

# Flesh of Our Flesh

Imperial Ambition and Republican Strategy in the U.S. Constitution

(draft)

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*“We are providing for our posterity, for our children & our grand Children, who would be as likely to be citizens of new Western States, as of the old States.” – Roger Sherman (1787).*

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## Preface

The core thesis of this book emerged gradually and then suddenly in the course of teaching a recurrent seminar on the *Federalist Papers*, first at Harvard Law School and then for more than twenty years at New York University School of Law. What I came to understand, expressed with telegraphic brevity, is that the United States Constitution is a plan of action. That at least is how its principal supporters during the ratification debates saw and defended it. If this assessment is correct, then we need to identify the most momentous objective of the plan, eclipsing all other “general and national purposes”<sup>1</sup> by its urgency and prominence in the value hierarchy of the age. This commanding and exhilarating aim, shared by the reformers who seized and maintained the initiative during the entire constitution-making process, was continental empire.

The framers devoted themselves to designing and enacting a new basic law because of what they wanted to do, not because of what they wanted to avoid doing, and their most historically consequential and politically pressing objective was to incorporate into the coastal federation the vast “unsettled” territory beyond the political control of the existing states. Although it was admittedly only one of the “principal purposes to be answered by Union,”<sup>2</sup> the collective will to extend the Confederation westward played an outsized, agenda-setting role in shaping the most ingenious and novel features of the Constitution. Without such an extravagantly ambitious long-term goal, moreover, there would have been much less pressure for Northerners and Southerners to put their deep religious and economic differences aside to restructure or even maintain the Union.

To pursue their expansionist objective, counterintuitively, the framers relied on two action instruments. These were the rights of individuals and the rights of states. That the framers saw both individual rights and states’ rights not as bulwarks against federal power, as many commentators assume, but as facilitators of federal expansion across the continent is doubtless the most paradoxical claim advanced in the pages below.

It also represents my attempt to liberate public understanding of the framers’ Constitution from a series of distorting, often anachronistic, and stubbornly persistent misconceptions. By far the most influential of these fallacies is that the United States Constitution imposed limits on government by guaranteeing rights and decentralizing power. That is pretty much the opposite of the truth. Far from wishing to constrain the federal government, those who worked to draft and ratify the new system aimed to unleash the “encroaching nature” of American power. They designed their plan of government, including federalism and basic rights, to help the confederated states intrude energetically and irreversibly into lands that were, at the time, warmly contested by rival powers.

A new generation of constitutional scholars and political historians have “unmasked” the expansionism animating the American project.<sup>3</sup> Although they offer many interesting insights along the way, in the end they are stating what should have been obvious. The framers’ imperial ambitions were not hidden desires needing to be uncovered but openly avowed and celebrated goals. The

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<sup>1</sup> *Federalist Papers*, No. 3.

<sup>2</sup> *Federalist Papers*, No. 23.

<sup>3</sup> For two notable examples, see Aziz Rana, *The Two Faces of Freedom* (Harvard University Press, 2010); Adam Dahl, *Empire of the People* (University of Kansas Press, 2018).

puzzle for law and history is not why they were interested in expansion, but rather how they intended to go about achieving it. To answer that question, we need to examine their strategic use of liberal norms and practices alongside representative government at a state and federal level as part of what turned out to be a successful bid for continental empire undertaken against almost impossible odds.

Anatomizing the liberal imperialism that, for better or worse, animated the most original provisions of the United States Constitution has nothing to do with justifying or condemning “settler colonialism.” My approach is analytical and explanatory rather than exculpatory or prosecutorial. It will also be self-consciously partial, requiring a severely selective treatment, not a comprehensive account of every aspect of the framing. My focus falls on a few strategic principles that informed and structured the institutional machinery meant, in turn, to effect the creation and consolidation of a republic of republics on a continental scale. By stressing the most striking “changes and innovations”<sup>4</sup> that distinguished the 1787 Constitution from the Articles of Confederation, I intend to provide a theoretical elaboration and completion of Robert Kagan’s controversial but fundamentally correct, and even profound, assertion that “[l]iberalism in the eighteenth century, and for the next two hundred years, was the main engine of American expansion.”<sup>5</sup>

Laying the foundations for a historically unprecedented republican empire meant, most immediately, binding the West constitutionally to the East. To realize this ambition, the framers adopted a distinctively liberal approach to colonization and settlement. That, however, is only half of the story. While calculatingly liberal, the framers’ project also had an undeniably racial, and therefore brutally illiberal, dimension. The republic they designed for westward expansion was in some sense a “dual state.”<sup>6</sup> They consciously created a two-caste order where, as a general matter, “our posterity” were to enjoy the blessings of liberty while nonwhites were, in varying degrees, subjected to arbitrary forms of coercion, including enslavement and gradual dispossession. This denial of individual rights to nonwhites, a dispensation that we now consider the quintessence of an illiberal political order, was not just a residual dark side of the Constitution. It played a critical role in the constitutional project of overland expansion. Clarifying how both framers and ratifiers

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<sup>4</sup> *Federalist Papers*, No. 37.

<sup>5</sup> Robert Kagan, *Dangerous Nation* (Vintage, 2006), p. 72. Kagan goes seriously wrong only when he argues that liberalism was “such a potent engine for expansion in part because a government founded on liberal principles could not easily prevent expansion” (Ibid., p. 74). His mistake here is to confuse the tide of migration, which was indeed unstoppable, with the project of expansion, which required the voluntary adherence of Westerners to the eastern Confederation. Liberalism was a potent engine for expansion not because the federal government was structurally incapable of preventing land-hungry settlers from crossing the mountain barrier but rather because a remarkably effective federal government, with no other instruments of conquest at its disposal, shrewdly deployed individual rights, including fee-simple property and a degree of political autonomy at the state level, to Americanize the settler movement, that is, to harness popular energies and loyalties to a national project of republican empire.

<sup>6</sup> Borrowing Ernst Fraenkel’s terminology and applying it to the American case, we can say that, with some exceptions, the framers created a “normative order” for whites and a “prerogative order” (*Maßnahmenstaat*) for nonwhites. Fraenkel, *The Dual State. A Contribution to the Theory of Dictatorship* (Oxford University Press, 1941).

understood the relationship between white empowerment, black enslavement, and slow but sure native dispossession is another fundamental objective of the chapters that follow.

*Flesh of Our Flesh* represents my attempt to explain, develop and justify the claim that imperial ambition inspired and shaped both liberal and illiberal features of America's founding document. Its central thesis is that the most remarkable innovations in the framers' Constitution were concrete responses to a concrete threat that is underappreciated today because it vanished from public consciousness a few short decades after ratification. This was the danger that Britain, Spain, Native American tribes, and restless frontier leaders might irreversibly detach the vast territory between the Alleghenies and the Mississippi River from the federal union. Singling out the prevention of Western secession as the most significant of the multiple and sometimes clashing purposes of those who framed and ratified the Constitution will no doubt strike some readers as one-sided to the point of irreverence. In any case, the value of such a narrowly focused interpretive framework hinges on the new light it promises to shed on a topic that has occupied generations of devotedly meticulous scholars and theorists. The evidence, to the extent that I have managed to gather it accurately and present it effectively, should decide how well this promise has been fulfilled.

### Think Continentally

For more than two centuries, the great powers of Europe had been vying for empire in the Western Hemisphere. The American Revolution turned out to be a spectacularly successful bid to join this epoch-defining struggle. The very first public act of the Continental Congress in 1774 was to endorse the Suffolk Resolves which not only urged organized resistance to the Coercive Acts but also broadcast the Patriots' hope "to transmit ... to our innocent and beloved offspring ... a boundless extent of continent, swarming with millions."<sup>7</sup> Tom Paine roused his readers to rebellion in the same spirit, reminding them "that our strength is continental, not provincial." That the making of a republican constitution could contribute to the building of an empire, he took to be a self-evident truth. A new "continental charter," he explained, would allow the united colonies to seize control of an entire continent occupying "at least one eighth part of the habitable globe."<sup>8</sup>

After winning Independence, such apostles of continentalism had to cope with the confederacy's embarrassing lack of military, administrative and fiscal resources compared to Britain, Spain or France. Their only decisive advantage was a formidable demographic edge. If the semi-independent states could be yoked together politically and the land-hungry population's "rage for emigrating to the western country"<sup>9</sup> could be channeled into a nationally coordinated thrust across the mountain barrier, the Union could conceivably wrest control of most of North America from its European and Native American competitors. To parlay the country's current and growing numerical superiority into sole proprietorship and dominion over "a boundless extent of continent," the framers improvised a singular strategy for transforming the spontaneous westward migration of individuals and families into a scripted, state-by-state expansion of the federal union itself. To harness the ongoing and only weakly coordinated westward movement to serve a collective project of national development, the framers worked out a comprehensive plan for preventing new Western settlements from breaking their tenuous ties with the coastal confederation. They subtly wove a blueprint for overland expansion into the radically novel instrument of government they crafted in Philadelphia in the summer of 1787. The institutional mechanisms they created to parry the threat of Western secession, and thereby secure the West's attachment to the East, illustrate what one of

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<sup>7</sup> "Suffolk County Resolutions, September 1774," *JCC* I:35. Rakove, *The Beginning of National Politics* (Knopf, 1979), p. 47.

<sup>8</sup> Paine, "Common Sense," *Collected Writings* (Library of America, 1995), p. 21, 33-34. The "Model Treaty" drafted by John Adams in 1776 to serve as a template for the young Republic's foreign relations also reveals the breathtaking scope of the Founding generation's territorial ambitions. As Article IX explained, "the true Intent and meaning of this Treaty" was "that the said United States, shall have the sole, exclusive, undivided and perpetual Possession of the Countries, Cities, and Towns, on the said Continent, and of all Islands near to it, which now are, or lately were under the Jurisdiction of or Subject to the King or Crown of Great Britain, whenever they shall be united or confederated with the said United States."

<sup>9</sup> Jay to William Bingham, May 31, 1785. This "rage for emigration" was often associated with a rage for "the establishment of new States" that might but might not choose to join the Union. Arthur Lee to John Adams, March 6, 1785, *PJA*, 16:546. Although it was generally agreed that "after peace shall take place," Trans-Appalachia would "be overspread with inhabitants" ("A letter from Congress to John Jay," October 17, 1780, written in Madison's hand. *JCC* 18:945), many contemporaries nevertheless doubted that the new western settlements, when fully developed, would join the Confederation.

the leading Federalists at the Convention and the strongest voice for ratification in Pennsylvania had in mind when he characterized the Constitution as “so contrived as to expand.”<sup>10</sup>

### What Changed?

Constitutional reforms are unintelligible without reference to the specific challenges their authors designed them to overcome. The publicly announced purpose of this historically novel instrument of government, in words less transparent than they first appear, was “to preserve the Union.”<sup>11</sup> The framers’ case for ratifying the proposed Constitution emphasized “the insufficiency of the present confederation to preserve that Union.”<sup>12</sup> Preserving the Union “was the great object of the people in forming that convention, and it is also the great object of the plan which the convention has advised them to adopt.”<sup>13</sup>

But what did these constitutional reformers mean by “preserving the Union”? And how did their proposed plan improve the Confederation’s chances of survival and success?

The previous charter of the United States, framed in 1777 and ratified in 1781, was inadequate to the task of preserving the Union for one simple reason. The Union that the framers of 1787 wished to “preserve” was no longer an Atlantic seaboard federation. Nor was it merely an association of coastal colonies that had recently banded together to wrest themselves free, singly and collectively, from British domination.

By far the most consequential intervening change was the doubling of the landmass that the Union government could realistically aspire to control. By the express terms of the 1783 Treaty of Peace, Great Britain “ceded” most of the eastern half of the Mississippi Valley to the American federation. Unmoved by the Treaty, Spain continued to station troops on the east bank of the lower Mississippi in putative American territory, while Native Peoples continued to inhabit and control most of the interior. Although neither of these formidable regional powers recognized the unilateral British cession, Congress seized upon the rationale it offered for transforming Trans-Appalachia into “a mine of vast wealth to the United States.”<sup>14</sup> Eye-watering Western horizons burst the institutional seams of the now superseded constitution that the Continental Congress had improvised a decade earlier to coordinate an ad hoc military alliance among rebellious seaboard communities seeking political independence.

To transform this thrilling prospect into an internationally recognized political reality, Congressional leaders set out, between 1783 and 1787, to coordinate state policies toward sovereignty and property in the West. The principal achievement of the Confederation Congress during this period, historians agree, was the conversion of mutually inconsistent state claims to western lands into *national* claims to be advanced and defended using the pooled resources of all members of the Union. Thomas Jefferson played an indispensable role in shaping the

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<sup>10</sup> James Wilson, “On the Improvement and Settlement of Lands in the United States,” *Collected Works of James Wilson*, Vol. 1, edited by Kermit L. Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), p. 373.

<sup>11</sup> *Federalist Papers*, No. 8.

<sup>12</sup> *Federalist Papers*, No. 1.

<sup>13</sup> *Federalist Papers*, No. 2.

<sup>14</sup> *Federalist Papers*, No. 38.



Confederation's Western policy in this period. He therefore deserves credit, as we shall see, for helping publicize the image of an expanded Union that the framers at Philadelphia subsequently aimed "to preserve."

"Foreigners," Hamilton explained at the Convention, "are jealous of our increasing greatness."<sup>15</sup> When he and Madison extolled the Union as "our bulwark against foreign danger,"<sup>16</sup> they meant the danger that the European superpowers, often acting through Native American proxies, would exploit the religious and economic differences among the country's regions to shatter their Union and prevent its collaborative development into a continental empire. What the framers aimed to defend, in other words, was America's potential *future* greatness. Intelligence that both Spain and Britain, in the mid-1780s, were actively encouraging secessionist movements in the West lent urgency to Congress's efforts to coordinate the Confederation's scant military and tax-gathering capacities. To preserve the Union as they imagined it, the expansionists around George Washington developed a plan to realize the territorial aspirations of the Patriots who had initiated the War of Independence. They decided to replace the Articles of Confederation because it had betrayed these Revolutionary aspirations. The loose league of states it created had proved too weak and disjointed to "baffle all the combinations of European jealousy to restrain our growth."<sup>17</sup>

The most original features of the Constitution reflect the framers' scheme for preventing Western secession by consolidating American sovereignty over "the great extent of country which the Union," as they imagined it, "embraces."<sup>18</sup> Evidence that ardent expansionism inspired and shaped the Constitution starts with the meaning of "to preserve the Union." For the leading minds among the framers, *preserving* the Union meant *extending* it far beyond the territory that its member states controlled. Their version of federalism was historically unprecedented because they designed it to enable and encourage successive annexations of contiguous territory in tandem with the sporadic and uneven but relentless advance of the line of settlement. To outmaneuver the hostile containment strategies of Britain and Spain, they reimagined federalism in an expanding republic less as a *structure* than as a *scenario* for encroaching piecemeal on lands claimed by rival powers.

Later, after the confederation's first decade of overland expansion, Hamilton would provide a succinct restatement of the framers' fundamental causal claim in this regard. In 1799, describing

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<sup>15</sup> Hamilton, June 29, Farrand I:473.

<sup>16</sup> *Federalist Papers*, No. 14. That its framers consciously designed the proposed Constitution to overcome the threat of Western secession is one of the principal, although seldom noticed, arguments for ratification contained in the *Federalist Papers*.

<sup>17</sup> *Federalist Papers*, No. 11. The strangely widespread idea that the Constitution was a betrayal of the Revolution, a betrayal inexplicably perpetrated by some of the leading Revolutionaries, fails to take seriously the continentalist aspirations they share. After all, the Revolution was provoked in part by Britain's attempt to "restrain our growth" with the Proclamation Line of 1763 and the Quebec Act of 1774. As Corwin remarked: "Rebels against the authority of the British Empire could not have taken an impoverished view of their future; and at the beginning of the war at least the spirit of Continentalism, forerunner of Manifest Destiny, was abroad in the land." Corwin, *French Policy and the American Alliance* (Princeton University Press, 1916), p. 217. That is why it makes more sense to accuse the Articles of Confederation of betraying the Patriot's expansionist cause by setting up a weak alliance easy for the European powers to confine to the region east of the Appalachians.

<sup>18</sup> *Federalist Papers*, No. 14.

American control of “the Floridas and Louisiana” as “the key to the Western country,” he remarked that “I have been long in the habit of considering the acquisition of those countries as *essential to the permanency of the Union*.”<sup>19</sup> The Confederation’s survival presupposed successive enlargements. That was an essential premise of the framers’ plan. It did not divide Jeffersonians from Hamiltonians, much less Northerners from Southerners, even though there were disagreements about the pace at which expansion should proceed. Indeed, without westward expansion the precarious union of North and South would almost certainly have dissolved.

### The Shadow of Dismemberment

If the Union failed to expand, they believed, it would not splinter into thirteen “sovereign” states. It would divide into rival northern and southern confederacies.<sup>20</sup> Paradoxically, the stark incompatibility of regional cultures and economies along the eastern seaboard, which presaged North-South disunion, intensified, rather than discouraged, the framers’ drive to tighten political ties with the western territories that were now formally adjoined to the confederation.<sup>21</sup> Wishing to “preserve the Union of so large an empire,”<sup>22</sup> the organizers and backers of constitutional reform corresponded obsessively about the need “to bind together the Western and Atlantic States.”<sup>23</sup> To begin to convey the moral and emotional importance to the framers of preserving the Union that had been formally (but not actually) expanded by the Peace Treaty of 1783, it helps to recall the haunting questions that Madison posed in a well-known 1785 letter to Lafayette:

Will the settlements which are beginning to take place on the branches of the Mississippi, be so many distinct Societies, or only an expansion of the same Society? So many new bodies or merely the growth of the old one? Will they consist of a hostile or a foreign people, or will they not be a bone of our bones, and flesh of our flesh?<sup>24</sup>

These existential questions about the future of American nationhood continued to preoccupy Madison and his allies in 1787. Their challenge was to frame a new constitution that could prevent “the dismemberment of the empire”<sup>25</sup> and ensure that the western settlements became consubstantial with the coastal states.

Fear of losing the current but perhaps fleeting opportunity to incorporate Trans-Appalachia into the Union dominated the geopolitical strategizing of the post-Revolutionary period. George

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<sup>19</sup> Hamilton to Harrison Gray Otis (January 26, 1799), emphasis added.

<sup>20</sup> “If we attend carefully to geographical and commercial considerations, in conjunction with the habits and prejudices of the different States, we shall be led to conclude that in case of disunion they will most naturally league themselves under two governments,” a Northern league and a Southern league. *Federalist Papers*, No. 13. This possibility of such a split seems is confirmed by the strong sectional divide along North-South lines that characterized votes in Congress in the year or two before the Federal Convention. H. James Henderson, Jr., *Party Politics in the Continental Congress* (McGraw-Hill, 1974), p. 395.

<sup>21</sup> Prior to the Revolution, it is worth recalling, efforts at inter-colonial union (the New England Confederation and the Albany Plan) had no Southern participants.

<sup>22</sup> *Federalist Papers*, No. 23.

<sup>23</sup> Madison to George Nicholas (May 17, 1788), in Bailyn, *The Debate on the Constitution* (Library of America, 1993), vol. 2, p. 444.

<sup>24</sup> Madison to Lafayette (March 20, 1785).

<sup>25</sup> *Federalist Papers*, No. 13.

Washington founded the Potomac Company in 1785 to help cement the coastal confederacy's hold on the lands across the mountain barrier by lowering transportation costs between East and West.<sup>26</sup> The emphasis on internal improvements was natural when communication was still wholly dependent on transportation.<sup>27</sup> Washington's consuming political passion was "to bind all parts of the Union together by indissoluble bonds—especially that part of it, which lies immediately west of us."<sup>28</sup> To preserve the Union, from his perspective, meant to "connect the New States, which are rising to our view in the Regions back of us, with those on the Atlantic, and thereby "to bind all parts of the Union together by indissoluble bonds—especially that part of it, which lies immediately west of us."<sup>29</sup> "connect the New States, which are rising to our view in the Regions back of us, with those on the Atlantic,"<sup>30</sup> and thereby "to bind all parts of the Union together by indissoluble bonds—especially that part of it, which lies immediately west of us"<sup>31</sup> was one of his driving obsessions.<sup>32</sup> For Washington, especially, preserving the Union meant "to open and make easy the ways between the Atlantic States and the Western territory."<sup>33</sup>

Washington was particularly anxious "to prevent the trade of the western territory from settling in the hands, either of the Spaniards or British," an unwelcome but all-too-likely outcome given the relatively convenient waterways for shipping western produce through the imperial possessions of each. If Trans-Appalachian trade were drawn into these channels, he warned, "there is a line of separation at once drawn between the Eastern and Western Country. The consequences of which may be fatal."<sup>34</sup> If they were to "become a distinct people from us," rather than "adding

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<sup>26</sup> If the project succeeded, "the East would be linked to the trans-Appalachian West, an essential step in Washington's dream—and the reveries of all nationalists—of holding together a United States that stretched all the way to the Mississippi River." John Ferling, *The Ascent of George Washington. The Hidden Political Genius of an American Icon* (Bloomsbury, 2009), p. 324.

<sup>27</sup> Analogously, Franklin's national postal service allowed newspapers to circulate at reduced rates "to foster the connections that would integrate an emerging nation." Walter Isaacson, *Benjamin Franklin. An American Life* (Simon & Schuster, 2003), p. 459. See also John Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States* (University of North Carolina Press, 2001).

<sup>28</sup> Washington to Benjamin Harrison (October 10, 1784).

<sup>29</sup> Washington to James Warren (October 7, 1785). Washington had been "an advocate of empire long before he became the hero of a revolution." Anderson and Cayton, *Dominion of War*, p. 107. See also Joel Achenbach, *The Grand Idea: George Washington's Potomac and the Race to the West* (Simon & Schuster, 2004).

<sup>30</sup> Washington to James Warren (October 7, 1785).

