WAS WASHINGTON'S FIRST TERM LEGITIMATE?: *TEXAS V. WHITE* AND THE CONSTITUTIONAL CONVENTION

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INTRODUCTION

When scholars and professors of constitutional law recount the origins of the Union, two conflicting theoretical accounts are often presented: one in which the Constitutional Convention of 1787 was convened, as the Founders presented at the time, under the authority of the Articles of Confederation and the Constitution was created under the authority to amend the Articles (we shall call this the Formal Theory); another in which the Articles were scrapped altogether and

the Convention proceeded of its own will, with the Constitution emerging as an artifact of political realism (the Realist Theory). The standard view today embraces the latter account, with the Founding Fathers taking it upon themselves to abandon the Articles in what one could alternately characterize as a surreptitious seizure of power, or a daring act of political entrepreneurship assumed at great risk to themselves had the states rejected it.

In a landmark Reconstruction Era case, *Texas v. White*,[1] however, Justice Salmon P. Chase adopted the former view, in which the Articles are seen as preserved, forming a backbone of continuity stretching forth from the time of their adoption.[2] In the Articles' assertion of the Union as "perpetual," the Chief Justice found sufficient cause for seeing the Confederate States as having never truly seceded but as having been in a state of revolt.[3] Joseph Story, too, writing many years earlier in Commentaries on the Constitution of the United States, pointed to the term "perpetual" as making the Union indissoluble.[4] Where the two men differed was in interpreting the effect of the Constitution on the force of the Articles.[5] Story, pointing to the Philadelphia Convention's letter to state ratifying conventions stating that it was effecting a "consolidation of the Union," took the view that the Constitution

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1 74 U.S. 700 (1869).

2 *Id.* at 724-26.

3 *Id.* at 725-26.

4 Brion McClanahan, *Is Secession Legal?*, THE AMERICAN CONSERVATIVE (Dec. 7, 2012), https://www.theamericanconservative.com/articles/is-secession-legal/.

5 *Id.*

superseded the Articles without disturbing the continuity of the Union.[6] Chase took the view that the Constitution merely made the Union "more perfect" without dispensing with the Articles.[7]

If, however, the Articles remained in effect and the Constitution was merely their refinement, then let us assume, in the traditions of legal interpretation, that the Constitution replaced only those provisions which the two documents contradict while leaving uncontradicted provisions intact. Then we are adopting the Formal Theory, contending that the Constitution was, after all, erected within the procedures and authority of the Articles. If so, the very procedural provision from which the word "perpetual" was drawn would entail a sizable wrinkle. To offer the fuller passage, Article XIII of the Articles reads, in relevant part, that "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 Congress of the United States, and be afterwards confirmed by the Legislatures *of every State*."[8]

The unanimity mandated by the Articles is a high bar and one in keeping with the model on which it was constructed, of a looser confederation of independent polities. Unanimity rules are, of course, forever plagued by the holdout problem of one actor's ability to obstruct the benefits of a change to all others by withholding consent.[9] So the Founders learned in dealing with Rhode Island, which, after declining to send a delegate to the Constitutional Convention, did not ratify the Constitution until May 29, 1790.[10] Fortunately for their efforts, the Founders had abandoned the unanimity principle of the Articles for a supermajority threshold of nine states to ratify.[11]

This article reasons that the Articles of Confederation's unanimity requirement combined with Rhode Island's late ratification of the Constitution would, under a Formal Theory approach, render George Washington's first term as president, and any legislation it produced, a nullity. If, as the Articles of Confederation demanded, every state's approval was required for the Constitution qua amendment to be brought into effect, and Rhode Island did not ratify until nearly sixteen months after George Washington was elected as president, then the newly created federal government was illegitimate until that date, along with Washington's election to his first term. Alternatively, the Constitution truly is a product of political realism wholly divorced from

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6 *Id.*

7 *See* White, 74 U.S. at 725.

8 ARTICLES OF CONFEDERATION OF 1781, art. XIII (emphasis added).

9 *See generally* Knut Wicksell, *A New Principle of Just Taxation in* CLASSICS IN THE THEORY OF PUBLIC FINANCE 72 (Palgrave Macmillan 1967); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 87–88 (1st ed. 1965).

10 Samantha Payne, *"Rogue Island": The last state to ratify the Constitution*, PIECES OF HISTORY (May 18, 2015 6:01 AM), https://prologue.blogs.archives.gov/2015/05/18/rogue-island-the-last-state-to-ratify-the-constitution/.

11 The Avalon Project, NOTES ON THE DEBATES IN THE FEDERAL CONVENTION – MADISON DEBATES CONTENTS August 31 (2008), https://avalon.law.yale.edu/18th_century/debates_529.asp [hereinafter *Madison's Notes*].

the Articles' authority, in which case Chief Justice Chase's argument in *Texas v. White* must be wrong.

Ultimately, this article concludes, through carefully detailed reasoning, that the Realist Theory is far less troubling in its implications. I make the case here that we must either accept, once and for all, that (i) the Constitutional Convention was a revolutionary usurpation of the Articles of Confederation, (ii) all portent of the Framers adherence to the Articles authority in crafting the Constitution must be abandoned, and (iii) cases such as *Texas v. White* that ground their conclusions in some remaining "background" force of the Articles are wrong, or we must accept that President George Washington's first term was unconstitutional and that all legislation issued during it was void on arrival. There is, it seems, no third way about it.

The following section presents a brief background of the Constitutional Convention, with special regard for the Founders' comments on the Articles and how their actions related to the Articles' terms and authority. Section Three summarizes how theories of the Convention have variously held it to be lawful or unlawful and within or beyond the authority of the Articles. Section Four examines, in detail, two occasions on which the Supreme Court has leaned on the Articles as a valid authority, at least once suggesting that they continue to run concurrent with the Articles: *Texas v. White*[12] and *United States v. Wheeler*.[13] Finally, Section Five relates these questions to the facts of Rhode Island's ratification and what it would mean for the legal and political legacy of the Washington administration. Section Six concludes.

I. BACKGROUND

The origins of the Constitutional Convention have been so often recited elsewhere and in greater detail by trained historians that it will little profit to revisit them at length here. I will therefore only pursue such a summary as is needed to tee up our questions and bring attention to the points of controversy raised below, namely whether the Constitution was adopted and ratified within the authority of the Articles of Confederation in such a way as to render it logical that the Articles would in some sense have continued to run as a concurrent source of legitimacy and of law.

The first attempt at a meeting meant to discuss the widely perceived shortcomings of the States and their national affiliation under the Articles was, of course, the September 11, 1786 meeting in Annapolis.[14] It was called for the purpose of "considering how far an uniform system in the commercial regulations may be necessary to their common interests, and their permanent

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12 74 U.S. 700 (1869).

13 254 U.S. 281 (1920).

14 ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES 109 (Clyde N.Wilson ed., 1999).

harmony; and to report to the several states such an act, relative to that object, as when unanimously ratified by them, would enable congress effectually to provide for the same."[15] Finding commissioners from only five of thirteen states among them and deeming their small number too few to meaningfully proceed, those gathered wrote a letter to their constituents, recommending the appointment of representatives to meet in Philadelphia the following May.[16] Virginia's legislature passed an act which approved the appointment of commissioners to take into consideration the situation of the United States; to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union; and to report such an act for that purpose, to the United States in Congress assembled, as when agreed to by them, and afterwards confirmed by the legislature of every State, will effectually provide for the same.[17]

All other States followed suit, save for Rhode Island.[18] Similarly, Congress passed a resolution in February 1787 reading, in relevant part,

> 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; 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 for the purposes expressed in the following resolution; and such convention appearing to be the most probable mean of establishing in these States a firm national government:
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> Resolved, That in the opinion of Congress it is expedient, that on the second Monday of 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 and the preservation of the Union.[19]

Planned to begin May 14, the resulting convention found itself again without a quorum when that day arrived.[20] By May 25, however, representatives of seven states had arrived and others gradually came as they could, and the plan for the States' more adequate national government unfolded with prodigious speed.[21]

On May 29, the first day of real, substantive (as opposed to procedural) discussion of priorities, Edmund Randolph of Virginia proposed fifteen

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15 *Id.*

16 THE AVALON PROJECT, PROCEEDINGS OF THE COMMISSIONERS TO REMEDY DEFECTS OF THE FEDERAL GOVERNMENT, Sept. 11, 1786 (2008), https://avalon.law.yale.edu/18th_century/annapoli.asp.

