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# IN SEARCH OF NATIONHOOD AT THE FOUNDING

Jonathan Gienapp\*

## INTRODUCTION

At the American founding, the nation was an idea and, constitutionally speaking, an immensely important one. Yet, it has been easy to ignore or overlook. Sometimes its existence is taken for granted without much additional reflection. The nation was simply proclaimed by the Declaration of Independence and then realized through the war with Great Britain, thereafter an undeniable reality.<sup>1</sup> Or, at other times, it has been assumed that the American Revolution failed to produce a nation, at least not a real one anyway.<sup>2</sup> Rather than creating a genuine nation-state, drawing on their colonial past, the revolutionaries erected a confederacy of autonomous states, held together by a “peace pact” or “federal treaty.”<sup>3</sup> By the terms of this treaty, independent states confederated to project strength outward and minimize interstate conflict without surrendering their essential sovereign prerogatives.<sup>4</sup> While the impotent Confederation government managed diplomacy, the real work of polity building that followed independence lay with the states, which jealously guarded their corporate identities, independent powers, and sovereign rights.<sup>5</sup> Even if the federal Constitution

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1. On the Declaration of Independence as principally a statement of nationhood, see generally DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007).

2. See DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* ix–x, xiv, 257–58 (2003); Jack P. Greene, *Colonial History and National History: Reflections on a Continuing Problem*, 64 WM. & MARY Q. 235, 242–50 (2007); Peter S. Onuf, *A Declaration of Independence for Diplomatic Historians*, 22 *DIPLOMATIC HIST.* 71, 71–72, 79–83 (1998).

3. See generally HENDRICKSON, *supra* note 2; Max M. Edling, *Peace Pact and Nation: An International Interpretation of the Constitution of the United States*, 240 *PAST & PRESENT* 267 (2018).

4. See Edling, *supra* note 3, at 281–83; see also HENDRICKSON, *supra* note 2, at 24–29, 104–11, 125–26, 145–46; Greene, *supra* note 2, at 242–43; Onuf, *supra* note 2, at 72–73, 76–78.

5. See JACK P. GREENE, *PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607–1788*, at 172–

of 1787 marked a remaking of the state-centered order, it did not fundamentally change—nor seek to change—the original purpose or aims of the original confederation.<sup>6</sup> The American states joined in a perpetual union and empowered a central government to promote the common defense, manage diplomacy, and regulate international trade but not to meddle in domestic matters—those would remain firmly within the province of the states, which is ultimately where most citizens’ true loyalties lay.<sup>7</sup> The early United States, thus, more closely resembled a states system than a nation-state.<sup>8</sup> Only much later would this conception of federal union give way to the idea of a unitary American nation.<sup>9</sup>

While no doubt many founding-era Americans viewed the Union in such diffuse terms and while, practically speaking, the Union might well have functioned in such a decentralized manner, we should not overlook why some revolutionaries—especially those who would become leading Federalists<sup>10</sup>—invested so much energy trying to establish the nation’s

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80 (1986); MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774–1781*, at 14–15, 109–10, 161–76, 239–45 (1970); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 127–34, 355–59, 463–67 (2d ed. 1998).

6. Edling, *supra* note 3, at 284–91; *see also* HENDRICKSON, *supra* note 2, at xiv, 3–7, 242–48, 257–59; Anthony J. Bellia Jr. & Bradford R. Clark, *The International Law Origins of American Federalism*, 120 COLUM. L. REV. 835, 857–71 (2020); Daniel H. Deudney, *The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union, Circa 1787–1861*, 49 INT’L ORG. 191, 194–216 (1995); Greene, *supra* note 2, at 243–45; Onuf, *supra* note 2, at 78–83; Robbie J. Totten, *Security, Two Diplomacies, and the Formation of the U.S. Constitution: Review, Interpretation, and New Directions for the Study of the Early American Period*, 36 DIPLOMATIC HIST. 77, 77–80, 89–110 (2012); Michael P. Zuckert, *Federalism and the Founding: Toward a Reinterpretation of the Constitutional Convention*, 48 REV. POL. 166, 174–75 (1986). *See generally* AARON N. COLEMAN, *THE AMERICAN REVOLUTION, STATE SOVEREIGNTY, AND THE AMERICAN CONSTITUTIONAL SETTLEMENT, 1765–1800* (2016); FORREST McDONALD, *STATES’ RIGHTS AND THE UNION: IMPERIO IN IMPERIO, 1776–1876* (2000); PETER ONUF & NICHOLAS ONUF, *FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS 1776–1814* (1993).

7. Edling, *supra* note 3, at 287. On the intellectual roots of American federalism, *see generally* ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010). On the lack of national identity at the time of the founding, *see* GREENE, *supra* note 5, at 157–65; FORREST McDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC, 1776–1790*, at 17–18 (2d ed. 1979); John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 333 (Richard Beeman et al. eds., 1987).

8. *See* HENDRICKSON, *supra* note 2, at ix–xii; Deudney, *supra* note 6, at 194, 208–09, 222; Totten, *supra* note 6, at 79–80, 111, 113–14.

9. *See* HENDRICKSON, *supra* note 2, at 281–97.

10. In this Article, for convenience, I mostly use the terms “Federalist” and “nationalist” interchangeably. At times, though, I hint at the ways in which they picked out distinct groups of individuals at the founding. “Federalists” could describe both those who supported the Constitution’s ratification and members of the nascent political party that took form over the course of the subsequent decade that supported President George Washington’s administration and Alexander Hamilton’s controversial financial plan. Some Federalists of the first variety, such as James Madison, became leading opponents of the later Federalists. Most Federalists, of either kind, were nationalists. But some were assuredly more committed to expansive national power than were others, especially during ratification. When I use the term “nationalists,” I do so to refer either to those individuals who championed increasing the power of the national government prior to the Constitutional Convention (and thus, before the term

existence. Leading Federalists, many of whom played as significant a role in creating the Constitution as anybody, fervently rejected the idea that the Constitutional Convention had created a mere treaty. This was no modest quibble over names or forms, either. The difference between the Constitution, as they imagined it, and a treaty was vast and significant. Constitutionally and legally speaking, few differences mattered more. Federalists' search for nationhood—as well as its implications and consequences—thus deserves further attention. Understanding why they conducted this intellectual work and how successfully they grounded their claims in commonly held assumptions illuminates an obscured dimension of founding-era constitutional thinking. It gives us new reason to emphasize the importance of nationhood at the founding and to not be so quick to assume that devolved federalism and localism were the shared commitments of the day.

In various ways, scholars have already helped point us in this direction. A recent wave of important work has called attention to the neglected importance of early American nationhood and constitutional governance.<sup>11</sup> Some have stressed that the ostensibly weak national government was actually far stronger and more capable than previously assumed.<sup>12</sup> Others have shown how, following ratification of the Constitution, state and federal centralization were not at odds but worked in tandem, as national authority helped states concentrate their power.<sup>13</sup> Still others have demonstrated powerfully how Federalists' pursuit of international recognition led them to emphasize the legal foundation of nationhood.<sup>14</sup> What also deserves

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Federalist had emerged) or, alternatively, to those Federalists who most energetically championed a powerful national government. See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 21–24 (1993) (discussing the differences between early and later Federalism). See generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010) (describing how leading Federalists at this time were strong nationalists).

11. For a comprehensive overview, see generally Gautham Rao, *The New Historiography of the Early Federal Government: Institutions, Contexts, and the Imperial State*, 77 WM. & MARY Q. 97 (2020).

12. See generally GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* (2021); BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009); MAX M. EDLING, *A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867* (2014); RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1995); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012); GAUTHAM RAO, *NATIONAL DUTIES: CUSTOMS HOUSES AND THE MAKING OF THE AMERICAN STATE* (2016); LINDSAY SCHAKENBACH REGELE, *MANUFACTURING ADVANTAGE: WAR, THE STATE, AND THE ORIGINS OF AMERICAN INDUSTRY, 1776–1848* (2019); Andrew J. B. Fagal, *American Arms Manufacturing and the Onset of the War of 1812*, 87 NEW ENG. Q. 526 (2014); Richard R. John, *Governmental Institutions as Agents of Change: Rethinking American Political Development in the Early Republic, 1787–1835*, 11 STUD. AM. POL. DEV. 347 (1997).

13. See generally Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792 (2019).

14. See generally ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* (2012); Golove & Hulsebosch, *supra*

attention is *how* defenses of national power were imagined and justified at the founding. On this front, several scholars have begun to underscore key facets of early nationalist constitutionalism that have long been downplayed or ignored, facets that point to a robust and ascendant Federalist Constitution in the nation's earliest years that seriously disrupts the enduring portrait of the period's constitutionalism.<sup>15</sup>

To further flesh out this Federalist Constitution that recent scholarship has begun to bring back into view, I focus on one particularly vital argument that founding-era nationalists relied on: that the existence of a national social contract entitled the national government to expansive power. Leading politicians and jurists, such as Alexander Hamilton, James Wilson, John Jay, John Adams, Gouverneur Morris, Rufus King, and Fisher Ames, made creative use of social contract theory, tapping into what was, at the time, a ubiquitous intellectual resource—that otherwise provided a pervasive framework for understanding the nature of political society and the foundations of constitutional authority—and turning it to their advantage. While scholars of the founding have long attended to the place of social contract theory in revolutionary American political and constitutional discourse, they have almost always interpreted it as a mechanism for

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note 10; Daniel J. Hulsebosch, *Being Seen Like a State: How Americans (and Britons) Built the Constitutional Infrastructure of a Developing Nation*, 59 WM. & MARY L. REV. 1239 (2018); Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759 (2014).

15. See generally, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010); Jonathan Gienapp, *The Myth of the Constitutional Given: Enumeration and National Power at the Founding*, 69 AM. U. L. REV. F. 183 (2020) [hereinafter Gienapp, *The Myth of the Constitutional Given*]; Jonathan Gienapp, *National Power and the Presidency: Rival Forms of Federalist Constitutionalism at the Founding*, in POLITICAL THOUGHT AND THE ORIGINS OF THE AMERICAN PRESIDENCY 127 (Ben Lowe ed. 2021) [hereinafter Gienapp, *National Power and the Presidency*]; Calvin H. Johnson, *The Dubious Enumerated Power Doctrine*, 22 CONST. COMMENT. 25 (2005); Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 MINN. L. REV. 699 (2016); John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015) [hereinafter Mikhail, *The Constitution and the Philosophy of Language*]; John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014) [hereinafter Mikhail, *The Necessary and Proper Clauses*]; Richard Primus, *Herein of "Herein Granted": Why Article I's Vesting Clause Does Not Support the Doctrine of Enumerated Powers*, 35 CONST. COMMENT. 301 (2020); Richard Primus, *"The Essential Characteristic": Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415 (2018); Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576 (2014); Richard Primus, *Why Enumeration Matters*, 115 MICH. L. REV. 1 (2016); Robert J. Reinstein, *The Aggregate and Implied Powers of the United States*, 69 AM. U. L. REV. 3 (2019); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573 (2017); David S. Schwartz, *McCulloch v. Maryland and the Incoherence of Enumerationism*, 19 GEO. J.L. & PUB. POL'Y (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3535750](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3535750) [<https://perma.cc/VV45-SSFZ>]; David S. Schwartz, *Recovering the Lost General Welfare Clause* (Univ. of Wis. L. Sch. Legal Stud. Rsch. Paper Series No. 1603, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3671883](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3671883) [<https://perma.cc/LAB2-NUF6>].

protecting rights and *limiting* government power.<sup>16</sup> Only rarely have scholars considered how social contract thinking helped *expand* governmental authority based on what it revealed about the interconnected implications of sovereignty, polity formation, and constitutional power. Yet, in the hands of early nationalists, this was one of social contract theory's most vital roles.

