illustrate, the meaning of “we the people”—one people or several—was contested immediately after ratification. As the participants in the debates on the National Bank (1791) and Alien and Sedition Acts (1798) found out, the Constitution could be made to serve mutually exclusive positions by relying on a different reading of its patchwork nature and history. Both the Federalist heirs to the supports of the Constitution as well as the newly formed Democratic-Republicans invoked the Constitution as supporting their views. “We the people of the United States,” as a result, was made to mean both the sum of it thirteen parts and more. One thing both sides in the debate agreed on, regardless of whether the people was a single entity or not, was that the Constitution was enacted by it. Immediately after ratification, in the debate

on the Bill of Rights, a discussion on amendments reinforced the myth by portraying it as the sacred and inviolable act of “we the people.” The myth continued to play an important role when the debates turned to the question whether “we the people” still played an active political role after ratification. The Democratic-Republicans in particular were eager to use the myth that the Constitution as an act of “the people” to argue that the same people could now overrule its elected representatives. The Federalists, on the other hand, employed a rhetoric of constraint to block further appeals to “we the people” to alter or abolish the Constitution. On the floor of Congress and from the bench of the Supreme Court, in *Marbury v. Madison* (1803), the Federalists vehemently denied that “the people” could exercise any influence. The sovereign people had spoken in 1787, they argued, and were now bound to this dictate. The result was a further strengthening of the sacredness of the Constitution by placing it in a long gone frozen past.

As the debates in Chapter 6 demonstrate, in the decades following 1819, the idea of forming one people came under increasing pressure. The constitutionality of slavery’s future in the western territories proved more divisive and persistent than any other issue Congress dealt with before. By begging the question whether the United States formed one or several peoples with regard to territorial expansion—and thus whether Congress or the territories themselves should determine it—the issue went to the heart of the patchwork paradox. The result was that views about the true identity of the polity became increasingly contested between two sections of the republic, slaveholding and non-slaveholding. Many Congressmen—though hardly all—from the non-slaveholding States lent new significance to the myth that the Constitution had formed the United States into one people, by claiming it consequently had only one identity in which there was little or no future for slavery. Their reading of the past stressed the Declaration’s notion that men were created equal and true Americans were freemen. In turn, most—though again not all—from the slaveholding States maintained that the Constitution created a union of sovereign peoples, which each could determine the slavery question for themselves. Their rival narrative stressed the Declaration’s guarantee of self-government which no true American would willingly violate.

Despite the many months that Congress spent debating the territorial question in the 1820s, 1840, and 1850s, no mutually satisfactory solution could be found that succeeded to put the conflict at rest. Instead, relying on conciliatory rhetoric, the members of Congress enacted a series of compromises that took away the immediate source of conflict, without addressing the underlying dispute on the identity of the polity. The Missouri Compromise of 1820 in fact consolidated the conflict by splitting “we the people” into two: one with and one without slaves. The subsequent debates on Nullification (1833) and the Wilmot Proviso (1846) all ended with compromises that dodged the fundamental question and kicked the can of what the true identity of the polity was further down the road. In these debates, the views of “we the people” in the two sections became more and more entrenched. Anti-slavery orators now claimed that

slavery harmed the entire federal “family,” while slave-owner John Calhoun now went as far as to deny that there ever existed a “people of the United States” and used the territorial question to self-identify as Southerner. Within decades of the Missouri Compromise, claims of belonging to either the “true” northern or southern people had more and more replaced that of belonging to the American people.

The compromises, as the debates in Chapter 7 illustrate, could not solve the paradox and conciliatory rhetoric eventually failed to settle the slavery question. When Congress, in the Kansas-Nebraska Act (1854), and the Supreme Court, in *Dred Scott* (1857), determined to settle the territorial question in 1850s, their success proved short-lived. At this point, the meaning of Constitution had become so contested between the two sections and their views so alienated, that they no longer considered themselves part of the same people. In the wake of these decisions, it became more and more clear that the patchwork republic was walking on its last legs. During the final debate in Congress, it turned out that each side viewed only its vision of the polity as acceptable and in line with America’s true identity and discarded the rest as degenerate and un-American. “We the people,” in short, was replaced by “we versus them.” Even in this last debate, however, each side continued to accept the Constitution as perfect and revered it as a myth. If no one questioned the infallibility of the framers, it is clear from the contrast between the remarks of Davis and Seward that each had an entirely different conception of the polity that had been created in 1787. In this respect, the final debate was the culmination of the decades that preceded it. With each side claiming that only their reading of the Constitution was true to its original spirit, there no longer was an appreciation or place in the debate for its patchwork origin.

