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Congressional sovereignty: Imperialism in a Republican Union

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Dedication

For Ann
Acknowledgements

I wish to acknowledge the support of Dr. Kevin Hardwick in the creation of this thesis. He taught me how to be a better writer, thinker, researcher, and scholar. Any success in this endeavor has his hand upon it. I also wish to thank Dr. Michael Gubser and Dr. Emily Westkaemper for their support in writing this thesis. Their input was invaluable. They are the finest of scholars and educators. Finally, I wish to acknowledge my classmates who critiqued my work, debated issues with me, revealed flaws in my thinking, and supported me as friends. They are fine historians.

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Abstract

This thesis analyzes the creation of congressional sovereignty in the 1770s and 1780s. Congressional leaders expanded the authority of the Continental Congress through a series of resolutions and ordinances in order to incorporate the Northwestern Territories into the union. My sources included primary documents issued by Parliament and Congress. I also researched the writings of various American and British theorists during the debate over parliamentary rule and the rights of colonists to self-government. Also, by studying the ordinances of the 1780s, I documented the expanding confidence and authority of Congress as leaders gained control of the Northwest Territories.

I discovered that Britain’s Royal Proclamation of 1763 was an assertion of imperial power over the thirteen American colonies, but more importantly was used as a model by congressional leaders for their own Resolution of 1780. Congress issued the resolution as a framework for incorporating the Northwestern Territories. The ordinances of 1784-5, and 1787 expanded and refined Congress’s sovereignty over the Ohio region as national leaders dictated the conditions of statehood and controlled all aspects of government in the territory. Congressional leaders rejected republican theories of self-determination in order to expand the union.

Employing imperial sovereignty to expand a republican union calls into question the concept of state sovereignty. The original thirteen states claimed sovereignty in the Articles of Confederation drafted in 1776. However, subsequent actions by Congress and the states challenged the existence of sovereignty at the state level. Congress asserted its own sovereignty in the 1770s in order to settle border disputes between states, create new states, and protect existing states from restive populations. Congressional leaders methodically worked to centralize sovereignty in America at the expense of the states and territories before the drafting of the Constitution in 1787. A fresh review of American federalism must be undertaken in light of the events in the 1780s to refine the understanding of state sovereignty in American political theory.
Introduction

The constitutional theory of federalism was the basis for the United States Constitution. The Federal government and the state governments each have areas of authority to govern American citizens. The Constitution assigned specific rights and authority to the Federal government, which included the right to print money, declare war, negotiate treaties, and regulate commerce with foreign nations, as well as between the states. The Tenth Amendment to the Constitution, drafted as part of the Bill of Rights and adopted in the first Federal Congress, stated “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”\(^1\) These two principles are the foundation of American federalism. Constitutional theorists refer to this concept as shared sovereignty, or dual sovereignty. Each level of government is a sovereign within distinct domains.

However, this simple and orderly theory is misleading. American sovereignty is not clear, distinct, or even split between the states and the Federal government. In fact, the two levels of government are in contention over sovereign rule. The states and the Federal government compete for ascendancy in governing the American people. Each level of government seeks advantage and authority at the other’s expense. Sovereignty is a zero-sum game in that, if one side gains authority, the other side loses it. Instead of dual sovereigns as mentioned above, there is a never-ending debate or negotiation over sovereignty in the United States.

This essay will show how congressional leaders laid the foundation of this debate when they rejected the radical republicanism of the revolutionary period in the 1770s and created congressional imperial rule in the 1780s. The idealistic, republican theory of self-rule for local populations so eloquently stated in the 1770s, gave way to a centralized, European theory of sovereignty that protected the union in the 1780s. Congressional leaders applied the political lessons learned from the British Parliament in controlling an empire. Congress did not let local populations in the territories distance themselves from the central government or develop their own governing institutions. The Northwest Territories were colonies that needed a firm hand to guide them to be republican states that supported the union. Congressional leaders established new states in the Northwest Territories through imperial rule with the intention of creating sovereign states equal to the original thirteen states. Congress and the states held sovereignty. Congress took these actions in the name of protecting the union by expanding it. America’s founders left sovereignty undefined in the American union.

The historiography of American sovereignty has expanded as new research highlighted various sources of American political theory. Historians replaced the traditional history that established the constitutional convention of 1787 as the beginning of American federalism and sovereignty. Historians such as Merrill Jenson, Jack Rakove, and Peter Onuf analyzed the period covered by the Articles of Confederation, from 1776 to 1787, and drew different conclusions from their research. Merrill Jensen in his work *The New Nation* (New York, 1950) focused on the period from 1781 – 1789 to analyze the effects of the Articles on the states and their relationship with Congress. Jensen described Congress as a creation of the states that maintained the states’ sovereignty. The
states, not Congress, tackled the problems of the confederacy during and after the war and succeeded beyond what traditional histories credited to them. Jack Rakove in his text *The Beginnings of National Politics* (New York, 1969) attributed prosecuting the war and the competing politics of the various states and regions to the drafting of the Articles of Confederation and the forming of a national government in the Constitution. The Articles gave Congress a working experiment in shared sovereignty and nationalism that leaders found lacking as a cohesive force to bind the union. Historian Peter Onuf, in his works *The Origins of the Federal Republic* (Philadelphia, 1983) and *Statehood and Union* (Bloomington, 1987) identified western expansion, state creation, and border disputes among the states as the foundation of nationalistic sovereignty. The states sought to replace the British imperial sovereign with an American version that protected the states and guaranteed their land claims.

Historians Jack Greene and John Phillip Reid analyzed existing constitutions, both written and unwritten, as well as other institutions as sources for American political theory. Greene in his work *Peripheries and Centers* (Athens GA, 1986) explored the interplay of the British constitution, the colonial charters, and an emerging imperial constitution in the eighteenth century and their influence on America’s constitution. Reid looked to an ancient British constitution as a strong influence on America’s founders in his work *The Ancient Constitution and the Origins of Anglo-American Liberty* (Dekalb, 2005). Alison L. La Croix found American sovereignty in political ideology that reflected the “intellectual endeavor” of America’s founders and their understanding of federalism, sovereignty, and empire in her work *The Ideological Origins of American Federalism* (Cambridge MA, 2010). All of these historians worked within the framework of a shift in political theory at the creation of the American republic during the critical period of the 1770s and 1780s.
This essay finds more continuity in political ideology and constitutionalism during this period. American imperial sovereignty did in fact, replaced British imperial sovereignty, as Peter Onuf claimed in his works. This essay expands that finding to claim that state sovereignty was an aberration during the period under study. As soon as the states enshrine their sovereign powers in the Articles of Confederation, Congress begins the slow, methodical, process of claiming imperial sovereignty at the expense of the states. Congress exploited the fears of the states to assert sovereign authority. By the time of the constitutional convention, Congress established a nationalistic, imperial sovereignty over the western lands that would compete with the states for political authority over the entire union at the convention in 1787.2

American sovereignty is even more unclear when one analyzes how eighteenth century political theorists understood it and its application by American founders. European states defined sovereignty as a centralized, national state. Sovereign governments controlled the military, collected revenues, made treaties with other states, and defined and defended the borders of the state. American leaders studied European sovereignty and believed that if the United States were to survive, a national government would not only need to be created, but also accepted by European powers on European terms. As Eliga Gould wrote, “Americans believed that the only way to secure liberty for themselves was by making peace with others. But to a greater degree than we often realize, the peace that they sought reproduced key features of the European empires that they otherwise hoped to replace.” In essence, American leaders had to apply the sovereignty of a modern European state to the US to gain acceptance into international agreements and trade. This was a problem for American leaders considering that the

original thirteen states claimed sovereignty of their own, a sovereignty that remained undefined, and lacked even a general agreement on its application.\textsuperscript{3}

The debate over colonial American sovereignty was not an eighteenth century development. Political authority was contentious from the creation of the first English North American colonies in the early seventeenth century. However, in the seventeenth century the English civil wars, the Interregnum, the restoration of the monarchy, and the Glorious Revolution all preoccupied English political leaders. It was not until Parliament abandoned “salutary neglect”-a term coined by mid-eighteenth century British statesman Edmund Burke-that the issue of sovereignty came to the forefront of political debate.\textsuperscript{4}

The more assertive governance by Parliament began with the attempt to tax the American colonies in the 1760s with the Stamp Act. This challenge to colonial self-government drew an immediate and powerful protest from colonial leaders. It also began a cycle of colonial legislation passed by Parliament, followed by protests from the American colonists, and ended with a withdrawal of the offending legislation. Parliament’s sovereignty was the central argument that led to the American Revolution. Colonial leaders insisted that Parliament had no authority over the colonies and that the thirteen American colonies answered directly to the King. According to American colonists, Parliament was simply another local government completely separate from the colonies.

\textsuperscript{3} Eliga Gould, \textit{Among the Powers of the Earth}, (Cambridge, MA: Harvard University Press, 2012), 4-5.

\textsuperscript{4} “Salutary neglect” was the undeclared policy of Parliament towards the American colonies in the seventeenth and eighteenth centuries. Parliament did not strictly enforce its rule over the colonies, but instead left the colonies to develop within the British Empire under loose guidance and oversight. Edmund Burke coined the phrase in a speech in Parliament in 1775. For a full discussion of salutary neglect see James Henretta, \textit{Salutary Neglect: Colonial Administration Under the Duke of Newcastle}, Princeton: Princeton University Press, 1972.
However, British leaders insisted that, since the Glorious Revolution of 1688, when Parliament subsumed the king’s sovereignty, the “King-in-Parliament” was the sovereign of Great Britain and all its colonies. Parliament controlled the colonies as the British sovereign. Thus, colonial leaders and the British government could not agree on the location and limits of sovereignty in the British Empire.

Generations of political theorists defined and redefined political sovereignty according to the governments under which they lived. One of the earliest theorists of sovereignty was sixteenth-century French philosopher and political theorist Jean Bodin who first defined sovereignty as a modern political concept. He wrote, “Sovereignty is the supreme and absolute power over citizens and subjects.” Bodin believed this power was “absolute and perpetual”. He also stated that a sovereign “recognizes nothing, after God, that is greater than himself.” Bodin defined the absolutist theory of sovereignty that placed power in the hands of a single man. The “Absolutist Theory” of sovereignty was the justification for European monarchies well into the eighteenth century.

However, Bodin’s theory of absolute sovereignty was not without its problems. Even in the sixteenth century, sovereignty was never absolute. Bodin dismissed legal checks on a sovereign, but also admitted that the pressures of magistrates and the people should limit an “absolute” sovereign. Bodin believed that kings were subject to the laws of nature and fundamental law. Thus, as historian Julian Franklin wrote, Bodin defined not a theory of absolute sovereignty, but a “theory of ruler sovereignty”, which stated that the “higher powers of government” could not be shared or divided among several

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agencies. A single individual or group must hold the powers of a sovereign, which included appointing magistrates, approving and repealing laws, prosecuting wars, settling appeals from lower magistrates, and the power of life and death. Whoever held those high powers was still constrained by customary law. Bodin continued to develop his theory until he rejected any direct challenge to sovereign rule from below. Bodin’s theory of absolute sovereignty did not allow for the sharing of sovereignty or the distribution of sovereignty, but it also did not mean a monarch was completely free of restraints.6

In his work _Leviathan_, seventeenth-century English philosopher Thomas Hobbes applied Bodin’s description of sovereignty more literally. Hobbes wrote, “There can happen no breach of Covenant on the part of the Soveraigne [sic]; and consequently none of his subjects.”7 According to Hobbes, once a society created a monarchical government, no one had the right to overthrow the sovereign or change the form of government under an absolute monarch. The citizens or governing officials of a state could not remove a sovereign because a sovereign could do no wrong.

During the English civil wars of the mid-seventeenth century, English writer George Lawson challenged Bodin’s version of absolute sovereignty. Lawson published his political treatise _Politica Sacre et Civilis_ in 1660 and described a mixed form of sovereignty in which the king and Parliament ruled together. Lawson stated a fundamental difference from Bodin, According to Lawson, sovereign power or “real majesty” as he called it, resided in the people. Lawson wrote, “there was a power of

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7 Thomas Hobbes, _Leviathan_, (1656, (chapter XVIII, paragraph 3).
kings, and also of Parliament severally, and a power of them jointly considered. We find the real majesty in the people, and personal majesty in king and Parliament jointly.” The king and Parliament shared “personal majesty” which they maintained as long as each side acted within its proper jurisdiction. If one branch of the government exceeded its authority, for example when English King Charles I attempted to rule without Parliament, the people could withdraw the authority given to the entire government. As Julian Franklin explains, “The personal majesty of a mixed constitution is dissolved entirely upon the default of any of its parts.”

Lawson, like Bodin and Hobbes, believed that sovereignty was indivisible, but if it was abused by any branch of a government, the entire government lost its authority. However, Lawson did not believe that the structure of government could change. The people could remove a person abusing his authority, but not remove the position he held in a government. Lawson did not extend the sovereignty of the people to include the ability to change the form of government.

John Locke studied Hobbes and Lawson’s works and expanded on their theories by placing sovereignty squarely upon the citizens of a political society. As long as a legislative body was acting within the assigned authority given it by the people, there was no higher power than the government. When a government exceeded its authority:

There remains still in the people a supreme power to remove or alter the [government] when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end be limited by that end, whenever that end is manifestly neglected or opposed

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the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it.9

Locke expanded the sovereignty of the people to include replacing not only an abusive monarch or parliament but of the governmental structure itself. Locke’s principles were the political and legal justification for the American Revolution. The drafters of the Declaration of Independence based their work upon the principles John Locke defined in his Second Treatise on Government.