At the founding, Federalists contended that there was a tight, inextricable relationship between the nature of the federal union and the character and scope of governmental power—that the latter could not be understood apart from the former. If, as a matter of legal fact, the United States was a nation, then its government enjoyed a credible claim to more power than might otherwise be assumed. If, however, the United States was not a nation, then its government necessarily was entitled to less power. What the Constitution permitted was determined, to a meaningful extent, by the nature of the underlying polity. In the early years of the republic, to an extent that is rarely appreciated, this argument held a tight grip on constitutional thinking. Not only did nationalists champion the idea but, arguably even more importantly, their opponents fully recognized its power. Precisely because Federalists built their account of national authority on such an authoritative foundation, and precisely because their starting point enjoyed such broad resonance across ideological divisions, their arguments had a clear impact on their intellectual and political rivals. These opponents recognized that defeating the Federalist account of national power meant undermining their attendant account of the social contract. Not everybody agreed with the Federalists that the United States was a nation, but most everybody agreed on why that fact was constitutionally important.

This dimension of Federalist constitutionalism and the ways in which it resonated in the early republic are curiously neglected. We know a great deal about debates during this period over nationhood, the contested nature of the federal union, social contract theory, and popular sovereignty. We know far less, however, about the ways in which each of these debates was interconnected—how a particular account of the national social contract bolstered a broad conception of national power. The burden of what follows is to bring these connections and the once pervasive, if now less familiar, kinds of constitutional arguments that they yielded back into focus in order to underscore their original significance. They illuminate a now forgotten

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16. See generally, e.g., SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995); THOMAS L. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1988); C. BRADLEY THOMPSON, *AMERICA'S REVOLUTIONARY MIND: A MORAL HISTORY OF THE AMERICAN REVOLUTION AND THE DECLARATION THAT DEFINED IT* (2019); THOMAS G. WEST, *THE POLITICAL THEORY OF THE AMERICAN FOUNDING: NATURAL RIGHTS, PUBLIC POLICY, AND THE MORAL CONDITIONS OF FREEDOM* (2017); MICHAEL P. ZUCKERT, *THE NATURAL RIGHTS REPUBLIC: STUDIES IN THE FOUNDATION OF THE AMERICAN POLITICAL TRADITION* (1996); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907 (1993).

way of thinking about constitutionalism that was once inextricably intertwined with the original Constitution.

This Article proceeds as follows. Part I examines social contract theory, considering the ways in which it is often misunderstood. Rather than simply placing limits on government power, at the founding, this form of thinking helped empower government to act in the general welfare. Parts II and III discuss how founding-era nationalists leveraged social contract theory to support their expansive vision of national power up through the drafting of the federal Constitution. Part IV investigates how, during ratification, Federalists and anti-Federalists debated what the proposed Constitution implied about the nature of the federal union. Part V demonstrates how readily Federalists, following ratification, claimed that debates over national power under the Constitution ultimately turned on the character of the United States itself. Part VI shows how Republicans, despite sharply disagreeing with Federalists' conclusions about national power, nonetheless agreed with their guiding premise: that the national government's authority was determined by the kind of polity it represented. Ultimately, whether or not the United States was a nation made a decisive difference. From the standpoint of constitutionalism, Federalists effectively argued that the scope of the national government's power was a function of the kind of union it governed. And remarkably, to an extent seldom appreciated, their opponents agreed. The concept of nationhood was central to founding-era constitutional thought and, if we seek to understand the original Constitution on its own terms, we must understand why this was.

#### I. SOCIAL CONTRACT THEORY AT THE FOUNDING

Federalists' interest in nationhood owed a great deal to how they thought about polity formation and the origins of the social compact—the underlying foundations of the constitutional regime. It was here that social contract theory played such a foundational role in their arguments.

Understanding how requires first appreciating what prior study of this subject has missed. There is, of course, nothing novel in claiming that social contract thinking—which was utterly ubiquitous in early modern European political theory—informed Revolutionary-era American political thought.<sup>17</sup> Yet, virtually all attention that has been paid to this kind of founding-era thinking has focused on the protection of individual rights or the cordoning off of certain spheres of liberty and thus on *limitations* on government power.<sup>18</sup> Social contract theory was built on a thought experiment designed to understand why human beings would have left a hypothetical state of nature, in which they enjoyed natural liberty, for the protections of government.<sup>19</sup> People would have done so, students of this theory often

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17. See, e.g., *supra* note 16 and accompanying text.

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

19. Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 87–88 (2017) (reviewing RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 31–82 (2016)).

emphasize, to ensure protection of their individual natural rights.<sup>20</sup> Government, therefore, is best understood as a contract predicated on consent—a bargain made to sacrifice some liberty to ensure that the remainder is safely guarded.<sup>21</sup> By these terms, government power is inherently constrained and limited, and its exercise is to be watched with relentless suspicion. In short, on this view, social contract theory offered an account of limited government. Hardly any attention, however, has been given to the ways in which, in the hands of certain founding-era Americans, social contract thinking served to *expand* government power.<sup>22</sup> This is an oversight that both misses the thrust of social contract theory at the founding and the far-reaching uses to which some leading founders put it.

Analyses of founding-era social contract thinking have often narrowly focused on rights and limitations to government power because, too often, they are infected with anachronism. They tend to be tacitly guided by the modern libertarian presumption that liberty and state power are inherently at odds—locked in a zero-sum game.<sup>23</sup> Where government acts, liberty is threatened, meaning the state should strive to do the minimum necessary to maintain order and the rule of law without interfering with the retained rights of consenting citizens—who only would have parted with certain kinds of natural liberty to secure the reliance and consistency that regular legal order alone could provide.<sup>24</sup> This is why the founding generation purportedly conceived of rights as trumps against the government.<sup>25</sup> No matter how popular these assumptions are today or how frequently they are imposed on the founding, they would have made little sense in the eighteenth century.

At that time, power and liberty were not believed to be inherently at odds. To be sure, it was widely assumed that liberty was fragile and always under threat and that unchecked, tyrannical power was always quick to destroy it.<sup>26</sup> However, one protected liberty not by disabling government power but rather by empowering government in the right kind of way. This meant, above all, constructing representative institutions that, by embodying the people's will, protected the people's liberty.<sup>27</sup> There was, in fact, no solution to the problem of liberty other than robust political institutions.

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20. See, e.g., ZUCKERT, *supra* note 16, at 24–31.

21. *Id.* at 27–29.

22. Jud Campbell's work, which has done so much to illuminate social contract thinking at the founding, is an important exception. Even so, Campbell has primarily focused on the nature of rights at the founding and only gestured toward the ways in which some founders harnessed social contract thinking to defend the robust exercise of government power. For one of these brief forays, see Campbell, *supra* note 19, at 101–03, 109–11. My argument is indebted to his analysis of eighteenth-century social contract thinking.

23. See BARNETT, *supra* note 19, at 31–82; RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 3–6, 17–25 (2014); Philip Hamburger, *The Inversion of Rights and Power*, 63 *BUFF. L. REV.* 731, 738–52 (2015).

24. See BARNETT, *supra* note 19, at 31–82; EPSTEIN, *supra* note 23, at 3–6, 17–25.

25. Hamburger, *supra* note 23, at 752.

26. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 55–93 (enlarged ed. 1992).

27. Jonathan Gienapp, Response, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 *TEX. L. REV. ONLINE* 115, 118–26 (2019). For the deeper colonial roots of



In this regard, our familiar distinctions between individual and collective liberty often had little meaning at the founding. Residents of the eighteenth century surely would have recognized how those categories were distinct, but they tended to think of them in compatible terms. One was not protected at the expense or denial of the other; instead, protecting one often ensured the protection of the other.<sup>28</sup> Individual and collective rights to a free press and jury trial and to speak freely, assemble, and bear arms were most effectively secured by devising and empowering popular institutions that promoted, all at once, the people's liberty, welfare, and happiness.<sup>29</sup> The crucial distinction was not between government and liberty but between *representative* government (which protected liberty) and *unrepresentative* government (which did not). "Representation," proclaimed Moses Mather on the eve of the American Revolution, "is the feet upon which a free government stands."<sup>30</sup> Liberty was not the absence of coercion but a state of being, predicated on living in a free state and, thus, the conditions of that state being free.<sup>31</sup> Jud Campbell has compellingly demonstrated how founding-era Americans reconciled their commitment to retained fundamental rights and the power of republican governments to regulate those rights in the interest of the public good.<sup>32</sup> The latter did not violate commitment to the former; rather, it embodied the very essence of freedom.<sup>33</sup> Alexander Hamilton thus described the "great principle of the social compact" to be "that the chief object of government is to protect the rights of individuals by the united strength of the community."<sup>34</sup> The primary reason one studied natural rights and probed the origins of the social compact was to identify the kind of government that could act most credibly in the public interest.<sup>35</sup> As the town of Boston proclaimed in 1772, "[t]he natural Liberty of Man, by entering into Society, is abridg'd or restrain'd so far only as is necessary for the great End of Society, the best Good of the Whole."<sup>36</sup>

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this thinking, see generally BARBARA CLARK SMITH, *THE FREEDOMS WE LOST: CONSENT AND RESISTANCE IN REVOLUTIONARY AMERICA* (2010).

28. Gienapp, *supra* note 27, at 118–26.

29. Jud Campbell, *Natural Rights and the First Amendment*, 127 *YALE L.J.* 246, 265–66, 272–87, 304–21 (2017).

30. MOSES MATHER, *AMERICA'S APPEAL TO THE IMPARTIAL WORLD* 70 (Hartford, Ebenezer Watson 1775).

31. Gienapp, *supra* note 27, at 125–26. See generally QUENTIN SKINNER, *LIBERTY BEFORE LIBERALISM* (1998) (recounting the development of this theory in seventeenth-century England and exploring its impact on the early United States).

