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Our Unconventional Founding

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The Founding was a process, not merely an outcome. And yet lawyers have given this fact short shrift. Over the last decade, they have explored every detail of the original text with renewed zeal; but the process that brought us the text remains virtually unknown.

This is unfortunate, not only because the facts are fascinating in themselves. Their study will lead us to challenge pat jurisprudential formulations that blinker constitutional understanding. It will also serve to frame the study of other great transformations of American constitutional history—most notably Reconstruction and the New Deal. We believe that Founding patterns recurred at these other moments of grave crisis. But this claim cannot be formulated, let alone tested, until we rediscover the distinctive ways in which the Founders won authority to speak in the name of We the People in the 1780s.

Our view contrasts sharply with one recently presented by Akhil Amar, who has sought to reassure the legal world about the Founding.¹ Provoked by earlier claims from one of us,² Professor Amar has tried to establish that the Founding was consummately legal. His work has led us to rethink the matter with greater care. Nonetheless, we remain unpersuaded, and we shall try to explain why.

Our main task, however, is to confront the problem raised by the Federalists' flagrant illegalities. Movements that indulge in systematic contempt for the law risk a violent backlash. Rather than establish a new and stable regime, revolutionary acts of illegality can catalyze an escalating cycle of incivility, violence, and civil war. How did the Federalists avoid this dismal cycle? More positively: How did the Founders manage to win acceptance

¹ See Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum L Rev 457 (1994); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U Chi L Rev 1043 (1988).

² Bruce Ackerman, 1 *We the People: Foundations* 41-42 (Belknap, 1991).

of their claim to speak for the People at the same moment that they were breaking the rules of the game?

Our answer distinguishes the Federalists' challenge to the preexisting rules from a broader attack upon an entire constitutional tradition. As an example of this second totalizing assault, consider the Bolshevik Revolution of 1917. Before the Communists seized power in October, the previous Provisional Government had scheduled elections for a Constituent Assembly whose task was the framing of a new Constitution. The Bolsheviks allowed these elections to proceed, only to find themselves winning a minority of the seats. It was at this point that the question of total revolution had to be confronted: Would the Bolsheviks disband the Constituent Assembly and thereby break their last institutional links to the past?³

The question provoked more anxious indecision than one might imagine. Nonetheless, Lenin persuaded his comrades to use the Red Army to disband the Assembly and to make a clean break with the existing legal order.⁴ Rather than adapting preexisting constitutional ideas and institutions to broaden support and gain consent, the Bolsheviks took a different path. The new regime's fate would depend on institutions—most notably the Red Army and Communist Party—that had *no* constitutional relationship, however remote, to the old regime.

But this is not what happened in the America of the 1780s. The Federalists fought for a radical reorganization of existing principles and institutions; but they were not longing for total revolution.⁵ It is this distinctive aspiration to *revolutionary reform* that set the stage for a unique approach to constitutional revision. Although they did not play by the established rules for amendment, the reformers tried to compensate for their legal deficiencies through a remarkable bootstrapping process.⁶ They constructed new lawmaking processes out of older ideas and institutions, seeking to infuse them with new meanings:

³ See Edward H. Carr, 1 *The Bolshevik Revolution, 1917-1923* 109-20 (MacMillan, 1950).

⁴ *Id.* at 115.

⁵ For a philosophical critique of the totalizing concept, see Bernard Yack, *The Longing for Total Revolution* (Princeton, 1986). For an attempt to reconceptualize the revolutionary experience as a partial, but fundamental, break with the past, see Bruce Ackerman, *The Future of Liberal Revolution* 5-24 (Yale, 1992).

⁶ For a comparative perspective, see Jon Elster, *Constitutional Bootstrapping in Philadelphia and Paris*, 14 *Cardozo L. Rev.* 549 (1993).

Granted, we did not play by the old rules. But we did something just as good. We have beaten our opponents time after time in an arduous series of electoral struggles within a large number of familiar lawmaking institutions. True, our repeated victories don't add up to a formal constitutional amendment under the existing rules. But we never would have emerged victorious in election after election without the considered support of a mobilized majority of the American People. Moreover, the premises underlying the old rules for constitutional amendment are deeply defective, inconsistent with a better understanding of the nature of democratic popular rule. We therefore claim that our repeated legislative and electoral victories have already provided us with a legitimate *mandate from the People* to make new constitutional law. Forcing us to play by the old rules would only allow a minority to stifle the living voice of the People by manipulating legalisms that have lost their underlying functions.

For reasons that will appear, we call this the *unconventional* argument. The Federalists' success at the Founding placed the argument at the very heart of the American constitutional tradition. Their unconventional precedent created patterns of talk and action that would be available to future generations of Americans as they confronted the gravest crises in the history of the Republic. In response to Civil War and Great Depression, Reconstruction Republicans and New Deal Democrats once again found themselves reenacting and transforming the Federalist precedent—breaking with the established system of constitutional amendment, but democratically adapting preexisting institutions to win a mandate from the People. We conclude with a brief discussion of the patterns that link these three great moments of revolutionary reform.

I. THREE LEGAL OBSTACLES

And the Articles of this confederation shall be inviolably observed by every State, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Con-

gress of the United States, and be afterwards confirmed by the legislatures of every State.⁷

So reads the thirteenth and final article of the Articles of Confederation, which had gained the unanimous consent of the thirteen states by 1781. After operating without any formal structure for six years and six months, the Continental Congress could now speak for the nation with a new authority—one that would allow it to bind the country to the terms of a peace treaty with England in 1783. Gaining unanimity was a real triumph, requiring four years of political struggle and many acts of accommodation between the thirteen states.⁸

Yet only six years later, the Federalists refused to play by the rules laid down with such great effort. After a summer of secret meetings, the Philadelphia Convention went public with a bombshell. Article VII of their proposal asserted that “[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”⁹

A. Problems under the Articles

This single sentence assaulted the revisionary process specified by the Articles on four fronts. First, and most fundamentally, it invited secession. It rejected the Articles’ proud assertion that “the Union shall be perpetual,” and authorized nine states to secede if the others insisted upon unanimity. As we shall see, this threat was crucial in pushing states like New York and Vir-

⁷ Articles of Confederation, Art XIII.

⁸ The Congress first met on September 5, 1774. Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781* 57 (Wisconsin, 1970). On June 7, 1776, Richard Henry Lee of Virginia proposed a resolution to the Continental Congress for a declaration of independence and for “a plan of confederation [to] be prepared and transmitted to the respective Colonies” *Id.* at 103. On July 12, 1776, a committee led by John Dickinson of Pennsylvania proposed a plan, which was debated for more than a year before Congress sent the Articles to the states. There followed four years of complex negotiation, *id.* at 126-39, with Maryland and other states insisting upon a settlement of the western lands question as a condition for ratification—which finally occurred on March 1, 1781, *id.* at 238; Jack Rakove, *The Beginning of National Politics: An Interpretive History of the Continental Congress* 159-60, 164-65, 179, 248, 285-86, 352-54 (Knopf, 1979). See generally Jack P. Greene, *Peripheries and Center: Constitutional Development in the Extended Politics of the British Empire and the United States 1607-1788* 154 (Georgia, 1986) (“Far from being an inevitable development, the fabrication of such a union was highly problematic.”); Peter S. Onuf, *Statehood and Union: A History of the Northwest Ordinance* (Indiana, 1987).

⁹ US Const., Art VII.

ginia to give the Constitution their reluctant endorsement. The First Congress began as a secessionist body, meeting without the approval of Rhode Island and North Carolina. Indeed, the secessionist Congress obtained Rhode Island's consent only after threatening to impose economic sanctions if it continued to insist on its rights under the Articles.¹⁰

Second, the Founding text ignored the role the Articles expressly assigned to the Continental Congress for approving subsequent amendments. This omission was especially remarkable since a number of states were reluctant to send delegates to Philadelphia until the convention received express congressional approval.¹¹ Not surprisingly, the convention's silent end run around the Congress led to a sharp confrontation immediately after the publication of the Constitution, with Madison struggling against efforts in the Continental Congress to require the convention to submit to preexisting rules.¹²

The Founders were no less contemptuous of existing authority on the state level. In the teeth of the Articles' express command, the proposed Constitution cut state legislatures out of the ratifying process, replacing them with special conventions in each state. Once again, this textual omission obscured a more complex institutional reality. The Federalists, in fact, relied upon the state legislatures to organize the elections necessary for their conventions, giving their opponents a chance to block the call for a convention. This was precisely what happened in Pennsylvania at a vulnerable moment in the ratification process, leading the Federalists to embrace outright violence in a desperate effort to sustain political momentum.¹³

Fourth, all this was done in the face of the Articles' express claim to specify the *exclusive* means for its revision.

B. Problems with the Convention

As if this sharp break with the Articles were not problem enough, consider the anomalous character of the assembly making the challenge. First, the convention was itself a secessionist body. Rhode Island was the obvious holdout, refusing to send any

¹⁰ See text accompanying notes 197-201.

¹¹ See text accompanying note 77.

¹² See text accompanying notes 117-24.

¹³ See text accompanying notes 127-28.

delegates.¹⁴ But New York and Delaware posed serious problems as well.

New York had sent three delegates to the convention, but two walked out in despair upon observing the pronounced centralizing bias of the Federalist majority. Since the New York commissions required a majority of delegates to bind the state, the vote of the only remaining delegate, Alexander Hamilton, was legally insufficient. The convention did not pretend otherwise. Its journal treated New York like Rhode Island on the final vote approving the Constitution. Neither state was recorded as casting a ballot.¹⁵

The status of the Delaware signatures was no less problematic. Its legislature expressly barred the delegation from agreeing to any proposal that deprived this small state of the equality in voting power it enjoyed under the Articles. In signing for the state, the Delaware delegation recognized that it was acting in contempt of its commission.¹⁶

We are presented, then, with the spectacle of ten delegations urging nine states to bolt a solemn agreement ratified by all thirteen. Even this understates the difficulty. In calling for the Philadelphia Convention, the Continental Congress had charged the delegates to meet "for the *sole and express* purpose of revising the Articles."¹⁷ Given this explicit language, did the delegates go

¹⁴ See text accompanying note 85.

¹⁵ After July 11, New York never voted in the convention. Compare Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 565 (Yale, rev ed 1937) (journal for July 10, 1787), with id at 577 (journal for July 11, 1787). On the last day, New York was recorded as not voting on the question "The Constitution as Unanimously agreed to." Farrand, ed, 2 *Records of the Federal Convention* at 641 (journal for Sept 17, 1787).

¹⁶ Merrill Jensen, ed, 1 *The Documentary History of the Ratification of the Constitution* 203 (Historical Society of Wisconsin, 1976), reprinting Act Electing and Empowering Delegates, 3 February (providing that the delegates could "devis[e], deliberat[e] on, and discuss[] such Alterations and further Provisions, as may be necessary to render the F[ederal Constitution adequate to the Exigencies of the Union," but "always and provided, that such Alterations, or further Provisions, or any of them, do not extend to that Part of the Fifth Article of the Confederation of the said States . . . which declares, that 'in determining Questions in the United States in Congress assembled, each State shall have one Vote'"). The Delaware problem was broadly recognized by the delegates to Philadelphia. See Farrand, ed, 1 *Records of the Federal Convention* at 4 ("On reading the Credentials of the deputies it was noticed that those from Delaware were prohibited from changing the Article in the Confederation establishing an equality of votes among the States.") (footnotes omitted); id at 6 (noting same); id at 37 (reprinting discussion about the Delaware provision); Jonathan Elliot, ed, 1 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* 345 (Taylor & Maury, 2d ed 1854) (remarks of Luther Martin to the Maryland Legislature noting concern with the Delaware provision).

¹⁷ Perhaps it is wise to place this formula in a larger context:

beyond their legal authority when they ripped the Articles up and proposed an entirely new text?

This charge was raised repeatedly—and justifiably in the cases of Massachusetts, New York, and Connecticut, where legislatures had expressly incorporated Congress's restrictive language in their own instructions to delegates.¹⁸ Other state delegations, however, came with a broader mandate, allowing them to make any constitutional proposal they thought appropriate.¹⁹ Thus, while some key delegates may well have acted be-

Whereas there is provision in the Articles of Confederation & perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several States; And whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the States and particularly the State of New York by express instructions to their delegates in Congress have suggested a convention . . . appearing to be the most probable mean of establishing in these states a firm national government.

Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.

Charles C. Tansill, ed, *Documents Illustrative of the Formation of the Union of the American States* 45-46 (US GPO, 1927).

¹⁸ See Jensen, ed, 1 *Documentary History* at 209 (cited in note 16), reprinting New York's February 26, 1787, resolution. Massachusetts's first resolution, passed on February 22 before it knew about Congress's resolution of the previous day, did not contain this limitation. The House, however, repealed it on March 7, substituting a new resolution containing the "sole and express" limitation to mirror Congress's prescription. *Id.* at 205, reprinting Resolution Authorizing the Appointment of Delegates and Providing Instructions for Them, 22 February; *id.* at 207, reprinting House Substitute of 7 March for the Resolution of 22 February. Connecticut was the only other state to impose a "sole and express" limitation. See *id.* at 215-16, reprinting Act Electing and Empowering Delegates, 17 May.

¹⁹ For instance, one of the first states to decide to send delegates to Philadelphia in 1786, New Jersey, commissioned its delegates "for the purpose of taking into consideration the state of the Union as to trade and other important objects, and of devising such further provisions as shall appear necessary to render the Constitution of the federal government adequate to the exigencies thereof." *Id.* at 196, reprinting Resolution Authorizing and Empowering the Delegates, 24 November. Absolutely no mention was made of the Articles in this resolution, which took much of its language from the state's oft-quoted legislation regarding the Annapolis Convention.

Virginia's early resolution similarly noted that the revision was not just for "the Commercial Interests" but was a "revision of the Federal System to all its defects . . ." *Id.* at 196, reprinting Act Authorizing the Election of Delegates, 23 November. The December 30 Pennsylvania resolution also granted power for the delegates to "devis[e], deliberat[e] on, and discuss[] all such alterations and further provisions as may be necessary to render the f[]ederal constitution fully adequate to the exigencies of the Union . . ." *Id.* at 199, reprinting Act Electing and Empowering Delegates, 30 December. The North Carolina delegates were "to discuss and decide upon the most effectual means to remove the

yond their commission, this was not true of all.

In contrast, no state delegation had any similar warrant to make an end run around the rules of revision found in the Articles of Confederation. The precise language of each delegation's commission varied from state to state, but Virginia's was typical. Its legislature had instructed delegates to participate in "*devising and discussing* all such alterations and further provisions, as may be necessary to render the Federal Constitution adequate . . . *reporting* such an Act for that purpose, *to the United States in Congress, as, when agreed to by them, and duly confirmed by the several States, will effectually provide for the same.*"²⁰

Such commissions expressly subordinated delegates to existing institutions and procedures. In joining the call for a convention, the Continental Congress also made it plain that the Philadelphians' proposals could become the law of the land only if they were "agreed to in Congress and confirmed by the states."²¹ There is not the slightest hint anywhere that the delegates were authorized to break with the Articles and set up a new mechanism for popular sovereignty. Indeed, a number of delegates to the Continental Congress refused appointments to the convention because it was inappropriate to join in proceedings they would later review as congressmen. As Richard Henry Lee explained in a letter to John Adams: "Being a Member of Congress where the plan of Convention must be approved," acceptance of a position as a delegate would require him to "pass judgment at New York upon his opinion at Philadelphia."²²

defects of our fl federal union, and to procure the enlarged purposes which it was intended to effect" Id at 201, reprinting Act Authorizing the Election of Delegates, 6 January. Delaware's language was similar, id at 203; as was Georgia's, id at 204; Maryland's, id at 222; and New Hampshire's, id at 224.

²⁰ *Acts Passed at a General Assembly of the Commonwealth of Virginia, October 16, 1786-January 11, 1787* 11 (Richmond, 1787) (emphasis added). Such wording appeared in virtually every resolution. See Jensen, ed, 1 *Documentary History* at 199-200 (cited in note 16) (Pennsylvania requiring "reporting such act or acts . . . to the United States in Congress assembled, as when agreed to by them, and duly confirmed by the several states, will effectually provide for the same"); the identical language used by Delaware, id at 203; Georgia, id at 204; Maryland, id at 222; New Hampshire, id at 225; similar language used by New York, id at 213. The second and final Massachusetts resolution provided for congressional and state approval, id at 207, as did other states in a variety of formulations, id at 214 (South Carolina); id at 216 (Connecticut). North Carolina mentioned only approval by the state. Id at 201. The only real exception was New Jersey, the one-sentence resolution of which omitted discussion of anything besides "taking into consideration" and "devising . . . further provisions." Id at 196, reprinting Resolution Authorizing and Empowering the Delegates, 24 November.

²¹ Jensen, ed, 1 *Documentary History* at 187 (cited in note 16).

²² Ruth Bogin, *Abraham Clark and the Quest for Equality in the Revolutionary Era*,

C. Problems with State Constitutions

The Federalists ran into a new round of legal trouble when they sought to convene ratifying conventions in each of the thirteen states. By virtue of the Constitution's Supremacy Clause, the Federalists' initiative amounted to a vast revision of each state's constitution, and yet they proceeded in a manner utterly indifferent to the formal mechanisms for amendment already stipulated by state constitutional law.

Since the legal status of each ratifying convention depended upon its particular state constitution, it will pay to distinguish between two broad types—those that contemplated the use of conventions in the process of state revision, and those that did not.

Those that did included Massachusetts, New Hampshire, and Pennsylvania. The first two had formulated their constitutions through a process by which a special convention made a proposal, which was then approved by popular vote in town meetings. Although Pennsylvania's Constitution of 1776 was enacted by the legislature, it was widely recognized throughout America (and abroad) as the most radically democratic document of its time.²³ It is therefore revealing how carefully these three states dealt with the convention mechanism. In each case, the constitutional text did not give the legislature, or anybody else, the unfettered right to call a convention whenever it was in the public interest. To the contrary, conventions could only meet after a specified number of years had passed—a seven-year interval was prescribed by New Hampshire and Pennsylvania; fifteen years by Massachusetts. Only in the case of New Hampshire was the convocation of such a convention automatic; Massachusetts authorized a meeting only if two-thirds of the voters throughout the state agreed;²⁴ Pennsylvania required the approval of two-thirds of a specially elected body of censors that met every septennium to review the operation of government.²⁵

1774-1794 134 (Fairleigh Dickinson, 1982). Abraham Clark similarly turned down his Philadelphia appointment. Jonathan Dayton, who replaced Clark, reported that Clark resigned because "he thinks there is a kind of incompatibility in the two appointments." *Id.*

²³ Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 226-27, 231-32 (Norton, 1972).

²⁴ Mass Const of 1780, Ch VI, Art X, reprinted in Francis Newton Thorpe, ed, 3 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 1911 (Hein, 1993).

²⁵ Pa Const of 1776, § 47, reprinted in Thorpe, ed, 5 *The Federal and State Constitu-*

These lengthy and regular intervals were not a detail. They reflected a deep concern with stability characteristic of republican thought.²⁶ During and after the Revolution, Americans were painfully aware of the Tory claim that, without the order supplied by the king, their infant republics would disintegrate amidst constant factional strife.²⁷ The careful structuring of the convention process permitted a constitutional commitment to stability at the same time it expressed a faith in popular sovereignty.

Unhappily for the Federalists, their 1787 call for conventions came at the wrong time in these three states. Pennsylvania's Council of Censors had rejected a convention in 1784, and its next meeting was not due until 1791. The next legal convention in New Hampshire was scheduled for 1791, and in Massachusetts for 1795. Moreover, the Federalists were calling for the wrong kind of convention. In all three states the convention's job was to make constitutional proposals, and not to ratify the initiatives made by others. In the New England states, these proposals were then presented to the voters in town meetings. Worse yet, the constitutions of Massachusetts and New Hampshire had explicitly subordinated themselves to the Articles of Confederation:

The people of this commonwealth have the sole and exclusive right of governing themselves, as a free, sovereign and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right, *which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress Assembled.*²⁸

Even without this delegation to the Articles of Confederation, it should be plain that the legislatures of these two New England states, along with Pennsylvania's, were blatantly violating their

tions at 3091 (cited in note 24).

²⁶ Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of State Constitutions in the Revolutionary Era* 137-44 (North Carolina, 1980); J.G.A. Pocock, *The Machiavellian Moment* 3-80, 506-52 (Princeton, 1975).

²⁷ See, for example, Letter from George Washington to Henry Lee (Oct 31, 1786), in John C. Fitzpatrick, ed, 29 *The Writings of George Washington from the Original Manuscript Sources* 34 (US GPO, 1938); Letter from George Washington to James Warren (Oct 7, 1785), in Fitzpatrick, ed, 28 *The Writings of George Washington* at 290-91.

²⁸ Mass Const of 1780, Pt 1, Art IV, reprinted in Thorpe, ed, 3 *The Federal and State Constitutions* at 1890 (cited in note 24) (emphasis added). New Hampshire copied essentially the same provision into its constitution. See NH Const of 1784, Pt 1, Art VII, reprinted in Thorpe, ed, 4 *The Federal and State Constitutions* at 2454 (cited in note 24).

constitutions in heeding the Federalists' call for ratifying conventions.²⁹

The legal situation in most of the other states was more propitious in one sense, less in another. Most of these states' constitutions had been proposed by the legislatures, and often enacted into law without any special form of consultation with the electorate.³⁰ Rhode Island and Connecticut continued to operate under Royal Charters which had always given them great political autonomy—the legislatures simply striking the clauses from the text that offered fealty to the British Crown.³¹

These texts would seem to give greater legal warrant to legislatures wishing to follow Philadelphia. As the source of the existing state constitutions, weren't they legally free to propose a new method for its amendment? Yes, but at the same time, the Federalists' challenge to legislative supremacy seemed more of a frontal assault on existing constitutional principles.³²

²⁹ Once the Federalists established their unconventional precedent, Pennsylvania's revolutionaries quickly proceeded to use it as a springboard for the illegal reconstitution of the state regime. Rather than waiting for the next meeting of the Council of Censors scheduled for 1791, radicals led by James Wilson took the law into their own hands in 1789. See text accompanying notes 125-27. Three other cases of illegality at the state level—involving Delaware in 1791, Rhode Island in 1841, and Maryland in 1850—are discussed in John Alexander Jameson, *A Treatise on the Principles of American Constitutional Law and Legislation: The Constitutional Convention; its History, Powers, and Modes of Proceeding* §§ 223-29 at 213-21 (Myers, 1869) (photographic reprint by Rothman, 1981).

³⁰ In four instances, state legislatures proposed and implemented constitutions as if they were statutes, without any advance authority or subsequent ratification by the people. The states were Virginia (1776), New Jersey (1776), Rhode Island, and Connecticut (the latter two through the continuation of their colonial charters). In three cases, state constitutions were adopted by legislatures authorized by popular vote to approve changes, but were "not submitted in any manner to the people." The states were Delaware (1776), Georgia (1777), and New York (1777). In four instances, legislatures with advance authority from the people to approve constitutions distributed copies before their enactment to give the people a chance to suggest changes. These states were Maryland (1776), Pennsylvania (1776), North Carolina (Dec 1776), and South Carolina (1778). Roger Sherman Hoar, *Constitutional Conventions: Their Nature, Powers, and Limitation* 4 (Little, Brown, 1917). Only the Constitutions of New Hampshire (1778 and 1781-83) and Massachusetts (1780) were submitted to the people. *Id.*

³¹ *Id.*

³² Georgia's legislature was the only state to take the illegalities of the Founding seriously enough to recognize the immediate need for explicit constitutional change on the state level. On January 30, 1788, it resolved to "name three fit and discreet persons from each county, to be convened at Augusta by the executive, as soon as may be after official information is received that nine States have adopted the Federal Constitution; and a majority of them shall proceed to take under their consideration the alterations and amendments that are necessary to be made in the Constitution of this State . . ." Jameson, *American Constitutional Law* § 148 at 134.

This turned out to be easier said than done. It took no fewer than three conventions before an acceptable constitution was worked out. See *id.* §§ 148-49 at 134-36.

Especially when the Philadelphians altogether lacked the legal authority from these legislatures to make such an end run; especially when they were calling on popular conventions to rubber-stamp proposals that they, without any direct authorization by the voters, saw fit to make.³³

II. THE UNCONVENTIONAL RUN-UP TO PHILADELPHIA

To sum up, we can do no better than repeat the reaction of John Quincy Adams, then twenty years old:

But to crown the whole the 7th: article, is an open and bare-faced violation of the most sacred engagements which can be formed by human beings. It violates the *Confederation*, the 13th: article of which I wish you would turn to, for a complete demonstration of what I affirm; and it violates the Constitution of this State, which was the only crime of our Berkshire & Hampshire insurgents [in Shays's Rebellion].

As a justification for this, it is said, that in times of great distress and imminent danger, the Constitution of any country whatever must give way; and that no agreements can be put in competition, with the existence, of a nation; but here, in order to apply this proposition, which is undoubtedly true, two points are to be established: the first, that we are now in this tremendous situation, where our

³³ Even John Jay—one of the voices of Publius—was especially anxious about this point. Writing to Washington before Philadelphia, he expressed alarm:

[T]he policy of *such* a convention appears questionable; their authority is to be derived from acts of the State Legislatures. Are the State Legislatures authorized, either by themselves or others, to alter constitutions? I think not; . . . perhaps it is intended that this convention shall not ordain but only recommend; if so there is danger that their recommendations will produce endless discussions, perhaps jealousies and party heats.

Would it not be better for Congress plainly and in strong terms to declare that the present Federal Government is inadequate to the purposes for which it was instituted, . . . but that in their opinion it would be expedient for the people of the States without delay to appoint State Conventions (in the way they choose their general assemblies) with the sole and express power of appointing deputies to a general Convention, who, or the majority of whom, should take into consideration the Articles of the Confederation, and make such alterations &c . . . No alterations in the government should I think be made, nor if attempted will easily take place, unless deducible from the only source of just authority—the *People*.

Letter from John Jay to George Washington (Jan 7, 1787), in Charles R. King, ed, 1 *The Life and Correspondence of Rufus King* 208-09 (Putnam, 1894). As we shall see, Jay and others were still making this objection at the Continental Congress when the authority of the convention was debated in February 1789; and this leitmotif continued in the ratification debates.

very national existence, is at stake; the second that no better remedy can be found than that of a revolution.—The first it appears to me, no man in his Senses, can pretend to assert: our situation it is true is disagreeable; but it is confessedly growing better every day, and might very probably be prosperous in a few years without any alteration at all. [B]ut even if some alteration be *necessary*, where is the necessity of introducing a *despotism*, yes, a *despotism*; for if there shall be any limits to the power of the federal Congress, they will only be such as they themselves shall be pleased to establish.³⁴

Note what the young Adams is not saying. He is not reporting that the Federalists of his acquaintance are spending lots of time and energy defending the legality of their conduct. He presents them as placing their break with the “the most sacred engagements which can be formed by human beings” on explicitly revolutionary ground—the same ground upon which Shays’s rebels had stood only two years before. Indeed, there are remarkably few public efforts by Federalists to disguise the revolutionary character of their enterprise with legalistic argument. By their words and deeds, leaders like Madison and Wilson repeatedly indicated their belief that revolutionary, rather than legalistic, arguments provided their best defense.³⁵

For Adams, and for us, this makes another question more important: How, if at all, did the Federalists differ from Shays’s rebels in their decision to take the law into their own hands? It is here, we think, that the notion of unconventional adaptation comes into play. While much about this phenomenon may be obscure, at least one thing is clear: If the Federalists were going to

³⁴ Letter from John Quincy Adams to William Cranch (Oct 14, 1787), in John P. Kaminski and Gaspare J. Saladino, eds, 14 *The Documentary History of the Ratification of the Constitution* 223-24 (Historical Society of Wisconsin, 1983). When Massachusetts ratified the Constitution in February, Adams used the language of revolution to explain to Cranch why he now accepted it: “In our Government, opposition to the acts of a majority of the people is rebellion to all intents and purposes.” Letter from John Quincy Adams to William Cranch (Feb 7, 1788), in Kaminski and Saladino, eds, 14 *Documentary History of the Ratification* at 220.

³⁵ As we have suggested, Professor Amar portrays a different picture. Extrapolating from a (very) few remarks, he seeks to supply the Federalists with powerful legal arguments for their unconventional conduct. As we will show, Amar’s arguments would have failed to convince any fair-minded court surveying the facts and law in an impartial manner. For the moment, however, it is more important to recognize that there was no such court in existence and that the Federalists were not particularly interested in establishing that they had the law on their side.

break the rules and expect established institutions to accept, or at least acquiesce, their chances of success would have been very small if they had come out of nowhere and simply demanded instant obedience. Unconventional adaptation requires a complex process of interaction—one in which revolutionary institutions gradually acquire the kind of authority that will allow them to gain acceptance of their break with the rules. In the present case, a group of Federalists did not just decide to come to Philadelphia and hold a convention. Their initiative succeeded only after a fascinating set of exchanges with established institutions that began in 1785 and ended with the grudging acquiescence of Rhode Island in 1790.