<sup>31</sup> Washington to Benjamin Harrison (October 10, 1784);

<sup>32</sup> Joel Achenbach, *The Grand Idea: George Washington's Potomac and the Race to the West* (Simon & Schuster, 2004).

<sup>33</sup> Washington to Richard Henry Lee (August 22, 1785), PGW, 3:196.

<sup>34</sup> Washington to Jacob Read (November 3, 1784).

strength to the Union,” they would become “a formidable and dangerous neighbor”<sup>35</sup> and “a severe thorn in our sides.”<sup>36</sup>

Although it would help bridge this gulf of separation, the engineering of new roads, canals and portages “to open all the communications which nature has afforded between the Atlantic States and the Western Territory”<sup>37</sup> would not, by itself, prevent the western settlers from being irreversibly “alienated from us.”<sup>38</sup> The Union’s political institutions had to be fundamentally re-engineered to “bind those people to us by a chain which never can be broken.”<sup>39</sup> When Washington’s protégés arrived in Philadelphia in the early summer of 1787, the challenge of tying the West politically as well as commercially to the East was foremost in their minds.

Thomas Jefferson’s letters to Madison around the time of the Convention reflect similar priorities and anxieties. Jefferson, too, worried that the western settlers “will end by separating from our confederacy and becoming its enemies.”<sup>40</sup> In the run-up to the Convention, he pointedly reminded Madison of his “serious apprehensions of the severance of the Eastern and Western parts of our confederacy.”<sup>41</sup> Some weeks later, he repeated his fear of an imminent “act of separation between the Eastern and Western country,” an outcome that would entail “a relinquishment of five parts out of eight of the territory of the United States.” He then added: “If they declare themselves a separate people, we are incapable of a single effort to retain them.”<sup>42</sup>

Jefferson reprised this painful theme while the Philadelphia Convention was underway. Referring to the Trans-Appalachian West, he told Madison: “When we consider the temper of the people of that country, derived from the circumstances which surround them, we must suppose their separation possible at every moment.”<sup>43</sup> All was not lost, however. The “men of the western

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<sup>35</sup> Washington to Henry Knox (December 5, 1784). The fear that the western settlers were becoming “a distinct People that has little connection with ... any of the Atlantic States” and that they would therefore be “fit instruments ready to be laid hold of by their Enemies” was common at the time. “Arthur St. Clair’s speech,” August 18, 1786, *LDC* 23:493. This particular restatement of a common worry is worth citing because uttered by a future governor of the Northwest Territory *before* the framers had overcome his doubts by crafting their novel but realistic plan for expanding the Union by a piecemeal addition of new self-governing member states. Here are a few additional expressions of the same worry: if “the people west of the mountains would be severed from their brethren on the East, they would “either set up for themselves or put themselves under the protection of Great Britain or Spain and in either case become formidable enemies to the US.” Henry Lee, Jr. (August 18, 1786), “Charles Thomson’s Notes of Debates,” *LDC*, 23:496); to “separate those people I mean all those westward of the mountains from the federal government” would probably “throw them eventually into the hands of a foreign power,” James Monroe to Madison (May 31, 1786); to “separate the interest of the western Inhabitants from that of the rest of the Union” would “render them hostile to it—that it would weaken if not destroy the union.” William Grayson (August 16, 1786), “Charles Thomson’s Notes of Debates,” *LDC*, 23:486.

<sup>36</sup> Washington to Samuel Purviance, Jr. (March 10, 1786), *PGW*, 3:594.

<sup>37</sup> Washington to Lee (June 18, 1786).

<sup>38</sup> Washington to Read (November 3, 1784).

<sup>39</sup> *Ibid.*

<sup>40</sup> Jefferson to Monroe (July 9, 1786).

<sup>41</sup> Jefferson to Madison (December 16, 1786).

<sup>42</sup> Jefferson to Madison (January 30, 1787).

<sup>43</sup> Jefferson to Madison (June 20, 1787).

waters” could be won over by fair dealing: “If they can be retained till their governments become settled and wise, they will remain with us always, and be a precious part of our strength and of our virtue.”<sup>44</sup> Because both his diagnosis and his remedy were apparently heeded at the Convention, Jefferson was later able to boast with a sense of personal achievement that “no constitution was ever before so well calculated as ours for extensive empire.”<sup>45</sup>

Madison, too, envisaged the Union’s East-West connectivity drive as running along two parallel tracks. The first was the relentless improvement of transportation infrastructure. To preserve the Union was “to facilitate the intercourse between the States,”<sup>46</sup> with an emphasis on shortening travel time between the coastal states and Trans-Appalachia: “The communication between the Western and Atlantic districts . . . will be rendered more and more easy by those numerous canals with which the beneficence of nature has intersected our country, and which art finds it so little difficult to connect and complete.”<sup>47</sup> As it turned out, such water routes connecting the coastal states with the eastern half of the Mississippi Valley proved harder to develop than Madison expected.<sup>48</sup> The hopes he vested in such internal improvements nevertheless reveal how he understood the Union’s future. In his mind, a “republic may be extended over a large region” if representatives from the new states to be created in the West are able to attend Congress “as often as may be necessary for the administration of public affairs.” By shortening “tramontane” travel times, internal improvements would give representatives of western states a chance to be heard in Congress equal to members from the original states. This was Madison’s main answer to “an objection that may be drawn from the great extent of country which the Union embraces.”<sup>49</sup>

The upgraded transportation routes linking the West to the East were to be complemented by a new, “partly national, partly federal” Constitution. In preparing arguments for the Virginia Ratifying Convention, Madison stressed the “inability of the existing confederation to retain the Western settlements under the general authority.”<sup>50</sup> A shrewdly reframed federation, if it could overcome sectional conflicts between North and South, could also prevent Trans-Appalachia from slipping away: “If the proposed Government will have energy enough to maintain the Union of the Atlantic States, it will be soon perceived, I think, that it will be equally capable at least, to bind together the Western and Atlantic States.”<sup>51</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> Jefferson to Madison (April 27, 1809).

<sup>46</sup> *Federalist Papers*, No. 42.

<sup>47</sup> *Federalist Papers*, No. 14.

<sup>48</sup> John Seelye, *Beautiful Machine: Rivers and the Republic Plan* (Oxford, 1991). **Seelye argues that the founders believed that natural and artificial waterways would tie together the states, east and west, but that the plan failed because of a lack of federal power over internal improvements.**

<sup>49</sup> *Federalist Papers*, No. 14.

<sup>50</sup> Madison to George Nicholas (May 17, 1788), in Bailyn, *The Debate on the Constitution* (Library of America, 1993), vol. 2, p. 444.

<sup>51</sup> Ibid. In Madison’s mind, the relation was apparently circular. Preventing North-South disunion was an essential condition for preventing East-West disunion and vice versa. The current Union would fall apart if it did not expand, and it would not expand unless it avoided breaking in two.

A few weeks before he arrived in Philadelphia, Madison wrote Washington about the mounting danger of East-West disunion: “the information from the Western settlements” is “truly alarming.”<sup>52</sup> He had just come from New York where Congress, throughout the early months of 1787, was debating proposals to head off western separatism by creating new western states and admitting them to the Union. Shortly before the Convention got underway, Madison reported that Congress was “at present deliberating on the most proper plan for disposing of the Western lands and providing a criminal and civil administration for the Western settlements beyond the Ohio.”<sup>53</sup> These discussions, aimed at reinforcing the Union’s tenuous hold on the territories, suffused the political atmosphere in which the Convention assembled at the end of May.<sup>54</sup>

Many if not most of his cherished proposals were voted down at Philadelphia. Madison nevertheless fought fiercely for ratification at Richmond and in the press. One reason was undoubtedly his conviction, shared by Washington and Jefferson, that avoiding East-West disunion ranked high, measured by gravity and urgency, among the multiple challenges facing the struggling Union government. The proposed Constitution was the last best hope for binding the western territories irreversibly to the coastal Confederation.

Recognition that the Union lacked the capacity to rule such geographically far-flung communities directly played an important role in structuring American federalism. The only hope for acquiring a continental empire was some version of divided sovereignty qualified by indirect federal rule. Congress had to help incubate new self-governing republics across the mountain barrier and persuade their leaders of the advantages of joining a national confederation.<sup>55</sup> The political jurisdiction of the new state governments would be restricted since where international affairs, Indian affairs, customs revenues, interstate dispute resolution and continental expansion were areas reserved to the federal government. The creation and admission of new states on these terms was the core of the framers’ plan for preventing what they feared most: the imminent severing of Trans-Appalachia from the Union. Congress could avert Western secession only if it managed to create and incorporate new, largely self-governing republics in areas beyond the effective control of existing state governments. Meeting this challenge was the most politically consequential of those “enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any.”<sup>56</sup>

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<sup>52</sup> Madison to Washington (April 16, 1787), LDC 24: 231

<sup>53</sup> Madison to Edmund Pendleton (April 22, 1787).

<sup>54</sup> The development of a workable and effective western settlement policy was the only significant achievement of the Confederation Congress. Seven delegates to the Philadelphia Convention were current or former members of Congress: Gorham (MA), King (MA), Johnson (CT), Madison (VA), Blount (NC), Few (GA), and Pierce (GA). This overlap of membership makes it virtually certain that the challenge of integrating the Western lands into the Union was on the minds of the framers as they gathered in Philadelphia.

<sup>55</sup> The brief interlude of federal supervision preceding statehood in the territories would help locals set up republican institutions and dispute-resolution mechanisms. It is somewhat misleading to describe territorial governors in this interim period as “authoritarian” since they didn’t aim at coercing inhabitants to join the Confederation by punishing opponents of incorporation.

<sup>56</sup> *Federalist Papers*, No. 14.

The proposed Constitution differed from the troubled league of states created by the Articles of Confederation in precisely this way. Its creators tailored the new system to foster overland expansion by coaxing and cajoling western communities to seek membership in the Union. To prevent Trans-Appalachia from hosting “a hostile or a foreign people,” the framers refashioned the Union to entice frontier settlements, despite their relative geographic isolation from the East, to cast their lot with the coastal states rather than establishing one or more independent Mississippi Valley federations, perhaps in alliance with Britain or Spain. Lack of coercive powers meant that Easterners had to cater to western interests and sensitivities. They had “to appease the discontents of our western brethren”<sup>57</sup> by making credible promises rather than wielding ominous threats.<sup>58</sup>

Although Hamilton was privately even more critical than Madison of the proposed plan of government, he, too, fought tirelessly for ratification. Convinced that the states up and down the seacoast shared a common interest in power and prosperity, as well as common enemies in Britain and Spain, he took it for granted that foreign competition made strategic planning at the national level into an imperative of republican statecraft. Leaping ahead once again, we find that the mastermind of Washington’s cabinet did not merely advocate a variety of subsidies to promote economic development. In the same mercantilist spirit, and contrary to the belief that Federalists in the 1790s were hostile to expansion, he declared the “strong link of connection between the Atlantic and Western country” to be “the knotty point of our affairs, as well as a primary object of our policy.”<sup>59</sup>

That he had already reached this conclusion in 1787 is amply demonstrated his most important speech at the Philadelphia Convention. Here is his preliminary list of the problems that, in 1787, Hamilton thought a new government under a revised constitution had to solve:

Let us take a review of the variety of important objects, which must necessarily engage the attention of a national government. You have to protect your rights against Canada on the north, Spain on the south, and your western frontier against savages. You have to adopt necessary plans for the settlement of your frontiers, and to institute the mode in which settlements and good government are to be made.<sup>60</sup>

When he surveyed the principal challenges facing the Union, securing and extending the American frontier was the first thing that came to Hamilton's mind.<sup>61</sup> Holding this territory against rival

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<sup>57</sup> Madison to Randolph (September 24, 1788).

<sup>58</sup> America’s expansionist elites knew they could not create a continental empire unless the footloose settlers freely chose loyalty to and incorporation in the Union. This is why the Union’s promises to potential settlers seemed palpably credible. The promisee trusts the promisor if the promisee knows that the promisor cannot achieve the promisor’s primary aims without the promisee’s voluntary cooperation.

<sup>59</sup> Hamilton to Washington (Cabinet Paper.) Remarks on the treaty of amity, commerce, and navigation, made between the United States and Great Britain (July 9, 1795).

<sup>60</sup> June 18, Farrand I:297. This passage appears in Yates’ notes, not in Madison’s. Hamilton employs the locution “to institute the mode” as a synonym for “to constitute” or “to frame a constitution.”

<sup>61</sup> “Hamilton’s design for national greatness,” according to Lance Banning, “envisioned an arena of competing empires into which America must enter much like any other state.” It would become “a nation capable in time of rivaling the Europeans empires on the Europeans’ terms.” Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca: Cornell University Press, 1995), p. 310.

powers would require a concerted effort to win the allegiance of both western leaders and ordinary settlers to the Union. The term was not yet fashionable. But “liberalism,” in a sense to be defined, was the answer.

This meant, first, offering terms of membership, including substantial autonomy and a decisive voice in national affairs, structured to be too generous for frontier leaders to refuse.<sup>62</sup> It also meant providing common whites with the opportunity to possess freehold property in land, helping to protect it from Indian violence, and opening up access to world markets. Such public provision would accelerate the immigration of industrious farmers and the rapid development of political organization among the settlers. No new Constitution could create overnight and by fiat an expanded confederacy capable of competing, fiscally and militarily, with the Spanish and British empires. What it could hope to do, and relatively quickly, was to encourage the human tidal wave of settlers already moving West to organize themselves politically while remaining loyal to the Union. This would help consolidate American control of territories that were impossible to dominate sustainably by the meagre military forces available to the United States at the time.

From Hamilton’s and Madison’s perspectives, the new plan of government, whatever its defects, deserved support primarily because it increased the chances that the Union government would be able to retain the eastern half of the Mississippi Valley inside the Confederation. The crux of this strategy was to create self-governing republics in the national domain, to offer legally defined and militarily protected property rights to settlers, and to offer state leaders membership in the Union on terms more favorable than the concessions and privileges held out by Britain and Spain to coax them into secession.

### Keeping it Together

Constitutional historians seldom emphasize an obsessive fear of Western secession as one of the principal motives for convening the Federal Convention. The standard view is that the framers had a long, tangled menu of problems to solve, and that the possibility of losing the chance to incorporate the eastern half of the Mississippi Valley into the Union was in no sense preeminent among them.<sup>63</sup> Some commentators point to a general, all-around sense of insecurity stemming from the generic “imbecility” of Congress under the Articles as the main driver of the movement for root-and-branch reform.<sup>64</sup> If we examine the framers’ private correspondence in the years between the peace and the Convention, however, we cannot overlook their obsessive focus on the danger of a fatal rift opening up along the Appalachian watershed. That they would proceed to develop a plan of action to resolve this acute anxiety seems only natural. There is no doubt that the framers also

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<sup>62</sup> The offer had to be generous because Congress's ability to project its authority across the mountain barrier at the time was so weak that, for Westerners, “seceding” from the Union would have made little noticeable difference. For the Union’s expansionists, by contrast, western secession would have thwarted their quest for a continental empire.

<sup>63</sup> Rakove, *The Beginning of National Politics*.

<sup>64</sup> For example, “the sense of national insecurity and of impending danger was a major drive wheel in the movement for constitutional reform which culminated in the Philadelphia convention of 1787.” Frederick W. Marks III, *Independence on Trial. Foreign Affairs and the Making of the Constitution* (Louisiana State University Press, 1973), p. 50.



wished “to do justice to public creditors, solve the problems of post-war trade, bring about recovery from depression, and win the respect of the world for the new nation.”<sup>65</sup> But the more we attend to how they saw their situation, the more plausible it becomes to interpret their most creative institutional innovations as calibrated responses to the threat of Western secession.

What you fear most intensely depends on what you most ardently desire. The greatest threat the framers faced was the threat to their project of a territorial empire. The danger of Western secession was existential for them because it was a threat to the continental ambitions that also provided the only genuinely pressing rationale for the union of North and South. Preserving that wartime Union required current member states to create a new system for tying “the western country” inextricably to “the Atlantic side of the continent.”<sup>66</sup> Dominating the debate at Philadelphia, as a result, was neither fear of tyranny, as the schoolbooks recount,<sup>67</sup> nor the fear of democracy, as many “progressive” historians allege.<sup>68</sup> It was, to repeat, the looming danger that faraway Western settlements would declare their political independence from the East. To understand the creativity and originality of the framers we need to examine their innovative, adaptive response to the threat of Western secession.

The framers were not simply fending off a crisis. They did not convene at Philadelphia merely to salvage a Confederation on the brink of collapse. Their aim was more positive than negative, more ambitious than remedial. Rather than focusing on near-term fixes, they looked

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<sup>65</sup> Merrill Jensen, *The New Nation. A History of the United States During the Confederation 1781-1789* (Northeastern University Press, 1981), p. 426. A secondary (and ultimately frustrated) aim of Union expansionism was to gain revenue from western land sales to repay onerous war debts. In this sense, it is correct to say expansionism was in part an attempt to remedy the insolvency of the Confederation treasury, a crisis eventually solved by a shift, under Hamilton’s supervision, to an Atlantic seaboard import tax regime—a revenue system that softened class conflict by offering tax relief to poor farmers, especially in the interior. As Congress’s eventual decision to offload enormous tracts of western land at bargain prices revealed, however, windfall earnings were a secondary aim of constitutional reform, much less compelling than the imperative of preventing East-West disunion. Securing a continental empire, if we follow the framers’ own expressions of purpose and motive, was the surest way to gain “the respect of the world for the new nation.”

<sup>66</sup> Madison, June 13, 1788, VA Ratifying Convention.

<sup>67</sup> It is perfectly correct to say that, in one sense, the framers designed the Constitution to “prevent tyranny.” We can’t dissociate the definition of tyranny from the purposes being pursued by the allegedly tyrannical government, however. The framers associated tyranny not with an excessive amount of governmental power, but with the illicit purposes for which the state employed its coercive capacities. Appalled by the Proclamation Line of 1763, for example, some Americans “called it a tyrannous check on the inevitable expansion of the race.” Justin Winsor, *Mississippi Basin*, pp. 430-431. By contrast, they would have seen nothing particularly tyrannous about forcing Native Peoples off their ancestral lands.

<sup>68</sup> Cf. “The Constitution was intrinsically an aristocratic document designed to check the democratic tendencies of the period.” Gordon Wood, *The Creation of the American Republic 1776-1787* (The University of North Carolina Press, 1998), p. 513. For other noteworthy examples, see Terry Bouton, *Taming Democracy: “The People,” the Founders, and the Troubled Ending of the American Revolution* (Oxford: Oxford University Press, 2007); Woody Holton, *Unruly Americans and the Origins of the Constitution* (Hill and Wang, 2008); and Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* (Oxford, 2016). **Too drive-by, find a place to give criticism of Progressives more breathing room.**

forward to “remote futurity.”<sup>69</sup> And like all real-estate developers, they kept a vivid image of future possibilities in mind. They strove to preserve the existing league of states as a favorable basis for what “the country was capable of becoming”<sup>70</sup> in a demographic, commercial and geographical sense. They saw western expansion as both an expression and a source of national power. Having occupied the outermost edge of civilization under the British Empire, America could become the cutting edge of free government under a new Constitution. If they stuck together and played their cards shrewdly, they could lay the foundations for a republican empire “upon an enlarged scale.”<sup>71</sup>

That the framers saw preserving the Union as a pathway to “greatness” is confirmed verbatim by Jay’s celebrated remark that “the dissolution of the Union” would mean “farewell” to America’s “greatness.”<sup>72</sup> The plan for achieving status and sway on the international stage was a brainchild of “the men who think continentally.”<sup>73</sup> It was also a response to demands rising up from below, not only the land hunger of potential settlers but also the need of political and economic elites for fair and effective systems for resolving interstate conflicts over territorial jurisdiction and land-company conflicts over the right to sell unsettled land.<sup>74</sup> The continentalist faction among the country’s Whig elites devoted themselves to erecting such a dispute resolution mechanism, or adjudicatory power, because they saw it as an essential step toward exciting and capturing the national energies required to take control of the vast territories lying along and beyond the Union’s current frontiers.<sup>75</sup>

Preventing Western secession was the most consequential task of the confederation for which the states were “separately incompetent.”<sup>76</sup> It required joint action of all members of the

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<sup>69</sup> *Federalist Papers*, No. 34. As witnesses of convulsive economic, demographic and political changes over the previous decades, the framers understood that the current distribution of power and wealth in North America was ephemeral and unstable. Aware that Native Americans controlled most of the continent in 1787, they were implicitly committed to overthrowing “the powers that be.” Their land speculation fever was less materialistic than a desperate attempt to keep up with the whirlwind of change and not to be left out of the coming bonanza.

<sup>70</sup> *Federalist Papers*, No. 11.

<sup>71</sup> *Federalist Papers*, No. 28.

<sup>72</sup> *Federalist Papers*, No. 2.

<sup>73</sup> Hamilton to Washington (April 8, 1783).

<sup>74</sup> This is the theme of Peter S. Onuf’s indispensable work, *The Origins of the Federal Republic. Jurisdictional Controversies in the United States, 1775-1787* (University of Pennsylvania Press, 1983).

<sup>75</sup> See Greg Ablavsky’s discussion of “the adjudicatory state.” *Federal Ground. Governing Property and Violence in the First U.S. Territories* (Oxford University Press, 2021), p. 12. A pertinent example is the adjudicatory tribunal established under Article IX of the Articles of Confederation (permitting the establishment of “a court for hearing and determining ... disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes”) in an attempt to resolve the Yankee-Pennamite conflict between Connecticut and Pennsylvania: “A method of terminating territorial disputes between the States, under the authority of the federal head, was not unattended to, even in the imperfect system by which they have been hitherto held together.” *Federalist Papers*, No. 80.

