Splitting Sovereignty: The Legislative Power and the Constitution's Federation of Independent States

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ABSTRACT

From the moment the Constitutional Convention of 1787 ended and the Framers presented their plan to "form a more perfect Union," people have debated what form of government that union established. Had the thirteen separate states surrendered their independence to form a new state stretching from New England to Georgia, or was their individual sovereignty preserved as in the Articles of Confederation? If the states remained sovereign in some respect, what did that mean for the new national government?

I propose that the original Constitution would have been viewed as establishing a federation of independent, sovereign states. The new federation possessed certain limited powers delegated to it by the states, but it lacked a broad power to legislate for the general welfare and the protection of individual rights. This power, termed "the legislative power" by Enlightenment thinkers, was viewed as the essential, identifying power of a sovereign state under the theoretical framework of eighteenth-century political philosophy. The state constitutions adopted prior to the national Constitutional Convention universally gave their governments this broad legislative power rather than enumerate specific areas where the government could legislate. Of the constitutional documents adopted prior to the federal Constitution, only the Articles of Confederation provides such an enumeration.

In this note, I argue that, against the background of political theory and constitutional precedent, a government lacking the full legislative power would not have been viewed as sovereign in its own right. Instead, the government created by the Constitution would have been viewed as a federation, deriving its powers from the delegations of its constituent states. Through such delegations, the states preserved their sovereignty while gaining the advantages of a larger union.

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INTRODUCTION

In *Democracy and America*, Alexis de Tocqueville described the United States as "two distinct societies enmeshed and . . . fitted into one another," with "twenty-four little sovereign nations, the sum of which forms the great body of the Union."[1] While this apparent paradox was still visible during de Tocqueville's

1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 56 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., U. Chi. Press 2002) (1835).

travels in America during the early part of the 19th century, it had its origins in the Constitution, framed several decades earlier. This Constitution represented the culmination of a decade-and-a-half long project to reform the political system in the former colonies following their split from Great Britain in 1776. While the former colonies had separated from and fought against Britain together, they remained very much separate, independent, and sovereign states under the Articles of Confederation. The state constitutions written during this period established governments vested with what was, according to the political theory of the day, the identifying power of a sovereign state. They called it the "legislative power." This power, as described during the Enlightenment by prominent political theorists such as John Locke, is the authority to make laws and order society to achieve the primary purpose of government: the protection of individual rights.

The legislative power was viewed as absolute, limited only by its purpose of protecting individual rights and bettering the lives of citizens. While laws that contravened that purpose were invalid, the holder of the legislative power, generally a legislature elected by the people, was otherwise granted broad discretion to pass laws in what it deemed to be the best interest of the people. Every state constitution endowed its government with this power of sovereignty in some form, vesting in it simply "the legislative power," the "legislative authority," or similar terms, rather than enumerating specific areas in which the government could pass laws. These state governments, in turn, delegated certain powers, such as the powers of war, peace, alliances, and treaties, to the Congress of the fledgling United States, forming with the other states a federation that retained the sovereignty of each individual state while allowing them to work in concert.

While the Constitution establishes a government far more powerful than that of the Articles of Confederation, its differences from the state constitutions are pronounced, and would have been more so at the time of ratification. Most notably, the Constitution does not vest in the national government the legislative power, held by every state and viewed as essential to sovereignty. In its place, the Constitution delimits a set list of areas, predominantly concerned with international and interstate powers, where the federal government may legislate. While the Constitution does not explicitly reaffirm the sovereignty of the states, the structure of government it creates would not have been understood by most as establishing a new, independently sovereign state according to the contemporary understanding of the term. Instead, the Constitution would have been viewed as establishing a federation, to which the states, through ratification, delegated certain limited powers while retaining their own sovereignty.

Although the power of the new federal government left some at the time with the fear that it would ultimately undermine the sovereignty of the states through expansion of powers, that possibility would require the government to exceed its powers as established by the Constitution. As written, the Constitution established not a sovereign national government, but a new form of federation that, while exercising substantial powers in many respects, lacked the power essential to sovereignty of freely ordering the domestic society as it deemed appropriate.

One argument against this conclusion is that several clauses found in the original Constitution of 1789 have been interpreted as vesting in the United States power equivalent to that of the legislative power found in the state constitutions. The ever-broadening reach of the Commerce Clause, for example, may currently approach that of the legislative power. That a power has been reinterpreted to grant a national version of the legislative power, however, does not retroactively change its character at the time of ratification. Similarly, arguments concerning the considerations or secret intentions of the drafters at the Convention do not shed light on how the Constitution would have been viewed and understood by the people who gave it force through ratification.

This note will explore this historical meaning of the Constitution from the perspective of the ratifiers. The vast majority of the ratifiers were not also drafters and, as such, would have come to the Constitution with fresh eyes, unaffected by the considerations or secret intentions of the national convention. Instead, they would have viewed the Constitution through the lens of that which was familiar to them: the state constitutions, the Articles of Confederation, and the contemporary understandings of political theory underlying each. I will analyze each of these sources in turn to discover how the concept of sovereignty would have been viewed at the time of ratification. I will then apply the lessons derived from these sources to the text of the Constitution in order to determine whether the form of government established by the Constitution would have been seen as fulfilling the contemporary requirements of a sovereign state.

In examining how the Constitution would have been viewed by its ratifiers, I do not mean to argue for or against any particular theory of modern constitutional interpretation, including any of the varieties of originalism. While the evidence offered in this note carries weight under a number of these theories, the questions of how much weight and what other evidence should be considered when reaching conclusions regarding constitutional meaning are beyond the scope of this note. The findings I present here shed light on the contemporary understanding of the unamended Constitution and the nature of the political system it created. Applying these findings to modern constitutional interpretation would require further research into whether and how the twenty-seven constitutional amendments and other legal developments since the ratification may have affected that political system.

Part I of this note discusses the philosophy and political theory of the Founding Era, focusing on contemporary understandings of the concept of sovereignty. Part II analyzes the state constitutions that predate the federal Constitution with particular attention paid to their grants of legislative authority. Part III focuses on the treatment of state sovereignty and legislative powers in three national documents: the Declaration of Independence, the Articles of Confederation, and the Constitution. Finally, I draw together the evidence and conclude that the Constitution would originally have been seen as establishing not a new sovereign state, but instead a federation of independent states. The independent states split and delegated their own sovereign powers and, in so doing, created a new union.