A legal scholar who redefined sovereignty to include the authorization of a government by the citizens was eighteenth century English legal theorist William Blackstone. American lawyers such as John Adams, James Wilson, and Thomas Jefferson studied his works and especially his Commentaries on the Laws of England. Blackstone firmly believed in the sovereignty of Parliament at the time of the American Revolution. However, American colonial leaders used his writings to support their arguments against parliamentary rule and as a source to create the Constitution. Blackstone defined sovereignty as “a supreme, irresistible, absolute, uncontrolled authority.”10 He went on to describe it in a democracy when he wrote, “In a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people’s will…the selection of representation [is] the exercise of this sovereignty.”11 Blackstone, like George Lawson a century before him, limited the sovereignty of the people to changing the members of a government, not the structure of a government. He

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10 Blackstone, 48-9.

11 Blackstone, 164-5.
firmly supported the English governmental structure of king-in-parliament when he wrote, “Whenever also a question arises between two provinces in America or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises original jurisdiction therein, upon the principles of feudal sovereignty.”¹² The “king in his council” was King George III ruling in conjunction with Parliament. Blackstone’s phrase “feudal sovereignty” described the absolute rule of a monarch that Bodin described centuries before. Only supplications to a sovereign were permissible from “below” and could sway a sovereign’s actions.

American colonial leaders defined sovereignty within the British Empire as residing specifically with the king. Parliament had no part in ruling the colonies. Benjamin Franklin wrote, “All the colonies acknowledge the king as their Sovereign: His Governors [in the colonies] represent his Person. Laws are made by their Assemblies or little Parliaments, with the Governor’s assent, subject to the king’s Pleasure to confirm or annul them.”¹³ By placing sovereignty solely with the king, the colonies claimed parity with and independence from Parliament. According to American colonial leaders, the sovereign king had many legislatures that were equal to each other and answered directly to him. This concept made each colonial legislature simply one of many parliaments.

However, if as British leaders claimed, Parliament held sovereignty in partnership with the king, then the colonies did not answer to the king alone. Parliament contended that the king was only one component of British sovereignty that consisted of the king,

¹² Blackstone, Supplement, v.

the House of Lords, and the House of Commons. No charter issued by the king alone could supersede the entire government.\(^\text{14}\) The colonies must submit to parliamentary authority. The argument over the location of sovereignty was predicated upon Blackstone’s – and Bodin’s - concept of sovereignty as indivisible. Indivisible but shared sovereignty as in the British “king-in-parliament” model, or distributed sovereignty as in the delegation of sovereign authority under a monarch were well-accepted theories. However, a polity with two sovereigns was illogical. As Connecticut clergyman and patriot Moses Mather wrote, “an imperium in imperio, one supreme power within another [was] the height of political absurdity.” Colonial leaders contended that the king alone was sovereign, and that there was no danger of two sovereign powers in the same state.\(^\text{15}\)

The debate over the location of sovereignty was not simply a dry constitutional argument for political theorists. If the king was the sovereign, as American leaders contended, then he held power – not just over the colonies – but over Parliament as well. A sovereign king threatened the gains made by Parliament at the Glorious Revolution. If George III ruled over all the local legislatures, including Parliament, then he could exercise an authority not seen since Charles II. Parliament would be subservient to an absolute monarch and the gains made at the Glorious Revolution forfeited. As British historian H.T. Dickinson wrote, “Fears of the kind of political instability experienced in the seventeenth century had generated the widely held belief that…there had to be a final authority against whose decisions there could be no appeal…this authority should rest with the legislature which made laws and raised taxes.” The alternative to this stability

\(^\text{14}\) Greene, 99-100.

\(^\text{15}\) Greene, 138.
was unthinkable to British leaders. As Dickinson reasoned, “If Parliament was not sovereign over the Atlantic colonies, then Britain had no constitutional authority to regulate Atlantic commerce in her own interests and might suffer a severe blow to her prosperity, power, and status.” American claims to independence from Parliament threatened a return of Britain to an older version of the English constitution that placed the colonists and British subjects under a sovereign monarch who was constrained only by common law and immemorial rights. This concept threatened the existence of the British Empire.16

The indivisibility of sovereignty was the basis for all of the above arguments. Blackstone’s “supreme, irresistible, absolute, uncontrolled authority” was still the agreed-upon definition of sovereignty. The debate between the colonists and the British government was over who held that authority. This debate led to the thirteen American colonies declaring their independence in 1776.

Declaring independence did not clarify the issue of sovereignty in the American colonies. From the beginning of the War for Independence, American leaders struggled over the location and limits of political authority. Thomas Jefferson addressed the issue of sovereign rule in The Declaration of Independence when he wrote, “That these United Colonies are, and of Right ought to be Free and Independent States; … and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right

This passage highlighted the challenge of assigning sovereignty. Did this passage create a single union of states where the Continental Congress held sovereignty or did it create thirteen independent sovereigns out of the colonies in rebellion? The phrase “free and independent states” suggested each state held these rights. Jefferson’s repeated reference to the states in the plural also suggested thirteen sovereign states. In addition, Article 1 of the 1783 Treaty of Paris refers to the states in the plural and lists each one when acknowledging their independence. However, there are several documents in support of a union, the first being the Declaration itself, which used capitals in the title “United Colonies” and suggested a formal union with a proper name. The resolution for independence submitted to Congress by Richard Henry Lee on June 7, 1776 called for “a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation.” Congress sought to replace the British Empire with a new American union. Two other defining documents in American history support the contention that the Declaration created a union. The first was the US Constitution that opened with the phrase “We, the people of the United States, in order to form a more perfect Union.” The phrase “more perfect union” suggested the existence of a union prior to the drafting of the Constitution.

Also in 1776, the American congress drafted the Articles of Confederation, which created a specific role for Congress while leaving the majority of sovereign authority to


the states. Article II stated, “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” This article seemed to support the creation of independent state sovereigns in the Declaration, but also delegated specific authority to the Continental Congress. Article VI of the Articles stated that Congress held the authority for establishing embassies, negotiating and approving treaties, and declaring and pursuing wars.21 In a prelude to the Constitution, the Articles simply assigned specific responsibilities to Congress and left the rest to the states. The clear definition of congressional sovereignty contrasted with the ambiguity of state sovereignty. This suggested that Congress employed the sovereignty of a modern European state as a guide in the Articles. However, the states would not accept a centralized European state as the model for the United States, so congressional representatives acknowledged undefined sovereignty in the states and specific limitations on congressional authority.

The strict limitations on Congressional sovereignty, and how congressional leaders circumvented these limitations, are the subject of this essay. Congress prosecuted the War for Independence under severe restrictions on raising funds and troops as it could only make requests to the states for money and men. The states maintained their sovereignty at the expense of Congress. After the war ended in 1783, congressional leaders expanded the authority of Congress while formulating a plan of incorporation for the Northwest Territories consisting of the lands between the Ohio and the Mississippi

Rivers. Once the states surrendered these lands to congressional authority Congress expanded its sovereignty through the organization, political principles, and governing institutions dictated to the new territories. Congress planned for the expansion of the union into the Northwest Territories with explicit directives and imperial sovereign control over the settlers and lands across the Ohio River. The US Congress assumed the role of an imperial sovereign over the territories and took on the role of a centralized government that a decade before, drove colonial leaders to revolt against Great Britain.
Chapter One

From Republican Theory to Imperial Rule

The relationship between Parliament and the American colonies rapidly deteriorated in the 1770s. The decade began with the Boston Massacre of 1770 when British soldiers killed five colonial protestors. The Gaspee affair followed in 1772 when colonials boarded, looted, and burned a British warship grounded off the coast of Rhode Island. However, it was the Boston Tea Party in December of 1773 that drove relations to their lowest point and set the colonies on a path towards independence. Parliament’s passage of the Intolerable Acts in 1774 in response to the Tea Party motivated American colonists to call for a continental congress in late 1774. The provincial colonial leaders had to overcome jealousies and animosity among colonies to consider a union – even a weak one. However, the Continental Congress that met in September of 1774 quickly developed its authority and power. By the end of the decade, Congressional leaders had a clear understanding of the role of Congress in the American union. Between 1774 and 1780, the Continental Congress redefined its role from an unauthorized and powerless congress to a national legislature employing imperial sovereignty in the territories.

After the French and Indian War ended in 1763, Parliament attempted to exercise—or expand according to colonial leaders–its authority over the American colonies. This attempt to change the relationship between the colonies and the metropolitan center forced American leaders to reconsider imperial rule, local governance, and the relationship between a government and the citizenry. Colonial leaders like James Otis and John Adams drafted legal tracts based on the

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1 The Intolerable Acts or—as Parliament referred to them, the “Coercive Acts”—were four acts passed by Parliament in early 1774. The acts closed Boston Harbor, placed Massachusetts under direct control of the British government, allowed the royal governor to move trials to Great Britain, and gave the governor the authority to confiscate public buildings to house British soldiers. A fifth act - the Quebec Act—did not directly punish Boston, but still inflamed American colonists by expanding the colony of Quebec and supporting the Catholics of Quebec in the exercise of their faith.

British constitution that defended the rights of Americans within the British Empire.\textsuperscript{3} There was no attempt or even consideration of independence as colonists argued their constitutional rights as proud subjects of the British Empire.

American leaders declared that Parliament could not legislate for the colonies without representatives from America. Parliamentarians rejected that argument and passed \textit{The Declaratory Act of 1766} which stated, “That the said colonies and plantations in America have been, are, and of right ought to be, subordinate unto, and dependent upon the imperial crown and parliament of Great Britain.”\textsuperscript{4} Parliamentary leaders held that imperial sovereignty resided in Parliament alone and its authority was without challenge by the colonies. The debate between American and British leaders in the 1760s concerned British constitutional theory, English Common law, and the legal rights of British subjects.\textsuperscript{5} By the early 1770s, American colonial leaders challenged British imperial rule with republican concepts of governance and natural rights that lent support to calls for independence.

\section*{I}

Before analyzing the writings of colonial leaders, it is important to review the concept of imperial sovereignty as exercised by Great Britain in the late eighteenth century. King George III

\textsuperscript{3} For examples of American essays drafted during the debates, see James Otis, \textit{A Vindication of the Conduct of the House of Representatives} (1762) and \textit{The Rights of the British Colonies Asserted and Proved} (1764). John Adams wrote \textit{Instructions of the Town of Braintree to Their Representative} (1765) as instructions to the delegates to the General court from Braintree, MA.


issued The Royal Proclamation of 1763 after defeating the French in the Seven Years War. The peace treaty that ended the war gave Britain control of the colonies of Quebec, Florida, and Grenada, as well as the unchartered lands of Canada and the land from the Appalachian Mountains to the Mississippi River. Britain moved quickly to establish rule over the vast territories and consolidate its North American empire. The proclamation sought to install British governments over the former French and Spanish colonies and maintain peace with the various Indian tribes of eastern North America.⁶

The language of the proclamation revealed Parliament’s confidence in Britain’s imperial sovereignty. British leaders first addressed the established colonies of Quebec, Florida, and Grenada. The proclamation identified the boundaries of each colony, split Florida into two colonies, and added lands annexed by Britain. The matter-of-fact, almost casual language used in this section of the proclamation revealed the confidence, or possibly arrogance, of an imperial giant. The repeated usage of the phrase “We have thought fit…” makes the passage sound like a subject beseeching a monarch rather than as monarch dictating imperial policy. This language hides the imperial might Britain employed to annex islands and lands adjacent to the new colonies in order to consolidate its hold on North America. The text read:

We have thought fit…to put all that Coast, from the River St. John's to Hudson's Streights [sic], together with the Islands of Anticosti and Madelaine, and all other smaller Islands lying upon the said Coast, under the care and Inspection of our Governor of Newfoundland. We have also…thought fit to annex the Islands of St. John's and Cape Breton, or Isle Royale, with the lesser Islands adjacent thereto, to our Government of Nova Scotia. We have also…annexed to our Province of Georgia all the Lands lying between the Rivers Alatamaha and St. Mary's. ⁷

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⁷ Yale, “Royal Proclamation”.
There was no mention of local populations or the status of Indian tribes living in these areas. British leaders extended the dominion of Britain to claim land that benefited the empire.

The proclamation next addressed the issue of local government. The important point in the following passage was that there was no mention of the current colonial governments. Spain controlled Florida for centuries before surrendering it to Britain. Quebec was a French Catholic province. There was no attempt by Britain to rule through the established governments in the colonies. The wording of the passage insinuated that the colonies were without legitimate governance and existed in a state of nature. There was no mention of existing governmental institutions or enlisting the support of local leaders. As conquered colonies, Parliament did not find any value in co-opting functional institutions or powerful locals to maintain governmental authority.

We have thought fit to publish and declare, by this Our Proclamation, that We have...given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of our Council, summon and call General Assemblies within the said Governments respectively, in such Manner and Form as is used and directed in those Colonies and Provinces in America which are under our immediate Government.8

The closing sentence directed the governor to establish a government “in such Manner and Form as is used and directed in those Colonies and Provinces in America” was telling. Britain would install local assemblies founded upon the same principles used in Britain’s other North American colonies.

By 1763, Britain possessed colonies from Hudson Bay to the Caribbean. The Privy Council had a wealth of experience in creating and administering colonies across the Atlantic Ocean and had a clear understanding of imperial sovereignty and its application in administering

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8 Yale, “Royal Proclamation”.

foreign colonies. Parliament understood the tasks necessary to establish new colonies and completed those tasks with ruthless precision.

The proclamation assigned control of lands to the governors and gave them the power to adjudicate any disagreements over title to lands. This was an important power to wield where a clear title to land was difficult for settlers to obtain. In addition, the governors of all North American colonies distributed land bounties owed to members of the military who served in the Seven Years War. The proclamation included a limitation on the governors’ power. Parliament banned colonial governors from assigning ownership of lands to settlers on the western side of the Appalachian Mountains.