<sup>76</sup> July 17, Farrand II:21. Not only were single states, operating independently, unable to advance continental expansion in the face of determined opposition by Britain, Spain and Native Americans but, to the extent that they retained their “sovereign” autonomy, they were likely both to encourage foreign plots to foment western secession and to foment interstate conflicts that would make cooperative expansion impossible. Article I,

Union following a common plan. True, Virginia could unilaterally announce that Kentucky “shall be free and independent of this colony and of all the world.”<sup>77</sup> What it could not do, on its own, was to incorporate Kentucky as a coequal member into the confederacy. Only “the United States in Congress assembled”<sup>78</sup> had a concrete interest in “the preservation of every part”<sup>79</sup> of the Union, not to mention the exclusive capacity to satisfy it. Only the general government could successfully integrate the territories into the Union.<sup>80</sup> And the flip side was also true. Without a strong demand on the part of speculators and other influential social forces to integrate the largely unsettled territories into the Union, there would have been no influential political constituency lobbying effectively to strengthen the general government’s hand.

In the course of my analysis, I will be discussing various reasons why the framers embraced overland expansion as a preeminent purpose of the new Constitution. It may be useful at this juncture to list the most important among them. One was their assumption that geopolitical “greatness” meant acting like great powers of Europe, all of which were involved in land seizure at the time. Another was the desire to imitate Britain’s insular situation by eliminating all contiguous land enemies on the North American continent, leading to the conclusion that self-defense required expansion. A third was the desire to leave a splendid legacy to their growing “posterity.” A fourth was a competitive response to the plots of Britain and Spain to stoke secessionist movements in the West. A fifth, and closely related, factor was the perception that a failure to seize control of the West, and to provide settlers with military and legal protection of their homesteads, would provoke western secession and the establishment of a contiguous land enemy, forcing the Union to militarize, a development incompatible with republican government. Sixth, unable to hold back the torrent of migrants already flooding into Trans-Appalachia, they decided that they had no choice but to exploit and harness the settler movement to crowd out the Native Peoples still occupying the area. A seventh factor was their realization that a large economy with diverse regional specializations would have an easier time surviving in a hostile international environment than a small Confederation. And finally, they were eager to get their hands on “the mine of vast wealth” waiting to be seized in the West and preventing their rivals from turning it against them. Let’s look more closely at one of these factors.

Alarmed by the prospect of the confederacy’s western enlargement, both Spain and Britain strove to eliminate “the dangers that may threaten their American dominions.”<sup>81</sup> They did so, in part, by fomenting secessionist movements in the West in order to effect “a breach in our

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Section 10 of the new Constitution aimed to prevent state assemblies from “drawing all power” into their “impetuous vortex” (*Federalist Papers*, No. 48) as essential for expansion on federalist principles.

<sup>77</sup> Jefferson’s 1776 draft of the Virginia Constitution.

<sup>78</sup> Article IX of the Articles of Confederation.

<sup>79</sup> *Federalist Papers*, No. 23.

<sup>80</sup> Here we see the theoretical weakness of the Anti-Federalist idea (picked up later by Calhoun and Jefferson Davis) that the states created the Union by transferring some of their powers to the federal government. The separate states, acting disjointedly, never possessed the power to seize control of the continent by creating new member states (any more than they possessed the power to adjudicate interstate conflicts) and could not, therefore, have transferred this power to the Union.

<sup>81</sup> *Federalist Papers*, No. 11.

confederacy.”<sup>82</sup> The American drive to reinvigorate the federal union in 1786-1788 was therefore, in part, a spirited reaction to these foreign plots to sever the Union from its ardently imagined future. Indeed, “the first job” the framers assigned to the federal executive was “to protect America from European reconquest.”<sup>83</sup> If the proposed Constitution were not ratified, according to the authors of the *Federalist Papers*, the Union would likely fragment into regional confederacies which would in turn become the playthings of European powers. That same priority informs the Constitution as a whole. Rather than being a “peace pact,” sealed as an “alternative to war,”<sup>84</sup> the Union was an *annexation pact* between North and South, an aggressive and acquisitive counteroffensive aimed first at thwarting “the policy of fostering divisions among us”<sup>85</sup> pursued by Britain and Spain and then relieving both empires of their tenuous possessions on the continent. By embarking on this mission, the framers were following what they considered the universal policy of “all states,” namely “to aggrandize” their country “at the expense of their neighbors.”<sup>86</sup>

To summarize: the looming danger that impelled the several states to deepen their collaboration in 1787 was the potentially fatal detachment of “the great interior Country”<sup>87</sup> from the coastal confederation under pressures simultaneously foreign and domestic. East-West disunion would have dashed the hopes expressed at the outset of the Revolution to parlay Independence into sovereign control over “a boundless extent of continent” which might eventually be “swarming with millions.” This is why the framers, in agitating for ratification, emphasized that “the business of the Federal Convention was not local” but rather “co-extensive with the continent.”<sup>88</sup> The consequence, while self-evident in a way, is unconventional enough to be worth encapsulating in a

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<sup>82</sup> Madison to Jefferson (August 20, 1785). The assumption that “foreign powers” were busy “encouraging the dissensions of a Confederacy, from the firm union of which they had so much to fear” (*Federalist Papers*, No. 16) played a central role in shaping the way the framers designed the new federation.

<sup>83</sup> Akhil Amar, *The Words that Made Us: America's Constitutional Conversation, 1760-1840* (Basic Books, 2021), p. 284.

<sup>84</sup> David C. Hendrickson, *Peace Pact, The Lost World of the American Founding* (Lawrence: University Press of Kansas, 2003), p. 282. If the Constitution had been an unaggressive peace pact, rather than an aggressively expansionist agreement aimed at ousting the British and Spanish from North America, it would have been more welcome than it was in the foreign ministries of Britain and Spain. Today’s European Union is a good example of a peace pact, which is why it cannot defend itself without American support. Peace is a means, not an end. That is why a mere league for preventing civil war would have been “a nerveless body,” bereft of any exhilarating purpose and subject to “observance and non-observance, as the interests or passions of the contracting powers dictate.” *Federalist Papers*, Nos. 19, 15.

<sup>85</sup> *Federalist Papers*, No. 11.

<sup>86</sup> *Federalist Papers*, No. 6. International law or the Law of Nations did not outlaw the change of international borders by force of arms until the Kellogg-Briand Pact of 1928. The framers took it as an irrepressible pattern of history, in fact, that the ruthless desire of human groupings to take what belongs to others has “deluged in blood all the nations of the world.” *Federalist Papers*, No. 7. While the “ambitious, vindictive, and rapacious” passions (*Federalist Papers*, No. 6) could be managed and channeled, they could not possibly be eliminated from the range of irresistible impulses that keep human affairs in constant motion. It is nevertheless true that decorum frequently led the framers to camouflage an aggressive plan to *annex* land controlled by Spain and Native Peoples as a defensive plan to *prevent the secession* of land “clearly” belonging to the Confederation.

<sup>87</sup> Morris, July 13, Farrand I:605.

<sup>88</sup> James Wilson, “State House Yard Speech,” October 6, 1787, *Collected Works of James Wilson*, Vol. 1, p. 173.

phrase. The Constitution was engineered not to restrict the government's reach but to extend it. Its aim was to promote "our advancement in union, in power and consequence by land and by sea."<sup>89</sup>

The implication that the framers endorsed and even celebrated the encroaching nature of power may seem scandalous to those who "look at Constitutions with sanctimonious reverence."<sup>90</sup> But ample evidence supporting it will be marshaled in the pages below.

Suffice it to say, at this stage, that the shockingly realistic opportunity for a recently assembled, internally disputatious, fiscally desperate and militarily feeble league of new-born republics to develop, if properly organized, into a "great, respectable and flourishing empire"<sup>91</sup> was bound to dominate the other vital but nevertheless secondary aims entertained by the most influential delegates gathered in Philadelphia. Lacking the means to build a potentially oppressive fiscal-military state on the European model, the framers planned to achieve "greatness" in a wholly original way by exploiting the nation's demographic growth and deploying annexationist federalism to create a republic of republics on a continental scale.

More than the other dire crises afflicting the confederacy at the time, the possibility of losing an imagined future where a vast continent might eventually be inhabited by millions of Euro-Americans, the "multiplied posterity"<sup>92</sup> of current inhabitants mingling with largely Protestant immigrants from northern Europe, explains much of what they accomplished and most of the new Constitution's extraordinary institutional novelty.

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If we conclude that the leading participants in the Federal Convention thought that preventing Western secession was their gravest and most urgent challenge, as well as being impossible to meet under the Articles of Confederation, then we may have solved one of the enduring puzzles about the Founding. Since the Union had originally emerged and been held together by a shared quest for independence from Great Britain, it has always been mysterious what unifying purpose was sufficiently compelling to overcome interstate conflict and bring the states to pool their resources in 1787-1788, half a decade after their common enemy was defeated. If a "well-grounded apprehensions of imminent danger induced the people of America to form the memorable Congress of 1774,"<sup>93</sup> what "imminent danger" induced them to call the Federal Convention of 1787?

Threats seem "existential" not only when they endanger one's physical survival, but also when they put at risk one's most highly prized projects, missions, or goals. The imminent danger that inspired Madison, Hamilton and their allies to organize the Federal Convention was the grave threat to their imperial ambitions looming on the Union's vulnerable and still sparsely settled frontiers: "The territories of Britain, Spain, and of the Indian nations in our neighborhood do not border on particular States, but encircle the Union from Maine to Georgia. The danger, though in

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<sup>89</sup> *Federalist Papers*, No. 4.

<sup>90</sup> Jefferson to Samuel Kercheval (July 12, 1816).

<sup>91</sup> *Federalist Papers*, No. 14.

<sup>92</sup> "[T]he immense population which is to fill ... the amazing extent of country" will include not only "the present generation of our people" but also "their multiplied posterity." Wilson, June 25, Farrand I:405.

<sup>93</sup> *Federalist Papers*, No. 2.

different degrees, is therefore common.”<sup>94</sup> The threat posed by Britain, Spain and the Indian nations was not to the bounded coastal confederacy, as currently constituted, but to its continental future as the framers and ratifiers imagined it. This is what Patrick Henry meant when he charged the advocates of the new plan with plotting “to convert this country into a powerful and mighty empire.”<sup>95</sup> The accusation closely tracked what the delegates themselves boasted behind closed doors. They were, in their own words, “laying the foundation for a great empire.”<sup>96</sup> Adding urgency to their efforts was the possibility that this window for achieving “greatness” on the world stage might soon close. Preventing Western secession was the new Common Cause that inspired influential leaders from states with clashing cultures and economic interests to lay their acute differences momentarily aside. The pressure they exerted on the states to pool their resources and coordinate their efforts did not abate after Independence was won. The reason was simple. Only jointly, not split into regional confederacies, could the Union’s members hope to prevail in the scramble for North America.

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<sup>94</sup> *Federalist Papers*, No. 25.

<sup>95</sup> Patrick Henry, Virginia Ratifying Convention, June 5, 1788. Henry himself was a declared expansionist who, as Governor of Virginia, had clamored in vain for federal troops to help the state’s militia fight the Indians tormenting western settlers. His failed attempt to block Virginia’s ratification of an expansionist Constitution was based not on anti-expansionism, therefore, but on distrust of the North.

<sup>96</sup> Rutledge, August 29, Farrand II:452.

### Things Once Held Impossible

The opportunity and the challenge were equally dizzying. Some of the Confederation's leading political figures set out to reorganize their newly independent league of coastal republics with the aim of launching a collective venture of territorial expansion by adding, over time, replica republics of their own creation. The project was all the more remarkable for its scale. The already confederated states were perched on the easternmost edge of "a rich and fertile country" covering an area many times larger than the already "inhabited extent of the United States."<sup>97</sup> No republic in history, Paine exclaimed, had ever been granted the chance to seize control of such a miraculous abundance of arable land lying in the temperate zone, and "unoccupied" in the euphemistic sense of being devoid of indigenous forces capable of resisting a human wave of armed and land-hungry white settlers supported by a rearguard of economically developed coastal communities.<sup>98</sup>

The historical uniqueness of the framers' plan reflected the historical uniqueness of the circumstances they faced. Looking beyond the contested western borders of the existing states, they saw "an immense Territory, favored by Nature with all Advantages of Climate, Soil, great navigable Rivers and Lakes"<sup>99</sup> and populated by tribes incapable, if deprived of European arms and supplies, of effectively defending their ancestral lands. None of "the other confederacies which could be consulted as precedents"<sup>100</sup> had been blessed with geographical and geopolitical circumstances such as these. The seemingly endless continental vistas "left us almost without precedent or guide, and consequently without the benefit of that instruction which in many cases may be derived from the constitution and history and experience of other nations."<sup>101</sup> And just as "a proper model was not to be found in other Confederacies,"<sup>102</sup> so the system devised by the framers has proven impossible to imitate successfully in the two-and-a-half centuries since it came into effect. A constitution tailored specifically for the unparalleled situation facing the American Confederation in 1787 could not be uncoupled from late eighteenth-century North America and relocated wholesale into a completely different context and function in a recognizable way.

As the most populous settler community in the Western hemisphere and one that continued to grow exponentially, the American Union, despite its relative weakness in conventional instruments of conquest and domination, had a once-in-a-millennium chance to win uncontested control over a continental landmass more extensive than the conquests of the most powerful overlords in world history. This was true even though "[f]or a long time to come, it [would] not be possible" for the Union "to maintain a large army."<sup>103</sup>

The phrase "manifest destiny" was of a later coinage. The framers were not so self-confident. They described their plan to seize control of much of North America as a risky political

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<sup>97</sup> *Federalist Papers*, No. 38.

<sup>98</sup> Paine, "Common Sense," in *Collected Writings* (New American Library, 1995), pp. 48, 41.

<sup>99</sup> Franklin to Lord Kames (February 25, 1767).

<sup>100</sup> *Federalist Papers*, No. 37.

<sup>101</sup> James Wilson, speech in the Pennsylvania convention, *Collected Works*, Vol. I, p. 181.

<sup>102</sup> Wilson, June 20, Farrand I.343.

<sup>103</sup> *Federalist Papers*, No. 28. The army of the Union, in the mid-1780s, consisted of approximately 300 men.

gamble, not as the ineluctable working out of some iron historical law. That the growth of the Union into a continental empire was nevertheless their self-conscious hope and intention is clear not only from their well-documented preoccupation with avoiding Western secession but also from their support, in Congress and the state legislatures, for tenacious extra-constitutional efforts to create new states in the national domain. The audacity of their imperial ambitions stands out, in fact, because they knew they were attempting to achieve something that, far from being foreordained, seemed next to impossible for a Confederation that many among them believed to be unraveling even as they convened.

To play their weak hand shrewdly, American expansionists determined to replace the Articles of Confederation with a new Constitution that prioritized consolidating political control over the territory beyond the mountains by encouraging armed agriculturalists not only to settle there but also to replicate roughly the political systems of the original states, setting up republican governments under binding constitutions to manage local affairs. The framers' plan of government looked the way it did because it was also a plan of action. It was engineered to launch "the experiment of an extended republic."<sup>104</sup> The experiment would work, they believed, only under one condition: if they succeeded in calling forth and putting to good use the scant resources available to them at the time.<sup>105</sup> The only way to make dispersed and decentralized capacities available for the realization of a common plan of action, they believed, was by policies of calculated liberality.

The Confederation's lack of coercive powers obliged the framers to resort to strategies that we would today call liberal. They aimed at winning the "attachment" and "support"<sup>106</sup> of the settlers already moving west, recruiting others to join them, helping them organize themselves along republican lines and giving them persuasive reasons to seek incorporation into the Union. The institutional structures they designed for what we would now call "sustainable development" were conciliatory and magnanimous rather than imperious and coercive. Their plans for overland expansion included building transportation and communication infrastructure and subsidizing immigration. Speaking more to hopes than to fears, they offered rights to individuals and republican statehood to political communities. Taken together, individual rights and states' rights would consolidate the Confederation's jurisdiction over the contiguous territories beyond the borders of the existing states. These were the only arrangements permitting an insolvent, internally divided and militarily insignificant Union to extend its sovereign control over the great interior.

As Linda Colley has argued, constitutions were universally seen at the time as instruments of power politics not as shackles designed to protect the defenseless from the ravages of untrammelled

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<sup>104</sup> *Federalist Papers*, No. 14.

<sup>105</sup> Brian Balogh has plausibly argued that "[i]n the United States, a national government capable of mobilizing compatible resources in the private and voluntary sectors often yielded more impressive results than unilateral state power. Historically, that is exactly the way Americans preferred it." Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge University Press, 2009). For the early years of the Republic, it would make more sense to say that unilateral state power was out of reach and, therefore, mobilizing private voluntary efforts was the only way for the general government to engender the energy needed to expand the territory under Union control.

<sup>106</sup> *Federalist Papers*, No. 46.



authority.<sup>107</sup> Indeed, there was nothing novel or esoteric about the insight that superior organization can create and enhance political power. The *constitution of power* was a common theme in the classical tradition of constitutional theory stretching from Polybius to Harrington. Celebrated political writers, well-known to the framers, had explicitly argued that a well-designed institutional order could enable an initially small political community to seize and maintain a vast empire.<sup>108</sup>

Contrary to current usage, the framers did not associate the word “constitution” exclusively with states that respected rights or held competitive elections.<sup>109</sup> In their vocabulary, all states, including pre-liberal and nondemocratic states, had “constitutions,” meaning they were organized for defense against foreign attack and domestic insurrection. Throughout recorded history, territorially anchored political systems have necessarily vested in their governments various powers required for these purposes, including the powers to tax and conscript. The framers’ Constitution did the same. Formulated differently: although not all states are liberal republics, all liberal republics are states. As a consequence, liberal republics, too, must make institutional preparations to face the sometimes fatal dangers, foreign and domestic, afflicting any state. The framers’ Constitution was historically novel in some respects, but not in its aim to increase the new country’s chances of survival in an unforgiving international environment.

The classically educated and practically minded framers drew comprehensively on the immemorial truth that constitutions are instruments of power. They aimed at restructuring the Confederation to replace its embarrassing international impotence with the ability of the national government to impose its will. They also strove to overcome the Union’s current fiscal insolvency while energetically promoting overland expansion. Building the institutional capacity to raise revenue without imposing unwelcome and unsustainable burdens on nascent frontier communities was central to this daring plan.

If “the principal function” of the federal government created by the new Constitution was “the conduct of the Union’s foreign affairs,”<sup>110</sup> then circumstantial evidence that overland expansion was the preeminent goal of the framers is also provided by the history of Union diplomacy as it was

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<sup>107</sup> Linda Colley, *The Gun, the Ship, and the Pen. Warfare, Constitutions, and the Making of the Modern World* (Norton, 2021). Colley’s book provides a pertinent corrective to the view that “[w]ritten constitutions” were designed by those who believed that “power is evil” (Bernard Bailyn, “The Central Themes of the American Revolution: An Interpretation,” in *Essays on the American Revolution* (1960), S. Kurtz and J. Hutson (eds.), pp. 26–27).

<sup>108</sup> E.g., “No Man can, by Care taking (as the Scripture saith) add a Cubit to his Stature, in this little Model of a Man’s Body: But in the Great Frame of Kingdoms, and Common Wealths, it is in the power of Princes, or Estates, to add Amplitude and Greatness to their Kingdoms. For by introducing such Ordinances, Constitutions, and Customs, as we have now touched, they may sow Greatness, to their Posterity, and Succession.” Francis Bacon, “Of the True Greatness of Kingdoms and Estates,” *The Essayes or Counsels, Civill and Morall* (Cambridge, Mass.: Harvard University Press, 1985), p. 99.

<sup>109</sup> Madison refers explicitly to “anti-republican Constitutions.” *Federalist Papers*, No. 43.

<sup>110</sup> David M. Golove and Daniel J. Hulsebosch, “The Known Opinion of the Impartial World” in *The Cambridge Companion to The Federalist*, edited by Jack N. Rakove and Colleen A. Sheehan (Cambridge University Press, 2020), p. 114. I agree with the authors about the primacy of foreign policy in the thinking of the framers but would place less emphasis on hopes for international comity and more on ruthless competition for territorial empire.

conducted, soon after ratification, by some of the most passionate defenders of the Constitution.<sup>111</sup> The principal achievements of U.S. foreign policy during the Washington Administration were the 1794 Jay Treaty, securing the evacuation of British troops from the forts dotting the southern shores of the Great Lakes, the Pinckney Treaty of 1795 securing American navigation rights to the lower Mississippi, and the Treaty of Greenville, also of 1795, opening the strategic Ohio frontier to American colonization. Taken together, these three treaties made clear the inestimable value of the Union to previously skeptical settler communities. That was their motivation and their purpose. They also put an end to foreign plots to exclude American surveyors, speculators and settlers from the West, fulfilling the promise of a Constitution premised on expansion.

The priorities of American foreign policy 1789-1795, as conducted by many of the framers themselves, point to territorial aggrandizement as the leading purpose of the Constitution they had designed only a few short years earlier. This does not imply that there was anything “providential” about subsequent events, even though they sometimes resorted to lofty language of this kind.<sup>112</sup> The decisive role played first by the wars of the French Revolution and then by the Napoleonic Wars in persuading both Britain and Spain to abandon their efforts to thwart American expansionism is a striking example of the role of serendipity, as opposed to providential inevitability, in American political development. The point is not that the framers wielded divine powers to shape the course of history. But they *did* make plans and, partly for contingent reasons, their and their successors’ determined efforts to implement these plans met with spectacular success. Although luck made America an empire, it would not have done so had the framers not deliberately programmed the Union to swallow more and more territory on a sequential basis.<sup>113</sup>

### It Wants a Name

When championing “a *new* Constitution for the United States of America,”<sup>114</sup> its most celebrated interpreters did not suggest that the plan was “new” only for citizens of the reformed American Union. The “experiment of an extended republic,” they extravagantly contended, had “no parallel in the annals of human society.”<sup>115</sup> Remarkably enough, their bitterest enemies agreed. Anti-Federalist John Lansing openly mocked the framers’ “System without example,” sneering that “[t]he Scheme is itself totally novel. There is no parallel to it to be found.”<sup>116</sup> In effect, advocates

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<sup>111</sup> As Jonathan Gienapp argues, the Constitution was significantly shaped and reshaped during the decade following ratification. Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Harvard University Press, 2018). We should add that it was developed and modified by many of the same individuals who had contributed to its original drafting and arguably with the same purposes, including expansion, in mind.