17 THE FEDERALIST NO. 40 (James Madison).

18 Payne, *supra* note 10.

19 *Id.*

20 EDWARD S. CORWIN, THE CONSTITUTION OF THE UNITED STATES OF AMERICA ANALYSIS AND INTERPRETATION, S. DOC. NO. 170, at 12 (1952).

21 *Id.*

resolutions to set the Convention's overall purpose and aims.[22] These came to be known as the Virginia Plan.[23] First among the resolutions: "that the Articles of Confederation ought to be so corrected & enlarged as to accomplish the objects proposed by their institution; namely, 'common defence, security of liberty and general welfare.'"[24] The very next day, however, Randolph moved, on the suggestion of Gouverneur Morris, to postpone consideration of that resolution in favor of a set of three others:

> 1. that a Union of the States merely federal will not accomplish the objects proposed by the articles of Confederation, namely common defence, security of liberty, & genl. welfare.
>
> 2. that no treaty or treaties among the whole or part of the States, as individual Sovereignties, would be sufficient.
>
> 3. that a national Government ought to be established consisting of a supreme Legislative, Executive & Judiciary.

The motion for postponing was seconded by Mr. Govr. MORRIS and unanimously agreed to.[25]

The delegates thus delicately evaded the question of whether this was indeed a process to amend or to replace the Articles, and after the May 30 dispensation with the Virginia Plan's first resolution, it was set aside in favor of debate over substantive provisions.[26] On June 18, Alexander Hamilton roused the subject again before the Convention and addressed it head-on, not to resolve concerns over whether the Convention operated within the legitimacy of the Articles but to dispel them as too fastidious in light of the great consequences of their success or failure.[27] Madison described Hamilton's address thusly:

> He agreed moreover with the Honble gentleman from Va. [Mr. R.] that we owed it to our Country, to do on this emergency whatever we should deem essential to its happiness. The States sent us here to provide for the exigences of the Union. To rely on & propose any plan not adequate to these exigences, merely because it was not clearly within our powers, would be to sacrifice the means to the end. It may be said that the States can not ratify a plan not within the purview of the article of Confederation providing for alterations & amendments. But may not the States themselves in which no constitutional authority equal to this purpose exists in the Legislatures, have had in view a reference to the people at large.[28]

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22 *Id.*

23 *Id.*

24 *Madison's Notes*, *supra* note 11, at May 29.

25 *Id.* at May 30.

26 CORWIN, *supra* note 20, at 12.

27 *Id.*

28 *Madison's Notes*, *supra* note 11, at June 18.

Two days later, on June 20, Oliver Ellsworth of Connecticut was first to speak, professing that "[h]e could not admit the doctrine that a breach of any of the federal articles could dissolve the whole," and warning his fellow delegates that "[i]t would be highly dangerous not to consider the Confederation as still subsisting."[29] Further,

> [h]e 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.[30]

In response, John Lansing of New York contended "that the true question here was, whether the Convention would adhere to or depart from the foundation of the present Confederacy."[31] The remainder of Lansing's speech departs from the subject, however, and no other delegates saw fit to take up Ellsworth's contentions in favor of the Articles.[32]

So, it seems, is the extent of discussion of the relationship between the Articles and the Constitution at the Convention. Even in Madison's general descriptions of the delegates' discourse, lacking verbatim wording, a tenor of avoidance comes through in which most of the delegates seem implicitly committed to avoiding sticky questions about how their present meeting relates to the Articles. David Kyvig notes as much, writing that "[a]s discussion of the Virginia resolutions proceeded, the delegates vacillated as to whether they were amending the Articles or doing something other."[33]

Whatever the preference for silence on the subject, in one sense, the debate over legitimacy within the Articles was transmuted into one about ratification. The fifteenth resolution of the Virginia Plan read,

> Resd. That the amendments which shall be offered to the Confederation, by the Convention ought at a proper time, or times, after the approbation of Congress to be submitted to an assembly or assemblies of Representatives, recommended by the several Legislatures to be expressly chosen by the people, to consider and decide thereon.[34]

But as Professor Carlos Gonzales notes, the resolution was clear as to the most important issue: ratification would be secured through special

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29 *Id.* at June 20.

30 *Id*.

31 *Id.*

32 *Id.*

33 DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 46 n. 23 (1996).

34 *Madison's Notes*, *supra* note 11, at July 19.

ratification assemblies or conventions, not by standing state legislatures.[35] The matter was debated on June 5, with delegates commending the ratification convention approach as a more direct form of ratification by the people in a way that ratification by legislatures was not.[36] Roger Sherman, speaking against it, pointed out that the Articles already provided for ratification of amendments by "the assent of Congs. and ratification of the State Legislatures."[37] Madison, speaking next, called the Articles "defective" for "resting in many of the States on Legislative sanction only.[38] Others joined in the debate, with Rufus King taking Madison's side of the issue and Elbridge Gerry joining with Sherman.[39] A week later, on June 12, the fifteenth resolution was adopted.[40]

The perception quickly emerged that the Virginia Plan was a plan to replace the Articles and, upon its introduction, the New Jersey Plan could be read as still within the context of amending them. The New Jersey Plan was described by John Lansing as being introduced "on the basis of amending the federal government, and the other [the Virginia Plan] to be reported as a national government, on propositions which exclude the propriety of amendment."[41] And on June 16, James Wilson described the Virginia Plan as to be ratified "by the people themselves," whereas the New Jersey Plan would be ratified "by legislative authorities according to the 13 art: of the confederation."[42] The two plans, so often characterized by their designs for the future government, were, it seems, similarly distinguished by differing views over how the delegates could enact that government.

On July 23, Ellsworth again opened discussion, this time moving that the Constitution "be referred to the Legislatures of the States for ratification."[43] George Mason of Virginia objected, drawing from his own state's experience to note that those state constitutions were "established by an assumed authority."[44] In doing so, Professor Carlos Gonzales observes, Mason "unmistakably implies that ratification by ordinary legislatures had failed to confer a popular sovereignty pedigree on these state governments."[45] Ellsworth, in a final push for observing the amendment procedures of the

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35 Carlos E. Gonzalez, *Representational Structures Through Which We the People Ratify Constitutions: The Troubling Original Understanding of the Constitution's Ratification Clauses*, 38 U.C. DAVIS L. REV. 1373, 1415-18 (2005).

36 *Madison's Notes*, *supra* note 11, at June 5.

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at June 12.

41 MAX FARRAND, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 246 (Max Farrand ed., Yale, rev. ed. 1937).

42 *Madison's Notes*, *supra* note 11, at June 16.

43 *Id.* at July 23.

44 *Id.*

45 Gonzalez, *supra* note 35, at 1408-09.

Articles, contends, "[t]he fact is that we exist at present, and we need not enquire how, as a federal Society, united by a charter one article of which is that alterations therein may be made by the Legislative authority of the States."[46] Ellsworth, however, knew that he was in the minority and was fighting a losing battle. As such, he retreated to a fallback position of supporting ratification by a non-unanimous threshold of state legislatures.[47] That, too, would fail.

Ultimately, on August 6, the Committee of Detail reported back to the Convention an Article XXI of the proposed draft, reading "[t]he ratifications of the Conventions of ___ States shall be sufficient to organize this Constitution."[48] Thus, whereas observation of the Articles' prescribed unanimity of legislatures approach had been abandoned, unanimity of state conventions was still a possibility. From the time of its proposal, that blank in Article XXI would linger for weeks. On August 31, Rufus King moved to amend Article XXI to append the words "between the said States," thereby limiting the Constitution to only those states which ratified.[49] James Madison answered with a compromise: that the blank be filled with "any seven or more States entitled to thirty three members at least in the House of Representatives according to the allotment made in the 3 Sect: of art: 4."[50] This would set the threshold requirement at a majority of both people and states.[51] In characteristic fashion, Madison's offer was diplomatic for its consideration of the differences between large and small states but purposeful in its effect, as it would still, after that threshold was met, bind all thirteen states.

