

ORIGINAL ARTICLE

The Carried-Off and the Constitution: How British Harboring of Fugitives from American Slavery Led to the Constitution of 1787

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Abstract

Accounts of the factors that led to the drafting of the U.S. Constitutional Convention have focused on Congress' failures to levy taxes, regulate commerce, and provide security against internal unrest and foreign encroachments. Left out from history are the attempts of the founders to force Britain to return thousands of escapees from slavery they sheltered. Patriot state leaders tried to coerce the return of all fugitives from slavery evacuated with the British army by blocking payment of debts to England in violation of the Treaty of Paris. Such actions ultimately caused the breakdown of the agreement and exposed the structural inability of the Congress to enforce the terms of a duly ratified treaty over intransigent states. Ultimately, the issue of the "carried off" and with it the nation's ability to conduct foreign policy, was the paramount issue that could only be resolved by a fundamental restructuring of the federal structure of government.

While American historians largely see slavery as an essential element in the debating and drafting of the Constitution, few have considered slavery's role in bringing about the convention that radically reworked the basic framework of government. This article argues that the Constitutional Convention was the culmination of an international dispute with England over possession of thousands of black refugees whom Americans claimed as their property. Various states' attempts to recapture escapees from slavery spiraled into an issue that imperiled Americans' ability to colonize their western frontier and to trade with the British empire. American state legislatures' attempts to pressure Great Britain to return their citizens' human property revealed structural deficiencies in the federal government that could not be patched by simply revising the existing charter. More than any other crisis of the 1780s, the struggle of many patriots to regain possession of the thousands of formerly enslaved African Americans set in motion a train of events that led to the scrapping of the confederation and its replacement with a centralized federal government.

The need for a new Constitution has been ascribed to Congress' difficulty raising taxes, trade disputes among states, the insurmountable barrier of unanimity to amend the Confederation Articles, the British refusal to abandon their western forts, British imposition of crippling trade restrictions, and the specter of armed veterans in Massachusetts demanding a moratorium on debts. These were certainly troubling problems but most of them did not require for their solution a sweeping new apportionment of powers between the states and the federal government. Repeatedly in this period, knowledgeable American politicians expressed confidence and optimism that the issues of taxes, of interstate trade squabbles, of amendment, and even of domestic insurrection, could be settled within the terms of the Articles of Confederation. Only two of these looming issues were widely recognized as being beyond the scope of that charter and the existing powers of the Congress to solve. Because they involved enforcement of an international treaty over intransigent state governments, and while treaties were defined in the Articles as supreme law but Congress possessed few coercive powers over the states, only the questions of British trade and European powers' control of western territories exposed an impasse that necessitated granting the federal government radically new powers.¹

It was well known to constitutional historians a century ago that the federal government under the Articles failed, not because it was difficult to pass

¹ Historians' original explanation for the drive to replace the Articles of Confederation centered around the British occupation of the western forts as the decisive issue. See Andrew C. McLaughlin, "Western Posts and British Debts," *Annual Report of the American Historical Association* (Washington, DC: Government Printing Office, 1895), 421. Then "Progressive" historians took a more cynical tack and tallied up the hectares of western land claims possessed by Washington, Madison, Jefferson, Franklin and other founders in explanation of their political positions. See Charles Beard, *An Economic Interpretation of the Constitution* (New York: Macmillan, 1913); John Franklin Jameson's, *The American Revolution Considered as a Social Movement* (Princeton, NJ: Princeton University Press, 1926) and Arthur M. Schlesinger's, *Colonial Merchants and the American Revolution* (New York: Columbia University Press, 1918). Scholars of the "critical period" argued that economic and political chaos in the 1780s forced a new constitutional founding. See Douglas Bradburn and Christopher R. Pearl, eds., *From Independence to the U.S. Constitution: Reconsidering the Critical Period* (Charlottesville: University of Virginia Press, 2022). More recently, Woody Holton and Michael Klarman have built Staughton Lynd's arguments to frame the convention as a counterrevolution against class insurrection. Woody Holton, *Unruly Americans and the Origins of the Constitution* (New York: Hill & Wang, 2007), Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* (New York: Oxford University Press, 2016). Two early scholars prefigured portions of the argument presented here: Arnett G. Lindsay, "Diplomatic Relations between the United States and Great Britain Bearing on the Return of Negro Slaves, 1783–1828," *The Journal of Negro History* 5, no. 4 (October, 1920): 391–419 and Ralph J. Lowry, "The Black Question in Article Seven of the 1783 Peace Treaty," *Negro History Bulletin* 38, no. 5 (June/July, 1975): 415–18. For diplomatic history with limited attention to fugitive slaves, see Charles R. Ritcheson, *Aftermath of Revolution: British Policy Toward the United States, 1783–1795* (Dallas, TX: Southern Methodist University Press, 1969). A more complete historiography of this question is presented in Timothy Messer-Kruse, "The 'Carried Off' Cover-Up: How Historians Hid the Founders' Drive to Recapture British Fugitives from American Slavery," *Ethnic Studies Review* 45:2 (Fall 2022), 27–42. See also Timothy Messer-Kruse, *Slavery's Fugitives and the Making of the United States Constitution* (Louisiana State University Press, forthcoming Nov. 2024).

legislation (as every act required a supermajority), but for lack of power to enforce the will of Congress once a policy was determined. As Max Farrand explained in 1913, “when a decision had been reached there was nothing to compel the states to obedience.”² In other words, the existing blueprint of government didn’t lack enumerated powers, it lacked *power*. This observation might have answered why the Articles were ultimately superseded by the Constitution but did not explain when. At what point was the weakness of congressional power sufficiently demonstrated to compel most states to move to revise their basic structure of government?

Among all the issues that faced the nation in the so-called “critical period” from the end of the war to the ratification of the new constitution, one stands out for the passions it evoked, its intransigence, and its role in exposing the structural flaws in the existing government’s power. It also happens to be, perhaps, the issue most ignored by chroniclers of the road to the Constitutional Convention. This issue was the fervent American demand that the British return escaped slaves to their American owners.

The Great Trade-Off: British Debts for American Slaves

When Congress tied the return of its citizens’ slaves to the payment of British debts and the protection of Loyalist property, it began a process that culminated in the scrapping of the Articles of Confederation and the drafting of the Constitution. Both sides had miscalculated: Congress underestimated the states unwillingness to remunerate British merchants or to punish supposed traitors by seizing their estates; neither Parliament nor the Crown understood the complicated logistics of returning fugitives who had long since fled to safety or been auctioned off in Bermuda, Barbados, or Jamaica.³

Congress only gradually came to realize that negotiating trade agreements or forcing British to surrender Western forts required reversing state laws sequestering debts and seizing loyalist lands. Doing so would require

² Max Farrand, *The Framing of the Constitution of the United States* (New Haven: Yale University Press, 1913), 3–4. It was the late great Stanley Kutler, who I had the privilege of assisting in his constitutional history course at the University of Wisconsin, whose pet phrase, “power not powers,” I’ve borrowed.

³ The resistance and fate of fugitives from American slavery are well chronicled. See Benjamin Quarles, *The Negro in the American Revolution* (Chapel Hill: University of North Carolina Press, 1961); Sylvia R. Frey, *Water from the Rock: Black Resistance in a Revolutionary Age* (Princeton, NJ: Princeton University Press, 1991); Simon Schama, *Rough Crossings: The Slaves, the British, and the American Revolution* (New York: Harper Collins, 2006); Alan Gilbert, *Black Patriots and Loyalists: Fighting for Emancipation in the War for Independence* (Chicago: University of Chicago Press, 2012); Douglas R. Egerton, *Death or Liberty: African Americans and Revolutionary America* (New York: Oxford University Press, 2009); Robert Parkinson, *The Common Cause: Creating Race and Nation in the American Revolution* (Chapel Hill: University of North Carolina Press, 2016). Maya Jasanoff, *Liberty’s Exiles: American Loyalists in the Revolutionary World* (New York: Alfred A. Knopf, 2011); Karen Cook Bell, *Running from Bondage: Enslaved Women and their Remarkable Fight for Freedom in Revolutionary America* (Cambridge: Cambridge University Press, 2021), 105; *The Black Loyalist Directory: African Americans in Exile After the American Revolution*, Graham Russell Hodges, ed. (New York: Garland Publishing, 1996), xi, xvii–xx.

fundamental restructuring of the division of powers between the states and the central government. In September 1782, after British troops evacuated Savannah with thousands of black refugees from American slavery, Congress voted to “as speedily as possible” send “authentic returns of the slaves and other property which have been carried off” to its diplomats negotiating peace terms with the British in Paris.⁴ Congressional instructions to peace negotiators explicitly connected the return of escaped slaves to respecting British creditors and Loyalist property. Although a lukewarm first attempt instructed diplomats to merely “contend in the most earnest matter” for United States citizens’ “slaves and other property,” a stronger version tied British return of fugitives from slavery to an American pledge not to confiscate loyalist property. Congress declared that the “many thousands of slaves” who had been “carried off” was such a “great loss of property” that the states will consider it “an insuperable bar to making restitution or indemnification to the former owners of property which has been or may be forfeited to or confiscated by any of the states.”⁵ Accordingly, Pennsylvania instructed all its county officials to make a record of “all losses of negro or mulatto slaves and servants, who have been deluded and carried away by the enemies of the United States.” When news of his home state’s action reached Paris, Benjamin Franklin told his British counterpart that “I have no doubt that similar acts will be made use of by all” the other states.⁶

The British viewed these developments anxiously because they understood the nature of America’s decentralized confederation and were already suspicious that they were negotiating with a party that could not hold up their end of any bargain. British negotiator David Hartley told Franklin that some in England expressed “alarm” at the possibility that “the unity of government in America should be uncertain, and the States reject the authority of Congress.” Hartley noted that a recent letter of Washington’s had “given weight to these doubts.”⁷ In what was perhaps a miscalculation, Franklin confirmed the decentralized nature of the Confederation and argued that nothing could be done about state confiscation laws because of America’s federal structure: “the confiscation being made by virtue of laws of particular States, which the Congress had no power to contravene or dispense with.” Franklin advised British negotiators that the best course would be for England to drop its objections to America’s confiscations of loyalist properties and in turn he would “write to America” and stop the inventory of lost American property, presumably including slaves.

⁴ *The Negro in the Continental Congress*, Peter M. Bergman and Jean McCarroll, eds., Vol. 1 (New York: Bergman Publishers, 1969), 56–57.

⁵ Journals of Congress for September 1782, in *The Negro in the Continental Congress*, Peter M. Bergman and Jean McCarroll, eds. (New York: Bergman Publishers, 1969), 56–57.

⁶ Franklin to Oswald, November 26, 1782, *The Diplomatic Correspondence of the United States of America*, Vol. 4 (Washington: Francis Preston Blair, 1833), 40–41; Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: University of Chicago Press, 1967), 130–31.