<sup>112</sup> *Federalist Papers*, No. 2.

<sup>113</sup> Pekka Hämäläinen’s richly illustrated claim that the European takeover of North America was fiercely contested is self-evidently correct as is his refutation of “the notion that colonial expansion was inevitable.” He could have said the same about all consequential developments in human history. Hämäläinen, *Indigenous Continent: The Epic Contest for North America* (Liveright, 2023), p. ix.

<sup>114</sup> *Federalist Papers*, No. 1, emphasis added.

<sup>115</sup> *Federalist Papers*, No. 14.

<sup>116</sup> Lansing, June 20, Farrand I:351; June 16, Farrand I:250.

and opponents alike viewed America's "compound republic,"<sup>117</sup> which represented the country's second stab at creating a national system, as a "radical innovation."<sup>118</sup>

The redesigned Constitution was so idiosyncratic, Alexis de Tocqueville would later remark, that "the new word that ought to express this new thing does not yet exist."<sup>119</sup> Opponents of the plan had already cited this lack of a proper term to denote the framers' handiwork as an important reason to vote against it. Speaking at the Virginia Ratifying Convention, Patrick Henry scathingly remarked that the proposed plan was "unprecedented in history" and "so new that it wants a name."<sup>120</sup>

Although he tirelessly rebutted Henry's other attacks, Madison welcomed his opponent's charge that the Constitution departed so utterly from preexisting models as to defy all conventional categories. After conceding that it was "in a manner unprecedented" and that "we cannot find one express example in the experience of the world," he added that the proposed system "stands by itself."<sup>121</sup> The vaunted "novelty of the undertaking"<sup>122</sup> reflected the framers' conviction that no off-the-shelf model would allow the states to exploit the spectacular developmental opportunities opened up by a sovereign Union hugging the eastern coast of a still-contested continent. The *sui generis* arrangement on which they settled represented a practical as well as conceptual breakthrough. It established the institutional framework for a uniquely "liberal" and republican style of piecemeal territorial conquest.

At the end of his life, reflecting on the achievement of 1787, Madison still referred to the Constitution as "a system without example ancient or modern."<sup>123</sup> He informed a foreign visitor that the one-of-a-kind federal union that it established showed that "things before held impossible" could be achieved by breaking the mold.<sup>124</sup> This may be Madison's most revealing statement of what the framers did and why they did it.

The primary purpose of a historically unprecedented constitution was to help the American confederacy accomplish something that, while eminently imaginable and desirable, had previously seemed out of reach. Madison was straightforward about the exact nature of this improbable goal. It is "a peculiar felicity of this Constitution, so dear to us all, that it is found to be capable, without losing its vital energies, of expanding itself over a spacious territory with the increase and expansion of the community for whose benefit it was established."<sup>125</sup> Here we find the master key to the

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<sup>117</sup> *Federalist Papers*, No. 51.

<sup>118</sup> *Federalist Papers*, No. 39.

<sup>119</sup> Tocqueville, *Democracy in America* (Library of America, 2004), p. 178.

<sup>120</sup> Elliott's *Debates*, 3.94, 3.103.

<sup>121</sup> Elliott, 3.68.

<sup>122</sup> *Federalist Papers*, No. 37.

<sup>123</sup> James Madison, "A Sketch Never Finished Nor Applied, 1830?," in James Madison, *Writings*, ed. Jack N. Rakove (New York: Library of America, 1999), p. 828. Similarly, "The actual System of Government for the U.S. is so unexampled in its origin, so complex in its structure, and so peculiar in some of its features, that in describing it the political vocabulary does not furnish terms sufficiently distinctive and appropriate." Madison to Daniel Webster (May 27, 1830).

<sup>124</sup> Harriet Martineau, *Society in America* (New York, 1837), vol. I, p. 1.

<sup>125</sup> Madison, 8th Annual Message to Congress (December 3, 1816).

framers' *Novus ordo seculorum*. Their novel plan was to create "a confederacy founded on republican principles, and composed of republican members"<sup>126</sup> that would unfold progressively into a vast territorial empire. There had been "other popular governments, as well ancient as modern," but none was so methodically primed for expansion as the American.<sup>127</sup> It would be a self-extending union of legally equal member states, combining national and federal features and stretching into territory that, at the time of the framing, lay well beyond the Confederation's sovereign control. Madison's concerted efforts, while serving as President between 1809 and 1817, to enlarge the territory encompassed by the Union,<sup>128</sup> strongly suggest that imperial expansion was among the most prized objectives that had "seemed impossible" for the weak-knit confederation, which barely managed to keep itself together after the Revolution. The new Constitution brought this objective within the realm of the achievable.

The Antifederalists who railed that the United States was too large to be a republic<sup>129</sup> assumed, among other things, that republicanism and imperialism were incompatible. That historically illiterate premise was one that Madison and his allies did not share. On the contrary, they assumed that the principal aim of the new charter was "extending the sphere of popular government."<sup>130</sup> Under American conditions, however, only a republic of republics, not a fully centralized, unified and consolidated state, had a chance to grow into an enduring continental empire.

Nothing could have been more alien to the framers' mindset than the facile assumption that inscribing rights on official documents increased their chances of being exercised and enjoyed. They nevertheless included, as a sign of upright intentions, a series of rights in the body of the Constitution. Among these were a right to habeas corpus and a ban on ex post facto laws. The point to emphasize about such rights is that they were wholly traditional privileges and immunities, copied verbatim from preexisting institutional models. No one at the time would have considered such rights as innovations. Nor were the national judiciary, the popularly elected lower chamber (the most explicitly "republican" branch of government) or even the national executive sufficient by themselves to mark a sharp break with all recorded constitutional precedents. While these were important innovations for the American Union, they too had rough equivalents either in "the British Constitution"<sup>131</sup> or in the constitutions of the states. Although the Three-Fifths and Fugitive Slave clauses undoubtedly exemplify America's historical singularity, they were not what either advocates or critics meant when they emphasized the radical newness of the plan. And given Madison's familiarity with the political history of humankind, he could not possibly have located the new plan's

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<sup>126</sup> *Federalist Papers*, No. 43.

<sup>127</sup> *Federalist Papers*, No. 63.

<sup>128</sup> J.C.A. Stagg, *Borderlines in Borderlands. James Madison and the Spanish American Frontier, 1776-1821* (Yale University Press, 2009).

<sup>129</sup> "History furnishes no example of a free republic, anything like the extent of the United States." Brutus, October 18, 1787, p. 289.

<sup>130</sup> *Federalist Papers*, No. 9.

<sup>131</sup> *Federalist Papers*, No. 41.

originality in provisions designed to over-represent the interests of socially well-connected property owners. As he later wrote: “such an arrangement has prevailed in all Governments.”<sup>132</sup>

So where should we turn to discover the proposed system’s allegedly unprecedented newness?

The plan’s defenders did not leave us in the dark in this regard. In their evocative words, the Constitution’s principal claim to historical originality was its “judicious modification and mixture of the *federal principle*.”<sup>133</sup> They explained how this strategic revision and recombining would make it possible to unify republicanism and imperialism: “Civil power, properly organized and exerted, is capable of diffusing its force to a very great extent; and can, in a manner, reproduce itself in every part of a great empire by a judicious arrangement of subordinate institutions.”<sup>134</sup> Only this specific variant of federalism, structured to amplify, not restrain, political sovereignty, makes it possible for the general government to extend its writ across such a vast expanse of territory. Here, without any doubt, lay the framers’ most momentous innovation.

Federalism, of course, had a storied past stretching back to ancient times. Wholly new, by contrast, was “the project of a general discretionary superintendence”<sup>135</sup> over the federated states. Over an inalterably decentralized system of partly autonomous republics, the framers proposed erecting weighty national institutions, including a bicameral legislature, a federal executive and a federal judiciary. The components of the system were all well-known. It was their combination that was unprecedented. Dismissive intent aside, Luther Martin was not wrong to comment that “[t]he present reported system is a perfect medley of confederated and national government, without example and without precedent.”<sup>136</sup> Intended to be derogatory, that observation nevertheless echoes the boasts of the most enthusiastic proponents of the plan.

### Empire by Replication

As Madison memorably explained, the proposed composite republic was “neither wholly national nor wholly federal.”<sup>137</sup> Its mixed or hybrid nature is what distinguished it from “all other governments of the confederate kind.”<sup>138</sup> That is also why it bore little or no resemblance to the *république fédératif* outlined by “the celebrated Montesquieu.”<sup>139</sup> For what the great French political theorist described was a league of states that was almost entirely federal with no weighty national ingredients. Montesquieu defined his confederate republic as “a kind of assemblage of societies that

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<sup>132</sup> James Madison, “Notes to his Speech on the Right of Suffrage” (1821), Farrand III:452.

<sup>133</sup> *Federalist Papers*, No. 51.

<sup>134</sup> *Federalist Papers*, No. 13. For the framers’ seeming rejection of the so-called non-commandeering principle, see: “The plan reported by the convention, by extending the authority of the federal head to the individual citizens of the several States, will enable the government to *employ* the ordinary magistracy of each, in the execution of its laws” (*Federalist Papers*, No. 27, emphasis added). The “magistracy” here refers to the executive or administrative officials of the states.

<sup>135</sup> *Federalist Papers*, No. 15.

<sup>136</sup> Martin, June 27, Farrand I:439.

<sup>137</sup> *Federalist Papers*, No. 39.

<sup>138</sup> *Federalist Papers*, No. 16.

<sup>139</sup> *Federalist Papers*, No. 47.

constitute a new one, capable of increasing, by means of new associations, till they arrive to such a degree of power as to be able to provide for the security of the united body.”<sup>140</sup> But a collective security alliance forged between otherwise vulnerable states was not what the framers had in mind. Indeed, the observed “imbecility”<sup>141</sup> of an exclusively *federal* league of republics, and the need to enhance its “national” elements is what brought them to Philadelphia in the first place.

One way to get at the framers’ originality is to say that they combined Montesquieu’s stylized account of confederate republics with his equally stylized account of British bicameralism. The result was what the Constitution’s critics derided as the “amphibious monster”<sup>142</sup> of federalist bicameralism. As a historical matter, Luther Martin was right again when he said he had “never heard of a confederacy having two legislative branches.”<sup>143</sup> But the framers’ departure from Montesquieu’s conception of a confederate republic cuts much deeper than this.

Like the Swiss and Dutch federations, the 1643 Articles of Confederation of the United Colonies of New England,<sup>144</sup> the Union between England, Scotland and Wales, the United States under the Articles, or the European Union today, Montesquieu’s confederate republics were composed of preexisting states, or legacy communities, containing native-born populations already living for multiple generations within already delineated borders. The federation framed in Philadelphia was “materially different”<sup>145</sup> from all previous federations because it was expected to expand by incorporating states that Congress was going to cut arbitrarily from the vast swaths of territory across the mountain range in preparation for the arrival of successive waves of white migrants with no regard to the customs and habits of previous inhabitants.<sup>146</sup>

Unlike the wholly federal Articles of Confederation, the new and only partially federal plan contemplated a federation of coequal political societies forged, in the careful wording of the Constitution, between “States now existing,”<sup>147</sup> meaning the coastline states that jointly won their independence from the British Empire and “all the new States,”<sup>148</sup> meaning “numerous states yet

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<sup>140</sup> *The Spirit of the Laws*, Vol. 1, Book IX, Chap. 1 (Prometheus Books, 2002), p. 126, cited by Hamilton in *Federalist Papers*, No. 9. Curiously, Thomas Nugent, whose 1750 translation of Montesquieu was used by the Framers, rendered *les États qui s'associent* as “the united states.” *The Spirit of the Laws*, op. cit., p. 128.

<sup>141</sup> *Federalist Papers*, No. 15.

<sup>142</sup> Jonathan Dayton, June 30, Farrand I:490.

<sup>143</sup> Martin, June 27, Farrand I:439. This historically unique aspect of the new plan of government suffices to cast doubt on Gordon Wood’s claim that “the new federal government of 1787—its structure and form—was derived from what had taken place in the making of the state governments in the previous decade” (Gordon Wood, *Power and Liberty*, p. 32). Art. XVI of the New York State constitution of 1777 decreed that the upper chamber, too, would be periodically reapportioned according to population as measured by a septennial census, unlike the federal Senate, where representation was to remain equal regardless of the decennial census. **State governments routinely created and then subdivided new counties at will according to population, something that the federal government was not allowed to do with the states.**

<sup>144</sup> “The object of that confederacy was, primarily, to defend themselves against the inroads and depredations of the Indians.” Madison, June 7, 1788, Virginia Ratifying Convention.

<sup>145</sup> *Federalist Papers*, No. 54.

<sup>146</sup> The framers did not anticipate a degree of federal adaptation to the customs of the *habitants* in Illinois, much less to the Spanish land grants in the trans-Mississippi West.

<sup>147</sup> U.S. Constitution, Art. I, sec. 9, para. 1.

<sup>148</sup> *Federalist Papers*, No. 58.

unformed,”<sup>149</sup> that will eventually “be admitted by the Congress into this Union.”<sup>150</sup> What the framers created, in other words, was a confederation between existing states and states that did not yet exist but would be conjured out of thin air and populated under federal supervision in the future. That is why “the other confederacies which could be consulted as precedents” could “furnish no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued.”<sup>151</sup>

### The Machinery of Expansion

In the course of the Federal Convention, not a single delegate objected to the proposal, central to the Virginia Plan submitted at the outset of their deliberations, “that provision ought to be made for the admission of States lawfully arising within the limits of the United States.”<sup>152</sup> Everyone agreed that, unlike the Articles of Confederation, the new Constitution must open the door to the “future additions from New States,”<sup>153</sup> meaning freshly created states as opposed to Britain’s dozen or so other North American and Caribbean colonies that had refused to break with the Empire and join the independent Union of former imperial dependencies.

There were good reasons why America’s first constitution, drafted in 1777, failed to vest Congress with the authority to manage territorial expansion. For one thing, the national domain governed directly by Congress officially came into existence only in 1784.<sup>154</sup> The Articles *did* contain an admissions clause, but it was narrowly tailored and devoid of developmental vistas. It specified that “Canada acceding to this confederation, and adjoining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.”<sup>155</sup> Commenting helpfully on this provision, Madison explained that “Canada was to be admitted of right, on her joining in the measures of the United States; and the other colonies, by which were evidently meant the other British colonies, at the discretion of nine States.”<sup>156</sup> What the Articles clearly didn’t do was empower Congress to create new states from scratch in the West and, when the population had grown sufficiently, incorporate them into the confederacy. The previous system’s lack of elasticity, at least as much as, and arguably more than, a perceived need to cure the “vices” of the state

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<sup>149</sup> James Wilson, “Remarks Of James Wilson In The Pennsylvania Convention To Ratify The Constitution Of The United States, November 26, 1787, in *Collected Works of James Wilson*, Vol. 1., p?

<sup>150</sup> Art IV, sec. 3, para. 1. Cf. “the several States which may be included within this Union” (Art. I, sec. 2, para 3). This paragraph, also containing the Three-Fifths Clause, was subsequently eliminated by amendment.

<sup>151</sup> *Federalist Papers*, No. 37.

<sup>152</sup> *Federalist Papers*, No. 43.

<sup>153</sup> Madison, July 10, Farrand I:568.

<sup>154</sup> By ceding the Old Northwest to the Union, Virginians were giving up these lands *as Virginians* but reacquiring them (also for themselves but primarily for their posterity) *as Americans*.

<sup>155</sup> The Articles of Confederation, Article XI. This requirement of an agreement of *nine* states, rather than of a fixed percentage of existing states, for the admission of new states was cited by the advocates of ratification to emphasize a crucial defect of the Articles, that it had not prepared the confederation to expand: “there is a probability of an increase in the number of States, and no provision for a proportional augmentation of the ratio of votes.” *Federalist Papers*, No. 22.

<sup>156</sup> *Federalist Papers*, No. 43.

systems, is what drove all those who worried about Western secession to push successfully for a Constitutional Convention.<sup>157</sup>

Many other factors played a role, but the creation of a national domain in 1784—bringing the area that became the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and the eastern third of Minnesota under the control of Congress—would have sufficed to make the case for radical constitutional reform. Faced with organizing the new national domain, Congress had been compelled to assume powers not granted by the Articles of Confederation. This suggests that, when boasting of the Constitution’s groundbreaking originality, the framers most likely had the deceptively prosaic but wholly new Territory and Admissions clauses in mind. After all, the previous charter contained no equivalent to Article IV, Section 3’s two enabling clauses. Under America’s first constitution, according to Madison, Congress had no power to forge a continental empire by gradually creating and incorporating new member states.<sup>158</sup> The new Constitution’s Territory and Admissions clauses, authorizing the Union’s piecemeal westward expansion, provided a concise constitutional anchor for the Northwest Ordinance’s blueprint for expansion.<sup>159</sup> It may seem surprising, but these two rather nondescript clauses are the principal reason why the Constitution framed in 1787 had “no parallel in the annals of human society.”<sup>160</sup> We miss their momentous importance as a mechanism for “preserving” a Union premised on expansion only because we have forgotten the looming danger they were designed to overcome: the threat of Western secession.

The immensely fertile originality of the framers’ plan can be conveyed in various ways. One might say, for example, that the framers artfully wove together two political projects, *the planting of colonies* and *the formation of leagues*, that in ancient times were usually seen as separate and unrelated.<sup>161</sup> In classical antiquity, colonies were newly founded political communities that quickly became independent of the mother city that had settled them. Leagues, on the other hand, were alliances of already existing political communities that banded together for the sake of collective security. These two systems had never previously been combined in the way proposed.<sup>162</sup> The framers expected

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<sup>157</sup> For the more conventional view, see Gordon Wood who remarks of the framers: “Their focus was not so much on the politics of the Congress as it was on the politics of the states.” Wood, *Creation of the American Republic*, p. 475.

<sup>158</sup> Cf. “Congress had no right under the articles of Confederation to authorize the admission of new States; no such case having been provided for.” Pinckney, July 6, Farrand I:542.

<sup>159</sup> Additional evidence of the framers’ commitment to expansion is their decision to eliminate the supermajority requirement for Congressional approval of the admission of new states in the Union. Simple majorities in Congress would suffice to incorporate new member states.

<sup>160</sup> *Federalist Papers*, No. 14.

<sup>161</sup> Unlike the Union of England, Scotland and Wales, made up of preexisting states, Britain’s American empire also consisted of colonies created from scratch. Thus, the framers departed from the British model of imperial expansion primarily by rejecting the permanent distinction between core and periphery, a funder of revolution, and admitting new states on an equal footing with the founding states.

<sup>162</sup> While still inside the British Empire, coastal colonies gradually created new districts in their western regions and granted them representation in their assemblies. This state-level method of step-by-step westward expansion provided a rough precedent for the new plan. [It is therefore striking that the framers consciously rejected repeated proposals to imitate the disproportionate representation of the long-settled coastal areas in most of the original state assemblies by locking in the ability of the original states to outvote



their reconstructed composite republic to expand by confederating on an equal basis, one step at a time, with its republican creations. As Madison wrote in 1788, “Our new constitution is of that expansive nature as to admit of a communication of its privileges to that group of new states, which, ere long will be planted in our Western territory.” What made the Constitution singularly “expansive” was the expected alacrity with which new colonial plantations would be accepted into the existing league: “provision is made for receiving them into the union as fast as they are formed.”<sup>163</sup>

The telegraphic enabling clauses of Article IV, Section 3 provided the script by which “[n]ew members of the Union will ... be formed from the unsettled tracts of western territory.”<sup>164</sup> They therefore outlined the institutional and procedural mechanisms at the heart of America’s imperial Constitution. They were also its most politically consequential provisions, making it possible for a relatively weak confederacy to seize and hold a swath of territory “of equal extent with the Roman Empire or that of Alexander.”<sup>165</sup>

Needless to say, the Territory and Admissions clauses cannot be comfortably described as *constraining* the federal government’s power. Indeed, they illustrate perfectly why constitutionalism cannot be reduced to limitations or restrictions on government by higher law. The constitutional blueprint for admitting new states to the Union is not a limitation. It is a *script*. Rather than telling political authorities what they cannot do, it tells them how to do what they have been planning to do once they decide that the time is ripe. Every political order, including pre-liberal and pre-democratic ones, contains *constitutional scripts*. The most obvious is probably the succession formula, helping political authorities identify a replacement when the current leader unexpectedly dies. No one would say that a credible succession formula is a restriction on the power of the state. The same is true of the Territory and Admissions clauses. They are not restrictions imposed on the powerful to protect the weak. Instead, they are scripts helping political authorities coordinate their efforts to achieve a common goal.

The Territory and Admissions clauses are the most Jeffersonian provisions in a constitutional system otherwise framed without his direct participation. When listing the new provisions that any new American constitution needed to include to remedy the defects of the Articles of Confederation, Jefferson placed first the need “[t]o establish a general rule for the admission of new states into the Union.”<sup>166</sup> The succinctly worded Territory and Admissions clauses can even be said to represent the culmination of Jefferson’s central role, first, in finalizing Virginia’s 1784 cession of the land northwest of the Ohio River to the Union and then in chairing

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new states in Congress. As it was initially understood, the equal footing doctrine required identical rules of representation in Congress to apply to the new states and the original states. See Chapter Six below.

<sup>163</sup> Madison to George Nicholas (May 17, 1788), *The Debate on the Constitution*, vol. 2, p. 444.

<sup>164</sup> Hamilton, New York Ratifying Convention, Poughkeepsie, June 20, 1788.