We call this the “bandwagon effect.” At each stage in the dynamic process of legitimation, the Federalists suffered grave legal difficulties in advancing their constitutional initiative. At each stage, there were some important institutions and actors who refused to cooperate on legalistic grounds. Nonetheless, the Federalists succeeded in gaining the acceptance of enough standing institutions to sustain their constitutional momentum. These acts of *ratification*, as we will call them, made it plausible for the unconventional Founders to embark on another illegal initiative, which, when ratified once again by another set of standing institutions, made it plausible for them to proceed to yet another illegal initiative in the name of We the People—and so on, until they had earned a deep sense of constitutional authority even though they had not played by the preestablished rules.

There is much that is puzzling about this process. Before speculating further, it is best to review the facts.

A. The Legal Background

The effort to amend the Articles of Confederation began as soon as they were ratified. But for a long time, the political stage was dominated by actors who played by the rules.

The first legalistic campaign sought to grant Congress the power to levy a 5 percent impost on foreign commerce. Proposed by Congress in 1781, the Five Percent Impost gained the consent of all states but Rhode Island within two years. Before Rhode Island could be persuaded, Virginia rescinded its approval, and Congress went back to the drawing board.³⁶ After some pulling

³⁶ Bogin, *Abraham Clark* at 83 (cited in note 22). Congress, led by Hamilton, had begun preparations to persuade Rhode Island to accept the impost. *Id.* at 82-83.

and hauling, it responded with a series of new initiatives. The most successful was another proposal for an impost, which passed Congress in April of 1783.³⁷ By 1786, only New York remained as a holdout, and even it had formally accepted the initiative—although it had coupled its acceptance with so many conditions that Congress found it unacceptable.³⁸ Moreover, the Congress in August of 1786 had proposed a package of seven amendments to the Articles that would have further enhanced its powers.³⁹

This meant that the Federalists were constantly obliged to contend with thoughtful supporters of a strengthened Union who believed that change might better proceed legally, step by step. Indeed, wouldn't the Federalist bandwagon effect only derail the legally unproblematic initiatives then underway?⁴⁰ While it was proving difficult to overwhelm New York's objections to an impost, why suppose that it or other states would acquiesce in a revolutionary break into the unknown?⁴¹ Would it not have been

³⁷ The 1783 impost was to expire in twenty-five years, and states, not Congress, would appoint the collectors. It differed in these respects from the 1781 impost. Linda G. De Pauw, *The Eleventh Pillar: New York State and the Federal Constitution* 33 (Cornell, 1966).

³⁸ In response to pressure by the Continental Congress and the neighboring states of Connecticut and New Jersey, New York reconsidered its position on the impost in February 1787 and rejected it by a two-to-one vote. E. Wilder Spaulding, *His Excellency George Clinton: Critic of the Constitution* 170-71 (MacMillan, 1938); De Pauw, *The Eleventh Pillar* at 49-50. There is no reason to suppose, however, that this would have been New York's last word, since pressures from its neighbors—as well as Hamilton's political faction—remained intense. Of course, we will never know the outcome since Hamilton and others shifted their attention to the campaign for the new Federalist Constitution.

³⁹ The amendments provided for exclusive congressional authority over commerce, a seven-member court to hear cases against federal officials, a reduction in the number of states needed to ratify amendments pertaining to revenue (from thirteen to eleven), a modification of the seven-states quorum rule, and other measures. John C. Fitzpatrick, ed, 31 *Journals of the Continental Congress 1774-1789* 494 (US GPO, 1934).

⁴⁰ For examples of such arguments, see Votes and Proceedings of the House of Delegates of the State of Maryland, 1st Sess (Mar 12, 1785) (on file at Maryland Hall of Records) ("[T]he proposed meeting, though originating from the best intention, may tend to delay the adoption of the [1783 impost], and the vesting that assembly with proper powers to regulate trade, by the states who have hitherto delayed to accede to these measures, and also that unforeseen consequences may result from such meeting, this legislature has declined to appoint commissioners for this purpose."). Daniel Carroll, President of the Maryland Senate, wrote that the convention had "a tendency to weaken the authority of Congress" and may "entirely destroy" the chance of an impost.

⁴¹ For example, here is Rufus King opposing the convention (in which he later served with distinction) on the floor of the House as late as October 1786:

If all the States could be brought into the Continental Impost, this resource indeed might be anticipated, and the national credit strengthened in that way, but there remained two States which had not acceded to it, Pennsylvania and New York. The

wiser to continue the campaign for the impost, preparing the way for a consensus on more sweeping reforms, like those that Congress had proposed in 1786?⁴²

situation of the former was known, and should that State be brought over, New York would not dare longer to oppose the Union.

Proceedings of Government, Boston, October 12, Worcester Mag 353 (3d week of Oct 1786); *Substance of the Communications made by Mr. Dane*, Worcester Mag 410 (3d week of Nov 1786). See also Letter from John Adams to Secretary Jay (May 16, 1786), in Charles Francis Adams, ed, 8 *The Life and Works of John Adams: Second President of the United States: With a Life of the Author, Notes and Illustrations* 391 (Little, Brown, 1853) ("New York, I am persuaded, will not long withhold her assent, because that, in addition to all the other arguments in favor of the measure, she will have to consider that all the blame of consequences must now rest upon her; and she would find this, alone, a greater burden than the impost.").

Certainly, New York was under severe pressure to agree to the impost. A congressional committee just days before the Annapolis Convention lambasted New York for its noncompliance. Fitzpatrick, ed, 31 *Journals of the Continental Congress* at 532-34 (cited in note 39) (journal of Aug 22, 1786). The General Assembly of Connecticut created a committee "to draft an address to New-York, respecting her antifederal measures . . ." NH Gazette (Portsmouth) 2 (Nov 25, 1786). Jackson wrote to Henry Knox, then the Secretary of War: "Every liberal good man is wishing New York in Hell." Letter from Jackson to Henry Knox (Apr 23, 1786) (on file at Massachusetts Historical Society, Boston). Some even thought civil war possible:

There is nothing but the restraining hand of Congress (weak as it is), that prevents N. Jersey and Connecticut from entering the lists very seriously with N. York and bloodshed would very quickly be the consequence [sic]. [B]ut however N. Jersey may suffer by her paying taxes for N. York, her refusal to comply with the requisition is unjustifiable, and unless she rescinds her resolution must work the end of all federal government.

Letter from Nathaniel Gorham to James Warren (Mar 6, 1786), in Edmund C. Burnett, ed, 8 *Letters of Members of the Continental Congress* xxii (Carnegie, 1936) ("*Letters of the Continental Congress*"). New York's February 15 rejection, according to Madison, "put a definitive veto on the Impost." Letter from James Madison to George Washington (Feb 21, 1787), in Robert E. Rutland and William M.E. Rachal, eds, 9 *The Papers of James Madison* 285 (Chicago, 1975). However, he didn't explain why he believed that New York would be amenable to more sweeping changes.

All we can say, in the final analysis, is that New York's obdurate opposition to the impost was inspiring great passion, and that it is hard to predict how the state would have responded over time. After all, it did finally accept the Federalist Constitution—although, as we shall see, not without much strategic manipulation and legerdemain by the Federalists. See text accompanying notes 181-90.

⁴² Indeed, even in 1788 many still wished for an impost instead of a new Constitution. See, for example, Elliot, ed, 3 *Debates in the Several State Conventions* at 278 (cited in note 16) (remarks of William Grayson at the Virginia Convention) ("I would recommend that the present Confederation should be amended. Give Congress the regulation of commerce."); Elliot, ed, 4 *Debates in the Several State Conventions* at 70 (cited in note 16) (remarks of Timothy Bloodworth at the North Carolina Convention) (declaring that while he was against the Constitution, "he was for giving power to Congress to regulate the trade of the United States . . ."); Elliot, ed, 2 *Debates in the Several State Conventions* at 80 (cited in note 16) (remarks of General Thompson at the Massachusetts Convention) ("It is my wish she may be one of the four dissenting states; then we shall be on our old ground, and shall not act unconstitutionally. Some people cry, It will be a great charge;

We should keep such questions in mind if we hope to understand the many protests engendered by the revolutionary thrust of the Federalist initiative.

B. The Mount Vernon Conference

The move toward a convention had very humble origins, which did not immediately provoke large-scale anxieties from legalistic opponents. Our story begins with the 1785 Mount Vernon Conference of commissioners from Maryland and Virginia. Though their commissions were limited to the regulation of the Potomac and Pocomoke rivers, they agreed to "sweeping, if sensible recommendations . . . [that] went considerably beyond the instructions that the respective legislatures had given to them."⁴³ Nonetheless, both legislatures approved their proposed interstate compact.

Madison, who was behind the initiative,⁴⁴ then moved that the Virginia legislature submit the agreement to the Continental Congress in compliance with Article VI of the Articles of Confederation, which required such approval whenever "two or more states" entered into any treaty, confederation, or alliance.⁴⁵ For reasons we cannot determine, the Virginia Assembly rejected Madison's proposal. Maryland also refused, citing the Articles as authorizing each state to "enter into a firm league of friendship with the other states respectively, for their mutual and general welfare."⁴⁶

The result may have provided Madison with a learning experience on three fronts. It suggested, first, that delegates to ad hoc assemblies might move beyond their commissions and get away with it when they returned to their state legislatures; second, this could happen even though the "whole proceeding was distinctly unconstitutional;"⁴⁷ and, third, that unconventional activ-

but it will be a greater charge, and be more dangerous, to make a new one. Let us amend the old Confederation. Why not give Congress power only to regulate trade?"

⁴³ Richard B. Morris, *The Mount Vernon Conference: First Step Toward Philadelphia*, 6 *This Const* 38, 40 (1985). See also Nancy McManus, *The Bicentennial of the Mount Vernon Conference*, 8 *This Const* 43 (1985).

⁴⁴ Broadus Mitchell, *Alexander Hamilton: Youth to Maturity 1755-1788* 356 (MacMillan, 1957).

⁴⁵ See Richard B. Bernstein, *Are We to Be a Nation? The Making of the Constitution* 98-99 (Harvard, 1987).

⁴⁶ An Act authorizing the states of Maryland and Virginia to lay out and improve a road within the limits of this state, between the waters of the River Patowmack and of the river Ohio, Md J 3 (Feb 21, 1786).

⁴⁷ Max Farrand, *The Framing of the Constitution of the United States* 8 (Yale, 1913).

ity might prove especially rewarding in a context, like Mount Vernon, that promised plain economic benefits to the states involved.⁴⁸

Madison made his next move on January 21, 1786, the last day of Virginia's legislative session. A member of his party convinced Virginia's legislature to authorize seven commissioners (including Madison) to invite deputies from other states to attend a meeting at Annapolis "to consider and recommend a federal plan for regulating commerce."⁴⁹ Even at this early stage, there is evidence that Madison was aware of the bandwagon dynamic. He wrote to Monroe:

Will it not be best on the whole to suspend measures for a more thorough cure of our federal system, till the partial experiment shall have been made [to regulate commerce at Annapolis]. If the spirit of the Conventioners should be friendly to the Union, and their proceedings well conducted, their return into the Councils of their respective States will greatly facilitate any subsequent measures which may be set on foot by Congress, or by any of the States.⁵⁰

Madison was already mastering the key insight into unconventional legitimation. Rather than aiming for a single grand victory, he was trying to set up a stepwise process—in which one partial initiative built on the next in a series of sequential ratifications:

⁴⁸ Morris, 6 *This Const* at 40 (cited in note 43) ("By its creative moves, the Mount Vernon Conference made Annapolis inevitable, and the audacity of the nationalists turned that subsequent ill-attended convention into a summons for Philadelphia."); Jack N. Rakove, *The Gamble at Annapolis*, 12 *This Const* 4, 8-9 (1986) (calling the Mount Vernon Conference a "useful precedent" for Annapolis).

⁴⁹ The resolution was careful, however, explicitly to require unanimous agreement. The commissioners were "to report to the several States, such an act relative to this object, as, when unanimously ratified by them, will enable the United States in Congress, effectually to provide for the same." Jensen, ed, 1 *Documentary History* at 180 (cited in note 16). Meeting at Benjamin Harrison's home on February 13, a quorum of the commissioners from Virginia set a time and place—Annapolis on the first Monday in September. Mervin B. Whealy, "The Revolution is not Over": *The Annapolis Convention of 1786*, 81 *Md Hist Mag* 228, 230 (Fall 1986).

⁵⁰ Letter from James Madison to James Monroe (May 13, 1786), in Gaillard Hunt, ed, 2 *The Writings of James Madison* 242-43 (Putnam, 1901). See also Jack N. Rakove, *The Collapse of the Articles of Confederation*, in J. Jackson Barlow, Leonard W. Levy, and Ken Masugi, eds, *The American Founding: Essays on the Formation of the Constitution* 225, 234-35 (Greenwood, 1988) (arguing that the best chance for reform was not a complete rejection of the Articles, but rather a "piecemeal, case-by-case" strategy).

The efforts for bringing about a correction thro' the medium of Congress have miscarried. Let a Convention then, be tried. If it succeeds in the first instance, it can be repeated as other defects force themselves on the public attention, and as the public mind becomes prepared for further remedies. The Assembly here [in Virginia] would refer nothing to Congress. They would have revolted equally against a pleni-potentiary commission to their deputies for the Convention. The option therefore lay between doing what was done and doing nothing. Whether a right choice was made time only can prove. I am not in general an advocate for temporizing or partial remedies. But a rigor in this respect, if pushed too far may hazard everything.⁵¹

The bandwagon had begun to roll, but in what direction?

C. The Annapolis Convention

Despite its questionable legality under the Articles,⁵² Virginia's call proved surprisingly successful, leading nine states to appoint delegates to a convention at Annapolis in September 1786. At the same time, it provoked expressions of dissent from four states.⁵³ South Carolina refused, on the ground that it had "an appearance of either revoking or infringing on those powers" granted to Congress that the legislature had voted when it supported the Five Percent Impost.⁵⁴ The Annapolis proposal led to

⁵¹ Letter from James Madison to James Monroe (Mar 19, 1786), in Hunt, ed, 2 *The Writings of James Madison* at 233-34 (cited in note 50). Stephen Higginson, a Massachusetts delegate to Annapolis, assessed Madison's aim: "[W]hen I consider the men who are deputed from New-York, Pennsylvania and Virginia, and the source of whence the proposition was made, I am strongly inclined to think political Objects are intended to be combined with commercial, if they do not principally engross their Attention. . . . [F]ew of them have been in the commercial line, nor is it probable they know or care much about commercial Objects." Letter from Stephen Higginson to John Adams (July 1786), in Thomas W. Higginson, *The Life and Times of Stephen Higginson* 72-73 (Houghton, Mifflin, 1907).

⁵² "Since states were forbidden by the Articles of Confederation [Art VI] to enter into treaties or alliances with each other without the consent of Congress, the Annapolis Convention, called by the Virginia Assembly at Madison's suggestion, would be of questionable legality. Any action the Convention might attempt to take would be clearly illegal. But Madison, if not yet desperate, was determined to do something." William Peters, *A More Perfect Union: The Making of the United States Constitution* 9-10 (Crown, 1987).

⁵³ Georgia rejected the invitation to Annapolis, see Letter from Rufus King to Jonathan Jackson (June 11, 1786), in Burnett, ed, 8 *Letters of the Continental Congress* at 389 (cited in note 41), but we do not know why.

⁵⁴ Whealy, 81 *Md Hist Mag* at 231 (cited in note 49).

an impasse in Connecticut, as legislators voiced a fear that it would undermine Congress and set a precedent for other illegal movements.⁵⁵ Maryland's rejection was more elaborate:

[T]he meeting proposed may be misunderstood or misrepresented in Europe, give umbrage to Congress, and disquiet the citizens of the United States, who may be thereby led erroneously to suspect, that the great council of this country wants either the will or wisdom to digest a proper uniform plan for the regulation of their commerce. The power must be given to Congress to effectuate any system which might be adopted by the proposed meeting of commissioners.⁵⁶

Worse yet, the meeting "may produce other meetings, which may have consequences which cannot be foreseen. Innovations in Government, when not absolutely necessary, are dangerous, particularly to republics, generally too fond of novelties, and subject to change."⁵⁷ The Annapolis commissioners were left in the embarrassing position of meeting in a state that had formally denounced them as dangerous revolutionaries.⁵⁸ Moreover, the early turnout was disappointing, considering that nine states had formally appointed delegates.⁵⁹ When only twelve delegates from

⁵⁵ Connecticut had undergone a series of popular conventions in 1783 and 1784, which had convinced its leadership of the perils involved in illegal departures from established procedures. Rakove, 12 *This Const* at 9 (cited in note 48). Madison explained in 1786 that "Connecticut declined not from a dislike to the object, but to the idea of a Convention, which it seems has been rendered obnoxious by some internal Conventions, which embarrassed the Legislative Authority." Letter from James Madison to Thomas Jefferson (Aug 12, 1786), in Hunt, ed, 2 *The Writings of James Madison* at 262 (cited in note 50).

⁵⁶ Votes and Proceedings of the Senate of the State of Maryland, 1st Sess 84-85 (Mar 8, 1785) (on file at Maryland Hall of Records).

⁵⁷ *Id.*

⁵⁸ Randolph lamented, "But what a dreadful chasm will the refusal of Maryland create? A chasm more injurious to us, than any other of the delegates." Letter from Edmund Randolph to James Madison (June 12, 1786), in Rutland and Rachal, eds, 9 *The Papers of James Madison* at 75 (cited in note 41).

⁵⁹ New Hampshire, Massachusetts, Rhode Island, and North Carolina had elected delegates, but they had not arrived. On September 8, Madison wrote in despair "I came to this place a day or two ago, where I found two [commissioners] only. A few more have since come in, but the prospect of a sufficient [number] to make the meeting respectable is not flattering." Letter from James Madison to Ambrose Madison (Sept 8, 1786), in Hunt, ed, 2 *The Writings of James Madison* at 269 (cited in note 50). The next day, a delegate, in what could have been a reference to the Articles' requirement of seven states to form a quorum, wrote that "[w]e wait with impatience for the more distant states, as without a deputation from seven, at least, it seems improper to enter on the main business of our mission." *Extract of a letter from a gentleman, now attending the meeting of a convention on the subject of the regulation of trade, at Annapolis, dated September 9, 1786*, NJ Ga-

five states had arrived,⁶⁰ the Federalists desperately sought to sustain institutional momentum. Before disbanding, the commissioners accepted Hamilton's proposal to issue a call for another convention—this time to meet in Philadelphia.

According to the commissioners, this new convention should not be limited to "commercial regulation" but should consider a broader range of deficiencies in the existing system: "defects, [which] upon a closer examination, may be found greater and more numerous." In calling for a radical expansion of the convention's mandate, the group recognized a need to justify itself. Who, after all, had given these commercial commissioners the authority to issue such a call? The report answered:

If in expressing this wish or in intimating any other sentiment, Your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.⁶¹

The upshot was a striking combination of hubris and humility.⁶²

zette 3 (Sept 18, 1786).

⁶⁰ The twelve delegates who finally made it to Annapolis were Alexander Hamilton and Egbert Benson from New York; Abraham Clarke, William C. Houston, and James Schureman from New Jersey; Tench Coxe from Pennsylvania; George Read, John Dickinson, and Richard Bassett from Delaware; and Edmund Randolph, James Madison, and St. George Tucker from Virginia.

⁶¹ The entire text of the Annapolis report is reproduced in Jensen, ed, 1 *Documentary History* at 182-85 (cited in note 16). The report was in Hamilton's handwriting, Kaminski and Saladino, eds, 13 *Documentary History of the Ratification* at 34 (cited in note 34), and Madison later confirmed Hamilton's authorship. Hunt, ed, 7 *The Writings of James Madison* 164-65 (cited in note 50), quoting letter dated Oct 12, 1804.

There are, however, problems with the modern reprinting of this document. Almost all reprints italicize the words "other important matters," which are underlined in the original. But they omit the emphasis placed on other words. For the most part, these phrases emphasize the importance that Annapolis placed on *unanimous consent*. Consider the phrases that Hamilton chose to underline: "by the other states in the union," "to report to the several States," and most importantly, "when unanimously ratified by them." The only underlined phrases not speaking to unanimity are the ones attempting to enlarge the scope of the Philadelphia Convention: "other important matters" and "for the exigencies of the Union." See Bernstein, *Are We to Be a Nation?* at 104 (cited in note 45) (photocopy of original Annapolis resolution). This modern failure can be traced back to the standard reference work, Tansill, ed, *Documents Illustrative of the Formation of the Union* (cited in note 17), though Tansill does note the italics for "other important matters," id at 40-43.

⁶² Some believed that Hamilton, Madison, and others had conspired to end the Annapolis conference quickly in order to plant the Philadelphia idea. This conspiracy theory was industriously propagated by Louis Otto, the French chargé d'affaires, Letter from Louis Otto to Vergennes (Oct 10, 1786), in George Bancroft, 2 *History of the Forma-*

The commissioners had taken upon themselves the right to propose a fundamental change in constitutional law. While Article XIII had confided exclusive authority in Congress to propose amendments, Annapolis was making an end run around the existing institution by calling for a second body, the convention, unknown to the Confederacy's higher lawmaking system.

Having taken this revolutionary step, the commissioners then covered their tracks to gain the cooperation of existing institutions.⁶³ First, they were careful to specify that any constitutional proposals emerging from Philadelphia should be approved by Congress and all thirteen legislatures in exact conformity with the Articles of Confederation. This was, of course, precisely what did not happen. Moreover, given the willingness of the Annapolis commissioners to go beyond their mandate, how seriously could one take their assurances about the future convention?⁶⁴ Nonetheless, the commissioners' stipulation softened the challenge to existing authorities implicit in the call for a new institution that, once convened, might serve as a formidable rival.

Second, the commissioners did not take decisive action unilaterally. They merely called upon Congress and the thirteen state legislatures to issue such calls. Surely there was little harm in that? If existing institutions refused to respond favorably, the Annapolis initiative would be quickly forgotten.

If, however, Annapolis struck a responsive chord, its hubristic aspect would reassert itself once again. While the commissioners were clear that any proposals made by the convention should gain the assent of Congress and all thirteen legislatures, they were entirely silent when it came to the rules for calling the Philadelphia Convention in the first place. Did its initiative re-

tion of the Constitution of the United States of America 399-401 (Rothman, 1983), and later picked up by the prominent pamphleteer, the Federal Farmer, Kaminski and Saladino, eds, 14 *Documentary History of the Ratification* at 22-23 (cited in note 34). See also Farrand, *The Framing of the Constitution* at 9 (cited in note 47); Fred Barbash, *The Founding: A Dramatic Account of the Writing of the Constitution* 39-40 (Simon & Schuster, 1987). Our review of the Maryland archives and other original sources has uncovered no hard evidence of such a conspiracy.

⁶³ Unfortunately, we have been no more successful than others in uncovering evidence that would reveal the course of the commissioners' discussions. Our analysis is based simply on the text of Hamilton's report.

⁶⁴ Rakove, 12 *This Const* at 4 (cited in note 48) ("[T]he initiative taken by the Annapolis commissioners set an important precedent for the delegates at Philadelphia, who also ignored their nominal duty to revise the existing Articles of Confederation and instead chose to frame a radically new constitution. One risky gamble thus led to another, for far greater stakes.").

quire the assent of all the existing institutions? If not, how much support was enough?

Rather than setting up a clear rule in advance, the commissioners were content to precipitate an institutional bandwagon; as more and more existing institutions recognized the need for changing the rules, would the dynamic of institutional consent create its own kind of legitimation?

D. The Impact of Shays's Rebellion

Some have characterized Hamilton's dramatic call at Annapolis as a response to news of the Massachusetts uprising we know as Shays's Rebellion.⁶⁵ Our comprehensive study of original sources gives no support to this claim. However, news of Shays's Rebellion rapidly overtook reports about Annapolis and profoundly affected its public reception.

But in a complicated way. Traditional accounts, relying on Beardian understandings, stress the way in which Shays's Rebellion generated class anxieties amongst the revolutionary elite, leading them to embrace strong measures like the Constitutional Convention. This is undoubtedly part of the story,⁶⁶ but there is another part as well. Shays's Rebellion was only the most dramatic example of agrarian uprisings that swept through Connecticut, New Hampshire, Rhode Island, as well as Massachusetts, in the mid-1780s. Throughout western New England, farmers were not only closing down courts and refusing to pay debts. They were engaging in more constructive forms of politics, meeting in illegal county conventions, and making extraordinary demands for fundamental change.⁶⁷

⁶⁵ See Walter B. Mead, *The United States Constitution: Personalities, Principles, and Issues* 18 (South Carolina, 1987); Mitchell, *Alexander Hamilton* at 366 (cited in note 44).

⁶⁶ This debate has been covered well by others. For the view that Shays's Rebellion had nothing to do with the Constitution, see Robert A. Feer, *Shays's Rebellion and the Constitution*, 42 New Eng Q 388, 393-94 (1969) (arguing that "[t]here is no evidence that state legislatures moved one whit faster to choose delegates to the Philadelphia Convention because of Shays's Rebellion."). On the other hand, David Szatmary argues that "domestic unrest helped to ensure in certain quarters a favorable reaction toward the meeting [of the Philadelphia Convention]. Developing at a critical juncture in time, the rebellion convinced the elites of sovereign states that the proposed gathering at Philadelphia must take place." David P. Szatmary, *Shays' Rebellion: The Making of an Agrarian Insurrection* 127 (Massachusetts, 1980).

⁶⁷ For a discussion of such activity in Connecticut, see note 55. New Hampshire had had so many popular conventions that by the middle of 1786, assemblies "were held in most of the towns of this state, appointing members to meet in convention" to "reliev[e] the alarming distresses of the people at large." Mass Gazette (Aug 14, 1786). Opponents of conventions once again raised concerns of illegality. See, for example, *General*

This predictably led opponents to assault the farmers' use of illegal conventions. In Massachusetts particularly, the newspapers were full of fascinating debates that wrestled with the conditions under which a break with the rules was appropriate.⁶⁸ Pamphleteers, like *An Other Citizen*, distinguished sharply between the use of illegal conventions during the American Revolution, and their use in the present dispute. When the colonists were fighting the British, they had no alternative but to break the law and meet in convention. But the situation had changed radically in 1780, when the people of Massachusetts solemnly approved a Constitution. Since that time, no group of men could properly meet in convention and "dare, with impunity, to lay the foundations of a CIVIL WAR in the state, or to molest that Government in the execution of its constitutional powers."⁶⁹ An address to Governor Bowdoin of Massachusetts elaborated the point:

In the same compact, the people solemnly agreed to support the Constitution for the space of fifteen years, and made ample provision for the revision of it at the end of that period, if it should then be thought necessary.—There is no officer, either high or low, within the commonwealth, who

Sullivan's Address to the Freemen of the State of New Hampshire, Worcester Mag 339 (2d week of Oct 1786) (Conventions "have by experience, been found in this and in one of the neighbouring states, to have a tendency to overturn and destroy all constitutional authority and government."). Vermont had conventions similar to the ones in Massachusetts, both in Rutland on August 15, 1786, and in Middletown on September 26, 1786. *Ga St Gazette* 1 (Jan 27, 1787), quoting a newspaper from Bennington, Vt (Nov 20, 1786). The protests for independence in Vermont were similar to those in Massachusetts. *Conn J* 2 (Aug 30, 1786). Rhode Island farmers likewise set up conventions in Scituate and East Greenwich in August 1786. Szatmary, *Shays's Rebellion* at 39 (cited in note 66).

⁶⁸ See, for example, *Address of James Sullivan, Charles Jarvis, Stephen Higginson, Edward Paine, Jonathan Jackson, and Jonathan Austin to the Governor James Bowdoin, September 14, 1786*, Worcester Mag 298 (3d week of Sept 1786) (arguing that the commotions "are equally repugnant to the constitution, as they are destructive of the peace and order of society"); and *Governor Bowdoin's reply*, id at 299 (referring to "the illegal measures"); *Monitor*, Worcester Mag 371 (1st week of Nov 1786) ("Open your eyes to the pit of destruction which gapes before you! — See the fair, and once firm fabrick of the Constitution, 'which your own hands have framed,' now falling to pieces! — See these Conventions and their consequences, these insurrections, these intestine discords, these 'worms in the bowels,' see them, and be convinced they portend the dissolution of all free government in America!"); *Petition from the Town of Holden to Governor Bowdoin*, Worcester Mag 507 (3d week of Jan 1787) ("[W]e view with grief and disapprobation, when other means more regular and constitutional might have been taken for a redress of grievances . . .").