32. Campbell, *supra* note 29, at 265–66, 272–87, 304–21; Campbell, *supra* note 19, at 87–99, 111–12; Jud Campbell, *The Invention of First Amendment Federalism*, 97 *TEX. L. REV.* 517, 525–29 (2019); Jud Campbell, *Fundamental Rights at the American Founding* 7–9 (Dec. 9, 2020) (unpublished manuscript) (on file with author).

33. JOHN PHILLIP REID, *THE ANCIENT CONSTITUTION AND THE ORIGINS OF ANGLO-AMERICAN LIBERTY* 38–39 (2005).

34. *New York Assembly. Remarks on an Act Acknowledging the Independence of Vermont*, *DAILY ADVERTISER* (N.Y.), Apr. 5, 1787, reprinted in 4 *THE PAPERS OF ALEXANDER HAMILTON* 126, 126 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

35. See *id.*

36. *THE VOTES AND PROCEEDINGS OF THE FREEHOLDERS AND OTHER INHABITANTS OF THE TOWN OF BOSTON* 4–5 (Boston Edes & Gill 1772) [hereinafter, *VOTES AND PROCEEDINGS*].

Given this unfamiliar understanding of the relationship between liberty and power, social contract theory—although squarely focused on the retention and protection of liberty and used to understand the origins of political communities with just this aim in mind—had no trouble reconciling what we would think of as limited and expansive government. Government was limited through a variety of means, but none more important than representation.<sup>37</sup> A government that was representative, and thus *was* limited, could claim the power necessary to advance the public good—and, indeed, often had a duty to do so.<sup>38</sup> In the context of the American founding, social contract theory was, therefore, not simply or even primarily preoccupied with curbing government power but rather focused on offering a basis for the legitimate exercise of government power, thus realizing the fundamental aim of republican political organization.<sup>39</sup>

Because liberty was so entangled with representation, it mattered enormously for whom the government spoke—whom it could claim to embody and mirror.<sup>40</sup> Determining whom the government represented, and thus could act in the name of to pursue the public good, invited consideration of how the public related to its government. Here, social contract theory, given how it conceived of the origins and nature of the political community, provided potent answers.

Social contract theory furnished a conceptual framework for thinking about the basis of governance. It imagined a two-step process in which individuals formed, first, a social compact (a body politic) and then second, a system of government (a constitution).<sup>41</sup> “The first ‘collection’ of authority,” John Adams explained, was an “agreement” among individuals “to form themselves into a *nation, people, community, or body politic*.”<sup>42</sup> Alexander Hamilton, in his 1775 pamphlet, *The Farmer Refuted*, claimed similarly that “the origin of all civil government, justly established, must be a voluntary compact.”<sup>43</sup> “When Men enter into Society,” declared the town of Boston shortly before Americans declared independence, “by voluntary

37. See Campbell, *supra* note 19, at 96–98; Gienapp, *supra* note 27, at 125–26.

38. On the importance of the public good at the founding, see JAMES T. KLOPPENBERG, *TOWARD DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT* 337–38, 349–55, 428–33 (2016); WOOD, *supra* note 5, at 53–65, 179–80.

39. Campbell, *supra* note 19, at 87–99, 111–12; Gienapp, *supra* note 27, at 118–26.

40. On the logic of political representation at the founding and how it often emphasized the idea of mirroring or *re-presenting* the people at-large, see ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 72–75, 78–83, 209–10 (2014); ERIC SLAUTER, *THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION* 123–67 (2009). For characteristic statements from the founding, see JOHN ADAMS, *THOUGHTS ON GOVERNMENT: APPLICABLE TO THE PRESENT STATE OF THE AMERICAN COLONIES* 9–10 (Philadelphia, John Dunlap 1776); *Brutus III*, N.Y.J., Nov. 15, 1787, *reprinted in* 14 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION* 119, 120–22 (John P. Kaminski et al. eds., 1983).

41. Campbell, *supra* note 19, at 87–90; Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 10 *PUBLIUS* 101, 103–06 (1980).

42. JOHN ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* 6 (Philadelphia, Hall & Sellers 1787).

43. ALEXANDER HAMILTON, *THE FARMER REFUTED* 6 (New York, James Rivington 1775).

Consent . . . [they] form an . . . *original Compact*.”<sup>44</sup> The Massachusetts Constitution explicitly begins from this premise as well. Its preamble reads: “The body-politic is formed by a voluntary association of individuals: It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”<sup>45</sup> The social compact created a polity, the members of which then decided on how they would be governed.<sup>46</sup>

Step two followed. “The society being formed,” James Wilson elaborated in his *Lectures on Law*, next came “the formation of [a] government.”<sup>47</sup> The powers and obligations of the latter flowed from the constitution of the former, because the body politic both established the government to act in its name and retained sovereignty following that delegation.<sup>48</sup> “When the society was formed,” Wilson went on, “it possessed jointly all the previously separate and independent powers and rights of the individuals who formed it,” but it also obtained “all the other powers and rights, which result from the social union.”<sup>49</sup> The “aggregate of . . . powers” that “compose[d] the sovereignty of the society or nation”<sup>50</sup> was thus determined, in significant measure, by the *kind* of union that had been formed.<sup>51</sup> Different social compacts produced different sums of power that were delegated, in turn, to the governments presiding over them.<sup>52</sup> A government’s power thus reflected the nature of the sovereign agent that had given life to it.<sup>53</sup>

Throughout the eighteenth century, different writers and commentators reached different conclusions about the nature of the social contract, how its conceptual pieces fit together, and its implications for political authority. But, at the risk of oversimplification, most everybody at the founding agreed on the outlines of the framework just sketched.<sup>54</sup> And in the hands of nationalists in the 1780s—those who soon became Federalists and spearheaded the movement for federal constitutional reform—this framework held the potential for a dramatic expansion of national power.

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44. VOTES AND PROCEEDINGS, *supra* note 36, at 3.

45. MASS. CONST. pmb1.

46. *See id.*

47. JAMES WILSON, *Lectures on Law, Part 2, Chapter V: Of Municipal Law, reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 549, 554 (Kermit L. Hall & Mark David Hall eds., 2007).

48. *See id.* at 553–54.

49. *Id.* at 556.

50. *Id.*

51. *See id.*

52. *See id.*

53. Gienapp, *The Myth of the Constitutional Given*, *supra* note 15, at 201; Jud Campbell, *The Natures of Constitutional Histories*, BALKINIZATION (May 1, 2020), <https://balkin.blogspot.com/2020/05/the-natures-of-constitutional-histories.html> [<https://perma.cc/H2FM-242V>].

54. *See supra* notes 41–53 and accompanying text.

## II. A NATIONAL PEOPLE, A NATIONAL POLITY: FINDING THE NATION

With social contract theory firmly in mind, leading nationalists would come to argue that the full scope of national power under the Constitution turned on sovereignty and union: *who* had authorized the Constitution and for *what kind* of polity did that agent speak? The nature of the polity and the meaning of the Constitution were inextricably entwined. Without understanding the social compact (step one in social contract theory), it was impossible to interpret the resulting constitution (step two). Depending on the character of the union, the exact same constitutional provisions might yield a different ambit of constitutional power. It was thus impossible to know what the Constitution declared—and therefore licensed or prohibited—without first understanding the nature of the federal union for which it spoke.

In the context of the United States, sorting out the character of the polity and its attendant sovereignty was complicated by the federal nature of the Union. There was wide agreement that the people were, in some manner, sovereign. During the revolutionary struggle against Britain, Americans had rallied around the concept of popular sovereignty; and then, during their initial efforts to construct an independent constitutional order, they had deepened and refined their understanding of it.<sup>55</sup> But, even as a matter of constitutional theory, if it was clear that *the people* wielded sovereign authority, in the context of authorizing a national government to preside over the nascent American Union, it was much less clear *which* people delegated the relevant authority: the people of the United States or the people of the separate states. The answer determined whether the body politic was rightfully understood to be a union of sovereign states, a nation, or something in between. For those both committed and opposed to a stronger national government, these were foundational questions—the ones that needed to be answered in order to comprehend the full scope of the federal government’s power: which kind of sovereign people had constituted the government and which kind of polity did the Constitution speak for? Many Federalists would come to defend an expansive vision of national power based on the belief that the Constitution had been established by a national people who had previously formed a national polity.<sup>56</sup>

Nationalists began gesturing toward these conclusions throughout the 1780s as they decried and lamented the feeble state of the Union—particularly the impotent state of the national government that struggled to govern the country or address any of its mounting problems.<sup>57</sup> From these complaints emerged not just calls for sweeping reform (which would

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55. See WOOD, *supra* note 5, at 344–89, 445–46, 462–63 (offering the canonical account of this concept). Of course, the accepted notion of the “people” at the time usually referred to white men.

56. Gienapp, *The Myth of the Constitutional Given*, *supra* note 15, at 193–94, 201–04.

57. See generally MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 11–125 (2016) (discussing the problems of the 1780s and the criticisms of the Confederation government that they inspired); JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 23–34 (1996) (same).

eventually win converts toward the end of the decade)<sup>58</sup> but also creative accounts of the nature of union, ones that claimed that the United States had been born a nation.<sup>59</sup> In that regard, as soon-to-be Federalists at once called for significant constitutional change, they also emphasized what they believed already to be the case—that which demanded recognition and acceptance, rather than invention: the idea that, through the act of independence, the American people had formed a national social compact.<sup>60</sup> A genuine national government was needed not only to solve the problems crippling the Union but also to affirm the kind of political community that the Revolution had brought into existence: “an INDEPENDENT NATION.”<sup>61</sup>

As one of the earliest critics of the Confederation government and boldest champions of national power, Alexander Hamilton was among the first to suggest that, no matter the “want of power in Congress,”<sup>62</sup> the “want of method and energy in the administration,”<sup>63</sup> or the myriad other ways in which the Confederation was ill structured,<sup>64</sup> as a point of fact, the United States government had “done many of the highest acts of sovereignty.”<sup>65</sup> Among the most vital of these—beyond declaring war, establishing an army and navy, issuing money, making alliances with foreign powers, and forging a peace treaty—was the “declaration of independence”—the act of deciding that British Americans were an independent nation.<sup>66</sup> These feats of high sovereignty implied that the national government had been vested, from the

58. See RAKOVE, *supra* note 57, at 23–34.

59. See, e.g., JAMES WILSON, CONSIDERATIONS ON THE BANK OF NORTH-AMERICA 10 (Phila., Hall & Sellers 1785) (stating that, rather than enumerating the colonies separately, the Declaration of Independence declared the colonies were “UNITED”).