<sup>165</sup> As reported by the Census Bureau of 1850. Anderson and Cayton, *Dominion of War*, pp. 283-284.

<sup>166</sup> Jefferson, Answers and Observations for Dêmeunier’s Article on the United States in the *Encyclopédie Methodique*, January 24, 1786.

the committees that prepared the “Ordinances” of 1784<sup>167</sup> and 1785.<sup>168</sup> Once a preliminary agreement was reached on the conditions of the Virginia cession,<sup>169</sup> Congress established these committees to jumpstart the process of organizing new states within the national domain. Taken together, these two constitutionally dubious ordinances, and their practical elaboration in the similarly suspect Northwest Ordinance of 1787, provided a driver’s manual for expansion. They spelled out the steps for transforming sparsely populated western communities into fully functioning republics and incorporating them as coequal states into the Union. The avowed purpose of all three ordinances was to prevent western secession. The Northwest Ordinance, in particular, can be read as filling in the blanks of the parsimoniously worded Territory and Admissions clauses.<sup>170</sup> As a result, the members of the committees that drafted them, especially Jefferson, should be considered co-framers of the 1787 Constitution. The fact that the delegates came to Philadelphia with the intent of revising the Union’s charter to accommodate some version of Jefferson’s plan for expansion is indisputable. They were largely responsible for the most original feature of the new plan: a new form of confederation that grew its membership by annexing, on an equal basis, states of its own creation. This Jeffersonian brainchild “underlay the whole later development of the continental United States.”<sup>171</sup> That is arguably why Jefferson, too, described the Constitution as something “new under the sun.”<sup>172</sup>

Writing of the national domain, Madison explained how the process had already been set in motion:

Congress have assumed the administration of this stock. They have begun to render it productive. Congress have undertaken to do more: they have proceeded to form new States, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy.<sup>173</sup>

This was the carefully plotted sequence scripted by the aforementioned committees along lines first sketched by Jefferson. In the two years before the Philadelphia Convention, Congress had begun to enact this plan, laying the groundwork for what they hoped would develop into a vast republican empire.

This is where the previously mentioned conundrum arose. The Congress that followed Jefferson’s script was still operating under the nominal authority of the Articles of Confederation, which had granted Congress no power to create new republican states in the West in the expectation that they would subsequently join the Confederation. When President, Jefferson would agree to

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<sup>167</sup> “Ordinance for the Government of the Western Territory” (April 23, 1784), JCC 26:275–79.

<sup>168</sup> “An Ordinance for ascertaining the mode of disposing of Lands in the Western Territory” (May 20, 1785), JCC 28:375ff.

<sup>169</sup> March 1, 1784 (JCC 26:117).

<sup>170</sup> The Constitution also gave teeth to the Northwest Ordinance by vesting the general government with the authority to promote international commerce and, partly thereby, to raise the revenue it needed to pay for the American army that eventually (1794) broke the Indian power in the Ohio lands, giving western settlers a powerful reason for allegiance to the Union.

<sup>171</sup> Dumas Malone, *Jefferson the Virginian* (Boston: Little, Brown, 1948), p. 412.

<sup>172</sup> Jefferson to Joseph Priestley, March 21, 1801, PTJ, 33:394.

<sup>173</sup> *Federalist Papers*, No. 38.

exceed the powers granted to the federal government when authorizing the Louisiana Purchase of 1803. The pattern of extraconstitutional expansion was already set in 1794-1795. Following his lead, Congress between the Virginia cession and the Federal Convention was busily setting up governing structures in the ceded territory, preparing the way for the emergence of new states in the national domain. “All this has been done,” as Madison dryly observed, “and done without the least color of constitutional authority.”<sup>174</sup> All that Congress could do to lend a patina of legitimacy to this unauthorized behavior was to invoke reason of state: “The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits.”<sup>175</sup>

This brings us back to the fundamental purpose of the Federal Convention: to *preserve* the Union of the thirteen original states together with the resource-rich western territories acquired in the Peace Treaty of 1783 and which offered “an ample theatre for hostile pretensions, without any umpire or common judge to interpose between the contending parties.”<sup>176</sup> Madison justified the Confederation Congress’s unconstitutional ordinances by observing that “It is in vain to oppose constitutional barriers to the impulse of self-preservation.”<sup>177</sup> For the Union to preserve the formally enlarged version of “itself,” it had to prevent western secession. It was allegedly the supreme law of self-preservation, therefore, that compelled Congress to initiate the process of creating new states in the West. Although Congress had no authority to create new states under the Articles, it began to do so anyway, claiming that it was exerting what Hamilton called “that original right of self-defense which is paramount to all positive forms of government.”<sup>178</sup> It was permitted to act outside the Constitution to save the Union, meaning the future American empire as they imagined it.<sup>179</sup> This could pass as orthodox liberalism since, as Locke taught, all governments had the right “to act according to discretion for the public good, without the prescription of the Law, and sometimes even against it” when self-preservation was at stake.<sup>180</sup> If “revolutionary consciousness” is “a state of mind which accepts and embraces a suspension of the normal rules of conduct and justifies non-ordinary behavior by referring to the extraordinary nature of the times,” then the Confederation Congress was never more thoroughly an heir to the spirit of 1776 than when

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<sup>174</sup> *Federalist Papers*, No. 38. Speaking at the Convention about federal “state building” in the national domain, Pickney had made the same point: “Congress had no right under the articles of Confederation to authorize the admission of new States; no such case having been provided for.” Pinckney, July 6, Farrand I:542.

<sup>175</sup> *Federalist Papers*, No. 38.

<sup>176</sup> *Federalist Papers*, No. 7.

<sup>177</sup> *Federalist Papers*, No. 41.

<sup>178</sup> *Federalist Papers*, No. 28.

<sup>179</sup> As Jefferson, too, would explain, “on great occasions every good officer must be ready to risk himself in going beyond the strict line of law, when the public preservation requires it: his motives will be a justification.” Jefferson to William C. C. Claiborne (February 3, 1807). Similarly, “The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.” Jefferson to John B. Colvin (September 20, 1810).

<sup>180</sup> Locke, *Second Treatise*, §160.

it defied legality to expand the Union by preparing for the creation of new member states in the West.<sup>181</sup>

To put an end to this revolutionary invocation of “necessity” to justify the creation and incorporation of new member states, the framers vested the new-modeled general government with the constitutional authority to do what it had been doing unconstitutionally and indeed what it had to do if it wished to realize shared hopes for westward expansion.

It helps to linger briefly over the ingenuity of the framers’ roadmap to enlargement. Far from being a straightforward security alliance among already functioning republics, the reformed American Confederation would expand not by adding other fully formed states but rather by incubating embryo settlements, either within or beyond their borders, and after a period of expectancy, giving birth to infant sister states. Madison says precisely this when listing what he considered *the two preeminent aims* of the new plan of government:

the immediate object of the federal Constitution is to secure the union of the thirteen primitive States, which we know to be practicable; and to add to them such other States as may arise in their own bosoms, or in their neighborhoods, which we cannot doubt to be equally practicable.<sup>182</sup>

Looking ahead, we can say that Kentucky, for example, developed in “the bosom” of Virginia, while Vermont arose in “the neighborhood” of New York, Massachusetts and New Hampshire.

Here lies the genuine radicalism of the plan. Where the framers left traditional federations behind was in their commitment, starting immediately, to add to the original thirteen states not other preexisting states but states concocted by fiat in former Native American homelands and populated by politically loyal white settlers migrating from coastal communities and Protestant Europe.<sup>183</sup>

Contrasting this method for growing the Union with how purely federal systems typically expand can helpfully illuminate the framers’ originality. American political development would proceed very differently than EU enlargement, which requires the existing members of the Union to overcome or accommodate ingrained cultural traditions in order to remake already existing, fully-formed candidate states in their own image. The enlargement process scripted by the Territory and Admissions clauses involved the creation of new member states from whole cloth on previously “vacant” land and the *subsequent* peopling of these states with the descendants of coastal populations and their cultural kin.

Admittedly, the immensely consequential role played by the Territory and Admissions clauses in creating America’s republican empire faded from view once overland expansion ended

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<sup>181</sup> Joyce Appleby, “Liberalism and the American Revolution,” *The New England Quarterly* (March 1976), p. 5.

<sup>182</sup> *Federalist Papers*, No. 14.

<sup>183</sup> While limiting naturalization to foreign whites was obviously racist, giving priority to foreign Protestants was not simply and solely bigoted, since European Protestants, for religious reasons, had a much higher rate of literacy than Catholics at the time and were therefore better prepared to participate in republican self-government.

toward the close of the nineteenth century.<sup>184</sup> But re-situated in their proper historical context, these two parsimoniously worded provisions fully justify the framers' boast that the Constitution had "no parallel in the annals of human society."<sup>185</sup> As a blueprint for achieving piecemeal expansion by incorporating new member states of its own creation, in line with the Union's limited resources, they provided the working gears of a wholly novel system of political development, enabling a relatively weak confederacy, by using civilians rather than soldiers, to seize and hold half a continent.<sup>186</sup>

While westward migration was largely spontaneous, Congress's power to initiate and supervise the creation of *replica republics* in the West was consciously engineered by the framers.<sup>187</sup> (The fateful split into slave-labor and free-labor replicas of Southern and Northern coastal models will be discussed below.<sup>188</sup>) Mirror-imaging, or the reliance on eastern templates when structuring western state governments, was conceived as an effective plan for dispossessing Native Americans and irreversibly ousting the Spanish and British empires from North America.<sup>189</sup>

Because all new states would be "republican" on the model of the original states, the generative process by which "the West was won" resembled cloning. The institutional architecture of latecomer states was to be modeled on their predecessors' constitutions and legal systems. It is surely relevant that the Republican Form of Government Clause occurs in Article IV, Section 4, immediately following the Territory and Admissions clauses in Article IV, Section 3. The "new associations" which were to join the federation would take over, with minor variations, the pre-tested political formats of the long-settled States.<sup>190</sup> Unlike the Union as a whole, which imitated no preexisting models, the new states were born as carbon copies. The derivative states across the mountains would be especially well "adapted to a federal coalition," Madison claimed, because they

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<sup>184</sup> Immigration from Europe to America continued after 1900, but it was no longer associated with western expansion, as it was for the framers; immigration to agricultural America was replaced by immigration to urban-industrial America. The lure was factory not farm.

<sup>185</sup> *Federalist Papers*, No. 14.

<sup>186</sup> In 1776 "Sketch of a Proposition for a Peace," Franklin included Bermuda and the Bahamas among the lands that "Britain shall cede to the United States." Adams "Model Treaty" of the same year said the same about "all Islands near" the United States. By 1787, American expansionists had decided to prioritize territory that a mass army of ordinary civilians could reach on foot.

<sup>187</sup> For "the principle of federative replication," see Anders Stephanson, "An American Story? Second Thoughts on Manifest Destiny," in David Maybury-Lewis (ed.) *Manifest Destiny and Indigenous Peoples* (Harvard University Press, 2009), p. 31.

<sup>188</sup> The expectation of a future fraternal war between Northern and Southern confederacies, openly discussed in the *Federalist Papers*, reflected its authors' recognition of the inherent instability of a half-slave-half-free system of western development.

<sup>189</sup> Anticipating a readership in European foreign ministries, Hamilton, Madison and Jay wrote somewhat euphemistically about American plans to eject the British and Spanish from North America.

<sup>190</sup> While departing radically from Montesquieu's idea of confederated republics as leagues of preexisting states, the framers presumably appreciated his comments on Britain's political self-replication in North America: "As men are fond of introducing into other places what they have established among themselves, they have given the people of the colonies their own form of government; and this government carrying prosperity along with it, they have raised great nations in the forests they were sent to inhabit" (*Spirit of the Laws*, XIX, 27, p. 311).

would be “of a kindred nature”<sup>191</sup> with their coastal parents. Making the states of the interior into rough facsimiles of the original states was another way of attaching “the western country” to “the Atlantic side of the continent.”<sup>192</sup> It represented a project of political parthenogenesis. Although the Constitution assigned the authority to create and incorporate new states to the general government, the process of expansion would be considerably eased by the transfer of fully worked-out models of state government from the old states to the new ones.<sup>193</sup> The resulting political uniformity, with all member states having Republican governments with executive, legislative and judicial branches, would make the state governments legible to each other and facilitate interoperability, lowering barriers to seacoast-inland commerce and cooperation.

To grasp the appeal of expansion by replication, it is essential distinguish between uniformity and centralization. Before the Revolution, the colonies were too heterogeneous to combine smoothly together in a tight federal union. The structural mismatch among royal, proprietary, and charter colonies was one reason why the Albany Congress, which proposed such a union, failed. The Revolution introduced a measure of centralization as a war-fighting expedient. Its most consequential effect, however, was to create greater structural homogeneity among the rebellious states. Responding to a Congressional initiative, they all became constitutional republics. This transformation considerably eased the path to confederation.<sup>194</sup> It also made the “equal footing” of American states very different from “equal footing” under international law which imposes no requirement of uniformity among the political systems of diplomatically interacting sovereign states.

### Imaginary Compacts

The radically unconventional thinking that the framers brought to bear on their expansionistic mission was reflected in a striking legal fiction omnipresent in their writings in the years before the Philadelphia Convention. This was the seemingly nonsensical postulate that the thirteen states of the Confederation had made and were continuing to make legally valid *compacts* with states that did not yet exist. Prior to 1791, Trans-Appalachia “states” were castles in the air. Important members of the founding generation nevertheless wrote “as if” such imaginary states already possessed the legal personality needed to seal legally valid contracts. This literary conceit provides a revealing window into how they modified the federal principle to promote American expansion. For one thing, their originality on this point is hard to deny. No community had ever built a federation by making apocryphal pacts with incorporeal political bodies, that is, by forging a “Union among the present and future States.”<sup>195</sup> So why exactly did the framers chose to disguise their radically transformative project as a routinely transactional one?

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<sup>191</sup> *Federalist Papers*, No. 43.

<sup>192</sup> Madison, June 13, 1788, VA Ratifying Convention.

<sup>193</sup> In another context, Hamilton writes of some states “putting themselves upon an equal footing” with others “by an imitation of their example.” *Federalist Papers*, No. 16.

<sup>194</sup> Cf. “uniformity in the organization and discipline of the militia would be attended with the most beneficial effects” (*Federalist Papers*, No. 29).

<sup>195</sup> Morris, July 19, Farrand II:52.

Examples of the patently premature claim “that frontier settlements were ‘states,’ at some early stage of development”<sup>196</sup> are numerous and easy to find. At the Philadelphia Convention, for instance, Virginia Governor Edmund Randolph summarized a decade of Congressional discussions of the West by reminding his listeners that “Congress have pledged the public faith to the New States.”<sup>197</sup> Since no one seems to have objected that a pledgor’s promises cannot be binding if the pledgee does not yet exist, the delegates must have assumed that Trans-Appalachia was somehow “pregnant” with Republican embryos and needed to be addressed “as if” they were fully formed states as a matter of preemptive courtesy.

Two weeks before the Virginia Ratifying Convention, in a passage already cited, Madison told a supporter that if they could manage to hold the current Confederation together, they should also be able “to bind together the Western and Atlantic States.”<sup>198</sup> Here again, speaking of the inchoate settlements across the mountain barrier as if they were already organized into territorially anchored political states was presumably meant to convey a sense of inevitability about a process of overland expansion that remained fraught, contingent and uncertain. When Madison wrote of “all the new States,” adding futuristically that “these States will, for a great length of time, advance in population with peculiar rapidity,”<sup>199</sup> he was not thinking merely of a few fledgling political communities, such as Kentucky and Vermont on the cusp of incorporation,<sup>200</sup> but of an indeterminate number of merely imagined and still nameless states which were expected to arise at some point *in vacuis locis*, beyond the western borders of the original states. They were to be re-populated by descendants of the original colonists copiously supplemented by common whites migrating across the Atlantic from Protestant Europe.

Having baptized such imaginary states with whimsically colorful names,<sup>201</sup> Jefferson wrote casually about the need to reconcile the “Ultramontane states” which did not exist, with the “Maritime states” which did.<sup>202</sup> He also called the Land Ordinance of 1784 “a charter of compact ... between the thirteen original states, and each of the several states now newly described.”<sup>203</sup> And in the summer of 1787, while the Federal Convention was underway, the drafters of the Northwest Ordinance followed Jefferson’s lead when they depicted relations between the settled coast and the unsettled interior in explicitly contractual terms, purporting to enact “articles of compact between the original States and the people and States in the said territory.”<sup>204</sup>

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<sup>196</sup> Peter S. Onuf, *Statehood and Union. A History of the Northwest Ordinance* (University of Notre Dame Press, 2019), p. 55.

<sup>197</sup> Randolph, July 11, Farrand I:580.

<sup>198</sup> Madison to George Nicholas, May 17, 1788, in Bailyn, *Debate on the Constitution*, vol. 2, p. 444.

<sup>199</sup> *Federalist Papers*, No. 58.

<sup>200</sup> “The number of States will also increase. Kentucky, Vermont, the province of Mayne and Franklin will probably soon be added to the present number.” Gorham, July 23, Farrand II:94.

<sup>201</sup> Ordinance of 1784.

<sup>202</sup> Jefferson to James Monroe (July 9, 1786).

<sup>203</sup> Jefferson, “Revised Report, Plan for Government of the Western Territory” (March 22, 1784), *Jefferson Papers* 6:609.

<sup>204</sup> “An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio” (1787).

That the Northwest Ordinance was *not*, in any ordinary sense, a compact between the original states and various hypothetical “new states” is perfectly obvious since no such states had arisen “in the said territory” at the time it was passed. No politically well-organized community had materialized or achieved anything resembling legally recognized corporate status in the lands northwest of the Ohio River by the summer of 1787. Being still on the drawing board, they could not have been promised anything. Nor could they, being non-existent, make any promises of their own that they had to keep.

The fiction of a meeting of the minds between existing states and “States which are not yet in existence”<sup>205</sup> might initially seem an exercise in wishful thinking. Neither legally nor practically could the Northwest Ordinance be an enforceable contract between existing and non-existing states. But this “proleptic” way of speaking is clearly less a conceptual fallacy than a political strategy. What might look delusional turns out to have been an attempt to convey the message that the Union could expand only by inviting the new Western settlements to join the Union of their own sweet will. The figment of a voluntary “compact” between existing and nonexistent states contained a powerful rejection of the British model of colonialism which assumed an enduring asymmetry between an imperial core and provincial dependencies

Speaking of possible future states as if they had already arisen was a shrewd way of conveying unwavering commitment to symmetrical relations between old and new states. It was not evidence of a jejune faith in “manifest destiny” but an effort to communicate goodwill and sincere commitment to equal footing. Only if they could publicly convey a credible promise to treat the sparsely populated and rapidly growing but still inchoate western settlements with fundamental fairness as fully equal partners in an expanding Union would they have a chance to win the contest for empire in North America.

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The federal government would not be seeking tyrannical authority over state governments. It would have no incentive to break its tools. After all, these were the sole serviceable instruments at its disposal for transforming the coastal federation into a continental empire. They hoped and expected that the federal organization of power could help secure “the fate of an empire in many respects the most interesting in the world.”<sup>206</sup>

At this point readers might begin to worry about *the teleology of hindsight* or the facile assumption that the framers, by promising legal equality to future states, were causally responsible for the prodigious territorial development that happened later for independent reasons and which they cannot possibly have foreseen. Such skepticism is natural and warranted, despite my acknowledgment above of the role of serendipity in the subsequent development of the United States. Evidence to be cited and examined below, however, will confirm that the framers self-consciously supported the incorporation of new states into the Union under the same rules of

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<sup>205</sup> George Mason, July 11, Farrand I:578.

<sup>206</sup> *Federalist Papers*, No. 1.



representation as applied to the original states to facilitate territorial expansion and the national greatness it promised and foretold.<sup>207</sup>

This brings us to the next step in our argument, the claim that the farmers embraced individual rights for the same reason they embraced states' rights, not to limit federal power but to extend its reach.

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<sup>207</sup> The evidence presented below touches solely on the framers' intentions, not on the myriad extraneous factors that brought about the consequences they desired. To reiterate the key distinction underlying my analysis: while westward migration was inevitable, westward expansion was not. The latter had to be constitutionally engineered. That the framers frequently suffered bouts of despair during their uphill struggle to bring it about reveals their lack of confidence in divine providence. Moreover, their continental ambitions ultimately succeeded only because of a heterogeneous array of contingent factors. It was, nevertheless, not an accident. It was neither unforeseen nor unintended. The United States in 1787 did not fluke its way to continental empire. It would not have occurred had it not been wished for and planned for, even though the wishing and planning alone did not suffice to bring it about.

### Rights Make Might

America's religiously intolerant European enemy was scandalized and dismayed. Freedom of conscience was helping the newly independent Confederation transform itself a powerful and dangerously hostile nation. That is the warning delivered by Count Aranda, Spain's ambassador to France during the Paris peace negotiations of 1782-1783. The United States was growing into mighty empire, the Spanish diplomat lamented, because it offered religious liberty to its citizens:

This federal republic is born a pigmy. A day will come when it will be a giant, even a colossus, formidable in these countries. Liberty of conscience, the facility for establishing a new population on immense lands, as well as the advantages of the new government, will draw thither farmers and artisans from all the nations. In a few years we shall watch with grief the tyrannical existence of this same colossus.<sup>208</sup>

Far from curbing the power of the American Confederation, according to Aranda, liberty of conscience would help transform a militarily insignificant country on the remote edges of civilization into an international behemoth able to threaten Spain's empire in the Western Hemisphere. Religious freedom would promote this political miracle first by attracting to America many thousands of industrious immigrants "from all the nations" and then by giving them powerful reasons for staying loyal to the country.