⁶⁹ *An Other Citizen, On Conventions*, Worcester Mag 273 (1st week of Sept 1786). For similar attacks, see *An Old Republican, Strictures upon County Conventions in General, and upon the Late Meeting Holden at Hatfield in Particular*, Worcester Mag 295 (3d week of Sept 1786).

does not derive his whole authority from the people, and who is not amenable to a proper and adequate tribunal for his conduct.

...

If the citizens of the State labour under grievances which can be redressed by the acts of the legislature, we conceive that their privileges in this case can never be enlarged, for the General Court are chosen annually by the people; and though in one year our complaints are not attended to, yet we can in the next election place men in power who will answer our reasonable expectations; and, we are constrained to say, that we are ignorant of the time when the representatives of the people in this state have not duly attended to the Instructions of their constituents.

...

Fellow-citizens, we now *entreat* you, by the *sacred* compact which holds us in one society—by the *blood* of our brethren *shed to obtain our freedom*—by the tender regard we feel for our *rising offspring*, claiming freedom from our hands, as *their inheritance* by the *grant* of heaven—to use your endeavours that redress of grievances be fought for in a *constitutional and orderly way only* ⁷⁰

Given these broad statements of principle, it was going to be tough for Shaysite opponents in New England legislatures to embrace the Annapolis call for a Philadelphia Convention. Was this call for a convention no less revolutionary, and no less illegitimate, than that of the rebel farmers?⁷¹

⁷⁰ *Address*, Worcester Mag at 300-02 (cited in note 68).

⁷¹ The dilemma confronting New England legalists was generally appreciated throughout the country. As late as the state ratifying convention in Virginia, one can hear William Grayson remarking:

When this state proposed that the general government should be improved, Massachusetts was just recovered from a rebellion which had brought the republic to the brink of destruction—from a rebellion which was crushed by that federal government which is now so much condemned and abhorred: a vote of that august body for fifteen hundred men, aided by the exertions of the state, silenced all opposition, and shortly restored the public tranquillity. Massachusetts was satisfied that these internal commotions were so happily settled, and was unwilling to risk any similar distresses by theoretic experiments. Were the Eastern States willing to enter into this measure? Were they willing to accede to the proposal of Virginia? In what manner was it received? Connecticut revolted at the idea. The Eastern States, sir, were unwilling to recommend a meeting of a convention. They were well aware of the dangers of revolutions and changes. Why was every effort used, and such uncommon pains taken, to bring it about? This would have been unnecessary, had it been approved of by the

It was not long before this question was raised in the Massachusetts legislature. Both Rufus King and Nathan Dane opposed the Annapolis report's call to Philadelphia as unconstitutional. As King explained:

The Confederation was the act of the people. No part could be altered but by consent of Congress and confirmation of the several Legislatures. Congress therefore ought to make the examination first, because, if it was done by a convention, no Legislature could have a right to confirm it Besides, if Congress should not agree upon a report of a convention, the most fatal consequences might follow. Congress therefore were the proper body to propose alterations ⁷²

King and Dane would become important figures. A few months later, they would be the authors of the congressional resolution calling upon the states to send delegates to Philadelphia. During the fall of 1786, however, they seemed preoccupied with the similarities between the Annapolis Convention and the County Conventions of the Shaysites. Rather than serving as a Beardian prod to the upper classes, Shays served as an example of the ease with which illegality could spiral out of control.⁷³

people. Was Pennsylvania disposed for the reception of this project of reformation? No, sir. She was even unwilling to amend her revenue laws, so as to make the five per centum operative. She was satisfied with things as they were. There was no complaint, that ever I heard of, from any other part of the Union, except Virginia.

Elliot, ed, 3 *Debates in the Several State Conventions* at 274-75 (cited in note 16).

⁷² *Proceedings of Government*, Worcester Mag at 353 (cited in note 41). A month later, Nathan Dane reinforced these concerns:

[A] question arises as to the best mode of obtaining these alterations, whether by the means of a convention, or by the constitutional mode pointed out in the 13th article of the confederation. In favour of a convention, it is said, that the States will probably place more confidence in their doings' and that the alterations there may be better adjusted, than in Congress. It is asked, what reason there can be for supporting this, as several of the States consider such a convention highly inexpedient, and some States unconstitutional, and not all the States are agreed even in the propriety of a commercial convention?

Proceedings of Government, Newport Mercury 1 (Nov 17, 1786) (speech of Nathan Dane to Massachusetts House of Representatives).

⁷³ In their speeches, both King and Dane emphasized their anxieties about Shays's Rebellion and the imprudence of destabilizing Congress at a time when federal troops might be required to assist the Massachusetts authorities. This supports the suggestion of Robert Feer, 42 New Eng Q at 393-94 (cited in note 66), that Shays's Rebellion had an adverse impact upon the prospects of the Philadelphia Convention.

Given these anxieties, it should be no surprise that New York and New England were slow to respond to Annapolis's call to Philadelphia.⁷⁴ Nonetheless, Federalists further south were successful in winning a number of favorable responses to Annapolis,⁷⁵ maintaining momentum through the winter of 1786 until the bandwagon effect could be renewed by another round of ratification.

E. The Continental Congress Gets on the Bandwagon

Congress received the Annapolis proceedings on September 20 and referred them to a special three-man committee. It took no action for months. By early February, Madison and Hamilton came to Congress to campaign for endorsement, but others—including future Publian John Jay—continued to be impressed by the illegality of it all. Richard Henry Lee, a member of the special congressional committee, surveyed the scene:

With difficulty the friends to the system adopted by the convention [at Annapolis] induced Congress to commit your report, altho' all were truly sensible of the respect manifested by the convention to this body, and all zealous to accomplish the objects proposed by the authors of the commercial convention. Indeed their conviction of the inadequacy of the present federal government render them particularly zealous to amend and strengthen it. But different opinions prevail as to the mode; some think with the Annapolis meeting, others consider Congress not only the constitutional but the most eligible body to originate and propose necessary amendments to the confederation, and others prefer State conventions for the express purpose, and a congress of deputys, appointed by these conventions with plenipotentiary powers.⁷⁶

⁷⁴ See text accompanying note 71. Of the northern states, only Massachusetts approved Philadelphia before Congress acted, and it made its earlier resolution less restrictive on March 3 in response to Congress's February decision. The other northern states acted later: New York (Mar 6); Connecticut (May 17); New Hampshire (June 27); and Rhode Island, of course, not at all. See text accompanying notes 84-85.

⁷⁵ States to the south of New York tended to act earlier: New Jersey (Nov 23); Virginia (Nov 23); Pennsylvania (Dec 30); North Carolina (Jan 6); Delaware (Feb 3); Georgia (Feb 10); South Carolina (Mar 8); and Maryland (May 26). See text accompanying note 19.

⁷⁶ Letter from Henry Lee to Henry St. George Tucker (Oct 20 1786), in Burnett, ed, 8 *Letters of the Continental Congress* at 489-90 (cited in note 41). James Madison's notes say that "[t]he objections which seemed to prevail against the recommendation of the convention by Congress, were with some: (1) that it tended to weaken the federal authority by

Despite these hesitations, ratification by Congress was imperative if Philadelphia were to become a credible reality. Many states, especially in the North, seemed quite unprepared to send delegates to an unconstitutional convention unless Congress expressly approved.⁷⁷

Within this context, the forces for the convention were reinforced from a surprising direction; the very same King and Dane who had opposed Philadelphia in Massachusetts now came to its defense as congressional delegates. After some preliminary sparring in mid-February, the two Massachusetts delegates wrote the resolution that gained congressional approval on February 21, 1787.⁷⁸ What accounted for the shift?

We have King's word, in a letter to Elbridge Gerry of February 11, that it was not any change of mind concerning the legality of the initiative:⁷⁹

For a number of reasons, although my sentiments are the same as to the legality of this measure, I think we ought not to oppose, but to coincide with this project. . . .

Events are hurrying to a crisis; prudent and sagacious men should be ready to seize the most favourable circumstances to establish a more permanent and vigorous government.⁸⁰

lending its sanction to an extra-constitutional mode of proceeding—with others (2) that the interposition of Congress would be considered by the jealous as betraying an ambitious wish to get power into their hands by any plan whatever that might present itself.” Madison's notes of the debates in Congress on February 21, 1787, in Jensen, ed, 1 *Documentary History* at 188 (cited in note 16). Madison also notes that New Englanders were less enthusiastic about plans for a stronger Union, attributing it in part to “the effect of their late confusions,” for example, Shays's Rebellion. *Id.* at 189.

⁷⁷ Madison wrote to Randolph,

A great disagreement of opinion exists as to the expediency of a recommendation from Cong[ress] to the backward States in favor of the meeting. It would seem as if some of the States disliked it because it is an extraconstitutional measure, and that their dislike would be removed or lessened by a sanction from Cong[ress] to it. On the other hand it is suggested that some would dislike it the more if Cong[ress] should appear to interest themselves in it.

Letter from James Madison to Edmund Randolph (Feb 18, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at xxxix (cited in note 41).

⁷⁸ Jensen, ed, 1 *Documentary History* at 187 (cited in note 16).

⁷⁹ We have Madison's words as well, noting that Dane, King's associate, who “was at bottom unfriendly to the plan of a convention, and had dissuaded his state from coming into it, brought forward a proposition” *Id.* at 189.

⁸⁰ Letter from Rufus King to Elbridge Gerry (Feb 11, 1787), in King, ed, *The Life and Correspondence of Rufus King* at 201-02 (cited in note 33).

Close observers had little difficulty explaining this conversion to the path of revolution. By this point, Massachusetts was effectively crushing Shays's Rebellion.⁸¹ Stephen Higginson, who had been appointed a Massachusetts delegate to the Annapolis Convention, drolly observed that King and Dane "will not now think there is so great a resemblance between our County Conventions . . . and that proposed to be held in Philadelphia in May, as they then thought, nor will they now imagine the same danger can result to the Union from the latter, as our experience has proved was justly apprehended from the former to this Commonwealth."⁸²

Despite the acknowledgment of formal illegality by its draftsmen, the resolution sufficed to propel the institutional bandwagon forward. Instead of stressing the revolutionary character of its enterprise, the resolution outwardly proclaimed continuity with the Articles, beginning with the words "Whereas there is provision in the Articles of Confederation and perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several states"⁸³ With Shays's Rebellion now under control, the northern states joined southern laggards in responding affirmatively to the congressional invitation to Philadelphia.⁸⁴

⁸¹ On February 4, General Lincoln's army took the Shaysites by surprise in Petersham. This was a major turning point in the battle. On the same day, the Massachusetts General Court declared a state of rebellion, which gave Governor Bowdoin close to unlimited powers. He used them to raise 2,600 new troops. Twelve days later, Massachusetts passed an act disqualifying Shaysites from voting, serving as jurors, or holding public office. All this ended the threat of major organized Shaysite assaults. Szatmary, *Shays' Rebellion* at 105-06 (cited in note 66).

⁸² Letter from Stephen Higginson to General Knox (Feb 8, 1787), in Higginson, *Steven Higginson* at 113 (cited in note 51). This letter also may contain the first suggestion that the convention might appropriately break with the unanimity rule of the Articles and call for nine states to breathe life into a new Constitution. *Id.* at 114.

King himself was more anxious about the effects of his conversion: "I will not venture a conjecture relative to the policy of this measure in Mass[achusetts]. The thing is so problematical, that I confess I am at some loss. I am rather inclined to the measure from an Idea of prudence, or for the purpose of watching, than from an expectation that much Good will come from it." Letter from Rufus King to Elbridge Gerry (Feb 18, 1787), in King, ed, *The Life and Correspondence of Rufus King* at 202 (cited in note 33).

⁸³ Jensen, ed, 1 *Documentary History* at 187 (cited in note 16).

⁸⁴ Indeed, fresh from its victories over the Shaysites, the Massachusetts legislature voted to support the convention even before it received word of Congress's favorable recommendation. Once this had been received, however, it significantly expanded the commissions given to its delegation, expressly citing the congressional action. Of the five other states (New York, South Carolina, Maryland, Connecticut, and New Hampshire) that acted late, only one, Maryland, did not base its appointment on the congressional resolution (which chose instead to track the language of the original Annapolis Conven-

With one exception.

F. Rhode Island's Protest

"Permit the legislature of this State to address you," Governor Collins of Rhode Island wrote to the President of the Continental Congress in explanation of its rejection of an invitation to send delegates to Philadelphia:

[A]s a Legislative Body, we could not appoint delegates to do that which only the people at large are entitled to do. By a law of our State, the delegates in Congress are chosen by the suffrages of all the freemen therein, and are appointed to represent them in Congress; and for the Legislative Body to have appointed delegates to represent them in convention, when they cannot appoint delegates in Congress (unless upon their death or other incidental matter,) must be absurd, as that delegation in convention is for the express purpose of altering a constitution, which the people at large are only capable of appointing the members.⁸⁵

Collins's objection to the convention was by no means unique. Others, including John Jay, were troubled by the fact that the Philadelphia Convention was a creature of state legislatures, and so could not claim a sufficiently direct connection to "the People."⁸⁶ After challenging the legitimacy of the convention, Collins quoted the final Article of Confederation verbatim, emphasizing Rhode Island's "diffiden[ce] of power and apprehension of dissolving a compact which was framed by the wisdom of men who gloried in being instrumental in preserving the religious and civil rights of a multitude of people . . . , and fearing, when the compact should once be broken, we must all be lost in a common ruin."⁸⁷

The letter was dated September 15, 1787, and arrived in New York just as the Philadelphia Convention was winding up its own anxious deliberations about the wisdom of a revolutionary break with legality.

tion). Kaminski and Saladino, eds, 13 *Documentary History of the Ratification* at 38 (cited in note 34). See also text accompanying notes 20-21.

⁸⁵ Letter from John Collins, Governor of Rhode Island, to the President of Congress (Sept 15, 1787), in William R. Staples, *Rhode Island in the Continental Congress* 575-76 (Providence, 1870).

⁸⁶ See text accompanying note 33.

⁸⁷ Staples, *Rhode Island in the Continental Congress* at 576.

G. Legality in Philadelphia

Illegality was a leitmotif at the convention from its first days to its last.⁸⁸ The theme's repeated recurrence was in part a matter of strategy. The Federalists' opponents constantly used legal arguments to discredit their rivals' efforts to gain support for a national government with unprecedented powers. But there was something more than rhetoric involved. Rather than responding to legalistic critique with legalistic defense, leading Federalists regularly proclaimed the revolutionary character of their enterprise.

The paucity of legalistic defenses might strike moderns as surprising. This was not, however, the first time that Washington and the rest had defied the law in the name of a mobilized People. If revolutionary action was justified against King George III,

⁸⁸ The problem burst onto center stage from the very first as the Virginia delegation sought to dominate the agenda with its fifteen-point Plan. The first point considered was Virginia's nationalistic contention that "a union of the states, merely federal, will not accomplish the objects proposed by the articles of the confederation." Farrand, ed, 1 *Records of the Federal Convention* at 39 (cited in note 15). Pinckney of South Carolina objected "that if the convention agreed to it, it appeared to him that their business was at an end," since the delegates only had been given power to revise the Articles and not junk them entirely. *Id.* Similarly, Gerry of Massachusetts rose to warn the delegates that it is "questionable not only whether this convention can propose a [] government totally different or whether Congress itself would have a right to pass such a resolution as that before the house. The commission from Massachusetts empowers the deputies to proceed agreeably to the recommendation of Congress. This the foundation of the convention. If we have a right to pass this resolution we have a right to annihilate the confederation." *Id.* at 42-43.

Men like Gerry and Pinckney were crucial for the Virginians. Rather than trying to force the question to a vote, they quickly deferred further discussion—only to encounter more legalistic resistance in response to their second resolve, demanding a break with the Confederation's "one state—one vote" system in Congress:

Mr. Reed [of Delaware] moved that the whole clause relating to the point of Representation be postponed; reminding the Com[mittee] that the deputies from Delaware were restrained by their commission from assenting to any change of the rule of suffrage, and in case such a change should be fixed on, it might become their duty to retire from the Convention.

Mr. Govr. Morris observed that the valuable assistance of those members could not be lost without real concern, and that so early a proof of discord in the convention as a secession of a State, would add much to the regret; that the change proposed was however so fundamental an article in a national Govt. that it could not be dispensed with.

Id. at 37. Once again, however, the Federalists rapidly retreated. At the time of these debates in late May, representatives from only eight states had appeared in Philadelphia. A legalistic walkout by Delaware could have readily pushed the convention down the road to Annapolis. By mid-June the debate on legality reasserted itself in earnest in the proceedings analyzed in the text.

was it not justified to consolidate the constitutional achievement of the Revolutionary generation?

Given their experience of successful revolution, it was no disgrace for these men to confess illegality—and disdain the rare and ingenious effort to construct a legalistic fig leaf for their initiatives. Instead, the challenge was to keep the dangers of a revolutionary breach with legality under control by designing another round of unconventional activities that involved the cooperation of established authorities in their own constitutional reorganization.⁸⁹

The ongoing discussion of illegality proceeded in two waves. The first was provoked by the bitter debate between nationalists and decentralizers that dominated the first six weeks of the convention. The nationalizers seized the agenda with their fifteen-point Virginia Plan, which contemplated a powerful national government with legislative, executive, and judicial institutions operating independently of the states. The decentralizers responded with the New Jersey Plan, which enhanced the powers of the existing Congress without challenging basic premises—especially the principle that gave each state equal voting power in the Continental Congress.

The decentralizers repeatedly wrapped themselves in a cloak of legality. Here is Paterson's speech introducing the New Jersey Plan:

The Convention he said was formed in pursuance of an Act of Congs. that this act was recited in several of the Commissions, particularly that of Massts. which he required to be read: That the amendment of the confederacy was the object of all the laws and commissions on the subject; that the articles of the confederation were therefore the proper basis of all the proceedings of the Convention. We ought to keep within its limits, or we should be charged by our constituents with usurpation. [T]hat the people of America were sharpsighted and not to be deceived. But the Commissions under which we acted were not only the measure of our power. [T]hey denoted also the sentiments of the States on the subject of our deliberation. The idea of a national Govt. as contradistinguished from a federal one, never entered into

⁸⁹ Forty-four of the fifty-five delegates were or had been delegates to the Continental Congress. James H. Charleston, et al, eds, *Framers of the Constitution* 29 (Guelier Educational, 1986).

the mind of any of them, and to the public mind we must accommodate ourselves. . . . We must follow the people; the people will not follow us.⁹⁰

Recall that Massachusetts was a key state that had expressly instructed its delegates to follow Congress's insistence that the convention meet "for the *sole and express* purpose of revising the Articles."⁹¹ On Paterson's widely shared view,⁹² it was only a moderate plan, like New Jersey's, that qualified as a revision. Nationalist proposals championed by Madison, Wilson, and Hamilton were simply beyond the convention's authority: "If the confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves."⁹³

Especially problematic was the nationalists' insistence on depriving the small states of the equal voting power guaranteed them by the Articles: "He reads the 5th. art: of Confederation giving each State a vote—& the 13th. declaring that no alteration shall be made without unanimous consent. This is the nature of all treaties. What is unanimously done, must be unanimously undone."⁹⁴ Throughout these bitter weeks, Paterson's legalistic concerns were reinforced by his allies.⁹⁵

The nationalists, in contrast, were strikingly unconcerned with legal technicalities. Edmund Randolph, who had presented the Virginia Plan, responded to Paterson's recurring legalisms by explaining that he "was not scrupulous on the point of power. When the salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary."⁹⁶ Broadly speaking, this was the dominant sentiment, with nationalist delegates repeatedly claiming that the danger of disunion

⁹⁰ Farrand, ed, 1 *Records of the Federal Convention* at 177-78 (cited in note 15).

⁹¹ See text accompanying note 17 (emphasis added).

⁹² Even Hamilton admitted at one point that the plans of the nationalizers "are very remote from the idea of the people. Perhaps the Jersey plan is nearest their expectation. But the people are gradually ripening" Farrand, ed, 1 *Records of the Federal Convention* at 301 (cited in note 15).

Curiously, many intelligent commentators seem blind to the problem of legal authority. For example, Fred Barbash asserts that the defenders of the New Jersey Plan could not come up with a positive argument for their plan; their best defense of it was that it was less radical and therefore more in touch with what the people wanted—as if legality were not a "positive argument!" Barbash, *The Founding* at 87 (cited in note 62).

⁹³ Farrand, ed, 1 *Records of the Federal Convention* at 250 (cited in note 15) (remarks of Paterson).

⁹⁴ *Id.*

⁹⁵ *Id.* at 336 (Lansing); *id.* at 469 (Ellsworth); *id.* at 531 (Bedford).

⁹⁶ *Id.* at 255.

justified the embrace of illegality.⁹⁷ This was sometimes buttressed by appeals to popular sovereignty, as with James Wilson's: "We have powers to conclude nothing—we have power to propose anything—we expect the Approbation of Cong. we hope for that of the Legis. of the several States perhaps it will not be inconsistent w[ith] Revolution principles, to promise ourselves the Assent of the People provided a more regular establishment cannot be obtained &c &c."⁹⁸

Only Madison seemed interested in exploring the possibility of a legalistic defense for the convention's break with the Articles. In an important speech, he asserted that the nationalists' plan could legally count as an appropriate "revision" of the Articles within the terms of Congress's resolution. After all, the resolution told the delegates to "render the federal constitution adequate to the exigencies of government and the preservation of the Union." He also disputed Paterson's claim that the Articles could not be legally dissolved without the unanimous consent of all thirteen states. On his view, there might be occasions where the breach of the Articles by some states allowed others to declare them void.

We will be discussing Madison's legal views more elaborately at a later point. For present purposes, it is enough to note how little influence they had on the debate. While others did pick up a bit on Madison's broad interpretation of the congressional call, Madison himself reports that even a strong nationalist like Hamilton proclaimed himself "not yet prepared to admit the doctrine that the Confederacy, could be dissolved by partial infractions of it."⁹⁹ On the following day, Ellsworth rose to attack the basic premises of Madison's argument:

⁹⁷ See, for example, id at 283, 338 (remarks of Hamilton and Mason).

⁹⁸ Id at 266 (as reported by King). Madison's report of the same remarks does not contain as explicit a reference to "revolution principles": "With regard to the *power of the Convention*, he conceived himself authorized to *conclude nothing*, but to be at liberty to *propose any thing*." Id at 253. Wilson had already confessed his secessionist intentions:

Mr. Wilson took this occasion to lead the Committee by a train of observations to the idea of not suffering a disposition in the plurality of States to confederate anew on better principles, to be defeated by the inconsiderate or selfish opposition of a few <States>. He hoped the provision for ratifying would be put on such a footing as to admit of such a partial union, with a door open for the accession of the rest.

Id at 123 (brackets in original). As we shall see, Wilson's revolutionary realpolitik only became more emphatic as the convention's deliberations progressed. See text accompanying note 114.

⁹⁹ Farrand, ed, 1 *Records of the Federal Convention* at 324-25 (cited in note 15).

He could not admit the doctrine that a breach of <any of> the federal articles could dissolve the whole. It would be highly dangerous not to consider the Confederation as still subsisting. He wished also the plan of the Convention to go forth as an amendment to the articles of Confederation, since under this idea the authority of the Legislatures could ratify it. If they are unwilling, the people will be so too. If the plan goes forth to the people for ratification several succeeding Conventions within the States would be unavoidable. He did not like these conventions. They were better fitted to pull down than to build up Constitutions.¹⁰⁰

Despite these clear challenges, Madison's notes do not record a single person rising to support his position. While the air was full of talk about the dangers of secession and the need to take revolutionary steps to consolidate the Union, nobody else suggested that the Union could *legally* be dissolved. The question instead was whether the legalist conservatives were right to limit themselves to some set of modest amendments that had a reasonable chance of universal acceptance, or whether the nationalist revolutionaries were right to condemn these as inadequate to save the Union.

This debate ended in July with the Great Compromise—in which the convention (by a very narrow margin) accepted much of the centralizing thrust of the Virginia Plan and mollified the decentralizers by giving an equal vote to all states in the Senate. Shortly before, New Yorkers Yates and Lansing had walked out, denouncing the illegalities contemplated by the runaway convention.¹⁰¹

¹⁰⁰ Id at 335 (footnotes omitted) (brackets in original).

¹⁰¹ As delegates Robert Yates and John Lansing explained to Governor Clinton:

The limited and well-defined powers under which we acted, and which could not, on any possible construction, embrace an idea of such magnitude as to assent to a general Constitution, in subversion of that of the state.

...

From these expressions, we were led to believe that a system of consolidated government could not, in the remotest degree, have been in contemplation of the legislature of this state; for that so important a trust, as the adopting measures which tended to deprive the state government of its most essential rights of sovereignty, and to place it in a dependent situation, could not have been confided by implication; and the circumstance, that the acts of the Convention were to receive a state approbation in the last resort, forcibly corroborated the opinion that our powers could not involve the subversion of a Constitution which, being immediately derived from the people, could only be abolished by their express consent, and not by a legislature possessing authority vested in them for its preservation. Nor could we suppose that if it had been the intention of the legislature to abrogate the existing Confederation, they would, in such pointed terms, have directed the attention of their delegates to

But those who remained had not yet finished with the problem. Although they were now moving in the direction of a revolutionary proposal, they had not squarely confronted Article XIII of the Confederacy: Were they prepared, in the end, to accept a humble role and submit their recommendations for the approval of Congress and all thirteen state legislatures, or were they going to break with the Articles utterly and completely?

The second wave of discussions dealt with this question in a variety of contexts. After some inconclusive sparring, the subject could no longer be evaded when the provision on ratification came to the floor in late August: "Mr. Sherman doubted the propriety of authorizing less than all the States to execute the Constitution, considering the nature of the existing Confederation. Perhaps all the States may concur, and on that supposition it is needless to hold out a breach of faith."¹⁰² Morris then attacked a second aspect of the proposal, moving to "leav[e] the States to pursue their own modes of ratification."¹⁰³ This immediately led Carroll of Maryland to open the hornets' nest of state constitutional law: "Mr. Carrol [sic] mentioned the mode of altering the Constitution of Maryland pointed out therein, and that no other mode could be pursued in that State."¹⁰⁴

This led Madison to reassure the delegates:

The difficulty in Maryland was no greater than in other States, where no mode of change was pointed out by the Constitution, and all officers were under oath to support it. The people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased. It was a principle in the Bills of rights, that first principles might be resorted to.¹⁰⁵

The Marylanders were not impressed, McHenry noting "that the officers of Govt. in Maryland were under oath to support the mode of alteration prescribed by the Constitution."¹⁰⁶ King

the revision and amendment of it, in total exclusion of every other idea.

Letter from Robert Yates and John Lansing to the Governor of New York, in Elliot, ed, 1 *Debates in the Several State Conventions* at 480-81 (cited in note 16)

¹⁰² Farrand, ed, 2 *Records of the Federal Convention* at 475 (cited in note 15).

¹⁰³ Id.

¹⁰⁴ Id. The 1776 Maryland Constitution declared that no changes could occur "unless a bill so to alter, change or abolish the same shall pass the General Assembly, and be published at least three months before a new election." Jameson, *American Constitutional Law* § 224 at 214 (cited in note 29).

¹⁰⁵ Farrand, ed, 2 *Records of the Federal Convention* at 476 (cited in note 15).

¹⁰⁶ Id. Luther Martin also "repeated the peculiarity in the Maryland Constitution." Id

chimed in to recall that the Constitution of Massachusetts, which did have an explicit procedure for calling conventions, "was made unalterable till the year 1790."¹⁰⁷

He reassured his fellows, however, that "this was no difficulty with him. The State must have contemplated a recurrence to first principles before they sent deputies to this Convention"¹⁰⁸—a remarkable statement from a man who had repeatedly confessed the illegality of the enterprise at earlier stages of the process. Previously, however, he had made clear the grounds for his insistence:

Mr. King thought that striking out "Conventions" [] as the requisite mode was equivalent to giving up the business altogether. Conventions alone, which will avoid all the obstacles from the complicated formation of the Legislatures, will succeed, and if not positively required by the plan, its enemies will oppose that mode.¹⁰⁹

As we shall see, King's predictions would be fulfilled during the struggle for ratification. The Constitution could never have succeeded without the convention's revolutionary breach with Article XIII. This was probably why the debate was so brief, with no one other than Madison trying to answer the dissenters' legalistic doubts. The Federalists had the votes, and that was that. The convention majority then made it plain that it would not formally ask Congress for its approval, leaving Elbridge Gerry unanswered when he "dwelt on the impropriety of destroying the existing Confederation, without the unanimous Consent of the parties to it"¹¹⁰

The die had been cast; but then, at the last moment, there was a surprising effort to provoke reconsideration. At one of the convention's final working meetings, Alexander Hamilton insisted that "the approbation of Congress [was] . . . a necessary ingredient in the transaction," and denounced the decision to "allow nine states . . . to institute a new Government on the ruins of the existing one."¹¹¹ He moved "that the foregoing plan of a Constitution be transmitted to the U.S. in Congress assembled, in order

(Madison reporting).