⁷ Hartley to Franklin, October 4, 1782, *The Diplomatic Correspondence of the American Revolution*, Vol. 4, Jared Sparks, ed. (Boston: Nathan Hale & Gray & Bowen, 1829), 24 [hereafter cited as DCAR].

Ultimately, the peace negotiations in Paris stalled over the question of compensation for escaped slaves carried off by the English and a few other issues. In the depth of the impasse, Franklin pulled a paper from his pocket and read a statement he had prepared for just this moment. Franklin demanded that the King “make compensation...for the tobacco, rice, indigo, and negroes, &c., seized and carried off by his armies.” He then fused together the problem of fugitive slaves with the thorny question of American debts to British creditors, asking, “Will not the debtors in America cry out that if this compensation be not made they were betrayed by the pretended credit and are now doubly ruined, first by the enemy and then by the negociators at Paris, the goods and negroes sold them being taken from them, with all they had besides, and they are now to be obliged to pay for what they have been robbed of?”⁸

Meanwhile, Franklin’s fellow negotiators, John Adams, John Jay, and Henry Laurens were worried that simply refusing the principle of payment of restitution would destroy the possibility of reaching an agreement and instead assured their English counterparts that while Congress could not override the states, they could “recommend it to the States, to open their courts of justice for the recovery of all just debts.” This broke the logjam by giving the British side a face-saving though hollow guarantee and the British came to terms. Among the articles of peace was Article VII which specified that as Britain withdrew its troops from the territories of the American states, it would do so “without causing any destruction, or carrying away any negroes or other property of the American inhabitants...”⁹

As negotiations continued in Paris, American political leaders grew increasingly worried that the British had no intention of relinquishing the fugitives under their protection. News of the evacuation of Charleston in 1783 underscored their concern since the British “carried off” between 6,000 and 7,000 African Americans, the vast majority former slaves, to New York and elsewhere.¹⁰ South Carolina’s Congressional delegation demanded that General Sir Guy Carleton, the supreme commander of forces in America, restore to South Carolinians “all their negroes and other property, of considerable value, which were carried off by the British Troops and Royalists, when they left Charlestown.”¹¹

The articles dealing with slavery and loyalist property were pivotal considerations in Congress’ debate over whether to ratify the peace agreement.¹² After ratification on April 15, 1783, Congress ordered the secretary of war to arrange for the release of all British prisoners and it instructed General Washington to make arrangements with his royal counterpart “for receiving

⁸ *The Revolutionary Diplomatic Correspondence of the United States*, Francis Wharton, ed., Vol. 5 (Washington: Government Printing Office, 1889), 843 [hereafter RDC].

⁹ DCAR, Vol. 6, 466.

¹⁰ William Floyd to George Clinton, January 16, 1783, *Letters of Delegates to Congress, 1774-1789*, Vol. 7, Paul H. Smith, ed. (Washington: Library of Congress, 1993), 18 [hereafter LDC].

¹¹ South Carolina Delegates to Carleton, March 27, 1783, LDC, Vol. 7, 110.

¹² See Madison to Jefferson, April 22, 1783, LDC, Vol. 20, 203 and Madison to Randolph, April 15, 1783, LDC, Vol. 20, 186.

possession of the posts” and for “obtaining delivery all negroes and other property of the inhabitants of the United States.”¹³

Following a Congressional resolution by Alexander Hamilton urging his intervention for “obtaining the delivery of all negroes and other property,” General George Washington stepped into the negotiations. Washington explained to Carleton that he sought “Agreements...which may be deemed expedient to prevent the future carrying away any Negroes or other property of the American Inhabitants.”¹⁴ When the two leaders met on May 6, 1783, at Orange Town, New York, Carleton explained that those fugitives who had fled to British protection during the war were entitled to the full benefit of whatever promises had been made to them and insisted that the only “negroes” encompassed by the treaty were those who arrived in British lines after the armistice. Over Washington’s protests, Carleton also made clear that according to his reading of the treaty, he was not obligated to turn over any of the people under his protection, only to ascertain their identities for purposes of future compensation.¹⁵

Two days later, Washington dispatched three “Commissioners for Superintending the Embarkations at New York” to record the names and descriptions of Black Americans under British protection. For the most part, the Commissioners would have to settle for ledgers of speculative information that they hoped would one day prove useful for solicitous slaveowners. Before finally setting sail in their armada of ships out of New York harbor, the British surrendered to the American commissioners a copy of their “Book of Negroes” containing the names of 1,388 men, 955 women, and 652 children including two men, Daniel and Harry, and a woman, Deborah Squash, who had stolen themselves away from the ownership of George Washington.¹⁶

Members of Congress, furious with Carleton’s duplicity, contemplated how to react. Congressman Theodorick Bland suggested not releasing British prisoners as had been agreed to “until an answer be given as to the delivery of slaves.”¹⁷

Robert Livingston wrote on behalf of Congress to the Paris commissioners, sending copies of Washington’s report of his negotiations with Carleton. “Nothing can be a more direct violation of the seventh Article of the provisional treaty, than sending off the slaves, under pretence, that their Proclamations had set them free.”¹⁸ Elias Boudinot, the President of Congress, sent Franklin a sheaf of newspapers and told him that the British, “sending away the negroes...has irritated the citizens of America to an alarming degree.”¹⁹

¹³ *Secret Journals of the Acts and Proceedings of Congress*, Vol. 3 (Boston: Thomas B. Wait, 1821), 328 [hereafter *Secret Journals*].

¹⁴ Washington to Carleton, May 6, 1783, *The Writings of George Washington from the Original Manuscript Sources, 1745–1799*, John C. Fitzpatrick, ed., Vol. 26 (Washington, DC: United States Government Printing Office, 1931–44), 408–9.

¹⁵ *The Writings of George Washington*, Vol. 26, 402–6.

¹⁶ Fritz Hirschfield, *George Washington and Slavery* (Columbia: University of Missouri Press, 1997), 23.

¹⁷ James Madison’s Notes of Debates, May 8, 1783, in LDC, Vol. 20, 239.

¹⁸ Livingston to the Commissioners, May 28, 1783, DCAR, Vol. 10, 148.

¹⁹ Boudinot to Franklin, June 18, 1783, DCAR, Vol. 10, 175. Slightly different wordings of this letter are found in the published compendiums of diplomatic correspondence. DCAR, that was

In a sign that the issue was significant enough for some to contemplate a renewal of war, Congress debated a motion to delay disbanding the army as planned because “Sir Guy Carleton has suffered many negroes the property of the citizens of the United States to be carried off, contrary to the 7th article of the Preliminary Treaty.” This motion was withdrawn before it could come to a vote. Instead, the Congress sent further instructions to its diplomats requiring that they “remonstrate...to the Court of Great Britain” about the “considerable number of negroes belonging to the citizens of these states, [that] have been carried off.” But the issue would not rest and a few days later debate flared up again, this time a determined faction moved that the army be maintained, even though the government had no funds to pay them because Sir Guy Carleton “had broken the Articles of the provisional Treaty relative to the negroes, by sending them off.” A majority voted to table the motion and instead, the legislators compromised to not disband the army but to grant furloughs to its troops, though these forces were to take their guns home with them and stand in readiness if called upon to fight again.²⁰

Joseph Jones of Virginia shared news of this development with General Washington saying that “from appearances the period of disbanding [of the army] will be more distant” because it by necessity “goes hand in hand with the evacuation of our Country by the British forces.” Jones, too, tied the furlough policy to the issue of British harboring of fugitives from slavery. According to Jones, British evacuation hinged on the “views and designs” of General Carleton “or those who direct his movement” and in this he seemed to depart from the usual English “fairness and liberality.” Jones said his constituents were writing to him asking what was being done to recover their runaways and they warned that if the British were “practicing their old game of deception” especially “respecting the Negroes in their possession claimed by our citizens” then “it will prove an effectual bar to the restoration of confiscated Estates.”²¹

Britain’s unabashed protection of runaways from American slavery provoked a loud response from patriots across the land. James Madison called Carleton’s refusal to return people to American slavery a “palpable & scandalous misconstruction of the Treaty.”²² Patriots on both sides of other controversies over slavery were equally shrill in denouncing British “deceit” and “depredations” in their harboring of former slaves. John Dickinson, champion of abolition while president of Pennsylvania, wrote to Congress in 1783 complaining that “a considerable number of negroes belonging to Citizens of this State are now in New York” and requested “that the most effectual Measures may be immediately taken by Congress...for securing such property.”²³

published by the Department of State in 1833, reads: “It has been an ill-judged scheme in the British to retain New-York so long and send off the negroes, as it has roused the spirit of the citizens of the several States greatly,” Vol. 1 (Washington: Francis Preston Blair, 1833), 8.

²⁰ *The Negro in the Continental Congress*, Vol. 1, 73–75, 87–88.

²¹ Joseph Jones to Washington, May 6, 1783, in LDC, Vol. 20, 230.

²² *The Papers of James Madison*, William T. Hutchinson, et al., eds., Vol. 7 (Chicago: University of Chicago Press, 1962), 40.

²³ *Pennsylvania Archives*, Samuel Hazard, ed. (Philadelphia: Joseph Severns & Co., 1854), 1st ser., vol. 10, 27.

As congressional leaders pressed America's diplomats to do more to recover lost slaves, Adams, Franklin and Jay could only weakly promise to "apply to Mr. Hartley" on the subject of "the transportation of negroes from New York, contrary to the words and intention of the provisional articles."²⁴ The three diplomats then duly notified their British negotiating partner, David Hartley, that Congress had ratified the Provisional Articles but raised a few outstanding issues. At the top of the list was "intelligence lately received from America... that a considerable number of negroes, belonging to the citizens of the United States, have been carried off from New York, contrary to the express stipulation contained in the said Article." Much further down in their letter, in fact the last point mentioned, was the slowness of the abandonment of frontier forts.²⁵

Congress instructed all of its ambassadors posted throughout Europe to press Britain to return the claimed human property.²⁶ To facilitate their claims, America's "Foreign Affairs Office" was ordered to compile a full list of all the "Negroes carried away...which were the Property of the Citizens of such States..."²⁷ This task was so large that the secretary, John Jay, requested funds to "employ a large additional Number" of clerks.

State Retaliations

In response to the British evacuation of escaped slaves, several states enacted further punitive laws against British creditors and property-claimants in direct violation of the provisional peace treaty between the two nations. Most states had begun confiscating loyalist property and shielding American debtors long before the terms of the provisional peace treaty were known. Virginia's patriots, for example, began shielding American debtors from recovery suits even before independence was declared by closing the colony's courts. By the time economic protest turned into war, Virginians owed British creditors two million pounds, half of all the private debt to English interests of all of the thirteen states combined. One angry Tory remarked, "the more a man is in debit, the greater patriot he is."²⁸ Soon after Crown armies began their sweep through the southern states, the Virginia Assembly passed the Sequestration Act of 1778 allowing repayment of debts in depreciated paper currency. At the time diplomats were drafting the terms of the provisional peace treaty, Virginia cancelled all British debts

²⁴ Adams, Franklin, and Jay to Livingston, July 18, 1783, RDC, Vol. 6, 570.