60. As will be explained, Jeffersonian Republicans later developed their own theory of the legal basis of the Union—a theory that they called “compact theory.” See *infra* Part VI. Although the terminology can be confusing, following the concepts and vocabulary of the period is important. Americans of all ideological stripes, and especially Federalists, frequently referred to the idea of a social compact by way of social contract theory. For a deeper explanation and comparison of social contract theory to compact theory, see *infra* note 187 and accompanying text.

61. Alexander Hamilton, *The Continentalist No. I*, N.Y. PACKET & AM. ADVERTISER, July 12, 1781, *reprinted in* 2 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 649, 649.

62. *Id.* at 650 (emphasis omitted); Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *in* 2 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 400, 401; see also Alexander Hamilton, *The Continentalist No. III*, N.Y. PACKET & AM. ADVERTISER, Aug. 9, 1781, *reprinted in* 2 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 660, 665; Alexander Hamilton, *The Continentalist No. V*, N.Y. PACKET & AM. ADVERTISER, Apr. 18, 1782, *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 75, 75–76; Alexander Hamilton, *The Continentalist No. VI*, N.Y. PACKET & AM. ADVERTISER, July 4, 1782, *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 99, 99–104 [hereinafter Hamilton, *The Continentalist No. VI*]. See generally Alexander Hamilton, *The Continentalist No. IV*, N.Y. PACKET & AM. ADVERTISER, Aug. 30, 1781, *reprinted in* 2 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 669.

63. Letter from Alexander Hamilton to James Duane, *supra* note 62, at 404.

64. *Id.* at 402–06; see also Hamilton, *supra* note 61, at 649–52; Hamilton, *The Continentalist No. VI*, *supra* note 62, at 105–06.

65. Letter from Alexander Hamilton to James Duane, *supra* note 62, at 401.

66. *Id.*; see also ALEXANDER HAMILTON, A LETTER FROM PHOCION TO THE CONSIDERATE CITIZENS OF NEW YORK ON THE POLITICS OF THE DAY (New York, Samuel Loudon 1784), *reprinted in* 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 483, 489–92.

beginning, with many (if not, perhaps, all) inherent national powers.<sup>67</sup> While, for political reasons, it was surely necessary to call a general convention to redraw the formal outlines of national power, Hamilton, the prodigiously talented New Yorker, claimed that it would be every bit as legitimate for Congress to merely “resum[e] and exercis[e] the discretionary powers . . . originally vested in them.”<sup>68</sup>

As the decade unfolded, Hamilton broadened his argument. Primarily in the context of defending former loyalists against what he took to be punitive postwar laws, he emphasized the obligations that the law of nations had placed on the United States.<sup>69</sup> Because, in his judgment, New York’s anti-loyalist legislation violated the peace treaty that Congress had negotiated with Britain and other European nations, the legislation violated the law of nations.<sup>70</sup> In making these arguments, Hamilton was further stressing the essential ways in which the United States had behaved as a sovereign nation and assumed the responsibilities of one. In claiming that the separate states were obligated to comply with the law of nations as well as the nation’s treaty obligations, Hamilton underscored the legal existence of the nation.<sup>71</sup>

Hamilton offered a conspicuous account of incipient nationhood and the exercise of its concomitant power. But even if he pointed to the nation’s legal existence, he had not quite offered an account of that nation’s origins or political foundations. That task would fall to other nationalist-minded champions of constitutional reform.

James Wilson, the Pennsylvania lawyer and adroit constitutional thinker, helped fill in the gaps that Hamilton had left—all while offering the most penetrating account of American nationhood and power advanced in the years prior to the Constitutional Convention.<sup>72</sup> Like Hamilton, Wilson had served in Congress and helped lead the nationalist charge from its earliest days.<sup>73</sup> Also like Hamilton, he simultaneously favored constitutional change on the ground that the Confederation government was much too weak, while defending that same government’s unrecognized inherent powers.<sup>74</sup> Unlike Hamilton, however, he tethered a recognition of nationhood and inherent

67. Letter from Alexander Hamilton to James Duane, *supra* note 62, at 401–02.

68. *Id.* at 407.

69. Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 844–46 (2006) (describing Hamilton’s legal work defending a loyalist in *Rutgers v. Waddington*). For a discussion of the broader phenomenon of state legislatures passing punitive laws against former loyalists, see generally *id.*

70. See 1 THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY 356 (Julius Goebel Jr. ed., 1964) (excerpting notes Hamilton made to prepare for his client’s defense in *Rutgers v. Waddington*).

71. See Hulsebosch, *supra* note 69, at 844–46. On nationalists’ commitment to the law of nations at this time, see generally Golove & Hulsebosch, *supra* note 10.

72. On Wilson’s constitutionalism, see generally Robert Green McCloskey, *Introduction to 1 JAMES WILSON, THE WORKS OF JAMES WILSON 1* (Robert Green McCloskey ed., 1967).

73. On the alliance nationalists forged beginning in the early 1780s, see JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 183–84, 293–94, 307, 319–26* (1979).

74. See Gienapp, *National Power and the Presidency*, *supra* note 15, at 133–34, 144–45.

national power to an account of the nation's underlying social compact, explaining more precisely why an American nation existed and how that fact impacted the resulting delegation of authority to that nation's government.<sup>75</sup>

Wilson did so in defense of the national government's authority under the Articles of Confederation to establish the nation's first national bank: the Bank of North America.<sup>76</sup> The Articles had both failed to enumerate the relevant power and also made clear that the state governments retained all powers "not . . . expressly delegated."<sup>77</sup> Nevertheless, Wilson explained, the inquiry needed to begin not with the Articles but rather with the Declaration of Independence—which, he contended, had established not thirteen autonomous states but a single nation, and with it, a national people.<sup>78</sup> Consequently, the government presiding over that nation was the creation, not of the people of the states but of the sovereign people of the United States. This meant that the national government derived its powers from two separate sources: some were expressly delegated by the states through the Articles, but others "*result[ed] from the union of the whole.*"<sup>79</sup> "The United States," Wilson contended, "have *general* rights, *general* powers, and *general* obligations, not derived from *any* particular States, nor from *all* the particular States . . . but *resulting from the union of the whole.*"<sup>80</sup> Any power that was "*general*" in character—that which the separate states could not competently exercise on their own—was delegated independent of the states.<sup>81</sup> Upon separating from Great Britain, those powers were assigned to the Union as a whole and the subsequent "confederation," Wilson stressed, did not "weaken or abridge the *powers* and *rights*, to which the United States were *previously* entitled."<sup>82</sup> These broad powers did not amount to national plenary power—many significant powers were reserved to the states.<sup>83</sup> But there was considerable space between a national government vested with plenary authority and one that was limited to formally delegated powers.<sup>84</sup> It was easy to reject the latter without embracing the former, and Wilson assumed, drawing on social contract theory, that a credible account of national power rested somewhere between those poles.<sup>85</sup>

Wilson had established, to his satisfaction, a basis for a national social compact. Independence had created a national people, not merely a collection of distinct peoples in distinct states. The Declaration of Independence itself—by speaking on behalf of a plural noun, "*these* UNITED

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75. See Gienapp, *The Myth of the Constitutional Given*, *supra* note 15, at 201–02.

76. See generally WILSON, *supra* note 59.

77. ARTICLES OF CONFEDERATION of 1781, art. II.

78. WILSON, *supra* note 59, at 10.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. See *id.* at 9.

84. See *id.* at 10.

85. *Id.* at 9–11.

colonies”—recognized that broader collective.<sup>86</sup> Because a national people and a national polity preceded the Articles of Confederation, the Confederation government derived its authority every bit as much from the nation that it governed as it did from the states that delegated particular powers to it.<sup>87</sup> “To many purposes,” Wilson wrote, “the United States are to be considered as one *undivided, independent* nation; and as possessed of *all the rights, and powers, and properties*, by the law of nations *incident* to such.”<sup>88</sup> The nature of the Union dictated the powers of government, so for Wilson, and nationalists to follow,<sup>89</sup> it made all the difference in the world that the nation had come first.

### III. CONSTITUTING A NATION: THE CONSTITUTIONAL CONVENTION

This form of nationalist thinking, which assumed that a national social contract had been forged through the act of independence, emerged swiftly and potently at the Constitutional Convention. In an early debate with Luther Martin over the nature of the Union, Wilson brandished the Declaration<sup>90</sup> and quoted from it at length (something that was highly unusual for the time),<sup>91</sup> confident that it confirmed that “the *United Colonies*” were originally “independent, not *Individually* but *Unitedly*.”<sup>92</sup> Independence had brought a national people into being and with it a national social compact. The task in Philadelphia was to devise a new constitution for that particular compact. Hamilton immediately “assented to the doctrine of Mr. Wilson,” denying (no doubt based on his own earlier reflections on the subject) “the doctrine that the States were thrown into a State of nature” through independence.<sup>93</sup> Wilson even insisted that “[i]n the beginning . . . congress themselves were as one state”—a single national body presiding over a

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86. *Id.* at 10 (alteration in original) (quoting THE DECLARATION OF INDEPENDENCE para. 5 (U.S. 1776)).

87. *See supra* notes 78–86 and accompanying text.

88. WILSON, *supra* note 59, at 10.

89. *See infra* Part III.

90. Danielle Allen and Emily Sneff have persuasively argued that Wilson likely commissioned a previously unknown copy of the Declaration of Independence—the “Sussex Declaration”—for his own personal use. *See* Danielle Allen & Emily Sneff, *Golden Letters: James Wilson, the Declaration of Independence, and the Sussex Declaration*, 17 GEO. J.L. & PUB. POL’Y 193, 209–16 (2019). Furthermore, Wilson possibly read from this version at the Convention. *See id.* at 218–23. Unlike the official Declaration, the Sussex Declaration emphasized collective national unity by placing the names of the signatories together rather than grouping them by the delegates’ states of origin. *See id.* at 214–16.

91. Few Americans paid much attention to the Declaration at this time, as the document had been long forgotten. *See* PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 154–70 (1997). Only later did it become a revered text. *See id.* at 170–89; *see also* Bernadette Meyler, *Between the States and the Signers: The Politics of the Declaration of Independence Before the Civil War*, 89 S. CAL. L. REV. 541, 553–71 (2016) (describing how, in the early decades of the nineteenth century, the Declaration became a contested political symbol that was used to justify rival accounts of union).

92. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (June 19, 1787) (statement of James Wilson).