¹⁰⁷ Id at 476-77. Actually, it was 1795. See text accompanying note 28. Madison might have misheard or King might have misspoke.

¹⁰⁸ Id at 477.

¹⁰⁹ Id at 476.

¹¹⁰ Id at 478-79.

¹¹¹ Id at 560.

that if the same shall be agreed to by them, it may be communicated to the Legislatures of the several States" After strictly complying with the Articles, his motion went on to "recommend" that each state consider whether it might voluntarily change its ratification practices. Hamilton suggested that legislatures refrain from considering the Constitution itself and instead call a special constitutional convention. He was even more tentative in confronting the Articles' insistence on unanimous approval, proposing a "recommendation" to each legislature that was doubly conditional. It did not suggest a break with the unanimity rule, but simply urged each of them to authorize its state convention to make the break "if" the convention "should be of the opinion" that nine states were enough to bring the Constitution into life.¹¹²

Hamilton's caution was undoubtedly based on the legalistic denunciations that Yates and Lansing were already publishing in New York. Even at this late moment, his pleas were joined by dissenting legalists like Elbridge Gerry, who then refused to sign: "If nine out of thirteen can dissolve the compact, Six out of nine will be just as able to dissolve the new one hereafter."¹¹³

As was typical, this last legalistic plea was not countered by a legalistic defense, but with some cold truths from James Wilson:

He expressed in strong terms his disapprobation . . . , particularly the suspending the plan of the Convention on the approbation of Congress. He declared it to be worse than folly to rely on the concurrence of the Rhode Island members of Congs. in the plan. Maryland had voted on this floor; for requiring the unanimous assent of the 13 States to the proposed change in the federal System. N—York has not been represented for a long time past in the Convention. Many individual deputies from other States have spoken much against the plan. Under these circumstances [c]an it be safe to make the assent of Congress necessary. After spending four or five months in the laborious & arduous task of forming a Government for our Country, we are ourselves at the close throwing insuperable obstacles in the way of its success.¹¹⁴

¹¹² Id at 562.

¹¹³ Id at 561.

¹¹⁴ Id at 562.

Hamilton's legalistic hesitations were swept aside by a vote of ten states to one,¹¹⁵ but Wilson's vivid description made it clear how vulnerable the convention's proposals would be in the months ahead. Out of fifty-five delegates, only thirty-nine had signed the final proposal. Luther Martin and John Francis Mercer of Maryland had recently followed Yates and Lansing of New York in a loud and public walkout from the convention.

Would the reputation of George Washington and a few other famous names be enough to sustain the institutional bandwagon?

III. THE UNCONVENTIONAL STRUGGLE FOR RATIFICATION

Consider how many times we have seen the unconventional movement back and forth from legal authority to illegal assemblies before the day that the convention finally proclaimed a change in the rules of the game. To summarize the pattern of interaction, we have italicized the roles of legal bodies in the ongoing sequence, using boldface when it comes to irregular assemblies:

From the authorization of commercial delegates by *Virginia and Maryland* to the **Mount Vernon Conference** to its ratification by the *two states* and *Virginia's* call for **Annapolis**.

To the ratification by *nine states* of the **Annapolis meeting** over the legalistic dissent of *four others* to the call at **Annapolis** for a **convention at Philadelphia** and its ratification by some of the *southern states* while the *northern ones* remained in legalistic indecision.

To the *congressional* recommendation of **Philadelphia** and its ratification by *New York and New England* over the legalistic dissent of *Rhode Island*.

To the decision by the **convention** to change the rules of the game.

And we have only told half the story. It was one thing for the convention to break the rules; quite another to win agreement from existing institutions that these new rules were appropriate. This agreement did not come easily, and might not have come at all without the strategic use of violence. Given the Constitution's status as Holy Writ, the discovery of even a little bit of violence at the Creation may be unsettling. But for more realistic types,

¹¹⁵ *Id.* at 563. After Lansing and Yates left the convention, Hamilton was no longer allowed to cast New York's vote since he could not represent the majority of the state's delegation. The single vote cast in favor of Hamilton's motion was that of Connecticut.

the challenge is to explain why the violence was so limited, given the Federalists' revolutionary assault on the legal order. A key to the answer, we suggest once again, is the Founders' unconventional behavior—the way they continued to adapt existing institutions to new roles, rather than eliminating them entirely from the legitimation process.

An important focus of the Federalist effort was the Continental Congress, which was very much alive throughout the period. While many scholars have overlooked Congress's role during this delicate phase, the Federalists could not afford to ignore it.

A. Congress Supports the Convention

On the same day it approved the Constitution, the convention also "RESOLVED, That the preceding Constitution be laid before the United States in Congress assembled," without conceding the right to veto or revise the final product.¹¹⁶

This was a dangerous game: once Congress seized hold of the instrument, would it use the occasion to change the rules once more by altering the proposed constitution? Once the convention dissolved in Philadelphia, how could it respond to a congressional counterassertion of authority?

These were not idle questions, as events proved. When Congress took up the convention's proposal nine days later on September 26, Richard Henry Lee of Virginia led the critics. Recall that Lee had served on the congressional committee that considered the Annapolis report, and had refused to serve at Philadelphia on the ground that he would have to review the final product when it returned to Congress:

Strangest doctrine he ever heard, that [in] referring a matter of report, that no alterations should be made. . . . The states and Congress, he thinks, had the idea that Congress was to amend if they thought proper. He wishes to give it a candid inquiry, and proposes such alterations as are neces-

¹¹⁶ Jensen, ed, 1 *Documentary History* at 317 (cited in note 16). The resolution continues:

. . . and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

Id at 317-18.

sary. . . . To insist that it should go as it is without amendments is like presenting a hungry man 50 dishes and insisting he should eat all or none.¹¹⁷

Having returned to his seat in Congress,¹¹⁸ Madison dealt with Lee's challenge in a revealing way. As we have seen, Madison was the only man at the convention who played with the idea that the Articles might have lost their legal force. However, he now played a different tune, expressly conceding congressional authority over the convention's work product.¹¹⁹ Rather than raising legal objections, he sought to preserve the convention's revolutionary legitimacy, urging his fellow congressmen to stay their legalistic hand:

that as the Act of the Convention, when altered would instantly become the mere act of Congress, and must be proposed by them as such, and of course be addressed to the Legislatures, not conventions of the States, and require the ratification of thirteen instead of nine States, and as the unaltered act would go forth to the States directly from the Convention under the auspices of that Body ¹²⁰

Going beyond the convention's plan to "[a]y the Constitution] before Congress," Madison continued his unconventional strategy by calling for explicit approval of revolutionary rule breaking.

In contrast, Lee emphasized the radical character of the convention's break:

Resolved, That Congress after due attention to the Constitution under which this body exists and acts find that the said Constitution in the thirteenth article thereof limits the power of Congress to the amendment of the present Confederacy of thirteen states, but does not extend it to the creation of a

¹¹⁷ Id. at 336, quoting Melancton Smith's notes for September 27, 1787.

¹¹⁸ Lee's earlier remarks had provoked Federalists to call upon Madison to return quickly to Congress. See Letter from Edward Carrington to James Madison, New York (Sept 23, 1787), in Jensen, ed, 1 *Documentary History* at 326 (cited in note 16).

¹¹⁹ Madison did not deny "the right of Congress" to propose amendments, but argued that it would be "inexpedien[t]." Letter from James Madison to George Washington (Sept 30, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 650-51 (cited in note 41).

¹²⁰ Id. Madison described claims made by Lee and Dane this way: "as the new Constitution was more than an alteration of the articles of Confederation . . . and even subverted those Articles altogether there was a constitutional impropriety in their taking any positive agency in the work." He parried these legalisms by denying their ultimate cogency: "if beyond those powers, the same necessity which justified the Convention would justify Congress" Id.

new confederacy of nine states; and the late Convention having been constituted under the authority of twelve states in this Union it is deemed respectful to transmit, and it is accordingly ordered, that the plan of a new Federal Constitution laid before Congress by the said Convention be sent to the executive of every state in this Union to be laid before their respective legislatures.¹²¹

Madison's response: "Can't accede to it. . . . If this House can't approve [the Constitution], it says the crisis is not yet arrived and implies disapp[robation]."¹²² At the end of the debate, Madison had to settle for something less than explicit approval, but something more than Lee's emphasis on the convention's illegality. On September 28, Congress resolved simply that the "said report . . . be transmitted to the several legislatures in order to be submitted to a convention of delegates chosen in each state by the people thereof in conformity to the resolves of the Convention"¹²³ While Congress refrained from passing on the merits of the Constitution, this simple resolution reinforced the convention's legitimacy at a time when it was very vulnerable.¹²⁴

B. Violence in Philadelphia

The importance of this decision is suggested by developments in Pennsylvania. Even before they received word of Congress's resolution, the Federalists had sought to maintain momentum by pressing ahead in the Pennsylvania Assembly, demanding an immediate call for a state ratifying convention.¹²⁵ A substantial minority of assemblymen were unimpressed. They pointed out that Pennsylvania's own Constitution required a six-month pause between the time amendments were proposed and the time a convention would be elected.¹²⁶ Since the federal Constitution

¹²¹ Jensen, ed, 1 *Documentary History* at 329-30 (cited in note 16).

¹²² *Id.* at 332.

¹²³ *Id.* at 340.

¹²⁴ Even the existence of the debate was unknown. We owe our knowledge of it to Julius Goebel, Jr., who found the manuscript in the archives of Melancton Smith and published it as Julius Goebel, Jr., *Melancton Smith's Minutes of Debates on the New Constitution*, 64 Colum L Rev 26 (1964). A comprehensive collection of the relevant sources is to be found in Jensen, ed, 1 *Documentary History* at 322-42 (cited in note 16).

¹²⁵ Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 Temple L Rev 575, 602-03 (1994).

¹²⁶ Pa Const of 1776, § 47, in Thorpe, ed, 5 *The Federal and State Constitutions* at 3092 (cited in note 24).

amounted to a massive amendment of Pennsylvania's, should not the Assembly wait at least six months? Surely the People should be given a chance to digest the proposal before electing delegates to such an important convention?

The Federalist majority in the state House ignored these very reasonable complaints, and pushed forward with a plan to hold an election within nine days! The dissenters described their reaction in a joint letter to their constituents:

In these circumstances we had no alternative; we were under a necessity of either returning to the House, and by our presence, enabling them to call a convention before our constituents could have the means of information or time to deliberate on the subject, or by absenting ourselves from the House, prevent the measure taking place. Our regard for you induced us to prefer the latter and we determined not to attend in the afternoon. . . . [W]e determined the next morning again to absent ourselves from the House, when James M'Calmont, Esquire, a member from Franklin, and Jacob Miley, Esquire, a member from Dauphin, were seized by a number of citizens of Philadelphia, who had collected together for that purpose; their lodgings were violently broken open, their clothes torn, and after much abuse and insult, they were forcibly dragged through the streets of Philadelphia to the State House, and there detained by force, and in the presence of the majority . . . treated with the most insulting language; while the House so formed proceeded to finish their resolutions, which they mean to offer to you as the doings of the legislature of Pennsylvania.¹²⁷

Note the menace of the final line. Had the House lost its status as "the legislature of Pennsylvania" by procuring its quorum through such blatant acts of coercion? If so, how should the dissenters respond? Should they urge a boycott of the elections for delegates to the convention?

News of the Federalist mob, and its coercive return of two dissenting members to the House, was published throughout the

¹²⁷ Jensen, ed, 2 *Documentary History* at 113-14 (cited in note 16), reprinting the address of the seceding assemblymen. The "seceding assemblymen" took some consolation in their success in inducing the majority to allow a six week campaign period before the decisive election for convention delegates—rather than the nine-day period the Federalist majority had planned before the need to mollify their opponents became apparent. *Id.* at 114.

nation.¹²⁸ The threads of political legitimacy were visibly beginning to unravel—a process more easily started than stopped.

On the same day that the fracas was erupting in the Assembly Hall, however, Philadelphia received word of Congress's ratification of the call for state conventions.¹²⁹ Would the unraveling have spun out of control were it not for this move reinforcing the federal convention's legitimacy? Without Congress's explicit ratification of Philadelphia's call for state conventions, would the entire process have degenerated into a series of mob scenes and legislative manipulations that discredited the entire initiative?

C. Congress's Stabilizing Role

Unanswerable questions. Nonetheless, they should lead us to appreciate the subtle ways in which Americans sustained a sense of institutional continuity at the very time that they were challenging some of their most fundamental rules. For this reason, we emphasize the continuing role of the Continental Congress in providing institutional structure during the ratification struggle.

This point was not lost upon the congressmen themselves. Consider, for example, the anxieties of Nathan Dane. Dane had refused to serve as one of his state's delegates at Philadelphia, since he assumed that the convention would follow its instructions and report back to Congress. As rumors to the contrary circulated, he wrote to Framer and fellow congressman Nathaniel Gorham:

I wish the officers of Congress and members not engaged in the Convention would return to New York. I do not know how it may be in the Southern States, but, I assure you, the present State of Congress has a very disagreeable effect in the Eastern States. The people hear of a convention in Philadelphia, and that Congress is done sitting, etc. Many of them are told, it seems, that Congress will never meet again probably. Dr. H[olten] says he saw several sober men who had got an idea that the people were to be called upon to take arms to carry into effect immediately the report of the

¹²⁸ See *id.* at 128. The Federalists' effort to establish a quorum was illegal as well as coercive. The rules of the Assembly only permitted it to fine absent members, not to compel their attendance. After the mob forced Antifederalist James McCalmont into the chamber, he "slapped his five shillings on the speaker's table and attempted to leave the chamber, but such procedural niceties were not the order of the day." Herrington, 67 Temple L Rev at 603 (cited in note 125) (footnote omitted).

¹²⁹ Herrington, 67 Temple L Rev at 602-03 (cited in note 125).

Convention, etc. . . . It appears to me that Congress, at this time especially, ought to be together and doing business as usual and if we mean to avoid convulsions those appearances which to the unthinking look so much like abandoning the established Government ought not to be suffered to take place.¹³⁰

These anxieties were hardly the monopoly of a few members of a dying institution who were unwilling to give up the ghost. Instead of disintegrating, Congress was reinvigorated. All thirteen states sent delegates to Congress throughout 1788. Indeed, this was the only time in the entire history of the Confederacy that all thirteen states were represented (seven states constituted a quorum).¹³¹ What is more, many states named delegates to a 1789 session of the Continental Congress.¹³²

¹³⁰ Letter from Nathan Dane to Nathaniel Gorham (June 22, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 613 (cited in note 41). Secretary of Congress Charles Thomson voiced similar concerns: "Were I to hazard an Opinion it would be that the peace of the union and the happy termination of the Measures of the Convention depend on the Meeting and continuance of Congress and keeping up the form of government until the New plan is ready for Adoption." Letter from Charles Thomson to William Bingham (June 25, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 614 (cited in note 41). For other statements emphasizing Congress's role, see Letter from Nicholas Gilman to the President of New Hampshire (Oct 31, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 670 (cited in note 41) ("[I]t was not my intention to have taken a seat in Congress this year but as it was conceived important to have a full House on the Subject of the new plan of Government I was induced to take a seat . . ."); Letter from Benjamin Hawkins to the Governor of North Carolina (Aug 14, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 639 (cited in note 41) ("It is of the first importance that our State be represented when the Convention make their report to Congress."); Letter from Samuel A. Otis to James Warren (Nov 27, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 683-84 (cited in note 41) (expressing similar sentiments); Letter from William Blount to the Governor of North Carolina (July 10, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 618 (cited in note 41) (referring to Thompson's letter stating that "a Congress was absolutely necessary for the great purposes of the Union"); Letter from Benjamin Hawkins to the Governor of North Carolina (July 10, 1787), in Burnett, ed, 8 *Letters of the Continental Congress* at 618 (cited in note 41) ("It being of great importance to the Union at this time particularly, that Congress should be and continue in session.").

¹³¹ *Prefatory Note*, in Roscoe R. Hill, ed, 34 *Journals of the Continental Congress 1774-1789* v (US GPO, 1937).

¹³² Rhode Island appointed John Gardner as a delegate to Congress "agreeably to the Articles of Confederation" on May 12, 1788. *Id.* at 614. On September 3, 1788, the General Court of Massachusetts appointed Samuel Otis for a term ending in November of 1789. *Id.* at 612. On October 21, Governor Pinckney of South Carolina extended Nicholas Eveleigh's commission as delegate to the Congress of the United States until November of 1789. *Id.* at 610-11. North Carolina appointed Hugh Williamson a delegate to the Congress on October 23, 1788, for a one-year term. *Id.* at 609. On January 15, 1789, Maryland appointed Joshua Seney, Benjamin Contee, and David Ross delegates until December 1789. *Id.* at 613-14.

Nor was this continuing representation a mere formality. Congress was active throughout 1788, meeting on 132 days—more than some previous years.¹³³ It examined the prospect of new Dutch loans, continued the Spanish negotiations, negotiated with the Indians, and pursued other diplomatic issues.¹³⁴ On the home front, it considered a new requisition,¹³⁵ devised new procedures for the survey and distribution of western lands,¹³⁶ and dispatched federal troops to quell disturbances in Pennsylvania.¹³⁷

The continuing flow of ordinary decision making helped sustain a sense of institutional order in the midst of a break with

Some states took the new Constitution into account when commissioning delegates. On October 31, 1788, Virginia's General Assembly elected Cyrus Griffin as a delegate "from the first Monday in November 1788 'til the first Wednesday in March next." *Id.* at 609-10. On November 25, the General Assembly of New Jersey appointed Abraham Clark, Jonathan Elmer, and Jonathan Dayton delegates "until the first Wednesday in March next." *Id.* at 611. New York on January 30, 1789, appointed Abraham Yates, Jr., David Gelston, Philip Pell, John Hathorn, and Samuel Jones "to represent our said State in the United States in Congress assembled from the said day of their appointment, for the present Year, or until the Congress of the United States under the New constitution adopted by the late convention of this State shall commence their proceedings." *Id.* at 614-15.

¹³³ *Id.* at v. In 1783-84, there were 113 days with a quorum; in 1784-85, there were 218; in 1785-86 there were 209; and in 1786-87 there were 112. *Id.* at vii.

¹³⁴ In the first two days of its session, the 1788 Congress received letters dealing with the Spanish negotiations over the Mississippi, the appointment of ministers in Lisbon, critical changes in European politics, and sundry other matters. *Id.* at 21-23 (journal of Feb 1, 1788). The Dutch loans were discussed in *id.* at 185 (journal of May 28, 1788). For discussions of negotiations with Native Americans, see Instructions from the Secretary of Congress to Governor St. Clair (Oct 26, 1787), in Clarence Edwin Carter, ed, 2 *Territorial Papers of the United States* 78-79 (US GPO, 1934); Letter from Governor St. Clair to the Secretary at War (Jan 27, 1788), in Carter, ed, 2 *Territorial Papers* at 89.

¹³⁵ Hill, ed, 34 *Journals of the Continental Congress* at 389 (cited in note 131) (journal of Aug 4, 1788).

¹³⁶ In March, Congress began considering Amendments to the 1785 Land Ordinance to Distribute Western Lands. A Committee consisting of Madison, Dane, Clark, William Irvine, and Jeremiah Wadsworth recommended selling certain portions of the lands and changing the procedures for surveying and distributing the western lands. *Id.* at 95-100 (journal of Mar 19, 1788). It passed on July 9. *Id.* at 305-10.

¹³⁷ See Letter from the Pennsylvania Delegates to the President of Pennsylvania (July 28, 1788), in Burnett, ed, 8 *Letters of the Continental Congress* at 770 (cited in note 41) (describing request for federal troops from the Pennsylvania Supreme Executive Council); Letter from William Irvine to William Alexander (July 28, 1788), in Burnett, ed, 8 *Letters of the Continental Congress* at 771 (cited in note 41) ("Congress have granted the aid of the Union to [Pennsylvania] in her [endeavor] to [suppress] the Wyoming [insurgents] so far as 100 men for two weeks will do it . . .") (brackets are originally blank spaces filled in by Burnett); Letter from the South Carolina Delegates to Thomas Pinckney (Aug 16, 1788), in Burnett, ed, 8 *Letters of the Continental Congress* at 782 (cited in note 41) (describing how Congress diverted troops to march to Luzerne County but there was no longer need for them).

the rules. If Congress had dissolved, how would the Dutch be convinced to float a loan for continued payment of interest on the national debt? Who would conduct diplomacy with foreign powers? Who would deal with Native Americans? On a more humdrum but hardly unimportant level, who would run the Confederacy's postal service?

Congressional dissolution would not only have generated shock waves nationally and internationally. It would have called into question other basic agreements as well. Would the British be free to denounce the Treaty of Peace now that the Confederacy had dissolved?¹³⁸ How to disentangle the conflicting claims to the vast territories that the Confederacy had acquired from the states?¹³⁹

The resulting sense of institutional chaos would have vastly destabilized a legal situation already destabilized by the Federalist breach of the rules. Within this disintegrating institutional climate, events like those in Pennsylvania could have easily sparked a more general conflagration.

D. Congress as an Unconventional Actor

But Congress did more than handle the normal problems of government. It also provided a continuing forum for an unconventional technique that should, by now, be familiar. As they had done so often in the past, the Federalists tried to use a perfectly legal body—in this case, the Continental Congress—to ratify their illegal actions.

A crucial moment came on July 2, 1788, when Congress learned that New Hampshire was the ninth state to ratify. At this point, it had a choice: either to insist on the Articles' demand for the unanimous consent of all thirteen states, or to assist in the organization of the new Constitution. It chose the latter course, immediately establishing a committee to place "the said constitution into operation in pursuance of the resolutions of the late federal Convention."¹⁴⁰

This was a sharp change from preceding practice. Consider Congress's treatment of Kentucky's ongoing effort to gain admission as an independent state of the Union. Virginia had reached

¹³⁸ Even James Wilson expressed such concerns at the Constitutional Convention. Farrand, ed, 2 *Records of the Federal Convention* at 47 (cited in note 15).

¹³⁹ Land policy had been important since the formation of the Articles; indeed Maryland did not sign the Articles until Virginia ceded disputed territories. See note 8.

¹⁴⁰ Hill, ed, 34 *Journals of the Continental Congress* at 281 (cited in note 131).

a compact with the Kentuckians, and both sides had submitted the agreement to Congress. On June 2, Congress submitted the agreement to a special committee to consider admitting Kentucky "into the Union as a member thereof, *in mode conformable to the Articles of Confederation*."¹⁴¹ Then came July 2 and the news about New Hampshire. John Brown of Virginia reacted to this news in a surprising way. Rather than declaring the Articles a legal nullity, he moved that Congress immediately "ratify and confirm the compact entered into between the state of Virginia and the district of Kentucky"¹⁴²

Only at this point were doubts expressed by Nathan Dane of Massachusetts and Thomas Tucker of South Carolina. Noting that Virginia had approved the new Constitution on June 25, these delegates moved that "as the constitution of the United States is now ratified, Congress think it unadvis[]able to adopt any further measures for admitting the district of Kentucky . . . under the Articles of Confederation and perpetual Union"¹⁴³ Rather than proceeding further, the Dane-Tucker motion suggested to Kentucky that it prepare itself for admission to the new Union. Over the objection of the Virginia delegation, Congress ceased further action on the Kentucky matter.¹⁴⁴

There are three important things about this episode. First, the quick response time shows how closely Congress was following the progress of ratification. Second, Congress did not respond to the new situation by declaring itself legally incompetent, but simply found further action inexpedient. Third, this was done over the opposition of the Virginia delegation—which wanted a formal confirmation of its compact with Kentucky—even though Virginia had already ratified the new Constitution. Rather than supposing that their state's recent ratification was tantamount to a renunciation of the Articles, the Virginians protested when their fellow congressmen found it "inexpedient" to push forward on so delicate a matter!

Five days later, on July 8, the committee examining the Constitution made a remarkable recommendation: the Congress should itself take the lead in organizing the new government. It proposed that Electors be appointed in the states that had rati-

¹⁴¹ Id at 194 (footnotes omitted) (emphasis added). The words "conformable to the Articles of Confederation" replaced "consistent with the Articles of Confederation" in the original draft. Id at 194 n 4.

¹⁴² Id at 288 (journal of July 3, 1788).

¹⁴³ Id at 293-94.

¹⁴⁴ Id at 290-91.

fied the Constitution by the first Wednesday in December, and that on the first Wednesday in January the Electors would "[a]ssemble in their respective States and Vote for a President, and that the first Wednesday in February next be the time, and ____ the place for Commencing proceedings under the said Constitution."¹⁴⁵

Throughout the summer, there was a fierce struggle to fill in the blank with the name of the nation's next capitol—an issue that was finally resolved in favor of New York on September 13. For much of this time, all thirteen states voted—including North Carolina, Rhode Island, and New York—although they had not yet ratified the new Constitution. Federalists were often busy lobbying these nonratifying states in order to win the capitol for their favorite city. As always, the Federalists were eager to use the old regime to legitimize their revolutionary transition.¹⁴⁶

Indeed, the unconventional character of this activity became the subject of self-conscious consideration. On August 4, Thomas Tucker proposed a resolution: "whereas the ratifications of the several States are to be considered as containing virtual authority and Instructions to their Delegates in Congress to make the preparatory Arrangements recommended by the said Convention to be made by Congress" ¹⁴⁷ Nonratifying North Carolina objected, however, by proposing to strike the words "and instructions to their delegates in Congress," substituting "to the United States in Congress assembled."¹⁴⁸ The result was an impasse, with nothing coming up for a vote.

Two days later, a similar scenario: Alexander Hamilton proposed that the votes by delegates from nonratifying states shall not be "construed directly or indirectly to imply either on their part or on the part of the states which they represent an approbation of the constitution aforesaid or of any part thereof or any

¹⁴⁵ Id at 304 (journal of July 8, 1788).

¹⁴⁶ For examples of nonratifying states voting on matters pertaining to the organization of the new government, see id at 317-18 (journal of July 14, 1788) (New York and North Carolina); id at 359 (journal of July 28, 1788) (North Carolina); id at 367-68 (journal of July 30, 1788) (North Carolina); id at 383-84 (journal of Aug 4, 1788) (North Carolina and Rhode Island); id at 394 (journal of Aug 5, 1788) (same); id at 395-402 (journal of Aug 6, 1788) (same). Even Alexander Hamilton went out of his way to reassure Rhode Islanders: "A doubt might perhaps be raised about your right to a vote under the present circumstances. There is not a member of Congress but one who has even *pretended* to call your right in question." Letter from Alexander Hamilton to Jeremiah Olney (Aug 12, 1788), in Harold C. Syrett and Jacob E. Cook, eds, 5 *The Papers of Alexander Hamilton* 199-200 (Columbia, 1962).

¹⁴⁷ Hill, ed, 34 *Journals of the Continental Congress* at 387 (cited in note 131).

¹⁴⁸ Id at 392 (journal of Aug 5, 1788).

manner or kind of obligation on the part of any such state”¹⁴⁹ The original resolution noted that “the Delegates of [North Carolina and Rhode Island] have thought fit to vote upon the said ordinance in virtue of the right of suffrage vested in them by the Articles of Confederation and perpetual Union”¹⁵⁰ This resolution also failed to come to a vote—though it shows how High Federalists like Hamilton were eagerly and self-consciously engaging in the strategy of unconventional adaptation that had served them so well throughout.

E. The Bandwagon in the States

While all this unconventional activity on the national level stabilized public order, it should not be confused with the main event: in each state, Federalists attempted to induce the legislatures to ignore the legalistic quibblings of their opponents and get on the institutional bandwagon by calling ratifying conventions. They could then use these legislative anchors to respond to charges of illegality down the road as they mobilized their forces in the electoral contests for convention delegates.¹⁵¹

As we have seen, the effort to gain legislative support did not get off to an auspicious start in Pennsylvania. But the violent violation of the Pennsylvania Constitution did allow the Federalists to catch their opponents by surprise in a brief six-week election campaign,¹⁵² ending in a two-to-one victory at the Pennsylvania Convention. At about the same time, they were winning four small states that depended on a strong central government

¹⁴⁹ Id at 403-04 (Aug 7, 1788).