Ironically, by 1861 the debate on the identity of the polity was back to where it had started: with one people separating from another. The debates in the applicative phase demonstrate that “we the people” remained contested. It did not provide the unequivocal identity of the United States as one single people that the advocates of the Constitution had hoped for, but was constantly challenged by the rival narrative of the United States as a union of several peoples. In the debates on slavery, the former narrative was increasingly confined to the North, while the latter dominated the South—to the point where some considered it to form a separate “southern people.”

By 1865, the United States could truly be said to form one, single people and the search for a foundation for the U.S. Constitution that had begun a century earlier had come to an end. However, the fact that it took a century of debate—from the first notion of forming a separate American people in 1765, to consolidating it in 1865—demonstrates that this was not the result of a “constitutional moment” or “fiction,” but the result of a long, piecemeal debate. Throughout this process, the existence and subsequently the meaning of “we the people” remained contested and the true identity of the United States was that of a patchwork republic.

Lessons Learned

This study started by noting the admiration for American constitutional history among contemporary advocates of a United States of Europe. At the end of this conclusion, the question remains what lessons can be drawn from this study for the debate on European constitutionalization. Naturally, there are serious limits to using past experiences to draw conclusions for today. No two epochs are exactly alike, and this is certainly true for the United States and the European Union. In this sense, the rule that past performances give no guarantees for the future holds true for investors and historians alike. Nevertheless, in this case the advocates of the United States of Europe provide the link between the American past and European present. The aim of this section is to discuss the implications of the conclusions of this study for the debate on Europe's constitutional future.

First and foremost, the counter-intuitive conclusion of this study is that the European project looks more like the process in the United States than has been realized thus far. After all, the description of a long, piecemeal, and wearisome process with fits and starts and little certainty perfectly captures both the constitutional history of the United States as well as that of the European Union. Academics and policymakers on both side of the Atlantic would benefit from this recognition, rather than chasing an elusive and mythical idea of “we the people” as an overnight invention. Instead, Europeans can take some comfort in the thought that the American project too was a long and difficult process.

There is also bad news for those who truly believe in a future United States of Europe, however. The American case demonstrates that hoping that this incremental process will turn out right as long as it keeps going is not justified. It is certainly true that the patchwork nature of the Constitution helped keep both advocates and opponents of “we the people” united and committed them to an ongoing debate. However, endless deliberation and countless compromises in the end did not solve the fundamental paradox that “we the people” could be claimed to refer to one as well as separate peoples. In fact, by avoiding to address the paradoxical foundation of the polity—by kicking the can ever further down the road—the members of Congress themselves seemed to deny that the United States could be considered one people.

As this study shows, constitutive rhetoric plays a large role in this by not only providing an integrative narrative, but also an excluding narrative. It is a double-edged sword that can both bring groups together as one people well as split them apart. As one side in the debate began to identify its position more and more as that of every true American, it became harder to align it with those of the others. Unlike what Habermas and other hopefuls have argued, simply creating a European public space to debate and find compromise solutions will not suffice. In similar vein, the constant hammering on fear of an outside threat to create unity—“hanging separately”—even if it works for

Europe—where a common enemy seems to be missing—is not a long-term solution, as the fate of the Articles of Confederation shows. Without a shared sense of a common destiny, this strategy does not stand a chance once the perceived enemy has disappeared.