Roger Sherman again doubted the propriety of adopting the Constitution with less than unanimity, "considering the nature of the existing Confederation."[52] Some debate was then had about letting each State choose its method of ratification, as delegates from Maryland emphasized that the Constitution of their state would not allow for adoption by any means except those that it prescribed.[53] This, however, was not long entertained nor taken up by many others. Daniel Carroll and Luther Martin moved, in support of unanimity, to fill the blank with "thirteen."[54] All but Maryland rejected the motion.[55] Sherman and Jonathan Dayton then moved to fill the blank with "ten," which tallied seven opposed and four in favor.[56] George Mason then motioned for the nine state threshold, contending that "[n]ine States had been required in

46 *Madison's Notes*, *supra* note 11, at July 23.
47 *Id.*
48 *Id.* at August 6.
49 *Id.* at August 31.
50 *Id.*
51 *Id.*
52 *Madison's Notes*, *supra* note 11, at August 31.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*

all great cases under the Confederation & that number was on that account preferable."[57] It carried eight-to-three.[58]

The answer would be affirmed when the Convention met on September 10 and resolved, upon James Madison's motion with Hamilton seconding, that

> The Legislature of the U.S. whenever two thirds of both Houses shall deem necessary, or on the application of two thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three fourths at least of the Legislatures of the several States, or by Conventions in three fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the U.S.[59]

The Framers who supported the measure clearly saw the Constitution's threshold for future amendments as inextricable from the decision rule that would govern their own present efforts. Alexander Hamilton discussed the proposition interchangeably with the idea of "allow[ing] nine States . . . to institute a new Government on the ruins of the existing one" and predicted that "[n]o convention convinced of the necessity of the plan will refuse to give it effect on the adoption by nine States."[60] Rather clearly, they saw their vote on August 31 and votes on future amendments as being one of a kind. Roger Sherman and Rufus King spoke in support of the nine-state rule, but support was not unanimous.[61] Elbridge Gerry notably objected to "the indecency and pernicious tendency of dissolving in so slight a manner, the solemn obligations of the articles of confederation" observing that "[i]f nine out of thirteen can dissolve the compact, Six out of nine will be just as able to dissolve the new one hereafter."[62] Ultimately (and fittingly), nine states voted to adopt Madison's proposition for a nine-state threshold, with only Delaware dissenting, New Hampshire divided, and New York's delegation lacking quorum.[63]

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57 *Id.*

58 *Madison's Notes*, *supra* note 11, at August 31.

59 *Madison's Notes*, *supra* note 11, at September 10.

60 *Id.* Hamilton's choice of word, "ruins," as recorded by Madison, presuming that the summary is exact on this point, can be counted as a point for what we will explore below as the "Outside the Articles, Lawful" theory. On the other hand, the equivalence implied in September 10's discussion between the threshold to amend the Constitution and the threshold to create it in the first place could be interpreted as further evidence that the Framers were engaged in a process of amendment. Neither side of the debate seems to gain ground from that day's transcripts.

61 *Id.*

62 *Id.* Unfortunately, no delegates saw fit to answer Gerry's challenge. Had they, their words might have been a valuable contribution to the secession debates several generations hence, at the end of which one-third of the states (eleven out of thirty-three) attempted to secede.

63 *Id.*

II. THEORIES OF THE CONVENTION

The question of whether the Convention (and therefore the Constitution) were within the authority of the Articles is not the same question as whether the Articles continued to run concurrently with the Constitution and to have legal effect, but they are deeply related. If the Convention was outside of the authority of the Articles, then the political realist approach would seem to be validated, and it is difficult to imagine how the Articles were not entirely abandoned, even if the Convention and resulting Constitution were otherwise lawfully adopted. If, however, the Formal Theory is correct and the Convention was both within the Articles' authority and lawful, then it is at least possible that the Articles could continue to run.

These questions present two dimensions of analysis: whether the Articles emerged within the authority of the Constitution and whether it emerged lawfully. One does not necessarily imply or negate the other. Here, I consider three of the four possibilities that this leaves, both of the "outside of the Articles" options and the theory that the Constitution emerged within the Articles and lawfully. These, of course, imply the possibility of a theory holding the Constitution to be within the authority of the Articles but somehow otherwise unlawful. Knowing of no such argument in the literature nor how such an argument might run, I reserve that category. None of the summaries of arguments as to various positions should be taken as nearly exhaustive but merely as indicative samplings of divergent thought on a complex question.

A. *Outside of the Articles, Lawful*

The standard interpretation is that the Convention (and therefore the Constitution) emerged outside of the Articles but lawfully. As Professors Ackerman and Katyal put it, "[i]ndeed, 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."[64] Nonetheless, legalistic arguments were attempted. On July 23, Madison addressed the Convention to argue that "[t]he 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," but that "[i]n the case of a union of people under one Constitution, the nature of the pact has always been understood to exclude such an interpretation," thereby nullifying the concerns of some that

64 Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. CHI. L. REV. 475, 488 (1995).

their departure from the Articles' terms for amendment might be illegitimate.[65]

In Federalist 40, published as a New York newspaper article on January 18, 1788, Madison claims that those who had quarreled with the legality of their procedure had by then "waived" their objection and that we could therefore "dismiss it without further consideration."[66] As Ackerman and Katyal note, however, critics were waging this very argument in the New York General Assembly and Senate, unaware, along with many likeminded compatriots, that they had apparently waived it.[67] Madison surely knew as much and, despite trying to dismiss these objections, nonetheless seemingly felt the need to address them.

In No. 40, Madison further grapples with challenges to the Convention's authority and instructs us to begin with an inspection of the delegates' commissions.[68] All of these, he notes, had reference either to the recommendations of the Annapolis meeting of September 1786, or of Congress in February 1787.[69] In interpreting the guidance given by these calls, Madison asks us,

> Suppose, then, that the expressions defining the authority of the convention were irreconcilably at variance with each other; that a national and adequate government could not possibly, in the judgment of the convention, be affected by alterations and provisions in the Articles of Confederation; which part of the definition ought to have been embraced, and which rejected? Which was the more important, which the less important part? Which the end; which the means?[70]

In this, he seems set on a course of justifying abandonment of the Articles, arguing that the dual mandate of the Convention, (i) to provide an adequate government (ii) by amending the Articles, was irreconcilable and that one of the two had to give.[71] Nonetheless, he contends, the Constitution that emerges from them is legitimate for several reasons.

First, he argues, "the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation."[72] Therefore, the principles underlying the national government are preserved even if their institutional manifestations are amended. No challenge, one might say, to the natural law has been affected by their drafting nor would be by their ratification.

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65 *Madison's Notes*, *supra* note 11, at July 23.

66 Ackerman & Katyal, *supra* note 64, at 546; THE FEDERALIST NO. 40 (James Madison).

67 Ackerman & Katyal, *supra* note 64.

68 THE FEDERALIST NO. 40 (James Madison).

69 *Id.*

70 *Id.* at 2.

71 *Id.*

72 *Id.* at 3.

Second, he writes with evident frustration, despite the "powers of the convention hav[ing] been analyzed and tried with the same rigor, and by the same rules, as if they had been real and final powers for the establishment of a Constitution for the United States," they "were merely advisory and recommendatory. . . . [T]hey were so meant by the States, and so understood by the convention; and . . . the latter have accordingly planned and proposed a Constitution which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed."[73] Thus, Madison says, our preoccupation with the authority of the Convention is misplaced; with no power to enact but only to recommend, the Convention is legitimate even on the weakest view of its powers because the real power comes from the States through ratification.[74]

Finally, he argues that "[t]he prudent inquiry, in all cases, ought surely to be, not so much from whom the advice comes, as whether the advice be good" or, as he later refines it, "if [the delegates to the Convention] had violated both their powers and their obligations, in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America."[75] An even more explicit and full-throated natural law argument, this one speaks for itself.

Professor Akhil Amar has argued that "inconsistency is not illegality" and that Federalists' disregard of the Articles' clear terms requiring approval by Congress and all state legislatures did not place their project outside of the law.[76] The Articles, in his view, had become voidable by any state choosing to renounce them. They were never, he contends, more than a "tight treaty among thirteen otherwise independent states" that nowhere described itself as a "Government" or "legislature," nor "its pronouncements as 'law.'"[77] Under well-established legal principles, he therefore argues, "these material breaches freed each compacting party each state to disregard the pact, if it so chose."[78]

Another, more nuanced argument by Professor Robert Natelson situates the Constitutional Convention within the longstanding tradition of interstate conventions stretching back decades.[79] Referencing the commonality of conventions of states up to that time, this view notes that such conventions were

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73 Id.