Aware that "America was indebted to immigration for her settlement and Prosperity,"<sup>209</sup> the framers sought ways to encourage more. That a credible promise of religious liberty could be a magnet for immigrants was self-evident to anyone familiar with the history of Protestant Europeans who fled religious persecution to seek refuge in British America: "Our forefathers, inhabitants of the island of Great Britain, left their native land, to seek on these shores a residence for civil and religious freedom."<sup>210</sup> As a result, no one at the time of the framing doubted that freedom of worship could encourage immigration. Its effectiveness in this regard did not imply that it lacked value in itself. On the contrary, it was only because religious liberty was intrinsically desirable that political leaders could deploy the credible promise of toleration to mobilize popular cooperation in their bold plan to transform a pygmy confederation into a republican colossus.

Aranda's prediction that the promise of individual freedom would transform a petty province into a formidable empire upends common assumptions about how the framers' eighteenth-century contemporaries understood liberty. His causal claim only seems counterintuitive to us

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<sup>208</sup> Pedro Pablo Abarca de Bolea y Jiménez de Urrea, 10th Count of Aranda's warning can be found in John Fiske, *The Critical Period in American History* (1888), p. 22. For the original, see Manuel Giraldo Lucena (ed.) *Premoniciones de la independencia de Iberoamérica* (Aranjuez and Madrid, 2003), p. 79, cited in J.H. Elliott, *Empires of the Atlantic World: Britain and Spain in America 1492-1830* (Yale University Press, 2020), pp. 367, 475.

<sup>209</sup> Madison, August 13, Farrand II:268.

<sup>210</sup> Thomas Jefferson and John Dickinson, "The Causes and Necessity of Taking Up Arms" (July 6, 1775). See David Cressy, *Coming Over. Migration and Communication between England and New England in the Seventeenth Century* (Cambridge University Press, 1987) on the role played by religious liberty in drawing migrants to Colonial America.

because we have come to think of personal rights, incorrectly, as shields against government power or restrictions on the strong for the benefit of the weak.

### Rights as Incentives

To say that the framers were building a state rather than safeguarding rights is subtly misleading.<sup>211</sup> What the framers were doing was building a state *by* protecting rights or promising credibly to do so. Unlike Aranda, they saw religious liberty as valuable in itself. But like Aranda, they also saw it as means to an end. Edmund Morgan brings some needed clarity to this issue when he observes that “freedom has frequently had to make its way in the world by serving as a means to an end, and it has often proved a powerful means.”<sup>212</sup> The architects and advocates of constitutional reform in 1787-1788 understood this perfectly well. Their instrumental approach to basic rights was a natural corollary to their strategic constitutionalism.<sup>213</sup> They openly described the promise of equal liberty for white commoners, for example, as a catalyst to ignite and channel the human energies that the Union’s leaders needed if they were to successfully lay the foundations of a continental empire.

The conventional assumption that individual liberty thrives when collective power is constrained or checked obscures from view one of the most consequential insights of those who framed and ratified the Constitution – that liberty can awaken and magnify the dynamism of an otherwise invertebrate and internally divided political community. From this premise, they concluded that what we would today call “liberalism” offered a set of ideals, institutions and practices which would enable a disorganized league of semi-sovereign states to transform itself miraculously into a republican empire on a continental scale.

The Declaration of Independence charged King George with having “endeavored to prevent the population of these States” by “obstructing the Laws for Naturalization of Foreigners,” and “refusing to pass others to encourage their migrations hither” as well as “raising the conditions of new Appropriations of Lands.” The framers set out to flip this script by smoothing the path to

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<sup>211</sup> Max Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford University Press, 2008).

<sup>212</sup> Edmund S. Morgan, *American Slavery, American Freedom* (Norton, 1975), p. 36.

<sup>213</sup> During the ratification debates, both Madison and Hamilton sought to justify and explain the proposed Constitution on essentially strategic grounds. They repeatedly, even obsessively, emphasized the way the new institutional framework would allow the reorganized Union to solve a series of grave and urgent problems afflicting the Confederation. Although they gestured repeatedly toward a source theory of legitimacy, stressing the importance of popular ratification, their specific arguments for ratification suggest the primacy, in their minds, of a consequence theory of legitimacy. Their emphasis on thinking consequentially, strategically and instrumentally comes across in trite-sounding phrases such as “the means ought to be proportioned to the end,” “every power ought to be commensurate with its object,” “there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation” and, finally, “[a] government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people.” *Federalist Papers*, No. 31.

naturalization and liberally granting basic rights to white commoners.<sup>214</sup> To overcome their rivals for control of North America, they sought to rally to their cause the most precious resource at their disposal: a relentlessly swelling population. They did so by employing rights as inducements to join the “Westward the course of empire” that the Confederation had inherited from Great Britain at the close of the Revolutionary war.<sup>215</sup>

The Union’s lack of conventional instruments for imposing imperial controls obliged American expansionists to rights and other favors to members of the white majority. They had no choice but to compensate for their paucity of sticks with a plethora of carrots. They aimed at winning the “attachment” and “support”<sup>216</sup> of the settlers already moving west, recruiting others to join them, helping them organize themselves along republican lines and giving them persuasive reasons to seek incorporation into the Union. The institutional structures they designed for what we would now call “sustainable development” were conciliatory and magnanimous rather than imperious and coercive, speaking more to hopes than to fears. By offering rights to cooperating individuals, the framers aimed to consolidate the Confederation’s jurisdiction over the contiguous territories beyond the effective control of the existing states.

This ploy was in line with the teachings of classical republicanism. According to Machiavelli, for example, “We see from experience that cities never expanded in territory or wealth except when they were free.”<sup>217</sup> Writing under the influence of this Machiavellian tradition, Hamilton brushed aside the false opposition between individual freedom and imperial greatness: “Happily for mankind, stupendous fabrics reared on the basis of liberty ... have flourished for ages.”<sup>218</sup> The framers believed that the promise of liberty would energize popular support for extending their federal republic into regions of North America yet unsettled by Europeans. They saw individual rights as immensely valuable strategic tools for rearing a stupendous empire from the Atlantic coastline to “the great interior Country.”<sup>219</sup>

They embraced and celebrated personal liberties not only for their inherent value but also, and more urgently, for the positive contribution they were expected to make to the political power, economic prosperity, military resilience and territorial aggrandizement of the federal union. They did not use the phrase, but their guiding principle might just as well have been: *rights make might*. This was true of freedom of conscience, legal equality, press freedom, the right to vote and, of

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<sup>214</sup> “Patriots believed that well-designed states should promote immigration. This was the reason the authors of the Declaration of Independence denounced George III for endeavoring ‘to prevent the population of these States.’” Steve Pincus, *The Heart of the Declaration: The Founders’ Case for an Activist Government* (Yale University Press, 2018).

<sup>215</sup> George Berkeley, “On the Prospect of Planting Arts and Learning in America” (1728).

<sup>216</sup> *Federalist Papers*, No. 46.

<sup>217</sup> The original reads: *si vede per esperienza, le cittadi non avere mai ampliato nè di dominio né di ricchezza, se non mentre sono state in libertà*. Niccolò Machiavelli, *Discourses on Livy*, translated by Harvey C. Mansfield and Nathan Tarcov (Chicago: University of Chicago Press, 1996, II.2, p. 129).

<sup>218</sup> *Federalist Papers*, No. 9.

<sup>219</sup> Morris, July 13, Farrand I:605. As we mentioned above and shall see below in greater detail, the framers also treated bicameralism, federalism, and republican government as effective means for an otherwise weak state to increase its territorial extent.

exceptional importance, the right lawfully to possess, use, convey and bequeath freehold property in arable soil.

Recruiting immigrant families able and willing to risk their lives and invest the backbreaking labor needed to clear the wilderness and till the soil was a priority if the Union was going to seize and hold the West. With that in mind, the framers deployed fundamental rights as powerful *lures* to engage the time, energy and commitment of common whites in the elite project of creating a republic of republics on a continental scale.<sup>220</sup>

To seize control of the vast interior, advocates of expansion knew that they had to cater to the values and interests of “that valuable class of the citizens who are employed in the cultivation of the soil.”<sup>221</sup> As the *adelantados* or civilian avant-garde of expansion, common whites who ventured west had much greater bargaining power than commoners in Europe precisely because they played an indispensable supporting role in realizing the ambitions of the most influential social and political groupings. They had to be seduced. If not, they could easily defect and create an independent confederation of their own. James Wilson’s remark that “[n]o government could long subsist without the confidence of the people”<sup>222</sup> was doubly true on the frontier. The Union’s authority there, the framers believed, would quickly dissolve if it failed to win the allegiance, loyalty and “attachment” of settler communities by visibly and believably committing to the security of their liberties.

Failure to appreciate the framers’ fundamentally instrumental theory of individual rights stems in part from our completely natural historical amnesia about the threat of Western secession that inspired the expansionists around Washington to organize the Philadelphia Convention. Because we pay no attention to the problem they were seeking to solve, we fail to see rights as the solution they proposed. They promised rights to common whites to encourage them to relocate from the coastal settlements and northern Europe to the Trans-Appalachian frontier. Recruiting immigrant families able and willing to invest the backbreaking labor needed to clear the wilderness and till the soil was a priority if the Union was going to seize and hold the West. With that in mind, the framers deployed fundamental rights as incentives to engage the time, energy and commitment of common whites in the project of continental expansion.

The Constitution drafted in Philadelphia assumed the inevitability and spontaneity of westward migration, undertaken by adventurers, many born in Europe with no preexisting allegiance to the Union or the original states. The challenge for Eastern political authorities was how to win the “fidelity and devotion”<sup>223</sup> of this growing, mostly apolitical settler movement. The British had lost their American colonies partly because they tried to annul land claims in the trans-Appalachian

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<sup>220</sup> I intend this as an alternative to Hulsebosch’s claim that “[t]he American founders’ resolution was to attempt to control a space by law that could not possibly be controlled by men.” Daniel Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830* (University of North Carolina Press, 2006), p. 10. My similar but slightly different argument is that they used rights to recruit the “men” they needed to control the territory they wanted to incorporate into the Union.

<sup>221</sup> *Federalist Papers*, No. 12.

<sup>222</sup> Wilson, May 31, Farrand I:49.

<sup>223</sup> *Federalist Papers*, No. 17.

region and discourage common whites from settling there. Learning from this fatal error, Jefferson concluded that “American leaders needed to ride, rather than resist, the settler wave heading west.”<sup>224</sup> This characterization subtly misrepresents what the Philadelphia delegates thought necessary. They devised a confederate republic not to yield passively to the migratory flood but in order to actively excite, exploit, subsidize, accelerate and direct it.

### Bounties and Subsidies

While unfamiliar today, this understanding of rights as recruitment bonuses fit comfortably, at the time, into a general style of social engineering. Political authorities saddled with weak coercive powers would enlist public cooperation by offering a range of favors and benefits. Exempting pioneers from taxation and conscription for a period of years, for example, was a standard incentive employed in Colonial times to incentivize westward migration. That may have been the simplest way in which “negative freedom” encouraged, accelerated, and guided the movement of settlers into the still-dangerous backcountry.<sup>225</sup>

A similar exchange of benefits for cooperation occurred in a rich variety of settings. Cash enlistment bonuses during the Revolutionary War, for example, served as “expedients for raising men.”<sup>226</sup> The French envoy to the United States during this period reported effusively on “the incentives offered to many industries or manufactories” in America, including the offer of “a prize to whoever will invent a machine which, by means of fire, water, or any other agent, will be able to lessen hand work in cotton, wool, linen, and flax, and to render their manufacture as cheap as in Europe.”<sup>227</sup> This example nicely illustrates how governments can awaken and enlist human energies to make the economy hum. In 1764, on a darker note, Pennsylvania “offered bounties for Indian scalps: \$134 for a man, \$130 for a woman, and \$50 for a child.”<sup>228</sup> Such schemes illustrate how common it was for political authorities to seek to mobilize private assistance in furthering public aims.

Two further examples appear in the constitutional text.

Letters of Marque and Reprisal refer to the system by which governments lacking naval forces sufficient unto the day recruited and rewarded privateers who we might just as well call

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<sup>224</sup> Alan Taylor, *American Revolutions*, p. 278; indeed, “[b]y leading, rather than slowing, the process of Indian dispossession, the federal government could gain influence in the West” (ibid., p. 7).

<sup>225</sup> “It is evident that the strength and security of the colony were the motives for the policy pursued, since it was to the settlers in the frontier counties that exemption was granted.” Erna Risch, “Encouragement of Immigration: As Revealed in Colonial Legislation,” *The Virginia Magazine of History and Biography*, Vol. 45, No. 1 (Jan., 1937), p. 4.

<sup>226</sup> *Federalist Papers*, No. 22.

<sup>227</sup> Otto to Montmorin, December 7, 1787, in Bancroft, *History of the Formation of the Constitution of the United States of America*, 2:452-453.

<sup>228</sup> Taylor, *American Revolutions*, p. 60. If we prefer to speak in euphemisms, we might describe this atrocity as the privatization of an essentially governmental function. By outsourcing killing and scalping to private gangs, the state government could husband its scarce capacity for violence and achieve indirectly what it could not accomplish so economically if it were compelled to deploy state officials to commit the heinous acts.

bounty hunters.<sup>229</sup> Such “letters” were permission slips awarded to ship owners and their crews, authorizing them to seize enemy vessels in wartime for a personal share in the profits. Here again, governments promoted the public good, as they defined it, by appealing to the acquisitive passions of individual privateers. Deputizing proxies allowed governments to punch above their weight in maritime affairs. The fact that privateers were personally acquisitive did not make them noxious in the framers’ eyes, so long as they did not drag the country into unwinnable wars.<sup>230</sup>

The same logic resurfaces in the one right that was mentioned in the Constitution and that was explicitly structured as an incentive rather than a restraint: “Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>231</sup> Patents and copyrights are productive, not merely protective.<sup>232</sup> They are stimulants not depressants.<sup>233</sup> To say that the framers held out the promise of such rights as incentives to elicit private cooperation in their nation-building and market-building projects is to stress the reliable connection they pledged to create between effort and reward.<sup>234</sup> Patent rights can neither be justified nor made intelligible without reference to the consequences they were expected to produce. The framers clearly thought they would swell the “common wealth” by incentivizing private efforts in science and the useful arts.<sup>235</sup> Governments expended scarce resources in enforcing patents not merely to be fair to the patentees but also to generate substantial benefits for society as a whole. As Madison remarked, “[t]he public good fully coincides in both cases with the claims of individuals.”<sup>236</sup> It should not be surprising that, following the classical English liberals, Madison, Hamilton and the other

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<sup>229</sup> “The Congress shall have Power To ... grant Letters of marque and reprisal.” Article I, Section 8, Clause 11.

<sup>230</sup> The danger that privateers would act contrary to the law of nations and invite reprisals on the homeland was obviated by compelling the privateers to have their claims to a legally sanctioned share of captured booty adjudicated by government-run prize courts. The institution of prize courts reminds us that, even when the government relies on private avarice and ambition to accomplish public aims, it needs not only to harness but also to discipline these often destructive motivations. The framers fully understood, for example, that “[a]n avaricious man might be tempted to betray the interests of the state to the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents.” *Federalist Papers*, No. 75.

<sup>231</sup> Art. I, Sec. 8, Cl. 8.

<sup>232</sup> Whether or not we describe patents and copyright as “constitutional rights,” they are rights inscribed in the Constitution that call for the government to enforce them against private parties who seek to violate them unlawfully.

<sup>233</sup> Another helpful analogy for explaining how rights can function as bargains or incentives to cooperate is the way the promise of confidentiality unlocks otherwise unattainable information: “the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery.” *Federalist Papers*, No. 64.

<sup>234</sup> Cf. “the desire of reward is one of the strongest incentives of human conduct.” *Federalist Papers*, No. 72).

<sup>235</sup> Patent enforcement is therefore an illustration of how the general government, by deploying rights as incentives, “can call to its aid the collective resources of the whole Confederacy.” *Federalist Papers*, No. 27.

<sup>236</sup> *Federalist Papers*, No. 43.

expansionists around Washington described “liberty” in general along the same lines, as a source of political and geopolitical power.<sup>237</sup>

To propel the Union’s authority westward, the framers relied on promises of religious freedom, habeas corpus, trial by a jury of one’s peers, protection from cruel and unusual punishments, due process of law, access to bail, fair compensation for property seized for public necessity, the inviolability of bona fide contracts and proportional representation of the people in legislative assemblies. These were the rights promised to western settlers by the Congress of the Confederation sitting in New York in mid- July 1787, while the Federal Convention was underway in Philadelphia. Effectively a roadmap for American expansion, the Northwest Ordinance promoted western expansion by “extending” to future immigrants “the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected.”<sup>238</sup> The framers’ constitutionalism was “rights-based,” therefore, but in an unfamiliar sense. Theirs was a propulsive system in which rights served not as reins but as spurs.

The Congress that first enacted the Northwest Ordinance had been struggling for four years to contrive a scheme for territorial governance in Trans-Appalachia. They settled in 1787 for organizing the region northwest of the Ohio River as a first step toward realizing a more comprehensive plan. Gordon Wood, among many others, has described the ordinance as “the greatest accomplishment of the Confederation Congress,” partly because it guaranteed “to the settlers basic legal and political rights” and assured that they “could leave the older states” without “losing their political liberties.” Credible promises of republican liberty, he argues, helps explain why there was “no limit to the westward expansion of the empire of the United States.”<sup>239</sup>

The first Article of section 13 of the Ordinance states that “No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.” To describe such a rule as a restriction on government power is to misconstrue its primary purpose, which was to strengthen the independence of future state governments, that is, to prevent their “capture” by a single religious denomination itching to impose its will on members of other sects.<sup>240</sup> What we normally see as a limitation on political authority works to improve state capacity for independent action. The various Protestant sects moving West will cooperate more willingly with state government freed from sectarian bias. For this and other reasons, the authors of the Northwest Ordinance saw freedom of conscience as an

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<sup>237</sup> “That Prince, who shall be so wise and godlike as by established laws of liberty to secure protection and encouragement to the honest industry of Mankind, against the oppression of power and narrowness of Party will quickly be too hard for his neighbors.” John Locke, *Second Treatise*, §42, p. 26.

<sup>238</sup> An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio. (July 13, 1787).

<sup>239</sup> Wood, *The American Revolution. A History*, (New York: Modern Library, 2002, p. 74.

<sup>240</sup> “Congress shall make no law respecting an establishment of religion” permitted Connecticut and Massachusetts to continue discriminating against non-Calvinists. But when it re-enacted the Northwest Ordinance in 1789, Congress denied that privilege to the new states to be created in the West.



“inducement” or “incitement” for common whites to participate actively in the elite project of creating a republican empire in North America.<sup>241</sup>

When the delegates in Philadelphia voted unanimously against including a Bill of Rights in the Constitution,<sup>242</sup> they were aware that Congress had already included a list of fundamental rights for western settlers in the Northwest Ordinance. Expressly guaranteed to the inhabitants of future states to be organized in the national domain, these rights were promissory notes meant to encourage settlement of the West. They also provided an “attractive source of popular obedience and attachment”<sup>243</sup> to the Union. The exclusion of a Bill of Rights from the federal Constitution and the inclusion of its equivalent in the Northwest Ordinance strongly suggests that the framers and their collaborators in Congress thought of basic rights less as limits on federal power than as magnets to extend its writ by attracting the workforce needed to move the Union westward one state at a time.

Future settlers in the area were endowed with these rights not by their Creator, of course, but by a far-thinking congressional committee.<sup>244</sup> One of Congress’s strategic aims was to persuade European commoners to uproot their families and resettle in America. However else they thought about basic rights, the architects of American expansion *also* viewed them as powerful lures and deployed them to recruit common whites not only from the coastal states but also from across Protestant Europe to clear the forests, settle the interior and crowd out the Native Americans.

### Liberty’s Power

Emphasizing the contribution of civil and political rights to America’s prodigious territorial development is not as perverse as conventional thinking assumes. That is because the conventional understanding of rights as limits on power is fundamentally wrong.<sup>245</sup>

Rhetoric aside, as Ed Morgan suggested, the founding generation saw liberty as a tool. During the Revolution, for example, the French monarchy supported American independence not because Louis XVI valued republican liberty for its own sake but because his foreign minister thought freedom for the colonies would inflict serious damage on their perennial cross-channel foe. As the French emissary to Philadelphia wrote in the summer of 1787: “We have never pretended to make of America a useful ally; we have had no other object than to deprive Britain of that vast

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<sup>241</sup> Encouraging the arrival of a variety of Protestant sects was a self-reinforcing process because the ambition of any single denomination to impose the kind of sectarian domination still observable in some New England states would fade in the face of its practical impossibility.

<sup>242</sup> Farrand II:587-588 (September 12). Unlike Articles 1 and 2 of the Northwest Ordinance, the federal Bill of Rights (added later as a politically expedient concession to the Constitution’s opponents) did not apply to either existing or future states.

<sup>243</sup> *Federalist Papers*, No. 17.

<sup>244</sup> Those who assumed that the right to transform Indian homelands into the private property of common whites was a natural right were implicitly founding natural rights on the power of the stronger.