In conclusion, it would to the credit of these advocates of a “United States of Europe” to be more conscious of the long and eventually violent struggle that gave rise to the interpretation of the “we the people” as it stands today and not be misled by a false belief that a “we the people of the United States of Europe” can be invented overnight. Today, the call for a new constitution that will turn the E.U. into a “United States of Europe” is louder than ever. The banner has been raised by Verhofstadt, Habermas, and Westerwelle, and they would do well to take at heart the lessons that U.S. constitutional history can teach them. This study, hopefully, will form the starting point of a better understanding on both side of the Atlantic of the contested role that “we the people” played in the United States constitutional debates and help scholars and politicians alike realize the problematic patchwork republic to which it gave birth.

Acknowledgments

The first time I laid my eyes on the original United States Constitution it rocked my world—literally. It was a hot summer afternoon in Washington D.C. when a 5.8 magnitude earthquake hit the capital, making the Washington Monument shake like a reed in the wind and the hallways of the National Archive dance.

In hindsight, the earthquake is an apt metaphor for the impact that the United States Constitution had on my life and career. As a young historian, desperately seeking to say something new about the French Revolution, I was elated to get the job to write a PhD on American and French comparative constitutionalism. I am still very grateful to my supervisors for giving me the opportunity to write this book, but it turned out, to be a lot harder than I expected. I struggled for years to find my own voice. Like many PhD's, I only discovered what I really wanted to say after most of my contract had expired, and ended up doing something entirely different than I started out with. I ended up saying farewell to my true academic love, the French Revolution, and started on a new, uncertain path as Americanist. The years spent researching the debates about the Constitution, both past and present, and teaching at the American Studies Department have enriched my understanding of the world around me in ways I never expected.

Today, many years later, I finish this project more humble and wiser than I began it. My ongoing struggle to understand the U.S. Constitution has brought me a lot in terms of friends, career, and, above all, wisdom. Now that the book is finished and the defense is in sight, for the first time in a very long time, I feel like my world has stopped spinning—at least for the moment.

In the process of working on this book, I have had the pleasure of working with many people who deserve my thanks for their help, support, and friendship. This list has to start with my supervisors Laurence Gormley, Rik Peters and Peter van den Berg. To Laurence I owe a lot, but especially that he took me in when the Arts Faculty had no place for me to go. You made the European Law department my home and always supported me to expand my horizon—even when I decided to leave for the U.S. right before finishing my manuscript. Rik and Peter, it has been a pleasure working with you and within the wonderful project that you conceived. At times, it must have been tiring to remind me to stay on message time and again. Throughout, however, your advice and suggestions were always helpful and your support generous and unrivaled. The many, many hours spent discussing my texts have not only helped shape this book, but also the researcher and writer I am today. You, Rik, I want to thank for helping me get started as a

teacher and for the great insight that you have given me in the working of persuasion. It truly has been a pleasure to work with you and even more so to teach by your side.

A special word of thanks to Jieskje, my sister in arms in the project. I remember talking to you about applying for the job in the Fall of 2007 and haven't regretted urging you to do so a single moment since. I'm blessed to call you my friend and cherish our time spent over coffee, during French class, and at conferences. You never got tired of reminding me to believe in myself and now, six years later, I sometimes fancy I do. You are a constant reminder that anything is possible, if you put your heart and soul behind it.

My colleagues lighted up my days at work. I fondly remember my time among the European lawyers, which offered me the wonderful company of Anatole, Nichola, Rieks, Karien, Hannah, and Marijn. When my contract expired, I continued my exodus through the Harmony Building. I will never forget the gracious offer of professor Wil Verhoeven to take me on board his department when I faced the black hole that is the end of one's PhD-contract. My time with the American Studies Department has deepened my understanding of U.S. culture in many ways. Apart from a new home, I also found great colleagues in my current roommate Aynur as well as Joost, Tim, and above all Mark.

Although I'm only two flights of stairs away, I regret not being able to spend more time with my colleagues in the History Department. I want to thank my colleagues in the Modern History Department, in particular Dirk Jan Wolffram and Hanneke Hoekstra to whom I can always turn for advice.