²⁵ To David Hartley, July 17, 1783, DCAR, Vol. 10, 185–86.

²⁶ *Ibid.*, 967. See also JCC, Vol. 28, 123.

²⁷ JCC, Vol. 30, 387–88.

²⁸ Emory G. Evans, "Private Indebtedness and the Revolution in Virginia, 1776 to 1796," *The William and Mary Quarterly* 28, no. 3 (July, 1971): 349; Thad W. Tate, "The Coming of the Revolution in Virginia: Britain's Challenge to Virginia's Ruling Class, 1763–1776," *The William and Mary Quarterly* 19, no. 3 (July, 1962): 336. See also Anthony S. Parent, *Foul Means: The Formation of a Slave Society in Virginia, 1660–1740* (Chapel Hill: University of North Carolina Press, 2003); Woody Holton, *Forced Founders: Indians, Debtors, Slaves, and the Making of the American Revolution in Virginia* (Chapel Hill: University of North Carolina Press, 1999).

incurred after the Spring of 1777, a largely symbolic move given the paltry volume of trade during the war.²⁹

Nevertheless, Virginia legislators redoubled their efforts to cancel British debt and formalize their loyalist confiscations as soon as the issue of carried-off slaves arose. To some degree, this must have reflected a popular anger at the British subverting the security of slavery. Of course, there were also those who seized on the issue of the British “carrying off” Virginians’ human property out of self-interest. Virginia assemblyman Joseph Jones told James Madison that “Sir Guy Carleton’s conduct respecting the negro property...will be made use of to justify a delay in paying the British debts” and that Carleton’s seizure of the slaves “confirms in their opinions, if it does not increase the number opposed to the payment of British debts.” Likewise, Virginia politician Edmund Pendleton wrote to Madison that “some Gentn have received wth. great pleasure the Account of Sr. Guy Carleton’s...conduct respecting the restitution of Our slaves, considering it as a proper excuse for not paying British debts.”³⁰ Whether opportunistic or emotional, those factions who had long campaigned to cancel their foreign debts were joined by allies upset at this gesture of British abolitionism.³¹

Once it became clear that London had no intention to return those claimed as patriot’s human property, especially those carried off from New York by General Carleton, state legislatures passed a raft of new and harsher laws penalizing loyalists and British creditors. Some states then explicitly tied their earlier laws to a demand that the Crown allow them to re-enslave those who had been “carried off.” North Carolina assemblyman Archibold Maclaine learned in mid-January of 1784 that “the Virginians are so exasperated [at the “carrying our negroes to Nova Scotia”] that they have passed a law not to pay any British debts.”³² South Carolina responded to Congress ratifying the definitive peace treaty by barring suits for recovery of past debts owed to British subjects to interest only and providing for fractions of principle to be paid on a schedule stretching five years into the future. Debtors were legally permitted to pay old sterling debts in either depreciated paper currency or even with land whose value was determined by their friends and neighbors. Additionally, the state’s legislators were most inventive in fashioning a number of procedural barriers to filing recovery suits that effectively made it impossible for distant merchant houses to access state courts. Georgia’s assembly largely copied South Carolina’s laws. British merchants reported that its judges freely proclaimed from the bench that their courts were closed to them. Maryland too allowed old hard money debts to be paid in state paper currency. British diplomats shared with John Adams their estimate that the \$273,554 of

²⁹ Charles Hobson, “The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790–1797,” *The Virginia Magazine of History and Biography* 92, no. 2 (April, 1984): 176–200.

³⁰ *Letters of Joseph Jones*, 108, 111; David John Mays, ed., *The Letters and Papers of Edmund Pendleton*, Vol. 2 (Charlottesville: The University Press of Virginia, 1967), 133–34.

³¹ April 11, 1783, JCC, Vol. 24, 240.

³² Maclaine to Hooper, January 17, 1784, in *The State Records of North Carolina*, Vol. 17, Walter Clark, ed. (Goldsboro, NC: Nash Brothers, 1899), 125.

Virginia currency paid under state law to satisfy British debts was worth but £15,044.³³

At the vanguard of these protests was Virginia. So upset were Virginians at the carrying off of their human property that the only member of Congress to vote against the preliminary treaty was Hugh Mercer, a delegate from Virginia.³⁴ The issue of the “carried off” was foremost on the mind of leading Virginians when that state began consideration of a new law making it difficult for English creditors to collect their debts in the state. In the spring of 1784, Virginia representative James Monroe wrote to his state’s governor, Benjamin Harrison, with the exciting news that the Congress had finally made its quorum and was about to “engage in the business of the utmost consequence both foreign & domestic.” First on Monroe’s list was “what can be done with respect to the negroes who were carried from N. York.” Monroe wondered if it may be appropriate for Harrison to appoint “some gentn. of character” to go to New York and ascertain the exact number of “negroes” who were “carried off” as grounds for claims of compensation. He then immediately pivoted to the issue of “Our debt to the B. merchants,” implicitly linking these questions together.

Monroe then estimated the debt of Virginians to be nearly three times the sterling then in circulation in the state, a sum that “puts it out of our power to comply with that article” of the treaty. “What then is the remedy?” Monroe pondered, but he really had his answer at hand, “We just obtain delay at least in the payment till by continued frugality & a succession of crops we can pay it. And to obtain this delay...we must have something to offer as compensation for the delay.” Though Monroe never explicitly said that the issue of the “carried off” would serve well as “something to offer as compensation” the obvious structure of his letter made this point for him.³⁵

Elsewhere Monroe did expressly connect the issue of “the infringement of the article of the treaty with G. Brittain respecting the negroes in their removal from N. York” to the states’ reluctance to comply with the terms of the peace treaty. Again, writing to Harrison, Monroe shared his hope that the Crown would concede the American position on the issue and thereby “remove all cause of umbrage from these States.”³⁶

But Monroe’s deep interest in the British evacuation of black refugees was more than just a bargaining chip with which to leverage a swap of debts. Monroe clearly saw it as an issue that brought to the fore the “great questions” of the relationship between the states and the national government. A few weeks later Monroe wrote again about the “subject of the Negroes” and the importance of obtaining an accurate count of their numbers and told Harrison that this issue was “of consequence to the fœderal interest & must therefore have the preference to any wh. relate only to particular states.” Monroe promised his governor that “I shall...most certainly pay great attention

³³ *Secret Journals*, Vol. 4, 189–202.

³⁴ April 11, 1783, JCC, Vol. 24, 240.

³⁵ Monroe to Harrison, March 26, 1784, LDC, Vol. 21, 460–61.

³⁶ Monroe to Harrison, May 14, 1784, LDC, Vol. 21, 616.

to this business & seize in conjunction with my colleagues the favorable moment to bring it on.”³⁷

Virginia’s assembly explicitly linked their longstanding debt and loyalist confiscations to British protections of American runaways. A pending bill to halt the further sale of confiscated Loyalist property was laid aside, according to Madison, because “the British military officers in the United States showed no inclination to enforce the terms of the preliminary peace treaty by returning slaves and other property.”³⁸

In the summer of 1784, Virginia’s assembly moved to begin a formal inquiry “concerning an infraction on the part of Great Britain, of the seventh article of the definitive treaty of peace between the United States of America and Great Britain, so far as the same respects the detention of slaves and other property, belonging to the citizens of this Commonwealth.” James Madison attempted to head off this movement but a substitute resolution calling for the repeal of all laws that “prevents a due compliance with the stipulations contained in the definitive treaty entered into between Great Britain and America” failed by a vote of 57–37.³⁹

This “inquiry” was but a formality as a fortnight later the delegates resolved that Britain’s “detaining the slaves” constituted an infraction of Article Seven and formally instructed its representatives in Congress to urge that body to remonstrate against this violation. More importantly, the assembly voted to “withhold their co-operation in the complete fulfillment of the said treaty, until the success of the aforesaid remonstrance is known, or Congress shall signify their sentiments touching the premises.”⁴⁰ Specifically, the Virginia legislature stated that it would not repeal its confiscatory acts until such time as “reparation is made...or Congress shall adjudge it indispensable necessary.”⁴¹

Seven Virginia senators (Nathaniel Harrison, Henry Lee, John Brown, William Lee, William Fitzhugh, and Burwell Bassett) voted against these articles and signed their names to a statement of “Dissention.” They reminded their colleagues that refusing to execute Congress’ will and letter of the law threatened to tear apart “that federal bond, by which their existence as an independent people is bound up together, and is known and acknowledged by the nations of the world.” They noted that Congress acted to ratify the treaty with the full knowledge that Sir Carleton had allowed black people to evacuate and had refused George Washington’s demands for their return. Moreover, they reminded their fellow lawmakers that not only had Carleton’s actions not been endorsed by the Crown, but that America’s chief diplomat in Europe, Doctor Franklin, had communicated that “in his opinion a full and ample reparation would be made by Great Britain, when applied to, for the

³⁷ Monroe to Harrison, April 10, 1784, LDC, Vol. 21, 513.

³⁸ *The Papers of James Madison*, Vol. 7, 28; *Ibid.*, Vol. 7, 172, n. 7.

³⁹ “Resolutions on Private Debts Owed to British Merchants, Resolution A, June 7, 1784,” *The Papers of James Madison*, Vol. 8, 60; “Editorial Note: Resolutions on Private Debts Owed to British Merchants,” *Ibid.*, 58–60.

⁴⁰ *Ibid.*, 63.

⁴¹ *The Pennsylvania Packet* (Philadelphia), July 22, 1784, 2.

detention of the said negroes.” Even worse, the dissidents warned, undermining the treaty in this way threatened to reignite the war they had just celebrated winning. “Because continuing legal impediments to the recovery of British debts, in direct violation of the treaty, will subject the property of the citizens of this state to be seized by the British government, and is therefore a proceeding full of temerity, violence and damage.”⁴²

Virginian legislator Joseph Jones charged that policymakers in his state would use “Sir Guy Carleton’s conduct respecting the negro property...to justify a delay in paying the British debts.”⁴³ Arthur Lee, the scion of one of Virginia’s largest slaveholding families who drafted one of the earliest plans for gradual emancipation, blamed Americans for overreacting and causing the British to hold on to the western territories. He observed that the “first violation” of the treaty was “allowing the negroes to be carried off”, but Americans were guilty of refusing to pay their British debts. This refusal, Lee pointed out, provoked the British to hold onto their frontier forts.⁴⁴

These developments also troubled James Monroe who wrote to Jefferson in Paris, begging his advice on the “great objects” of how to improve the operations of the federal government. Monroe was sure “a variety of points may arise to you when you look back on our country, in wh. our policy may [no] doubt be much improv’d.” Monroe then offered the points that came to his mind, namely, “The laws prohibiting the executions for recovery. of Brith. debts are still in force. An address or something of that nature is made to Congress upon that subject, desiring their sense of the propriety of keeping them in force until satisfaction is made for the removal of the negroes from N. York.”⁴⁵

It was not just southern states that reacted to Britain’s evacuation of American slaves with punitive laws. Massachusetts passed a law in November of 1784 suspending all debts and interest owed to British creditors for most of the preceding year. New York cancelled all British debts incurred during the war, seized loyalist estates, and permitted Americans forced from their homes and farms during the war to bring suit in state courts for back rent from those who occupied them under British license. Immediately after the definitive peace treaty was approved, Pennsylvania moved to render it virtually impossible for British creditors to recover debts incurred prior to that date in state court.