¹⁵⁰ Id at 403 n 2.

¹⁵¹ For example, at the North Carolina Convention, Mr. Spaight argued:

The gentleman says, we exceeded our powers. I deny the charge. . . . The proposing a new system, to be established by the assent and ratification of nine states, arose from the necessity of the case. It was thought extremely hard that one state, or even three or four states, should be able to prevent necessary alterations. . . . It was, therefore, thought by the Convention, that if so great a majority as nine states should adopt it, it would be right to establish it. It was recommended by Congress to the state legislatures to refer it to the people of their different states. Our Assembly *has confirmed what they have done*, by proposing it to the consideration of the people. It was there, and not here, that the objection should have been made.

Elliot, ed, 4 *Debates in the Several State Conventions* at 206-07 (cited in note 16). See also id at 16 (remarks of Mr. Davie at the North Carolina Convention) (providing similar response).

¹⁵² See text accompanying notes 126-27. This contrasts with the six-month pause mandated by the Pennsylvania Constitution. See text accompanying note 126.

for their economic survival.¹⁵³ By January 9, 1788, the Federalists had once again established institutional momentum.

But nobody could be optimistic about the next round of ratifications. On February 13, 1788, the New Hampshire Federalists found themselves outnumbered at their convention by more than a two-to-one margin. Foreseeing disaster if they pushed forward, they successfully postponed their meetings for three months in the hope that the closely divided Massachusetts Convention would ratify in the interim.

Things were going no better in North Carolina. There is evidence of "heated debates" in the legislature prior to the calling of a state ratifying convention.¹⁵⁴ When elections were held on March 28, the Antifederalists won a landslide victory of 184 to 84—made even more impressive by the fact that Federalists had twice precipitated riots at polling places, allowing them to run off with some ballot boxes.¹⁵⁵ The convention was to meet in July, but only a fool would be optimistic.

The news was no more auspicious from New York.¹⁵⁶ On January 31, Cornelius Schoonmaker generated a bitter debate in the General Assembly when he proposed to amend the resolution calling for a ratifying convention by declaring that the Philadelphia Convention had exceeded its powers and that its proposal would "materially alter" New York's Constitution "and greatly affect the rights and privileges" of New York residents.¹⁵⁷ The

¹⁵³ Delaware, New Jersey, Georgia, and Connecticut ratified the Constitution within the first seventeen weeks. The convention vote in all these cases, with the exception of Connecticut, was unanimous; in Connecticut's case, it was three to one. In Georgia's case, the overwhelming support was not only a function of economic dependence but sheer physical survival. As a state bordering Spanish territory and powerful Indian tribes, it was especially dependent upon military support from the center.

¹⁵⁴ "Thomas Person . . . tried unsuccessfully to prevent the call of a convention" Hugh Tallmage Lefler and Albert Ray Newsome, *The History of a Southern State: North Carolina* 267 (North Carolina, rev ed 1963). Senate journals confirm that on December 5, "Mr. Person having on this occasion spoken as often as the rules of the House would permit," was unable to block the final vote. Walter Clark, ed, 20 *State Records of North Carolina* 369-70 (Nash, 1902). There appears to be no record of the substance of Person's remarks.

¹⁵⁵ Robert J. Dinkin, *Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776-1789* 127 (Greenwood, 1982).

¹⁵⁶ Knowledgeable political observers, like Albany attorney Richard Sill, reported that it was "doubted by the best friends to the New Government whether we shall have a Convention called by a Legislative Act, the opposition are determined to make their first stand here." John P. Kaminski, *New York: The Reluctant Pillar*, in Stephen L. Schechter, ed, *The Reluctant Pillar* 48, 73 (Russell Sage, 1985), quoting letter from Richard Sill to Jeremiah Wadsworth (Jan 12, 1788).

¹⁵⁷ NY Daily Advertiser (Feb 12, 1788).

Schoonmaker amendment was voted down twenty-seven to twenty-five after it was discovered that the parchment on which it was written contained scratched-out writing hostile to the Constitution. In the Senate, Robert Yates, who had earlier walked out of Philadelphia, proposed a resolution denouncing the convention for going “beyond their powers” and asserting that “they have not amended, but made a new system.”¹⁵⁸ This motion was rejected by twelve to seven, and the Senate voted eleven to eight to accept the Assembly’s call for a June 17 convention, with balloting for delegates on April 29.¹⁵⁹

The election resulted in an Antifederalist landslide. They elected forty-six delegates, compared to the Federalists’ nineteen.¹⁶⁰ The June convention threatened to be a disaster.

And then there was Rhode Island. At its February session, the legislature simply refused to call a convention, putting the Constitution to the people in a special referendum:

[We] cannot make any innovation in a Constitution which has been agreed upon, and the compact settled between the governors and governed, without the express consent of the freemen at large, by their own voices individually taken in town meetings assembled.¹⁶¹

The result was an overwhelming defeat of the Constitution: 2,708 to 237, although an indeterminate number of Federalists boycotted the election.¹⁶² In a letter written on April 5 to the Conti-

¹⁵⁸ NY Daily Advertiser (Feb 8, 1788).

¹⁵⁹ This late date was the result of a strategic compromise between Federalists and Antifederalists. The Federalists hoped that nine states would ratify before April 29 (and believed that an earlier rejection from New York would cripple the conventions in other states), while Antifederalists hoped that by that late date, a large state such as Virginia would reject the Constitution, making it easier for New York to do so. Kaminski, *New York* at 76 (cited in note 156).

¹⁶⁰ Id at 79.

¹⁶¹ John R. Bartlett, ed, 10 *Records of the State of Rhode Island and Providence Plantation in New England* 272 (Providence, 1865) (“*Records of Rhode Island*”); Providence Gazette (Mar 1 and Mar 8, 1788).

¹⁶² A Federalist writer, calling himself “A Freeman,” denounced the referendum as a “novel mode” in the *Providence Gazette* (Mar 15, 1788): “If the freemen . . . should *unanimously* vote for the Constitution, it cannot be considered a valid ratification . . . for the Constitution itself provides only for a ratification by State Conventions.” A similar position was advanced by the Town Meeting of Providence in its petition of March 26 to the General Assembly, reported in the *Providence Gazette* (Apr 12, 1788). Since Rhode Island was still operating under a slightly modified version of its colonial charter, there was in fact no textual procedure regulating constitutional amendments. It would seem, then, that the legislature was well within its constitutional rights to call a referendum, especially since bills had often been referred to town meetings for instructions. The particular form

mental Congress, Governor Collins reported the result and defended the procedure:

Although this state has been singular from her sister states in the mode of collecting the sentiments of the people upon the Constitution, it was not done with the least design to give any offence to the respectable body who composed the convention, or a disregard to the recommendation of Congress, but upon pure republican principles, founded upon that basis of all governments originally deriving from the body of the people at large.¹⁶³

We can begin to appreciate the supreme importance of the Philadelphia Convention's decision to take the law into its own hands and break with the unanimity rule established by the Articles of Confederation. With four states pointing decisively in a negative direction by spring, the Constitution was a dead letter under the old rules.

Especially when opponents could cloak their opposition with attractive rhetoric. Rather than opposing the Federalist proposal outright, they could propose a middle road: Why not condition ratification upon the acceptance of perfecting amendments like the Bill of Rights? To rebut such arguments, Federalists found it necessary to reemphasize their revolutionary challenge to the legal status quo. They argued that it would be counterproductive to insist on preratification amendments since these would be governed by the unanimity rule laid down by Article XIII of the Confederation. If opponents were interested in effective revision, they should ratify first and then take advantage of Article V's more relaxed approach to amendment. This was a plausible counterthrust, but it explicitly conceded the legal vitality of the Articles and thereby reinforced the Federalists' revolutionary stance.¹⁶⁴

in which the referral took place does seem to have been an "innovation" on all previous customs." William R. Staples, *Rhode Island in the Constitutional Congress* 589 (Providence, 1870).

¹⁶³ Bartlett, ed, 10 *Records of Rhode Island* at 291 (cited in note 161).

¹⁶⁴ See, for example, Elliot, ed, 2 *Debates in the Several State Conventions* at 116-17 (cited in note 16) (remarks of Mr. Jarvis at the Massachusetts Convention) ("[W]e shall have in this article [V] an adequate provision for all the purposes of political reformation. . . . Should it be rejected, I beg gentlemen would observe, that a concurrence of all the states must be had before a new convention can be called to form another Constitution; but the present article provides, upon nine states' concurring in any alteration or amendment to be proposed either by Congress or any future convention, that this alteration shall be a part of the Constitution"); Elliot, ed, 3 *Debates in the Several State Conventions* at 636-37 (cited in note 16) (remarks of Mr. Innes at the Virginia Convention)

But it would take more than clever rhetoric to gain success. Even with the nine-state rule, the Federalists barely squeaked through. A crucial turning point came in Massachusetts. Federalists were outnumbered by opponents at the convention, which began on January 9.¹⁶⁵ As a consequence, they focused their energies on John Hancock, who “had it in his power to throw the convention’s vote either way.”¹⁶⁶ The vain Hancock was given Federalist assurances that he would be the Vice President or even the President if Virginia did not ratify the Constitution in time to put forth Washington. As Forrest McDonald says, “[n]othing could have appealed to Hancock more, and he gave his support to ratification.”¹⁶⁷ After five hard weeks, the Federalists gained a narrow majority by supporting a “conciliatory proposition” that the new government propose a series of amendments as soon as possible after its establishment.¹⁶⁸ The vote was 187 to 168, with 9 abstentions.

(“[T]he mode pointed out in the Constitution is much better; for, according to their mode [of proposing previous amendments], the Union would never be complete till the thirteen states had acceded to it, and eight states must rescind and revoke what they have done. By the paper before you, if two thirds of the states think amendments necessary, Congress are obliged to call a convention . . . Now, is there not a greater probability of obtaining the one than the other? Will not nine states more probably agree to any amendment than thirteen?”). Similarly, Ames:

Why shall we reject the Constitution, then, for the sole purpose of obtaining that unanimous vote of thirteen states, which, it is confidently said, it is impossible we ever shall obtain from nine only? An object which is impossible is out of the question. The arguments that the amendment will not prevail, is not only without force, but directly against those who use it, unless they admit that we have no need of a government, or assert that, by ripping up the foundations of the compact, upon which we now stand, and setting the whole Constitution afloat, and introducing an infinity of new subjects of controversy, we pursue the best method to secure the entire unanimity of thirteen states.

Elliot, ed, 2 *Debates in the Several State Conventions* at 158 (cited in note 16) (remarks of Mr. Ames at the Massachusetts Convention).

¹⁶⁵ See Samuel B. Harding, *The Contest Over the Ratification of the Federal Constitution in Massachusetts* 67 (Longmans, Green, 1896) (“Had a vote been taken on the adoption of the Constitution as soon as the convention assembled, there can be no question but that it would have been overwhelmingly against the proposed plan.”); Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 227 (MacMillan, 1937); Forrest McDonald, *We the People: The Economic Origins of the Constitution* 183 (Chicago, 1962) (“It seems likely, however, that a clear majority of the 355 delegates, perhaps as many as 200, were opposed to ratification.”) (footnote omitted).

¹⁶⁶ McDonald, *We the People* at 184.

¹⁶⁷ Id at 185.

¹⁶⁸ Three of Massachusetts’s nine proposals became part of the Bill of Rights. See Elliot, ed, 2 *Debates in the Several State Conventions* at 177 (cited in note 16) (reprinting Massachusetts’s nine proposed amendments).

Then two more states came through. The Federalists won Maryland rather easily, despite the powerful, and often legalistic, denunciations of Luther Martin and others.¹⁶⁹ Victory in South Carolina, however, owed itself entirely to a remarkable gerrymander that transformed the Federalists' 40 percent of the popular vote into 60 percent of the convention delegates.¹⁷⁰

The South Carolina victory made eight, and permitted the Federalists to squeeze the two major states, Virginia and New York, that remained outstanding. Consider Virginia first. Here it was the Antifederalists who were better at strategic manipulation. Although the polls returned eighty-five Federalists and only sixty-six Antifederalists, the Antis managed to convert a substantial number of delegates at the convention itself. The twelve members from the district of Kentucky yielded especially good pickings for the Antifederalist cause, and so the convention's outcome was extremely uncertain.¹⁷¹

The Virginia Convention opened with Patrick Henry demanding that the relevant legal papers—from the Annapolis report onward—be read to the convention with the aim of establishing the illegality of the initiative. The Federalist Pendleton responded, characteristically, by urging his fellow delegates “not to consider whether the federal Convention exceeded their powers. It strikes my mind that this ought not to influence our deliberations.”¹⁷² While Henry withdrew his motion, his speeches were full of legalistic attacks upon “a proposal that goes to the utter annihilation of the most solemn engagements of the states—a proposal of establishing nine states into a confederacy, to the eventual exclusion of four states. . . . The people gave them no power to use their name. That they exceeded their power is perfectly clear.”¹⁷³

¹⁶⁹ Letter from Luther Martin to the Maryland legislature (Jan 27, 1788), in Elliot, ed, 1 *Debates in the Several State Conventions* at 386-88 (cited in note 16).

¹⁷⁰ Coastal areas of South Carolina overwhelmingly favored the Constitution, while the upcountry opposed it no less strongly. The Federalists owed their victory to the fact that the less populated coast had 151 delegates compared to the upcountry's 86. The key was Charleston, which had 46 percent of all convention delegates but contained 11.3 percent of the nonslave population. The Federalists swept Charleston. See Charles W. Roll, Jr., *We, Some of the People: Apportionment in the Thirteen State Conventions Ratifying the Constitution*, 56 J Am Hist 21, 30-31 & n 15 (1969).

¹⁷¹ The Antifederalists converted ten Kentuckians, three Federalists, and one of the undecideds at the convention. McDonald, *We the People* at 259 (cited in note 165).

¹⁷² Elliot, ed, 3 *Debates in the Several State Conventions* at 6 (cited in note 16).

¹⁷³ *Id.* at 21-23. See also *id.* at 277 (remarks of Mr. Grayson at the Virginia Convention).

Note the terms in which influential leaders like Governor Randolph, who had been a delegate to the convention, responded:

[Henry] objects because nine states are sufficient to put the government in motion. What number of states ought we to have said? Ought we to have required the concurrence of all the thirteen? Rhode Island—in rebellion against integrity—Rhode Island plundered all the world by her paper money; and, notorious for her uniform opposition to every federal duty, would then have it in her power to defeat the Union Therefore, to have required the ratification of all the thirteen states would have been tantamount to returning without having done any thing. What other number would have been proper? Twelve? The same spirit that has actuated me in the whole progress of the business, would have prevented me from leaving it in the power of any one state to dissolve the Union; for would it not be lamentable that nothing could be done, for the defection of one state? A majority of the whole would have been too few. Nine states therefore seem to be a most proper number.¹⁷⁴

This is the voice of the assertive revolutionary, defending the convention's decision by an unmediated appeal to necessity and the public good. There is no hint of legalism in such responses. Rather than apologizing for their revolutionary nine-state rule, the Federalists were constantly threatening the delegates with the secessionist consequences that would follow if Virginia rejected the Constitution and another state supplied the missing vote.¹⁷⁵

This approach forced Antifederalists onto the defensive. Grayson found himself responding to fears that Pennsylvania and

¹⁷⁴ Id at 28 (remarks of Governor Randolph at the Virginia Convention).

¹⁷⁵ See, for example, id at 187 (remarks of Governor Randolph at the Virginia Convention) ("I have shown the principles which actuated the general Convention; and attempted to prove that, after the ratification of the proposed system by so many states, the preservation of the Union depended on its adoption by us."); id at 454 (remarks of Mr. Madison at the Virginia Convention) ("Great as the evil [of slavery] is, a dismemberment of the Union would be worse."); id at 594 (remarks of Mr. Henry at the Virginia Convention) ("A great deal is said about disunion, and consequent dangers."); id at 603 (remarks of Governor Randolph at the Virginia Convention) ("If we declare that these amendments . . . must be incorporated into the Constitution before we assent to it, I ask you whether you may not bid a long farewell to the Union? It will produce that deplorable thing—the dissolution of the Union—which no man yet has dared openly to advocate."); id at 642 (remarks of Mr. Stephen at the Virginia Convention) (discussing "the unhappy situation of the country, and the absolute necessity of preventing a dismemberment of the confederacy").

Maryland would invade Virginia if it did not ratify: "Have they not agreed, by the old Confederation, that the Union shall be perpetual, and that no alteration should take place without the consent of Congress, and the confirmation of the legislatures of every state? I cannot think that there is such depravity in mankind as that, after violating public faith so flagrantly, they should make war upon us, also, for not following their example."¹⁷⁶ And Patrick Henry, responding to such Federalist charges, argued that the convention should not suppose that the Constitution could survive Virginia's rejection:

They would intimidate you into an inconsiderate adoption, and frighten you with ideal evils, and that the Union shall be dissolved. 'Tis a bugbear, sir: the fact is, sir, that the eight adopting states can hardly stand on their own legs. Public fame tells us that the adopting states have already heart-burnings and animosity, and repent their precipitate hurry: this, sir, may occasion exceeding great mischief. When I reflect on these and many other circumstances, I must think those states will be found to be in confederacy with us. If we pay our quota of money annually, and furnish our ratable number of men, when necessary, I can see no danger from a rejection.¹⁷⁷

"Bugbear" or no, the final words voiced in the convention suggest how large the nine-state rule played in the outcome. As we have seen, Randolph had defended the convention's revolutionary break with Article XIII, but his general position on the Constitution was more complex. As a delegate in Philadelphia, he had refused to sign the proposal, and as the present governor of Virginia, his vote was influential with many other fence sitters.¹⁷⁸ Here is how he justified his affirmative decision:

Mr. Chairman, one parting word I humbly supplicate.

¹⁷⁶ Id at 277 (remarks of Mr. Grayson at the Virginia Convention).

¹⁷⁷ Id at 62 (remarks of Mr. Henry at the Virginia Convention).

¹⁷⁸ Randolph had devoted considerable time to organizing the Virginia delegation to Annapolis, and had played a vital role in persuading the Annapolis Convention to call another convention on general matters. John J. Reardon, *Edmund Randolph: A Biography* 82-84 (MacMillan, 1974). At the convention, he played a leading role, introducing the Virginia Plan. Id at 98-105. His refusal to sign seems to have been a response to the extensive compromises demanded by the smaller states. Id at 115-19. By the time the Virginia Convention met, however, Randolph had become convinced that the Union was in danger if Virginia failed to ratify. Id at 142-47.

The suffrage which I shall give in favor of the Constitution will be ascribed, by malice, to motives unknown to my breast. But, although for every other act of my life I shall seek refuge in the mercy of God, for this I request his *justice* only. Lest, however, some future annalist should, in the spirit of party vengeance, deign to mention my name, let him recite these truths—that *I went to the federal Convention* with the strongest affection for the Union; that I acted there in full conformity with this affection; *that I refused to subscribe, because I had, as I still have, objections to the Constitution*, and wished a free inquiry into its merits; and that the accession of eight states reduced our *deliberations* to the single question of *Union or no Union*.¹⁷⁹

The final vote was eighty-nine to seventy-nine.¹⁸⁰

The effect of the nine-state rule was even greater in New York.¹⁸¹ Facing a forty-six to nineteen majority against them, friends of the Constitution played a waiting game when the convention began on June 17.¹⁸² With both the New Hampshire and Virginia conventions deliberating, Federalists moved that the convention debate the Constitution clause by clause—stalling for time until one or the other of these states made the ninth vote necessary for secession from the Confederacy.¹⁸³

The gambit worked. News that New Hampshire had ratified seems to have reached the convention on June 24.¹⁸⁴ Its first

¹⁷⁹ Elliot, ed, 3 *Debates in the Several State Conventions* at 652 (cited in note 16) (remarks of Governor Randolph at the Virginia Convention).

¹⁸⁰ Id at 654.

¹⁸¹ Russell Hardin has put New York's dilemma in modern terms: "[A] constitution is clearly like a convention in the strategic sense: it may not give you the best of all results, but it gives you the best you can expect *given that almost everyone else is following it*." Russell Hardin, *Why a Constitution?*, in Bernard Grofman and Donald Wittman, eds, *The Federalist Papers and the New Institutionalism* 100, 109 (Agathon, 1989). See also Robert A. McGuire and Robert L. Ohsfeldt, *Public Choice Analysis and the Ratification of the Constitution*, in Bernard Grofman and Donald Wittman, eds, *The Federalist Papers and the New Institutionalism* 175, 185 (Agathon, 1989) (arguing that the nine-state ratification rule meant that "the outcome in a particular ratifying assembly often affected the vote in subsequent assemblies").

¹⁸² Kaminski, *New York* at 100 (cited in note 156).

¹⁸³ Federalists supported the clause-by-clause motion (proposed by Livingston) because the delay permitted them to hear the news from New Hampshire. Antifederalists, wanting to appear fair, agreed to the motion; moreover, they had just received word from Patrick Henry and other Virginians asking New Yorkers to send copies of their proposed amendments, which a clause-by-clause debate facilitated. Id at 101-02.

¹⁸⁴ In December of 1787, Federalist President John Sullivan of New Hampshire called for a special session of the legislature for the purpose of calling a ratifying convention, even though the regular legislature was to meet a month later. The special session agreed

mention occurred the next day:

Mr. Chancellor LIVINGSTON observed, that it would not, perhaps, be altogether impertinent to remind the committee, that, since the intelligence of yesterday, it had become evident that the circumstances of the country were greatly altered, and the ground of the present debate changed. The Confederation, he said, was now *dissolved*. The question before the committee was now a question of policy and expediency. He presumed the convention would consider the situation of their country. He supposed, however, that some might contemplate disunion without pain. They might flatter themselves that some of the Southern States would form a league with us; but he could not look without horror at the dangers to which any such confederacy would expose the state of New York. He said, it might be political cowardice in him, but he had felt since yesterday an alteration of circumstances, which had made a most solemn impression on his mind.¹⁸⁵

Notice that Livingston did not suggest that the nine seceding states had any legal right to leave the Confederacy. On pain of charges of "political cowardice," he simply urged the delegates to

to hold a convention in mid-February. However, the special session itself lacked a quorum: "Since the convention was called by a session of the legislature in which there was no quorum, neither was actually a legal body and thus, technically speaking, New Hampshire has never yet ratified the Constitution." McDonald, *We the People* at 237 (cited in note 165).

The convention met in February, where a "clear majority" opposed ratification. *Id.* at 235-36. See also Beard, *Economic Interpretation of the Constitution* at 225-26 (cited in note 165). An intense lobbying effort at the convention ensued, leading some delegates to switch to the Federalist position. Because these delegates considered themselves bound by instructions to oppose ratification, they proposed that the convention adjourn to permit consultation with their towns. This delay also allowed the convention to hear the result from Massachusetts, its powerful neighbor to the south. See Roll, 56 J Am Hist at 29-30 (cited in note 170) ("Finding themselves outnumbered by opponents of the new Constitution, Massachusetts Federalists thought it necessary to make a 'conciliatory proposition'—to propose that the new government, as soon as possible after its establishment, consider and adopt a number of amendments The importance of the Massachusetts decision cannot be exaggerated. During the five weeks that the Massachusetts convention was in session, the New Hampshire convention met. The pro-Constitution delegates, finding themselves outnumbered . . . were able to effect a postponement to await the outcome in neighboring Massachusetts.").

The convention adjourned for four months, and in the interim the Federalists used the time to their advantage. On June 22, the convention ratified the Constitution by a vote of fifty-seven to forty-seven. McDonald, *We the People* at 239 (cited in note 165).

¹⁸⁵ Elliot, ed, 2 *Debates in the Several State Conventions* at 322 (cited in note 16) (remarks of Mr. Livingston at the New York Convention).

face the facts. This proved difficult for Governor Clinton, the leading opponent of the Constitution. While he tried to remain steadfast,¹⁸⁶ his troops remained uncertain as to their next step.¹⁸⁷

Hamilton, still feeling desperate, wrote to Madison on June 25 that "[o]ur chance of success here is infinitely slender, and none at all if you go wrong"; and, two days later, that "our only chance of success depends on you."¹⁸⁸ Even after news of Virginia's ratification arrived, Hamilton was still writing to Madison that "[o]ur arguments confound, but do not convince. Some of the leaders however appear to me to be convinced *by circumstances . . .*"¹⁸⁹ Only on July 26 did the New York Convention approve the Constitution by a vote of thirty to twenty-seven with eight abstentions. To make their unhappiness clear, the delegates sent a circular letter to all governors:

We, the members of the Convention of this state, have deliberately and maturely considered the Constitution proposed for the United States. Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by a general convention, and an invincible reluctance to separating from our sister states, could have prevailed upon a sufficient number

¹⁸⁶ Clinton "was the recognized leader of the Antifederalist majority in the convention," and had been elected President of the New York Convention. Spaulding, *His Excellency George Clinton* at 179 (cited in note 38). His "leadership was not entirely to blame for the defeat of the Antifederalists. It was expediency and not conviction that finally persuaded New York . . . The principal consideration in bringing New York Antifederalists to terms was the fact that ratification by New Hampshire and Virginia, while the Poughkeepsie Convention was sitting, made the Union a certainty. Rejection by New York would mean isolation." *Id.* at 181-82.

¹⁸⁷ Melancton Smith, for example, began formulating a plan under which the convention would agree to the Constitution without amendments, but with the stipulation that New York would withdraw from the Union if a second convention was not called within two years. See Kaminski, *New York* at 106 (cited in note 156).

¹⁸⁸ Rutland and Rachal, eds, 11 *The Papers of James Madison* at 179, 183 (cited in note 41).

¹⁸⁹ *Id.* at 185. See also Kaminski, *New York* at 115 (cited in note 156) ("The single most important factor in obtaining ratification, however, was simply the course of events taking place throughout America. . . . New York could not kill the Constitution by itself. The new government was going into effect with or without New York. . . . By staying out of the Union, New York would lose the federal capital and most of the benefit of its lucrative state impost. Furthermore, the threat of civil war within New York or among the states or the secession of the southern district from the state were real and serious concerns to New Yorkers. Finally, the all-important task of amending the Constitution seemed most obtainable if New York, within the Union, cooperated with other like-minded Antifederalists.").

to ratify it, without stipulating for previous amendments. We all unite in opinion, that such a revision will be necessary to recommend it to the approbation and support of a numerous body of our constituents.¹⁹⁰

This theme dominated the entire letter, which emphasized that “[o]ur attachment to our sister states, and the confidence we repose in them, cannot be more forcibly demonstrated than by acceding to a government which many of us think very imperfect” and urged the governors of other states to ask their legislatures to call a second convention.¹⁹¹

All this not only emphasizes the key role of the Philadelphia Convention’s illegal decision to break with the unanimity rule of the Articles, but also suggests the crucial reinforcement provided by the Continental Congress when it declared on July 3 that the new Constitution had been ratified by the requisite number of states.

To see our point, suppose that Congress had responded to New Hampshire’s ratification by proclaiming that the Articles insisted on unanimous consent and denouncing the secession of nine states as positively illegal. Under this scenario, we have no doubt whatsoever that Governor Clinton and his very powerful political allies would have held the line against the Constitution. Instead of allowing Livingston, a Federalist, to go unchallenged when he urged his fellow delegates to face the fact that “the Confederation, . . . was now *dissolved*,” Clinton would have rallied his Antifederalist majority to the banner held aloft by the Congress.

The First Congress would then have begun with only ten states in attendance—with New York joining North Carolina and Rhode Island as holdouts, condemning the illegality of their seceding brethren’s departure from the Confederation. This would have had a very substantial impact on the bandwagon effect that

¹⁹⁰ Elliot, ed, 2 *Debates in the Several State Conventions* at 413-14 (cited in note 16) (reprinting the New York circular letter). The nine-state rule clearly influenced (though did not persuade) the North Carolina Convention of July 1788. Governor Johnston framed the issue on the convention’s second full day: “We are not to form a constitution, but to say whether we shall adopt a Constitution to which ten states have already acceded.” Elliot, ed, 4 *Debates in the Several State Conventions* at 15 (cited in note 16). Despite an immediate protest by Rutherford, who declared that he was “unhappy to hear gentlemen of learning and integrity preach up the doctrine of adoption by ten states,” *id.*, the numbers gambit was used over and over, particularly by James Iredell. See note 204 and accompanying text.