Above all, I want to thank my buddy Maarten. I could always turn to with my inspirations and frustrations and still enjoy sharing stories with you about life as young instructors. I'm glad to call you my friend and meet you for coffee or beer every week. You've taught me more about American history than anyone else and I hope you'll continue you to do so, wherever our careers might take us next.

This list would be incomplete without the mentioning of my fellow Groningen PhDs Reinbert, Annelies, Wouter, Korrie, Roberto, and Anne. Crucial for finding some time away from the project was the friendship of my extended Groniek family: Diederik, Karin, Jasper, Kris, Joyce, Tomek, Ricus, Rieks, and Jeroen. We don't get to see each other as often as in the Borkum days, but I enjoy every minute that we do.

Finally, I want to thank my family for their support during this long project—especially to my parents, who really helped me out in the final months. I know many of you must have wondered at times what kept me busy for all these years. This book, I hope, will serve as an excuse for my regular absent-mindedness.

Truly finally, myn leave Jits, I want to thank you for your love and support. You've sacrificed many weekends and holidays to let me finish this project, but always kept supporting me. You bring out the best in me and, more than a friend, are my perfect lover. I'm proud to call you my wife and mother of our daughter, who was playing on my lap while I typed the last words of the manuscript. I love you both and dedicate this book to you.

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Illustrations

The Missouri Compromise of 1820, map retrieved from:

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The Kansas-Nebraska Act of 1854, map retrieved from:

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Nederlandse Samenvatting

De Grondwet van de Verenigde Staten heeft een sacrale status binnen de Amerikaanse samenleving. Als oudste grondwet in zijn soort, neergepend in een broeierig conventie in Philadelphia tijdens de zomer van 1787, geldt het als het grondvest van de Unie. De *Philadelphia Convention* vormt voor veel Amerikanen een cesuur in de geschiedenis van de Verenigde Staten waarin een kleine groep visionaire *Founding Fathers* als bij toverslag een onsamenhangende groep ex-koloniën veranderde in één volk.

Ook aan de Europese kust van de Atlantische Oceaan spreekt dit verhaal tot de verbeelding. Veel van de grondleggers van de Europese Unie bewonderden de Verenigde Staten als een model. Het bleef niet alleen bij dromen. De Europese Grondwet van 2004, opgesteld door de Europese Conventie (geen toevallig gekozen naam), moest volgens voorzitter Giscard d'Estaing een Philadelphia-moment in het Europese integratie proces vormen.

Het zou zo'n vaart niet lopen. In het voorjaar van 2005 strandde het project na resolute afwijzing door het electoraat in referenda in Frankrijk en Nederland. Het volk dat de Europese Grondwet van haar legitimiteit moest voorzien had zich er tegen gekeerd.

Academici hebben sinds 2005 vele verklaringen voor het debacle van de Europese Grondwet aangevoerd, maar de vooronderstelling dat er in 1787 een Philadelphia-moment in Amerika plaats heeft gevonden is hierbij onaangeroerd gebleven. In tegendeel: de roep om een 'Verenigde Staten van Europa' klinkt vandaag de dag luider dan ooit. Door hun begrip van het constitutionele verleden van de V.S. niet in twijfel te trekken, lijken Europese leiders op koers voor een volgend debacle.

Deze studie wil het perspectief omdraaien en een nadere blik werpen op het proces van constitutionalisering zoals dat rond 1800 in de Verenigde Staten plaatsvond. In plaats van een soepele, pijnloze affaire is het belangrijk te realiseren dat het constitutionele verleden van de V.S. een moeizaam en omstreden proces was. De eerste eeuw van de Amerikaanse Grondwet moet dan ook gezien worden als provisorisch lappenwerk: een *Patchwork Republic*.