Alexander Hamilton viewed the growing movement to obstruct English creditors and seize Loyalist property in his state as a dangerous impediment to normalizing trade with the old empire. “I observe with great regret the intemperate proceedings among the people in different parts of the state in violation of a treaty the faithful observance of which so deeply interests the United States,” Hamilton

⁴² *The Virginia Gazette* (Richmond), July 10, 1784, 1.

⁴³ Jones to Madison, May 25, 1783, in *Letters of Joseph Jones of Virginia, 1777–1787*, Worthington C. Ford, ed. (Washington: Department of State, 1889), 108.

⁴⁴ Lee to the Marquis of Lansdowns, March 3, 1786, in Richard Henry Lee, *Life of Arthur Lee*, Vol. 2 (Boston: Wells & Lilly, 1829), 167–68.

⁴⁵ Monroe to Jefferson, July 20, 1784, LDC, Vol. 21, 733.

wrote New York Governor Clinton. Hamilton reminded the governor that the treaty “exceeded the hopes of the most sanguine” and established American borders and rights to Atlantic fisheries “even better than we asked” and then pointed out that New York’s lucrative fur trade will be lost if the Americans “furnish a pretext...for delaying” the British evacuation of its frontier forts. Hamilton then lectured Clinton that “no part of the 6th [article] can be departed from...without a direct breach of faith” and that the “power of making treaties is exclusively lodged in Congress.” Hamilton expressly connected the anti-Loyalist movement and the issue of British harboring of fugitives from slavery. Hamilton acknowledged that the British excuses for “the negroes, who have been carried away” were based on a “doub[t]ful construction of the treaty.” Americans would be in their rights to “justly accuse them with breaking faith” but have refrained from doing so for fear of a complete breach and a “renewal of war.”

While Hamilton fretted over the fate of the peace treaty, it was not just its immediate benefits that concerned him. Rather, he understood that America’s place in a world of competing empires would inevitably come to depend on its ability to fulfill its promises. “Will foreign nations be willing to undertake any thing with us or for us, when they find that the nature of our governments will allow no dependence to be placed upon our engagements?”⁴⁶

With his broad understanding of American institutions, of America’s relative place in the world, and of the nation’s possibilities, Hamilton came to view the harassment of Loyalists and English creditors as being unavoidably linked to the fugitives from slavery and ultimately to the international trade and the western frontier that would build its economy. Consequently, Hamilton risked his reputation and took a public stand against the debt-shielding and Loyalist confiscation laws.

Years before Alexander Hamilton dipped his quill to argue for the ratification of the new Constitution in newspaper columns that would later be collected as part of the famed *Federalist Papers*, he wrote a similar series of articles calling on the New York legislature to comply with the treaty by repealing laws that confiscated loyalist property and revoked loyalist citizenship. Writing as “Phocion,” Hamilton observed that “a breach of the treaty on the part of the British, in sending away a great number of negroes, has upon my principles long since annihilated the treaty, and left us at perfect liberty to desert the stipulations, on our part.” Hamilton praised Congress for its wisdom and restraint in not declaring the treaty voided by these infractions, though he admitted they were perfectly within their rights to do so.⁴⁷

Phocion in another letter connected the issue of confiscations to the peace treaty and stridently argued that Congress possessed the sole power to negotiate treaties and states were then bound to their terms:

⁴⁶ Hamilton to George Clinton, June 1, 1783, LDC, Vol. 20, 292–96.

⁴⁷ *A Second Letter from Phocion to the Considerate Citizens of New-York. Containing Remarks on Mentor’s Reply* (New York, Printed by Samuel Loudon, 1784) in *The Papers of Alexander Hamilton*, Vol. 3, 1782–1786, Harold C. Syrett, ed. (New York: Columbia University Press, 1962), 530–58.

Would not a different doctrine involve the contradiction of *imperium in imperio*? ...it follows from this, that these states are bound by it, and ought religiously to observe it.⁴⁸

Hamilton knew his argument was hollow—that Congress enjoyed a grant of power it could not exercise—as it was the opposite of what he would write a couple years later in *Federalist* number eleven. Here, the very fact that Hamilton was pleading with a state legislature to comply with a duly ratified treaty proved that the Confederation Congress lacked the powers he attributed to it. Unable to simply declare states incompetent to violate the treaty, Hamilton was reduced to pleading, “Do not equity and prudence strongly urge the several states to comply with it?”

By the end of 1784, two and a half years before the convening of the constitutional convention, leaders of Congress and their trio of all-star diplomats, Jefferson, Adams, and Franklin, had come to understand that their government was unable to uphold their end of the favorable peace treaty they had wrung from the British. They feared the consequences not only for their political and economic relations with Britain but their ability to make any agreements with other European powers. Jefferson, Adams, and Franklin were compelled to beg the Crown for concessions to their agreement because of their own failure to enforce it over their states. The American diplomats admitted to the Duke of Dorset, Britain’s “Ambassador Extraordinary and Plenipotentiary” in Paris, that “there are Some unusual circumstances attending the English debts in America contracted prior to the war, that Seem to merit consideration, and to Show the reasonableness & utility of explaining & modifying that article.”

So deep was America’s institutional impasse, that the trio also urged that “provision Should be speedily made for the Satisfaction of the masters whose negroes were Carried away with other property.” In other words, since the federal government could not force its own states to comply, the English government would have to fulfill all of its obligations and excuse American violations to keep their treaty from crumbling.⁴⁹

Later when John Adams, a famously churlish founder, met with Prime Minister William Pitt in London on August 24, 1785, he “began the conversation by recapitulating the complaints of the United States on the subject of the posts not being yet evacuated, and no satisfaction having been given for the negroes who were carried away.” By this time the American side had given up on trying to cajole the Brits to make concessions and Adams now took the lawyerly stance that Americans were not in violation as all that the treaty’s wording technically required was that no prohibitions be put in the way of the

⁴⁸ A Letter from Phocion to the Considerate Citizens of New-York On the Politics of the Day (New York, Printed by Samuel Loudon, 1784) in *The Papers of Alexander Hamilton*, Vol. 3, 483–97. See also Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004), 194–96.

⁴⁹ “The American Commissioners to the Duke of Dorset, October 28, 1784,” *The Adams Papers, Papers of John Adams*, vol. 16, February 1784–March 1785, Gregg L. Lint, C. James Taylor, Robert Karachuk, Hobson Woodward, Margaret A. Hogan, Sara B. Sikes, Sara Martin, Sara Georgini, Amanda A. Mathews, and James T. Connolly, eds. (Cambridge, MA: Harvard University Press, 2012), 355–58.

collection of old debts, not that they necessarily had to be paid. (At the same time Adams described Massachusetts' stay laws as a "direct Breach of the Treaty" and American behavior toward England as "dishonest" to confidants back home.) Adams' bluster accomplished little but pushing the royal negotiators to dig in their heels. In response, the British government formally presented Adams with a list of the eight states and their obstructionist laws that would have to be removed for the English army to quit their posts. Adams' frustration poured over in a letter to John Jay, "We cannot unite, in Laws and Measures which would make one.—By the best Judgment I can form, the Posts upon the Frontiers will never be evacuated, nor the Maryland stock recovered, nor the Rhode Island demand satisfied, nor the Negroes paid for while there remains in force a Vote of any Assembly suspending Proccess for the Recovery of British Debts."⁵⁰ Here in Adams' complaint to Jay can be seen the wheels already in motion driving toward a fundamental reorganization of the federal system. Adams, like most other leading American policymakers had become convinced that a more powerful centralized federal government was necessary to reign in the ease with which popularly controlled state legislatures could break apart the nation's vital international agreements.⁵¹

The Road to the Constitution

John Adams, who tended to write obtusely and thereby hedge his political risks, was clear about what changes he thought needed to be made in the charter of government for America. In the only volume of his three-volume history of constitutionalism that was published before the Philadelphia convention, Adams concluded that Congress needed additional powers to have the international standing an independent nation needed to negotiate with other powers.

Full power in all foreign affairs, and over foreign commerce, and perhaps some authority over the commerce of the states with one another, may be necessary; and it is hard to say, that more authority in other things is not wanted: yet the subject is of such extreme delicacy and difficulty, that the people are much to be applauded for their caution.⁵²

In London, negotiating all the ragged and unresolved issues that he hoped would lead to an advantageous commercial treaty, John Adams worried that his countrymen's continuing fixation on the issue of slaves carried off would

⁵⁰ John Adams to John Jay, October 25, 1785," *The Adams Papers, Papers of John Adams, Vol. 17, April–November 1785*, Gregg L. Lint, C. James Taylor, Sara Georgini, Hobson Woodward, Sara B. Sikes, Amanda A. Mathews, and Sara Martin, eds. (Cambridge, MA: Harvard University Press, 2014), 541–51.

⁵¹ Robert W. Smith, *Keeping the Republic: Ideology and Early American Diplomacy* (DeKalb: Northern Illinois University Press, 2004), 37; Minute of Conversation with Mr. Adams, October 20, 1785, David Hartley Papers, Vol. 1, 426, Clements Library, University of Michigan.

⁵² John Adams, *A Defence of the Constitutions of Government of the United States of America* (London: John Stockdale, 1794), 364.

compromise all his efforts. Adams' worries only deepened when he learned from congressional president Elbridge Gerry that he was only narrowly approved by Congress as ambassador to England, and this after "many attempts have been made to determine the Choice" and "States were tenacious of their Vote, for several days." In the end, Adams received five votes, Livingston four, and Rutledge two, meaning a majority of the states voted against him. Gerry told Adams that his opponents thought him soft on the issue of the repatriated escaped slaves. "[T]he Southern States were impressed with the Idea, that You being totally averse to the Slave Trade, would not exert Yourself at the Court of London to obtain Restitution of the Negroes taken and detained from them in Violation of the Treaty..."⁵³

Adams immediately set about lobbying key Congressional leaders claiming that he was sincerely dedicated to obtaining payment for American slaves freed by England. Adams assured Richard Henry Lee, one of the leading Virginian politicians, that he viewed the "Negroes... carried off" as a top priority:

the "Debts" and the "slaves," ...are great and important Quantities, and Shall have a proportional Attention paid to them.⁵⁴

While Adams was attempting to lobby for his job from across the ocean, John Jay tried to convince members of Congress that demanding compensation for war damages and stolen "property" was a fool's errand. Jay forwarded to Congress Adams' dim assessment of the possibility of negotiating any restitution ("It is my Duty to be explicit with my Country, and therefore I hope it will not be taken amiss, by any of my fellow Citizens, when they are told, that it is in vain to expect the Evacuation of Posts, or Payment for the Negroes, a Treaty of Commerce...or any other relief of any kind, untill these [confiscation] Laws are all repealed.") Jay unsuccessfully urged Congress to instruct Adams "not to bring on any *formal* demand" respecting lost American property.⁵⁵

Congress met Jay's recommendation halfway and stopped short of issuing demands on the Crown, but also directed Adams to admit the U.S. was in violation of articles IV and VI of the treaty and that they considered Britain in violation of the seventh article. Adams was to tell his British counterparts that the U.S. was working to bring the states into compliance and was instructed to share with them copies of Congress' two resolutions to the states on the matter. As for the African Americans carried away on British ships, Adams was to propose a conference of commissioners charged with estimating "the value of the Slaves or other American Property carried away contrary to the 7th Article" and this payment to be made after the states repealed their

⁵³ Gerry to Adams, February 24, 1785, in *Letters of Members of the Continental Congress*, Edmund C. Burnett, ed., Vol. 8 (Washington, DC: Carnegie Institution, 1936), 39 [hereafter LMCC].