<sup>245</sup> That the framers opposed individual rights to government *tyranny* goes without saying. Tyranny, however, is defined not by the *sheer quantity* of power but by the *illicit purposes* for which political power is being deployed. For example, power used to obstruct expansion was tyrannical while power used to advance expansion was not. We return to this important distinction below.

continent.”<sup>246</sup> Foreign support for secession movements within enemy states or empires may even be the most politically consequential illustration of how one community’s longing for liberty can be made to serve another community’s pursuit of power.<sup>247</sup>

A further example of how religious liberty served at the time as a subtle instrument of imperial domination was the controversial Quebec Act of 1774, which sought, among other things, to stabilize London’s authority over the population of Upper Canada by granting local Catholics civil and political rights denied to their co-religionists back in Ireland. No one would credit the sponsors of the Quebec Act with a principled commitment to religious tolerance and pluralism. They granted French Catholics a degree of religious liberty for purely strategic reasons, to preempt colonial revolt and strengthen imperial power. Such well-known imperial policies suggest why the authors of the Constitution would have found it perfectly natural to treat rights as tools, not only as hypothetical restraints *on* government but also as highly motivating incentives to cooperate *with* government.<sup>248</sup>

How grants of liberty can bolster imperial power was even more spectacularly illustrated by a celebrated episode at the outset of the Revolution. On November 7, 1775, Lord Dunmore, the royal governor of Virginia, declared martial law and promised freedom to all able-bodied enslaved men who, escaping from of American Patriots, agreed to fight on the British side.<sup>249</sup> The recent scholarly and public controversy over this act has centered on its alleged role in radicalizing Virginia planters and on what it says about the prevalence of abolitionist sentiments at the time. While historically and politically engaging, this debate sidesteps the most striking implication of the episode. What Dunmore’s gambit reveals is the weaponization of liberty in the service of a military campaign. The strategy was partly successful because the promise of freedom gave many of Virginia’s enslaved males a powerful incentive to cooperate with the objectives of Britain’s counterinsurgency campaign.

In an attempt to preempt Dunmore, states in the Upper South and the North agreed to manumit slaves willing to join the Patriot side.<sup>250</sup> Such proposals met strong resistance from the planters, however, especially in the Deep South. Although approved by the Continental Congress, John Laurens’ similar plan for South Carolina was rejected by the state assembly, probably for the same reason that Hamilton favored it, that it might snowball into a general emancipation: “the plan

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<sup>246</sup> Louis-Guillaume Otto, August 30, 1787, in George Bancroft, *History of the Formation of the Constitution of the United States of America*, vol. 2, p. 438.

<sup>247</sup> That a powerful country can offer “liberty” to stir rebellion in the province of an enemy and then betray that promise, as the Romans did when destroying a Greek confederacy, confirms the political efficacy of the tactic even when it involved duplicity and treachery. *Federalist Papers*, No. 18.

<sup>248</sup> We are more familiar with seeing welfare rights as bids for public support. At the time of the founding, for instance, “the public maintenance of disabled soldiers” functioned as an incentive to enlist. Sanford Levinson, *An Argument Open to All: Reading The Federalist in the Twenty-First Century* (Yale University Press, 2015), p. 125. As the examples cited above show, however, the identical logic applies to misleadingly labeled “negative rights.”

<sup>249</sup> Benjamin Quarles, *The Negro in the American Revolution* (University of North Carolina Press, 2012), pp. 19-32.

<sup>250</sup> Philip D. Morgan and Andrew Jackson O’Shaughnessy, “Arming Slaves in the American Revolution,” in Christopher Leslie Brown and Philip D. Morgan (eds.), *Arming Slaves: From Antiquity to the Modern Age* (Yale University Press, 2006), pp. 180-208.

is to give them their freedom with their muskets. This will secure their fidelity, animate their courage, and I believe will have a good influence upon those who remain, by opening a door to their emancipation.”<sup>251</sup> It seems reasonable to assume that Laurens’ proposal to offer emancipation in exchange for military service was rejected in South Carolina because the downside risk was thought to outweigh the expected upside benefit. That freedom was considered valuable or dangerous depending on the likely consequences of granting it to some people rather than others provides powerful evidence that the founding generation saw liberty as a fundamentally instrumental value. If they had seen it as an ultimate or absolute or universal value, they would have automatically and uniformly granted it to all individuals (apart from convicted criminals) regardless of race.

Be this as it may, promising liberty to populations subordinated to a rival in order to degrade the latter’s capacity to fight is a perennial tactic among warring states. Examples involving the emancipation of enslaved peoples stretch from the proposal that Sir Walter Raleigh and Richard Hakluyt made to Queen Elisabeth to free Spain’s Indian slaves in a bid to destroy the Spanish Empire in the Western Hemisphere to Lincoln’s Emancipation Proclamation of 1863, introduced as a war measure to deprive the Confederacy of resources it needed to continue the conflict and which had the added benefit of preventing European recognition of the Confederacy. The enslaved peoples in question were not freed out of respect for their humanity or inherent dignity but with the military aim of reducing the power of their dispossessed owners.<sup>252</sup> That would have appeared self-evident to those taught by Montesquieu that power alone can arrest power.<sup>253</sup>

The fate of the sparsely inhabited American Union hinged, to an unparalleled degree, on exceptionally generous immigration and naturalization policies for common whites. That freedom can serve as a powerful draw for immigrants was a recurring theme in the writings of the framers. It surfaces, for instance, in Hamilton’s remark that America’s new Constitution, if ratified, would transform the country into a natural “asylum” to “receive and console” Dutch republicans after their failed attempt to establish a free government in Holland.<sup>254</sup> Indeed, the unapologetic way in which the framers treated liberty as a recruitment bonus is never clearer than when they pitched American liberty to summon hither immigrants from Protestant Europe.

Such an influx was desirable and even urgent for reasons of power politics. It would allow the otherwise feeble and fissiparous Union to impose its sovereign control over a vast and fertile

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<sup>251</sup> Hamilton to Jay, March 14, 1779, emphasis added. This is a good example of the framers’ belief that the offer of liberty can excite and channel a release of human energy.

<sup>252</sup> That Washington, too, valued liberty for its political and military consequences rather than for its universal, intrinsic value is suggested by the way he reacted to the weaponizing of liberty against the Patriots. He blasted Dunmore as an “Arch Traitor to the Rights of Humanity” and warned that if “that Man is not crushed before Spring, he will become the most formidable Enemy America has—his strength will Increase as a Snow Ball by Rolling.” Washington hoped that a bullet soon would kill Dunmore, for then “the World would be happily rid of a Monster.” Washington to Richard Henry Lee (November 27, 1775).

<sup>253</sup> *Spirit of Laws*, XI, 4, vol. I, p. 150.

<sup>254</sup> *Federalist Papers*, No. 20. George Mason, despite being (or perhaps because he was) a slaveholder himself, openly complained that slavery not only discouraged “arts and manufactures” but also prevented “the immigration of whites, who really enrich and strengthen a Country.” Mason, August 22, Farrand II:370. While offering liberty to white immigrants from Europe will incentivize their willingness to immigrate, an economy based on the deprivation of liberty, he contended, would make them reluctant to come.

country by attracting workers and artisans from all nations, with the explicit aim of displacing and supplanting rival European and native claimants to North American lands by a kind of human wave.

As mentioned at the outset of this chapter, the framers believed that denominational pluralism would draw much-needed European immigrants to the country. It was precisely because the Union “founds her empire upon the idea of universal toleration” and “admits all religions into her bosom” that America would eventually rise “to a pitch of greatness.”<sup>255</sup>

Their view of freedom of conscience as a magnet drawing Europeans across the Atlantic surfaced, ironically, in their fiercely hostile reaction, some years earlier, to the Quebec Act. One of John Jay’s most vehement objections to the Act was that allowing French Catholics to own land and hold office would encourage a surge of Catholic immigrants from Europe.<sup>256</sup> After London had vastly increased the number of Catholics in North America by their perfidious offer of religious liberty, he speculated, it could then deploy them “to reduce the ancient, free, Protestant colonies” to a “state of slavery.” Jay’s reasoning may sound paranoid, but it illustrates the assumption that the promise of liberty, as a magnet for migrants, can not only create “fit instruments in the hands of power.”<sup>257</sup> It can also be consciously employed by a calculating empire to punish its rebellious dependencies.

None of this means that Madison and his allies supported religious liberty *solely* for its consequences, much less solely for its contribution to American political development.<sup>258</sup> But their argument in its favor cannot be separated from their expectation about its various consequences, including its contribution to territorial expansion. They were acutely aware that the promise of religious liberty would help recruit the workforce needed to expand the Union westward. This is clear, for example, in Madison’s “Memorial and Remonstrance against Religious Assessments” of 1785.<sup>259</sup> He began the pamphlet by declaring, as a matter of principle, that “[t]he Religion ... of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.” But he had no trouble reinforcing his argument with strategic considerations, describing freedom of religion as that “generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a luster to our

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<sup>255</sup> Noah Webster, 1781

<sup>256</sup> Referring to the inhabitants of the expanded territory of Quebec created by the Quebec Act, Jay wrote disapprovingly of “their numbers daily swelling with Catholick emigrants from Europe,” John Jay, “Address to the People of Great Britain” (October 21, 1774), vol. I:917.

<sup>257</sup> Jay, “Address to the People of Great Britain.”

<sup>258</sup> To say that a constitutional provision can be justified and made intelligible only in light of the purposes it was meant to serve, or the problems it was meant to solve, is not to imply that that any single aim or motive animated the diverse group who drafted it or the even more diverse group who ratified it. For example, the Article VI, Section 3, Clause 3: “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States” may have helped entice Protestant dissenters and other desirable settlers, preferably republican and industrious, to immigrate to America. Its more immediate purpose, similar to that of the No Establishment Clause of the First Amendment, was to prevent Congress from establishing a national religion and thereby destroying the *modus vivendi* among states dominated by Calvinists, Quakers and Episcopalians on which interregional harmony hinged.

<sup>259</sup> Madison, *Writings* (Library of America, 1999), pp. 30, 33.

country, and an accession to the number of its citizens.” In the same promotional spirit, he described religious *intolerance* as a “species of folly which has dishonored and depopulated flourishing kingdoms.” By drawing attention to the way religious freedom attracts immigrants to the country while intolerance drives them away, Madison did not impugn the intrinsic value of freedom of mind. But he did arguably help rally broad political support for an Enlightenment project that was still novel at the time.

The leading minds at the Philadelphia Convention agreed about both the Union’s most pressing challenge and its most feasible potential solution. The country needed more farmhands to consolidate its grip over such an expanse of land. To rectify the imbalance, “the advantage of encouraging foreigners was obvious and admitted.”<sup>260</sup> Where they expected these foreigners to go was clear from their expectation that the West “should be in great measure settled from abroad rather than at the entire expense of the Atlantic population.”<sup>261</sup> When they specified the type of immigrant they were hoping to recruit, they made no mention of national origin or sectarian affiliation. Because the Union, in 1787, “had immense and almost immeasurable territory, peopled by not more than two million and a half of inhabitants, it was of very great consequence to encourage the emigration of able, skillful, and industrious Europeans.”<sup>262</sup> The question was how to do so.

It is one thing to say that liberty promoted immigration, and quite another thing to say that the framers supported and defended liberty *because* it promoted immigration. Plentiful evidence supports the second and stronger claim. Madison was merely restating the Federalist consensus, for example, when he stated: “If we afford protection to the Western country, we will see it rapidly peopled.”<sup>263</sup> The most effective way to lure immigrants from Protestant Europe was to promote the country’s reputation for religious liberty. More generally, the least costly way to “encourage foreigners” to immigrate to the American frontier was to make them a credible promise that, if they came, the entire range of rights listed in the Northwest Ordinance would be secured. Madison made the identical point in a private letter around the same time:

The protection and security which the new Government promises to purchasers of the federal lands, will have several consequences extremely favorable to the rights and interests of the Western Country. It will accelerate the population and formation of new States there.<sup>264</sup>

These pregnant sentences convey the gist of the social contract that the framers imagined between the government and the settlers. The white Protestant world would beat a path to Trans-Appalachia

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<sup>260</sup> Hamilton, August 13, Farrand II:268. Joining this discussion to underscore the palpable benefits, including military benefits, of an open-door immigration policy, Wilson cited Pennsylvania “as a proof of the advantage of encouraging emigrations,” observing that “almost all the General officers of the Pennsylvania line of the late army were foreigners.” Wilson, August 13, Farrand II:269. Cf. “countries have admissions committees. In the United States, Congress functions as such a committee” Michael Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (Basic Books, 1983), p. 40.

<sup>261</sup> Hamilton to Arthur St. Clair, 19 May 1790, Papers of Hamilton, 6:421.

<sup>262</sup> Charles Pinckney in the House of Representatives, February 14, 1820, Farrand III:444.

<sup>263</sup> Madison, Virginia Convention (June 1788), *The Debate on the Constitution Part Two*, p. 671.

<sup>264</sup> Madison to Nicolas, May 17, 1788.

if the Union could help build a reliable system of religious, civil, and political liberties on the frontier. The key was to offer newcomers “the security of their liberties,” a precious sense of having solid ground beneath their feet that could not possibly be created in a vacuum of government power.

Immigration and the rapid peopling of the West were crucial to the framers, it bears repeating, because the American dilemma was not the Malthusian nightmare of insufficient foodstuffs to support the population, but rather the opposite, the challenge of too few people to bring into cultivation the arable soil lying unexploited under hardwood forests in the West. The need to encourage immigration in order to narrow the gap between a surfeit of fertile land and a scarcity of farm labor (as well as other inputs into a productive economy) was formulated most succinctly by James Wilson:

In the United States there is an immense Quantity of Land, rich, well-situated and in a salubrious Climate. This Land lies useless and unimproved from the Want of Labor and Capital and Stock. In Europe there is an Abundance of Labor and Capital and Stock; but rich and well-situated Land cannot be obtained, unless at a very high Price. *A Plan*, by which the surplus Labor and Stock and Capital of Europe would be employed on the unimproved Lands of the United States, must be eminently advantageous to both.<sup>265</sup>

The Constitution, in some sense, *was* this plan. It was engineered to help the Union assert control over the contested territories of Trans-Appalachia by attracting European credit and by recruiting sufficient numbers of politically loyal settlers to clear and cultivate the soil and displace rival claimants to the great interior.

#### A Nation of Commoners

The advocates of the proposed Constitution also characterized *equal liberty* as a recruitment bonus used to attract an industrious workforce to the country and the West in particular. A striking example is Franklin’s claim that the weakened grip of birth status on an individual’s life prospects in America will inspire potential immigrants to cross the Atlantic. He formulaed this claim in the negative: “This Constitution will be much read and attended to in Europe, and if it should betray a great partiality to the rich, will not only hurt us in the esteem of the most liberal and enlightened men there, but discourage the common people from removing to this Country.”<sup>266</sup> The implication for immigration policy, summarized earlier by Franklin, was that noble birth was “a Commodity that cannot be carried to a worse Market than to that of America.”<sup>267</sup>

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<sup>265</sup> Wilson, “On the Improvement and Settlement of Lands in the United States” (mid-1790s), *Collected Works* I:372, emphasis added. That imprudent speculation on western lands, inspired in part by a fear of missing out, drove one of the great legal minds of the time into ruinous bankruptcy provides a suggestive commentary on the role of territorial expansion in the thinking of the framers.

<sup>266</sup> Franklin, August 10, Farrand II:249.

<sup>267</sup> Franklin, “Information to those who would remove to America” (*Writings*, pp. 976-978). In this pamphlet, published in 1784, Franklin also identifies “liberty” as the principal incentive that the Union is offering to attract potential immigrants to America: “With Regard to Encouragements for Strangers from Government, they are really only what are derived from good Laws and Liberty” (*ibid.*).

When Hamilton commented that “[t]here can be no truer principle than this — that every individual of the community at large has an equal right to the protection of government,”<sup>268</sup> he was apparently thinking along similar lines since he also insisted that “[p]ersons in Europe of moderate fortunes will be fond of coming here where they will be on a level with the first Citizens.”<sup>269</sup>

Charles Pinckney made the same point. The United States contains “but one order,” he explained. It was “the order of Commons.”<sup>270</sup> As a result, European immigrants were invited to join a society where “[e]very freeman has a right to the same protection and security” as well as “the possession of all the honors and privileges the public can bestow.”<sup>271</sup> After speaking these words, Pinckney immediately warned of the downside consequences if the Confederation failed to fulfill the promise of equal liberty made to new arrivals: “the Princes and States of Europe would avail themselves of such breach of faith to deter their subjects from emigrating to the U.S.”<sup>272</sup>

A signal way to attract immigrants was publicizing that foreign birth posed no lasting barrier to running for office.<sup>273</sup> Upon naturalization, as Pinckney said, immigrants from Europe will “enjoy an equal power of arriving at the supreme offices and consequently of directing the strength and sentiments of the whole Community.”<sup>274</sup> According to one of the most radical provisions in the Constitution, American voters could elect men “of no property at all” to the House of Representatives.<sup>275</sup> A few years after the Constitution came into effect, Wilson stressed the same point:

If the Increase of the new Settlements shall be rapid and uniform; many generous Souls in Europe, who are now depressed by the extrinsic Advantages, which others enjoy on Account of their Birth and Interest and not of their Talents and Virtues, may, in the Course of a few Years—much fewer than is generally imagined—fill the first Offices in the States, which they shall have contributed to found and form. By a natural Gradation, they may be raised to Places of great Dignity and Consequence in the extended and the growing Government of the United States. In this Manner, they may acquire a just Importance,

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<sup>268</sup> Hamilton, June 29, Farrand I:473.

<sup>269</sup> Hamilton, August 13, Farrand II:268. Writing before the ratification of the Constitution and therefore before the passage of the “Naturalization Act” of 1790, Jefferson, too, emphasized the equal liberty which, in this case, Virginia offered to European immigrants: “A foreigner of any nation, not in open war with us, becomes naturalized by removing to the state to reside, and taking an oath of fidelity: and thereupon acquires every right of a native citizen.” Jefferson, “Notes on the State of Virginia, in *Writings* (Library of America, 1984), p. 260. Cf. “because that incorporation offered the settlers the prospect of equal citizenship, they accepted it” (Hulsebosch, p. 10). That this idea became a part of American folklore is confirmed by observations such as the following: “Every American who emigrates knows he does not sink into a colonist; he is and remains a full citizen, which aids much in inducing people to emigrate.” Francis Lieber to Alexis de Tocqueville (September 25, 1846).

<sup>270</sup> Pinckney, July 25, Farrand I:403.

<sup>271</sup> Pinckney, July 25, Farrand I:398.

<sup>272</sup> Wilson, August 13, Farrand II:272.

<sup>273</sup> Seven years after naturalization, for example, “adopted citizens, whose merits and talents may claim a share in the public confidence” could be elected to the House of Representatives. *Federalist Papers*, No. 62.

<sup>274</sup> Pinckney, July 25, Farrand I:398.

<sup>275</sup> *Federalist Papers*, No. 35.

which will enable them to behold with perfect Equality, perhaps, with conscious Superiority, those, who now treat them with undeserved Severity, or with supercilious Contempt.<sup>276</sup>

Once again, the appeal to potential immigrants of political office open to talent was not something the framers realized only in retrospect. They presented it at the time as one of the principal advantages of the new system: “Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgement or disappoint the inclination of the people.”<sup>277</sup> Although state constitutions and laws were going to determine who had the right to vote in federal elections, Madison chose to emphasize the rough egalitarianism, among white males, of suffrage rules across all the states:

Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States.<sup>278</sup>

The scoffing reference in this paragraph to “the haughty heirs of distinguished names” suggests that the framers, while tolerant of economic inequality, were eager to advertise their antipathy toward *hereditary* rank. Hamilton even described Article 1, Section 9, Clause 8 (“No Title of Nobility shall be granted by the United States”) as “the cornerstone of republican government.”<sup>279</sup> Although American society at the time was riven by “ranks” based on wealth,<sup>280</sup> upward and downward social mobility was so convulsively rapid that bequeathing a lofty social status to one’s descendants seemed less likely than in Europe.

At the Convention, the wealthy George Mason spoke in a shocking way about the intergenerational transfer of wealth: “our own Children will in a short time be among the general mass.”<sup>281</sup> As a consequence,

We ought to attend to the rights of every class of the people. He had often wondered at the indifference of the superior classes of society to this dictate of humanity and policy, considering that however affluent their circumstances, or elevated their situations, might be, the course of a few years, not only might but certainly would, distribute their posterity throughout the lowest classes of Society.<sup>282</sup>

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<sup>276</sup> James Wilson, “On the Improvement and Settlement of Lands in the United States,” *Collected Works of James Wilson*, Vol. 1, edited by Kermit L. Hall and Mark David Hall (Indianapolis: Liberty Fund, 2007), pp. 372-373.

<sup>277</sup> *Federalist Papers*, No. 57. In response to Rutledge’s suggestion that an American citizen coming from another state should be required to reside for seven years in a state before running for Congress from that state, Madison “suggested the case of new States in the West, which could have perhaps no representation on that plan.” Madison, August 8, Farrand II:217.

<sup>278</sup> *Federalist Papers*, No. 57.

<sup>279</sup> *Federalist Papers*, No. 84. States, too, were barred from granting titles of nobility (Article I, Section 10, Clause One).

<sup>280</sup> *Federalist Papers*, No. 15.

<sup>281</sup> Mason, May 31, Farrand I:56.

<sup>282</sup> Mason, May 31, Farrand I:49.



The irony here is spectacular. Under American conditions, family feeling, a stabilizer of class hierarchy in Europe, turned “inequality aversion” into a natural impulse and political norm shared by those who are currently rich. Egalitarian principles, far from reflecting an Enlightenment commitment to our common humanity, expressed a less impartial and more personal desire to bequeath the blessings of liberty to one’s biological posterity whose fate in a rapidly changing society had become radically unknowable. Because we are doomed to provide for our posterity from behind a veil of ignorance, Mason concluded, “every family attachment, ought to recommend such a system of policy as would provide no less carefully for the rights — and happiness of the lowest than of the highest orders of Citizens.”<sup>283</sup>

### Baits to Ambition

Like a windmill or water mill, the government machinery that the framers sketched in the Constitution needed an external power source to set its gears in motion. No one seriously imagined it would “go of itself.”<sup>284</sup> As Madison later wrote in a different context, the Constitution was “nothing but a dead letter until life and validity was breathed into it.”<sup>285</sup> Under the Articles, “the wheels of the national government” had ground “to an awful stand.”<sup>286</sup> The reformers around Washington called the Convention because “the government of the United States is destitute of energy.”<sup>287</sup> The framers’ challenge was not merely to reorganize the political system. Their problem was also how “to supply that energy”<sup>288</sup> to ensure that “a national Constitution” could “be kept in motion.”<sup>289</sup> They had to identify and harness a source of libidinous vitality that would fuel “an energetic government”<sup>290</sup> and render it adequate to the challenges of conquering and holding a continental empire. Only “an energetic government” could possibly “preserve the Union of so large an empire.”<sup>291</sup>

Perhaps they drew inspiration from another great revolution of 1776 that forever changed the world. That was also the year when James Watt revealed how an expertly contrived device could harness “steam power” to help accomplish what had hitherto seemed unachievable. Just as Watt’s engine needed to capture and exploit the energy of steam to defy river currents and propel boats upstream, so the framers needed to find a bountiful source of energy to make the wheels of government turn and propel the Union’s writ over the mountain barrier and into the great interior.