I. PHILOSOPHICAL FOUNDATIONS

The political system created in the newly independent colonies did not emerge out of nothing. The Enlightenment's century of explosive intellectual curiosity, innovation, and exploration was winding down, leaving in its wake a wealth of ideas and political theories yearning to be put into practice. While the founding generation was exposed to many different thinkers, some theorists stand out as particularly influential due to the frequency with which they are referenced, the use of language from their writing in Founding-Era documents, and the assumptions contemporary speakers and writers make regarding the audience's familiarity with the author. The Baron de Montesquieu is a strong example of such a thinker. References to his work, *The Spirit of Laws* in particular, abound in essays and speeches both for and against ratification of the Constitution.[2] For example, Alexander Hamilton and James Madison's use his ideas extensively in *The Federalist Papers*, and the Anti-Federalist Cato references Montesquieu's conception of political liberty as dependent on security and confidence in government.[3] John Locke was similarly influential—Cato, Cincinnatus (Arthur Lee), and others made regular use of his ideas from the *Second Treatise on Government*.[4] When writing the Declaration of Independence, Thomas Jefferson relied on Locke's *Treatise* to such an extent that "Richard Henry Lee of Virginia complained that Jefferson had copied the Declaration from Locke."[5] Finally, Emer de Vattel, while less prominent than Montesquieu or Locke, was referenced by politicians such as James Wilson during the ratification debates as a quintessential political writer on individual rights and other topics.[6]

The theories of Montesquieu, Locke, and Vattel showcase the intellectual backdrop within which the Founding generation lived. They provide guidance in determining how a contemporary, well-informed citizen of the sort who would attend a ratification convention would read the Constitution. While such a person may not have read each author discussed above, engagement with the political environment of the time would have provided an immersive familiarity with the theories at work. Each of these three thinkers addresses the question of

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2. *See* Douglas G. Smith, *An Analysis of Two Federal Structures: The Articles of Confederation and the Constitution*, 34 SAN DIEGO L. REV. 249, 259–60 (1997) (acknowledging Montesquieu's influence on the Constitution during the framing and ratification debates).

3. THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 43 (James Madison); *Cato III*, N.Y.J., Oct. 25, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 214, 216 (Bernard Bailyn ed., 1993).

4. *Cato III*, *supra* note 3; Arthur Lee, *Reply to Wilson's Speech: "Cincinnatus" V*, N.Y.J., Nov. 29, 1787, *reprinted in* 1 THE DEBATE ON THE CONSTITUTION, *supra* note 3, at 114, 119 (replying to James Wilson's speech at a public meeting in Philadelphia on October 6, 1787); Letter from Benjamin Rush to David Ramsay (Apr. 19, 1788), *in* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 3, at 417, 418.

5. Donald L. Doernberg, *"We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 65 (1985).

6. James Wilson, Speech at the Pennsylvania Ratifying Convention for the Federal Constitution (Dec. 4, 1787), *in* 1 THE FOUNDERS' CONSTITUTION ch. 14, document 27 (Philip B. Kurland & Ralph Lerner eds., 1987), http://press-pubs.uchicago.edu/founders/documents/v1ch14s27.html [https://perma.cc/7YRL-6QF9].

sovereignty and power from a different angle. By comparing them, we can piece together the contemporary view on these subjects and, in so doing, discover whether the Constitution would have been viewed as establishing one sovereign nation state, or merely a federation of thirteen independent sovereignties.

A. Montesquieu on the Confederate Republic

Montesquieu and Vattel are particularly instructive in that they attempt to answer the problems posed to a state's sovereignty when it enters an alliance, federation, or confederation. In *The Spirit of Laws*, Montesquieu discusses the advantages of a "confederate republic," ascribing to it "the internal advantages of a republican, together with the external force of a monarchical, government."[7] He notes how social stability is increased by the ability of the confederation to provide a check on the power of the individual member states and quell insurrections in the same.[8] Most notably for our present purposes, Montesquieu argues that, despite the confederate nature of government forming "a kind of assemblage of societies, that constitute a new one," the individual confederate states "preserve their sovereignty."[9] While most easily applied to the form of government under the Articles of Confederation, the type of association Montesquieu describes is not so limited. Rather, he includes a wide variety of confederate republics in his definitions, such as Holland, Germany, Switzerland, and ancient Greece, each of which had different levels of centralization and federal powers.[10] While it is unlikely that he would place no limits on his assertion that component states retain sovereignty when combined into a larger political body, there is nothing to suggest that his broad use of the term "confederation" would not apply with equal force to the systems put in place by the Articles of Confederation and the Constitution.[11]

B. Vattel on Sovereignty and the Legislative Power

While Montesquieu's description of combined states is somewhat brief, Vattel analyzes the subject in great depth. In *The Law of Nations*, Vattel explicitly defines a "sovereign state" as any "nation that governs itself, under what form soever, without dependence on any foreign power."[12] This definition itself raises questions, however. What determines whether a nation "governs itself"? What qualifies as the nation as opposed to a foreign power? To address these issues, Vattel goes through several examples of situations which might appear to disqualify a state from sovereignty; tributary states, for instance, whose payment of

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7. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 126 (Prometheus Books 2002) (1748).
8. *Id*. at 127.
9. *Id*. at 126–27.
10. *Id*. at 126.
11. Smith, *supra* note 2, at 260–61 (discussing how Montesquieu's term "confederate republic" was used by both Federalists and Antifederalists to refer to "the union among the states under the Articles of Confederation and the Constitution").
12. EMER DE VATTEL, THE LAW OF NATIONS 83 (Knud Haakonssen ed., Liberty Fund 2009) (1758).

tribute to foreign powers "diminish[es] the dignity of those states," are nevertheless sovereign under his definition, as paying the tribute allows the state to otherwise govern itself.[13] By contrast, conquered states, even those that retain some internal power, are clearly not sovereign because they are obliged to follow orders in all external matters without input or control.[14] Vattel, however, finds that no such problem exists in federal republics: "[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member."[15] In explanation, Vattel analogizes such an arrangement to the duties one is obliged to perform in furtherance of a voluntary formed contract.[16] While such obligations limit one's freedom in a practical sense, one would be unlikely to say that being bound by a contract meant he was no longer "free and independent" more generally.[17] As Vattel later says regarding treaties, "if a nation finds her safety and substantial advantage in a treaty [that limits her liberty to do certain things], she is unquestionably justifiable in contracting it."[18] In the same way, where a state finds it advantageous to, say, give up some power in exchange for the advantages of a federation, it is justified in doing so. Thus, a state may be sovereign and yet still lack perfect freedom or control over all of its actions for, unlike the conquered state, the limitation was assumed voluntarily.[19]

Vattel considered the concept of sovereign power to be closely tied with that of the legislative power, saying that "[i]t essentially belongs to the society to make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens:—this is called the *legislative power*."[20] This power may be entrusted to either an "assembly," a prince, or the two together.[21] Whichever person or body is entrusted with this power "ha[s] then a right to make new laws and to repeal old ones."[22] Unpacking this, we see three principles at work. First, a society's intrinsic legislative power includes both power over the primary conduct of citizens as well as over the manner of governance.[23] Second, this legislative power includes the power to make and repeal laws. Third, this power in its entirety is entrusted by the people to the monarch or legislature. For Vattel, therefore, the legislative power is the inherent power of a society, entrusted to a

13. *Id.* at 83.
14. *Id.* at 85.
15. *Id.* at 84.
16. *Id.*
17. *Id.*
18. *Id.* at 277.
19. *Id.* at 84.
20. *Id.* at 95.
21. *Id.*
22. *Id.*
23. Vattel clarifies that he does not mean that the legislative power includes the power to change the fundamental laws or constitution of the state, as that power originates separately and is placed above the legislative power. *Id.*

governmental body, to make and repeal laws concerning the conduct of citizens and activities of government.