⁵⁴ "From John Adams to Richard Henry Lee, April 29, 1785," *The Adams Papers, Papers of John Adams*, Vol. 17, Gregg L. Lint, C. James Taylor, Sara Georgini, Hobson Woodward, Sara B. Sikes, Amanda A. Mathews, and Sara Martin, eds. (Cambridge: Harvard University Press, 2014), 72-73.

⁵⁵ Jay to Congress, January 31, 1786, *Secret Journals*, Vol. 3, 609.

obnoxious laws. Almost as an afterthought, the British were to evacuate their frontier forts at the same time.⁵⁶

Congress made it clear what their priority was between the question of the compensations for slaves transported away and the abandonment of the western forts later in July when Jay quietly dropped from the wording of the former resolution any specific reference to the western forts. New York's Melancton Smith and Virginia's William Grayson, tried to put a pledge to surrender the forts "within the limits of the United States" back into the resolution, but Massachusetts Nathan Dane and Virginia's Edward Carrington moved to strike reference to the "posts and places now held by his Majesty" and their narrowing of the diplomatic demand to just compensation for slaves passed by eighteen to three congressmen (or eight states to one).⁵⁷

Given Congress' insistence on pressing on, all Adams could do was ask Jay to send him "the whole Amount & Evidence of the Claim" that concerned "the Negroes carried off contrary to the Treaty" as well as "explicit Instructions of Congress to demand Payment for the Negroes in Money, and especially at what Prices they Should be Stated."⁵⁸

Jay did so, but also laboriously catalogued all the state laws and actions that were in violation of the provisional peace treaty and bemoaned to Adams, "there has not been a single Day since it took Effect on which it has not been violated in America by one or other of the States."⁵⁹ Adams dutifully drafted a "Memorial" to the Royal Ministry and later that summer, Adams was granted an audience with King George the Third that was cordial but again led nowhere.

As negotiations with England had clearly reached an impasse, Jay grew even more determined to spur Congress to use what power it had to apply pressure to the states to clear up the nation's violations of Articles IV and V. In October, Jay took to the floor of Congress and read a lengthy report detailing each state's violations of the standing peace treaty and presenting his frank views of what Americans owed and what they were owed to and from the British government.

Jay faced an uphill battle to convince Congress that it needed to apply more pressure on the states to rescind their laws violating the British treaty. Jay had earlier that year shocked southern representatives when he presented a proposed treaty with Spain that would have closed the Mississippi River to American shipping for a period of twenty-five to thirty years. Not only the many speculating members of Congress who had purchased vast tracts of western land for resale to homesteaders and plantation builders understood that closing the main artery of commerce would depress land values and stifle settlement. It was only New Englanders who were willing to swap western expansion for the commercial opportunities the Spaniards dangled to Jay, including opening the port of Havana to American shipping. In a series of nakedly

⁵⁶ JCC, Vol. 32, 229.

⁵⁷ JCC, Vol. 32, 379–80.

⁵⁸ "John Adams to John Jay, May 25, 1786," *The Adams Papers*, Vol. 18, 313–15.

⁵⁹ "John Jay to John Adams, November 1, 1786," *The Adams Papers*, Vol. 18, 501–4.

sectional votes, Congress voted to reject Jay's proposed terms but failed to muster the required supermajority to replace them. Southerners were so alarmed they even attempted to repeal Jay's authority to negotiate treaties altogether and replace him with a pair of commissioners of their own choosing.⁶⁰

Given his earlier clash with the southerners in Congress who had good reason to suspect that Jay favored the sectional interests of the maritime north over the staple-growing south, it is surprising how little ground he conceded to southern interests. While noting that both sides had violated their treaty, Jay factually pointed out that Americans were the first offenders: "In whatever light, therefore, deviations from the Treaty prior to its final conclusion and ratification may be viewed, it is certain that deviations on our part preceded any on the part of Britain; and therefore instead of being justified by them, afford excuse to them."⁶¹

Not only did Jay stress American violations as the bigger issue in obtaining the normalized relations with England they all sought but he also downplayed the scope of British infringement of Article Seven. Jay distinguished between different classes of slaves that had been expatriated by the British, some that were legally recoverable and some that were not. Those slaves seized as British armies swept inland were, by the laws of war, unrecoverable. Here Jay turned slave-owners' own longstanding legal bulwark of declaring slaves property and not people and turned it against them: if slaves were indeed property and not people, then by the laws of war they constituted booty and "become the property of the Captors." Jay perhaps unnecessarily belabored his point when he then wondered aloud "Whether men can be so degraded as under any circumstances to be with propriety denominated Goods and Chattels" and noted that this was a question "which opinions are unfortunately various, even in Countries professing Christianity and respect for the rights of mankind. Certain it is that our Laws assert, and Britain by this Article as well as by her practice admits, that Man may have property in Man."⁶²

Importantly, it is clear from Jay's remarks that one of his goals in his report to Congress was to convince the American leadership to step back from its insistence that their escaped slaves be physically returned to them. In other words, Jay's speech is clear evidence that well into the Autumn of 1786, patriot insistence on the enforcement of Article Seven was not figurative or symbolic, but an actual movement for the bodily return of the men, women, and children who had escaped their bondage. Jay offered his opinion that Congress drop its demand for return and with "great propriety and justice insist" upon payment of their "full value" instead. Indeed, Jay reported that "there is an intimation" that the British Minister did not object to this arrangement.

⁶⁰ *Secret Journals*, Vol. 4, 44, 85, 107. The most complete account of Jay's interactions with Congress on the British Treaty remains Donald L. Robinson, *Slavery in the Structure of American Politics, 1765-1820* (New York: Harcourt Brace Jovanovich, 1971), 347-52.

⁶¹ JCC, Vol. 31, 867.

⁶² JCC, Vol. 31, 863-64.

As for the issue of the British occupied posts and forts, Jay concluded this was entirely justified by American actions, as Britain had no obligation to surrender any until the treaty was ratified by Congress on January 14, 1784 and Parliament on April 9. "From that time to this, the 4th and 6th Articles of the treaty have been constantly violated on our part by legislative Acts then and still existing and operating." Therefore, Jay argued, "Under such circumstances, it is not a matter of surprise to your Secretary that the posts are detained; nor in his opinion would Britain be to blame in continuing to hold them until America shall cease to impede her enjoying every essential right secured to her, and her people and Adherents, by the treaty."⁶³

Having conceded precious little to the southerners in the room, Jay may have been impolitic to also choose this moment to state plainly his view of an exclusive federal jurisdiction in foreign policy. He may have been spurred to do so by earlier attempts of some southern politicians to claim that treaties could not infringe on a state's sovereignty. It was only a few months before, during the tussle over Jay's proposed Spanish treaty that effectively choked off the western half of the nation, that southern congressmen had retreated to a spread-eagled states' rights position to thwart him. While the Articles of Confederation had clearly and unequivocally declared treaties to be the supreme law and Congress to have exclusive authority to negotiate and approve them, southern representatives issued a declaration that rested on a theory of co-equal sovereignty that would bedevil the nation for the next eighty years:

No treaty even of peace entered into by the United States in Congress assembled, extending to a cession or suspension of the rights of any of the states without their consent, can therefore be valid...⁶⁴

Such expressions of a proto-states' rights position compelled Jay to defend a federalist understanding of the distribution of foreign powers:

When therefore a treaty is constitutionally made, ratified and published by Congress, it immediately becomes binding on the whole nation, and super-added to the laws of the land, without the intervention, consent or fiat of State legislatures...⁶⁵

The Articles of Confederation had no means to resolve this fundamental conflict of ideas about the nature of the treaty power because it had neither a federal judiciary, a supreme court, or an executive to enforce their orders. Here then was laid bare a far more fundamental conflict of constitutional powers than any other; no other issue, taxation, interstate commerce, international trade, or even angry indebted farmers required a wholesale structural revision to be solved. General Carleton's act of noblesse oblige toward the African

⁶³ JCC, Vol. 31, 868.

⁶⁴ *Secret Journals*, Vol. 4, 103–4.

⁶⁵ JCC, Vol. 31, 797–98.

Americans in New York City had uncovered a contradiction at the heart of the American confederation that could not be resolved without replacing it.

After Secretary Jay submitted his report to Congress, it unanimously agreed in March of 1787 to exert all the powers it had to force the states to comply with the terms of the treaty. Such powers consisted of a stern statement that the legislatures of the states “cannot of right pass any act or acts for interpreting, explaining or construing a national treaty...nor for restraining, limiting or in any manner impeding, retarding or counteracting the operation and execution of the same...” and calling on the states to repeal such acts. As the Congress had no mechanism to enforce law over the states, all it could do was “recommend to the several States to make such a repeal” by “declaring in general terms that all such acts...repugnant to the treaty of peace between the United States and his Britannic Majesty...shall be and thereby are repealed.”⁶⁶

Little action was taken by the states over the next month and Congress was compelled to unanimously issue another pleading resolution to the states that drew heavily from the constitutional principles John Jay had laid out in his speech on the British treaty:

...we regret that in some of the States too little attention appears to have been paid to the public faith pledged by that treaty. Not only the obvious dictates of religion, morality and national honor, but also the first principles of good policy demand a candid and punctual compliance with engagements constitutionally and fairly made...⁶⁷

In the spring of 1786, congressman Charles Pettit of Pennsylvania expressed his concerns about the future of the country to his colleague Jeremiah Wadsworth, then in Paris, but who would soon return to his native Connecticut and serve in Congress and later play a role in ratifying the new constitution in his home state. “Our political Situation, merely from want of [ar]rangement and Combination of our Strength, is indeed wretched—Our Funds exhausted, our Credit lost, our Confidence in each other and in the federal Government destroyed.” These were vexing problems, but Pettitt thought others even more urgent:

Instead of supporting the respectable Rank which we assumed among Nations, we have exposed our Follies to their View—they treat us accordingly, they severally shut the Door of commercial Hospitality against us, while ours being open they enter and partake with us at their Pleasure.