And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them.[We declare] that no Governor or Commander in Chief in any of our Colonies…do presume, upon any Pretence [sic] whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments.9

This limitation was the most troubling for American settlers and directly contributed to the colonists’ protests against Britain. The phrase “essential to our interest” at the start of this passage justified the ban on settlements in the west. British leaders framed every action and decision in terms of what was best for Britain. The welfare of colonists and Indian tribes were of lesser concern to Parliament. Historians portrayed the proclamation as a protection for the Indians against settlers’ encroaching on Indian lands. However, British leaders viewed the welfare of the Indians primarily within the context of the good of the empire. British leaders wanted peace and stability in the empire because Britain could not afford a war with Indians in North America. Protecting the Indian tribes was not a goal in itself, but it served Britain’s goal of a stable empire.

9 Yale, “Royal Proclamation”. 
That is not to say that Britain would close off the west for all time. As historian Colin G. Calloway wrote in his study of Native Americans in 1763, “Westward expansion would occur, the [British] said, but it would follow a measured British pace, not a frantic American one, and it would be checked by clear boundaries dividing colonial settlers and Indian nations.” Segregation was a more effective policy than integration. British officials understood the power of maps, surveys, and clearly delineated boundaries in supporting the peaceful establishment of colonies. Controlled settlement would benefit Native Americans and settlers, but mostly, Britain.\textsuperscript{10}

Britain’s authority to make the proclamation was addressed in the phrase “[Indians] should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them.”\textsuperscript{11} The Indian lands were part of Britain’s “Dominions”. The use of the term “dominions” revealed British leaders advanced theory of imperial rule. From the beginning of European settlement of the Americas in the sixteenth century, monarchs attempted to define and reconcile the two concepts of \textit{imperium} (sovereignty) and \textit{dominium} (property). \textit{Imperium} was political or imperial rule over a people or society. \textit{Dominium} was rule over the land. The English never conquered the Native American tribes. How could a monarch arbitrarily apply his sovereignty to a foreign people? In addition, if Native Americans populated the land first, how could a monarch impose \textit{dominium} over their land?\textsuperscript{12} By the middle of the eighteenth century, British leaders set aside such legal conundrums and claimed that the Indians of the west were “under our Protection” because they were part of Britain’s \textit{dominium}.\textsuperscript{13}


\textsuperscript{11} Yale, “Royal Proclamation”.


\textsuperscript{13} Several texts explore the imperial debates concerning sovereignty around the Atlantic. Lauren Benton, \textit{A Search for Sovereignty: Law and Geography in European Empires, 1400-1900}, (Cambridge: Cambridge University Press, 2009; Anthony Pagden, \textit{Lords of all the World: Ideologies of Empire in
The proclamation addressed the issue of *dominium* a second time. It also hinted at sovereignty over the Indians of the west. After banning governors from administering lands outside their colonial boundaries, the proclamation stated:

> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments.\(^\text{14}\)

Britain reserved the lands beyond the Appalachians “for the use of the said Indians”. The Indian tribes of the west were under British protection and were part of Britain’s dominions. This statement implied that Native Americans no longer held their own sovereignty because they did not own the land on which they lived. Native Americans lost their property rights. Without control of their property rights, their sovereignty came into question. Britain’s imperial power extended to all peoples and lands in North America to the Mississippi River.

The application of British *imperium* and *dominium* was not a simple imperial land grab by a European monarch. The establishment of British sovereignty over Native Americans also served a practical purpose. By asserting sovereignty over the Indians of the west, Britain could legally protect the tribes. As the Indians’ sovereign, British leaders were obliged to use all means to safeguard Indian lands and livelihood. In effect, British leaders claimed control over all the lands and peoples of North America to the Mississippi River. The King became the arbiter of any disagreements that occurred because all the people of the area were under his authority. Settlers

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\(^{14}\) Yale, “Royal Proclamation”.

*Spain, Britain and France c.1500-c.1800*, (New Haven: Yale University Press, 1998); and David Armitage, *The Ideological Origins of the British Empire*, (Cambridge: Cambridge University Press, 2000), all deal with the ideological debates between the European empires during the Atlantic period between 1500-1800 ad. Imperial leaders made religious, constitutional, and racial arguments to justify the establishment of colonies in the Americas.
could not claim land in the west, since Indians could only surrender land to the crown or its agents. 15

The proclamation of 1763 was the act of an imperial giant that controlled half of North America and much of the Caribbean Islands. Parliament ruled over the colonies and dictated their relationship with the imperial center. Britain also defined property ownership, settlement, trade, Native American relations, and colonial government all in terms of benefiting the British Empire. It radically changed the relationship between Great Britain and North American Indian tribes as Britain assumed sovereignty over western tribes to protect Indians and their lands. The battles between Indians and British forces during and after the Seven Years War—most notably Pontiac’s War of 1763, would end with the tribes placed under the protection of British law and force. The Royal Proclamation of 1763 made British imperial sovereignty the absolute law of the land.16

II

Britain’s attempts at imperial rule over the American colonies led to protests and pamphlets attacking Parliament’s rule. A pivotal year for American political theories was 1774. It was in this year that colonial leaders drafted some of the most eloquent and expansive concepts of republican theories of government. While many colonists wrote essays protesting the actions of Parliament, James Wilson, John Adams, and Thomas Jefferson produced three of the most clear and eloquent documents describing the relationship between a government and the governed. They employed the theories of Locke, Montesquieu, and Rousseau to attack Parliament’s expansion of imperial rule and to protect local governance based on natural rights.17 The

15 Calloway, 93, 97.


17 See John Locke’s The Second Treatise of Civil Government (1690), Jean Jacques Rousseau’s The Social Contract (1762), and Baron de Montesquieu’s The Spirit of the Laws (1752) for examples of the political theories that influenced American political writers.
constitutional arguments made by Otis and Adams in the 1760s evolved into theoretical arguments about the nature of governance in the 1770s by revolutionaries like Wilson and Jefferson. John Adams, due to his legal and theoretical brilliance, was capable of arguing a constitutional argument in the 1760s and then shifting to a natural rights argument in the 1770s.

The first of the writers, James Wilson, emigrated from Scotland in 1765 and tutored students in Philadelphia before studying law under John Dickinson. He served on the local committee of safety in 1774 and represented Cumberland County to the first provincial convention in Pennsylvania. It was while he was on the committee of safety that he published a pamphlet that defined his political philosophy. Wilson’s pamphlet stated that all political power derived from the people and the people must have representation in a government for that government to be legitimate.18

Wilson began by restating John Locke’s theory of natural rights. He stated three times that the consent of the people was required to legitimize any government.

All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the first law of every government.19

Wilson went on to describe the ideal state of British liberty. He stated the fundamental importance of a government obtaining the consent of the government. Without the consent of the people, a government was not legitimate. Wilson also identified one of the most significant problems of early republicanism. Who was qualified to vote? Wilson appeared to state that all members of a society must freely elect their representatives when he wrote, “British liberty, it


was thought, could not be effectually secured, unless those who made the laws were freely, and
without influence, elected by those for whom they were made.” However, Wilson immediately
undercuts his own statement by qualifying who was qualified to vote by limiting enfranchisement
when he wrote, “Upon this principle is reasonably founded the maxim in law—that every one
[sic], who is capable of exercising his will, is party, and presumed to consent, to an act of
parliament.” Wilson did not elaborate on who was “capable of exercising his will”. Defining
who was capable of electing representatives was contentious during the American Revolution.
British leaders identified the problem with Wilson’s theory and employed it against the colonists’
arguments about “no taxation without representation”. Americans could not participate in
elections to Parliament due to the distance between the colonies and Great Britain. British
statesman and political theorist Edmund Burke gave a speech in Parliament in 1775 where he
attacked Wilson’s point about the colonists being capable of representation in Parliament due to
the slow nature of eighteenth century travel and communications. Burke stated, “Three thousand
miles of ocean lie between you and [the colonists]. No contrivance can prevent the effect of this
distance, in weakening government. Seas roll, and months pass, between the order and the
execution; and the want of a speedy explanation of a single point, is enough to defeat a whole
system.” Parliamentary leaders made a logical case that including colonists in governance was
simply not feasible due to the inability of colonists to exercise their will in a timely fashion.

Wilson’s next point concerned the act of expatriation. He analyzed the rights of settlers
who left Britain to immigrate to foreign lands. Wilson believed that American settlers maintained
their rights under the British crown when they migrated to North America. He wrote, “Is British
freedom denominated from the soil, or from the people of Britain? If from the latter, do they lose

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20 Hall, Wilson.

21 Hall, Wilson.

22 Constitution.org, “Speech on Conciliation with America: Edmund Burke, March 22, 1775,”
it by quitting the soil? Do those, who embark, freemen, in Great Britain, disembark, slaves, in America?” Wilson concluded his point by stating, “From hence it undeniably appears, that parliamentary authority is derived solely from representation—that those, who are bound by acts of parliament, are bound for this only reason, because they are represented in it.” Wilson connected representation with legitimate government based on a republican theory of government that undercut the authority of Parliament in the colonies.

Wilson concluded his pamphlet with the demand that “The superiority of Great Britain over the colonies ought, therefore, to be rejected; and the dependence of the colonies upon her, if it is to be construed into ‘an obligation to conform to the will or law of the superiour [sic] state,’ ought, in this sense, to be rejected also.” James Wilson wrote as an American patriot who protested against the abuses of an imperial government. He believed in the purity of republican theory as expressed by John Locke. Wilson was not a radical but was revolutionary in his thought, in that, the American colonies should be free of Parliament and Great Britain’s rule. The colonies had a right to govern themselves through their own representatives.

Another essayist writing about republican theory in the 1770s was John Adams. Adams attended Harvard College before graduating in 1755. He practiced law before becoming involved in the revolutionary cause and serving as a delegate to the Continental Congress. Adams was a brilliant legal and constitutional theorist who drafted the 1780 Massachusetts State Constitution, the oldest active constitution in the world. His writings concerning governance, constitutions, and republics remain defining documents of American political theory.

In 1774 and 1775, John Adams wrote a series of essays responding to loyalist Daniel Leonard. Under the name “Massachusettensis”, Leonard had published his own essays defending

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23 Hall, *Wilson*.

24 Hall, *Wilson*.

Parliament’s rule over the American colonies. Adams published his works to refute each point made by Leonard. As C. Bradley Thompson, the editor of Adams’ essays wrote, “Historians have long recognized the importance of Adams’s Novanglus letters to the Revolutionary cause. They were not only a close, point-by-point refutation of Leonard’s argument, but they represent the most advanced Patriot argument against British imperial policy.” Adams answered the question, “Does the authority of Parliament extend to the colonies?” Adams, like James Wilson, focused on the relationship between Great Britain and the American Colonies and based his arguments on republican theory.

In Adams’s second essay, he addressed the revenue bills passed by Parliament in part to pay the salaries of colonial officers. It was common practice for colonial legislators to pay the salaries of governors and other officers of the colony. This kept the officers accountable to the citizens of the colonies through their representatives. If Parliament paid the salaries of these colonial officers, they could act with impunity towards the legislatures and thus, the people. It would remove the accountability of crown-appointed officials to the legislatures. Adams understood the importance of forcing governmental leaders to answer to the legislatures of their respective states. Adams predicted the results of colonial officials paid by the crown, “This would gratify [Massachusetts Governor] Bernard’s avarice; and then, it would render him and all other governors, not only independent of the people, but still more absolutely a slave to the will of the minister.” Any official who could act independently of the people’s representatives could abuse the powers of their position to the detriment of the citizens and the colony. Adams concluded his point by contrasting the independence of colonial officers with that of the people. He wrote,

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26 Dr. Leonard is a political science professor who studies ideas within political movements and writings. His statement concerning Adams writings is from a legal and ideological perspective.


28 Liberty, “Novanglus”.
“There are but two sorts of men in the world, freemen and slaves. The very definition of a freeman is one who is bound by no law to which he has not consented. Americans would have no way of giving or withholding their consent to the acts of this parliament, therefore they would not be freemen.”

Parliament could pass laws for the colonies and colonial governors could implement those laws with impunity. Local legislatures would be powerless without controlling the salaries of governmental officers.

Adams applied the philosophy of Jean-Jacques Rousseau, a nineteenth century Genevan philosopher who wrote about political leadership and its relationship to the citizenry of a society. In 1762, Rousseau published *Of the Social Contract or Principles of Political Right*. In his first book, he analyzed the relationship between leaders with absolute authority and the people of a society. Only the people whom he served could legitimize a political leader. Political authority must come from the citizenry of a society or there was tyranny and slavery. Rousseau wrote:

> Finally, it is an empty and contradictory convention that sets up, on the one side, absolute authority, and, on the other, unlimited obedience…So, from whatever aspect we regard the question, the right of slavery is null and void, not only as being illegitimate, but also because it is absurd and meaningless. The words *slave* and *right* contradict each other, and are mutually exclusive.

Adams employed Rousseau’s republican theory to defend the rights of colonists against the usurpation of power by Parliament.

In the third Novanglus essay, Adams expanded upon his earlier descriptions of the relationship of Parliament and the colonies. He stated the belief held by British officials that Parliament was the “only supreme, sovereign, absolute, and uncontrollable legislative over all the colonies”, and then refuted that belief when he wrote:

> But, at the same time, they know that, in their own opinions, and in the opinions of all the colonies, parliament has no authority over them, excepting to regulate

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29 Liberty, “Novanglus”.

their trade, and this not by any principle of common law, but merely by the consent of the colonies...therefore, they have as good a right to charge that minister, Massachusettensis, and the whole army to which he has fled for protection, with treason and rebellion.31

The relationship between the colonies and Parliament was consensual and equal in political power. The colonies consented to allow Parliament to regulate trade for the good of the empire. By challenging the authority of the colonies, Leonard was challenging the imperial law of Great Britain. Adams employed this logic to turn the charge of treason around when he declared that Massachusettensis–Leonard–was treasonous in challenging historical imperial rule.