74 THE FEDERALIST NO. 40 (James Madison) at 3.

75 Id. at 4.

76 Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465 (1994) [hereinafter *Consent of the Governed*].

77 *Id.*

78 *Id.*

79 *See* Robert Natelson, *Yes, the Constitution was Adopted Legally*, THE HILL (April 11, 2017 7:00 AM), https://thehill.com/blogs/pundits-blog/uncategorized/328112-yes-the-constitution-was-adopted-legally [hereinafter *The Constitution was Adopted Legally*]; *see generally* Robert G. Natelson, *Founding Era Conventions and the Meaning of the Constitution's "Conventions for Proposing Amendments,"* 65 FLA. L. REV. 615 (2013) (discussing the long tradition of state conventions).

not held pursuant to the Articles but under sovereign powers reserved to the states.[80] Professor Natelson argues that it is a common mistake to see the Convention as called by the February 21, 1787 resolution of the Confederation Congress.[81] He points to the events of late 1786, when, in September, delegates from five states to the Annapolis Convention recommended to their states another convention in Philadelphia.[82] By the end of November, New Jersey had appointed commissioners to it.[83] And on December 1, the Virginia legislature approved the Convention and directed their governor to communicate their resolution to all other states.[84] This, Natelson argues, was the formal call to Philadelphia, and no state expressly limited its delegates to the task of amending the Articles.[85] It was not until New York and Massachusetts, concerned about the breadth of the call, recommended some limitations that Congress stated, by Resolution, an opinion (meaning not a call or an order) that the Convention should be held to amend the Articles.[86] Ten states out of the attending twelve, Natelson notes, gave their delegates sweeping proposal powers.[87]

This argument, entirely plausible, gets us to an explanation of how the Convention was permissible under decades of established practice and was well within existing customs of interstate relations at the time. It does not, however, get us an explanation of how it was not in direct contradiction to the Articles. It is an account of an otherwise legal method being used to circumvent the channels prescribed by the Articles, rendering Article XIII mere surplusage. To the extent that the Articles, in prescribing their own method of amendment, meant to supplant and prohibit extraneous methods of fundamentally altering relations between the states, the commonality of state conventions and the use of such a convention even to amend the Articles (if not to abrogate them altogether) would seem to be an usurpation of the Articles. The inclusion of Article XIII seems to preclude such outside measures, and any who would argue otherwise may find themselves hard-pressed to explain how Article V of the Constitution would not be equally vacuous should a sufficient number of political leaders today decide to abandon that document without adhering to its prescribed procedures. Presented as an argument of lawfulness based in emerged norms, this theory would seem to inevitably wind up at a conclusion of political realism that it labored to avoid.

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80 *The Constitution was Adopted Legally*, *supra* note 79.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *The Constitution was Adopted Legally*, *supra* note 79.

87 *Id.*

Whatever the rationale behind it, the notion that the Convention and resulting Constitution were at once lawful and an abandonment of the Articles seems to have been the implicit understanding of the Federalist delegates to the Convention and has since become the standard view in historical and legal scholarship on the Constitution and its origins.[88]

B. *Outside of the Articles, Unlawful*

Antifederalists, more broadly imbued with a concern for the loss of state autonomy that the new Federalist plan might mean, were nonetheless also animated by a concern for the procedure and legitimacy of the Convention. Patrick Henry firmly denounced the nine-state decision rule at the Virginia ratifying convention.[89] In New York's General Assembly, Cornelius Schoonmaker introduced a resolution denouncing the convention for its illegality, losing by a vote of twenty-seven to twenty-five, and Robert Yates' similar motion would lose twelve to seven.[90] A young John Quincy Adams, writing during the ratification period, contended that 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 [Massachusetts], which was the only crime of our Berkshire & Hampshire insurgents (in Shays's Rebellion).[91]

Elsewhere, other writers have contended, whatever they think of its content and effects, that the Constitution's origins are plainly illegal. "Illegality was a leitmotif at the convention from its first days to its last," write Professors Ackerman and Katyal.[92] They point to the fact that many Americans at the time did not see the Articles as a mere treaty that could be treated as abandoned,[93] noting "an enormous body of evidence expressing legalistic objections to the Federalists' unconventional activities" and Federalists' evident need to respond to these objections by "making the revolutionary assertion that the times required breaking the rules laid down by Article XIII."[94] Indeed, they note, Madison responded to the characterization of the Articles

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88 *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION (1833); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2006) [hereinafter *America's Constitution*]; *Consent of the Governed*, *supra* note 76.

89 Ackerman & Katyal, *supra* note 64, at 548.

90 *Id.* at 546.

91 *Id.* at 487.

92 *Id.* at 506. It should be noted here that these authors ultimately conclude that the Convention, though unlawful, nonetheless produced a governing document that was legitimate, so this quote should not be construed out of context to cast their views otherwise.

93 *Id.* at 542.

94 *Id.* at 540.

as a mere treaty by describing "the federal 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."[95] He would then go on to make qualified comparisons to a treaty structure but never abandon the notion, key to the Virginia Plan, of one nation composed of one people.[96]

And objections to end-around approaches to reform were not limited to Anti-Federalists, at least if one is willing to look to the years prior to the Convention. Formalists had stressed the necessity of adhering to the Articles' substantive and procedural terms since before the Convention was ever proposed. John Jay, the prominent Federalist and representative of New York at the Convention, and Thomas Burke, the prominent North Carolina governor who died several years before its meeting, are singled out by David C. Hendrickson as having strongly maintained that "the authority of the congress rested on the prior acts of the several states, to which the states gave their voluntary consent, and until those obligations were fulfilled, neither nullification of the authority of congress, exercising its due powers, nor secession from the compact itself was consistent with the terms of their original pledges."[97]

Two soon-to-be Federalists from Massachusetts, Rufus King and Nathan Dane, responded to the Annapolis meeting's call for a convention in Philadelphia by denouncing it as unconstitutional:

> 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.[98]

In a surprising change of heart, however, both men would not only attend the convention but withdraw their concerns and come to vote for ratification.[99] Indeed, Rufus King would join Madison in advocating for ratification via convention rather than via state legislatures, further departing from the Articles' clear requirements.[100]

As the delegates left Philadelphia and the ratification debate spread across the country, a major objection of the Antifederalists was to the replacement of Article XIII's unanimity requirement with the nine-out-of-

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95 Ackerman & Katyal, *supra* note 64, at 542–43.

96 *Id.*

97 DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 153–54 (2003).

98 Ackerman & Katyal, *supra* note 64, at 501.

99 *Id.* at 503.

100 Gonzales, *supra* note 35, at 1403–04.

thirteen threshold for approval adopted at the Convention. Many did not initially go directly to calling the enterprise therefore illegal.[101] The statement published on December 18 by the minority delegates at the Convention made a wide array of objections, including questioning whether those delegates commissioned by their states to "amend" the Articles had exceeded their powers, but despite the time spent on the question at the Convention, they neglected to mention the unanimity issue.[102] Others evinced no inclination to skirt the issue of such a fundamental rule change. As the Antifederalist writer Portius asked his audience of Massachusetts readers,

> [H]ow can Nine States dissolve a System of Government, which Thirteen had instituted, and which the whole Thirteen pledged their faith to each other should not receive any alterations without the consent and approbation of the whole Thirteen? . . . Or, in another point of view, what right has this State either at their own instance, or at the recommendation of any body of men whatever, to break through the established Constitution of the United States and openly set at defiance that System of Federal Government, for the support of which, they had pledged their most solemn engagements and sacred honour?[103]

His conclusion: that if the concern for ratification procedure "is not obviated, [it] cannot fail of over-throwing the whole structure, and reduce it to the situation of a baseless fabrick of nocturnal reverees."[104]

And what would be the status of those states who chose not to join? If the rule was not to be unanimity, then what would be the status of relations with those states that declined to ratify? Would they be forced into the new union? Made foreign states? Favored nations? The Framers present at the Convention did not say. As Amar notes,

> Generally, [the friends of the Constitution] seemed to concede that governance under the Constitution would be incompatible with continuation of the Articles of Confederation, and maintained a prudent silence on the precise nature of the relationship the new union would work out with any nonratifying states. See, e.g., *Federalist* No. 43.[105]

Portius was not so silent. Indicating his own conviction as to how nonmember states should respond, he wrote,

> Supposing Nine States should ratify and confirm the proposed Federal Government, and Four States should reject the same, Would not those Four States, still adhereing (*sic*) to the Articles of Confederation, have an undoubted right, both in the sight of God and man, to accuse the

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101 *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1787.