Pettitt complained of how his fellow congressmen did not take their appointments seriously and gathering a quorum was difficult. But the root cause of the

⁶⁶ JCC, Vol. 32, 124–25.

⁶⁷ JCC, Vol. 32, 177–84. For a thorough study of the constitutional issues raised in the clash of treaties and states sovereignty see David M. Golove, “Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power,” *Michigan Law Review* 98, no. 5 (March, 2000): 1075–319.

nation's problems he attributed to the states refusing to pay British debts in retaliation for the loss of their fugitive human property:

Foreigners perceive our lethargic Imbecility—That Respect which they were disposed to shew us is held in Suspence...Our late Enemies seeking a Rupture with us by withholding Military Posts within our Territories are teaching the Savages to despise and insult us. They openly charge us with a Breach of the Treaty by obstructing the Recovery of British Debts by Legislative Acts in some of the States; in this, however, there is some Truth, tho' less than [the]y pretend; but I should suppose that their refusal to [pa]y for the Negroes they purloined and which they acknowledge [t]o be a failure on their Part, might have been a balance for this breach of ours, as it was in some Measure the Occasion or at least the Pretence for it.

Pettit worried that these problems could doom the republic: "Is it possible that a great political System, however wise[ly] formed, can be preserved and well conducted in this Manner [?]" He predicted that these problems would soon come to a head: "Such Disorders both within and without cannot fail to bring on a Crisis of some kind ere long—What will be the Result, or what Turn it will take, is uncertain. However we may dread the Event, it seems to be the only chance we have of restoration to political health..."⁶⁸

Pettit's analysis that the federal government suffered from a "lethargic imbecility" was shared by America's counterparties to the treaty across the Atlantic. When Parliament debated the Provisional Articles Lord North rose to complain about the lack of protections for Loyal Britons in the treaty, saying they were "subject of an odious exception...those who deserved of this country every grace, every favour that it could bestow, should be abandoned to the impotent recommendation of a Congress, whose authority to levy money, was disputed and denied by every state in the confederacy."⁶⁹

In the year following the declaration of peace, both influential English and French newspapers highlighted stories of troubles between American states and implied the American union was falling apart. Benjamin Franklin, then still in Paris, was particularly rankled by their slanders and wrote so to David Hartley, the chief British negotiator of the peace treaty:

You have deceived yourselves too long with vain Expectations of reaping Advantage from our little Discontents... Our domestic Misunderstandings, when we have them, are of small Extent; tho' monstrously magnified by your microscopic Newspapers. He, who judges from them that we are on the Point of falling into Anarchy, or returning to the Obedience of Britain, is like one, who, being shown some Spots in the Sun, should

⁶⁸ Charles Pettit to Jeremiah Wadsworth, May 27, 1786, LMCC, 368–71.

⁶⁹ *Full and Faithful Report of the Debates in Both Houses of Parliament...* (London: S. Bladon, 1783), 20–21.

fancy that the whole Disk would soon be overspread with them, and that there would be an End of Day Light.⁷⁰

Such letters, of course, were propaganda, intended to sway international policymakers into a rosy view of American prospects and wariness of American strength. But Franklin's more confidential remarks were not that different in tone except for one threat to the nation that he saw as paramount to all others: the failure to adhere to their agreements. To the congressional secretary, Charles Thomson, he wrote:

...our future Safety will depend on our Union and our Virtue. Britain will be long watching for Advantages, to recover what she has lost. If we do not convince the World that we are a Nation to be depended on for Fidelity in Treaties; if we appear negligent in paying our Debts, and ungrateful to those who have served and befriended us; our Reputation, and all the Strength it is capable of procuring, will be lost, and fresh Attacks upon us will be encouraged and promoted by better Prospects of Success.⁷¹

Franklin's letter reveals that he believed the paramount object in America's federal system of government was having the ability to uphold the nation's international agreements and thereby be a power in the world. Franklin's views are particularly relevant to this chain of events as he was the only member of the delegation that hammered out the Treaty of Paris to also participate in the drafting of the new constitution in the summer of 1787.

On the eve of the opening of the Constitutional Convention, *The American Museum*, the most influential periodical of its day, printed on its first page the text of General Washington's farewell letter that he submitted to all the state governors in June of 1783. Its republication at this moment was clearly calculated to influence the delegates and focus attention on the problems facing the union that the great general said were "of greatest importance" four years earlier.

Washington warned that the United States had arrived at a historic junction and faced a choice of the highest importance, a question that would determine the "destiny of unborn millions" to come. With certain and direct language, Washington indicated that this decision hinged on the nation having the ability to conduct its foreign affairs in unity:

This is the moment, to establish or ruin their national character forever. This is the favourable moment to give such a tone to the federal government, as will enable it to answer the ends of its institution; or, this may be

⁷⁰ Benjamin Franklin to David Hartley, September 6, 1783, *The Papers of Benjamin Franklin*, Vol. 40, May 16 through September 15, 1783, Ellen R. Cohn, ed. (New Haven and London: Yale University Press, 2011), 582–83.

⁷¹ "Charles Thomson to the American Commissioners, August 13, 1784," *The Adams Papers, Papers of John Adams*, vol. 16, February 1784–March 1785, Gregg L. Lint, C. James Taylor, Robert Karachuk, Hobson Woodward, Margaret A. Hogan, Sara B. Sikes, Sara Martin, Sara Georgini, Amanda A. Mathews, and James T. Connolly, eds. (Cambridge, MA: Harvard University Press, 2012), 299.

the ill-fated moment, for relaxing the powers of the union, annihilating the cement of the confederation, and exposing us to become the sport of European politics, which may play one state against another, to prevent their growing importance, and to serve their own interested purposes.

Applying his astute strategic mind to this problem, Washington laid out his prescription for a remedy, warning that unless these steps were followed, “everything must rapidly tend to anarchy and confusion.” First, the states had to “suffer congress to exercise those prerogatives they are undoubtedly invested with, by the constitution.” This required recognizing that congress had “a supreme power to regulate and govern the general concerns of the confederated republic,” and, conversely, “there must be a faithful and pointed compliance, on the part of every state” with congress’ rulings and acts.

Among these measures, Washington detailed “but one or two, which seem to me of the greatest importance.” At the top of his list was the issue of “treaties of the European powers, with the United States of America,” followed closely by the problem of raising revenues from the states (which were needed to fund soldier’s pay and pensions).⁷²

The American Museum’s editor reinforced Washington’s emphasis on the importance of allowing the federal government full control over foreign affairs by reprinting in the next column the circular sent from Congress to all the state governors the previous month, demanding the repeal of those laws in violation of the provisional treaty of peace with England. These demands famously proved ineffectual.⁷³ This was followed by Lord Carmarthen’s response to John Adams’ request that all British posts be handed over from the previous year. (Carmarthen answered curtly that Britain would do so “when America shall manifest a real determination to fulfil her part of the treaty” followed by a state-by-state rundown of all the confiscatory laws passed in response to England’s harboring of escaped slaves.⁷⁴

Later in the same issue, “Z” described clearly what the root issue was that the convention needed to rectify. All the country’s problems began when “the several states began to exercise the sovereign and absolute right of treating the recommendations of congress with contempt.” For Z there was one obvious example of this: “...we have seen the great federal head of our union clothed with the authority of making treaties, without the power of fulfilling them...”

Many people had suggested all manner of schemes of reorganizing congress, including some who proposed simply doing away with the states altogether. But Z noted that all such “schemes, like many others, with which we have been amused in times past, will be found to be merely visionary, and produce no lasting benefit.” The reason for this was evident: “The error is not in the form of congress... The source of all our misfortunes is evidently in the want of sufficient power in congress.” Z proposed allowing the states to legislate

⁷² *The American Museum*, (Philadelphia), May 1787, 343–49; Eliga H. Gould, *Among the Powers of the Earth* (Cambridge, MA: Harvard University Press, 2012), 127.

⁷³ *The American Museum*, May 1787, 349–52.

⁷⁴ *The American Museum*, May 1787, 353–54.

on “local and internal” matters but give entirely to congress “those things which alike concern all the states, such as our foreign trade, and foreign transactions” along with the “power of enforcing their regulations.”⁷⁵

Another columnist, an “Honest Cheerful Citizen” of Boston, published an essay on the faults of the current congress that the upcoming convention could remedy and like so many others, identified the need for supremacy in upholding foreign obligations as paramount. “When congress have plenary power to support the national faith and honor, by wise measures—to do justice to foreign and domestic creditors—to regulate trade, without being counteracted by any partial adjustments of particular states—then commerce will flourish; all nations will seek to trade with us; we shall have a ready market, and a good price.”⁷⁶

Only a few months before the opening of the constitutional convention, Madison wrote to Edmund Randolph his assessment of the state of national politics. He listed what he saw as the most “interesting measures” that he expected congress to tackle and they were, first, the question of the Mississippi, by which he meant the many issues related to the western territories and which notably required coming to diplomatic agreement with Spain, and second, the lingering issues regarding the peace treaty with Great Britain:

This subject is now depending in the form of a Report from Mr. Jay. I find what I was not before apprized of, that infractions on the part of the U.S. preceded in several instances even the violation on the other side in the instance of the Negroes. If Cong’s should be able to agree on any measures for carrying the Treaty into execution, it seems probable that the fundamental one will be a summons of the States to remove all legal impediments which stand at present in the way.

Madison then listed his third item, which was the “proposed Convention in May.” Though Madison did not say it explicitly, his framing linked the British treaty, the “carried off negro” question, and the coming constitutional convention. For, in fact, they were closely connected as obtaining recognition of the supremacy of foreign treaties over state laws and some legal mechanism to enforce this principle, was clearly the only way to conduct foreign negotiations at a moment in time when the future of the young nation depended heavily on careful and delicate diplomatic negotiations.⁷⁷

Three days later, Madison repeated many of the same points in a letter to George Washington, though now he listed the priority of business facing the Congress as “1. Treaty of peace...I find what I was not before apprized of that more than one infraction on our part, preceded even the violation of the other side in the instance of the Negroes.” His second “object” was “the proposed Convention in May.” Madison noted with satisfaction that his last

⁷⁵ *The American Museum*, May 1787, 364.

⁷⁶ *The American Museum*, March 1787, 187–88.