Adams returned to the analogy employed by Rousseau. Republican theory dictated that the people must choose, or at least authorize through some means, their political leaders. Adams wrote, “This they thought a plan to enslave them; for they uniformly think that the destruction of their charter, making the council and judges wholly dependent on the crown, and the people subject to the unlimited power of parliament as their supreme legislative, is slavery.”32 To ignore the people of a political society in governance was to invite tyranny, abuse, and “slavery”.

In the seventh Novanglus essay, Adams made a broad, sweeping statement about political representation. He stated, “The constitution requires that every foot of land should be represented in the third estate, the democratical [sic] branch of the constitution. How many millions of acres in America, how many thousands of wealthy landholders, have no representatives there?”33 This statement is instructive for two reasons. Firstly, Adams claimed that “millions of acres in America” had no representation in Parliament. Did this include the Indian lands to the west of the colonies? Did this include the settlers who violated the Proclamation of 1763 and its closure of the lands west of the Appalachian Mountains to settlement? Was this strictly the lands of the

31 Liberty, “Novanglus”.
32 Liberty, “Novanglus”.
33 Liberty, “Novanglus”.
thirteen colonies? The second point in this statement seemed to answer the first, but it was not clear. Adams mentioned “wealthy landowners” as an unrepresented group. While this could be simply a case of Adams selecting an example for his argument, it is more likely that he believed that “wealthy landowners” were the ones that Parliament’s actions reduced to “slavery”. Adams distinguished his own class from the rest of Americans and Indians, because he believed that his class was the ruling class. Parliament’s actions went against natural law and republican theory because wealthy landowners lost their political rights.

Adams’ final Novanglus essay established the legal justification for his claims of independence from Parliament and the King. He compared the Native American tribal rulers of early North American history to King George III. Adams portrayed a decidedly romantic version of the settling of North America by Europeans. In his description, European settlers arrived on the shores of North America and negotiated for lands with local tribes. The purchase of lands was consensual and between even partners who could act independently and without coercion. Adams stated, “Our ancestors…honestly purchased their lands of the natives…There is no fundamental or other law that makes a king of England absolute anywhere, except in conquered countries; and an attempt to assume such a power, by the fundamental laws, forfeits the prince’s right even to the limited crown.” The actual settling of land in North America and the relationship between settlers and Native Americans is outside the scope of this essay. What is important is that Adams applies the settling of foreign lands without state support as outside the realm of imperial rule. Settlers that migrated outside the imperial or common law boundaries of a sovereign were no longer bound by that sovereign.

Thomas Jefferson also addressed the relationship between the American colonies and Great Britain in his essay *A Summary View of the Rights of British America*. Jefferson drafted the essay as a set of instructions for the Virginia delegation to the First Continental Congress.

34 Liberty, “Novanglus”. 
Jefferson was to attend the Virginia convention to select delegates for the Continental Congress but became ill on the trip. He sent the essay ahead to Williamsburg where the delegates debated it but rejected it as too radical. However, convention members published the essay. In the essay, Jefferson claimed that the settlers of North America chose to associate with Great Britain. Just as James Wilson and John Adams argued in defense of the colonists’ rights to self-government, Jefferson also stated the case that the colonists founded the American colonies free of British governmental intrusion or support. 

Jefferson first suggested that the congress send a remonstrance to the king to protest the “many unwarrantable encroachments and usurpations, attempted to be made by the legislature of one part of the empire, upon those rights which God and the laws have given equally and independently to all.” Jefferson stated that the colonists possessed natural rights that no sovereign could revoke. He then built upon this idea by describing the role of the monarch. The king, according to Jefferson, was “no more than the chief officer of the people, appointed by the laws, and circumscribed with definite powers, to assist in working the great machine of government, erected for their use, and consequently subject to their superintendence.” Jefferson’s next logical step was to highlight the difference between British subjects and American colonists. The colonists’ ancestors left Britain and the king’s sovereignty by “going in quest of new habitations, and of there establishing new societies, under such laws and regulations as to them shall seem most likely to promote public happiness.” Jefferson made a clear distinction between a sovereign’s rule within the limits of the monarch’s dominium and any lands settled outside of the accepted borders of the monarchy.

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Jefferson did not address the complicated debate of sovereignty in colonization but reduced it to a more simplified version. He stated, “Their own blood was spilt in acquiring lands for their settlement, their own fortunes expended in making that settlement effectual; for themselves they fought, for themselves they conquered, and for themselves alone they have right to hold.”\textsuperscript{37} For Jefferson, the settlers conquered the native peoples and established colonies without the support of the English government. The settlers held sovereign rule over the conquered people and the land.

The early colonists, once their sovereignty was established, chose to associate with England. Jefferson stated, “That settlements having been thus effected in the wilds of America, the emigrants thought proper to adopt that system of laws under which they had hitherto lived in the mother country, and to continue their union with her by submitting themselves to the same common sovereign, who was thereby made the central link connecting the several parts of the empire thus newly multiplied.”\textsuperscript{38} The underlying point of this statement is that since the colonists chose to place themselves under the English sovereign, they could choose at any time to leave that same sovereign. The settlers never surrendered their right of association. As long as the settlers were favorably disposed to the British sovereign, they would choose to maintain the union.

However, the British monarch did not recognize the sovereignty of the colonists. The king imposed laws and restrictions on the colonists. Jefferson stated that the colonists did not “hold undisturbed the rights they acquired, at the hazard of their lives, and loss of their fortunes,” as Parliament and the king enforced acts contrary to the freedom of the settlers. The king usurped the rights of the settlers by arbitrarily creating new colonies owned and controlled by court

\textsuperscript{37} Peterson, 106.

\textsuperscript{38} Peterson, 107.
favorites. Jefferson applied John Locke’s theories of self-government to protest the actions of the British monarch:

Accordingly that country…was by these princes, at several times, parted out and distributed among the favourites [sic] and followers of their fortunes, and, by an assumed right of the crown alone, were erected into distinct and independent governments; a measure which it is believed his majesty’s prudence and understanding would prevent him from imitating at this day, as no exercise of such a power, of dividing and dismembering a country, has ever occurred in his majesty’s realm of England.\textsuperscript{39}

Arbitrary government was one of the primary arguments Jefferson and others made against the rule of Parliament and the king. Jefferson concluded, “The British Parliament has no right to exercise authority over us”.\textsuperscript{40} However, Jefferson hinted that the actions of the king were not entirely arbitrary when he wrote that the king could “No longer persevere in sacrificing the rights of one part of the empire to the inordinate desires of another; but deal out to all equal and impartial right. Let no act be passed by any one legislature which may infringe on the rights and liberties of another.”\textsuperscript{41} What was arbitrary rule to the American colonists could have been concerted imperial rule that promoted the empire at the expense of a specific colony or region. To British leaders, placing the good of the empire had to take precedence over local needs or rights.

Jefferson based his work on republican theory, simplified concepts of sovereignty, and a colonial interpretation of imperial actions. He infused his essay with the theories of John Locke in his defense of self-government. As historian Reginald Horsman wrote, “A Summary View of the Rights of British America was a fervent defense of American rights, but it was also an ardent defense of the rights of new settlers to their own forms of government.”\textsuperscript{42}

\begin{footnotes}
\item[39] Peterson, 107.
\item[40] Peterson, 110.
\item[41] Peterson, 121.
\end{footnotes}
View employed the writings of John Locke, Jean-Jacques Rousseau, and other political theorists that supported self-determination for a citizenry.

The year 1774 was a remarkable year for describing republicanism, and self-determination for populations. James Wilson, John Adams, and Thomas Jefferson protested the actions of the British Parliament and king in a series of essays that became founding documents in American political theory. The three essayists professed that the people of a newly settled society are free to choose their form of government and define the rights assigned to that government. These writers, and others, created a philosophy that became the legal justification for independence and propelled the colonies into rebellion and a war for independence. Their writings still stir oppressed peoples to protest and revolution.

III

Jefferson maintained his idealistic position on republican theory and self-government when in 1776 he drafted a constitution for the state of Virginia. In his third draft, he addressed the western lands issue and anticipated the creation of new colonies. Jefferson envisioned settlers holding absolute sovereignty over their territory. As a free and independent people, they could choose whether to join the United States or create a new republic. Jefferson predicted that “one or more territories shall be laid off Westward of the Alleghaney [sic] mountains for new colonies, which colonies shall be established on the same fundamental laws contained in this instrument, and shall be free and independent of this colony and of all the world.”43 Jefferson maintained his theoretical idealism in self-governance during the revolutionary years of the 1770s.

In the same year Jefferson drafted his version of the Virginia constitution, he also drafted the Declaration of Independence. The authority of the people in sanctioning a government was established in the passage, “That whenever any Form of Government becomes destructive of

43 Peterson, 344.
these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and happiness.” The creation or rejection of a government was the sole responsibility of the citizens of the society affected. No superior body or sovereign could impose a government on a people.

The Articles of Confederation, sent to the states for ratification in 1777, defined a sovereign role for Congress in the confederacy. This was the first official acknowledgement by American leaders that a centralized government, which the people did not directly sanction, should exist and act in the interests of the union. Article IX granted specific rights to Congress.

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article -- of sending and receiving ambassadors -- entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. Congress also had the authority to adjudicate boundary disputes between states, coin money, and regulate trade with Native Americans, along with other rights. It is important to note that the states remained sensitive to their own sovereignty. The Articles did not grant Congress all the rights associated with a modern, European state. Congress could declare war and coin money, but the states controlled the collection of revenue and the military. In the passage above, Congress held the right to enter into treaties and alliances but could not enter any treaty that would restrict the states in controlling their own trade. Congress attempted to raise revenue through impost


taxes in 1781 and 1783 but failed each time. This failure highlighted the sensitivity with which states protected their rights to trade.46 Congress struggled to assert its authority under the Articles.

IV

In 1777, Congress took advantage of an opportunity to establish for itself a unique role in the confederacy that could potentially be free of influence from the thirteen states. In October of that year, Congress debated control of the lands west of the Ohio River and the disputed boundaries between the thirteen states. Congress first debated a resolution requesting surveys of state boundaries. Congressional nationalists – those who wanted a stronger central government – proposed expanding the authority of Congress to include sanctioning the boundaries of the states:

That, in order to render the present union and confederacy firm and perpetual, it is essential that the limits of each respective territorial jurisdiction should be ascertained by the articles of confederation; and, therefore, it is recommended to the legislatures of every State to lay before Congress a description of the territorial lands of each of their respective states, and a summary of the grants, treaties, and proofs upon which they are claimed or established.47

However, Congress could only recommend that the states comply. The states voted down this seemingly simple request.

Congressional nationalists tried again to give Congress authority over the western boundaries of the thirteen states. Congress sought to not only establish state borders, but also claim the western lands defined outside the state borders for its own use. The second resolution read, “That the United States in Congress assembled, shall have the sole and exclusive right and power to ascertain and fix the western boundary of such states as claim to the South Sea, and to dispose of all land beyond the boundary so ascertained, for the benefit of the United States.”48


48 Ford, JCC.
Since the previous resolution to simply report on the boundaries and any treaties attached to the states failed, it should be as no surprise that this resolution also failed. The states were not prepared to consider surrendering their lands to a national government.

Finally, in a third resolution, congressional nationalists attempted to expand the authority of Congress to include not only establishing current state boundaries, and claiming the western lands for its own use, but also to creating new states out of the territorial lands. The final resolution read, “That the United States, in Congress assembled, shall have the sole and exclusive right and power to ascertain and fix the western boundary of such states as claim to the Mississippi or South Sea, and lay out the land beyond the boundary, so ascertained, into separate and independent states, from time to time, as the numbers and circumstances of the people thereof may require.”49 This resolution failed just as the previous two resolutions failed. The authority and reputation of Congress were not sufficient to sway the states to surrender any land to its control. The states saw Congress as a necessity strictly designed to fight the war with Great Britain. It would be two more years before the states allowed Congress to pass a resolution concerning the expansion of the union.

The reason Congress felt compelled to adjudicate land claims between the states was that with British imperial control removed after independence, states did not have a superior power to authorize their land claims, no matter how dubious the claims. Historian Peter Onuf described the situation of the mid–1770s as, “The failure of the empire and, in turn, of the United States to secure colony–state claims led to a proliferation of new claims, one leading to another.” Several states had to defend unsettled areas from encroachment by other states. If the states could not settle their boundaries, then the land claims could threatened the union at its most vulnerable time.50

49 Ford, JCC.

As an example, in 1774, the Connecticut assembly extended its jurisdiction to cover the Wyoming Valley in Northeastern Pennsylvania. Connecticut’s old charter included the area, but Connecticut’s leaders surrendered claims to the valley as part of the chartering of Pennsylvania in 1682. Connecticut planned to use the Wyoming Valley as a destination for landless citizens who wanted farmland. An “Article IX” court, which, under the Articles of Confederation, gave authority to Congress to adjudicate disagreements between states, upheld Pennsylvania’s claim to the Wyoming Valley. However, the dispute lingered until the states ratified the Constitution in 1788. In the 1770s, Congressional nationalists believed that only a stronger centralized government could control the rapaciousness of the states for land. By settling boundaries and claiming territorial lands, Congress could establish itself as a sovereign and place the union on a solid footing for expansion.