¹⁹¹ Elliot, ed, 2 *Debates in the Several State Conventions* at 414 (cited in note 16) (reprinting the New York circular letter).

ultimately propelled the country to accept the legitimacy of the Union despite the very narrow Federalist victory. It is impossible to guess how, and whether, the new Constitution would have survived.¹⁹² But the thought-experiment emphasizes the role of the old Congress in the birth of the new regime.

F. Diehards

And yet, for all this, the First Congress began as a secessionist body with two defiant states remaining outside. The large Antifederalist majority of North Carolina's Convention did not crumble upon hearing the news that Virginia and New York had joined. After eleven days of debate rehearsing familiar charges of illegality,¹⁹³ Antifederalist leader Willie Jones carried a resolution, 184 to 84, neither rejecting nor ratifying the Constitution, but taking up New York's call for a second federal convention. Urging this convention to consider a twenty-item Bill of Rights and twenty-six other amendments prior to ratification, the Antifederalists adjourned their meeting on August 2.¹⁹⁴

But their triumph was short lived. The Federalists waged an energetic campaign for a new convention, which North Carolina's

¹⁹² Surely the movement, in New York and other states, for a second Constitutional Convention would have been greatly advanced. See Linda Grant De Pauw, *The Anticlimax of Antifederalism: The Abortive Second Convention Movement, 1788-89*, 2 Prologue 98 (1970).

¹⁹³ William Lancaster clearly made the point in the North Carolina Convention:

We find that the ratification of nine states shall be sufficient for its establishment between the states so ratifying the same. This, as has been already taken notice of, is a violation of the Confederation. We find that, by that system, no alteration was to take place, except it was ratified by every state in the Union. Now, by comparing this last article of the Constitution to that part of the Confederation, we find a most flagrant violation. The Articles of Confederation were sent out with all solemnity on so solemn an occasion, and were to be always binding on the state; but, to our astonishment, we see that nine states may do away the force of the whole.

Elliot, ed, 4 *Debates in the Several State Conventions* at 212-13 (cited in note 16). See also id at 24 (statement of Joseph Taylor at the North Carolina Convention); id at 25 (statement of James Galloway at the North Carolina Convention); id at 201 (statement of William Lenoir at the North Carolina Convention); id at 203-04 (same) ("The Confederation was binding on all the states. It could not be destroyed but with the consent of all the states. There was an express article to that purpose. The men who were deputed to the Convention, instead of amending the old, as they were solely empowered and directed to do, proposed a new system. If the best characters departed so far from their authority, what may not be apprehended from others, who may be agents in the new government? . . . The states are all bound together by the Confederation, and the rest cannot break from us without violating the most solemn compact. If they break that, they will this?").

¹⁹⁴ Id at 243-52.

newly elected legislature granted in November of 1788. When elections were finally held in August 1789, they revealed a sea change in public opinion: the second North Carolina Convention ratified in November by 195 to 77.

Rhode Island was a tougher nut to crack. Despite the disastrous referendum, Federalists continued to campaign for a convention, and in January 1790 persuaded the legislature to reconsider. When a legislator's departure for church deadlocked the General Assembly, Governor Collins cast the tie-breaking vote, citing "the extreme Distress we were reduced to by being disconnected with the other States."¹⁹⁵ But Rhode Islanders were unimpressed. The Antifederalists won a slim majority at the convention, and they adjourned the convention after four days of desultory debate.¹⁹⁶

Meanwhile, Congress was beginning to play tough. In May, 1790, the Senate approved the Rhode Island Trade Bill, which embargoed all trade and demanded immediate payment in hard currency of all the state's debts to the United States.¹⁹⁷ Unfortunately, the Senate's debates were not then published, but we do have the notes of Senator Maclay of Pennsylvania, which explain the grounds for his protest. Maclay called the action "premature" and distinguished between imposing sanctions as "a punishment [] for rejection" of the Constitution, and acting on the basis of a "[s]upposition [t]hat they would ruin our [r]evenue." The latter might be legitimate if the facts could be established, and this is apparently why he judged the statute "premature." But at the present time, "the bill could not be justified on the Principles of freedom law the Constitution or any other Mode Whatever."¹⁹⁸

Pierce Butler of South Carolina rose to defend the bill: "It is no infringement of Her Sovereignty to withdraw Your Trade . . . Granted—Mr Izard says their little State is brought

¹⁹⁵ Providence Gazette (Jan 23, 1790). If he presented any more affirmative arguments, we have been unable to find them in the sources.

¹⁹⁶ Robert C. Cotner, ed, *Theodore Foster's Minutes of the Convention Held at South Kingstown, Rhode Island, in March 1790, Which Failed to Adopt the Constitution of the United States* 21 (Books for Libraries, 1929); *Account of the Convention Proceedings*, Providence Gazette (Mar 6 and Mar 13, 1790).

¹⁹⁷ Joseph Gales, ed, 2 *The Debates and Proceedings in the Congress of the United States with an Appendix containing Important State Papers and Public Documents and All the Laws of a Public Nature* 1638 (Gales and Seaton, 1834) ("Annals of Congress").

¹⁹⁸ Kenneth R. Bowling and Helen E. Veit, eds, 9 *Documentary History of the First Federal Congress of the United States of America* 260, 263-64, 268 (Johns Hopkins, 1988).

into Compact with the other States.”¹⁹⁹ Despite the legal compunctions of Izard and Maclay, the Senate passed the bill by a vote of thirteen to eight, and sent it to the House.

Meanwhile, with a renewed Antifederalist majority in the Rhode Island General Assembly, the Antifederalist delegates to the convention reassembled, and once again moved for adjournment. But this time they were defeated. While a majority of the delegates had explicit instructions from their towns to reject the Constitution, the trading centers of Providence and Newport threatened secession if the Constitution were to fail again.²⁰⁰ Finally, on May 29, two Antifederalist delegates defied their instructions, and the Constitution was ratified by a vote of thirty-four to thirty-two. They were just in time: the House of Representatives had already considered the Rhode Island bill briefly, but dropped it upon learning of the news of ratification on June 3, 1790.²⁰¹

The bandwagon had finally lurched to its ultimate destination.

IV. THE LEGALISTIC FOUNDERS?

It is against this background that we invite you to assess Professor Amar’s very different picture of the Founding. Amar does not deny that the Federalists ignored the Articles’ insistence on explicit approval by Congress and all thirteen legislatures. He assures us, though, that “inconsistency is not illegality.”²⁰² In his view, the Articles had become voidable by any state that chose to renounce them. Despite its pledge of “perpetual union,” the Articles were no more than a treaty; and under the law of treaties then prevailing, the many breaches of the Articles authorized any of the contracting parties to renounce them if they so chose. According to Amar, then, the Framers were on solid legal ground in treating the Articles as dead and buried.

Even if we granted all of Amar’s premises, his legal conclusions do not follow.²⁰³ But it is more important to challenge his premises. First, is there any evidence that Americans took Amar’s argument seriously as they considered the Federalists’ end run around the Articles?

¹⁹⁹ Id at 458.

²⁰⁰ Staples, *Rhode Island in the Continental Congress* at 666 (cited in note 85).

²⁰¹ Gales, ed, 2 *Annals of Congress* at 1686 (cited at note 197).

²⁰² Amar, 94 Colum L Rev at 465 (cited in note 1).

²⁰³ See text accompanying notes 234-47.

After all, from Maryland's repudiation of the Annapolis Convention through Rhode Island's resistance to the new Union, we have amassed an enormous body of evidence expressing legalistic objections to the Federalists' unconventional activities. We have also seen that the Founders' violation of the final Article of Confederation was not a detail, but absolutely essential for the success of their enterprise. The Federalists were well aware of this. Rather than ignoring the question, Federalists repeatedly responded by making the revolutionary assertion that the times required breaking the rules laid down by Article XIII. Despite his deserved reputation for industry, Professor Amar has uncovered virtually nothing that suggests that Federalists seriously presented his breached-treaty argument, much less that they gave great weight to it, much less that Americans in general were impressed with it.²⁰⁴

²⁰⁴ Apart from the remarks analyzed in the text, Amar has found remarkably little support for his view. In urging the Connecticut legislature to send delegates to the convention, General Jedidiah Huntington asserted:

The compact between the several states has not any penalty annexed to it for the breach of its conditions Whenever therefore any state refuses a compliance with a requisition made agreeably to the confederation, all obligation on the part of the other states is dissolved.

Conn Courant 2 (May 21, 1787). The General's statement is brief and, as we will see, does not do justice to the legal complexities. But the most important thing about it is its uniqueness: This obscure remark in the Connecticut legislature simply does not weigh in the balance against the mass of evidence we have accumulated.

Turning to the ratification period, Amar relies on James Iredell's remarks. The time was June 1788, and ten states had already ratified before Iredell spoke to the North Carolina Convention:

It is suggested, indeed, that, though ten states have adopted this new Constitution, yet, as they had no right to dissolve the old Articles of Confederation, these still subsist, and the old Union remains, of which we are a part. The truth of that suggestion may well be doubted, on this ground: when the principles of a constitution are violated, the constitution itself is dissolved, or may be dissolved at the pleasure of the parties to it. . . . Perhaps every state has committed repeated violations of the demands of Congress. . . . The consequence is that, upon the principle I have mentioned, (and in which I believe all writers agree,) the Articles of Confederation are no longer binding.

Elliot, ed, 4 *Debates in the Several State Conventions* at 230 (cited in note 16). But notice that Iredell did not describe the Articles as a treaty, but called them a "constitution." It is hard to see this as supporting Amar's "breached treaty" theory. Instead, the passage seems to be endorsing an idiosyncratic view of the right of secession. Moreover, Amar omits reference to other remarks by Iredell at the convention that embrace, in typically Federalist fashion, the right of revolution:

It is true that, by the Articles of Confederation, the consent of each state was necessary for any alteration. It is also true that the consent of nine states renders the Constitution binding on them. The unhappy consequences of that unfortunate article

To overwhelm the sound of silence, Professor Amar transforms James Madison into his spokesman-in-chief—trying to convince us that at least this great man authoritatively defended the legality of the Federalists' breach with the Articles. But Madison was no less a revolutionary than any of his fellow Federalists. While he did play with Amar's breached-treaty argument, he did not embrace it. Amar evades this hard truth by focusing on a few of Madison's many remarks on the subject.

Begin with Madison's most considered discussion of the issue at the Constitutional Convention.²⁰⁵ When introducing the New

in this Confederation produced the necessity of this article in the Constitution. Every body knows that, through the peculiar obstinacy of Rhode Island, many great advantages were lost. . . .

It will often happen, in the course of human affairs, that the policy which is proper on common occasions fails, and that laws which do very well in the regular administration of a government cannot stand when every thing is going into confusion. In such a case, the safety of the community must supersede every other consideration, and every subsisting regulation which interferes with that must be departed from, rather than that the people should be ruined. The Convention, therefore, with a degree of manliness which I admire, dispensed with a unanimous consent for the present change, and at the same time provided a permanent remedy for this evil, not barely by dispensing with the consent of one member in future alterations, but by making the consent of nine sufficient for the whole, if the rest did not agree, considering that the consent of so large a number ought in reason to govern the whole

Id at 228-29 (remarks of Iredell to the North Carolina Convention). See also id at 230 (same) ("I have stated the reasons for departing from the rigid article in the Confederation requiring a unanimous consent. We were compelled to do this, or see our country ruined. In the manner of the dispensation, the Convention, however, appear to have acted with great prudence, in copying the example of the Confederation in all other particulars of the greatest moment, by authorizing nine states to bind the whole."). On other occasions, Iredell repeatedly stressed the need to face the fact that ten states had already ratified the Constitution, leaving North Carolina out in the cold. See, for example, id at 14 ("Is there any gentleman so indifferent to a union with our sister states, as to hazard disunion rashly, without considering the consequences?"); id at 232 ("But we ought to consider whether ten states can do longer without one, or one without ten."). All things considered, the balance of the evidence weighs against Professor Amar's claim that Iredell should be counted as a legalistic partisan of the breached-treaty position. Apart from one idiosyncratic remark (that doesn't use the word "treaty"), he appears to be a typical Federalist revolutionary.

²⁰⁵ Madison raised the breached-treaty argument three other times at the Philadelphia Convention. On June 5, he noted: "[A]s far as the articles of Union were to be considered as a Treaty only of a particular sort, among the Governments of Independent States, the doctrine *might* be set up that a breach of any one article, by any of the parties, absolved the other parties from <the whole> obligation. For these <reasons as well as others> he thought it indispensable that the new Constitution should be ratified in the most unexceptionable form . . ." Farrand, ed, 1 *Records of the Federal Convention* at 122-23 (cited in note 15) (emphasis added) (brackets in original). Madison's use of the word "might" suggests that he did not actually make the argument, much less place great weight on it.

Madison raised the argument another time on June 30:

Jersey Plan, Paterson had insisted that the Articles could only be amended unanimously: "This is the nature of all treaties. What is unanimously done, must be unanimously undone."²⁰⁶

Madison responded with a speculative disquisition, not a dogmatic lecture. He recognized (as Amar does not) that it is controversial to treat the Articles as if they were merely a treaty to be assessed under the law of nations. Indeed, he began his discussion on a very different premise, considering "the federal

In reply to the appeal of Mr. Ellsworth to the faith plighted in the existing federal compact, he remarked that the party claiming from others an adherence to a common engagement ought at least to be guiltless itself of a violation. Of all the States however Connecticut was perhaps least able to urge this plea. Besides the various omissions to perform the stipulated acts from which no State was free, the Legislature of that State had by a pretty recent vote *positively refused* to pass a law for complying with the Requisitions of Cong[ress].

Id at 485-86. Madison did *not* deny that the other states might raise Ellsworth's argument. He said that Connecticut "was perhaps least able" to raise it. Moreover, Madison's attack was parried by Ellsworth, who argued that the state's financial crisis justified its lower payments and "def[ie]d any gentleman to shew that we ever refused a federal requisition." Id at 497. This response appears in Yates's notes; Madison fails to mention it in his own. See id at 487.

Madison's final words on the subject were on July 23:

[I]t would be a novel & dangerous doctrine that a Legislature could change the constitution under which it held its existence. There might indeed be some Constitutions within the Union, which had given, a power to the Legislature to concur in alterations of the federal Compact. But there were certainly some which had not; and in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty*, and a *Constitution*. The former in point of *moral obligation* might be as inviolable as the latter. In point of *political operation*, there were two important distinctions in favor of the latter. 1. A law violating a treaty ratified by a preexisting law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void. 2. The doctrine laid down by the law of Nations in the case of treaties is that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation.

Farrand, ed, 2 *Records of the Federal Convention* at 92-93 (cited in note 15). Madison here is *not* making a final judgment about the present legal status of the Articles, but is addressing the future and arguing that ratification of the new Constitution by state conventions has the advantage of being more durable than a "league."

These three quotations, which all come from Madison's notes, do not begin to answer the intricacies of the breached-treaty argument. For starters, they do not establish that the Articles were "breached" by all sides. They do not show that those previous breaches could be raised several years later, and by parties who are themselves guilty. They do not take into account the multilateral nature of the Confederation. They do not come to grips with the fact that everyone, including Madison, kept referring to the "existing" Articles of Confederation. See text accompanying notes 244-47.

²⁰⁶ See Farrand, ed, 1 *Records of the Federal Convention* at 250 (cited in note 15).

union as anal[o]gous to the fundamental compact by which individuals compose one Society, and which must in its theoretic origin at least, have been the unanimous act of the component members"²⁰⁷ Madison took this interpretation seriously, and argued that it supported the Virginia Plan.²⁰⁸

Only then did he adopt an Amarian interpretation of the Articles, considering it as a treaty:

Clearly, according to the Expositors of the law of Nations, that a breach of any one article, by any one party, leaves all the other parties at liberty, to consider the whole convention as dissolved, *unless they choose rather to compel the delinquent part to repair the breach*. In some treaties indeed it is expressly stipulated that a violation of particular articles shall not have this consequence, and even that particular articles shall remain in force during war, which in general is understood to dissolve all su[bsisting] Treaties. But are there any exceptions of this sort to the Articles of confederation?²⁰⁹

Note Madison's careful qualifications. Even if the Articles were a treaty rather than part of the social compact, he did not assert that breaches made the "treaty" void. At most they gave innocent parties an option to terminate if they did not choose to compel the delinquents to repair the breach. Nor was this rule of voidability absolutely binding. It was merely suppletive, and the parties were free to change it to one that made treaties more durable. While Madison denied that the Articles contained a provision changing the voidability rule, his comments failed to confront the text's explicit pledge of "perpetual Union."

Perhaps this is the reason that his minilecture went over like a lead balloon. Even Federalists like Hamilton and Ellsworth took the floor to declare themselves unconvinced, while Madison's notes do not cite any supporters.²¹⁰ Not that Madison seemed very upset. Even he "did not wish to draw any rigid inferences from these observations."²¹¹ Thus it is not surprising that Madi-

²⁰⁷ Id at 314.

²⁰⁸ Id at 315. Madison believed that there may well be a term "*implied* in the [social] compact itself" that barred dissolution even if there were a breach by some members. Id at 314. This implied term would give a majority of the nation the right to form a new constitution over the dissent of a minority.

²⁰⁹ Id at 315 (emphasis added).

²¹⁰ See their emphatic rejections of Madison's views at text accompanying notes 99-100.

²¹¹ Farrand, ed, 1 *Records of the Federal Convention* at 315 (cited in note 15). The

son failed to renew his legalistic arguments at the crucial moments when the convention was debating whether to break with the Articles' insistence on congressional consent and unanimous state approval—leaving it to fire-eaters like Wilson to console the fainthearted: "The House on fire must be extinguished, without a scrupulous regard to ordinary rights."²¹²

Because the convention's deliberations were secret, perhaps Amar can rehabilitate his image of the legalistic Madison by emphasizing his public pronouncements. But this will not work, for the simple reason that Madison's published writings reveal him to be an emphatic revolutionary. Turning to the *Federalist*, two papers are relevant: Forty and Forty-three. Unfortunately, Amar paints his picture of a legalistic Madison by quoting a fragment from Forty-three, and consigning Forty to a dismissive footnote.²¹³ But when Amar's quotations are supplemented, the revolutionary Madison reemerges.

We begin with Forty, since it devotes itself entirely to the question of legality: "whether the Convention were authorised to frame and propose this mixed Constitution."²¹⁴ Madison's answer distinguished between the authority of the convention to make its sweeping proposal and its authority to change the rules of ratification set down by Article XIII. On the first question, he treats his audience to a complex, if strained, legal argument. When it comes to the second subject his tone shifts radically:

tentative character of Madison's remarks is also evident in his "Vices of the Political System of the United States," an unpublished memorandum prepared before the convention. Here he describes the Articles as no "more than a treaty of amity of commerce and of alliance . . .," but it is quite plain that this is not intended as a lawyerly characterization. To the contrary, he recognizes that the Articles possess "the form of . . . a Constitution," but discounts this point given his ambition—which is to describe the "vital principles of a Political Cons[ti]tution." From this vantage point, Madison denies that a text that fails to grant a full panoply of coercive powers to the Congress can qualify as a "vital" constitution. While this may well be true as a matter of political statecraft, Madison is cagey about its legal implications. He conditions his later discussion of international law with the telltale caveats that "[a]s far as the Union of the States is to be regarded as a league of sovereign powers, and not as a political Constitution . . . , so far it seems to follow from the doctrine of compacts, that a breach of any of the articles of the confederation by any parties to it, absolves the other parties from their respective obligations, and gives them a right, if they chuse to exert it, of dissolving the Union altogether." Rutland and Rachal, eds, 9 *The Papers of James Madison* at 345, 351-53 (cited in note 41). As at the convention, Madison makes his remarks conditionally, and is attentive to the distinction between void and voidable treaties.

²¹² Farrand, ed, 2 *Records of the Federal Convention* at 469 (cited in note 15).

²¹³ Amar, 94 *Colum L Rev* at 497 n 157 (cited in note 1).

²¹⁴ *Federalist* 40 (Madison), in Jacob E. Cooke, ed, *The Federalist Papers* 258 (Wesleyan, 1961) (footnote omitted).

In one particular it is admitted that the Convention have departed from the tenor of their commission. Instead of reporting a plan requiring the confirmation of *the Legislatures of all the States*, they have reported a plan which is to be confirmed by the *people*, and may be carried into effect by *nine States only*. It is worthy of remark, that this objection, though the most plausible, has been the least urged in the publications which have swarmed against the Convention. The forbearance can only have proceeded from an irresistible conviction of the absurdity of subjecting the fate of 12 States, to the perverseness or corruption of a thirteenth; from the example of inflexible opposition given by *a majority* of 1-60th of the people of America, to a measure approved and called for by the voice of twelve States comprising 59-60ths of the people; an example still fresh in the memory and indignation of every citizen who has felt for the wounded honor and prosperity of his country. As this objection, therefore, has been in a manner waved by those who have criticised the powers of the Convention, I dismiss it without further observation.²¹⁵

Three things make this paragraph remarkable. First, it is remarkably frank. No fig leaf of legality is offered up, no dismissive talk of the Articles as a breached treaty that has lost its legal force. In case the point was missed, the rest of the paper devotes itself to the question of "how far considerations of duty arising out of the case itself, could have supplied any defect of regular authority."²¹⁶ This discussion reveals Madison as an all-out revolutionary insisting that "in all great changes of established governments, forms ought to give way to substance; that a rigid adherence in such cases to the former, would render nominal and nugatory, the transcendent and precious right of the people to abolish or alter their governments as to them shall seem most likely to effect their safety and happiness"²¹⁷ Surely if Madison were confident about his breached-treaty argument, all this revolutionary talk would have been unnecessary.

Second, Madison is remarkably nationalistic: We cannot allow little Rhode Island to veto an initiative undertaken by "59-60ths of the people." This calculation presupposed that We the

²¹⁵ Id at 263.

²¹⁶ Id.

²¹⁷ Id at 265. See also Ackerman, 1 *We the People: Foundations* at 175-79 (cited in note 2).

People of the *United States* already existed, and could not allow their voice to be strangled by a small minority in the name of states' rights. This Madisonian line is completely inconsistent with the thrust of Amar's interpretation. If Madison had opted for the breached-treaty argument, he would not have condemned Rhode Island for frustrating the (incipient) national will. He would have emphasized her breaches of the Articles—since, for an Amarian Madison, it is these breaches that authorized her sister states to exercise their sovereign right to renounce the treaty and go their own way. But the Madison who wrote *Federalist* Forty was not a legalistic defender of states' rights. He was a revolutionary defender of the national right of self-determination.

The third remarkable thing is Madison's chutzpah: he blandly announces that his opponents have "wa[i]ved" their powerful legal objection, and "dismiss[es] it from further consideration." Madison published these words on January 18 in New York's newspapers. This was two weeks before Cornelius Schoonmaker's resolution denouncing the convention for its illegality would lose in New York's General Assembly by a vote of twenty-seven to twenty-five, and a similar motion by Robert Yates would lose in the Senate by twelve to seven.²¹⁸ Doubtless these Antifederalists would have been surprised to learn about their waiver—as would those in the many other states whose repeated protests we have rehearsed.

Indeed, even Madison's castigation of Rhode Island was misleading. While Rhode Island vetoed the 1781 proposal for a five percent impost, it was New York that remained the only naysayer to the impost at the time that Madison was writing. Since Madison was writing in New York newspapers, he was perfectly aware of how little his readers had "waived" their legalistic objections to the Federalists' end run around the unanimity rule.

Professor Amar ignores all this when he dismisses Forty in a conclusory footnote²¹⁹ and urges us to focus on Madison's remarks in Forty-three. Here Publius once again explains that a decision to follow the Articles "would have subjected the essential interests of the whole to the caprice or corruption of a single member."²²⁰ Failing to change the rules "would have marked a want of foresight in the Convention, which our own experience

²¹⁸ See text accompanying notes 157-59.

²¹⁹ See Amar, 94 Colum L Rev at 497 n 157 (cited in note 1).

²²⁰ *Federalist* 43 (Madison), in Cooke, *The Federalist Papers* at 297 (cited in note 214).

would have rendered inexcusable.”²²¹ Having confessed that the Federalists were fated to lose under the old rules, Madison then turns to a question of “a very delicate nature On what principle the confederation, which stands in the solemn form of a compact among the States, can be superceded without the unanimous consent of the parties to it?”:

[This] question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature’s God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. PERHAPS also an answer may be found without searching beyond the principles of the compact itself . . . A compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article is a breach of the whole treaty; and that a breach committed by either of the parties absolves the others; and authorizes them, if they please, to pronounce the treaty violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the federal pact, will not the complaining parties find it a difficult task to answer the MULTIPLIED and IMPORTANT infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it, the part which the same motives dictate.²²²

Professor Amar only quotes the Madisonian speculations that immediately follow “PERHAPS.”²²³ The fuller version, however, makes it clear that Madison had not changed his mind radically in the five days since he published *Forty*. Like *Forty*, *Forty-three* did not rest the case for the convention’s end run around the Articles on legalistic grounds. Instead, it defended the convention by continuing *Forty*’s revolutionary appeal to “the absolute neces-

²²¹ *Id.*

²²² *Id.* at 297-98.

²²³ Amar, 94 *Colum L Rev* at 467 (cited in note 1).

sity of the case . . . the great principle of self-preservation . . . the transcendent law of nature and of nature's God," and so forth.

The breached-treaty claim merely appears as a speculative add-on, and is, moreover, completely consistent with the frank confession of illegality in the preceding discussions. To see why, consider that Forty did not speculate about the future legality of the Articles but contented itself with confessing that the Articles were illegally breached by the convention. In contrast, the Amarian passage in Forty-three looks to the future: PERHAPS it might be lawful for a state to renounce the Articles if it could establish that other states had breached. Madison did not even take the trouble to demonstrate that such breaches had occurred on a state-by-state basis. Nor did he suggest that any state had in fact exercised its putative right to denounce the treaty. He was merely sketching a possible strategy for future use, creating options that might prove useful given the gloomy prospects for ratification at the time he wrote *Federalist* Forty-three.

January 1788 was an especially dark month in the ratification struggle. Not only was New York dominated by the fierce opposition of the Clinton faction,²²⁴ but Antifederalists were in the ascendancy in many other states. They had already won elections in New Hampshire and Massachusetts, while Rhode Island remained defiant. As a southerner, Madison was perfectly aware of the hard struggle that loomed ahead in Maryland, North Carolina, and his own state. This dark scene would not brighten until the Federalists' February surprise in snatching victory from the jaws of defeat at the Massachusetts Convention. Within this context, it is entirely understandable that Madison was speculating that PERHAPS a renunciation of the Articles might be necessary sometime in the future as part of a desperate effort to rebuild the Union.

Unfortunately, Professor Amar does not follow Madison after January to consider whether his PERHAPS became more than a MIGHT HAVE BEEN during the long months ahead. The moment of truth came in June at Virginia's ratifying convention. As we have seen, eight states had ratified by this point, and the legalistic denunciation of the nine-state rule by Patrick Henry and others was especially hot and heavy. Madison was among the most talkative members of the convention. This would have been the perfect moment to explain to the legalists that Virginia was perfectly within its rights to renounce the Articles as a

²²⁴ See note 186 and accompanying text.

breached treaty and join the eight secessionist states in breathing life into a more perfect Union under the nine-state rule.

But nothing like this happened. Here is how Madison responded to Henry's legalistic complaint:

Could any thing in theory be more perniciously improvident and injudicious than this submission of the will of the majority to the trifling minority? Have not experience and practice actually manifested this theoretical inconvenience to be extremely impolitic? Let me mention one fact, which I conceive must carry conviction to the mind of any one: the smallest state in the Union has obstructed every attempt to reform the government Twelve states had agreed to certain improvements which were proposed, being thought absolutely necessary to preserve the existence of the general government; but as these improvements, though really indispensable, could not, by the Confederation, be introduced into it without the consent of every state, the refractory dissent of that little state prevented their adoption. The inconveniences resulting from this requisition, of unanimous concurrence in alterations in the Confederation, must be known to every member in this Convention; it is therefore needless to remind them of them. Is it not self-evident that a trifling minority ought not to bind the majority? Would not foreign influence be exerted with facility over a small minority? Would the honorable gentleman [Henry] agree to continue the most radical defects in the old system, because the petty state of Rhode Island would not agree to remove them?²²⁵

We have heard all this before. Madison is recapitulating the revolutionary themes of Federalist Forty, where he also pointed to Rhode Island's rejection of the impost as establishing the "absurdity" of Article XIII's demand for unanimity. With Henry staring him in the face, he could not pretend that the opposition had "waived" the legalistic objection that Forty had admitted was the "most plausible." Rather than responding with a legalistic critique of the Amarian type, Madison condemned compliance with Article XIII as "extremely impolitic." Rather than asserting the right of each state to renounce the Articles as a breached treaty, Madison returned to the revolutionary nationalism of *The Feder-*

²²⁵ Elliot, ed, 3 *Debates in the Several State Conventions* at 88-89 (cited in note 16).

alist Papers—proclaiming the “self-evident” right of a national majority to rule over a “trifling minority.” Throughout his repeated and lengthy lectures to the convention, he never breathed an Amarian word about breached treaties.²²⁶ Instead he appears in June as he appeared in January: a revolutionary Federalist, answering his opponents’ legalisms with a nationalistic appeal to “self-evident” truths about democracy.