102 *Id.*

103 Portius, *To the People of Massachusetts*, AMERICAN HERALD, Nov. 12, 1787.

104 *Id.*

105 *Consent of the Governed*, *supra* note 76, at 465.

> 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![106]

While a legally defensible contention, it still does not address how signatory states to the new Constitution should view continued relations with those states that were not persuaded to join. James Wilson commented on August 30, in the course of debates over how many states were necessary to ratify the Constitution, that "the States only which ratify can be bound."[107] Daniel Carroll of Maryland responded by insisting that thirteen states' assent be required, "unanimity being necessary to dissolve the existing confederacy which had been unanimously established."[108] Rufus King endorsed Carroll's measure, "otherwise as the Constitution now stands it will operate on the whole though ratified by a part only."[109] That comment coming at the end of the day's transcript, it would have seemed an opportune moment for those proponing the nine-out-of-thirteen threshold to challenge the assumption that the Constitution would be expected to operate on all thirteen states even if they did not ratify it, but no one spoke up, again leaving it unstated but implied that this was the Founders' understanding.[110] As we shall further explore below, in the months prior to ratification by all thirteen, the chosen strategy of the ratifying states was a combination of presumption, gentility, and hard diplomacy.

The variation in opinions among the Framers and their contemporaries, both across individuals and, often, within the same individual over time is understandable and not easily attributed to mere political convenience or fleeting whims. These were difficult questions, with good arguments on both sides being made by some of the world's most sophisticated political minds. Thus, common and easy as it may be to dismiss those who argue today that there was legal impropriety in the transition from the Articles to the Constitution, it is a case with which to be reckoned and to be addressed directly, as many notable figures saw fit to do at that time.

C. *Within the Articles, Lawful*

The idea that the Articles and Constitution may not be in conflict is a view that has been either advocated or implied in scholarship and Supreme Court reasoning more than once, not least by James Madison in the very same writing discussed above.[111] Professor Gregory Maggs writes, "The theory is

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106 Portius, *supra* note 103.

107 *Madison's Notes*, *supra* note 11, at August 30.

108 Id.

109 *Id.*

110 *Id.*

111 THE FEDERALIST NO. 40 (James Madison).

controversial because it goes against the generally accepted idea that the Constitution replaced the Articles of Confederation, and that the Articles, like a repealed statute or rescinded treaty, have no continuing validity. Yet, despite being somewhat counterintuitive, the theory has a strong pedigree and appears to be correct at least in some instances."[112] His analysis points to a number of considerable arguments for the view.

First and, as he rightly notes, "with little practical consequence," is the origin of the name "United States of America" being in Article I of the Articles of Confederation.[113] The Constitution, so that argument goes, only presumed but did not declare the name of the Union and its government, merely taking the point as established.[114] Naming provisions not going to the heart of what it means to be a nation, this is not a very considerable argument but nonetheless one worth noting. It arguably speaks in favor of some form of continuity in the Union and a theory of the Constitution qua amendment. Second, and more significant, is Article XIII's declaration of the Union as "perpetual," which the Constitution did not address, much to Unionists dismay some seventy years later.[115] Abraham Lincoln, in arguing for the impossibility of secession, stated,

> [W]e find the proposition that, in legal contemplation, the Union is perpetual, confirmed by the history of the Union itself. The Union is much older than the Constitution. It was formed in fact, by the Articles of Association in 1774. It was matured and continued by the Declaration of Independence in 1776. It was further matured and the faith of all the then thirteen States expressly plighted and engaged that it should be perpetual, by the Articles of Confederation in 1778. And finally, in 1787, one of the declared objects for ordaining and establishing the Constitution, was 'to form a more perfect union.'[116]

By Lincoln's account, the Union as it stood in 1861 was not born in 1787. The Constitution, in this view, is a furtherance of a Union formed by the Articles of Association in 1774 and made perpetual by the Articles of Confederation.[117] For his part, in Federalist No. 40, Madison began to make the case that the Convention was a necessary abandonment of the Articles in order to preserve their guarantee of a "national and adequate government," but in the very next paragraph, he argues that the Convention's actions can be viewed as merely an extensive amendment process within the Articles' authority:

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112 Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 397, 428-29 (2018).

113 *Id.*

114 *Id.* at 429.

115 ARTICLES OF CONFEDERATION OF 1781, art. XIII.

116 *Id.*

117 Lincoln's locating the origin of the Union in the Articles of Association is an intriguing alternative to pursue and at least has the benefit of being more specific than what we shall see is Chief Justice Chase's view: that the Union formed culturally, organically over time.

> But is it necessary to suppose that these expressions are absolutely irreconcilable to each other; that no alterations or provisions in the Articles of Confederation could possibly mould them into a national and adequate government; into such a government as has been proposed by the convention? No stress, it is presumed, will, in this case, be laid on the title; a change of that could never be deemed an exercise of ungranted power. Alterations in the body of the instrument are expressly authorized. New provisions therein are also expressly authorized. Here then is a power to change the title; to insert new articles; to alter old ones. Must it of necessity be admitted that this power is infringed, so long as a part of the old articles remain? Those who maintain the affirmative ought at least to mark the boundary between authorized and usurped innovations; between that degree of change which lies within the compass of alterations and further provisions, and that which amounts to a transmutation of the government. Will it be said that the alterations ought not to have touched the substance of the Confederation? The States would never have appointed a convention with so much solemnity, nor described its objects with so much latitude, if some substantial reform had not been in contemplation.[118]

Madison may have been, to some extent, covering his bases, but he seems to genuinely argue for the latter view, in which the Constitution was within the amendatory powers of the Convention. This could be conceived of, as Madison held it, as a set of recommended amendments by an unofficial body never claimed to be vested with any authority but merely making friendly suggestions to the States.[119] Alternatively, as Akhil Amar has proposed, it could be conceived of as within the Articles' formal provisions for side deals.[120]

Amar offers an intriguing account of how this would work by contending that the Constitution might be seen as a concurrent side deal to the Articles until ratified by all states, thereby resolving any perceived conflict between the two documents.[121] In a footnote in his book, *America's Constitution: A Biography*, Amar, citing Art. VI, para. 2 of the Articles, he writes that although there seems to be no evidence that the Constitution's advocates ever advanced the argument,

> [i]t might be suggested that the proposed Constitution would merely amount to a new side alliance among nine or more of the thirteen states, and that such alliances were permissible so long as (1) the allying states lived up to all the rules of the Articles of Confederation when dealing with the remaining states, and (2) the allying states secured the blessing of the Congress under the Articles (which, presumably, they would have been able to do by so instructing their confederate delegates).[122]

Such a "side alliance" theory could hold the side alliance as lasting from the start of the convention until the ratification by thirteen states and the Articles as wholly abrogated on that date or, alternatively, hold any provisions of the Articles not in direct conflict with and not field preempted by the

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118 THE FEDERALIST NO. 40 (James Madison).

119 *Id.*

120 *America's Constitution*, *supra* note 88, at 517 n.65.

121 *Id.*

122 *Id.*

Constitution to be preserved, though given the similarity of the two documents' scopes, such provisions would be scant.

Importantly for our purposes, the "within the articles and lawful" category leaves open to us a consideration that has emerged at least once explicitly but arguably one or more times implicitly in Supreme Court: whether the Articles might still be drawn upon as a basis of union and a source of law.