Between 1778 and 1780, the authority of Congress grew. The states were more receptive to settling land disputes through Congress. As a result, Congress passed the Resolution of 1780 concerning the lands to the west and north of the Ohio River. The wording of the resolution reflected the growing maturity of Congress and its understanding of its role in the union. The resolution did not dictate that Congress would establish the boundaries of the current states. Congress would simply accept lands ceded to the union. However, any state ceding land would have its remaining territory guaranteed by Congress. States had incentive to surrender contested or unprotected lands to Congress to settle their borders and end contentious land disputes between states. Congress would use the lands for the “common benefit of all the United States”. What is most revealing about the resolution is how Congress saw its role in the process of establishing new states. Each new state will be republican, of a certain size, and be a full, sovereign member of the federal union. Congress would not allow settlers to determine their own state governments. The resolution read in part:

Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states…shall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states: that each state which shall be so formed shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that upon such cession being made by any State and approved and accepted by Congress, the United States shall guaranty the remaining territory of the said States respectively.\(^{52}\)

The writings of Wilson, Adams, and Jefferson describing republican theory were set aside in favor expanding the union. Congressional leaders sacrificed Locke’s theory of self-government for the good of the union. What might appear like arbitrary, imperial rule to local settlers made perfect sense from the vantage point of Congress. The good of the union must come first.

Congress established other principles in the resolution that reflected its expanded sense of power. Congress would control the rate of expansion for the union to ensure a smooth integration process and orderly assimilation of new states. The resolution stipulated, “The said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them.”\(^{53}\) In addition, Congress considered any purchases of Indian land invalid if the buyers did not have the approval of the state that held the right of preemption.

Marking the evolution of American political philosophy, Congress’s 1780 resolution is a point-by-point copy of Britain’s 1763 royal proclamation. In 1763, American colonists had protested the actions espoused in Britain’s Royal Proclamation of 1763, which closed off western lands to settlers, voided land titles, and dictated governmental structures for the colonies. In the

\(^{52}\)JCC, p 915-6, (http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc01830)).

\(^{53}\)JCC, p 915-6, (http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc01830)).
proclamation, Parliament acted as a confident, focused, imperial power that understood its role in ruling over an empire. The good of the empire always came first. By 1780, the same actions made perfect sense to Congress. The good of the union came first.

In the mid-1770s, Wilson, Adams, and Jefferson employed the natural rights arguments and republican theories within American political theory to protest the imperial sovereignty of the British government. They also protested the imposition of taxes, laws, and the reduction of authority in the colonial assemblies. By 1780, Congress applied a similar imperial sovereignty when it passed the Resolution of 1780 that laid out the path for statehood for all future territories. Congress’s actions copied those of Parliament which led to the republican protest essays of 1774. The Resolution of 1780 placed Congress on a path towards an imperial sovereignty of its own. However, Congress developed a more sophisticated version of imperial rule than Parliament. The congressional version began more heavy-handed and controlling than the British version, but transferred sovereignty to the new states created out of the Northwestern Territories. As will be seen in the land ordinances of the 1780s, Congress sought to protect and extend republican government and the union by applying the lessons learned from British imperial rule in the 1760s.
Chapter 2

The Northwestern Territories and Congressional Sovereignty in 1784

Before Congress could enact a land ordinance concerning western lands, it had to settle land disputes with the various states, primarily Virginia. In effect, Congress had to gain title to the lands it wished to control. This complicated process dragged out over many years. As early as 1776, Virginia leaders considered the creation of new states in the west. The Virginia assembly passed a cession act in 1781, but Congress, led by the smaller states, refused Virginia’s demands and its offer. According to the small, landless states, led by Maryland, Virginia’s cession offer left it too large and powerful. An oversized Virginia could threaten the small states’ very existence. It was not until 1784 that Virginia’s opponents finally gave in to most of Virginia’s requests and accepted the cession of lands to the west of the Ohio River. The rationale of Virginia’s leaders concerned territorial integrity. Virginia faced challenges to its territories from settlers, land speculators, other states, and potentially, European empires. Virginia’s leaders sought to exchange territorial land for an acknowledgement of the state boundaries. It was not until 1784 that the small states gave in to the conditions set down by Virginia’s leaders and Congress gained control of the Ohio territory. Virginia’s cession was critical to Congress because, as Peter Onuf wrote, “Virginia had the best-developed claim to the trans-Ohio region that Congress coveted.” Congress needed a national domain, but Virginia stood in the way of gaining ownership to it. Congress sought the lands across the Ohio because state jurisdiction did not extend over the territories. Disputes between the states over ill-defined territorial borders disappeared as each state surrendered lands
outside of its defined borders to Congress. The Northwestern territory became the domain of Congress.¹

Once Congress settled Virginia’s cession claims, it could proceed with a land policy for the Ohio region. Thus, in 1784, Congress drafted and debated an ordinance concerning the organization of the Northwest Territories.² The 1784 land ordinance created a process that would lead to statehood for the new territories. Congressional leaders debated the ordinance under the Articles of Confederation, which stipulated that the original thirteen states must vote to allow a new state to send delegates to Congress. In addition, each state legislature must approve a change to the Articles to accept a new state as a full and equal member of the confederation. The Articles placed explicit restrictions on Congress concerning the expansion of the union. Article XI of the Articles stated, “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.”³ The states possessed the authority to admit new states. However, Congress did not adhere to the constraints of the Articles in organizing the territories. Congressional leaders designed and implemented a process for statehood in the western territories without the approval of the states. In fact, the statehood process drafted by

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² There is some disagreement on whether the Ordinance of 1784 was an ordinance at all. Some historians believe the ordinance was only a report and simply laid out principles for the expansion of the union. For the purposes of this essay, the term ordinance is used for the 1784 document to maintain clarity and cohesion with the ordinances passed by Congress in 1785 and 1787. For a full discussion of the legal standing of the 1784 ordinance see Richard McCormick, “The ‘Ordinance’ of 1784,” The William and Mary Quarterly, Third Series, Vol. 50, No. 1, Law and Society in Early America (Jan., 1993).

³ Yale, “Articles”.
Congress in 1784 was an unauthorized expression of imperial sovereignty unsupported by the Articles of Confederation or by congressional experience.

I

The restriction on congressional actions concerning new states was indicative of the strict limits the Articles placed on congressional authority. Congressional leaders knew they were exercising rights concerning the territories that Congress did not possess. In 1788, in *Federalist Essay #38*, James Madison described the powers exercised by Congress concerning the western territories. Madison’s comments highlighted the extralegal actions of Congress as well as the sensitivity of state leaders towards Congressional power at the time. Madison wrote:

> Congress have assumed the administration of [the territories]…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. All this has been done; and done without the least color of constitutional authority.4

By dictating terms for new states, Congress treated the territories similarly to conquered colonies ruled from a metropolitan center.5

Congressional leaders understood that they needed additional powers to perform various tasks but could not agree on what those powers should be, or if those powers should be permanent or temporary. Nationalist leaders wanted to make fundamental

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changes to the Articles through amendments, interpretation, or even force. Federalist leaders sought to give Congress specific powers for a limited time without amendments to the Articles. In 1783, at the end of the war with Great Britain, nationalist leaders left Congress as Federalists took power in state legislatures and sent their leaders to Congress. The Federalists would expand congressional power in a deliberate and specific manner. The ordinances of the 1780s reflect this methodical expansion of congressional power.

Beginning with the Ordinance of 1784, Congress expanded its power by creating specific rules for a territory to become a state. The 1784 ordinance was an ideological departure from the loose confederation of states and weak congress defined in the Articles. Congress began to assert itself as a sovereign in its own right as it dictated the territories’ pathway to statehood and sovereignty. The Ordinance of 1784 was Congress’s first attempt to exercise authority modeled on the modern, European definition of centralized, nationalistic sovereignty.

Congress used the 1784 ordinance to attempt to answer the question of how much authority to give to the settlers in the new territories. Congress was unsure of the answer and changed its position during the debate over the ordinance. The main issue for

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6 In 1783, the term “Federalist” applied to the supporters of limited and specific congressional power. Later in 1787-8, during the ratification debate over the Constitution, those who favored a strong national government claimed the title. “Federalists” in 1783 were “Anti-federalists” in 1787-88.


congressional leaders was a lack of trust in the settlers. Congress had to decide how much it should trust the frontiersmen to create a republican constitution and institutions that supported the union and Congress.\(^9\) Congress had no experience and no established political theory to guide them in creating and assimilating new states. Congressional representatives understood the importance of guiding the settlers towards statehood. In the end, Congress decided to control the statehood process, which led to a pre-ordained outcome.

The process to turn territories into states—including border surveys, land sales, and the creation of governmental institutions—was critical to the expansion and existence of the union. Congress might jeopardize the union if it did not handle the creation of new states correctly. It was imperative for Congress to control the process to create not just new states, but new republican states. This type of control required a nationalist government. In reference to the Resolution of 1780, historian Robert S. Hill wrote, “In calling on the states to cede territory to the United States, the Congress used strikingly nationalistic language. Union was said to be ‘essential ... to our very existence as a free, sovereign and independent people.’ Throughout the protracted and hard-fought struggle that eventually produced the Northwest Territory can be seen the persistence and primacy of the conviction that the federal union had to survive.”\(^10\) The nationalism expressed by Congress went against the language and spirit of the Articles of Confederation. The

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Federalist leaders in Congress applied their theory of granting specific powers to Congress in the statehood process. Congress expanded its authority and took a more nationalistic tone in the statehood process specifically to protect the union by expanding it.

When Thomas Jefferson drafted the 1784 ordinance, he exhibited a more moderate republicanism than in his writings of the mid-1770s. While his draft ordinance proposed local control of government, Jefferson also understood the importance of creating obligations for each new state. In fact, by 1784 Jefferson no longer professed that new colonies should be “free and independent of…all the world”, as he stated in his draft constitution for Virginia in 1776. The 1784 ordinance reflected the wishes of Congress that all new states would support the expansion of the union in the west. Jefferson supported the position that a central authority should control the dispersal of lands and their formation into political entities.

II

The language in the ordinance was clear and specific about Congress’s role in forming new states. Its authority over the creation of new states was absolute. In many ways, when compared to actions by Great Britain before the revolution, Congress acted in a similar manner. It acted as an imperial sovereign. The contrast between Congress’s nationalistic, sovereign authority over the new territories and its weak, limited authority over the thirteen states revealed the changing nature and center of American sovereignty.

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Congress asserted its authority in the opening lines of the ordinance. The settlers in each new state did not have the right to determine the boundaries of the societies they formed or to negotiate common boundaries with other states. The first sentence declared that new states “shall be divided into distinct states, in the following manner…” The ordinance then used longitude and latitude to determine the number, location, and size of each state. In his *Summary View* essay, Jefferson criticized English monarchs for granting proprietary colonies to favorite supporters. He mentioned Maryland as an example. In 1632, Charles I granted Maryland to Lord Baltimore. The language used by Charles I to determine the boundaries of Maryland was very similar to that used by Congress for the new states. The *Charter of Maryland* used longitude and meridians, as well as rivers, the seashore, and Delaware Bay to define the boundaries of the new colony of Maryland. The sovereign, in this case King Charles I, arbitrarily defined a specific plot of land and established a political society. In the proprietary colony of Pennsylvania granted to William Penn in 1681, King Charles II used the same language to determine the new colony. Charles II gave Penn all the land from the Delaware River to the forty-third longitude and the fortieth latitude. This included the land in a “circle drawn at twelve miles distance from New Castle Northward and Westward unto the beginning of the fortieth degree of Northern Latitude, and then by a straight Line Westward to the Limit of Longitude.”12 Over one hundred and fifty years later Congress acted in the same manner by arbitrarily defining the borders of the new states in the Northwest Territories. It

assumed the authority of an imperial sovereign for the determination of political societies.\textsuperscript{13}

The arbitrary creation of political societies conflicted with the political theories of English philosopher John Locke. In his \textit{Second Treatise on Government}, Locke addressed the transition from a state of nature to that of a political society. Locke wrote, “For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body, with a power to act as one body, which is only by the will and determination of the majority.”\textsuperscript{14} Locke criticized the arbitrary nature of absolute monarchy concerning the governing of citizens. However, in 1784, Congress acted as an arbitrary sovereign in the creation of new states by removing the settlers’ right to create their own society – including defining its borders. Congressional authority over the territories under the Articles was ambiguous. Leaders exploited this ambiguity to exercise imperial, arbitrary control over the territories.

Congress used its unauthorized sovereign powers not only to create new states, but also to control each one’s political development. Settlers in the new territories did not begin the statehood process of their own accord. Their political evolution required the consent of Congress. The ordinance stated, “That the settlers on any territory so purchased, and offered for sale” the second paragraph of the 1784 ordinance began, “shall, either on their own petition or on the order of Congress, receive authority from them, with appointments of time and place, for their free males of full age within the

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limits of their State to meet together, for the purpose of establishing a temporary
government.”\textsuperscript{15} Jefferson previously criticized the same action by the British monarch
and the re-introduction of the royal veto. In \textit{A Summary View}, Jefferson wrote, “For the
most trifling of reasons, and sometimes for no conceivable reason at all, his majesty has
rejected laws of the most salutary tendency.” He concluded his point with, “That this so
shameful an abuse of a power trusted with his majesty for other purposes, as if not
reformed, would call for some legal restrictions.”\textsuperscript{16} Jefferson proclaimed in 1774 that the
king should “no longer persevere in sacrificing the rights of one part of the empire to the
inordinate desires of another; but deal out to all equal and impartial right. Let no act be
passed by any one legislature which may infringe on the rights and liberties of another.”
A decade later, he accepted that there was a need for centralized control of new territories
and that the “order of congress” was entirely appropriate for guiding settlers towards
statehood. Congress was concerned about maintaining the union and expanding
westward. Local considerations and theoretical rights of settlers had to give way to the
needs of the union. Congressional approval of the territories’ actions was critical to
ensure the smooth, controlled, and republican growth of the union.

A second legal restraint placed on the territories was the drafting of state
constitutions. Congress did not trust the settlers to create republican constitutions that
would sufficiently support the union. Therefore, leaders forced the territories to select a
constitution from one of the original thirteen states. The 1784 ordinance stated that the
new states must “adopt the constitution and laws of any one of the original States; so that

\textsuperscript{15} Yale, “1784 Report”.