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<sup>283</sup> Mason, May 31, Farrand I:49.

<sup>284</sup> Michael Kammen, *A Machine That Would Go of Itself. The Constitution in American Culture* (Knopf, 1986).

<sup>285</sup> Madison, “Jay’s Treaty, (April 6) 1796.” Similarly, Congress under the Articles was “a nerveless body” (*Federalist Papers*, No. 19) precisely because it failed to tap any external well of popular loyalty and commitment.

<sup>286</sup> *Federalist Papers*, No. 15.

<sup>287</sup> *Federalist Papers*, No. 15; cf. “greater energy of government is essential to the welfare and prosperity of the community.” *Federalist Papers*, No. 26. .

<sup>288</sup> *Federalist Papers*, No. 15.

<sup>289</sup> *Federalist Papers*, No. 16.

<sup>290</sup> *Federalist Papers*, No. 11. According to Walter A. McDougall, “the genius of the Constitution derived in good part from its ability to harness selfish private ambition for the collective good.” McDougall, *The Tragedy of U.S. Foreign Policy: How America’s Civil Religion Betrayed the National Interest* (Yale University Press, 2016), p. 35.

<sup>291</sup> *Federalist Papers*, No. 23.

So what energy source did they have in mind? What was the political equivalent of steam? Where did the framers look to find “the quantity of power necessary to the accomplishment of ... the objects to be provided for by the federal government”?<sup>292</sup> And what mechanisms did they devise to turn it into a source of conation or forward motion?<sup>293</sup>

Madison described “liberty” in general as a fuel or “aliment” of action.<sup>294</sup> Nevertheless, he and his allies expected one freedom in particular to be the most decisive “pull factor” drawing European immigrants to America. The noneconomic attractions of the American federation included freedom of conscience and the right to vote and run for office. As important and independently motivating as they undoubtedly were, they were arguably less powerful lures than the chance to acquire freehold title to inheritable land.

American nationalism was still too anemic to inspire individuals throughout the Union, much less recent arrivals from Europe, to coordinate patriotically around a common plan of action. As a consequence, the framers were compelled to look to more everyday motives for a source of energy that would help them realize their continental aspirations. The premise of their plan was this. In order “to call to its assistance and support the resources of the whole Union,” the general government had to “engage the citizens.”<sup>295</sup> Religious and political freedoms helped do just that. In the geographical and geopolitical conditions of 1787, however, the surest way to rally the population in support of government plans was by catering to the land hunger of common whites.

The strategy was by no means novel. While acknowledging the importance of religious and political liberty as magnets for immigration, they also understood that a very different right had played a pivotal role in motivating and organizing the original settling of North America. This was the now largely forgotten institution of “headrights.”<sup>296</sup> For the American expansionists primarily responsible for the new Constitution, headrights were prototypical of the most politically consequential right: the *natural* right “to make private property from Indian lands.”<sup>297</sup>

Headrights were legal instruments created and deployed by the Crown to recruit the workforce needed to support its imperial policies and programs. They were not limits *on* government, therefore, but tools *of* government. They were similar to patent rights in this respect but more exemplary because directly aimed at building an empire on “vacant” land by attracting settlers to clear forests and build farms.<sup>298</sup>

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<sup>292</sup> *Federalist Papers*, No. 23.

<sup>293</sup> As is well-known, engines on early riverboats frequently exploded with lethal consequences. To pursue the analogy, we might recall that ambition and acquisitiveness can also be unleashed for destructive ends. Thus the framers, while aiming to enlist ordinary human passions in their imperial enterprise, also deplored “an intention to mislead the people by alarming their passions, rather than to convince them by arguments addressed to their understandings.” *Federalist Papers*, No. 24.

<sup>294</sup> *Federalist Papers*, No. 10.

<sup>295</sup> *Federalist Papers*, Nos. 27, 28.

<sup>296</sup> For details, see Morgan, *American Slavery, American Freedom*, pp. 93-94, 171-173, 405-406.

<sup>297</sup> Alan Taylor, *American Revolutions*, p. 251.

<sup>298</sup> Spain, too, offered land grants to recruit settlers to the territory it controlled, including, notably, Daniel Boone.

The headright system involved offering “legal ownership” of large parcels of land in America to private parties willing to undertake the risk and cost of crossing the ocean and laboring to turn wilderness into farmland. Prospective settlers would typically receive one hundred acres for every person (or “head”) in their party, most of whom would be bonded servants. While the settlers would receive legal title to private property *in* the land, imperial authorities would obtain political sovereignty *over* the land. That was the same bargain, the framers hoped, that would aggrandize the struggling Confederation into a republican empire.

While the grants were worth no more than the parchment they were inscribed upon, they represented a kind of intertemporal bargain or contract. The entire upfront risk of the venture fell upon those willing to finance the voyage, endure the dangers and undertake the backbreaking effort required to turn forests into farmland.<sup>299</sup> Recipients of on-paper rights to uncultivated land in the wilderness assumed the risk because the downstream reward was substantial: the possibility, if the colonization project proved successful, of becoming socially recognized and judicially protected proprietors of a large estate. The promisees could rely on the promisors keeping their commitments because legally secured private ownership of land obviously served the imperial goal of extending the metropole’s territorial jurisdiction.

Issuing pieces of paper awarding vast tracts of wilderness to investors and adventurers cost the English government next to nothing. Nevertheless, the headright system helped the Crown, through its appointed agents, to out-compete its European rivals in the colonial settlement of North American territory. Ownership rights were granted and guaranteed in exchange for broadening and strengthening the territorial anchor of imperial power.<sup>300</sup>

Jefferson’s drafts of Virginia’s 1776 constitution reveal the influence on the founders of this idea. Jefferson proposed that every adult male settler in the trans-Appalachian West would receive “full and absolute dominion” over at least fifty acres of land. Going beyond a promise to defend settlers’ rights to own land, the state government was promising to give settlers plots of land outright. Just as Henry VIII had confiscated Church lands in the sixteenth century and doled out the resulting private estates to his courtiers, so Jefferson, in 1776, proposed that Virginia take over Native American lands and dole out private plots to the state’s friends and favorites. Because Americans had infinitely more land to distribute than Henry VIII, they could move in the direction of mass enfranchisement of adult white males rather than simply recruiting a few new members to join an established land-owning aristocracy. Thus, even though the headright system originated as

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<sup>299</sup> Those unable to pay for their transportation would travel as indentured servants and, if they survived, receive their own plot of land (as well as tools, foodstuffs, and clothes) after completing seven years of service to those who brought them. The legally enforceable right to these “freedom dues” implies that “liberty” was worth little in the absence of the “conditions of liberty.”

<sup>300</sup> We should also mention that the system functioned through intermediaries. These were the land companies that the Crown licensed to arrange the transfer of parcels of land to private individuals. The Crown would grant an exclusive license to a Trading Company, which functioned as a private developer, and it would allow that company, in turn, to grant headrights as incentives to immigration. This system functioned because the Crown was willing to share the booty with those able to recruit, transport, supply and support the workforce needed to clear and sustainably occupy the land.

an appeal to class-conscious individuals in Britain hoping to build a grand estate and found a dynasty in America, by Jefferson's time, it had evolved into a promise not of material equality but of the genuine possibility for more commoners than anywhere else on earth to own a piece of land. Headrights were evolutionary precursors to the Homestead Acts that, in the nineteenth century, pushed the American empire beyond the Mississippi and across the Great Plains.

What set the reformed Union apart and made it “a system without example ancient or modern,”<sup>301</sup> was its surprisingly pragmatic promise to future generations of Americans. Securing the blessings of liberty for posterity meant something very concrete. Federal land policy would offer citizens the most universally appealing and politically consequential form of freedom: fee simple property or clear title in perpetuity to arable land.<sup>302</sup> The framers favored “a general distribution of real property among every class of people”<sup>303</sup> because their expansionist project depended on popular cooperation. As property holders knew, conveyance rights in real property were a form of liberty that assumed government performance not merely government forbearance.<sup>304</sup> For example, they required an active federal government capable of untangling the confusion over title created by states and land companies that had issued mutually contradictory land patents. And they required federal troops and garrisons capable of protecting and advancing the line of settlement.

Among the organized groups whose interests also had to be engaged were prominent American land speculators, both in and out of government.<sup>305</sup> They, too, “needed to have in the West a liberal form of government ... as an inducement to Easterners,” as well as new arrivals from Europe, “to buy from them land for new farms.”<sup>306</sup> The quest for windfall profits from buying and selling western land, a mania that swept up so many distinguished framers, including Wilson, can be

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<sup>301</sup> Madison, “A Sketch Never Finished Nor Applied, 1830,” p. 828.

<sup>302</sup> Claire Priest, *Credit Nation: Property Laws and Institutions in Early America* (Princeton University Press, 2022).

<sup>303</sup> Noah Webster, “An Examination into the Leading Principles of the Federal Constitution.” Bailyn (ed.), *The Debates*, vol. 2, p. 151.

<sup>304</sup> Here we see the one-sidedness of Joyce Appleby's emphasis on “the use of constitutions to limit government power and thereby release the energies of republican citizens.” Appleby, *Liberalism and Republicanism in the Historical Imagination* (Harvard University Press, 1992), p. 187. The framers' project was to unleash the energies of republican citizens by granting the federal government sufficient power to deport Native Americans from their homelands as well as to help construct legal institutions able to resolve disputes about private property in land.

<sup>305</sup> Congress at the time of the framing, and after failing to sell western lands itself, employed a system similar to the Crown's, offering windfall profits to land companies and speculators willing to do the work of helping survey, populate and organize what came to be called the National Domain. JCC, July 27, 1787, 33:427-30. The common inference that this ad hoc solution, which admittedly benefited the haves over the have-nots, reveals the Federalists' class bias, as opposed to its perceived need to impose order on the territories, is dubious. The plan admittedly rewarded speculators but did so less from patronage and favoritism than because they were instrumental to expansion. Congress openly subcontracted the colonization of Trans-Appalachia to various land companies created by private speculators in western lands because, like their colonial-era precursors, these companies functioned as real-estate developers who could profit only if they successfully recruited armed agriculturalists to turn frontier forests into farmland.

<sup>306</sup> Frederick Merk, *History of the Westward Movement* (New York: Knopf, 1978), p. 105.

considered a secondary fuel of expansion alongside the hunger for legal title to land so ardently sought by common whites.

### Harnessing the Acquisitive Passions

In working out how to win the support of the settlers, the framers took for granted what Madison unsentimentally described as the defect of better motives. “Take mankind as they are, and what are they governed by?” Hamilton asked. And he answered: “Their passions.”<sup>307</sup> Harnessing the *acquisitive passions* was critical to the framers’ plan for injecting human energy into the Confederation’s westward push. The Union should “address itself immediately to the hopes and fears of individuals; and to attract to its support those passions which have the strongest influence upon the human heart.”<sup>308</sup>

Land hunger was the most compelling of these passions. The promise of legally defined and militarily protected property rights would suffice to channel it toward public purposes. Channeling the land hunger of common whites toward the national project of overland expansion was expected to inaugurate a self-reinforcing process. By making available freehold property in land, a private asset “conducive to the prosperity and felicity of the people,”<sup>309</sup> the Union would demonstrate its good faith, both winning the settlers’ allegiance and encouraging others to join the steady advance further west.

Making property rights available would permit Congress and the President “to direct the passions of so large a society to the public good.”<sup>310</sup> Their republican empire would “grow and flourish in proportion to the quantity and extent of the means concentrated towards its formation and support.”<sup>311</sup> The problem was finding sufficient “means” to devote to national ends. Given the scarcity of other available sources of support, these could be none other than the aspirations, commitments and efforts of the country’s current and future citizens. That is why the framers repeatedly and explicitly confirmed that “the vast project of western development depended on the mobilization of private initiatives.”<sup>312</sup>

The new government needed urgently to engage the passions that exerted an “active and imperious control over human conduct.”<sup>313</sup> When listing these passions, Hamilton, despite his personal (and ultimately fatal) obsession with honor, conspicuously failed to mention the “virtues.”<sup>314</sup> Indeed, their obsession with incentives reveals how little confidence the framers placed

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<sup>307</sup> Hamilton, June 22, Farrand I:381.

<sup>308</sup> *Federalist Papers*, No. 16.

<sup>309</sup> *Federalist Papers*, No. 28.

<sup>310</sup> *Federalist Papers*, No. 13.

<sup>311</sup> *Federalist Papers*, No. 11.

<sup>312</sup> Peter S. Onuf, *Statehood and Union*, p. 5. The framers would have agreed heartily with the proposition that “the general prosperity attains a great height, and is more widely diffused, in proportion to the amount and variety of personal energies enlisted in promoting it” (J.S. Mill, *Considerations on Representative Government*, CW XVIII, p. 404).

<sup>313</sup> *Federalist Papers*, No. 6.

<sup>314</sup> Purely individual or personal morality is unreliable because no one wants to be the only honest player in a poker game. That is to say, how people behave naturally depends on how others around them behave: “Why

on the independent power of morality and justice to guide human behavior. They relied more on “the true springs by which human conduct is actuated.”<sup>315</sup> The nature of these motivating impulses was self-evident: “Our prevailing passions are ambition and interest; and it will ever be the duty of a wise government to avail itself of those passions, in order to make them subservient to the public good — for these ever induce us to action.”<sup>316</sup>

Franklin, whose lifelong devotion to territorial expansion was well-known, confirmed the central role played by harnessing ordinary human passions, including the land hunger of common whites, in the wished-for creation of an American empire. He identified two passions in particular that needed to be captured and directed by political institutions in order to extend the Union’s writ across the continent:

These are ambition and avarice; the love of power, and the love of money. Separately each of these has great force in prompting men to action; but when united in view of the same object, they have in many minds the most violent effects. Place before the eyes of such men a post of honor that shall at the same time be a place of profit, and they will move heaven and earth to obtain it.<sup>317</sup>

For the expansionists, the most important way in which “ambition” could “be made to counteract ambition”<sup>318</sup> was to engage the land hunger of common whites in an effort to foil the territorial ambitions of British, Spanish and Native forces. That is how they hoped to awaken personal appetites and aspirations to serve collective purposes.<sup>319</sup> Edward Corwin was perfectly right, therefore, when he wrote that “the importance to government . . . of engaging the self-interest of groups and individuals by its active policies” was “constantly present” to the minds of the framers.<sup>320</sup>

As a potential engine of westward migration, popular land hunger was arguably the most compelling passion that the expansionists gathered around Washington aimed to harness and exploit. It would be a mistake, however, to construe land hunger as a crudely “materialistic” passion, indistinguishable from “greed.” If it were merely that, it would not have struck the imagination and engaged the affections of human beings so hypnotically. True, the quest for freehold property in land was not an otherworldly “errand in the wilderness.” It nevertheless *was* a

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should we do more in proportion than those who are embarked with us in the same political voyage? Why should we consent to bear more than our proper share of the common burden?” *Federalist Papers*, No. 15.

<sup>315</sup> *Federalist Papers*, No. 15.

<sup>316</sup> Hamilton, June 22, Farrand I:381-382. Cf. “Is not the love of wealth as domineering and enterprising a passion as that of power or glory?” *Federalist Papers*, No. 6.

<sup>317</sup> Franklin, June 2, Farrand I:82.

<sup>318</sup> *Federalist Papers*, No. 51.

<sup>319</sup> A stock example of the same mechanism can be found in their theory that periodic elections motivate ambitious incumbents to serve the interests of their constituents: “Is it not natural that a man who is a candidate for the favor of the people, and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors, should take care to inform himself of their dispositions and inclinations, and should be willing to allow them their proper degree of influence upon his conduct?” *Federalist Papers*, No. 35. Confirming the Constitution’s reliance on incentives rather than virtue, Madison describes the candidate’s concern for their voters as “artificial sympathy.” *Federalist Papers*, No. 55.

<sup>320</sup> Corwin, “The Constitution as Instrument and as Symbol,” p. 1073.

search for reputable social status, reflecting a universal human need for social “approbation.”<sup>321</sup> Integration into a national and international market provided a degree of independence from the arbitrary will of others, including one’s irritatingly envious neighbors.

What most attracted immigrants from Northern Europe to the United States was the chance to quit a society where landed estates were monopolized by a few and join a society where the opportunity to own land was available to most or at least many common whites. Land ownership was the ground of freedom. The owner of fee simple property did not have to work for someone else. Appealing directly to the burning desire for status and autonomy, the framers identified “a general distribution of real property among every class of people” as “the very soul of a republic.”<sup>322</sup>

Its “soulful,” not material, side explains why the right to property “so generally strikes the imagination and engages the affection of mankind.”<sup>323</sup> Unlike freedom of religion or the right to a jury trial, a landed estate can be handed down, as a particular family’s achievement, from one generation to the next. In other words, property rights include the inestimable chance to leave a personalized legacy to one’s heirs. Intrinsic to freehold property in a landed estate is “that enjoyment which consists not merely in its immediate use, but in its posthumous destination to objects of choice and of kindred affection.”<sup>324</sup> People will move heaven and earth for the right to bequeath a homestead to their children, grandchildren and consanguineous posterity. The longing for a this-worldly afterlife was arguably the most powerful passion that the framers plotted to harness to create a continental empire. In Europe, this modestly human form of life-after-death was reserved to the upper classes. In America, it was, in principle, open to all common whites.<sup>325</sup> Because the right to bequeath was an individual liberty that obviously presupposed the stability over time of a publicly financed system of inheritance law and probate courts, the desire for this right, far from being a desire for freedom *from* government, was a demand *for* a government with sufficient power to resolve disputes and enforce the law. Common whites recognized “the necessity of some regular and permanent provision for accommodating disputes”<sup>326</sup> because they deplored the uncertainty created by a disorganized system for assigning property rights in the wilderness. From hard experience they had learned the profound frontier maxim that *two rights make a wrong*, that is to

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<sup>321</sup> Adam Smith, *Theory of Moral Sentiments* (Liberty Fund, 1994).

<sup>322</sup> Noah Webster, “An Examination into the Leading Principles of the Federal Constitution.” Bailyn (ed.), *The Debates*, vol. 2, p. 151.

<sup>323</sup> Blackstone, *Commentaries*, Vol. II, p. 2.

<sup>324</sup> James Madison, “Note to His Speech on the Right of Suffrage,” 1821, Farrand III:450.

<sup>325</sup> As Douglas Adair argued, “the desire for fame is primarily the desire for immortality,” able to generate “tremendous energy” by harnessing the ambition and self-interest of American elites and channeling them into superhuman efforts for the sake of the community. Adair, *Fame and the Founding Fathers* (Norton, 1974), pp. 12, 24. Bequeathing a homestead to posterity, by analogy, was an economy-class ticket to immortality. The desire to do so was arguably the most powerful motivation, stronger than material self-interest, driving the westward migration of common whites. What the framers were proposing, therefore, was not merely a “democratization of material well-being.” Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* (Harvard University Press, 1992), p. 187. It was a democratization of the power to leave a legacy, to partake of immortality by speaking after death. This is not to imply, needless to say, that the organizers of expansion were in any way disdainful of “material well-being.”

<sup>326</sup> *Federalist Papers*, No. 19.

say, that two equally justified (or unjustified) land claims, if left unreconciled, can easily spiral into an endless cycle of mimetic violence.

It is generally true that property rights depend on government performance, not government forbearance. Settlers obtained valid titles from a *federal* land office, not from swinging an axe, for the same reason that a dog cannot “own” a bone.<sup>327</sup> By conducting proper land surveys, untangling disputes over title and establishing territorial courts to resolve future conflicts over land ownership, the new national government was designed to engage the migrants’ longing for independence, social status and the chance to bequeath wealth to their descendants.<sup>328</sup> This is how the framers planned to “capture” the migratory propensity of footloose settlers and transform it, as if by alchemy, into the combustible fuel powering the Union’s imperial advance.

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<sup>327</sup> Cultural historian Richard Slotkin waggishly suggests, on the contrary, that “the founding fathers were not those eighteenth-century gentlemen who composed a nation at Philadelphia. Rather, they were those who ... tore violently a nation from the implacable and opulent wilderness.” Slotkin, *Regeneration through Violence. The Mythology of the American Frontier 1600-1860* (Norman: University of Oklahoma Press, 1973), p. 4. Even though it is paradoxical, this entertaining claim is still not true. The real founding fathers were just as folklore insists: the bewigged Easterners who created the institutional *incentives* to prevent western separation from the Union.

<sup>328</sup> The most significant contribution of state assemblies to the *insecurity* of property was not debtor relief legislation but the uncoordinated issuance of overlapping and contradictory titles to the same bits of western land. Untangling the resulting legal maze was therefore an indispensable contribution of the Union government to liberty. The only time in which the federal judiciary is empowered to adjudicate a dispute between two members of a single state is when they are recipients of conflicting land patents issued by different states. In an important exception to the principle that the national judiciary must stay out of internal state disputes, federal courts are given jurisdiction over controversies “between citizens of the same State claiming lands and grants of different States” (Art. 3, Sec. 2, clause 1). Having the “claims under grants of land by different States” (*Federalist Papers*, No. 40) adjudicated “under the authority of the federal head” was an essential “method of terminating territorial disputes between the States” (*Federalist Papers*, No. 80).