C. Locke on Liberty and Power

Montesquieu does not devote much space to analyzing the nature and scope of the legislative power at large, focusing instead on the need for such power to be separate from executive and judicial power.[24] Locke, by contrast, devotes considerable time to the nature of concepts such as freedom and power, including that of legislative power specifically.[25] Freedom, he argues, is not "a liberty for every one to do what he lists, to live as he pleases, and not to be tied by any laws."[26] Rather, "freedom of men under government is, to have a standing rule to live by, common to every one of the society, and made by the legislative power erected in it."[27] That legislative power is supreme, but it is not an "absolute, arbitrary power" because the origin of the power is in the individuals who make up society.[28] A core belief of many Enlightenment thinkers, including Locke and Vattel, was that man enters society in order to achieve better protection of his rights, and thus the purpose of society is the protection of individual rights.[29] Government power is therefore secondary to the rights it was established to protect.[30] Thus, the legislative power of the state cannot be so large as to allow for the violation of rights. When examining the state constitutions later in this essay, the importance of this assumed limitation on the legislative power will become clear—while the state constitutions give apparently broad grants of power to the legislature, these grants are tempered by rights either explicitly declared or implicitly assumed.

The legislative power has four notable constraints in Locke's formulation: first, the government must govern by "promulgated established laws" that are uniform in application; second, the laws passed "ought to be designed for no other end ultimately, but the good of the people;" third, any seizure of property, including taxation, must be with the consent of the people "or their deputies," such as their representatives in the legislature; and, fourth, the body to whom the legislative power is granted cannot transfer that power elsewhere.[31] Locke's legislative

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24. MONTESQUIEU, *supra* note 7, at 151.

25. *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Yale University Press 2003) (1689).

26. *Id.* at 110.

27. *Id.*

28. *Id.* at 110, 137.

29. *Id.* at 155 ("[T]he dangers of the state of nature make man] willing to join in society with others, who are already united, or have a mind to unite, for the mutual preservation of their lives, liberties, and estates, which I call by the general name property."); VATTEL, *supra* note 12, at 97 ("It is evident that men form a political society, and submit to laws, solely for their own advantage and safety. The sovereign authority is then established only for the common good of all the citizens."). Montesquieu is more cynical on the ends of government in general but identifies England as a country where "the end of its constitution [is] political liberty." MONTESQUIEU, *supra* note 7, at 151.

30. As Randy Barnett phrases it, this view is that "first come rights and then comes government." RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION 33 (2016).

31. LOCKE, *supra* note 25, at 163–64.

power thus looks substantially like Vattel's—it is the power to pass laws, granted to a political body to use for the good of and with the consent of the people. Importantly, Locke distinguishes this legislative power from the executive and "federative" powers.[32] The executive is the power "which should see to the execution of the laws that are made," while the federative is the "power of war and peace, leagues and alliances, and all transactions with all persons and communities without the commonwealth."[33] Locke notes, however, that the executive and federative powers are often held by the same person or body.[34]

D. Philosophical Conclusions

Taking the three authors together, we can draw several conclusions regarding the contemporary view of sovereignty and power. First, from Montesquieu and Vattel we see that a state joining into a confederation or federal system would not, in itself, lead to an assumption that the state was stripped of sovereignty, even where such joinder resulted in a substantial loss of autonomy.[35] Instead, a state's decision to join a union is better viewed as a prudential choice to maintain the advantages of a small, independent state while taking on the additional advantages of a larger federation.[36] Second, from Vattel and Locke we see that the governments of sovereign states are entrusted with the legislative power, but that such power is limited to those uses which are in the public interest.[37] Finally, Locke (and, to a lesser extent, Vattel[38]) shows how this legislative power is

32. *Id*. at 164–65. Vattel, while less explicit in his division of powers, frequently makes the same distinctions when, for instance, he refers to the right to make treaties as its own inherent power of a state without reference to the legislative and executive powers. VATTEL, *supra* note 12, at 276.

33. *Id*.

34. *Id*.

35. VATTEL, *supra* note 12, at 84 ("[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member."); MONTESQUIEU, *supra* note 7, at 126–27 (arguing that individual states joining a "confederate republic" "preserve their sovereignty").

36. VATTEL, *supra* note 12, at 83 ("[A] weak state, which, in order to provide for its safety, places itself under the protection of a more powerful one, and engages, in return, to perform several offices equivalent to that protection, without however divesting itself of the right of government and sovereignty,—that state . . . does not . . . cease to rank among the sovereigns who acknowledge no other law than that of nations."); MONTESQUIEU, *supra* note 7, at 126 (discussing how a confederate republic has "the internal advantages of a republican, together with the external force of a monarchical, government"). *See also* VATTEL, *supra* note 12, at 277 ("[I]f a nation finds her safety and substantial advantage in a treaty [that limits her liberty to do certain things], she is unquestionably justifiable in contracting it.").

37. VATTEL, *supra* note 12, at 95 ("It essentially belongs to the society to make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens:—this is called the *legislative power*."); LOCKE, *supra* note 25, at 110, 163–64 (recognizing a state's "legislative power" and that that power is not an "absolute, arbitrary power," but instead tied to protecting the individual rights and "the good of the people").

38. *Supra* note 32, and accompanying text.

distinct from both the "federative" power of external world affairs and the executive power of carrying the legislature's laws into effect.[39]

This last point from Locke sheds light on the reasoning behind Vattel's and Montesquieu's belief that states that join confederate or federal systems remain sovereign states despite their joinder. It is the *legislative* power (which both Locke and Vattel treat as a solely *domestic* legislative power[40]) that is essential to status as a sovereign state; for the legislative power to direct the daily affairs of men fulfills the core, rights-protective purpose of government.[41] The executive power is simply the enforcement arm of the law passed under that power, but the federative power is fundamentally different.[42] Rather than concern itself with the governance of the state, the federative power involves the state's relations with the outside world.[43] Unlike the executive, the federative is truly its own font of power or authorization of authority, though the possibility of its direction by the legislature is not foreclosed. When a state joins a federal or confederate union with other states, it loses a substantial amount of its federative power, but it generally maintains the majority of its legislative power.[44] It is not a completely clean division; one essential aspect of the federative power, namely the right to exit the union, is kept while some elements of legislative power may be given up in order to better knit together the federated states.[45] However, the minimum amount of legislative power that must be retained to remain sovereign appears to be far higher than in the case of the federative power. If the legislative power is the regulation of internal affairs in the public interest and it originates in the state's rights-protective purpose, then a state must maintain chief control over those internal affairs else it will lose its ability to fulfill its primary purpose of rights-protection and cease to be a sovereign state.

In a federation however, the reverse is also true: while the federation may be endowed with all of the federative powers to handle affairs external to its component states, in addition to some amount of those states' legislative power, it can only be considered a sovereign state itself if it possesses the legislative power in its own right. This means that it would need sufficient power to control its internal affairs and serve as the chief guarantor of individual rights. The colonial ratifiers accepted both the theoretical framework animating this requirement and the substance of the requirement itself. Accordingly, if and only if we find that the Constitution grants the legislative power to the new federal government can we

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39. LOCKE, *supra* note 25, at 164–65.