\textsuperscript{16} Peterson, 115-6.
such laws nevertheless shall be subject to alteration by their ordinary legislature;”17 The second phrase about laws being “subject to alteration by their ordinary legislature” revealed Congress’ ambivalent attitude about local rule. By requiring each new state to adopt a constitution from one of the thirteen original states, Congress would establish the parameters for debate over any future constitutional changes by state leaders. New states would begin with republican institutions to constrain future modifications to their constitutions. In addition, congressional leaders did not want to establish a precedent for interfering in the actions of a sovereign state. As Reginald Horsman wrote, “Jefferson obviously intended that from the time of the first establishment of the government a new territory would govern its own affairs.”18 Congress exerted sovereign rule to protect and expand the union. It did not intend for a new state to lose authority over its internal governance, but only to ensure that local control meant republican control.

Congressional control of the territories was similar to that which King George III had exercised over the colonies before the revolution, but the control Congressional leaders envisioned was not permanent. Congressional sovereignty over the territories was temporary. As territories became states, they would gain “an equal footing with the said original states”19 This was an early step in Congress’ attempts to redefine sovereignty to include a role for the states. As the territories became states, they earned their sovereignty in their relations with the other states and with Congress. When the territories proved

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17 Yale, “1784 Report”.
18 Horsman, 107.
19 Yale, “1784 Report”.
themselves good republican entities and members of the union, Congress allowed them to participate as polities equal to the original thirteen states.

Congress established seven principles to guide the territories on the path to statehood. The first revealed Congress’s concern about the westward expansion of the union and the pressures or “centrifugal forces” that expansion placed upon the union. Members of Congress feared an independent country forming in the west or perhaps a region influenced or directly controlled by a European power. There was also a fear that the current thirteen states would split up due to expansion pressures. The condition stated, “That they shall for ever [sic] remain a part of this confederacy of the United States of America.”20 Listing this principle first reveals Congress’s greatest fear and its primary motivation for the ordinance.21 A writer in a South Carolina newspaper warned about the dire consequences of a weak union when he wrote, “For the states to trifle any longer [in strengthening the union] is to sport with their existence, and to offer themselves a prey to any invader, or to a tyrant, or to anarchy.”22 Historian Robert Berkhofer stated that the first condition in the ordinance “appears the very reason for the existence of the ordinance.”23 To protect the union, Congress knew the union must expand. As Peter Onuf wrote, “Most commentators agreed that the alternative to expansion was disintegration; even the most superficial knowledge of western conditions confirmed that

20 Yale, “1784 Report”.


22 Boston, July 19, 1786, State Gazette of South Carolina, August 24, 1786.

23 Berkhofer, 247
such fears were well grounded.”24 It was the fear of disunion that drove Congress to establish principles to guide the territories—principles that Congress did not have the authority to create. The situation was such that Congress felt obliged to act in the interests of the union and to act as an imperial sovereign over newly acquired territories. Within the context of the relationship between the northwestern territories and Congress, Congress was a sovereign in the mold of Parliament and George III.

The second condition established by Congress for statehood was similar to the first condition. However, the wording of the condition revealed Congress’s mistrust of the settlers of the territories. Congress believed that the settlers of the territories lacked the capacity for republican government and therefore, were not to be trusted to establish proper legal and governmental constraints on their actions. The condition stated, “That in their persons, property & territory, they shall be subject to the Government of the United States in Congress assembled and to the articles of confederation in all those cases in which the original states shall be so subject.”25 This was not merely a stated desire or general guideline for the territories. In a later action, Congress created the position of Commissioner as one of the positions to oversee the territories’ move to statehood. The commissioner appointed a magistrate, who acted as a judge, for each district in the territory. The commissioner was also to “appoint executive officers in the respective districts and carry [the magistrates’] decrees into execution. That [the officers] explain to the inhabitants of the said district, such resolutions and proceedings of the United States in Congress, as respect to the same, and endeavor to form their habits for the reception of


25 Yale, “1784 Report”.
a republican government.”26 The condescending tone of these instructions highlights the
gulf between the established Eastern leadership and the frontiersmen in the western
territories. According to Congress, territorial settlers were not to be trusted to form
republican habits and needed guidance to develop into good citizens. The appointed
officers would “explain” the proceedings of Congress to “form” the proper habits in the
inhabitants of the territories. John Jay wrote to Thomas Jefferson in 1786 and expressed
the fears that Eastern leaders held concerning settlers in the west. Jay wrote:

Would it not be wiser gradually to extend our Settlements, as want
of Room should make it necessary, than to pitch our Tents through the
Wilderness in a great Variety of Places, far distant from each other, and
from those Advantages of Education, Civilization, Law, and Government
which compact Settlements and Neighbourhood [sic] afford? Shall we not
fill the Wilderness with white Savages and will they not become more
formidable to us than the tawny ones who now inhabit it?27

Congress believed that the western territories were simply too important to the union to
trust to the people actually living there. Later Congress removed the phrase “person,
property, and territory” and added a phrase about making laws in accordance with
Congressional law. The meaning and intent of the condition did not change. Congress
would ensure that the people in the new states would be republican citizens according to
congressional standards.

26 W. C. Ford et al., eds., Journals of the Continental Congress, 1774-1789. 34 vols. (Washington,
http://memory.loc.gov/cgi-bin/query/D?hlaw:5::/temp/-ammem_y7ou: 

http://founders.archives.gov/?q=john%20jay%20means%20of%20civilization&s=1111311111&sa=&r=7&
  sf=.
The first two conditions set down by Congress established congressional sovereignty in the creation of political institutions in the new states. Congressional leaders learned from Parliament’s mistakes and intended to keep a tight rein on the new territories and their transition to states. There would be no “salutary neglect” on the part of Congress. Clearly established principles controlled by Congress that favored the union would ensure that the new states received congressional approval and joined the union as republican equals to the thirteen original states.

Another condition set by Congress concerned the sale of public lands in the territories. This was not a part of the original document submitted by Jefferson’s committee. Congressional leaders added the principle during the debate over the document. This condition extended congressional control of the territories beyond the creation of states into the distribution of lands in the states. The principle read, “That they in no case shall interfere with the primary disposal of the soil by the United states [sic] in Congress assembled, nor with the ordinances and regulations which Congress may find necessary, for securing the title in such soil to the bona fide purchasers.”

Numerous parties contested property claims in the Northwestern Territories. Squatters established farms and small communities without legal title to the lands they claimed. Land speculators pressed for title to vast tracts of land to resell at a profit. Native Americans possessed large areas in the territories. To control this chaotic situation, Congress copied the authority exercised by the Privy Council in Britain during the first half of the eighteenth century. The King’s Privy Council oversaw Britain’s colonies and their

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28 Yale, “1784 Report”.

development. The council reviewed and could nullify colonial laws. It also appointed commissioners of review to settle colonial boundary disputes. As the eighteenth century progressed, the British Secretary of State assumed the role of the Privy Council and personally ruled in colonial affairs.\textsuperscript{30} Congress copied this authoritarian model of governance in the disposition of territorial lands.

Disputes over land ownership were not new to Americans in the 1780s. Arguments over land claims between the states and land speculators went back decades. As Robert Berkhofer wrote, “Rather it was in many ways a continuation of the earlier fights among the colonies and their land speculators over rival land claims and political jurisdiction in the trans-Appalachian West.” Congress became the arbitrator over disputed claims in the same way Parliament held the role before the Revolution.\textsuperscript{31} In addition, there were separatist movements in several states that threatened established states and their sovereignty over lands within their own borders. Residents of the Maine district, western North Carolina, the Kentucky District, and the Wyoming Valley in eastern Pennsylvania all sought statehood or were contested by multiple states at various times.\textsuperscript{32} The questions facing Congress and the existing states was if the original states held the sovereignty to create new states or territories out of their own lands, and whether settlers in an established state could secede to create a new state. Were the states sovereigns or not?


\textsuperscript{31} Berkhofer, 233.

The statehood principle listed in the Resolution of 1784 that new states recognize that Congress controlled the “primary disposal of the soil” forced the territories to acknowledge that their future sovereignty was subservient to Congress. New states would not dispose of their lands as they saw fit, nor could citizens carve out a new state from within the borders of an established state. This was an acknowledgement of the cession agreements made between Congress and the various states during the early 1780s discussed above.

The next condition addressed the debt contracted by Congress during and after the war. However, there was a larger issue than simply paying the debt. It involved the relationship between the states and Congress. The lack of respect and attention paid to Congress by the states made the collection of monies for debt payment difficult, if not impossible. Robert Berkhofer stated that “The plight of the Confederation treasury and the pressures that generated compromise over cession seem adequate to explain the stipulation that new states pay their share of federal debts.”

The clause read, “That they shall be subject to pay a part of the federal debts contracted or to be contracted, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states.” Debt payment by Congress became a sovereignty battle with the thirteen states. Ronald Gephardt wrote, “As local interests flourished, national-minded leaders feared congressional impotence would make the United States an object of international ridicule.”

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33 Berkhofer, 247.

34 Yale, “1784 Report”.

under the pseudonym of “The North American” in *The Freeman’s Journal* on September 17, 1783 addressed the problem in an article that shaped the debate over the sovereignty of the states and the authority of Congress.36 “North American” wrote, “Unhappily then for America, the separate sovereignties of our respective states [maintain] an undeviating adherence to state interests, state prejudices, [and] state aggrandizement.” “North American” proceeded to criticize the debt payment plan in effect in Congress and to despair of ever paying down the country’s foreign debt. “Let any rational man with this view ask, what reasonable hopes can we have of voluntarily discharging our foreign debt; it is a debt which can never be divided among the different states.” According to “North American”, the loan agreements prohibited apportioning the debt among the states and the formula for apportionment created by Congress was untried and unworkable.37 “North American” called on the integrity and honor of the states and the union to pay the debts owed to European countries, particularly France due to its support in the war. Under the *Articles of Confederation*, Congress was powerless to collect money from the states. The assignment of war debt to new states merely spread the debt among all states, new and original, as well as avoided any future problems with new states absolving themselves from any debt created prior to their incorporation.

36 The author of the “North American” essays is unknown as of this writing. Several candidates are possible. Various historians support James Madison, Pennsylvanian Richard Peters, or a collective effort lead by South Carolinian Jacob Read as the author or authors.

Congress exempted itself from state taxes as another condition of statehood and added this condition during the debate over the ordinance. This condition reflected the growing desire of Congress to assert itself over the authority of the states. The delegates wanted clear, unequivocal language that asserted Congress’s distinct sovereignty, apart from specific rights delegated to it under the Articles. The condition read, “That no tax shall be imposed on lands, the property of the United States.”

Twenty years before this time, William Blackstone described the legal theory to support this stipulation in his *Commentaries on the Laws of England*. Blackstone wrote that the British sovereign held “incidental prerogatives’ and that among these were “that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects.”

A sovereign was financially superior and unassailable by any subject. Congress applied this concept to the territories. It set itself apart and above any financial constraints imposed by newly created governments. Congress continued to expand its concept of an imperial sovereign at the expense of the future states.

Another principle required a republican government in each newly added state and a ban on hereditary titles. This ban was especially important to Jefferson. He believed hereditary titles would damage or ruin the republican virtues of the citizens of the new states. The original version written by Jefferson stated, “That their respective governments shall be in republican forms, and shall admit no person to be a citizen who

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38 Yale, “1784 Report”.

holds any hereditary title.”40 In a letter written in April of 1784 to George Washington, Jefferson was concerned about Washington’s membership in the Society of the Cincinnati. Officers of the Continental Army and the French Army that served in the Revolutionary War formed the society to foster fellowship among its members. Membership in the society was hereditary. In the letter, Jefferson displayed his antipathy towards aristocracy. He wrote:

[Those who oppose the society] urge that it is against the confederation -- against the letter of some of our constitutions; -- against the spirit of all of them -- that the foundation on which all these are built is the natural equality of man, the denial of every preeminence but that annexed to legal office, & particularly the denial of a preeminence by birth.41

Jefferson saw the society—and by extension the rights of heredity—as antithetical to republican principles. An American aristocracy would bring the worst of British political and cultural society to the union and threaten republican equality. Jefferson’s ban on hereditary titles in the 1784 ordinance was consistent with his beliefs. Congress, by a large majority, deleted the section about denying citizenship to those who held hereditary titles. Many members of Congress did not approve of hereditary titles but felt the ordinance was not the place to address the issue.42

The principle that banned slavery in the new states – another cause dear to Jefferson – revealed the developing sectionalism in the union. It read, “That after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any

40 Yale, “1784 Report”.


42 Berkhofer, 249.
of the said states, otherwise than in punishment of crimes, whereof the party shall have
been convicted to have been personally guilty.” Congress deleted the passage during the
debate over the ordinance. All the delegates above the Mason-Dixon Line voted to
maintain the ban on slavery, but most below the line voted to remove it. New Jersey was
not sufficiently represented to vote, so the antislavery forces lost and the principle was
deleted.43

When Congress finished editing Jefferson’s principle concerning republican
government, hereditary titles, and slavery, all that remained was, “That their respective
governments shall be republican.” In 1784, Congress was not prepared to debate the
expansion of slavery at so crucial a time for the union. Congress pushed its authority far
beyond what the Articles granted it. Unanimity and single-mindedness of purpose
required Congress to delay the passionate and potentially damaging debate over slavery
in the new territories. For the purposes of the 1784 ordinance on the western lands, it was
enough to require the new states to maintain republican governments and not create
divisions within the original thirteen states that might damage the union. Since
Congress’s sole purpose was to save the union by expanding it, a sectional battle over
slavery in the territories would be counterproductive, if not disastrous.