⁷⁷ Madison to Randolph, February 18, 1787, LMCC, 542.

information was that the “mutiny” in Massachusetts (meaning Shay’s Rebellion) was “nearly extinct.”⁷⁸

Madison’s anxiety about the fate of the republic continued to rise and a few days later, in another letter to Edmund Pendleton, he noted that “men of reflection [are] much less sanguine as to the new than despondent as to the present System.” The current structure of government lacked powers to coerce states to fulfill their duties and to adhere to federal law: “no respect is paid to the federal authority” and unless “some very strong props are applied will quickly tumble to the ground.”⁷⁹ A month later, Madison’s tone in a letter to Jefferson was much the same: congressional ranks were too “thin” to undertake the needed business at hand, foremost being the report of Secretary of State, Jay, on the violations by both parties of the provisional peace treaty. Madison approved of Jay’s report on the British treaty which he thought asserted that “the Treaty having been constitutionally formed is the law of the land, and urges a repeal of all laws contravening it ...” Madison didn’t have to highlight that the federal government having to “urge” the repeal of state laws by sending a circular to offending states requesting them to do so, was not the action of a powerful central government.⁸⁰

Resistance to the calling of a constitutional convention came mostly from northern states (referred to at the time as the “eastern states”). Congressman William Irvine observed as much in a letter to James Wilson, “It was with some difficulty Congress carried the recommendation for a Convention. the Eastern Delegates were all much against the measure, indeed I think they would never have come into it, but that they saw it would be carried without them, then they Joined...”⁸¹ Connecticut’s representative William Samuel Johnson thought the proposed convention was “a very doubtful Measure at best.”⁸² New York’s Rufus King noted the enthusiasm of southerners for the convention and “many well disposed men from Southern States” would attend but used nearly the same words as Johnson to describe it, “What the Convention may do at Philadelphia is very doubtful...my fears are by no means inferior to my Hopes on this subject.”⁸³

William Grayson, though a slave-owning Virginian, didn’t think the upcoming convention would do much, “I believe the whole will terminate in nothing.” Grayson’s reasoning was that “the more slack the government the better the people like it: of course they will not give up any power, which will prevent them from being compelled to make satisfaction to their Creditors.”

Grayson was an astute listener and told an overseas friend that some of the delegates he had spoken with seemed “for going a great way: some of them are

⁷⁸ Madison to Washington, February 21, 1787, *LMCC*, 545–46.

⁷⁹ Madison to Pendleton, February 24, 1787, *LMCC*, 547. Gordon Wood, “Interests and Disinterestedness in the Making of the Constitution,” in *Beyond Confederation: Origins of the Constitution and American National Identity*, Richard Beeman, Stephen Botein, and Edward C. Carter II, eds. (Williamsburg: University of North Carolina Press, 1987), 75–76.

⁸⁰ Madison to Randolph, March 25, 1787, *LMCC*, 565.

⁸¹ Irvine to Wilson, March 6, 1787, *LMCC*, 551.

⁸² Johnson to Williamson, March 31, 1787, *LMCC*, 568.

⁸³ King to Parsons, April 8, 1787, *LMCC*, 572.

for placing Congress *in loco* of the King of the G.B.—besides their present powers...” Grayson, however, thought such talk fantastical, “Figure to yourself how the States will relish the idea of a negative on their laws...”⁸⁴ States’ resistance to such “negatives” was something Grayson immediately illustrated:

Congress have lately determined on the representation of the Court of G. B. respecting the infraction of the treaty; and have recommended to the States in the most pointed terms to repeal all acts and parts of acts, which violates the same: this though a right measure I am satisfied will create great uneasiness in most of the States and particularly in ours: where you know so many people will be affected.⁸⁵

While Grayson, seemingly a natural pessimist, remained skeptical that the upcoming convention could accomplish anything, he did put his finger directly on the problem that needed to be solved, a problem highlighted by the fiasco with Britain. Americans, he hoped “will eer long being also to see the folly of a weak disjointed nation contracting with a strong one, who can explain the contract as he pleases.”

A southerner like Benjamin Hawkins, a plantation owner and slave trader and member of the congressional delegation from Virginia, knew well how those like him were eager for a stronger central government. Hawkins called the coming convention a “most desirable object” in “establishing a firm national government.” He noted that Massachusetts was in turmoil, but the “Southern States are more tranquil and are emerging fast into order: and if the Federal Government can be made efficient the revolution will be a blessing to them.”

Southerners’ need for a more powerful central government, Hawkins noted, was evident in the clear intention of Spain to choke off America’s westward expansion by closing the Mississippi. Such acts as the recent seizure of American boats on that river would only serve to “strengthen our bonds of Union.” (Hawkins reported that Congress, with the seven votes of the eastern states alone, had voted to repeal Jay’s instructions that he negotiate to obtain navigation rights on the Mississippi and now Jay was free to bargain those away if he wished.)⁸⁶

Just as Congress’ “recommendations” and “urging” of states to comply with the provisions of the peace treaty and remove legislative barriers to payment of claims to British creditors were issued in April 1787, Virginia adjourned its legislature until January of 1788. Madison recognized immediately the obstructionism that motivated this move:

This is an ominous example to the other States, and must weaken much the claim on Great Britain of an execution of the Treaty on her part as promised in case of proper steps being taken on ours. Virginia we foresee

⁸⁴ Grayson to Short, April 16, 1787, *LMCC*, 581.

⁸⁵ Grayson to Short, April 16, 1787, *LMCC*, 582.

⁸⁶ Hawkins to Jefferson, March 8, 1787, *LMCC*, 553.

will be among the foremost in seizing pretexts for evading the injunctions of Congress. S. Carolina is not less infected with the same spirit.⁸⁷

It was clear to many astute observers of the growing tensions with England that the issues of the forts, American debts, and British sanctuary for American slaves were all tied together. William Grayson, who as much as anyone seemed to know all the doings in Congress, wrote that John Adams thought the issue of the forts and posts the British refused to vacate was entirely secondary to that of the British debts to Americans and the “negroes carried off.” Grayson recorded Adams’ opinion that “with regard to the Posts it was so connected with other matters as not to be decided on singly.”⁸⁸ Many of the most powerful members of Congress clearly looked upon them in this way. Richard Henry Lee told Washington that he thought the “disputes concerning debts and removed Negroes” were “points of consequence” that “together form a field for able and ample negotiation” on the issues of the exact location of the north-eastern boundary line and the evacuation of the British forts.⁸⁹

Correcting the lack of power required the restructuring of the whole. Investing Congress with more coercive power increased the risk of tyranny, a danger that could be reduced by dividing that unitary chamber into halves to check and balance each other. Greater authority of administration required an executive, removed from faction and politics of either chamber.

In late February of 1787, Jay wrote to his diplomat in London, John Adams, about the slow and halting movement for revising the powers of the federal government. Jay described what he saw as “the Changes which ought to take place” and these required more than reforming or amending the powers of the current Congress. Rather, an entirely new structure was required: “It is hard to say what those Changes should be exactly.—There is one however which I think would be much for the better, Vizt. to distribute the federal Sovereignty into its three proper Departments of executive, legislative and judicial, for that Congress should act in these different capacities was I think a great Mistake in our Policy.”

Within the same paragraph, and immediately after offering this insight, Jay brought up the recent action of New York’s legislature in repealing some of its laws disenfranchising and discriminating against loyalists. Jay commented, “I hope all Discriminations inconsistent with the Treaty of Peace will gradually be abolished, as Resentment gives place to Reason and good Faith.” So, in Jay’s mind, the prospect of calling a “Convention” to restructure the national government was connected to the long running issue of states ignoring Congress and its treaties to seize Tory property and discharge debts to England.⁹⁰

⁸⁷ Madison to Jefferson, April 23, 1787, *LMCC*, 589.

⁸⁸ Grayson to Madison, November 22, 1785, *LDC*, Vol. 23, 24.

⁸⁹ Lee to Washington, December 26, 1784, *LDC*, Vol. 7, 636. For a balanced analysis of the issue of the British forts from both sides of the Atlantic, see Alfred L. Burt, *The United States, Great Britain, and British North America* (New York: Russell & Russell, 1961).

⁹⁰ John Jay to John Adams, February 21, 1787, *The Selected Papers of John Jay*, Vol. 4, 1785–1788, Elizabeth M. Nuxoll, ed. (Charlottesville: University of Virginia Press, 2015), 478–79.

The Convention

The founders' conviction that the states had allowed their legislatures to accumulate what Alexander Hamilton termed an "excess of democracy" was the tipping point that led to restructuring the nation's fundamental law. In the days following the conclusion of the Philadelphia convention, Madison observed that it was particularly the "flagrant" "evils issuing" from state legislatures that "contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects." So thoroughly did Madison think the state legislatures required checks and balances that he had unsuccessfully pushed during the convention for a specific federal veto over all state laws.⁹¹

While Madison was also deeply troubled by laws emitting paper currency and frustrating foreclosures of property, he seems to have viewed the state laws that conflicted with treaties to be the main problem facing the delegates who would draft the Constitution. Indeed, while a member of the Virginia assembly, Madison himself voted for a measure that would allow Virginians to pay their taxes with tobacco rather than specie. When Madison reminded his fellow Virginian Jefferson of "our own experience both during the war and since the peace" when states were too solicitous of popular moods and passed unwise laws, he termed these "[e]ncroachments of the States on the general authority, sacrifices of national to local interests..." pointing to laws that conflicted with federal authority rather than those that may have been, in his view, the unwise rule of the mob, but local matters.⁹²

Madison's fixation with the problem of state legislatures trampling over federal powers is evident in the notes he accumulated that he eventually organized into a memorandum he titled "The Vices of the Political System of the United States." In this outline, Madison listed twelve vices of the present Confederation government that had to be reformed. "Encroachments by the States on the federal authority" and "Violations of the law of nations and of treaties" ranked second and third on Madison's twelve point list trailing only behind "Failure of the States to comply with the Constitutional requisitions."⁹³

The bold proposal to hold a convention to redraft a new constitution, rather than just propose amendments to the existing Confederation charter, was the brainchild of Charles Pinckney. It was Pinckney who took the floor during the

⁹¹ Madison to Jefferson, October 24, 1787, *The Papers of James Madison*, Vol. 10, May 27, 1787–March 3, 1788, Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, and Frederika J. Teute, eds. (Chicago: The University of Chicago Press, 1977), 205–20. Hamilton used the phrase "excesses of democracy" while arguing for a more powerful Senate and executive during the Constitutional Convention. *The Papers of Alexander Hamilton*, Vol. 4, January 1787–May 1788, Harold C. Syrett, ed. (New York: Columbia University Press, 1962), 195–202.

⁹² Madison's vote on tobacco is mentioned in p. 86. Madison to Jefferson, October 24, 1787, *The Papers of James Madison*, Vol. 10, May 27, 1787–March 3, 1788, Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, and Frederika J. Teute, eds. (Chicago: The University of Chicago Press, 1977), 205–20.