III. *WHITE*, *WHEELER*, AND THE ARTICLES AS LAW

At least two Supreme Court cases have treated the Articles as having legal effect, implying that they in some sense run concurrent to the Constitution: *Texas v. White* and *United States v. Wheeler*. *White*, being the more prominent, important decision and offering a clearer explication of the justices' view of the Articles' status, will be the primary focus here, but *Wheeler* also seems to take the Articles as giving substance to the Constitution's terms on a key issue, implying that they carry sufficient force to conclusively decide a constitutional question and might be in a sense "good law."

A. *Texas v. White*

The facts of *Texas v. White* are somewhat exciting for their relation to major historical events, political intrigue, and implied themes of con-artistry. In 1851, in satisfaction of the terms of the Compromise of 1850, in which Texas ceded its boundary claims north of New Mexico to be free territory under control of the federal government, the United States issued ten thousand $1,000 bonds, thereby issuing $10 million in public debt dated January 1, 1851.[123] They were coupon bonds payable to the State of Texas or bearer with interest set at five percent paid semi-annually, redeemable after December 31, 1864.[124] The terms on the face of the bonds required that no bond should be available in the hands of any holder until endorsed by the governor of Texas.[125]

At the onset of the American Civil War, on January 11, 1862, after Texas had declared itself seceded from the Union, the Texas legislature repealed the requirement of a governor's endorsement on the bonds and provided for a military board to use up to $1,000,000 of the bonds in its treasury in defense of the State.[126] In February 1862, G.W. Paschal, a Union loyalist from Texas notified the U.S. Treasury before any of Texas' bonds were sold,

123 White, 74 U.S. at 717-718.

124 *Id.*

125 *Id.* at 718.

126 *Id.* at 717-18.

and the Treasury ran a legal notice in the New York Tribune refusing to honor any bonds not endorsed by the pre-war governor, Sam Houston.[127]

Nonetheless, towards the war's end, on January 12, 1865, the military board of Texas, operating under its relaxed rules, sold one hundred and thirty-five of these bonds to George W. White and John Chiles in one transaction and seventy-six more to be deposited for them in England, for which White and Chiles contracted to deliver supplies of cotton cards and medicines in support of the war effort.[128] In 1865 and 1866, these bonds were exchanged by purchase or as security with other defendants who were party to the case.[129] Incidentally, there was also a cloud of uncertainty in the case as to whether White's and Chiles' transaction with the State may have been disingenuous. The goods for which the State had contracted were never delivered, and White and Chiles claimed that they had been destroyed in transit by disbanded troops roaming Texas after the war had ended.[130] Their loss, they claimed, was unavoidable.[131]

At the Confederacy's defeat, President Andrew Johnson appointed Union General Andrew J. Hamilton as provisional governor on June 17, 1865, and U.S. Army soldiers arrived in Texas two days later to take possession of the State and restore order under federal authority.[132] In its efforts to rebuild, a State convention in 1866 passed an ordinance to recover the bonds and authorizing the governor to take necessary measures to either recover them or compromise with their holders.[133] J.W. Throckmorton, elected governor of Texas under Texas' new constitution of 1866, authorized agents of the state to file suit directly in the Supreme Court under Art. III, 2, cl. 1, the State being a party to the suit.[134] The State's bill contended that the bonds were seized in armed hostility to the United States and sold in support of an effort to overthrow the federal government; that the recipients, White and Chiles, had failed to perform in that agreement; that the subsequent transfers to others were not in good faith and were executed despite express notice in the newspapers; that the bonds were overdue at the date of transfer; and that they had never been endorsed by any governor of Texas.[135] White contended that Texas lacked evidence, claiming that the unnumbered bonds had been destroyed by soldiers and that proof of the transaction and its terms was absent.[136]

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127 *Id.* at 706.
128 *Id.* at 718.
129 White, 74 U.S. at 718.
130 *Id.* at 700.
131 *Id.*
132 *Id.* at 719.
133 *Id.* at 711.
134 *Id.* at 708.
135 White, 74 U.S. at 709.
136 *Id.* at 710.

Precedent to the Supreme Court's determination of whether Texas could reclaim the bonds was the standing question of whether Texas could lawfully file directly in the Supreme Court as a State. Texas filed in 1867,[137] and the Court issued its decision in 1868,[138] but Texas would not be formally readmitted to the Union by Congress until March 30, 1870.[139] White thus argued that Texas, having seceded and being at that time under military administration by the federal government, had no standing to bring the suit.[140] The Supreme Court, with Chief Justice Chase writing for a 5-3 majority, held that Texas did have standing.[141] In doing so, Chase offered a novel view on the nature of the Union and its establishment.

Chase begins by considering what it means to be a State, even apart from a union or confederation:

> It describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times, it represents the combined idea of people, territory, and government.
>
> It is not difficult to see that, in all these senses, the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser and less definite relations, constitute the state.
>
> This is undoubtedly the fundamental idea upon which the republican institutions of our own country are established.[142]

The State as conceived of in the Constitution, Chase thus reasoned, is a "political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[143] It is in the broader sense of a political community, Chase reasons, that the Constitution uses the term "State" in the Guarantee Clause and in its promises to protect the States against invasion.[144] In this, "a plain distinction is made between a State and the government of a State."[145]

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137 ROBERT BRUCE MURRAY, LEGAL CASES OF THE CIVIL WAR 151 (2003).

138 Texas v. White, 74 U.S. 700 (1868).

139 Act of March 30, 1870, ch. 39, 16 Stat. 80 (admitting the State of Texas to Representation in the Congress of the United States).

140 White, 74 U.S. at 718-19.

141 *Id.* at 726.

142 *Id.* at 720.

143 *Id.* at 721.

144 *Id.; See* U.S. CONST. art. IV, § 4.

145 White, 74 U.S. at 721.

Texas, Chase noted, was admitted to the Union as a State in 1845, an act which invested the new State and its people with all of the responsibilities and duties of membership in the Union, as truly and fully as if they had been among the first thirteen at the Constitutional Convention.[146] Chase contended that the Union was not an "artificial" relation but an emergent one that grew out of common origin, mutual sympathies, kindred principles, similar interest, and geographical relations.[147] Most poignantly for our purposes, the Chief Justice went on to describe the Union as having "received definite form and character and sanction from the Articles of Confederation. By these, the Union was solemnly declared to 'be perpetual.'"[148] And by the Constitution's enactment it was made a "more perfect Union."[149] The final product: "a perpetual Union, made more perfect."[150]

From this, Chase deduced that when Texas joined the United States, it entered an indissoluble relation to all other states and was bound to guarantee its citizens a republican form of government.[151] When, on February 1, 1861, the Texas secession convention drafted an Ordinance of Secession for approval by the state legislature and a statewide referendum, Chase determined, it violated the Guarantee Clause and the Ordinance was therefore null.[152] Texas at all times remained a State within the Union, and its war against the Union was a war of rebellion, not of "conquest and subjugation.[153] Texas therefore had standing.

Pursuant to this conclusion, the Chief Justice followed an orthogonal but interesting discussion of the constitutionality of Reconstruction governments,[154] ultimately reaching the question of Texas' claim to the bonds sold by the Confederate military board of Texas.[155] As to the legal acts of Confederate governments, he concluded that those legal acts and decisions "necessary to peace and good order among citizens," including acts sanctioning and protecting marriage and domestic relations and others relating to property, wills, injuries to persons and estates, etc., that would have been valid if emanating from a lawful government were still legal but that those acts in aid of rebellion against the United States were invalid.[156] The question then was whether the sale of the bonds was in aid of rebellion. The Court held that it plainly was in aid of rebellion and that White, Chiles, and those to whom

146 *Id.* at 722.
147 *Id.* at 724.
148 *Id.*
149 *Id.*
150 *Id.*
151 White, 74 U.S. 728-30.
152 *Id.*
153 *Id.* at 724.
154 *Id.* at 727-32.
155 *Id.* at 732.
156 *Id.* at 733.

they transferred the bonds had sufficient notice of the instruments' repudiation to vindicate Texas on all counts.[157]