Indeed, Professor Amar’s search through the records of the ratification period has been rewarded by the discovery of a single public remark, by Charles Pinckney at the South Carolina Convention, that unconditionally endorses his breached-treaty argument, and this remark provoked an immediate counterattack.²²⁷ Since we have seen Antifederalists repeatedly raise legalistic protests under very dramatic conditions, the silence on the other

²²⁶ At one point he does ask (rhetorically): “What is the situation of this country at this moment? Is it not rapidly approaching to anarchy? Are not the bands of the Union so absolutely relaxed as almost to amount to a dissolution?” *Id.* at 399 (remarks of James Madison to the Virginia Convention). Even this passage does not assert that the “bands of the Union” have been dissolved. Nor is there anything here that resembles a rigorous argument from the law of treaties.

²²⁷ Elliot, ed, 4 *Debates in the Several State Conventions* at 308 (cited in note 16). Like Madison’s remarks at the Philadelphia Convention, Pinckney’s comments at the South Carolina Convention immediately provoked a sharp challenge. The very next delegate, Rawlins Lowndes, responded:

For his part, he did not think matters had come to such a crisis; rather let us comply with our federal connection, which, not yet being broken, admits of being strengthened. A gentleman had instanced Vattel in support of his argument, and laid down, from that author, an opinion that where parties engaged in the performance of an obligation, should any one of them fly off from his agreement, the original was null and void. He had ingeniously applied this to our present Continental situation, and contended, as some of the states acted in a refractory manner towards the Continental Union, and obstinately refused a compliance, on their parts, with solemn obligations, that of course the Confederation was virtually dissolved. But Vattel merely recited such a case as where only a part of a confederation was broken; whereas ours was totally different, every state of the Union having been uniform in refusing a compliance with the requisitions of Congress.

Id. at 310. Lowndes seems to be referring to the doctrine of “clean hands” that treatise writers typically imposed on states that sought to nullify treaties. See text accompanying note 240.

Our view of the record, then, is very different from Professor Amar’s. He claims that “not a single Anti-Federalist, to my knowledge, contradicted” Pinckney or Madison, and that “when pressed to put up or shut up, [the Antifederalists] shut up.” Amar, 94 *Colum L. Rev.* at 468-69 (cited in note 1). The truth is that just as Pinckney’s claims were immediately contradicted at the South Carolina Convention, so too were Madison’s at Philadelphia. See text accompanying notes 210-11. The “breached treaty” argument was rarely refuted because it was rarely made.

As the final witness on his behalf, Professor Amar summons James Iredell. But we have already explained why we believe that Iredell was a garden-variety Federalist revolutionary, rather than an Amarian legalist.

side really is quite deafening, and deserves further attention in its own right: Why were the Federalists so shy about Amar's legalistic argument?

A. Treaty or Constitution?

As Madison himself suggested at the convention,²²⁸ the very idea that the Articles were merely a "treaty" was not obvious to most Americans. Treaty language was almost never used to describe the existing arrangement. Two other words predominated. The Articles were often described as a "compact"—usually modified with adjectives like "solemn" or "fundamental" to indicate its very special status. Or they were simply called a "constitution." For example, Madison's own state of Virginia authorized its delegation to Philadelphia to "devis[e] and discuss[] all such alterations and further provisions, as may be necessary to render the *Federal Constitution* adequate."²²⁹ And Amar's favorite, James Wilson, repeatedly equated the Articles and the Constitution as establishing a "confederate republick."²³⁰ The debates at the state ratifying conventions are full of similar references. Thus, when Antifederalists denounced the "open and avowed violation of a sacred federal constitution,"²³¹ their charges resonated in the common understanding.²³²

²²⁸ See text accompanying note 207.

²²⁹ See text accompanying note 20 (emphasis added).

²³⁰ See, for example, Robert G. McCloskey, ed, 1 *Works of James Wilson* 262-63 (Belknap, 1967) ("[T]he United States have been formed into one confederate republick; first under the articles of confederation; afterwards, under our present national government."); McCloskey, ed, 2 *Works of James Wilson* at 764 (describing the Constitution as "a plan of a confederate republick"); id at 767 (same); id at 768 (arguing that in "confederate republicks," states "retain the free and generous exercise of all their other faculties as states, so far as it is compatible with the welfare of the general and superintending confederacy.").

²³¹ Vox Populi, *Essays by Vox Populi: Massachusetts Gazette October-November 1787*, in Herbert J. Storing, ed, 4 *The Complete Anti-Federalist* 41, 44 (Chicago, 1981).

²³² As if anticipating Professor Amar, one Antifederalist quoted the text of Article XIII and remarked:

Here is a System of Government as sacred as the nature of the thing will admit of . . . is it within the compass of human ideas to imagine that a System of Government so formed can be torn up by the roots, . . . that if the majority are in favour of such a measure, they may do it?—I answer no, by no means: Where a Government is instituted upon the idea of a majority, there a majority have undoubtedly a right to make such an alteration as they think proper: But the case is widely different where a System of Government is formed on ideas of unanimity, and where it is expressly stipulated, that it shall receive no alterations but such as are unanimously agreed to. It is a maxim in law, founded on the eternal principles of reason and the fitness of things,—"That no act shall be revoked but with the same solemnity with which it

Indeed, when John Adams described the Continental Congress as a “diplomatic assembly” in his important *A Defence of the Constitutions of Government of the United States of America* in 1787, the response was quite revealing. Upon receiving and reading this long book, Thomas Jefferson wrote Adams immediately to pinpoint this single claim for critique:

There is one opinion in it however, which I will ask you to reconsider, because it appears to me not entirely accurate, and not likely to do good. Pa[ge] 362. “Congress is not a legislative, but a diplomatic assembly.” Separating into parts the whole sovereignty of our states, some of these parts are yeilded [sic] to Congress. Upon these I should think them both legislative and executive; and that they would have been judiciary also, had not the Confederation required them for certain purposes to appoint a judiciary. It has accordingly been the decision of our courts that the Confederation is a part of the law of the land, and superior in authority to the ordinary laws, because it cannot be altered by the legislature of any one state. I doubt whether they are at all a diplomatic assembly.²³³

In describing the Congress as a “diplomatic assembly,” Adams is far more cautious than Amar. One could only imagine Jefferson’s reaction, as Ambassador to France, to the Amarian suggestion that his government had dissolved without giving him notice.

was first enacted.” . . .

Supposing nine States should ratify and confirm the proposed Federal Government, and four States should reject the same—would not those four States, still adhering to the articles of Confederation, have an undoubted right, both in the sight of God and man, to accuse the nine approbating States with the most unequivocal breach of public faith, point-blank *national infidelity*, and I will add, of open REBELLION against the *national Constitution*?—And what confidence could *they*, or any foreign power ever place in those nine States, thus confederated into a Government, the very *basis* of which is laid in the violation of public faith, and whose existence, as a State, sprang out of a revolt from their own established Government.

Portius, *US Chronicle: Political, Commercial & Historical*, RI 1 (Nov 29, 1787) (reprinted from *American Herald*, Mass).

²³³ Letter from Thomas Jefferson to John Adams (Feb 23, 1787), in Lester J. Cappon, ed, 1 *The Adams-Jefferson Letters: The Complete Correspondence between Thomas Jefferson and Abigail and John Adams 174-75* (North Carolina, 1988).

B. The Law of Treaties

In avoiding treaty talk, Americans showed sound legal instincts. Not only had the law of treaties been developed in corrupt and monarchical Europe, but the paradigm case for the classical law of treaties was a bilateral agreement restricted to a small number of issues—most often, war or peace or commerce. The Articles of Confederation were multilateral and envisioned an ongoing collaboration over a multiplicity of projects. Americans were alive to this distinction, repeatedly insisting that the Confederacy could not be dissolved without the unanimous consent of all thirteen parties.²³⁴

Insofar as European precedents were applicable,²³⁵ they did not suggest that renunciation was the appropriate legal response for every breach. Especially in multilateral agreements, leading authors recognized that a breach by one party could disrupt ongoing arrangements between other parties who were all complying

²³⁴ This point was repeatedly made at the North Carolina Convention, which met after eleven states had already ratified. Samuel Spencer, for example, emphasized that North Carolina had not taken any steps to renounce the treaty:

[T]hey were before confederated with the other states by a solemn compact, which was not to be dissolved without the consent of every state in the Union. North Carolina had not assented to its dissolution. If it was dissolved, it was not their fault, but that of the adopting states. It was a maxim of law that the same solemnities were necessary to destroy, which were necessary to create, a deed or contract. He was of opinion that, if they should be out of the Union by proposing previous amendments, they were as much so now.

Elliot, ed, 4 *Debates in the Several State Conventions* at 228 (cited in note 16). Timothy Bloodworth also rebutted the charge that North Carolina's violations dissolved the Articles, arguing that "[t]he compact between the states was violated by the other states, and not by North Carolina. Would the violating party blame the upright party?" Id at 236. See also Farrand, ed, 1 *Records of the Federal Convention* 250 (cited in note 15) (remarks of William Paterson) ("If the Confederacy was radically wrong, let us return to our states and obtain larger powers, not assume them of ourselves. I came here not to speak my own sentiments, but <the sentiments of> those who sent me. . . . If we argue the matter on the supposition that no Confederacy at present exists, it can not be denied that all the States stand on the footing of equal sovereignty. . . . If we argue on the fact that a federal compact actually exists . . . the 13th. declar[es] that no alteration shall be made without unanimous consent. This is the nature of all treaties. What is unanimously done, must be unanimously undone.") (footnote noting that "supposition" was crossed out and replaced with "fact" has been omitted) (brackets in original).

²³⁵ The closest cases were leagues, but even these weren't that close. Moreover, since there were fewer cases, the doctrine was less considered and developed. See Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 2 Brit YB Intl L 100, 106 (1930) ("[T]he seed-bed of the traditional rules as to the . . . discharge of treaties which swell the bulk of our text-books . . . was sown at a time when the old conception of the treaty as a compact, a bargain, a *Vertrag*, was exclusively predominant and the dawn of the new multilateral treaty had not begun.").

with their obligations. In such cases, treatise writers did not recognize the right of country A to renounce its obligations to B because C had breached the treaty. Vattel, for example, confronts the problem raised in a multilateral alliance when some of the parties remain faithful to their engagements. He concludes that, as to these parties, "the treaty subsists in full force"²³⁶ Other important writers recognized that multifaceted agreements presented different problems than ones focusing on a single problem. Christian Wolff, for example, considered a case in which a treaty concerned "different matters, the one of which depends in no way upon the other," and denied that a breach of one term by one party allowed the other "to withdraw from the entire treaty"²³⁷ The extent to which Wolff's doctrine applied to the Articles was, of course, debatable, but if Americans had been interested in the law of treaties, we would have heard them debating it.

Putting all problems of multiple purpose and multilateralism to one side, classical doctrine still contained many important restraints on treaty renunciation. First, the principles it announced were merely suppletive, applying only if the parties had failed to stipulate otherwise.²³⁸ This meant that any fair-minded lawyer would have had to think long and hard about the final Article's pledge that "the Union shall be perpetual." As Pufendorf explained, "[T]he most binding species of treaties are produced by those which concern some perpetual union of several states."²³⁹

²³⁶ Emmerich de Vattel, *The Law of Nations* 451 (T. & J.W. Johnson, 1863) (Joseph Chitty, trans) (originally published 1758). See also Samuel Pufendorf, 2 *De Jure Naturae Et Gentium Libri Octo* 1044-51 (Yale, 1934) (C.H. Oldfather and W.A. Oldfather, trans) (originally published 1688).

²³⁷ Christian Wolff, 2 *Jus Gentium Methodo Scientifica Pertractatum* 227 (Clarendon, 1934) (Joseph H. Drake, trans) (originally published 1764). See also Johann Wolfgang Textor, 2 *Synopsis of the Law of Nations* 267 (Carnegie, 1916) (John Pawley Bate, trans) (originally published 1680).

²³⁸ Alberico Gentili, 2 *De Iure Belli Libri Tres* 83 (Oxford, 1933) (John C. Rolfe, trans) (originally published 1612); Vattel, *The Law of Nations* at 214, 449; Hugo Grotius, *The Rights of War and Peace* 396 (Universal Classics Library, 1901); J.J. Burlamaqui, 2 *The Principles of Natural and Politic Law* 222-23 (Cambridge, 5th ed 1807) (Thomas Nugent, trans). Nineteenth-century treatise writers agreed. See, for example, Henry Wheaton, *Elements of International Law* 374 (Carey, Lea & Blanchard, 1863); J.T. Abdy, ed, *Kent's Commentary on International Law* 392-93 (Deighton, Bell, 2d ed 1877).

²³⁹ Pufendorf, *De Jure Naturae* at 1336 (added by Barbeyrac from Samuel Pufendorf, *De Officio Hominis et Civis*). The contemporary Johann Textor agreed:

[A]n alliance may be dissolved, even without any reason, by the common consent of the confederated members

This is subject to the proviso that, when there are several federated members, they all assent, the matter being one of those where the special rights of each indi-

Was it not a bit too soon to decide, after six years, that international law allowed parties to renounce a treaty, if it was a treaty?

PERHAPS one or another state was within its rights to advise the others that it would consider abrogation if they did not cure one or another breach considered fundamental. But even here, international law limited this right to states that could plausibly claim to have “clean hands.”²⁴⁰ As applied to the Articles, this insistence on clean hands would serve as a serious constraint. Thus, when Charles Pinckney actually raised Amar’s breached-treaty argument in the South Carolina Convention, Rowland Lowndes immediately argued against voiding the treaty: “[L]et us comply with our federal connection, which, not yet being broken, admits of being strengthened.”²⁴¹

There is a final problem. As Madison repeatedly emphasized, international law made breached treaties voidable, but not void. This distinction is of fundamental importance. It deprives private parties of their authority to ignore a treaty because *they* believe that one or another state has breached its terms. It was one thing for Charles Pinckney to proclaim at the South Carolina Convention that the Articles were merely a treaty that had been irreparably breached—quite another for the State of South Carolina to take a similar position. It was the state, after all, that had entered the treaty in the first place. And if anybody could renounce it, it was only after a considered debate and a somber collective decision—recognizing that international law did *not* give sovereigns the authority to ignore any treaty they disliked,

vidual are taken into account. And so a vote of the majority to retire from the alliance does not bind the minority, or even a single member who prefers to abide by the alliance. So the unanimous consent of the federated members is required, and this by mere Law, even if there is no clause in the document such as: “This alliance is not dissoluble, save by common consent.”

Textor, *The Law of Nations* at 266-67 (cited in note 237).

²⁴⁰ This point was recognized by one of Professor Amar’s favorites, James Iredell, just a few years later: “It is a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, *if innocent*, to declare, in consequence of the breach, that the treaty is void.” *Ware v Hylton*, 3 US (3 Dall) 199, 261 (1796) (Iredell seriatim) (emphasis added). For a historical and contemporary discussion of this principle, see Bhik P. Sinha, *Unilateral Denunciation of Treaty Because of Prior Violations of Obligations by Other Party* 83 (Martinus Nijhoff, 1966) (“[I]t is a well-established principle of international law that it is only an innocent party that possesses the right to denounce or abandon a treaty because of breaches by [the] other party or parties.”); id at 59 (“[A] number of major municipal legal systems contain norms which are essentially analogous to the often-asserted concept or rule that an innocent party to a violated treaty has the right to abandon its obligations.”); id at 67 (noting that under American contract law “[a] breach merely endows an innocent party with certain rights of action”).

²⁴¹ See note 227.

especially a multipurpose and multilateral arrangement that pledged perpetuity.²⁴²

This is where practice speaks louder than words. Rather than renouncing the "treaty," all the states went out of their way to reaffirm its vitality not only during the Philadelphia Convention but after. At the very time the convention was meeting, Congress was voting on one of the greatest legal acts of American history—the Northwest Ordinance.²⁴³ This act stipulated that "[t]he said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, *subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made*; and to all the Acts and Ordinances of the United States in Congress Assembled, conformable thereto."²⁴⁴ Once the convention went

²⁴² According to treatise writers of the time, a declaration was necessary to abrogate a treaty. Vattel, *The Law of Nations* at 177 (cited in note 236); Grotius, *The Rights of War and Peace* at 816 (cited in note 238); Gentili, *2 De Iure Belli Libri Tres* at 427-28 (cited in note 238). It was also confirmed by Justice Iredell in *Ware*, 3 US at 261 (Iredell seriatim) ("If congress, therefore, (who, I conceive, alone have such authority under our government), shall make such a declaration [that the treaty is void] . . . I shall deem it my duty to regard the treaty as void But the same Law of nations tells me, that until that declaration be made, I must regard it (in the language of the law) valid and obligatory.").

²⁴³ The Ordinance contained a precursor to the Bill of Rights—providing, among other rights, freedom of religion, trial by jury, and the writ of habeas corpus. It was, in short, a blueprint for the future expansion and progress of the nation. The magnitude of this provision led Daniel Webster to doubt "whether one single law of any lawgiver, ancient or modern, has produced effects of a more distinct, marked, and lasting character than the Ordinance of 1787." Harold M. Hyman, *American Singularity: The Northwest Ordinance, the 1862 Homestead and Morrill Acts, and the 1944 G.I. Bill* 19 (Georgia, 1986), quoting Daniel Webster.

²⁴⁴ Ordinance of 1787, July 13, 1787, reprinted in Carter, ed, *2 Territorial Papers* at 39, 46 (cited in note 134) (emphasis added). Nor were these words treated dismissively by the Federalists who confronted them at the First Congress held under the new Constitution. These gentlemen were obliged to deal with the fact that the Ordinance's arrangements for the management of the territories were premised on the continued existence of the Articles and required modification if they were to sustain themselves under the new Constitution. This inconsistency would not have been a problem if the Federalist Congress had considered the Confederacy Congress a legally defunct entity operating under a lapsed treaty. On this premise, the Federalist Congress would have simply ignored the Ordinance, enacting a new one that might—or might not—have borrowed from the old Congress as the new one deemed appropriate.

This is not, however, the way the first Congress viewed the situation: "*Whereas*, in order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution" Act to Provide for the Government of the Territory Northwest of the Ohio River, 1 Stat 50, 50-53 (1789). As the text makes plain, the Federalist Congress explicitly recognized that the Confederation Congress validly enacted the Ordinance under the Articles. It aimed simply to assure that the Ordinance "may *continue* to have full effect." So far as we can tell, the First Congress's view was hardly idiosyncratic. We have found

public in September, Congress continued to remain a vital force. We have heard Madison himself recognize its legal authority to modify the convention's constitutional text.

Perhaps the most telling response to the breached-treaty argument, however, is the behavior of the states after New Hampshire became the ninth state to ratify the Constitution in June of 1787. Rather than closing up shop, all thirteen states continued to be active in Congress. This means that the seceding states were acting in just the opposite way that an Amarian would have expected. Rather than following international law and formally declaring the Articles void,²⁴⁵ all eleven ratifying states sent delegates to Congress where Rhode Island and North Carolina continued to exercise the suffrage guaranteed by the Articles. This is curious behavior for states who were allegedly treating the Articles as nullities. As Chief Justice Marshall put the point in 1820:

Both Governments could not be understood to exist at the same time. The new Government did not commence, until the old Government expired. It is apparent, that the Government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to congress, whose continuing existence was recognised by the Convention, and who were requested to continue to exercise their powers, for the purpose of bringing the new government into operation. In fact, congress did continue to act as a government, until it dissolved on the first of November, by the successive disappearance of its members. It existed potentially, until the 2d of March, the day preceding that on

no evidence that the Confederacy's competence to enact the Ordinance was challenged by anybody at the time.

²⁴⁵ This need for a formal act of renunciation is a fixture of Madisonian thought. Thus, in a much-cited letter of 1791 to Pendleton, Madison explained that the Treaty of Peace with Britain remained in force despite the fact that England had breached its provisions:

That a breach on one side (even of a single article, each being considered as a condition of every other article) discharges the other, is as little questionable; but with this reservation, that the other side is at liberty to take advantage or not of the breach, as dissolving the Treaty. Hence I infer that the Treaty with [Great Britain], which has not been annulled by mutual consent, must be regarded as in full force, by all on whom its execution in the [United States] depends, until it shall be declared by the party to whom a right has accrued by the breach of the other party to declare, that advantage is taken of the breach, [and] the Treaty is annulled accordingly.

Letter from James Madison to Edmund Pendleton (Jan 2, 1791), in Charles F. Hobson and Robert A. Rutland, eds, 13 *The Papers of James Madison* 342, 343-44 (Virginia, 1981).

which the members of the new congress were directed to assemble.²⁴⁶

We would go even further than Marshall. The final important act of the Confederacy was not in November, but in January—when its governor for the Northwest Territory, Arthur St. Clair, negotiated a treaty with the Wyandot.²⁴⁷

Amar's claim, then, fails within its own terms. A voidable treaty that has never been renounced remains legally binding. The Federalists were not disturbed by this point because they were revolutionaries, and so failed to exploit the legalistic opportunities that Professor Amar has creatively elaborated two centuries later.

C. Unconventionality

The founders were revolutionaries of a special sort, however, and it is here where Amar's description becomes positively misleading. By seeking to legalize the Federalists, he disguises the unconventional ways in which they induced established authorities to recognize that the revolutionary break with the rules was appropriate. This meant that the process of public deliberation could proceed in a relatively orderly (if not legal) manner, and that many of the old institutions—in this case, the state legislatures—could retain a redefined, but important, role in the new order.

This unconventional effort on both national and state levels played a crucial role in the Federalists' success. As we have seen, the Federalists only won by a hair even after their redefinition of the rules. Without gaining the support of established institutions at crucial junctures, their effort to speak for the People would have degenerated into more and more violent mob scenes of the sort presaged at the Pennsylvania General Assembly. Even if their state ratifying conventions had met without violence, the Federalists would have failed to gain the consent of nine conven-

²⁴⁶ *Owings v Speed*, 18 US (5 Wheat) 420, 422 (1820). Justice Curtis agreed, arguing that the Articles were "in existence when the Constitution was framed and proposed for adoption" *Dred Scott v Sandford*, 60 US (19 How) 393, 572 (1857) (Curtis dissenting).

²⁴⁷ Treaty of Fort Harmar, January 9, 1789, reprinted in Carter, ed, 2 *Territorial Papers* at 174 (cited in note 134). The Senate ratified this treaty on September 22, 1789. Linda G. De Pauw, Charlene B. Bickford, and LaVonne Marleve Siegal, eds, 2 *Documentary History of the First Federal Congress: Senate Executive Journal and Related Documents* 43 (Johns Hopkins, 1974). However, a companion treaty to the Treaty of Fort Harmar, made with six nations, was not ratified. Carter, ed, 2 *Territorial Papers* at 183 n 84 (cited in note 134).

tions amidst a battery of legalistic denunciations by state legislatures and the Continental Congress. At best, their bandwagon would have stalled permanently after their first five victories. And even if nine consents had been miraculously achieved, would the nine seceding states have successfully induced the other four to enter? It was one thing to prevail over little Rhode Island; it was a very different matter to threaten a whole series of legalistic naysayers with economic sanctions.

Professor Amar's legalisms, then, serve only to obscure a genuinely remarkable feature of the Founding that helps to account for its success.

V. THE TRANSFORMATION OF THE CONVENTION

We have been looking at the Founding from the vantage point of preexisting institutions. Time and again, these institutions were faced with a choice: should they stand on their legal rights and refuse to cooperate with the new initiative, or should they cooperate with an initiative that could well lead to a diminution in, or elimination of, their own authority?

While the adaptive response of most, if not all, elements of the old order was crucial, it nevertheless remains mysterious. Existing institutions do not normally take challenges to their authority easily—self-aggrandizement, not self-abnegation, is their leading theme. Why, then, did they respond so submissively and join the Federalists' bandwagon?

The place to begin is with the curious institution that the Federalists brought to center stage. In English constitutional law, the word "convention" described a legally defective Parliament, most notably the one presiding over the Glorious Revolution of 1688. Before slipping out of London in that fateful year, King James II tried to make it legally impossible for his foes to organize a legal Parliament that might effectively act against him. James cancelled the writs of election he had issued, and dropped the Great Seal in the Thames, explaining: "A 'meeting of a parliament cannot be authorized without writs under the great seal.'"²⁴⁸

In response, the king's enemies constructed an ersatz process. Members of earlier Houses of Commons met in Westminster

²⁴⁸ King James II, as quoted in Lois Schworer, *The Declaration of Rights, 1689* 126 (Johns Hopkins, 1981). Chapter Six of Schworer's book contains a fine analysis of the political balance that made the calling of a convention seem the most plausible constitutional response to James's actions.

as an ad hoc body and issued a "circular letter" that might substitute for legal writs of election. Acting under these letters, officials conducted something that looked very much like a traditional election. Members of this unconventional House joined (some) Lords to meet as a "Convention." Even this ersatz Commons plus Lords was not enough for a Parliament under English law—since the presence of the king was required, and James was all too absent.²⁴⁹ Despite the evident break with the legal rules, the procedure had been designed to establish as much institutional continuity with the old regime as was plausible under the circumstances.

In the eyes of the victors of the American Revolution, the Convention of 1688 was responsible for some of the greatest achievements in English constitutional history—the promulgation of a Bill of Right and the replacement of a tyrant king with a constitutional monarch. This great precedent provided the Federalists with a language that permitted them to present their rule-breaking initiative in a way that allowed them to fall short of total revolution. As in the English case, the Federalist break with the legal rules did not mark an utter and complete repudiation of the institutional past. The Federalist conventions of 1787-88, like the English Convention a century earlier, had made a credible effort to link their pedigree with institutional elements of the preexisting constitution. While this mix of institutional continuity and rule violation still seems remarkable two centuries later, the Federalists were not required to make up an alien language to explain what they were doing. In calling for conventions, they could adapt an older vocabulary which already had roots in the living political culture.

Modern English has evolved to the point where the Federalists' use of the word "convention" is anything but conventional. To mark its historical roots, we have been using the word "unconventional" to describe this ongoing Federalist effort to break the rules without doing *unnecessary* damage to the underlying institutional practice. This is a sharp verbal change, to be sure, but the Federalists also made great changes in received linguistic practice. Consider that the Federalist conventions were different beasts from their great English predecessor. For one thing, they claimed greater authority. The English Convention

²⁴⁹ See John Miller, *The Glorious Revolution: 'Contract' and 'Abdication' Reconsidered*, 25 Hist J 541 (1982); Thomas P. Slaughter, *'Abdicate' and 'Contract' in the Glorious Revolution*, 24 Hist J 323 (1981).

was profoundly embarrassed by its defective legality. As soon as William and Mary were comfortably seated on the throne, the convention declared itself a proper Parliament, and passed a statute retroactively legalizing the anomalous acts of its legally defective predecessor.²⁵⁰ In contrast, the Federalist conventions were unembarrassed by their defective legality. They claimed to speak for the People *better* than the established Congress and state legislatures.²⁵¹ While these legally established bodies were asked to cooperate in the process of higher lawmaking, they were assigned the inferior status of helpers. In a remarkable inversion, the legally defective character of the conventions was taken as a sign of their superior capacity to speak for the People.

Once again, in making this move, the Federalists were not acting entirely without precedent. A few years earlier, the town meetings of both New Hampshire and Massachusetts had refused to approve constitutions proposed by their state legislatures, insisting on special conventions.²⁵² This resistance proved successful. In both states, legislatures responded to defeats by calling conventions that successfully gained the assent of the town meetings to their constitutions. Thus, in asserting the superiority of the convention over normal legislatures, the Federalists were nationalizing a precedent that had already gained a foothold on the local level. At the same time they gave these precedents a crucial spin. While the town meetings of New Hampshire and Massachusetts had insisted upon state conventions to propose constitutions, they saw no need to demand special ratifying conventions. Instead, the town meetings reserved the right to ratify the proposals themselves.²⁵³

²⁵⁰ The Parliament of 1690 quickly promulgated An act for recognizing King William and Queen Mary, and for avoiding all questions touching the acts made in the parliament assembled at Westminster, the thirteenth day of February, one thousand six hundred eighty eight, which declared "[t]hat all and singular the acts made and enacted in said parliament were and are laws and statutes of this kingdom, and such as ought to be reputed, taken and obeyed by all the people of this kingdom." E. Neville Williams, *The Eighteenth-Century Constitution, 1688-1815: Documents and Commentary* 46-47 (Cambridge, 1960). J.P. Kenyon treats the entire affair with great subtlety in his *Revolution Principles: The Politics of Parties, 1689-1720* 37-41 (Cambridge, 1977).