40. *See supra* note 29, for discussion of Locke and Vattel's distinction.

41. *See* supra note 37.

42. LOCKE, *supra* note 25, at 164–65 (defining the executive as the power "which should see to the execution of the laws that are made," and the federative as the "power of war and peace, leagues and alliances, and all transactions with all persons and communities without the commonwealth").

43. *Id*.

44. *See supra* notes 35–36.

45. *See supra* note 36. Compare with Vattel's description of states that have "passed under the dominion of another" such that they cannot exit the union as no longer sovereign. VATTEL, *supra* note 12, at 85.

conclude that ratifiers would have understood the Constitution as creating a new sovereign state.

II. THE STATE CONSTITUTIONS

The national Constitution was not the beginning of constitutional drafting in the United States. Rather, it reaped the benefits of over a decade of experimentation and refinement of state constitutions. By the time that the Constitution was presented to the states for ratification, eleven of the thirteen states had adopted their own state constitutions. State constitutional drafting developed over time, with later constitutions copying from and improving on earlier ones. The national process of constitutional drafting and debate would have embedded the state constitutions, the ideas they embodied, and the forms of government they created firmly in the minds of citizens at the time. When called upon to examine the new national Constitution and approve or reject it, ratifiers would have likely viewed the new Constitution through the lens of what was familiar to them, namely their state constitutions.

As I will show in this section, the state constitutions granted their state legislatures, explicitly or implicitly, the full legislative power rather than enumerating a list of areas in which the legislature could legislate. Additionally, the state constitutions simultaneously asserted the sovereignty of their respective states and delegated certain federative powers to the Continental Congress. These structures in state constitutions support the necessary link between the legislative power and sovereignty as well as the ability of a state to delegate certain powers to a federation while remaining sovereign. Viewed through this lens, the national Constitution both lacked sovereignty in its own right and did not represent an inherent threat to the sovereignty of the independent states.

The early state constitutions were created in an interesting variety of circumstances, which one can loosely divide into four categories. First are the constitutions that were not—the royal charters. Connecticut and Rhode Island continued to use the royal charters under which they had operated as colonies until well into the nineteenth century.[46] Because these charters were created while the states in question were unequivocally not sovereign states, and because they were not considered constitutions, they are not particularly instructive with regard to the contemporary understanding of constitutional documents and sovereignty. The remaining three categories are: constitutions adopted before the Declaration of Independence was announced in July of 1776; constitutions adopted after the Declaration of Independence was announced; and constitutions replacing earlier constitutions.

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46. THE FIRST CONSTITUTION OF CONNECTICUT: THE "FUNDAMENTAL ORDERS," 1638–39, *reprinted in* OFFICE OF THE SECRETARY OF THE STATE OF CONNECTICUT, DOCUMENTS OF CONNECTICUT GOVERNMENT 47 (2005), https://www.cga.ct.gov/asp/content/constitutions/docsofctgov.pdf [https://perma.cc/94KV-4YT9]; *Constitution of the State of Rhode Island and Providence Plantations: Introduction*, STATE OF R.I. GEN. ASSEMBLY, http://www.rilin.state.ri.us/RiConstitution/Pages/constintro.aspx [https://perma.cc/QFD6-ZD3C].

The constitutions that were created prior to the issuance of the Declaration of Independence were those of New Hampshire, South Carolina, Virginia, and New Jersey. These constitutions were adopted by their states on the Continental Congress's recommendation that they establish governments to rule themselves during the lead up to the Revolutionary War.[47] The first such of these is New Hampshire's constitution of 1776.[48]

A. New Hampshire (1776)

New Hampshire's first constitution bears the marks of both the haste with which it was written and the precarious political situation that existed in the colonies in early 1776. Adopted on January 5, 1776, the constitution is very short, consisting only of a preamble of sorts followed by a brief outline of the government established.[49] The preamble both justifies the creation of the constitution by accusing Britain of having deprived New Hampshire citizens of natural and constitutional rights and privileges and yet, at the same time, expresses that the state would "rejoice" at a reconciliation with Britain "as shall be approved by the Continental Congress, in whose prudence and wisdom we confide."[50] Following this, the constitution sets up a legislature, but no executive, and provides little in the way of detail.[51] Notably, the constitution refers to New Hampshire exclusively as a "colony" and not as a state or other term denoting independence.[52] As the first constitution established by the colonies, it is unsurprising that New Hampshire's is both conservative in its claims of independence and unsophisticated. After all, the drafters were faced with both time and political pressures, in addition to having few relevant precedents from which to draw. Despite the New Hampshire constitution's lack of a claim of sovereignty, it is noteworthy that the only branch of government they thought absolutely essential in a short, emergency constitution was the legislative branch, while external international diplomacy is explicitly delegated to the Continental Congress. These actions fit with the political theories discussed in the previous section and presage later similar allocations of power.

B. South Carolina (1776)

South Carolina became the second state to adopt a constitution on March 26, 1776.[53] As with the first New Hampshire constitution, but unlike many later constitutions, the first South Carolina constitution has no bill of rights. Even so, it is far more extensive than New Hampshire's.[54] Following an extensive list of

47. RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 316 (Forgotten Books 2018) (1991).
48. N.H. CONST. of 1776.
49. *Id.*
50. *Id.* pmbl.
51. *Id.*
52. *Id.*
53. S.C. CONST. of 1776.
54. *Id.*

grievances against Great Britain, the South Carolina constitution establishes a government similar in form to, albeit more complex than, the government established by New Hampshire.[55] The larger house of the legislature was directly elected, but this house then chose the members of the second house in addition to the governor.[56] The constitution provided that "the legislative authority be vested in the president and commander-in-chief, the general assembly and legislative council," and "[t]hat the executive authority be vested in the president and commander-in-chief, limited and restrained aforesaid."[57] This first South Carolina constitution also begins an important trend in state constitutions of explicitly enumerating many executive powers (though the construction does not seem to suggest that the enumeration of some powers forbids the exercise of other aspects of the executive authority, except where explicitly provided for) while providing no guidance at all on the purpose, limits, or use of the legislative powers beyond requiring that money bills originate in the upper house.[58]

Like the New Hampshire constitution, this South Carolina constitution exclusively refers to South Carolina as a colony.[59] Unlike with New Hampshire however, the constitution here *does* seem to give the new government greater federative powers, albeit only obliquely, providing that "the president and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council."[60] While no power to do any of these is provided elsewhere, the implication of this note is that with consent of the legislature the governor *may* conduct the federative power actions listed.[61] Despite maintaining the designation of "colony," potentially in order to avoid British retribution, this constitution represents a far more distinct step towards sovereignty than the first constitution of New Hampshire. Though the preamble here expresses the same "hope" of a future "accommodation of the unhappy differences between Great Britain and America," the establishment of a thought-out government would appear to evince an acknowledgement that, if only for the time being, South Carolina had become an independent political actor and thus must assume responsibility for the legislative powers of government.