A final principle added during the debate concerned protecting absentee
landowners and land speculators from burdensome taxes. It read, “That the lands of non-
resident proprietors shall, in no case, be taxed higher than those of residents within any
new State, before the admission thereof to a vote by its delegates in Congress.”44 This

43 Yale, “1784 Report”.

44 Yale, “1784 Report”.

would seem to be a curious principle to include, given Congress’s hostility towards land speculators. Congress believed that speculators were in competition with Congress over the control of western lands. The development of western settlements would be out of the control of Congress if speculators purchased large plots of land and then resold them on their own terms. However, speculation was not the real issue. It was balancing the public needs with private investment that concerned Congress. Speculation in western lands was acceptable if it served the public good. Therefore, the limitation on taxing absentee landowners served notice to land speculators that Congress would control the land market but support some speculation. The minimum price of a dollar an acre set by Congress limited the size of investment in western lands and was an example of managing the development of western lands.45

The principles for statehood established congressional control over the creation and admission of new states to the union. During the debate over the ordinance, Congress continued to expand its sovereignty over the western territories. In the case of the western territories, Congress transferred sovereignty to territories once they became states. Congress began the process of creating new states as an imperial sovereign over the western lands. It dictated conditions, required actions by territorial leaders, and limited the involvement of local leaders and populations. However, the result of the process was a group of new states equal to the original thirteen states.

When a territory met the principles set down in the ordinance, and the population of the territory reached the population of the least numerous original state, it could send a

delegate to Congress. This delegate could not vote until Congress voted the state into the
confederation. The original ordinance laid out the voting process for statehood:

Such state shall be admitted by its delegates into the Congress of the
United States, on an equal footing with the said original states: After
which the assent of two thirds of the United States in Congress assembled
shall be requisite in all those cases, wherein by the Confederation the
assent of nine States is now required. Provided the consent of nine states
to such admission may be obtained according to the eleventh of the
Articles of Confederation

Congress edited the voting process during the debate by removing the reference to the
eleventh article in the Articles of Confederation. The final version required “the consent
of so many states in Congress is first obtained as may at the time be competent to such
admission.” Congress acknowledged that admitting a new state under its own initiative
was a step too far for its unauthorized actions and that there was no provision for adding
states to the union in the Articles.

Congress also added instructions to the ordinance for amending the Articles to
include a statehood vote. The members of Congress created principles for statehood in
the western territories that did not threaten the existing states. For Congress to
unilaterally add new states to the union and place them on equal footing with the original
states would be too much for the original states to accept. The state leaders would see this
as an abridgment of state authority by Congress and a blatant expansion of its power. The
instructions stated:

And in order to adapt the said Articles of Confederation to the state of
Congress when its numbers shall be thus increased, it shall be proposed to
the legislatures of the states, originally parties thereto, to require the assent
of two-thirds of the United States in Congress assembled, in all those
cases wherein, by the said articles, the assent of nine states is now
required, which being agreed to by them, shall be binding on the new states. 46

Adding new states would weaken the voting power of the existing states. At a time when sectionalism was becoming a political force and superseding state interests, the states would not tolerate the creation of a new section in the union that might or might not support the North’s or the South’s regional ambitions. Congress would have to ask the existing states to amend the Articles of Confederation to create new states.

The closing paragraph of the ordinance revealed Congress’s concerns about the legality of its actions and the authority required to implement the principles. The first line stated, “That the preceding articles shall be formed into a charter of compact.” The phrase “charter of compact” described a covenant with the thirteen states. Congress would organize the western territories into states by agreement or “compact” with the states. As Roger McCormick wrote in his essay concerning the 1784 ordinance, “Rather than an ordinance, which was a legislative act, the committee presented Congress with quite a different approach to the vexatious problem of bringing the new western states into the Union.”47 Political scientist Donald Lutz described a compact as “a mutual agreement or understanding” that did not carry the weight of law.48 Thus, Congress in the 1784 ordinance attempted to place binding, legal authority behind its actions without actually creating a law. The Articles of Confederation did not give Congress the authority to

46 Yale, “1784 Report”.


create laws that affected the states. Therefore, by labeling the ordinance a “charter of compact” Congress skirted the issue of authority. Jefferson’s committee reinforced the concept of a compact between Congress and the states with a second passage in the final paragraph. The ordinance represented “fundamental constitutions between the thirteen original states, and each of the several states now newly described, unalterable but by the joint consent of the United States in Congress assembled, and of the particular State within which such alteration is proposed to be made.” Congress attempted to redefine its role in national affairs and its relationship with the states. The states and Congress would be equal partners in creating and admitting new states to the union.

Members of Congress considered two substantive amendments during the debate over the ordinance. Elbridge Gerry of Massachusetts proposed an amendment that specifically granted to Congress the right to form temporary governments in the territories. This amendment seems redundant when the language and conditions of the ordinance are considered. Congress assumed the role of an imperial sovereign over the territories based on the already approved text of the ordinance. Gerry’s amendment read, in part:

[Congress shall] in the interim to appoint a committee to report a plan, which to be full consistent with the principles of the Confederation, for connecting with the Union by a temporary Government the said purchasers and Inhabitants of the said District, until their Number and circumstances shall entitle them to form for themselves a permanent government; [illeg.] permanent constitution for themselves and as citizens of a free sovereign and independent state shall be admitted to a representation in the Union.50

49 Yale, “1784 Report”.
50 Berkhofer, 239.
Samuel Huntington of Connecticut proposed adding a clause that stated, “Provided such Constitution shall not be incompatible with the republican principles which are the basis of the Constitutions of the respective states in the Union.” While this amendment appears a replication of previously stated rights, Gerry and Huntington wanted clear language that, in addition to the principles already listed, the ordinance placed Congress in complete control of the statehood process.51

Before Congress voted on Gerry’s amendment and Huntington’s clause, David Howell of Rhode Island offered a second amendment that would give more control of the transitional governments to the settlers of the territories. His amendment contained Huntington’s clause but modified Gerry’s plan for a committee to oversee the territories’ governments. Howell wanted to require Congress to seek the approval of the settlers in governing the territories before they achieved statehood. The important passage in Howell’s amendment was:

[Congress] for this purpose a committee be appointed with instructions to said committee to devise and report a plan for the government of the inhabitants and the due administration of justice, which if agreeable to the settlers shall be their form-of temporary government until their number and circumstances shall entitle them to a place among the States in the union; when they shall be at liberty to form a free constitution for themselves not inconsistent with the republican principles which are the basis of the constitutions of the republican States in the Union.52

The phrase “which if agreeable to the settlers” placed control of the transitional government in the hands of the settlers. This was similar to the situation Congress faced in dealing with the original thirteen states. Congress did not have any coercive authority

51 Berkhofer, 239-40.
52 Berkhofer, 240.
over the states to force them to comply with its requests. Congress rejected Howell’s amendment and approved Gerry’s amendment. Congress created a committee to draft a plan for transitional governments in the territories. Congress would be in complete control of the statehood process.

The 1784 ordinance was Congress’s first attempt at devising a plan to expand the union. Congressional leaders took advantage of the opportunity to expand the sovereignty of Congress. They used the powers of Parliament and the king as a guide to create a centralized, imperial sovereign. The attempt was tentative, experimental, and limited. After all, an imperial sovereign government was exactly what the American Revolution removed. However, the expansion and the very survival of the union demanded centralized control over the territories. The 1784 ordinance became a basis for further congressional actions. The *Articles of Confederation* were too restrictive, weak, and inflexible for Congress to maintain the union. Congress understood the flaws in the confederation. The land ordinance of 1784 was a starting point in establishing congressional sovereignty.
Chapter 3

The Land Ordinance of 1785

The Land Ordinance of 1785 was an expansion of congressional authority similar to that in the 1784 ordinance. However, it is a mistake to dismiss the 1785 ordinance as simply a furthering of the principles established in the 1784 document. The 1785 ordinance established a practical framework for the distribution of public lands that defined American expansion throughout the nineteenth century. As Daniel Elazar wrote in his article “Land and Liberty in American Society”, “The [1785] Land Ordinance established the basis for organizing, dividing, and disposing of the public domain. The greatest act, and the most American of national planning ever undertaken in the United States, it established a system that put an indelible stamp on 80 percent of the American landscape, one that worked to enhance liberty rather than restrict it.”1 While the 1784 ordinance contained the guiding principles in assigning statehood to the territories, the ordinance of 1785 was specific and clear on the allocation of land within the new states. The 1785 ordinance described the process for surveying townships and creating parcels for buyers and for congressional use. It also made clear to all potential settlers and land speculators that Congress would dictate land sales in the territories. The Land Ordinance of 1785 reflected the maturing sense of sovereignty in Congress and its expanded authority concerning the states and people in the northwestern territories.2

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It was important for Congress to act quickly. Settlers were streaming across the Ohio into the territories and establishing farms and small communities without clear title to their lands. Squatters settled on Indian land, which could cause retaliatory raids and the necessity for military intervention. The flow of settlers into the region continued unabated by governmental pressure. Neither Virginia’s government before its land cession to Congress, or Congress afterwards controlled the flood of settlers into the Ohio region. In the ordinance of 1785, Congress, in an attempt to dissuade unauthorized settlement and to control expansion, proclaimed that it would not encourage emigration, nor recognize the governmental structures created by settlers.3

Congressional leaders created a process that revealed their determination to organize the public lands to suit their purposes. When surveyors laid out seven townships in the territories, all the original states would hold public land auctions. The base price for an acre was set at one dollar. This would dissuade investors from purchasing large tracts for resale. In addition, by surveying the land before offering it for purchase, Congress would establish clear titles to the land, regardless of squatters already living on the land. As Peter Onuf wrote, “This meant clearing squatters off the land, by force if necessary.” Surveyors would organize and clarify title to the public land as if the squatters had never set foot on it. Congressional leaders developed a growing confidence in centralized authority over the northwestern territories and the people already in them.4


Before reviewing the ordinance and its language, it is important to place the 1785 agreement within the context of the times. While a committee was drafting the ordinance, a congressional debate took place that reflected the original states’ sensitivity towards congressional authority. In February of 1785, Congress debated changing the Articles of Confederation to place trade regulation in the realm of congressional authority. This would require a change to Article IX of the Articles. The original text of Article IX stated:

The United States in Congress assembled, shall have the sole and exclusive right and power of ...entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever.5

The proposed change read:

The United States in Congress assembled shall have the sole and exclusive right and power of...entering into treaties and alliances, of regulating the trade of the States, as well with foreign Nations, as with each other, and of laying such imposts and duties upon imports and exports, as may be necessary for the purpose.6

James Monroe supported and led the fight for the proposed change. He believed that congressional regulation of trade would make agreements with European states easier as it would bring uniformity to treaties by using the Model Treaty as a guide.7

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5 Yale, “Articles”.


7 The “Model Treaty” was a plan for establishing trade agreements with European states. The plan stipulated that any agreement should be reciprocal, and trade should be on the freest terms possible. Any treaty should also give the most liberal terms to American shipping during times of war. For a full discussion of the Model Treaty and America’s relations with European states, see Eliga H. Gould, Among the Powers of the Earth, (Cambridge (MA): Harvard University Press, 2012).
worked to put as many nationalists on the drafting committee as possible. Jefferson, now in France, supported the change. In a letter to Monroe, Jefferson wrote, “I am also much pleased with the proposition to the states to invest Congress with the regulation of their trade, reserving its revenue to the states. I think it a happy idea, removing the only objection, which could have been justly made to the proposition. The time too is the present, before the admission of the Western states.” However, the proposal ran into difficulties. As historian Harry Ammon wrote, “The plan to revise article nine was coolly received.” The states were not prepared to surrender a fundamental right like trade regulation to Congress. New England representatives were sympathetic to the change but needed time to overcome the anti-centralization beliefs of Northeastern people. Virginia delegates Richard Henry Lee and William Grayson were against it. Monroe clearly understood that the change to Article IX would end the debate over whether the United States was a confederacy or a union. Placing state trade relations, in effect the economies of the states, in the hands of Congress would severely restrict, if not end, state independence. In a letter to Jefferson in June of 1785, Monroe described the states’ fear of giving Congress control of trade agreements and the effect would have on Congress and the states. Monroe wrote:

The report upon the 9th article hath not been taken up. The importance of the subject & the deep and radical change it will create in the bond of the Union together with the conviction that something must be done, seems to create an aversion or rather a fear of acting on it. If the report should ultimately be adopted it will certainly form the most permanent and powerful principle in the confederation ... the effect of this report would be to put the commercial economy of every state entirely under the hands of the Union, the measure necessary to obtain the carrying trade, to encourage domestic by a tax on foreign industry, or any other ends which

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in the changes of things become necessary, will depend entirely on the Union.

In the end, Congress rejected the change to Article IX. The nationalists lost the fight to centralize and standardize the authority to negotiate trade agreements. The concept of expanded congressional authority over the original thirteen states was too radical and too threatening to the states. It was only in the northwestern territories that Congress would be able to expand its authority and develop its own sovereignty.