Om een beter begrip van het constitutionaliseringsproces in de V.S. te krijgen neemt, deze studie de geschiedenis van de Amerikaanse Grondwet onder de loep. Als onderdeel van het NWO-gefinancierde onderzoeksgroep *Omstreden Grondwetten* aan de Rijksuniversiteit Groningen is het uitgangspunt van het project dat grondwetten de uitdrukking vormen van identiteit van een gegeven politieke gemeenschap. Dat wil zeggen: een grondwet legt niet alleen de regels binnen een politiek systeem vast, maar

verschafft ook een *raison d'être*, waarom de bewoners van een bepaald gebied één gemeenschap vormen. In de Verenigde Staten werd deze legitimerende identiteit gevonden door de Grondwet als uitdrukking van de wil van 'we the people of the United States' af te schilderen, zoals bekende openingszin van de Grondwet luidt.

Het idee dat de Grondwet een daad van 'we the people' is, heeft tegenwoordig de status van onweerlegbare waarheid in Amerika. Toch is er iets merkwaardigs met dit idee, aangezien 'we the people' zowel als de auteurs én het product van de Grondwet worden gezien. Veel historici zijn het er over eens dat de Verenigde Staten voor 1787 niet één volk vormden en dat de Grondwet, in de woorden van één historicus (Edmund Morgan): 'call[ed] into existence (...) a new people.' Het resultaat is een merkwaardige paradox, waarin de Grondwet het product is van het volk en het volk het product van de Grondwet.

De relatie tussen grondwet en volk is niet onbelangrijk voor het hedendaagse debat over de toekomst van Europa. Als deze relatie problematisch is, wat blijft er dan over van het gedachtegoed van auteurs als Habermas en Verhofstadt die menen dat een Europees volk in het leven kan worden geroepen met een Europese grondwet?

Deze studie wil een nieuw licht werpen op de paradox door 'we the people' te benaderen als een retorische zet in een voortdurend debat over de definitie van de politieke identiteit van de Verenigde Staten. Om de rol van het begrip 'we the people' als de fundering van de V.S. te traceren, onderneemt deze studie een onderzoek naar de parlementaire debatten waarin het idee van een Amerikaanse Grondwet voor het eerst werd geopperd en vervolgens werd uitgewerkt, geratificeerd en tenslotte geïnterpreteerd. In totaal is een periode van honderd jaar constitutioneel debat bestudeerd, van de Stamp Act crisis van 1765 tot het einde van de Amerikaanse Burgeroorlog in 1865.

Om te analyseren hoe sprekers in deze debatten poogden het idee van de Verenigde Staten als 'we the people' aannemelijk te maken, dan wel aan te vechten, is in deze studie een retorische benadering gekozen. Door de in speeches gebruikte narratieven, dissociaties, metaforen, enz. in kaart te brengen wordt duidelijk hoe sprekers bewust en onbewust een identiteit voor de V.S. als één volk creëren en in twijfel trekken. Met name de theorie van *constitutive rhetoric*, zoals geformuleerd door Maurice Charland, speelt hierin een belangrijke rol. Volgens Charland kan een spreker zijn toehoorders van een identiteit voorzien—bijvoorbeeld als één volk—door hen een gezamenlijke geschiedenis toe te kennen. Door vervolgens te eisen dat het gehoor zich conform deze identiteit gedraagt, kan de spreker het debat ook daadwerkelijk in een nieuwe richting sturen. De theorie van *constitutive rhetoric* leent zich uitstekend om proces in V.S. te analyseren, aangezien het een nieuw licht werpt op de wijze waarop een volk tegelijk als auteur en product van de Grondwet kan worden voorgesteld.

De eerste drie hoofdstukken van dit boek behandelen de zogenaamde constitutieve fase, waarin sprekers trachten een identiteit te vormen voor de nieuwe politieke gemeenschap die de Verenigde Staten heet. Zoals uit het eerste hoofdstuk blijkt,

voelen de kolonisten die de Noord-Amerikaanse koloniën van Groot-Brittannië bewonen zich uitgesproken Brits. Als in 1765 een debat losbarst in de koloniën over de constitutionele relatie met het Britse *Empire* doen de vertegenwoordigers van de dertien koloniën geen beroep op een Amerikaanse grondwet—een enkeling bespot zelfs het idee—maar op de Britse Grondwet. Tegelijk zijn er sprekers, zoals Patrick Henry, die al blijk geven van een begrip van Amerika als één, afzonderlijk volk, maar zijn stem gaat verloren binnen de naar verzoening snakkende meerderheid. In 1776 verliest verzoening het van onafhankelijkheid. De Onafhankelijkheidsverklaring van 4 juli spreekt voor het eerst over de kolonisten als een afzonderlijk volk, maar stelt tegelijk dat de dertien delen van de nieuwe Verenigde Staten onafhankelijk zijn. Dit is het begin van de paradox dat de Verenigde Staten tegelijk één en verschillende volkeren zijn waarover nog veel te doen zou zijn.