C. Virginia (1776)

Virginia's constitution, adopted June 29, 1776, is similar to many later state constitutions.[62] The Virginia constitution, in recognition of the proper purpose of government, begins with a lengthy declaration of rights before establishing the

55. *Compare* S.C. CONST. of 1776, *with* N.H. CONST. of 1776.
56. S.C. CONST. of 1776.
57. *Id.* art. VII.
58. *Id.*
59. *Id.*
60. *Id.* art. XXVI.
61. *See generally id.*
62. VA. CONST. of 1776.

form of government.[63] Unlike South Carolina, Virginia does not make explicit reference to the legislative power or authority by itself, providing instead that the legislative, executive, and judiciary powers "shall be separate and distinct, so that neither exercise the powers properly belonging to the other."[64] The executive power is explicitly granted, though, where the constitution provides that the governor, with the Council of State, shall "exercise the executive powers of government according to the laws of this Commonwealth," followed by an enumeration of some of the powers (aside from the execution of the laws) granted to the governor.[65] However, the explicit grant of the executive power and not the legislative is not an indication either that the legislative is not granted or that the executive is superior. As to the first, the legislative power can be presumed from the statement, following the separation of powers provision, that "[t]he legislative [department] shall be formed of two distinct branches."[66] The most logical reasoning of this is that, having mentioned both the legislative department and the legislative power in the preceding paragraph, and the two having the same name, the creation of a legislative branch was thought to include the legislative power. By contrast, the grant of the executive power both comes much later in the document and involves the "governor," a title that does not include the name of the power so granted.[67] As to the second, the grant of power to the governor makes clear that the executive power can only be used according to "the laws of this Commonwealth," that is, according to the dictates of the legislative power.[68]

Finally, the constitution takes a much bolder stance towards Britain than New Hampshire and South Carolina, declaring that the government of Virginia by Great Britain "is TOTALLY DISSOLVED."[69] Instead of referring to the body politic as a colony, the constitution refers to "the Commonwealth of Virginia" and, in so doing, proclaims Virginia's new status as a sovereign state.[70] Provision is made for the appointment of delegates to the Continental Congress, but no other reference to the Congress is made.[71] There is not, however, any mention of the federative powers in the provisions for the governor's authority (or elsewhere), save for his power over the militia.[72] Since the federative powers, in particular that of making war and peace, would hardly have been overlooked, it seems likely that the drafters of the Virginia constitution thought them either contained within the executive powers granted the governor, or else that the Continental Congress currently held them for the colonies collectively. While one cannot be sure, the first seems more likely, as it would seem odd to leave

63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

such important powers out of the constitution entirely, and a single allusion to the Continental Congress in the context of appointing delegates hardly seems sufficient to support an implication that the Congress held the powers of war, peace, and treaties. By contrast, if the drafters considered the federative and executive powers to be even more closely linked than Locke guessed, it is very plausible than they assumed that the executive power included the federative power.

D. New Jersey (1776)

The last constitution to be adopted before the Declaration of Independence was New Jersey's, adopted just two days prior to the Declaration on July 2, 1776.[73] Despite this timing, it refers to itself as a colony (though this was later amended in 1777, replacing "colony" with "state").[74] New Jersey does not explicitly mention the legislative power, providing only that the two legislative houses have the power to "prepare bills to be passed into laws."[75] As with the previous constitutions, there is no enumeration of legislative powers while many executive powers are enumerated.[76] The constitution does provide "[t]hat the Governor . . . shall have the supreme executive power," and, like Virginia, makes no mention of the federative powers, by name or description.[77] Unlike Virginia's constitution, there is no mention whatsoever of the Continental Congress when discussing the form and powers of government, possibly lending credence to the notion that some at the time assumed that the federative power was included in a grant of the executive power.[78]

E. Delaware (1776)

With the exception of Connecticut, Rhode Island, and the states previously mentioned, every one of the new American states adopted their first constitutions between July of 1776 and their ratification of the Constitution. The first constitution adopted after the Declaration was that of Delaware, which adopted its constitution on September 21, 1776.[79] Borrowing somewhat from the Declaration, Article 5 of Delaware's constitution provided that the legislature "shall have all other powers necessary for the legislature of a free and independent state,"[80] while the president "may exercise all the other executive powers of government, limited and restrained as by this constitution is mentioned, and according to the laws of the state."[81] As with the other constitutions examined thus far, there is an enumeration of several executive powers, but no such enumeration of the

73. N.J. CONST. of 1776.
74. *Id.*
75. *Id.* art. VI.
76. *Id.*
77. *Id.* art. VII.
78. *See generally id.*
79. DEL. CONST. of 1776.
80. *Id.* art. 5.
81. *Id.* art. 7 (1776).

legislative powers.[82] The "free and independent state" language here appears to allude both to the Declaration as well as to the types of background political theory assumptions discussed in the preceding section.[83] Given the perceived interdependence of sovereignty and the legislative power in the theoretical backdrop, the powers delegated here certainly include the legislative power, but the language used also strikes a powerful note for the claim that the states were sovereign states at least prior to the ratification of the Constitution. Lastly, the formulation of executive powers continue to follow the model set by previous state constitutions, with the same considerations applying here as above.

F. Pennsylvania (1776)

Pennsylvania's constitution, adopted on September 28, 1776, has some odd features in it, but the elements on which we have been focusing do not stray far from the path already trod.[84] As with many of the other constitutions, it begins with a declaration of rights, followed by language providing that "[t]he supreme legislative power shall be vested in a house of representatives," and "[t]he supreme executive power shall be vested in a president and council."[85] Not content to merely grant the legislative power, however, Pennsylvania also borrows from both New Jersey and Delaware and clarifies that the house of representatives' powers include the power to "prepare bills and enact them into laws," and "all other powers necessary for the legislature of a free state or commonwealth."[86] Pennsylvania's legislature also had many non-legislative powers, and thus, in addition to enumerating the powers of the president and executive council, the constitution enumerates several non-legislative powers of the legislature.[87] Unusually, Pennsylvania also includes a provision grouped with its protections of religious liberty declaring that "[l]aws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution."[88] Whereas with other constitutions we had focused on the absence of *limitations* on the legislative power, Pennsylvania appears to have uniquely *required* that the legislature act on certain topics, potentially granting even more power to the legislature than was otherwise necessary for a sovereign state.

G. Maryland (1776)

Maryland's November 11, 1776 constitution has many similarities with New Jersey's constitution.[89] While the timing of Maryland's constitution—after the

82. *Id.*
83. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).
84. PA. CONST. of 1776.
85. *Id.* §§ 2, 3.
86. *Id.* § 9.
87. *Id.*
88. *Id.* § 45.
89. *Compare* MD. CONST. of 1776, *with* N.J. CONST. of 1776.