B. United States v. Wheeler

Wheeler is the stuff of movies. It arises from the harsh tenor of labor relations that had emerged in America by the 1910s. Nearly two-thousand miners, members of the Industrial Workers of the World (IWW), contracted by the Phelps Dodge Company and other mining operations to work in Bisbee, Arizona, struck on June 26, 1917.[158] In response, Phelps Dodge executives met with Bisbee Sherriff Harry Wheeler in conspiracy to forcibly seize all two-thousand workers (out of a town of roughly eight thousand) and deport them hundreds of miles away and abandon them there, in the desert, without food, water, or money.[159] Early on the morning of July 12, twenty-two-hundred deputies arrested every man on the list whom they could find, along with any other men who refused to work in the mines, totaling roughly two thousand persons.[160] The detainees were taken at gunpoint to a baseball stadium, where some were released in exchange for denouncing the IWW.[161] The others were loaded onto twenty-three cattle cars and transported two hundred miles over sixteen hours without food or water and unloaded at Hermanas, New Mexico at three o'clock in the morning on July 13.[162]

The local sheriff in New Mexico and the state's governor contacted President Woodrow Wilson for federal support with the relocated men, and Wilson sent U.S. Army troops to take the men to Columbus, New Mexico, where they were furnished tents until September.[163] Back in Bisbee, Sheriff Wheeler established a perimeter around the town and the neighboring town of Douglas, requiring a "passport" issued by the Douglas Chamber of Commerce and Mines to enter or exit the town and trying them before a secret sheriff's court, deporting hundreds and threatening them with lynching if they returned.[164]

In May 1918, the Department of Justice brought suit against twenty-one mining company executives along with Wheeler and other Cochise County officials, alleging conspiracy to violate § 19 of the United States Criminal Code, which prohibited injuring, oppressing, threatening, or intimidating citizens of the United States in the rights and privileges secured to them by the federal Constitution, namely to reside and remain in a state where they are

157 White, 74 U.S. at 736.

158 Philip Taft, *The Bisbee Deportation*, 13 LABOR HIST. 3, 7 (1972).

159 *Id.* at 4, 13-16.

160 *Id.*

161 *Id.*; W. Lane Rogers, *The Bisbee Deportation* 19-20 (2007).

162 Rogers, *supra* note 161.

163 Taft, *supra* note 158, at 24.

164 *Id.* at 23.

citizens and to be immune from unlawful deportation to another state.[165] The indictments mentioned no federal law, as there was no federal offense of kidnapping until the Federal Kidnapping Act of 1932.[166] The government thus relied upon the claim of an implied federal power to forbid and punish those violating § 19.[167] The defense, in turn, contended that the federal Constitution left the rights implicated "to the protection of the several states having jurisdiction."[168] The case invited notable representation, with W.C. Herron, brother-in-law of President William Howard Taft, representing the Justice Department and former Associate Justice, future Chief Justice Charles Evans Hughes arguing for the defense.[169]

Chief Justice White, writing for the majority, held that the Articles of Confederation established a uniformity of the right of citizens to peaceably dwell within their respective states and to have free ingress and egress among states.[170] States were thereby invested with an authority to forbid and punish violations of those rights. Article IV, White contended, did not assign protection of this right to Congress but instead placed direct limitations on state power to prohibit discriminatory behavior, its text stating clearly that

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states, and the people of each state shall have free ingress and egress to and from any other state. . .[171]

The Constitution, in Art. IV, § 2, the Chief Justice reasoned, intended

> to preserve and enforce the limitation as to discrimination imposed upon the states by Article IV of the Confederation, and thus necessarily assumed the continued possession by the states of the reserved power to deal with free residence, ingress, and egress, cannot be denied for the following reasons: (1) because the text of Article IV, § 2, of the Constitution makes manifest that it was drawn with reference to the corresponding clause of the Articles of Confederation, and was intended to perpetuate its limitations, and (2) because that view has been so conclusively settled as to leave no room for controversy.[172]

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165 *Id.* at 30; Wheeler, 254 U.S. at 292. Section 19 is incorporated today as 18 U.S.C. § 241, which defines the offense as "two or more persons conspir[ing] to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."

166 18 U.S.C. § 1201.

167 Wheeler, 254 U.S. at 292.

168 *Id.*

169 *Id.* at 281.

170 *Id.* at 293-94.

171 ARTICLES OF CONFEDERATION OF 1781, art. IV.

172 Wheeler, 254 U.S. at 294.

White goes on to discuss how a description of the original Article IV's limitation being "preserve[d] and enforce[d]" by the Constitution can easily be read as implying the preservation of the Articles' force as a constitutional background.[173] White seems to be saying more than many judges and justices before and since who have cited the Articles as interpretive references that can give Constitutional interpreters a convenient picture of possible original meanings. Indeed, in a line of reasoning harkening to Chief Justice Chase, he seems to conceive of statehood, union, and fundamental rights as tracing to some undefined point predating both founding documents:

> In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, to move at will from place to place therein, and to have free ingress thereto and egress therefrom, with a consequent authority in the states to forbid and punish violations of this fundamental right.[174]

White cites *Corfield v. Coryell*[175] and *The Slaughterhouse Cases*,[176] and in both of these precedents there is interpretive use of the Articles, but in *Wheeler*, as in *White*, there is the shade of something more than interpretive reference; there is the indication of a constitutional backbone that does more than clarify language but introduces forceful points of its own that, when applied, are capable of binding the power that public officials can wield over private rights.

IV. UNANIMITY, HOLDOUTS, AND WASHINGTON'S FIRST TERM

One implicit defense of the Convention's authority seems to have been that whatever the nature of the Convention, as long as the final product was ratified unanimously by the States, nothing had been usurped. The point at which any shade of that argument was abandoned came when the threshold for adoption of the Constitution was lowered from unanimity to a mere nine out of thirteen states.[177] This question is all the more poignant when operating under an assumption that the Convention was within the authority of the Articles. A theory holding that the Convention abandoned the Articles easily avoids the issue of their unanimity requirement,[178] but one premised on the view that the Convention was within the Articles' authority, even one as plausible as the "side alliance" theory, cannot get around the conclusion that the

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173 *Id.*

174 *Id.* at 293.

175 4 Wash. C.C. 371, 380-81 (1823).

176 16 Wall. 36, 76 (1873).

177 Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1 (2001).

178 *Id.* at 6; *see also* Vasan Kesavan, *When Did the Articles of Confederation Cease to Be Law?*, 78 NOTRE DAME L. REV. 35 (2002).

Constitution would not take effect until it had been ratified by all thirteen states.

The reluctance of Rhode Island and North Carolina to ratify the Constitution and join the Union for many months after the Convention's end makes these questions more than mere abstract brain teasers. I argue here that they are made tangible by the fact that the new federal government would commence operation before these two states had ratified. As a result, one's preference among theories of the Convention leads to different answers about the legality of federal action before unanimity was secured.

A. *Rhode Island and North Carolina's Late Ratifications*

Of the thirteen original states, eleven ratified the Constitution prior to the elections of 1788.[179] Federalists in the two holdout states, North Carolina and Rhode Island, would require more time and repeated attempts before securing a favorable vote.[180] North Carolina's is the less storied effort, with most of the evident controversy there turning on the guaranteed inclusion of a Bill of Rights before they would ratify.[181] Rhode Island, where ratification was not only very late but by the smallest margin, was a different story. Rhode Island was, from the start, the wayward state, long seen as frustratingly prone to dissent.[182] As a result, it gathered a collection of nicknames and epithets: "the perverse sister," "an evil genius," the "quintessence of villainy," and, of course, "Rogue Island."[183] Its local Country Party had won a sweeping victory in 1786, opposing the expansion of the national government for fear of a national tax, meanwhile advocating for greater reliance upon inflationary monetary policy as a tool of public finance.[184] The state legislature printed one-hundred-thousand pounds worth of paper currency in a month, generating rampant inflation and making it a cautionary tale to other states.[185]

As the Convention debates neared a close, a letter was received from Governor Collins of Rhode Island, which had never sent a delegate to represent it, presenting the state's various points of contention with both the Convention's purpose and structural propriety:

> [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

179 *Id.* at 36 n.9.
180 *Id.*
181 *Id.*
182 Payne, *supra* note 10.
183 *Id.*
184 *Id.*
185 *Id.*

> 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.[186]

The people of Rhode Island, Collins wrote, had "not separated themselves from the principles" of the Articles, and they would need further guarantees of limitations on federal powers before they could ratify what the Convention was producing.[187] Between 1787 and 1790, Rhode Island would make eleven attempts at ratification without success.[188]