93. *Id.* at 324 (June 19, 1787) (statement of Alexander Hamilton).



nation.<sup>94</sup> At this time, he suggested (rather implausibly but in order to stress his own point about the Declaration) “dissentions or state interests were not known.”<sup>95</sup>

Rufus King, a leading nationalist from Massachusetts, agreed but took the point in a different direction. Because they did not precede the nation, “[n]one of the states are now sovereign or independent,” he declared.<sup>96</sup> They were, in fact, “subordinate corporations or Societies.”<sup>97</sup> “If they formed a confederacy in some respects,” importantly, “they formed a Nation in others.”<sup>98</sup> It was not out of necessity or the needs of confederation that so “[m]any . . . essential rights are vested in congress,” King explained.<sup>99</sup> There was a crucial, underlying reason why “[n]one of the states, individually or collectively, but in congress, have the rights of *peace* or *war*.”<sup>100</sup> That was because, as he tellingly put it, “[t]his is a union of the men of those states.”<sup>101</sup> Indeed, a “Union of the States is a union of the men composing them, from whence a *national* character results to the whole.”<sup>102</sup> The Union was a compact of a national people, of individuals who lived in separate states but, from the standpoint of sovereignty, were not *of* the separate states. “To certain points,” King therefore proclaimed, “we are now a united people.”<sup>103</sup> “Consolidation,” he observed, “is already established.”<sup>104</sup> As Hamilton had argued several years earlier, it was already a brute fact.<sup>105</sup> This was why King considered “the proposed Government as substantially and formally, a General and National Government over the people of America”—precisely because it was *over* the *people of America*, rather than the people of the several states.<sup>106</sup> These arguments regarding the nature of the polity provided a crucial foundation from which so many other delegates claimed throughout the Convention that, as Hamilton put it, the “national government ought . . . to have full sovereignty.”<sup>107</sup>

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94. *Id.* at 170 (June 8, 1787) (statement of James Wilson).

95. *Id.* Though, however implausible it might have been, it is worth stressing how ambiguous the legal status of the states was during these early years of the Union. See Mark A. Graber, *State Constitutions as National Constitutions*, 69 ARK. L. REV. 371, 373–78, 421–23 (2016) (investigating “early state constitutions, state declarations of independence, and state instructions to delegates to the Continental Congress” for evidence of how state leaders conceived of the states’ legal condition).

96. 1 FARRAND’S RECORDS, *supra* note 92, at 328 (June 19, 1787) (statement of Rufus King).

97. *Id.* at 331.

98. *Id.* at 324.

99. *Id.* at 328.

100. *Id.*

101. *Id.*

102. *Id.* at 323.

103. *Id.* at 328.

104. *Id.*

105. See Hamilton, *supra* note 61, at 649; Letter from Alexander Hamilton to James Duane, *supra* note 62, at 401, 407.

106. 2 FARRAND’S RECORDS, *supra* note 92, at 6 (July 14, 1787) (statement of Rufus King).

107. 1 *id.* at 328 (June 19, 1787) (statement of Alexander Hamilton); see also *id.* at 305 (June 18, 1787) (outline of statement of Alexander Hamilton).

The nationalist understanding of the polity also shaped the drafting of the Constitution in profound ways. In particular, it no doubt shaded how many delegates understood the enumeration of legislative powers that were eventually written into Article I. The mere fact of the enumeration did not mean, to their eyes, that national power was limited to it. As John Mikhail has shown, with his theory of delegated national authority surely in mind, Wilson dramatically revised what became the Necessary and Proper Clause while serving on the Committee of Detail (the committee charged with compiling a working draft of the Constitution roughly halfway through the Convention).<sup>108</sup> The national legislature would enjoy the power to make all necessary and proper laws, not only to carry out its “foregoing powers” (those enumerated in what would become Article I, Section 8) but also “all other Powers” that had been vested “in the Government of the United States.”<sup>109</sup> This clause confirmed that there were “other Powers,” independent of anything enumerated, that were delegated to the national government as a whole, based on the character of the preexisting union. These revisions provided a textual reminder of what nationalists already assumed to be the case: that certain national powers resulted from the formation of the American Union itself.<sup>110</sup> These powers were not “vested” via text but through an entirely different mechanism. And thus, the phrase “this Constitution,” found in the “necessary and proper” clause and elsewhere throughout the document, described not merely the textual content being written in Philadelphia but also, necessarily, the underlying constitution of the polity on which that text would fundamentally be based. Those powers “vested” by “this Constitution,” therefore, could not be identified solely based on the expressed text found in the written Constitution, because the content of “this Constitution” was as much a function of the kind of sovereign people who had established it as it was the discrete textual provisions written into it.

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108. Mikhail, *The Necessary and Proper Clauses*, *supra* note 15, at 1096–106. For the definitive study of the Committee of Detail, see William Ewald, *The Committee of Detail*, 28 CONST. COMMENT. 197 (2012). On Wilson’s role on the committee, see *id.* at 213–14, 242–46, 276–83. For the committee’s appointment, see 2 FARRAND’S RECORDS, *supra* note 92, at 87, 95–98, 106. For the committee’s work, see *id.* at 129–74.

109. U.S. CONST. art. I, § 8; Mikhail, *The Necessary and Proper Clauses*, *supra* note 15, at 1099–101, 1121–28.

110. See, e.g., WILSON, *supra* note 59, at 10–11; *supra* notes 92–107 and accompanying text. Nationalists, therefore, presumably believed that the final enumeration of legislative powers found in the Constitution incorporated, rather than eliminated, the principle advanced in Resolution VI of the Virginia Plan (the initial draft for a new constitution presented at the Convention). Resolution VI called to vest the national legislature with the authority “to legislate in all cases to which the separate states are incompetent” or “in which the harmony of the United States may be interrupted.” See 1 FARRAND’S RECORDS, *supra* note 92, at 21 (May 29, 1787) (Virginia Plan). The Committee of Detail replaced Resolution VI with an enumeration of legislative powers, but social contract theory enabled nationalists to explain why Resolution VI endured—why, thanks to the nature of union, the national government *already* claimed the authority to address genuinely national ends. See Gienapp, *National Power and the Presidency*, *supra* note 15, at 145–46.

Wilson's Committee of Detail work was soon fortified by his nationalist ally, Gouverneur Morris, on the Committee of Style—which was assigned the task of producing a final draft of the Constitution.<sup>111</sup> Morris, quite possibly with Wilson's assistance,<sup>112</sup> dramatically reworked the Constitution's Preamble (which Wilson had initially drafted on the Committee of Detail).<sup>113</sup> Of enormous importance for the nationalist cause, the final version unambiguously established "We the People of the United States" as the Constitution's founding agent.<sup>114</sup> Especially when combined with what punctuated the document—rules for ratification that empowered the people themselves, acting through special ratifying conventions, rather than the state legislatures, to consider the new Constitution<sup>115</sup>—these opening words did away with the lingering residue of the Articles. Even under the Articles, the states could only delegate and retain those powers they could competently exercise;<sup>116</sup> but now, by so dramatically undermining the states' claims to sovereign authority, the Constitution further underscored the primacy of the Union. Or so nationalists believed.<sup>117</sup> In addition, and as important, the final Preamble specified six specific purposes for which the new national government would be established—including the need to "promote the General Welfare"<sup>118</sup>—which could be read as the referent of the "all other powers" so conspicuously referenced in the revised "necessary and proper" clause: a set of national ends that a national people licensed its national government to pursue.<sup>119</sup>

The Preamble was proof positive of the importance of social contract theory to the nationalist view. It served as the clearest evidence imaginable of how so many Federalists understood the nature of the American social compact and thus, would have read the final Constitution.<sup>120</sup> Like the "all other powers" clause, the Preamble did not vest any power in the new government but rather reinforced what was already believed to be vested,<sup>121</sup>

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111. See 2 FARRAND'S RECORDS, *supra* note 92, at 547, 553 (documenting the appointment of a committee "to revise the style of and arrange the articles agreed to" and listing Gouverneur Morris as a committee member); *id.* at 565–80 (documenting the committee's final work).

112. Even though Wilson was not formally appointed to the Committee of Style, he might have unofficially helped with the final drafting. Based on a visit with Convention delegate Abraham Baldwin of Georgia, Ezra Stiles of Connecticut recorded in his diary that Baldwin had claimed "Messrs Morris & Wilson had the chief hand in the last Arrangt & Composition" of the Constitution. See Ezra Stiles, *Diary* (Dec. 21, 1787), reprinted in 3 FARRAND'S RECORDS, *supra* note 97, at 168, 170.

113. William Michael Treanor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 119 MICH. L. REV. (forthcoming 2021) (manuscript at 78–87), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3383183](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3383183) [<https://perma.cc/UHT8-LZGV>].

114. U.S. CONST. pmb1.

115. *Id.* art. VII.

116. See WILSON, *supra* note 59, at 10.

117. See Gienapp, *The Myth of the Constitutional Given*, *supra* note 15, at 198–99.

118. U.S. CONST. pmb1.

119. Mikhail, *The Constitution and the Philosophy of Language*, *supra* note 15, at 109–103.

120. See *supra* notes 113–19 and accompanying text.

121. See *supra* notes 109–10 and accompanying text.

serving as both proof of a particular understanding of the federal Union and reminder of what necessarily followed from that fact. As under the Articles, the proposed national government lacked plenary authority. But thanks to the polity set to establish it, the government would enjoy vastly more authority than the sum of enumerated powers expressed in the written Constitution. As far as nationalists were concerned, the national government would have all of the power entitled to a government established by a national people and its nation—no more, no less.

#### IV. WE THE PEOPLE VS. WE THE STATES: RATIFICATION

During ratification, several nationalists drew out these readings, appealing to social contract theory to explicate and defend the proposed Constitution. James Wilson, fresh off his command performance in Philadelphia, was especially eager to ground understanding of the new system of government in a debate over the nature of the polity.<sup>122</sup> What was the Constitution and who had authorized it? Critics were confused on both counts, Wilson contended, for contrary to what they maintained, “[t]his . . . is not a government founded upon compact.”<sup>123</sup> That was because “[t]here can be no compact unless there are more parties than one,”<sup>124</sup> and the Constitution recognized but one party: “WE, THE PEOPLE OF THE UNITED STATES.”<sup>125</sup> If one studied the Preamble and the document as a whole, “the system itself tells you what it is,” Wilson stressed.<sup>126</sup> It was neither a treaty nor a peace pact; rather, “it is an ordinance and establishment of the people”—a national people.<sup>127</sup>

Of course, many founding-era Americans sharply disagreed with the nationalists’ aims, but beginning with the ratification debates, to a striking degree, disputes over the Constitution were defined on the nationalists’ terms.<sup>128</sup> Indeed, it was precisely because nationalists such as Wilson, Morris, King, and Hamilton were right—if not about how much national power was preferable, then about the relationship between the constitution of the polity and the constitution of its government—that opponents found the proposed Constitution so threatening.<sup>129</sup>

The Preamble immediately caught anti-Federalists’ attention. “I confess,” Samuel Adams uneasily reported, “as I enter the Building I stumble at the Threshold. I meet with a National Government, instead of a f[e]deral Union

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122. See *infra* notes 123–27 and accompanying text.

123. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 550, 552, 555 (Merrill Jensen ed., 1976) (Dec. 11, 1787) (statement of James Wilson).

124. *Id.* at 555.

125. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA, *supra* note 123, at 465, 493–94 (Dec. 4, 1787) (statement of James Wilson).

126. *Id.* at 556 (Dec. 11, 1787) (statement of James Wilson).

127. *Id.* at 555–56.

128. Gienapp, *The Myth of the Constitutional Given*, *supra* note 15, at 198–201, 204–05.

129. *Id.* at 204–05.

of Sovereign States.”<sup>130</sup> At its “very commencement,” observed Cincinnatus in direct response to Wilson, the Constitution “prescribe[s] this remarkable declaration—*We the People of the United States*.”<sup>131</sup> Patrick Henry echoed this sentiment most famously, asking why the Constitution began: “*We, the People*, instead of *We, the States*?”<sup>132</sup> While Henry’s quip is best known, it was hardly the only one.

The Preamble proved so threatening because anti-Federalists perfectly understood, much as Federalists did, that it revealed something substantive about the kind of union the United States would be under the Constitution. The proposed Constitution presupposed a certain kind of federal polity, one that revealed it to be “a compact between individuals entering into society,” William Findley observed, “and not between separate states enjoying independent power and delegating a portion of that power for their common benefit.”<sup>133</sup> Indeed, Robert Whitehill claimed in the Pennsylvania ratifying convention, the Preamble showed “the principle of confederation excluded, and a new unwieldy system of consolidated empire . . . set up upon [it].”<sup>134</sup> Thanks to what it said about the underlying polity, anti-Federalists assumed, the Constitution entitled the national government to more power than was expressly enumerated. “The inference is natural,” Brutus complained,<sup>135</sup> based on “the great end of the constitution . . . to be collected from the preamble,”<sup>136</sup> that “the [national] legislature will have an authority to make all laws which they shall judge necessary for the common safety, and to promote the general welfare.”<sup>137</sup> These implications were only reinforced, an anti-Federalist author writing under the pseudonym “An Old Whig”<sup>138</sup>

130. Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), in 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: MASSACHUSETTS 349, 349 (John P. Kaminski et al. eds., 1997).

131. *Cincinnatus V: To James Wilson, Esquire*, N.Y.J., Nov. 29, 1787, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 303, 307.

132. 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: VIRGINIA 915, 930 (John P. Kaminski et al. eds., 1990) (June 4, 1788) (statement of Patrick Henry).

133. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA, *supra* note 123, at 444, 447–48 (Dec. 1, 1787) (statement of William Findley); see also Luther Martin, *Genuine Information IV*, BALT. MD. GAZETTE, Jan. 8, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 296, 297 (“It is in its very introduction declared to be a compact between the *people* of the United States *as individuals* . . .”).

134. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA, *supra* note 123, at 382, 393 (Nov. 28, 1787) (statement of Robert Whitehill).

135. *Brutus V*, N.Y.J., Dec. 13, 1787, reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 422, 423.

136. *Brutus XII*, N.Y.J., Feb. 7, 1788, reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 72, 74.

137. *Brutus V*, *supra* note 135, at 423.

138. Some believe that “An Old Whig” was George Bryan, either writing alone or as part of a wider group of writers. See 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 376.

believed, by the inclusion of a clause “for carrying into execution ALL OTHER POWERS,” which indicated that “other powers may be assumed hereafter as contained by implication in this constitution.”<sup>139</sup> Nationalists were not alone in their reading of the Necessary and Proper Clause, in particular Wilson’s strategic changes to it.

Those Federalists who were less committed to expansive national power, such as James Madison, worked to reassure anti-Federalists that the proposed Constitution delegated powers that were, in fact, “few and defined.”<sup>140</sup> Though, importantly, Madison’s disagreement with the nationalists did not stop there. Despite supporting the Constitution, he resisted the nationalist account of union. While it might have seemed, Madison argued, “that the Constitution is to be founded on the assent and ratification of the people of America,” on closer examination, that “assent and ratification is to be given by the people, not as individuals composing one entire nation; but as composing the distinct and independent States to which they respectively belong.”<sup>141</sup> Therefore, the “act . . . establishing the Constitution,” he concluded, “will not be a *national* but a *federal* act.”<sup>142</sup> Madison thus believed that national powers under the Constitution would be “few and defined,” in part, because a nonnational people were set to establish its legitimacy.<sup>143</sup>

Nationalists such as Wilson, who insisted, in contrast to Madison, that the Constitution would be “ordained and established by the people themselves”<sup>144</sup> because “[t]here can be no compact unless there are more parties than one,”<sup>145</sup> nonetheless, on account of the rhetorical and political needs of the moment, offered their own reassurances to anti-Federalists. Being the skilled lawyer that he was, however, Wilson made sure to leave room for his own genuine understandings of national power and union. For instance, “where the powers are particularly enumerated,” he pledged “the implied result is, that nothing more is intended to be given, than what is so

139. *An Old Whig II*, PHILA. INDEP. GAZETTEER, Oct. 17, 1787, reprinted in 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 399, 402–03.

140. THE FEDERALIST NO. 45 (James Madison), reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 476, 479; see also 27 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: SOUTH CAROLINA 90, 97 (John P. Kaminski et al. eds., 2016) (Jan. 16, 1788) (statement of Charles Pinckney) (“The distinction which has often been taken between the nature of a federal and state government appeared to be conclusive—that in the former no powers could be executed or assumed but such as were expressly delegated, and in the latter the indefinite power was given to the government, except upon points that were by express compact reserved to the people.”).

141. THE FEDERALIST NO. 39 (James Madison), reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, *supra* note 40, at 380, 383.

142. *Id.*

143. THE FEDERALIST NO. 45 (James Madison), *supra* note 140, at 479.

144. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA, *supra* note 123, at 550, 556 (Dec. 11, 1787) (statement of James Wilson).

145. *Id.* at 555.

enumerated, unless,” he made sure to add, “*it results from the nature of the government itself.*”<sup>146</sup> The federal government would be able to exercise only those powers delegated to it, but that, of course, raised the question of how power was delegated under a constitution like the one proposed in the first place. Here, Wilson reminded careful listeners: “I consider the people of the United States, as forming one great community,” while “the people of the different states” formed communities “on a lesser scale.”<sup>147</sup> “From this great division of the people into distinct communities,” he went on, different allotments of power were “given to the governments, according to the nature, number, and magnitude of their objects.”<sup>148</sup> Those objects were a function of the polity that constituted the government. The sum of delegated authority was limited to what happened to be enumerated if—and *only* if—the underlying polity happened to be a collection of sovereign states rather than a far-flung sovereign people. If it was the latter—as nationalists insisted it was—then the sum of delegated power was greater than if it was not.

No matter how many Federalists hinted otherwise to help ensure ratification, therefore, few skeptics were pacified by these assurances because the Federalists’ foundational assumption resonated. Most assumed that there was indeed an inescapable relationship between the constitutional text and the underlying polity, one that could not be ignored.

#### V. DEBATING NATIONAL POWER THROUGH THE NATURE OF THE POLITY

After ratification, these fault lines continued to shape constitutional debate in profound ways. To an extent often not appreciated, defenders of national power instinctively appealed to the kinds of nationalist social contract arguments that had emerged in the 1780s and to powerful effect.

They did so in a range of important debates, though perhaps nowhere quite as significantly as during the debate over Alexander Hamilton’s proposed national bank.<sup>149</sup> In the House of Representatives, bank defenders appealed to the nature of the polity and government with as much frequency as they parsed the Constitution’s textual commands. They claimed, as Wilson and King had earlier, that the national government’s power was shaped by the character of the underlying federal union: “by the very nature of government,” contended Fisher Ames, the quick-witted representative from Massachusetts, “the legislature had an implied power of using every mean not positively prohibited by the constitution, to execute the ends for which that government was instituted.”<sup>150</sup> The Preamble, he continued, “vested

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146. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA, *supra* note 123, at 465, 470 (emphasis added) (Dec. 4, 1787) (statement of James Wilson).

147. *Id.* at 472.

148. *Id.*

149. Gienapp, *The Myth of the Constitutional Given*, *supra* note 15, at 205–11. On the bank debate as a whole, see JONATHAN GIENAPP, *THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 202–47* (2018).

150. *Philadelphia, Feb. 9.*, GEN. ADVERTISER (Phila.), Feb. 9, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF

Congress with the authority over all objects of national concern or of a general nature.”<sup>151</sup>

Numerous bank defenders echoed Ames. “The principles of the government and ends of the constitution,” John Laurance declared, “were expressed in the preamble.”<sup>152</sup> Among those principles was the fact of a national people and polity. As John Vining of Delaware explained, by virtue of the Declaration of Independence, the United States “derive[d] all the powers appertaining to a nation,” which included the specific “power under consideration”—the right to charter a national bank.<sup>153</sup>

When it came time for Hamilton to offer his own opinion on the constitutionality of the proposed bank, he too relied on social contract principles to justify a more expansive set of powers for the national government, though his appeal to these precepts was subtler.<sup>154</sup> He did not underscore the Preamble, nor did he speak explicitly about a national people having formed a national polity.<sup>155</sup> But he did allude to the formation of political society to justify a broad interpretation of the Constitution’s powers. “[A]ll government is a delegation of power,” he wrote, and “how much is delegated in each case” turned on “fair reasoning & construction upon the particular provisions of the constitution—*taking as guides the general principles & general ends of government.*”<sup>156</sup> Interpretation needed to be guided by a fair assessment of the general principles and ends of government, something to be derived from the formation of the underlying social compact.<sup>157</sup> With these ends of government in mind, it was fair to assume that “the powers contained in a constitution of government . . . ought to be construed liberally, in advancement of the public good.”<sup>158</sup> Because the American people had entered into a common political society—that is, because they had formed a national social compact—the government established for that society was necessarily empowered to promote the general welfare.<sup>159</sup> As long as a liberal exercise of power was “not contrary

AMERICA 385, 386 (Charlene Bangs Bickford et al. eds., 1995) (statement of Fisher Ames, Feb. 3, 1791).

151. *Philadelphia, Feb. 10.*, GEN. ADVERTISER (Phila.), Feb. 10, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 150, at 387, 389 (statement of Fisher Ames, Feb. 3, 1791).