Declaration of Independence—means that it can unequivocally declare itself a "state," rather than a "colony," the Maryland constitution, like the New Jersey constitution, does not explicitly refer to the legislative "power" or "authority," instead simply establishing its bicameral legislature and requiring that the House of Delegates originate all money bills.[90] Also similar to New Jersey, and nearly every other state constitution as well, the Maryland constitution explicitly provides that "the Governor . . . may alone exercise all other the executive powers of government, where the concurrence of the Council is not required, according to the laws of this State."[91] Familiarly, this is followed by an enumeration of many of the powers of the governor.[92] The omission of a specific mention of the legislative power seems unlikely to have been the result of a choice to give the state legislature *less* than the full legislative power, as explicit boundaries on the types of bills that could be adopted would likely have been included if that were the case. More likely is that the establishment of a "legislature" in a body declaring itself a "state" was thought enough to imply that the legislature held the legislative power, so essential was that concept to the notion of sovereignty.

H. North Carolina (1776)

North Carolina's constitution, adopted on December 18, 1776, does not stray far from the precedents set by the other state constitutions.[93] Like others we have looked at, it vests "the legislative authority . . . in two distinct branches both dependent on the people,"[94] and provides that the Governor "may exercise all the other executive powers of government, limited and restrained as by this Constitution is mentioned, and according to the laws of the State."[95] The state's declaration of rights does, however, have a particularly clear version of a principle expressed in many similar declarations, providing that "the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."[96] Combined with multiple references to the "United States"[97] and the lack of any federative powers appearing the constitution,[98] the specificity of declaring the right to regulate the *internal* government and "police" thereof appears to recognize the growing political scheme in the newly independent states where each former colony was a sovereign state with full legislative power over itself, but with the federative powers of war, peace, treaties, and the like being held by the national Congress.

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90. MD. CONST. of 1776.
91. *Id.* art. XXXIII.
92. *Id.*
93. N.C. CONST. of 1776.
94. *Id.* art. I.
95. *Id.* art. XIX.
96. *Id.*
97. *Id.*
98. *See generally id.*

I. Georgia (1777)

Georgia's constitution, adopted February 5, 1777, makes a departure from the constitutions which precede it by being the first to include within its grant of power to the legislature a limitation on how it may be used.[99] The constitution's seventh article declares that "[t]he house of assembly shall have power to make such laws and regulations as may be conducive to the good order and wellbeing of the State; provide such laws and regulations be not repugnant to the true intent and meaning of any rule or regulation contained in this constitution."[100] The Georgia constitution additionally enumerates that the legislature may repeal laws, direct its own affairs, and (unusually) grant pardons and reprieves.[101] It is interesting that Georgia chose to specify the limitation of the legislative power in its constitution, though the fact that the legislature would be so limited was not itself revolutionary; as explored in the previous section, Georgia's limitation that only those laws "conducive to the good order and wellbeing of the State" may be made is contained within the "legislative power" already, as such power is only properly exercised in furtherance of the rights and good of the public from whom the power is delegated. This language does, however, highlight the breadth of both the legislative power generally and the authority the grant of that power to the state legislatures created specifically. As we have found to be typical among constitutions at the time, the Georgia constitution also specifically grants the governor and council the ability to "exercise the executive powers of government," pursuant to the law and constitution of the state, followed by an enumeration of executive powers held by the governor which, in this case, specifically excluded pardons.[102]

J. New York (1777)

The April 20, 1777 constitution of New York is typical in its grant of legislative and executive powers.[103] The constitution vests "the supreme legislative power within this State,"[104] in the legislature and the "supreme executive power and authority of this State," in the governor.[105] The preamble to the constitution, however, establishing the right to create the constitution, is interesting in its demonstration of the dual authority of the states individually and the states in congress assembled. The constitution begins by quoting, in full, the lengthy recommendation from the Continental Congress recommending that the former colonies adopt governments.[106] This would seem to indicate that that this recommendation is the

99. GA. CONST. of 1777.
100. *Id.* art. VII.
101. *Id.*
102. *Id.*
103. N.Y. CONST. of 1777.
104. *Id.* art. II.
105. *Id.*
106. *Id.* pmbl.

source of the authority to create the government, and yet the constitution goes on to state that:

> This convention, therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that no authority shall, on any presence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them.[107]

This language makes clear that the authority of both governance and the creation of the constitution can only originate, and did in fact originate, in the people of the State of New York. Why, then, include the recommendation from the Continental Congress? While the reason for the inclusion is not stated, this seems to be further evidence of the growing sense that internal and external government, or legislative and federative powers, were divided in the fledgling United States. That the Continental Congress recommended the states establish their own governments, rather than attempting to act as a full legislative power, seems to evince an understanding that the Congress' power was limited to the external powers of war, peace, and treaties, while the legislative power over the lives of citizens was held solely by the individual sovereign states. Stating both sources of authority here acknowledges both the power and the limitations of the Continental Congress with respect to the people of New York; while they may handle external matters and make recommendations regarding internal governance, the actual legislative power resides in the state.

K. Massachusetts (1780)

The last adopted of the original state constitutions prior to the ratification of the Constitution also ended up being the longest lasting. Massachusetts' state constitution, adopted March 2, 1780, is still in force today, possibly due to the relative sophistication of the document as compared to those constitutions adopted before it in other states.[108] The constitution is extensive and, like many other state constitutions, begins with a declaration of rights, which includes a provision that directly addresses the issue of state versus national sovereignty:

> 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.[109]

While with other state constitutions we have had to make inferences concerning the relationship of state and national power, Massachusetts lays out the

107. *Id.* art. I.
108. MASS. CONST.
109. *Id.* art. IV.

relationship in clear terms. At least during the period leading up to the Constitution, Massachusetts was both a sovereign state and a component state in the United States, with the provision for powers delegated to the national government demonstrating the philosophical view at the time that states could remain sovereign despite delegating powers to a federal or confederate system. That this language remained in place through the ratification of the national Constitution is instructive, as ratifiers at the Massachusetts convention would presumably be familiar with their own state constitution and view an establishment of national power in light of the state constitution's provision that such delegation of powers both (1) is limited to the *expressly* delegated powers and (2) in no way limits Massachusetts' status as a sovereign state.

In keeping with this clear and explicit description of powers, the remainder of the Massachusetts constitution is equally detailed as compared to the other state constitutions. The first two chapters of the constitution's "Frame of Government" are entitled "The Legislative Power" and "Executive Power," respectively.[110] The legislative power chapter begins by establishing a bicameral legislature as with several other state constitutions, but its explicit description of the broad limitation of the powers of that legislature is similar only to Georgia's constitution:

> [F]ull power and authority are hereby given and granted to the said General Court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this Constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof, and of the subjects of the same, and for the necessary support and defense of the government thereof.[111]

As the chapter within which this language appears is titled "The Legislative Power," it is reasonable to infer that this was taken to be a description of that same power. As with Georgia's similar language, this is notable both for the limitation it imposes and the breadth of the remaining power that it implies. While the legislature's laws are only proper when they are for specific purposes, those purposes are consistent with the contemporary theoretical understanding of the inherent powers of a state as being derived from its purpose as a rights-protective organization. Within this broad realm of authority the legislative power is thus characterized by the discretion it hands to the legislature, without limitation as to the specific areas in which they may legislate.

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110. *Id.*
111. *Id.* art. IV.