De debatten in het tweede hoofdstuk laten zien dat de Amerikaanse Revolutie een afzonderlijke ‘wij’ creëert, maar niet duidelijk maakt wat de identiteit hiervan is. Tijdens de debatten over de voorloper van de Grondwet van 1787, de *Articles of Confederation*, leggen pogingen om de V.S. als één volk te zien het af tegen de metafoor van de Staten als afzonderlijke ‘personen.’ Van een breed gedragen begrip van de V.S. als één volk met één identiteit is gedurende deze periode geen sprake.

De doorbraak van ‘we the people’ vindt plaats in de Philadelphia Conventie van 1787 die worden behandeld in het derde hoofdstuk. De openingszin wordt echter op het nippertje opgenomen, op een moment dat de gedelegeerden uitgeput verlangen naar het afronden van een moeizame strijd. Gedurende de zomer van 1787 speelt zich een conflict in de Conventie af tussen voorstanders van een hechtere nationale en lossere federale unie. Beide groepen hanteren rivaliserende narratieven waarin de ware identiteit van de V.S. respectievelijk als één volk en als dertien onafhankelijke Staten wordt voorgesteld. Uiteindelijk slaagt een kleine groep compromis-gezinde gedelegeerden erin de patstelling te doorbreken door vast te leggen dat de V.S. tegelijk één (nationaal) en dertien verschillende (federale) volkeren vormt. Door de Grondwet van 1787 op twee narratieven te rusten committeren de auteurs in feite de volgende generaties aan een voortdurend debat over de ware identiteit van de politieke gemeenschap. In plaats van heldere blauwdruk voor de Unie, creëert de Conventie een *Patchwork Republic* waarin het idee dat de V.S. één ‘we the people’ vormen volstrekt omstreden blijft.

De ratificatiedebatten die in het vierde hoofdstuk worden besproken vormen de scharnier tussen de constitutieve en applicatieve fase. De paradox van ‘we the people’ als zowel auteur als product van de Grondwet is hier het meest prangend. Tegen het bezwaar van tegenstanders dat de oude afspraken tussen soevereine Staten niet zomaar ontbonden kunnen worden, werpen de voorstanders van de Grondwet de claim op dat het Amerikaanse volk alleen, vertegenwoordigd in de ratificatie conventies, de benodigde legitimiteit kan leveren voor een Grondwet die uit haar naam is geschreven. Dit staaltje *constitutive rhetoric*, waarbij de voorstanders het volk in leven roepen in wiens naam de

Grondwet wordt verordent, werkt omdat niemand ontkent dat de V.S. één volk vormt. Talloze pogingen om de V.S. als één volk voor te stellen werpen nu hun vruchten af.

Ondanks ratificatie blijft de paradox van de V.S. als zowel één als verschillende volkeren voortbestaan. In de applicatieve fase die vanaf 1789 volgt, staat niet langer het creëren van een nieuwe identiteit, maar de vraag of de V.S. daadwerkelijk één volk vormt centraal. In alle debatten in deze fase wordt telkens de vraag opgeworpen hoe een bepaald probleem—of het nu een nationale bank, importheffingen, of slavernij is—moet worden aangepakt: als één volk of verschillende (d.w.z. per Staat).