²⁵¹ See text accompanying notes 88-98.

²⁵² Wood, *Creation of the American Republic* at 340-43 (cited in note 23); Hoar, *Constitutional Conventions* at 5-7 (cited in note 30).

²⁵³ See NH Const of 1784, reprinted in Thorpe, ed, 4 *The Federal and State Constitutions* at 2470 (cited in note 24); Jameson, *American Constitutional Law* § 132 at 121 (cited in note 29) (New Hampshire "submitted their projected Constitutions to a vote of the electors of the State, in their town meetings—an act which . . . constitutes the best guaranty of the sovereign right of the people over the form of their government that has ever been devised."); id §§ 157-58 at 142-44 (discussion of Massachusetts); Wood, *Creation*

In contrast, the Federalists responded to their legal problems by using the convention imagery twice: first in Philadelphia, and second in the states. This second round was essential in legitimating their exercise in rule breaking. Without it, the Federalists would have been obliged to defend their lawbreaking activity to the state legislatures that had sent delegates to Philadelphia in the first place. By appealing for ratifying conventions, however, they could redefine the relevant question. No longer would they be required to act defensively when their opponents accused them of breaking the rules. They could go on the offensive and deny that the Antifederalists' legalistic objections could be appropriately invoked to prevent a convention of the People from deliberating on its fate. After all, if the citizenry found the illegality really troubling, they would simply elect so many Antifederalist delegates to the convention that the Constitution would be doomed.

This referendum-like appeal placed the Antifederalists at a distinct ideological disadvantage. No less than the Federalists, they too were children of the American Revolution. They too had engaged in countless illegal activities against the British in the name of the People. As children of the Radical Whig tradition, they were perfectly aware of the role played by the illegal Convention of 1688 during the Glorious Revolution. Once the Federalists had adapted traditional convention imagery to propose a popular decision on the constitutional question, the Antifederalists were left looking like legalistic nit-pickers—and they knew it. Since the calling of ratifying conventions was a bitterly fought question in some of the state legislatures, the Federalists' success in taking the high ideological ground could well have made the difference.

Once again, we have no standard word to describe the distinctive character of their innovation. So please forgive us when we call the Federalist ratifying conventions an exercise in *quasi-direct democracy*. To grasp this distinctive concept, begin with the sense in which the Federalist initiative approached the notion of "direct" democracy, as exemplified by a popular referendum. As in a referendum, the elections for convention delegates were focused on a concrete proposal—the Federalist Constitution of 1787. As a consequence, debate amongst the general citizenry centered on the constitutional issues in a way that is not typical

of the American Republic 340-43 (cited in note 23) (examining both Massachusetts and New Hampshire).

of ordinary election campaigns. At the same time, the process was only quasi-direct—the voters did not cast ballots on the merits of the Federalist Constitution (as in a referendum), but rather for delegates, who would then deliberate further on the matter. This quasi-direct method allowed for a more complex process of decision than the simple yes/no of a modern plebiscite. Delegates could be elected who were publicly uncommitted on the merits; others might pay the political price involved in changing positions they announced before the voters. Yet, for all this flexibility, convention delegates had a much clearer sense of a “mandate” from the People to move in a particular direction—either for or against the Federalist proposal. This sense of a popular “mandate” is usually more muffled, and is often quite nonexistent, in normal electoral contests.

The convention mode, in short, represented a distinctive mix of popular will and elite deliberation. On the one hand, debate and decisions in the electoral campaign pushed the convention in a definite direction. On the other, the delegates still had leeway to debate and refine the nature of the “mandate” that their success at the polls represented. The Federalists were trying for the best of two worlds—combining the popular involvement of “direct democracy” with the enhanced deliberation of “representative democracy.” The aim, in short, was for a *deliberative plebiscite*.²⁵⁴

Of course, by aiming so high, the Federalists risked missing both targets: their conventions might lack the distinctive democratic credibility of a referendum while lacking the deliberative quality of the best representative bodies. In fact, the historical record is mixed. While there was a great deal of focused deliberation in the election campaigns and at the conventions, the quantity of citizenship participation was not nearly as impressive as its quality. It is now commonly recognized that property requirements did not disqualify a substantial percentage of white male voters from casting a ballot; indeed, a few states suspended all property requirements for this special election.²⁵⁵ Nonetheless,

²⁵⁴ Interestingly, early Swiss referendum practice also avoided the sharp yes/no alternatives of modern plebiscites. See Benjamin R. Barber, *The Death of Communal Liberty* 189-94 (Princeton, 1974).

²⁵⁵ Georgia's state constitution enfranchised 90 percent of adult males. Dinkin, *Voting in Revolutionary America* at 37 (cited in note 155). Georgia's election of delegates to the ratifying convention used the same voting requirements. Beard, *An Economic Interpretation of the Constitution* at 236-37 (cited in note 165). North Carolina had also enfranchised 90 percent of its white adult males with a provision permitting all taxpayers to vote,

participation rates were unspectacular. In only three states did voter turnout seem higher than the historical norm; in four, lower; in the rest, about the same.²⁵⁶ Some elections were held in

Dinkin, *Voting in Revolutionary America* at 36-37 (cited in note 155), and this provision was used in the vote for delegates to the first ratifying convention, McDonald, *We the People* at 311 (cited in note 165). New Hampshire extended the vote to all taxpayers, freeholders, and poll taxpayers, thereby enfranchising a similar percentage of white men eligible to vote in the ratifying election. Dinkin, *Voting in Revolutionary America* at 33, 39 (cited in note 155). Pennsylvania granted suffrage to all taxpayers, allowing 90 percent of white adult males to vote. *Id.* at 36. A similar percentage was reached in New Jersey. *Id.* at 37. In Massachusetts, the property requirements enfranchised 60-70 percent of the white adult males on the seaboard and 80-90 percent of those inland, *id.* at 37, and the requirements were used in the ratifying election, Beard, *An Economic Interpretation of the Constitution* at 226 (cited in note 165).

In South Carolina, about 80 percent of the free adult males were enfranchised by the 1778 Constitution. Dinkin, *Voting in Revolutionary America* at 37 (cited in note 155). In Delaware, a similar percentage were enfranchised, and these qualifications were used for the ratifying election. In Virginia, a freehold requirement enfranchised about 70 percent of the white adult males.

Connecticut and Rhode Island combined property qualifications with oath requirements, which meant that only 60 percent of the men were enfranchised. *Id.* at 39. These requirements were used for the ratifying election in Connecticut. Beard, *An Economic Interpretation of the Constitution* at 240-41 (cited in note 165). We have found no data on voting requirements in Rhode Island on the constitutional referendum.

In New York and Maryland, all property qualifications were dropped for the election to the ratifying convention. Journal of the Assembly of the State of New-York, 11th Sess 48-49 (New York, 1788) (Jan 31, 1788); Journal of the Senate of the State of New York, 11th Sess, 1st Mtg 20-21 (New York, 1788) (Jan 31, 1788); McDonald, *We the People* at 149 (cited in note 165) (discussing Maryland).

In general, we agree with Robert Brown: "[p]resent evidence seems to indicate that there were no 'propertyless masses' who were excluded from the suffrage at the time. Most men were middle-class farmers who owned realty and were qualified voters Figures which give percentages of voters in terms of the entire population are misleading, since less than twenty per cent of the people were adult men." Robert E. Brown, *Charles Beard and the Constitution: A Critical Analysis of "An Economic Interpretation of the Constitution"* 197 (Princeton, 1956).

²⁵⁶ New York, Georgia, and Connecticut probably had higher turnout for their ratifying elections. In New York, more than 24,500 persons went to vote, nearly 43.4 percent of the electorate, while in the accompanying election for the New York Assembly, 31.8 percent voted in the five counties where data is available. This compared to much lower percentages in prior elections for state offices. Dinkin, *Voting in Revolutionary America* at 122 (cited in note 155).

Though little data exists for Georgia's ratifying election, the data from Chatham County is suggestive. There, 59.2 percent of the adult white males (401 people) voted for delegates to the state ratifying convention. This contrasts with general election figures of 1783, when 39.9 percent of the adult white males (270 people) participated, and 36.3 percent (246 people) in 1784. *Id.* at 129. Connecticut was similar to Georgia: it was plagued by low turnout in the gubernatorial races through the 1780s (about 15 percent of adult men and about 25 percent of qualified voters). Like Georgia, participation may have been higher for the ratifying election, though the data is sparse. *Id.* at 119-20.

In most other states, turnout remained constant. In South Carolina, about 20 percent of the free adult males voted in state and local elections. *Id.* at 128. The only returns available for the ratifying election are for St. Philip's and St. Michael's Parish (Charles-

the dead of winter, not the best time for large turnouts.²⁵⁷ Balloting for delegates was not generally combined with votes for other positions. This meant that candidates for other offices did not have an incentive to bring their followers to the polls, who

ton), where about 22 percent voted (and voted overwhelmingly for Federalists). Id; McDonald, *We the People* at 203 (cited in note 165). Moreover, Charleston may have enjoyed a higher turnout rate than other towns in the State. Dinkin, *Voting in Revolutionary America* at 128 (cited in note 155).

In North Carolina, turnout fluctuated between 30 percent and 40 percent in state elections. Id at 127. The only figure for the ratifying elections is from Dobbs County, which shows that 40 percent of the white adult males turned in their ballots before the Federalists ran off with the ballot box. Id. In Massachusetts, participation in state governor elections from 1780 to 1786 drew only between 10 and 17 percent of the electorate, but factionalism and Shays's Rebellion increased participation in 1787 and the following two years to a range between 23 and 29 percent. Participation in the ratifying election was about 27 percent. Id at 117-18.

Maryland enjoyed one of the highest turnout rates in post-Revolutionary America. Id at 115. However, the data for the ratifying convention is mixed—one report claiming that participation was only 25 percent of eligible voters, another claiming that participation was 43 percent in Baltimore and 48.8 percent in Montgomery County. Id at 116.

In Virginia, by way of contrast, data from seven counties shows that the turnout was lower at the ratifying election (26.5 percent of white adult males) than for the 1788 and 1789 state elections, where much larger percentages (hovering at about 35 percent to 40 percent) participated. Id at 125. Similarly, in Pennsylvania, where more data is available, about 25 percent of white adult males voted in the annual elections from 1783 to 1788, while only 17 percent voted for delegates to the state ratifying convention. Id at 114-15. This was part of the minority protest:

The election of members of the Convention was held at so early a period, and the want of information was so great, that some of us did not know of it until after it was over We apprehend that no change can take place that will affect the internal government or Constitution of this commonwealth, unless a majority of the people should evidence a wish for such a change; but on examining the number of votes given for members of the present State Convention, we find that of upwards of *seventy thousand* freemen who are entitled to vote in Pennsylvania, the whole convention has been elected by about *thirteen thousand* voters, and though *two-thirds* of the members of the Convention have thought proper to ratify the proposed Constitution, yet those *two-thirds* were elected by the votes of only *six thousand and eight hundred* freemen.

John Bach McMaster and Fredrick D. Stone, eds, *Pennsylvania and the Federal Constitution, 1787-1788* 459-60 (Historical Society of Pennsylvania, 1888). Turnout in New Hampshire may have decreased as well—though data is scant. The state enjoyed a high annual participation rate in its election for the governor—hovering at about 37 percent. Dinkin, *Voting Rights in America* at 108-09 (cited in note 155). Unfortunately, little data exists on turnout to the ratifying election, but it may have been lighter. Id at 110. In Rhode Island, turnout at the 1788 vote to decide ratification was about 24.4 percent—but this was affected by the Federalist boycott, and contrasts with the 33 percent turnout since 1786. Id at 111-12.

Delaware and New Jersey lack enough data from which to form a conclusion about turnout. Id at 122-24.

²⁵⁷ Bad weather seems to have especially affected the turnout in Virginia and New Hampshire. Brown, *Charles Beard and the Constitution* at 167 (cited in note 255).

then might also cast ballots for convention delegates.²⁵⁸ And of course, a vast majority of Americans—women and slaves—were simply excluded from the process.

Moreover, if judged by the mechanistic standards of the modern referendum, the legitimacy of the Federalist triumph will forever be open to serious question. We simply do not have reliable electoral data from most states.²⁵⁹ But this, in a sense, only dramatizes our point—it is anachronistic to impose some simple mathematical formula upon the complex process through which the Federalists won the authority to speak in the name of the People.²⁶⁰ Rather than the product of a magic moment at

²⁵⁸ Georgia, New York, and New Hampshire were exceptions to this rule. Dinkin, *Voting in Revolutionary America* at 129 (cited in note 155); McDonald, *We the People* at 237 (cited in note 165).

²⁵⁹ As far as hard data is concerned, pickings are very slim. We know that the Federalists were overwhelmingly defeated in New York by a vote of about 16,000 to 7,000, McDonald, *We the People* at 286 n 120 (cited in note 165), and that in Rhode Island the vote against the Constitution was 2,708 to 237 (although an indeterminate number of Federalists boycotted the election), id at 322. As to other states, we possess very fragmentary returns or rough guesses. We know that the Federalists won a large majority in the counties of Philadelphia, Northampton, and Northumberland in Pennsylvania. Id at 165. In Maryland, the vote in favor of ratification was about two to one. Id at 149. In New Jersey, people seemed to have voted overwhelmingly for the Federalists, Dinkin, *Voting in Revolutionary America* at 18 (cited in note 155); the election was not so overwhelming in Virginia, but it does appear that the Federalists prevailed here as well, see text accompanying note 180.

While Delaware's convention voted unanimously for the Constitution, allegations of voter fraud cloud the picture. Id at 17. Georgia's convention was also unanimous, but we have been unable to discover any hard returns. While Connecticut politics was largely dominated by Federalists, and the state convention had little difficulty ratifying the Constitution, voting results are absent. McDonald, *We the People* at 130, 136-38 (cited in note 165).

As for Antifederalist victories, we know that they entered the state conventions with strong majorities in North Carolina, New Hampshire, New York, and Massachusetts, but (apart from New York) we do not know how these majorities correlated with popular votes on a statewide basis. There does seem strong reason to suspect that malapportionment in South Carolina deprived the Antifederalists of the fruits of a statewide electoral victory. See Roll, 56 J Am Hist at 30-31 (cited in note 170).

Altogether, it is impossible to know how all this adds up in a strict mathematical way. This point is generally obscured by scholarly "vote counts" which merely assume that the proportion of delegates at each convention track the percentage of the popular vote. See, for example, Evelyn C. Fink and William H. Riker, *The Strategy of Ratification*, in Bernard Grofman and Donald Wittman, eds, *The Federalist Papers and the New Institutionalism* 220, 230 (Agathon, 1989).

²⁶⁰ This leads us to refine a second area of disagreement with Professor Amar, who has adopted a mechanistic formula to capture the Founding commitment to popular sovereignty. In his view, the Federalists were simple majoritarians, and popular sovereignty meant nothing more than the right of the majority to impose its will anytime it wanted to do so. Amar, 94 Colum L Rev at 481-87 (cited in note 1). In our view, the practice of popular sovereignty is a far more complex matter—involving an ongoing institutional exchange between political leaders and ordinary citizens in which the formal act of

the ballot box, the Constitution gained its legitimacy from a complex dialogue between citizens and their representatives—in both established and transformative institutions—extending over months and years. It is only by sustaining public support in their long march through a broad variety of institutions, defeating their opponents time and again, that the Federalists *earned* their higher lawmaking authority.

We still have much to learn from this distinctive interplay between the deliberations of ordinary citizens and the efforts of political leaders to crystallize them into a series of institutional victories. Of course, the Federalists had it easy. They claimed a popular mandate from a relatively homogeneous and restrictive constituency, while modern American movements confront an even more formidable challenge as they seek to crystallize the considered judgments of an incredibly diverse citizenry.

But it would be wrong to understate the remarkable achievement of our unconventional Founders. When placed in historical context, their call for ratifying conventions represented a breakthrough for democratic ideals. The Federalist experiment in quasi-direct democracy was way ahead of its time. In the half-century after 1787, thirty-four state constitutions would be enacted into law, but only six were ratified through a special procedure involving a focused vote by the People—and precisely two of these took place outside of New England. Popular ratification became a national norm only after the Jacksonian Revolution of the 1830s.²⁶¹ When set within its time and place, the Federalist call for ratifying conventions was a radical experiment in democracy—inviting ordinary citizens to make their influence felt on the most fundamental matters of political self-definition.²⁶²

voting plays only a part. See Ackerman, 1 *We The People: Foundations* at 266-94 (cited in note 2).

²⁶¹ Outside New England, the first case of popular ratification was Louisiana in 1812 (under very special circumstances); New York submitted its new constitution to the People in 1821. See Daniel Rodgers, *Contested Truths: Keywords in American Politics Since Independence* 87 n 10 (Basic Books, 1987), who continues:

Unwillingness to hazard a ratification election did not mean that the constitution-writing bodies were indifferent to the people's will. Most of them, after 1789, consisted of men directly and especially elected to their tasks, presumably with some notion of what their constituents wanted. To make doubly sure, many states invented some sort of machinery to test their work against the currents of popular opinion [short of running a special election].

Rodgers's entire chapter on constitutional conventions is well worth reading.

²⁶² See generally Gordon S. Wood, *The Radicalism of the American Revolution* (Knopf, 1992); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the*

It is impossible to understand the Federalists' success without taking full account of the power of this radical ideal. After all, their opponents could have responded to the Federalists' revolutionary break with existing rules by boycotting the elections, thereby depriving them of a great deal of their legitimacy. Instead, they responded to the Federalists' appeal to the People by competing for popular support in a relatively fair and open contest. Indeed, the contest was so open that the Antifederalists almost won despite the Federalists' success in changing the rules to their advantage. For present purposes, the most important point is not the narrowness of the Federalist victory, but the way in which the Antifederalists' engaged competition in the ratifying conventions allowed the victors to claim that theirs was more than a factional triumph. After so many of their political opponents had leaped onto the bandwagon starting at Annapolis, it would be hard for them to jump off and condemn the outcome simply because they lost.

After three years of engaged institutional struggle, the Federalists had reached a point where even bitter opponents had a hard time denying that the Constitution represented a considered judgment of We the People of the United States. To summarize this bandwagon dynamic, it may be clarifying to distinguish between its negative and positive aspects. Negatively, unconventional action served to constrain the destabilizing consequences of a breach of the basic rules for constitutional revision—providing the political participants with an institutional context for decision that was sufficiently familiar to engage in constructive debate and decision. Positively, the elaboration of new forms of quasi-direct democracy allowed the public to intervene in the process in a specially focused way—without reducing the notion of a mandate to a mechanical yes/no vote in a formal referendum. Having isolated this distinctive mixture of constrained illegality and quasi-direct democracy, we conclude by putting the Federalist contribution in larger constitutional perspective.

VI. THE FOUNDING PRECEDENT

We have taken the first step in reconstructing the professional narrative that informs the modern study of constitutional law. All too often, this begins by placing the Federalists on a pedestal: they are the *Founders*, whose constitutional achievement dwarfs

anything attained at later moments of transformation. Even Reconstruction is accorded a lesser place in the standard account—while the Republicans made important substantive changes in our constitutional principles, they are portrayed as if they enacted the Reconstruction Amendments in obedience to the rules and principles established by the Federalists in Article V. The most striking transformations of the twentieth century are accorded an even more humble status. The New Deal Revolution is understood as if it were a constitutional footnote to some nationalistic opinions by John Marshall; the Civil Rights Revolution, as if it were simply the fulfillment of promises made in 1868. As we look forward to the twenty-first century, we are telling ourselves a story that casts us as tired epigones of bygone ages.²⁶³

But there is a different story that we can tell ourselves—one that is both truer to the past and more revealing about our present and future possibilities. Rather than putting the Founding on an unapproachable pedestal, we should learn to look upon the Federalists as pioneers of an ongoing tradition of revolutionary reform. Rather than casting later generations as epigones, we should return to our sources and grasp the many ways that constitutional practice at later turning points resembled the unconventional aspects of the Founding. In particular, Reconstruction Republicans and New Deal Democrats were no more willing than the Federalists to play by the preexisting rules of constitutional revision.²⁶⁴ But like them, they broke the rules without seeking to destroy the entire institutional framework. Like them, they sought to adapt preexisting institutions in ways that ultimately earned them the constitutional authority to claim a mandate in the name of We the People. The challenge is to clarify how these later exercises in revolutionary reform were similar and different from those at the Founding.

This is a large task, but here is an orienting sketch. Begin with the basic problem that led the Federalists to their revolutionary break with the rules. The Federalists were the first, but not the last, to assert that the preexisting system gave the states too much power to veto constitutional initiatives emerging from

²⁶³ For more on the concept of a professional narrative, and its existing condition, see Ackerman, 1 *We the People: Foundations* at 3-33 (cited in note 2).

²⁶⁴ *Id.* at 34-57; Bruce Ackerman, *Constitutional Politics / Constitutional Law*, 99 *Yale L. J.* 453, 499-515 (1989); Bruce Ackerman, 2 *We the People: Transformations* (Harvard, forthcoming 1997).

the center. While it is a mistake to view them as embracing the more emphatic nationalisms of Reconstruction Republicans or New Deal Democrats, Federalists were espousing a vision of the Union that was relatively nationalistic for its time and place—nationalistic enough to make it impossible to enact through a system that gave so much power to the states. And so we have heard them adopt a strong nationalistic stance in dealing with the efforts of the Antifederalists in general, and Rhode Island in particular, to insist upon playing by the old state-centered rules of the game.

We can hear the same voice during Reconstruction and the New Deal.²⁶⁵ Like the Federalists, nineteenth-century Republicans and twentieth-century Democrats confronted opponents who insisted upon the established rules of constitutional revision. Like the Antifederalists, these constitutional conservatives were confident that they would win the old game so long as it was played fairly. Republicans and Democrats responded in the same unconventional way as the Federalists and for the same reason: the old state-centered rules threatened to stifle their efforts to speak in the name of We the People of the *United States*.

At the same time Reconstruction Republicans and New Deal Democrats played fast and loose with the old rules, they followed the Federalists in making unconventional use of established institutions. They too created institutional bandwagons that would give them the popular mandate they sought for their revolutionary reforms. The particular institutions used by Republicans and Democrats in constructing their bandwagons were different from those used by the Federalists. But that is because the Federalist transformation had created a new institutional background that set the stage for the unconventional activities of Republicans and Democrats. While the Federalists used constitutional conventions and the Continental Congress to legitimate their end run around state-centered rules of ratification, Republicans and Democrats used the new national institutions created by the Federalists—the Presidency, Congress, and the Supreme Court—to legitimize the same result.

It has not been our task here to trace the development of these more modern institutional bandwagons.²⁶⁶ But for present purposes, the details are less important than their broad similarities to the Federalist effort. In justifying their end run around

²⁶⁵ See Ackerman, 2 *We the People: Transformations* (cited in note 264).

²⁶⁶ See id.; Ackerman, 99 *Yale L J* 453 (cited in note 264).

state-centered ratification rules, nineteenth-century Republicans and twentieth-century Democrats not only resembled eighteenth-century Federalists in asserting more nationalistic conceptions of We the People than their opponents. They also sought to give new meaning to the idea of popular sovereignty by making it far more inclusionary than anything contemplated by the eighteenth century. The inclusionary thrust is especially evident in the enactment of the Fourteenth Amendment—where the black voters of the South provided a crucial contribution to the Republicans' effort to win ratification of the Fourteenth Amendment. Although this process of ratification raised many awkward questions under Article V, the Republicans could defend their actions by asserting that the expanded suffrage in the South provided the People with an unprecedented opportunity to decide their fate.²⁶⁷ Inclusionary ideals were once again a central aspect of the New Deal's end run around Article V. Roosevelt repeatedly warned that formal amendments would be sabotaged in state legislatures by the die-hard economic elites that the People had already repudiated in national elections.²⁶⁸

These revolutionary appeals to an inclusionary form of nationalism gained credibility because they built upon years of political mobilization. The Federalist success in breaking with the old rules was unthinkable without the ability of Washington and others to draw heavily on the mobilized support they had won during the American Revolution. The unconventional ratification of the Civil War Amendments had everything to do with the Republican Party's ability to convince a majority that their constitutional amendments expressed the meaning of the terrible sacrifice made for the Union during the Civil War. Political mobilization reached another peak during the New Deal, leading to a fundamental reorganization of the party system. Without massive infusions of workers, farmers, and minorities into the Democratic Party, Roosevelt's claim of a national mandate for fundamental change would have been hollow.²⁶⁹

²⁶⁷ See Michael L. Benedict, *A Compromise of Principle: Congressional Republicans and Reconstruction 1863-1869* 108 (Norton, 1974); Ackerman, 2 *We the People: Transformations* (cited in note 264).

²⁶⁸ Ackerman, 2 *We the People: Transformations* (cited in note 264).

²⁶⁹ See Kristi Anderson, *The Creation of a Democratic Majority, 1928-1936* 19-52 (Chicago, 1979). See also James L. Sundquist, *Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States* 208-39 (Brookings, rev ed 1983); Walter Dean Burnham, *Critical Elections and the Mainsprings of American Politics* 68 (Norton, 1970).

But in all three cases, revolutionary appeals to an inclusionary nationalism would have failed without the skillful use of the bandwagon effect. Even at their moments of maximum success, inclusionary nationalists were required to confront skeptical decentralists who saw the dark side of their state-building activities. Where the Federalists saw the need for new energetic commitments on the national level, the Antifederalists saw the clear and present danger of oppression, as did the Democrats in the 1860s and the Republicans in the 1930s. If the revolutionary reformers refused to confront their critics, or their critics simply boycotted the constitutional processes that the reformers created, neither Federalists nor Republicans nor Democrats would have won the constitutional authority needed for enacting *enduring* solutions in the name of a redefined American People.

In short, we are calling upon our fellow lawyers to learn from the Founding in a new way. Just as we already begin our study of doctrine by studying the Founding text, we should learn to look upon the Founding as a great precedent in the ongoing practice of popular sovereignty. Just as we use the original understanding as a benchmark for further doctrinal reflections, we should use our unconventional Founding as a benchmark in assessing the claims of later Americans to make new constitutional law in the name of the People. Some generations, of course, have not used their higher lawmaking authority in very creative ways. But others have equalled the Federalists in winning constitutional legitimacy for their transformative programs by unconventionally adapting preexisting institutions.

The New Deal is a case in point. It is the only moment in our history when a nationalist and inclusionary movement gained the overwhelming support of every region, race, and class in America for its revolutionary reforms. In contrast, the Federalists and Reconstruction Republicans just barely won even after changing the rules to their advantage. Moreover, the New Dealers are far closer to us in time than are the Americans who fought and won the Revolution and the Civil War. If any of these three great movements deserve constitutional recognition from modern Americans, it is the one closest in time and possessing the most overwhelming popular mandate.²⁷⁰

²⁷⁰ We should note, however, that even the New Deal excluded most blacks, de facto if not de jure, from the processes of popular decision. For further discussion of this point, and its implications, see Ackerman, 1 *We the People: Foundations* at 295-322 (cited in note 2); Bruce Ackerman, *Rooted Cosmopolitanism*, 104 *Ethics* 516 (1994).

But constitutionalists cannot afford to remain fixated on any single moment. Both the Civil Rights Revolution and the Reagan Revolution must be integrated into the larger constitutional narrative. We must compare each of these movements with their great predecessors: How did their engagement in the higher law-making process compare (both positively and negatively) with those attempted by Federalists, Republicans, and Democrats?

Such inquiries allow constitutional law to test the perennial claims of politicians to speak in the name of the People, enabling Americans to separate the rare act of constitutive popular decision from the ebb and flow of normal politics. Only those movements deserve higher law recognition that manage to build a sustained bandwagon of democratic victories that resemble the great constitutional triumphs of Federalists, Republicans, and Democrats in the nation's past.

Though these backward-looking exercises provide an essential test of the validity of present-day efforts at higher lawmaking, they should never be allowed to exhaust the meaning of the Founding. So long as the Republic lives, the Founding will serve as a caution for the future: The Glorious Revolution has no end, but only new beginnings; we cannot sustain our constitutional tradition without unconventional innovation and democratic renewal; we cannot sustain our tradition without leaving a large space for the People, and their ongoing effort to take control of their government.