L. Second Constitutions: South Carolina (1778) and New Hampshire (1784)

Two states adopted more than one constitution between 1776 and their ratification of the Constitution: New Hampshire and South Carolina (whose first constitutions had been the earliest, both adopted prior to the Declaration of Independence).[112] South Carolina's second constitution, adopted in 1778, brought the state more in line with other state constitutions at the time, specifying that the "legislative authority" was vested in the legislature and the "executive authority" was vested in the governor.[113] As with other constitutions of the time, there is an enumeration of many of the powers of the governor, but no enumeration of the legislative powers save for a provision that money bills must originate in the lower house of the legislature.[114]

New Hampshire's second (and current) constitution, however, is particularly interesting, as it was the last state constitution adopted prior to the ratification of the Constitution and thus had the benefit of every other state's constitution to serve as example.[115] This influence is reflected in its similarity to the last constitution adopted prior to New Hampshire's, that of Massachusetts, its neighbor to the south. New Hampshire's declaration of rights section includes language nearly identical to the declaration of sovereign state authority in Massachusetts' constitution, with only grammatical changes being made.[116] Similarly, the description of the legislative power is a verbatim copy of that found in the Massachusetts constitution, save for the use of the word "state" in place of "commonwealth," and minor punctuation changes that do not alter the meaning of the language in question.[117] The sole difference between the two constitutions that is relevant for the purposes of this note is that the New Hampshire constitution is marginally more explicit in saying that "[t]he supreme legislative power within this State shall be vested" in the legislature, but this appears to be a matter of different organization rather than different meaning, as the New Hampshire constitution does not divide up its "Form of Government" part into chapters titled "The Legislative Power" and "Executive Power" like the Massachusetts constitution.[118]

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112. N.H. CONST.; S.C. CONST. of 1778.

113. S.C. CONST. of 1778.

114. *Id.*

115. N.H. CONST.

116. *Compare id.* art. VII, *with* MASS. CONST. art. IV. New Hampshire's language is Article VII of its bill of rights, reading as follows: "The people of this State, 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 pertaining thereto, which is not, or may not hereafter be by them expressly delegated to the United States of America in Congress assembled."

117. *Id.* New Hampshire's language reads as follows: "full power and authority are hereby given and granted to the said general-court, from time to time, to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without ; so as the same be not repugnant, or contrary to this constitution, as they may judge for the benefit and welfare of this State, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defence [sic] of the government thereof." *Id.* art. 5.

118. *Id.*

New Hampshire's and Massachusetts' constitutions represent the culmination of the principles espoused in the constitutions that preceded them, as each sought to put into practice the political theory of state sovereignty and its various powers advanced by Enlightenment thinkers. The legislative power, unqualified save by the requirement that it be used for the good of the people and the state, is found to be universally present in the state constitutions of the time, as is a belief in the sovereignty of each individual state (save for in those constitutions adopted prior to the Declaration of Independence). Many of the state constitutions, particularly those that were later adopted, either implicitly or explicitly address the bifurcated nature of government in the fledgling United States, acknowledging that some power, particularly what Locke would term the federative power, is held by the states together, yet qualifying that this power is ultimately less than the legislative power of the states and has its origin in the delegation of authority from the sovereign states. That these views of the legislative powers of sovereign states and the sovereign-yet-federated nature of those states were so widely held is instructive in determining how the ratifiers would have interpreted both the powers of the federal government under the Constitution and the effect that their act of ratification would have on the status of the states.

III. THE NATIONAL DOCUMENTS

The state constitutions were not the only constitutional documents preceding the Constitution in North America. The Declaration of Independence and the Articles of Confederation each shed light on the question of sovereignty and their importance as national documents in the early Republic lends them even greater weight in influencing the reading of the Constitution. Before turning to the Constitution itself, I will examine this last set of precursor documents to which the ratifiers would likely have compared the Constitution.

A. The Declaration of Independence

The Declaration of Independence is, of course, neither a constitution nor the act of a state, but it is important to our present issue for two reasons. First, the Declaration was an act of the Continental Congress using its federative powers to sever the colonies, collectively, from Great Britain.[119] While the state constitutions expressed similar grievances with Britain and many declared the bonds tying them to England to be dissolved, the states, through their delegates, allowed the Continental Congress to handle the relationship between England and the states. As discussed in Part I, this delegation of international relation powers did not decrease the sovereignty of the states. Second, the sovereignty of the states is explicitly established by the Declaration, which proclaims:

> That these United Colonies are, and of Right ought to be, Free and Independent States . . . and that, as Free and Independent States they have full

119. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

> Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.[120]

It is first important to note that, while the Continental Congress speaks for all of the colonies, the sovereignty asserted is expressed in the plural, referring to the states individually rather than a United States as a whole. More important, however, is that the Declaration, despite being an exercise of a federative power by the Continental Congress, makes it clear that the federative powers of war, peace, alliances, etcetera, belong to the states as sovereigns, not to the Continental Congress. Exercising a power while acknowledging that it is of right held by another is only consistent if there is an underlying belief that the holder of that power has delegated it. Thus, while the states *have* the federative powers, these powers have been delegated to the Continental Congress to exercise. In 1776, therefore, the United States was not one sovereign but thirteen individual sovereign states, with the federative powers of international relations delegated to a central body.

B. The Articles of Confederation

Next, we turn to the Articles of Confederation. While the Declaration of Independence did not establish the United States as a sovereign, it would of course be possible for the Articles of Confederation to be that moment of state establishment. The Articles make clear, however, that "[e]ach state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."[121] While the Articles of Confederation were adopted in 1777, several years prior to the Massachusetts and second New Hampshire constitutions, the language used mirrors that which those states later use in asserting their state sovereignty.[122] While this language is quite clear, the sovereignty of the states and identity of the United States as a repository of delegated and united powers originating in the states, rather than a sovereign state of its own, is made clear when the confederation is described as "a firm league of friendship with each other, for [the states'] common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."[123] Reflecting this confederate nature, the powers delegated to the United States Congress under the Articles were limited, by and large, to those which would be characterized as federative powers, including international diplomacy, war and peace, interstate

120. *Id.*
121. *See* ARTICLES OF CONFEDERATION of 1781, art. II.
122. *Id.*
123. *Id.*

disputes, or as legislative powers that concern the nation as a whole, such as setting weights and measures.[124] As the state constitutions universally gave their legislatures "the legislative power," limited only by the common good, this list of enumerated powers and declaration of state sovereignty makes clear that the Articles did not establish any national sovereignty for the United States. Thus, the assumption leading up to the ratification of the Constitution would have been thirteen sovereign states with certain powers delegated to a national government.

C. The U.S. Constitution

The Constitution begins with the famous preamble, declaring the Constitution to be established by the people of the United States in order to "form a more perfect Union." This language, at first glance, appears to declare the people of the United States as a whole the creators and originators of the power of the new government.[125] The Constitution was not, however, put into effect by the people of the nation acting as a whole to create a new sovereign state, rather it was ratified separately by the individual states delegating pieces of their sovereign power, as allowed by several state constitutions, to a new federation. The source of federal power is, accordingly, the states, rather than the people directly.