In de debatten in het vijfde hoofdstuk wordt duidelijk hoe sterk de zeggingskracht van de mythe dat de Amerikaanse Grondwet een daad van ‘we the people’ is. Beide partijen in het Congres, Federalisten en Republikeinen, claimen in elk conflict dat de Grondwet alleen aan hun kant staat. Waar de Republikeinen echter stellen dat ‘we the people’ op ieder moment hun vertegenwoordigers kan overstemmen, houden de Federalisten vol dat het volk heeft gesproken en nu gebonden is aan de Grondwet. Ook rechter John Marshall is deze mening toegedaan en schuift in *Marbury v. Madison* het Hooggerechtshof naar voren als de plek waar de Grondwet uitgelegd moet worden.

Als in de loop van de 19^e-eeuw slavernij een steeds belangrijker twistpunt in het Congres begint te worden, wordt de vraag of Amerika nu één of juist verschillende volkeren vormt steeds prangender. Zoals het zesde hoofdstuk laat zien claimen de vertegenwoordigers van de Noordelijke vrije Staten in toenemende mate dat de Grondwet de V.S. in één volk veranderde en houden zij vol dat er slechts één volk, met één slavernij-vrije identiteit bestaat. De vertegenwoordigers van de Zuidelijke slaven houdende Staten stellen daarentegen dat de Grondwet een Unie van soevereine volkeren creëerde die het vrij staat zelf de slavernij-kwestie te bepalen. In 1820 slaagt het Congres erin door middel van een compromis-lijn tot rust te brengen, maar legt daarbij wel geografisch vast dat de V.S. niet één, maar tenminste twee afzonderlijke volkeren vormt. Hernieuwde spanningen in 1833 en 1846 en 1850 voeren de druk op en de twee narratieven raken steeds meer verbonden met één zijde in het conflict.

In het zevende hoofdstuk wordt duidelijk dat compromissen er niet langer in slagen de fundamentele vraag, of de V.S. één of meerdere volkeren vormen, af te wentelen. De betekenis van de Grondwet wordt steeds meer omstreden tussen Noord en Zuid tot het moment dat men elkaar niet langer als onderdeel van dezelfde Unie herkent, maar als ontaardt van de ware identiteit en daarmee on-Amerikaans. Wat volgt is een bloedige Burgeroorlog waarin voor eens en altijd wordt vastgesteld dat de Verenigde Staten één volk vormen en een eind komt aan de *Patchwork Republic*.

In 1865 komt het debat over de fundering van de Amerikaanse Grondwet dat een eeuw eerder begon tot een eind. Het feit dat het honderd jaar debat en een bloedige oorlog kostte om deze paradox te beslechten toont aan dat constitutionalisering in de V.S. niet het gevolg was van een Philadelphia-moment, maar juist een lang, onzeker, en moeizaam

proces vormde waarin ‘we the people’ omstreden bleef en de ware identiteit van de V.S. die van een *Patchwork Republic* was.

Met het oog op Europa is het van belang vast te stellen dat een volk niet zonder meer in het leven wordt geroepen door het in een Grondwet op te nemen. Als de geschiedenis van de Amerikaanse Grondwet iets leert is het wel hoe moeizaam dit proces is en hoe gevaarlijk. Simpelweg door erop te hameren dat Europa één volk vormt, zal dit niet onherroepelijk tot stand brengen. In tegendeel zelfs. Het zou de voorstanders van een hechter Europa sieren als zij zich hier meer van bewust waren, in plaats van naar een onhaalbaar, want ahistorisch, Philadelphia-moment te streven. Want terwijl Europese leiders al die jaren probeerden een Amerikaans ideaal na te streven is de ontnuchterende conclusie van deze studie dat het moeizame, omstreden constitutionaliseringsproces van de Europese Unie als twee druppels water lijkt op het constitutionele verleden van de Verenigde Staten.

About the author

After getting his MA in the Research Master Modern and Contemporary History (with distinction) in 2007, Jelte Olthof (1983) continued on as a PhD at the University of Groningen. The research for this book, *Patchwork Republic: The rhetoric of “we the people” in the United States constitutional debates, 1765-1865* is part of the NOW-funded *Contested Constitutions*. He currently works as instructor with the American Studies Department and Honours College of the University of Groningen. His work has been published in the *Saint Louis University Journal of Law*.