152. *Philadelphia, Feb. 15.*, GEN. ADVERTISER (Phila.), Feb. 15, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 150, at 412, 413 (statement of John Laurance, Feb. 4, 1791).

153. *Congress. House of Representatives. Tuesday, Feb. 8.*, GAZETTE OF THE U.S. (Phila.), Apr. 16, 1791, *reprinted in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra* note 150, at 471, 472 (statement of John Vining, Feb. 8, 1791).

154. For a related discussion, see Campbell, *supra* note 19, at 101–03.

155. Gienapp, *The Myth of the Constitutional Given*, *supra* note 15, at 208–09.

156. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (1791), *reprinted in* 8 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 34, at 97, 100 (emphasis added).

157. *See id.*

158. *Id.* at 105.

159. *See id.*



to the essential ends of political society,” then that government was justified to pursue the general purposes for which that society had been established in the first place.<sup>160</sup> To an important degree, then, Hamilton based his argument on an account of the nation’s underlying compact.

Even more emphatically, the U.S. Supreme Court’s ruling in *Chisholm v. Georgia*,<sup>161</sup> orchestrated by leading nationalists Justice James Wilson and Chief Justice John Jay, firmly relied on social contract theory. The entire question of whether states could be sued by residents of other states came down, in their minds, to the nature of the United States itself—to what kind of people and community had given life to the Constitution.<sup>162</sup> The distribution of sovereignty in the Union tracked the nature of the Union and turned on the kind of people that had brought it into being. The Constitution’s text did not, and could not, stand alone. Its meaning was, ultimately, a function of the kind of sovereign agent who had authorized it and, in turn, the kind of union for which that sovereign agent spoke. Just as in the eyes of leading Federalists it was impossible to determine whether the national government enjoyed a power to charter a national bank without first understanding the character of the Union,<sup>163</sup> so too was it impossible to sort out state suability (and related issues of retained sovereignty) by simply fixating on the Constitution’s expressed text. The issue in *Chisholm* turned on a question that preceded the text: whether the United States was a nation of genuine legal standing.<sup>164</sup>

In determining the issue in question, Wilson dissected principles of general jurisprudence, the laws and practices of the various states, and the law of the Constitution.<sup>165</sup> But all of this detailed analysis was preceded by a more basic consideration, one that ultimately shaped and, in many ways, drove the remainder of the inquiry. “The question to be determined,” he stated at the outset,

is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this—“do the people of the United States form a Nation?”<sup>166</sup>

Here was the foundational question.

Answering it required probing the nature of sovereignty in the United States and particularly the ways in which the American Revolution had transformed it. In taking stock of Americans’ recent history, Wilson remarked that all too often states and sovereigns had been conflated, a mistake Americans had not made. “To the Constitution of the United States,”

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160. *Id.* at 98.

161. 2 U.S. (2 Dall.) 419 (1793).

162. *Id.* at 453, 470–71.

163. *See supra* notes 150–60 and accompanying text.

164. *See supra* note 162 and accompanying text.

165. *Chisholm*, 2 U.S. (2 Dall.) at 453.

166. *Id.* (emphasis omitted).

he explained, “the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety . . . [the] ‘SOVEREIGN’ people of the United States.”<sup>167</sup> Neither the nation-state nor the individual states that comprised the American Union were sovereign.<sup>168</sup> Only the people who had brought both kinds of states into being merited that exalted designation.<sup>169</sup> (This, among many reasons, was, to Wilson’s mind, why Blackstone’s theory of law, based on the command of a superior governmental sovereign, was so deeply mistaken.)<sup>170</sup> If “the majesty of the people,” rather than “the prerogative of Kings” or the “sovereignty of [s]tates” (the conventional focus of political and legal writing), was the only authority known in the wake of the Revolution, then the question boiled down to: which kind of people?<sup>171</sup>

For Wilson, the answer was clear: a national people. “[O]ur national scene opens with the most magnificent object, which the nation could present,” he averred, “[t]he PEOPLE of the United States’ are the first personages introduced.”<sup>172</sup> And, quoting the Preamble, he continued “[i]n order, therefore, to form a more perfect union, to establish justice, to ensure domestic tranquillity, to provide for common defence, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present Constitution.”<sup>173</sup> Consequently, Wilson concluded, taking “a combined and comprehensive view, the general texture of the Constitution” confirmed that “the people of the United States intended to form themselves into a nation for national purposes.”<sup>174</sup>

Jay offered a comparable analysis. The matter of whether Georgia, or any other state, enjoyed sovereign immunity turned on the Constitution’s legal foundations. And on this score, what mattered above all was that “the people, in their collective and national capacity, established the present Constitution.”<sup>175</sup> Jay based this conclusion primarily on a historical account. “The Revolution, or rather the Declaration of Independence,” he observed, “found the people already united for general purposes.”<sup>176</sup> He continued:

From the crown of Great Britain, the sovereignty of their country passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed not to the people of the Colony or States within whose limits they were situated, but to the whole people . . .<sup>177</sup>

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167. *Id.* at 454 (emphasis omitted).

168. *See id.*

169. *See id.*

170. *Id.* at 458.

171. *Id.* at 463 (emphasis omitted).

172. *Id.* (emphasis omitted).

173. *Id.* (emphasis omitted).

174. *Id.* at 465 (emphasis omitted).

175. *Id.* at 470.

176. *Id.*

177. *Id.* (emphasis omitted).

Echoing Wilson's argument in defense of the Bank of North America,<sup>178</sup> Jay stressed that the act of declaring independence from Britain had established a national people. This national people then gave voice to "their own proper sovereignty" in "declar[ing] with becoming dignity, 'We the *people* of the *United States*, do ordain and establish this Constitution.'"<sup>179</sup> "Here we see," Jay noted, "the people acting as sovereigns of the whole country and in the language of sovereignty, establishing a Constitution by which it was their will that the State Governments should be bound, and to which the State Constitutions should be made to conform."<sup>180</sup> Everything came down to the fact that a national people had brought the American legal order into being.

Of course, *Chisholm* caused consternation, and the Eleventh Amendment eventually nullified its narrow holding.<sup>181</sup> But even if some people at the time and many since have assumed that the Amendment established a broader principle of state sovereign immunity, there is no reason to believe that nationalists concluded that the amendment undermined the broader account of national popular sovereignty on which the Court's decision had been based. To at least nationalist eyes, the Eleventh Amendment protected states from retrospective liability on claims predating the Constitution.<sup>182</sup> But that said nothing about claims incurred thereafter.<sup>183</sup> Nor, more importantly, did it unsettle the fundamental principle announced in *Chisholm*, which remained as undeniable as it had been since the Constitution took effect: that the people of the United States, as a national people, had created a nation.<sup>184</sup>

Wilson's and Jay's enquiries requires reinforced what so many nationalists had to that point maintained: that the Preamble, far from the rhetorical flourish to which it would later be reduced,<sup>185</sup> was the key to unlocking the Constitution. It revealed what sort of thing the Constitution was, by confirming what kind of people and polity it represented. It was evidence of the Union's underlying social contract. Beneath a national constitution could be found a national people. It was, thus, utterly misguided—not to mention legally mistaken—to view the Constitution as a treaty or anything comparable. It was no such thing. It was a *national constitution*, and each of those words mattered. As a constitution, it was predicated on the sovereign will of a people. As a *national constitution*, it was predicated on the sovereign will of a *national* people. Its character and authority could not be divorced from the social compact that undergirded it.

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178. See *supra* notes 76–85 and accompanying text.

179. *Chisholm*, 2 U.S. (2 Dall.) at 471.

180. *Id.*

181. See U.S. CONST. amend. XI; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97–98 (1984) (dicta) (stating that *Chisholm* "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted" and that the Amendment "overruled the particular result in *Chisholm*" (citation omitted)).

182. See James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1368–69 (1998).

183. *Id.* at 1343–52.

184. See *supra* notes 167–80 and accompanying text.

185. In 1905, the Supreme Court held that the Preamble was not a grant of power. See *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905).

During the Constitution's earliest years, leading nationalists routinely transformed debates over the limits of national power into ones over the nature of the American polity.<sup>186</sup> Building on the ideas they had first articulated in the 1780s, they imagined that national constitutional interpretation was tightly entangled with issues of nationhood. Sorting out the Constitution's meaning required deciphering its underlying social contract—grasping the compact and polity that preceded the constitution of government. Whoever tried to limn the boundaries of national power based solely on a textual analysis of the Constitution's words betrayed ignorance of what they were reading and the kind of legal content it contained—or so Federalists insisted, time and again.

#### VI. COMPACT THEORY: THE ULTIMATE CONCESSION

Strikingly, nationalists' argument proved so resonant that their intellectual opponents would come to tacitly agree with its underlying premise. Possibly the strongest evidence of that argument's resonance has been hiding in plain sight. Only because nationalists were right about the implications of social contract theory were anti-nationalists compelled to invent compact theory<sup>187</sup>—the idea that the federal Union was a compact among sovereign states rather than a national contract among the individuals of the United States.<sup>188</sup> They conceded that the scope of the national government's authority was indeed determined by the nature of the preceding political compact (the two-step logic of social contract theory), while denying nationalists' account of step one (the nature of the social compact found in the United States). Rather than challenge nationalists' logic, in other words, anti-nationalists tried to refute the argument on its own terms. This implies

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186. *See supra* Parts II–IV.

187. Because of how eighteenth-century constitutional and political authors wrote, terminology can get tricky here. Social contract theory—which, to make things especially confusing, was often itself called social compact theory—was the larger framework. As discussed, this overarching theory presupposed a two-step process of political formation that explained how human beings moved from the state of nature to living under government: step one involved forming a social compact, while step two consisted of constituting a government for that compact. *See supra* Part I. From within this framework, there were lots of different ways to understand, as a matter of contingent fact, how one's own political community had been formed. Federalists, as we have seen, devised one alternative: people across the American Union had formed a national social compact of individuals at the national level. *See supra* Part II.

Compact theory, by contrast, presented a different alternative from *within* the framework of social contract theory: people in the individual states had formed separate state social compacts, followed by separate state governments, and *only thereafter* had they attended to the Union as a whole. Compact theory, therefore, was neither a substitute for nor a competitor to social contract (or social compact) theory. It was, instead, an *application* of social contract theory—a particular account, based on the terms of social contract theory, of *which kinds* of social compacts existed in the United States. *See* SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 237–45 (1999); CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 190–234* (2008).

188. CORNELL, *supra* note 187, at 237–45; FRITZ, *supra* note 187, at 190–234.

something striking about founding-era constitutional assumptions and thus the conceptual background against which the original Constitution was set.