The difference in power between the state and national government is clear from the different allotments of power. While the state constitutions universally grant their legislatures "the legislative power," the Constitution provides instead that "all legislative powers herein granted shall be vested in [Congress]." The difference in language between this and all other constitutions up until this point would not have gone unnoticed, nor would the enumeration of specific powers. Where the states could act freely, the U.S. Constitution, like the Articles of Confederation before it, was limited in scope. The legislative power, an essential aspect of statehood, is denied to the federal government. In its place, the delegated powers of a federation are given.

There are, of course, clauses original to the Constitution of 1789 that have been reinterpreted as granting to the federal government broad powers, some of which could be argued to approach that of the legislative power. The best example of this is the Commerce Clause.[126] Since the New Deal, the Supreme Court has repeatedly held that the Commerce Clause grants Congress the power to regulate any activities that have a direct or indirect "substantial economic effect on interstate commerce."[127] In 2005, the Supreme Court held in *Gonzales v. Raich* that the Commerce Clause allowed the federal government to prohibit a person

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124. *Id.*

125. U.S. CONST. pmbl.

126. Another example of a possible grant of the "legislative power" in the Constitution is the "necessary and proper" clause, which John Mikhail has argued may vest Congress with "implied or unenumerated powers." John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

127. Wickard v. Filburn, 317 U.S. 111, 124–25 (1942); *see also, e.g.*, Gonzales v. Raich, 545 U.S. 1, 17 (2005); United States v. Lopez, 514 U.S. 549, 556–57 (1995); Perez v. United States, 402 U.S. 146, 153–54 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 355 (1964).

from growing marijuana at home for medical purposes despite the marijuana never having been bought or sold.[128] As Justice Thomas writes in his dissent in *Raich*, "[i]f Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."[129] If Justice Thomas is correct, then the power of the modern Commerce Clause might be fairly said to approach or meet that of the legislative power. While the correctness of the Court's current interpretation of the Commerce Clause is beyond the scope of this note, it is important to remember that this interpretation is "but an innovation of the 20th century."[130] In Justice Stevens' majority opinion in *Raich*, he acknowledged that the Court's "understanding of the reach of the Commerce Clause, as well as Congress' assertion of authority thereunder, has evolved over time."[131] Thus, while modern reinterpretations of the Commerce Clause and other enumerated powers granted by the Constitution may have expanded the breadth of Congress' present-day authority, these reinterpretations are not indicative of how these enumerated powers would have been viewed at the time of ratification.[132]

The Commerce Clause and other enumerated powers were just that: enumerated. Had any of the delegated, enumerated powers approached the breadth of the legislative power, there would have been no need for such an enumeration. As Chief Justice Marshall wrote in the context of the Commerce Clause, "enumeration presupposes something not enumerated."[133] Unlike every state constitution existing at the time, the U.S. Constitution granted a specific list of powers to the new national legislature, powers delegated from the sovereign powers of the states. Because the legislative power is comprehensive, the enumeration of specific legislative powers (and, by extension, not others) would have signaled that the new federal government did not possess the legislative power. Federative powers held by the states, such as the power to control commerce with persons and entities exterior to the state,[134] were delegated to Congress to prevent and resolve disputes among the sovereign members of the federation. That a federative power has been reinterpreted in the modern day as a national version of the legislative power does not change its character at the time of ratification.

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128. *Raich*, 545 U.S. at 23–33.

129. *Id.* at 57–58 (Thomas, J., dissenting).

130. *Lopez*, 514 U.S. at 596 (Thomas, J., dissenting) ("I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.").

131. *Raich*, 545 U.S. at 15–16.

132. While space does not permit providing a complete bibliography of the wealth of scholarship on the changing interpretations of the Commerce Clause throughout the Constitution's history, some relevant further reading includes Randy Barnett's *The Original Meaning of the Commerce Clause*, 68 UNIV. CHI. L. REV. 101 (2001), and *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003).

133. Gibbons v. Ogden, 22 U.S. 1, 195 (1824).

134. For a definition and description of the federative power, see *supra* note 42 and the accompanying paragraph.

At that time, the enumerated structure of powers granted to Congress in the Constitution had only one parallel in American constitutional documents: The Articles of Confederation, under which "[e]ach state retain[ed] its sovereignty."[135] The absence of the legislative power, the identifying power of a sovereign state, in the structure of the new Constitution would have made this retention of state sovereignty implicit in the new government, creating one federation composed of thirteen sovereign states.

CONCLUSION

The Constitution was a novel political creation. It united large and geographically disparate independent states so as to present a unified front to the exterior world. It was the culmination of the Enlightenment's political theories and, as such, operates under the terms of those theories. The new government created by the Constitution had many powers, most notably the power to control the federative powers of all thirteen constituent states and to regulate in a set number of areas so as to create a more unified and functional nation. It acted as a check on the power of the sovereign states, and in so doing helped to secure the rights of citizens. Despite all of these powers, however, it lacks that which is essential to any truly sovereign state: the legislative power. While it could act in a number of areas, that number was finite and enumerated, delegated by the states out of their own sovereign power. Its ratification, not by the people of the United States as a whole, but by each individual state, underscores the source of its authority as separate sovereignties rather than one people.

In ratifying the Constitution, the separate constitutions of the states, proclaiming their own sovereignty and legislative power, were not overthrown as the Articles of Confederation were. While the Constitution was the creation of a new, more powerful federation, it was not the creation of a new state and, as such, left the documents that created the sovereign states of America in place.

As I discussed in the introduction to this note, this finding is not sufficient to conclude that this state of affairs has been preserved into the modern day. More research into the effect of intervening legal and political events would be required to determine whether a national government that lacked true sovereignty at the time of its creation could become a sovereign state over time. Key questions include: whether any of the twenty-seven constitutional amendments altered the constitutional structure and granted Congress the legislative power; whether subsequent developments in constitutional interpretation may create a legislative power where none originally existed; whether the Civil War's implicit denial of the right of a state to secede from the Union transformed the states from sovereign entities willingly joined in a federation into constituent regions of a national sovereignty; and whether the independence or lack thereof of a state prior to its

135. *See* ARTICLES OF CONFEDERATION of 1781, art. II.

admission to the Union affects its sovereignty or relationship with the Federal government.

This is hardly an exhaustive list, and the multiplicity of factors that could be relevant to the question of sovereignty is a testament to the complexity of the constitutional system approved by the ratifiers at the state conventions over two hundred years ago. The government established by the Constitution was a novel one, but still a product of the political and philosophical ideas of the day. It is through the lens of these ideas and their manifestations in the early constitutional documents of the United States that we can make sense of the Constitution and the form of government it establishes. The Constitution's structure and delegation of powers resulted in a split sovereignty in America, in accordance with the principles of federations found in the political thought of theorists like Montesquieu and Vattel. The legislative power to create a society remained with the states, but the international powers of each individual state were combined and delegated. This established one nation of thirteen sovereign yet united states and, in so doing, achieved the Enlightenment dream of a political entity possessing both the liberty of small republics and the strength of a large federation.