⁹³ *The Papers of James Madison*, Vol. 9, April 9, 1786–May 24, 1787, Robert A. Rutland and William M. E. Rachal, eds. (Chicago: The University of Chicago Press, 1975), 345–58.

session of Congress on February 7, 1786, and pointed out that the government's disastrous financial situation and its general powerlessness could only be solved by reworking its basic structure. Pinckney crusaded and lobbied his fellow Congressmen all the next year until they agreed to form a general convention.⁹⁴

The convention opened with its bare quorum on a Friday and occupied most of the day with organizing itself and delegating Pickney along with George Wythe and Alexander Hamilton to draft rules for their proceedings. Monday's session was again filled with credential-scrutinizing and rules-making. It wasn't until the next afternoon that anything of true importance occurred. Pinckney's fellow rooming house guest, Edmund Randolph, rose and listed the problems the nation faced: "commercial discord" existed between the states, "rebellion" in Massachusetts, foreign debts had become "urgent," paper-money created "havoc," and treaties had been "violated." The root of all of these lay in the "defects" of the present confederation. Interestingly, all the "defects" Randolph proceeded to describe connected to the controversy of the British treaty:

He then proceeded to enumerate the defects:—First, that the Confederation produced no security against foreign invasion; Congress not being permitted to prevent a war, nor to support it by their own authority. Of this he cited many examples; most of which tended to shew, that they could not cause infractions of treaties, or of the law of nations to be punished; that particular States might by their conduct provoke war without control; and that, neither militia nor drafts being fit for defence on such occasions, enlistments only could be successful, and these could not be executed without money.⁹⁵

Randolph's list of faults continued through several more points, most of these having to do with Congress' lack of power over the states: that the federal government could not resolve a "quarrel between the states," "defend itself against encroachments from the States," or put down a rebellion within them because it did not have "means to impose according to the exigency." Congress didn't need more powers; it just needed more power.

Randolph then proposed the plan that he and the other Virginians, Madison and McClurg, had agreed upon—that the Articles of Confederation should be "corrected and enlarged." He proposed fifteen revisions, including splitting Congress into two houses, the lower house proportioned by population ("free inhabitants" or a "rule [as] may seem best") the members of the second house to be elected by the other. Randolph's plan added executive and judiciary branches, and a "Council of Revision" that was empowered to overrule state laws. Except for the tripartite frame of government with its bicameral

⁹⁴ Marty D. Matthews, *Forgotten Founder: The Life and Times of Charles Pinckney* (Columbia: University of South Carolina Press, 2004), 30–33.

⁹⁵ *Journal of the Constitutional Convention Kept by James Madison*, Erastus H. Scot, ed. (Chicago: Scott, Foresman & Co., 1893), 59–60.

legislature, nothing in this so-called “Virginia Plan” looked anything like the government that would be hammered out over the next three months.

Immediately upon Randolph taking his seat, Charles Pinckney rose to introduce his plan of government. While Randolph’s speech is only known in outline from Madison’s notes (Madison revised his notes with a summary Randolph later provided), Pinckney’s rhetoric is preserved.

Perhaps he felt entitled and piqued because he wasn’t able to hold the floor and deliver all of his planned speech, or maybe he was just a rule-breaker, but Pinckney, who had written the rules, which included utter secrecy both during and after the convention, published the speech he wasn’t able to finish almost immediately after the convention closed. It is, as a result, one of the few verbatim records of remarks delivered on the convention floor. Pinckney began by reviewing why they were there in the first place, “It is, perhaps, unnecessary to state to the House the reasons which have given rise to this Convention.” Which, of course, means he would, and the reasons he highlighted all pointed to the trouble with the British and the enslaved people they sheltered:

Our government is despised—our laws are robbed of their respected terrors—their inaction is a subject of ridicule—and their exertion, of abhorrence and opposition—rank and office have lost their reverence and effect—our foreign politics are as much deranged, as our domestic economy—our friends are slackened in their affection,—and our citizens loosened from their obedience.⁹⁶

It is not difficult to locate the causes of America’s “deranged” foreign politics, its “despised” government with its “inaction” and ignored laws. The federal government was simply “destitute of that force and energy, without which, no government can exist.” As that government currently consisted of nothing more than a national legislature, dependent on its constituent governments to carry out its will, it “might therefore to be said, in some measure, to be under the control of the State legislatures.” While not mentioning the issue of the fugitive slaves directly, Pinckney alluded to it in a way that everyone in the chamber would have understood. The “laws of the several States” had “interfered” with Congress’ “objects or operations.”

Step by logical step, Pinckney marched to his radical conclusion, a proposition that no delegate had yet voiced, that Randolph with his “Virginia Plan” that suggested fifteen amendments to the existing Articles, feared to tread. The whole charter needed to be scrapped and reinvented.

Like Randolph’s plan, Pinckney envisioned a bicameral legislature and a government with three branches.⁹⁷ Peppered throughout Pinckney’s list of

⁹⁶ Charles Pinckney: “Observations On The Plan of Government Submitted to The Federal Convention, in Philadelphia, on the 28th of May, 1787” (May 28, 1787).

⁹⁷ Andrew C. McLaughlin, “Sketch of Charles Pinckney’s Plan for a Constitution, 1787,” *American Historical Review* 9, no. 4 (July, 1904): 735–47; Charles C. Nott, *The Mystery of the Pinckney Draught* (New York: The Century Co., 1908); S. Sidney Ulmer, “James Madison and the Pinckney Plan,” *South Carolina Law Quarterly* 9 (1957): 416–43; John F. Jameson, “Studies in the History of the Federal Convention of 1787,” *Annual Report of the American Historical Association* 1 (1902): 87.

governmental powers were mechanisms that had they existed a few years earlier would have prevented the breakdown of the Peace of the Paris. Where the old Articles merely attempted to restrain states from trespassing on federal prerogatives (“No State shall lay any imposts or duties, which may interfere with any stipulations in treaties”), Pinckney’s plan clearly stated the legal supremacy of treaties and required federal judges to interpret them that way. Of course, these were just legal principles, the real power came from the business end of a gun. Pinckney vested authority in the federal government to nationalize state militia, an authority necessary because, as he explained publicly, militia “are in fact the only adequate force the Union possess, if any should be requisite to coerce a refractory or negligent Member, and to carry the Ordinances and Decrees of Congress into execution.”⁹⁸

When the convention was finally adjourned, Madison wrote a famous and lengthy summary of its achievements and failures to Jefferson in Paris. At one point, Madison ruminated upon the factors that had led up to the convention and surmised that it was the lack of a “constitutional negative on the laws of the States” that made it happen:

The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

Several historians have interpreted these remarks to indicate that Madison was referring to the sort of stay laws and paper money pushed by poor farmers that infringed upon the rights of merchants and bankers. But they could equally reflect the long record of states trampling on Congress’ ratified Treaty of Paris. While Madison certainly viewed the sort of populist debtor laws the Shaysites demanded in Massachusetts as trampling on individual rights, they did not necessarily violate federal prerogatives the way that loyalist confiscation laws did and in other portions of his letter Madison seemed far more concerned with such transgressions.

Madison began his letter by noting that no delegate had suggested dividing the nation, or what Madison termed “a partition of the Empire,” and then immediately headlined what he must have seen as the convention’s greatest work, overcoming the “evil of imperia in imperio” the “encroachments of the States on the general authority” that had been “a great part of the history of our political system.” At least, he observed, it “was generally agreed that the

⁹⁸ Charles Pinckney: “Observations On The Plan of Government Submitted to The Federal Convention, in Philadelphia, on the 28th of May, 1787” (May 28, 1787); *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, Jonathan Elliot, ed., 2nd ed. Vol. 1 (Washington: Taylor & Maury, 1854), 68–69.

objects of the Union could not be secured by any system founded on the principle of a confederation of sovereign States” or the “voluntary observance of the federal law by all the members.” While Madison fell short in pulling the body towards granting the federal government a veto over state laws, he took comfort that the central government was strengthened and, at last, given power.⁹⁹

Epilogue

America’s new Constitution had just been ratified when Lord Grenville, whose London office oversaw “colonial affairs,” dispatched a special emissary to New York to discuss future commercial agreements. Lieutenant-Colonel George Beckwith arrived in New York as the federal government was just preparing for its first meeting of Congress. Beckwith knew the city well as he had served under General Carleton during his time preparing for the evacuation of soldiers, loyalists, and refugees from American slavery from the city.

Beckwith was unable to meet with America’s new Secretary of State because Jefferson had yet to return from France, so instead he arranged a series of meetings with Alexander Hamilton, the Secretary of the Treasury. Hamilton assured Beckwith that he spoke for “the most enlightened men in this country” and that his views were also “those of General Washington...as well as of a great majority in the Senate.” More importantly, Hamilton emphasized that he spoke for a central government that now had the power to enforce its will upon the states and was a reliable partner to any agreements the two countries would reach. “We have lately established a Government upon principles, that in my opinion render it safe for any nation to enter into Treaties with us...which has not hitherto been the case,” he boasted.

The two men spoke extensively of trade policies and the future of their respective “empires” but Hamilton soon cautioned the English emissary that there were still outstanding issues to be settled from the old Treaty of Peace. “There are two points only that occur to me as being complained of,” Hamilton said. He then explained that the laws confiscating English property and disadvantaging English creditors were effectively “done away by the present Government” with the “formation and establishment of its Judiciary branch” and soon the organization of a “supreme court very shortly.”

Having established those British complaints would soon be swept away by the powers of the new federal system, Hamilton then pivoted to America’s complaints, of which there were only two. “On our side there are also two points still unadjusted, the Western Forts and the Negroes...” Hamilton then confided in Beckwith that personally he approved of General Carleton’s policy, saying “To have given up these men to their masters, after the assurance of protection held out to them, was impossible...” The official summary of Beckwith’s memoranda of these discussions, prepared for dispatch to

⁹⁹ “James Madison to Thomas Jefferson, October 24, 1787,” *The Papers of James Madison*, Vol. 10, 27 May 27, 1787–March 3, 1788, Robert A. Rutland, Charles F. Hobson, William M. E. Rachal, and Frederika J. Teute, eds. (Chicago: The University of Chicago Press, 1977), 205–20.

London, omitted Hamilton's support of London's sanctuary policy and simply read: "That a government is now established in the United States with which it is safe to enter into treaties" and that the conversation added some other "considerations respecting the confiscation and other Acts, the cession of the western posts, and the giving up of negroes..."¹⁰⁰

Hamilton's frank conversation with Beckwith revealed that in the mind of this leading Federalist, the strong central government had all along been propelled by the necessity for this young aspiring nation to play the great game of empire by upholding its agreements. Congress' failure and paralysis in enforcing the terms of its most important international agreement—the one that recognized its sovereignty and independence, secured its trade, and opened the door to the conquest of a vast hinterland—had been brightly illuminated by the tangle of patriot demands for the reenslavement of fugitives from slavery, British refusals to hand over men and women under their protection, and popular retaliation against English Tories and merchants in response. The road from the Articles to the Constitution was built, like so much else in early America, by the sweat and labor of black people struggling for their freedom and patriots trying to confine them. The men, women, and children who secured their liberty from American slavery by sailing away on British ships were instrumental in forcing the founders to realize one of the holes in their blueprint of government that could not be fixed without starting over.

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¹⁰⁰ Samuel Flagg Bemis, *Jay's Treaty: A Study in Commerce and Diplomacy* (New York: Macmillan Co., 1924), 43–47; Ron Chernow, *Alexander Hamilton* (New York: Penguin Press, 2004), 294–95; *Report of Canadian Archives, 1890*, Douglas Brymner, ed. (Ottawa: Brown Chamberlin, 1891), 125, 127, 239.

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