Initially, skeptics of national power, most of whom rallied behind Thomas Jefferson's and James Madison's opposition to the Washington administration, and particularly Hamilton's policies within it, tested different arguments. Among other things, they pressed the Constitution's text into service, hopeful that they could confine the national government's powers to the express terms of the document. In the debate over the national bank, they countered defenses of far-reaching national power by contending that, as Madison famously argued, the Constitution's "essential characteristic" was that it established a government "of limited and enumerated powers."<sup>189</sup> William Branch Giles of Virginia took this argument a step further, asserting that "the peculiar nature of this government" lay in the fact that it was "composed of mere chartered authorities."<sup>190</sup> Accordingly, any "authority not contained within that charter" was off-limits.<sup>191</sup> The soon-to-be Tenth Amendment, which declared that the states retained all powers not delegated to the federal government, Giles argued, underscored this essential point.<sup>192</sup> Throughout the 1790s, as the nation divided into discernible political coalitions, these became common refrains among Jeffersonian Republicans.<sup>193</sup>

Yet, strikingly, champions of strict enumerated powers and the Constitution's written character recognized that limiting the scope of the federal government's power required challenging nationalists' account of federal union. Pointing to the enumeration of legislative powers or clamoring about the Tenth Amendment only reinforced that the debate turned not on the Constitution's written content but on the operative meaning of "delegated." To claim that something about the Constitution's writtenness settled the matter already presupposed a robust understanding of how federal power was, as an initial matter, delegated and, thus, what kind of polity had constituted the federal government in the first place. That Republicans did not ultimately rest their case on the inherent limitations of enumerated powers but instead based it on a rival account of federal union, is conspicuous acknowledgement that, to their minds, nationalists' core premise was correct.

Republicans, consequently, began trumpeting compact theory. According to the dominant version of this theory, there was no people of the United States, no national social contract. There were peoples of the various states,

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189. *Congress. House of Representatives. Wednesday, Feb. 2.*, GAZETTE OF THE U.S. (Phila.), Feb. 23, 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, *supra* note 150, at 367, 371 (statement of James Madison, Feb. 2, 1791).

190. *Congress. House of Representatives. Saturday, Feb. 7.*, GAZETTE OF THE U.S. (Phila.), Apr. 6, 1791, reprinted in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES, *supra* note 150, at 466, 468 (statement of William Giles, Feb. 7, 1791).

191. *Id.*

192. *Id.*

193. On the origins of the nation's first political parties, see generally ELKINS & MCKITRICK, *supra* note 10; GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815 (2009).

each of whom had created separate polities through state-level social contracts.<sup>194</sup> These states had then compacted together to form a union, and *this* was why federal power was inherently limited. Republicans, in other words, accepted the premise, if not the conclusion, of nationalists' argument. At the Constitutional Convention, Gouverneur Morris had "explained the distinction between a *federal* and *national, supreme*, Govt.; the former being a mere compact . . . the latter having a compleat and *compulsive* operation."<sup>195</sup> Because, he went on, "in all communities there must be one supreme power," the question of delegated authority thus turned on whether or not the United States formed one single political community.<sup>196</sup> Defeating nationalists' sweeping claims that the federal government could broadly interpret the Constitution to promote the national public good meant cutting them at their roots. It required demonstrating that the Union was not a single political community but, in fact, several. It meant taking Morris's logic and distinctions seriously and, based on them, reaching an alternative conclusion.

When defending compact theory in 1798 in the Kentucky Resolutions, Thomas Jefferson did just this. His arguments could not have been more revealing. The Constitution, he asserted, was a "compact under the style and title of a Constitution for the United States."<sup>197</sup> This phrasing is worth a careful look. No matter the Constitution's own *style* and *form*, which otherwise seemed to present it *as* a constitution (signaled nowhere more clearly than in the Preamble), it was actually something else entirely: a compact.<sup>198</sup> This foundational statement colored everything that followed, including especially what came next. The resolutions claimed that the "several states composing the United States of America . . . [had] constituted a General Government for special purposes, delegat[ing] to that Government certain definite powers" while "reserving . . . the residuary mass" to themselves, meaning any assumption on the part of the national government of "undelegated powers" was, accordingly, "void, and of no force."<sup>199</sup> These claims about enumeration and the express delegation and reservation of powers rested on the initial premise that there was *no* federal polity and that the "style and form" of the Constitution was misleading.<sup>200</sup>

These arguments became doctrinaire among Republicans. Virginian John Taylor claimed that "the people in state conventions," in their capacity as the peoples of the individual states, were "incontrovertibly the contracting parties" of the Constitution.<sup>201</sup> In *The Report of 1800*, written in defense of

194. See FRITZ, *supra* note 187, at 194–96, 198–99.

195. 1 FARRAND'S RECORDS, *supra* note 92, at 34 (May 30, 1787) (statement of Gouverneur Morris).

196. *Id.*

197. Thomas Jefferson, Resolutions Adopted by the Kentucky General Assembly (Nov. 10, 1798), reprinted in 30 THE PAPERS OF THOMAS JEFFERSON 550, 550 (Barbara B. Oberg et al. eds., 2003).

198. See *id.*

199. See *id.*

200. See *id.*

201. Letter from John Taylor to Thomas Jefferson (June 25, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON, *supra* note 197, at 430, 434.

the Virginia and Kentucky Resolutions, Madison similarly regarded “the people composing” the “political societies” of the various states as having acted “in their highest sovereign capacity” when they ratified the Constitution.<sup>202</sup> Meanwhile, a few years later, in 1803, the leading legal theorist of the Republican movement, St. George Tucker,<sup>203</sup> systematically defended this point in an extensive essay appending his annotated (and Americanized) edition of Blackstone’s *Commentaries*.<sup>204</sup> The federal government’s powers were confined to those written, Tucker argued, because the Constitution was a compact among sovereign states; there was no national polity, just a national government brought into being by separate peoples in separate states.<sup>205</sup> There was no escaping, it seemed, the recognition that constitutional powers derived, in some significant sense, from the nature of the American Union. Republicans certainly seemed content to argue on the terms that Federalists had so spiritedly defended and leveraged to such effect.

Why, we ought to ask, did Republicans feel a need to construct compact theory? Why did they not simply fall back on strict construction or point to the Constitution’s enumerated powers or putative writtenness? Because, it would seem, they believed that Federalists were right: if, as a point of fact, there was a national polity, then the national government would indeed have claim to more power than if there was not. Compact theory was designed to deny the existence of a federal polity, of a national social compact, of a nation.<sup>206</sup> This only made sense in the context of social contract theory and what it implied about the Union: that there were two constitutions (one for the polity and another for the government), the first of which necessarily informed and shaped the second. Jefferson’s comments, in particular, are so revealing and so rarely appreciated for what they imply. Republicans could not concede, ultimately, that the federal Constitution was a *constitution*—it had to be something else. If it was a constitution, if it spoke for a nation and a national people, then all bets were off. Few developments more powerfully underscore the nation’s importance—as a legal category at the founding—

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202. JAMES MADISON, THE REPORT OF 1800 (Jan. 7, 1800), *reprinted in* 17 THE PAPERS OF JAMES MADISON 303, 309 (David B. Mattern et al. eds., 1991). Though, in crucial ways, Madison resisted compact theory. Unlike Jefferson and most other Republicans, he acknowledged the existence of a national polity and national social contract; contrary to nationalists, however, he believed that that polity did not predate the Constitution but rather was only created through the act of ratifying it. *See id.* at 309, 315. While the states did not retain sovereignty post-ratification, nonetheless they were the parties to the Constitution because state polities had been the ones to divest the authority necessary to create the new nation. *See id.* In a revealing development, John Marshall, despite his nationalism, would make an argument similar to Madison’s some two decades later in defense of *McCulloch v. Maryland*. *See* Martin S. Flaherty, *John Marshall, McCulloch v. Maryland, and “We the People”*: *Revisions in Need of Revising*, 43 WM. & MARY L. REV. 1339, 1370–79 (2002).

203. CORNELL, *supra* note 187, at 263–73.

204. On Tucker’s 1803 edition of Blackstone and how he attempted to republicanize it, see Clyde N. Wilson, *Foreword* to ST. GEORGE TUCKER, *VIEW OF THE CONSTITUTION OF THE UNITED STATES, WITH SELECTED WRITINGS* viii–x (Clyde N. Wilson ed., 1999).

205. ST. GEORGE TUCKER, *View of the Constitution of the United States* (1803), *reprinted in* *VIEW OF THE CONSTITUTION OF THE UNITED STATES, WITH SELECTED WRITINGS*, *supra* note 204, at 91, 91–106.

206. *See supra* notes 194–96 and accompanying text.

than the emergence of compact theory. That Jeffersonians assumed, as a matter of course, that their vision of limited constitutional power was incompatible with the existence of a national polity confirms as much.

#### CONCLUSION

If we begin to understand why Federalists were so obsessed with nationhood, and the creative constitutional thinking that grew out of that obsession, we can bring back into focus a cluster of assumptions that were once inseparable from efforts to interpret the Constitution. At the founding, constitutional interpretation and social contract theory were often tightly connected.

We are not beholden to anything Federalists or their opponents thought. We need not assume, as they once did, that questions of constitutional meaning and interpretation were inextricably entangled with questions of sovereignty and union. Maybe, heeding Don Herzog's recent advice, we will decide that sovereignty is a concept that has outlived its usefulness.<sup>207</sup> Maybe, in our modern age, on the other side of positivist and historicist revolutions that have fundamentally remade how we think about legal authority and its fundamental basis, we will have little interest in social contract theory and its attendant natural law assumptions. Maybe, especially in the wake of the Civil War, we will decide it is tedious to sort out quasi-metaphysical questions regarding the character of our federal polity and instead be content with focusing on how the federal system works in practice rather than theory. Maybe, in short, it just does not matter anymore whether, constitutionally speaking, our polity was born a nation or a set of independent states.

But what we cannot do is claim to be interested in recovering, describing, or understanding the original Constitution, while ignoring the social contract assumptions that Federalists and their opponents treated as foundational. There is nothing wrong with reading the Constitution apart from any particular understanding of federal union—times change, after all. But if the point is to understand the Constitution as it once was—to recover the meaning it might have had at its inception—then we need to appreciate what reading the Constitution necessarily entailed. We cannot start with the document or its words; we need to start with the Union for which it spoke. Originally, the Constitution was inseparable from theories of federal union. If we disaggregate one from the other, we do not clear the way for clearer interpretation. To the contrary, we simply wrench the Constitution out of the eighteenth century and transform it into something it originally was not. We leave behind the past and make the Constitution an artifact of the present. If then our goal is to confront the original Constitution on its own terms, we need to understand why Federalists and, in turn, their opponents, cared so deeply about the state of the nation.

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207. See generally DON HERZOG, *SOVEREIGNTY, R.I.P.* (2020).