In its responses, Congress finally answered that lingering question of what its policy would be toward those states that did not ratify. Its approach entailed both gentle and hard diplomacy alike. On the gentle side, Congress still allowed Rhode Island's delegates and those of North Carolina, which was similarly reticent to ratify, to take their seats.[189] Their voting powers were not nullified by their failure to ratify.[190] And a number of Rhode Island's listed grievances with the Constitution, though not uniquely its own, would be addressed by the passage of the Bill of Rights.[191] On the hard diplomacy side, it threatened to treat Rhode Island as a foreign nation and impose tariffs on its exports.[192] In January 1790, Rhode Island persuaded Congress to extend the then-expiring deadline Congress had given to it until March.[193] But in March, another convention came and went without a vote.[194] On May 11, the U.S. Senate debated a bill to not only prohibit commerce with Rhode Island but authorize the President to demand restitution from Rhode Island for its $27,000 share in the national debt from the Revolutionary War.[195] Finally, on May 18, 1790, the Senate passed the bill prohibiting any commercial intercourse with Rhode Island.[196] Before the bill could pass the House (where it had considerable support and was sure to do so), Rhode

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186 *Letter from the Governor of Rhode Island to the President of Congress (Sept 15, 1787) in* 10 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND, 1784-1792, 259 (John Russell Bartlett ed., 1865).

187 Payne, *supra* note 10.

188 *Id.*

189 Ackerman & Katyal, *supra* note 64, at 524.

190 *Id.*

191 *See generally Amendments Proposed By the Rhode Island Constitution (Mar. 6, 1790) in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, 225–26 (Ralph Ketcham ed., 1986).

192 Payne, *supra* note 10.

193 *Id.*

194 *Id.*

195 *See* Jonathan White, *North Carolina and Rhode Island: The 'Wayward Sisters' and the Constitution*, THE IMAGINATIVE CONSERVATIVE (Feb. 15, 2015), https://theimaginativeconservative.org/2015/02/north-carolina-rhode-island-wayward-sisters-constitution-jonathan-white.html.

196 Payne, *supra* note 10.

Island succumbed to the pressure of its merchants and ratified the Constitution on May 29, with a vote of 34-32.[197]

B. *Implications for Washington's First Term*

The concerning implication of these late ratifications arises from the unanimity principle in the Articles. Even if one takes the view that the Constitution was adopted within the authority of the Articles and that the eventual unanimity of its ratification by those thirteen states party to the Articles assures us of the Constitution's validity under law, we are still left with questions as to its validity prior to the unanimous ratification. More specifically: if the Constitution is within the Articles and lawful, it could only take effect once all thirteen states had ratified. Rhode Island's ratification not coming until May 29, 1790, means that the Constitution would not have properly come into effect until nearly halfway through George Washington's first term as president, not only rendering his election void but making any federal legislation signed prior to that date (and, arguably, any legislation signed in Washington's first term) likewise void. The only means of maintaining the "within the Articles and lawful" position and evading this conclusion would be to imply that there was something implicitly retroactive in Rhode Island's and North Carolina's ratifying instruments, but that would seem to be a stretch. Retroactivity is generally not to be presumed unless stated, and nothing in the Framers' debates would suggest the Constitution being so.

To be fair, other popular accounts of the Constitution's effectiveness date have problems of their own. The nine-out-of-twelve approach taken in Article VII would place effectiveness in the summer of 1788, but as discussed above, it merely assumed away the unanimity requirement of the Articles, taking a revolutionary approach rather than a legalistic one. In contrast, Justice Marshall's opinion in *Owings v. Speed* suggested that the Constitution became law when Congress first sat on March 4, 1789.[198] This account has attained status as the conventional wisdom on the subject but suffers from a glaring flaw in its inability to account for how Congress got there on March 4 from the elections of 1788. If the Constitution was not effective until then, there would presumably have been no constitutional law governing the federal elections of 1788, which, though the issue has never been raised in court, seemingly cannot be true.

The consequences of the "within the Articles and lawful" theory being correct, however, are much more serious. If true, it would require us to hold as void all legislation emerging from Washington's first term.[199] That

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197 *Id.*

198 18 U.S. (5 Wheat.) 420, 422 (1820).

199 As noted above, there is also a weaker version by which one could say that any legislation Washington signed after Rhode Island ratified would be valid, leaving open any legislation between May 29,

includes, in notable part, the creation of the First Bank of the United States, the United States Mint, the U.S. dollar, the Tariffs of 1789 and 1790 (the latter of which spurred the Whiskey Rebellion), and, of course, the Judiciary Act of 1789. It is not difficult to imagine the consequential invalidations of all manner of government activities that would flow from those acts being rendered nullities. Thus, we find ourselves at a fascinating impasse: either we accept, once and for all, that the Articles were usurped in revolutionary fashion at the Convention and we set aside all possibility of reconciling the actions of the Framers with the Articles' authority, up to and including any more recently extolled views holding that the Articles form a backbone of continuity underlying the Constitution,[200] or we accept the unconstitutionality of all legislation issued by the first two Congresses and let the dominoes fall from there. The Court, as discussed above, has at least twice suggested that the Articles might have some continuing force.[201] This conclusion suggests that to the extent that those cases' resolutions depended upon a view of the Articles as still carrying legal force, they must be incorrect.

CONCLUSION

In the end, it seems that in the duel between the Formal Theory and the Realist Theory, the Realist Theory leads to a better, less troubling explanation of the nature of the Constitution and the origins of federalism. The Formal Theory, in which the Constitution truly arose from the Articles' procedures to amend, is, of course, not wrong in the sense of being self-contradictory or clearly refuted by some immutable points of fact. Rather, it is "wrong" only in the legalistic sense of leading to implications so great and disruptive that prudence would seem to demand that we avoid that path lest we find ourselves in a deep constitutional quagmire. For those more extremist friends willing to accept the bitter pill of George Washington's first term and all legislation signed during those four years being illegitimate, we can only say, "go boldly!" There are certainly points to be scored there for those still passionate about the Jacksonian struggle against national banking and surely for others. This article has hopefully persuaded its reader, however, that in holding the Articles as having a continued background force of law, we must accept the bitter with the sweet.

1790, and Washington's second inauguration on March 4, 1793. It seems difficult, however, to argue convincingly that an unconstitutionally elected president could gain constitutional legitimacy halfway through his first term despite the election that brought him there having been unconstitutional. I thus set aside this option.

200 *See generally* Texas v. White, 74 U.S. 700 (1868); United States v. Wheeler, 254 U.S. 281 (1920); *see, e.g.*, Abraham Lincoln, *First Inaugural Address (Mar. 4, 1861) in* THE AVALON PROJECT, https://avalon.law.yale.edu/19th_century/lincoln1.asp; Maggs, *supra* note 112, at 429 (finding at least partial merit to the argument); *America's Constitution*, *supra* note 88, at 517 n.65 (neither endorsing the view nor rejecting it; merely considering its merits).

201 *See generally* Texas v. White, 74 U.S. 700 (1868); United States v. Wheeler, 254 U.S. 281 (1920).

Further, incorrect though we find them to be, we must be grateful for cases like *White* for highlighting the issue and forcing us, as well as authors before us, to consider these questions more deeply and for, in the course of their reasoning, expounding upon the question, fleshing out the issue into refutable propositions, and casting greater light on how we should understand the founding and the nature of the Union. Ultimately, we find the concerns of some Framers that they were exceeding the powers granted by the Articles to be not only respectable but valid; they were indeed acting ultra vires as far as the Articles went. On the other hand, the case, as argued by Madison, that their actions were still wholly in accord with natural law and the law of nations and that to do otherwise, to persist under the Articles, would be an abandonment of the duties required of any legitimate government, is perfectly plausible. James Madison's careful balancing of the question, never outright declaring his intent to usurp the Articles but never denying the revolutionary nature of their project was probably just the right balance of diplomacy and vision needed to make it succeed. One can make a variety of arguments, as have already been made, that the Articles were already nullified by non-observance or ineffectuality or that alternative traditions in international law justified the Articles' neglect. However, as revealed by the Convention's records, in the Framers' own views, they were proceeding on unsure footing. Nonetheless, they proceeded. In that act, we might say, the Founders rebelled twice: the first time against a faraway king, and the second time against themselves.