II

The preamble of the ordinance clearly described Congress’s legal rights over the territories. Congress based its authority to control the northwestern territories upon the land cessions from the various original states and a legal purchase of the lands from the Indian tribes living in the territories. The first paragraph of the ordinance read:

An ORDINANCE for ascertaining the Mode of disposing of LANDS in the WESTERN TERRITORY. BE IT ORDAINED BY THE UNITED STATES IN CONGRESS ASSEMBLED, THAT the territory ceded by individual states to the United States, which has been purchased of the Indian inhabitants, shall be disposed of in the following manner.---

Ownership of the land was not as simple or as clear as the opening paragraph presumed. As Historian Robert Berkhofer wrote, “Essentially, then, the issue of legal status is phrased in terms of whether the United States in Congress Assembled exercised de facto control in addition to de jure title in the Old North-west. According to this view, to the degree that Congress possessed and asserted actual authority, then the 1784 Ordinance

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10 Indiana Government, “Land ordinance of 1785,”
was in effect.” Berkhofer was referring to the phrase in the 1784 report, “whenever the same shall have been purchased of the Indian Inhabitants & offered for sale by the U.S.” The 1784 report presumed congressional purchase of the land from the Indian tribes in the territories. However, Congress did not purchase the land between the writing of the 1784 report and the 1785 ordinance. The change in tense from “shall have been purchased” in 1784 to “has been purchased” in 1785, suggests a positive action on the part of Congress to gain legal title to the territories, yet Congress did not attempt to purchase Indian lands during the time between the two ordinances. The change in tense is attributable to the fact that the national treasury was in debt and had no money for land purchases, as well as congressional leaders anticipating the purchase of lands as settlers moved west and put pressure on Native Americans. Purchasing Indian lands would occur as funds became available.

In fact, Congress did not address ownership of the territories until 1786 and even then, only acknowledged that the lands belonged to the Indian tribes. In An Ordinance for the Regulation of Indian Affairs, passed in August of 1786, Congress organized the Indian lands into two districts. The northern district included the lands north of the Ohio River and west of the Hudson River. The southern district included all the Indian tribes within the boundaries of the United States. Congress placed strict controls on access to the Indian tribes and their lands. The 1786 ordinance stated,

That no person, citizen or other, under the penalty of five hundred dollars, shall reside among or trade with any Indian or Indian nation, within the territory of the United States, without a license for that purpose first obtained from the Superintendent [sic] of the district...nor shall permits or

11 Berkhofer, 261.

12 Yale, “1784 Report”.
passports be granted to any other persons than citizens of the United States to travel through the Indians nations, without their having previously made their business known to the superintendent of the district, and received his special approbation.13

The requirements for a license to trade with Indians as well as a passport to travel through Indian lands reveals that Congress considered Indian lands to be owned by the tribes residing in the area. Great Britain ceded the lands to America in the treaty that ended the war. However, Congress still considered these lands “Indian territory” in 1786. The land ordinance of 1785 was premature in its belief that Congress had purchased the territories for resale.

The next two sections of the 1785 ordinance concerned the administration of the program to survey the territories. Congress appointed surveyors for the new states and placed them under the direction of the US geographer who administered the program. The geographer reported directly to Congress on the progress of the surveys and any issues concerning the surveyors:

The geographer, (under whose direction the surveyors shall act) shall occasionally form such regulations for their conduct, as he shall deem necessary; and shall have authority to suspend them for misconduct in office, and shall make report of the same to Congress or to the committee of the States; and he shall make report in case of sickness, death, or resignation of any surveyor.14

One should take this passage at face value as Congress simply wanted to pass off the day-to-day management of the program to a capable administrator who could report problems as necessary.

13 Ford, JCC, 492, http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc0316)).

14 Indiana Government, “1785 Ordinance”.
The instructions to the surveyors revealed the detailed control Congress wanted over the creation of the new states. These instructions concerned the size of towns and their layout. Congress feared uncontrolled settlement as well as speculation by land companies. If all the northwestern territories were available at one time, the settlers would be dispersed and ungovernable. The passage instructed the surveyors to, “divide the said territory into townships of six miles square, by lines running due north and south, and others crossing these at right angles, unless where the boundaries of the late Indian purchases may render the same impracticable, and then they shall depart from this rule no farther than such particular circumstances may require.”

Congress was fearful of antagonizing the Indians of the area. By surveying the lands before purchase, Surveyors could avoid Native American lands. As Timothy Pickering, in a letter to Elbridge Gerry explained:

But if adventurers should be permitted to ramble over that extensive country, and take up all the most valuable tracts, the best lands will be in a manner given away, and the settlers thus dispersed, it will be impossible to govern; they will soon excite the resentments of the nations and bring on an Indian war; to the destruction of multitudes of the settlers and to the injury of the public.  

One way to prevent an Indian war was to survey towns before offering any land for sale. Congress would only acknowledge titles to land surveyed by congressional appointees. It also allowed Congress to control the release of public lands for sale. Congress would offer only a certain amount of land at any single auction. This would increase the value of lands sold at later auctions. Settlers would fill a congressionally surveyed state before

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15 Indiana Government, “1785 Ordinance”.

16 Charles H. King (ed.), “Pickering to Gerry, March 1, 1785,” The Life and Correspondence of Rufus King, 9 volumes, (New York: Putnam’s Sons, 1894-1900), 1:72-73.
Congress opened another territory for settlement. This made the lands to the west more valuable. Congressional leaders were suspicious if not hostile towards uncontrolled speculation. However, there were limits to that hostility. Even Congressional leaders were not above taking advantage of an investment opportunity. As Pickering wrote to Gerry, “But if there must be a scramble, we have an equal right with others and therefore the information desired in the beginning of this letter may be of essential importance.”

Pickering and Gerry understood that if congressional efforts failed to stem speculation in the territories, then there was no reason that they should not join in the land grab and profit from their knowledge.

Expansion into the western lands had to be a national program designed by Congress. By controlling the development and settlement of the territories, Congress would ensure that the union benefited from expansion into the west with economic growth and population growth. Congressional representatives saw the territories as not simply a new set of sovereign states, but as an extension of the union. It was this vision that led to the tight controls on surveys and land sales. By insisting on congressional surveys before auctioning land, Congress would open lands at its pace and not allow settlers and speculators to drive expansion.

As mentioned above, the strict controls on passage through Indian lands and trading with the tribes were reminiscent of the Proclamation of 1763 in which King George III banned surveying and settling in the lands outside of the defined British colonies. The language was similar as well. Congress placed the same tight, centralized

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17 King (ed.), “Pickering to Gerry”.

control on interactions with the Indians as Parliament and King George had done over twenty years before. Congress, just like Parliament before the war, understood that settlers were streaming into the territories and provoking the Indians of the area. In addition, foreign traders continued to deal with the various tribes. Violence against settlers would require a military response that Congress wanted to avoid. Strict controls on settlers and traders would ensure an orderly expansion of the union without a corresponding war with Indian tribes. However, the 1786 controls Congress placed on settlers were as ineffective as the 1763 controls placed on settlers by Parliament.

Congress dictated that each town be subdivided into 640-acre lots. This appears to be a compromise between the various regions of the union. “The plats of the townships respectively, shall be marked by subdivision into lots of one mile square, or 640 acres.” Sectional identities were in their nascent state at this time but the people of the various regions of the country had already formed differing cultures concerning land settlement. The people of New England preferred settlement through township surveys and subdivision. This fostered a sense of community built around groups that settled new areas together. Mid-Atlantic residents preferred the purchase of surveyed lands. This allowed settlers to create a degree of privacy—whether communal or personal. Pennsylvania Quakers preferred social separation from other groups. In addition, land for the mid-Atlantic settlers meant economic advancement. This led to the creation of businessmen-farmers in the Ohio region. Southerners believed in settling as much land as possible through “squatting”. Their settlement philosophy, predicated on structures of “class and caste”, led to the plantation economy concept for land and stressed the

19 Indiana Government, “1785 Ordinance”.
importance of maintaining tradition in lifestyles. The three regions’ differing concepts for land needed to be reconciled in the 1785 ordinance. The 640-acre lot size garnered enough support from all the regions to be acceptable.20

Not content to subdivide townships, Congress claimed specific lots within each township for its own use and a portion of any mining ventures. The provision that one third of all mining projects belonged to the government was a revenue generator. Note the passage that reserved lots for public education and religion. The inclusion of these passages stems from political ideologies as well as economic realities. The ordinance stated:

There shall be reserved for the United States out of every township, the four lots, being numbered, 8, 11, 26, 29, and out of every fractional part of a township, so many lots of the same numbers as shall be found thereon. There shall be reserved the lot No. 16 of every township, for the maintenance of public schools within the said township. Also one third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of, as Congress shall hereafter direct.21

The inclusion of a lot for education shows the influence of New England leaders and their culture. New England had a history of promoting education in townships. By specifically including a lot for schools, Congress was hoping to entice more settlers and thus, drive up the cost of the available land.22 William Grayson wrote to George Washington in April of 1785, “That the idea of a township with the temptation of a support for religion and education holds forth an inducement for neighborhoods of the same religious sentiments

20 Elazar, 5-8.

21 Indiana Government, “1785 Ordinance”.

to confederate for the purpose of purchasing and settling together.” The inclusion of a lot for education and a lot for religion expressed congressional leaders’ desire for high land values, as well as their ideology concerning education and religion. Only the lot reserved for education survived the congressional debate. Congress rejected the requirement that reserved a lot for religion. According to congressional leaders, state supported education and the lack of a state supported religion would both support the liberty of the people, since a free people had to be an educated people and they should be free of a state religion. Historian Dennis Denenberg wrote, “If indeed congressional interest in settlement were genuine, whether from an economic standpoint or from early stirrings of manifest destiny, then the establishment of schools served a very utilitarian purpose.” Congress made a positivist statement about the value of education to settlers, but did not see the same general economic value in religion. Any lots not sold after eighteen months would revert to direct congressional control. The Board of Treasury would dispose of them under the direction of Congress.

The final section of the ordinance concerned land bounties for veterans of the Revolution. Congress passed resolutions in September of 1776 and August of 1780 granting land bounties to veterans of the war “who had engaged or should engage in the service of the United States during the war, and continue therein to the close of the same, or until discharged by Congress, and to the representatives of such officers and soldiers

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24 Dennenberg, 223; Elazar, 2.

25 Indiana Government, “1785 Ordinance”.

as should be slain by the enemy, in the following proportions, to wit.”¹²⁶ The ordinance went on to reserve a section of the Ohio country specifically for veterans. However, even the noble act of rewarding veterans was not without issues. The land between the Little Miami River and the Scioto River is in southern Ohio and fronts the Ohio River across from Kentucky. This was prime territory for settlers who wished to use the rivers to transport agricultural commodities to markets. Settlers were already in the area due to its easy access to water. When Congress reserved the lands for veterans, these settlers would potentially lose their lands. The passage declared:

Be it ordained, that no part of the land included between the rivers called little Miami and Scioto, on the northwest side of the river Ohio, be sold, or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers, and persons claiming under them, the lands they are entitled to, agreeably to the said deed of cession and act of Congress accepting the same.²⁷

Once again, Congress showed no concern about settlers or their farms as leaders continued to put the interests and the very existence of the union ahead of all other concerns. Rewarding veterans was not as straightforward as hoped. Congress’s methodical and detailed oversight of surveying the lands frustrated veterans who might wait years to receive their promised land.²⁸ In fact, Congress did not fully settle land claims for veterans until the adoption of the Constitution in 1788. Even when granted a land claim, a veteran had to travel to the Ohio region, locate the land, build a home, and establish a new life. This was beyond the abilities and finances of many ex-soldiers. More

²⁶ Indiana Government, “1785 Ordinance”.

²⁷ Indiana Government, “1785 Ordinance”.

²⁸ McCormick, 430.
typical was the experience of Joseph P. Martin of Connecticut who received a land
bounty in Ohio for his service in the war, only to lose it to a speculator.29

III

The Land Ordinance of 1785 addressed the connection between private ownership
of land and individual liberty. It also specifically provided for public education, thus
connecting good, republican virtues and a knowledgeable citizenry. Finally, it did not
provide for support for religion. Congress declined to connect republican government and
state-supported religion.30 Congress placed strict controls on growth in the west and its
ideological foundations. The territories would not be free to direct their growth or
distribution of lands as each one saw fit. Congress, by detailing the organization of
towns, made sure that each new state fostered republican citizens that would support the
union. Congress did not believe that settlers were capable of republican government.
However, with the proper structures in place – New England style townships, public
education, a relatively narrow range of wealth among the citizens, and freedom of
religion, the settlers would develop into citizens that supported and enhanced the union.
When territories became states, they would contain republican institutions that copied the
existing models in other states.

Congress did not pass the 1785 Ordinance solely for creating republican citizens.
Congressional leaders understood the economic benefits of their actions. The ordinances
of 1784 and 1785 created a national market for western lands. The 1784 ordinance

29 Martin, J.P. *Private Yankee Doodle*. Ed. by George F. Scheer, (Fort Washington (PA): Eastern

30 Elazar, 2.
established the principles for managing the western lands. The 1785 ordinance was specific and practical in its description of Congress’s plans for the organization and disposal of land in the territories. By taking total control of the territories, ensuring that the territories would become republican states and part of the union, and creating a uniform, congressionally backed title process for obtaining land, the territories became more valuable. The western lands would generate more income for the cash-starved union if Congress saw to every detail of the land sales. Settlers and land speculators could confidently invest their money and labor in the newly available lands knowing that Congress backed their efforts.

The 1785 ordinance was a strong congressional statement in support of republican ideology. However, viewing the document as only drafted for the good of the union misses the more practical aspect of it. Congress had war debts and needed funds to pay European lenders. The sale of the western lands would allow Congress to continue to pay its debts. Congressional leaders understood land speculation, investment, and how to drive up the price of land. Congress acted as a speculator in how it established and sold the land after claiming ownership. Settlers and speculators would pay more for a plot of land if the title was clearly established, land was in short supply, and surveys already completed. Congressional leaders wanted republican states but at as great a profit as possible. The 1785 ordinance was both an investor’s guide and a republican statement of American political theory.
Chapter 4

The Northwest Ordinance of 1787

The Northwest Ordinance of 1787 was a defining document for republican government in the United States. Congress defined republicanism, required it for all future states that entered the union, and established the expansionist philosophy for the United States throughout American history. As historian Jack Eblen wrote, “[The ordinance’s] basic ideas were to be applied more or less successfully in the United States possessions for over 175 years.”¹ The 1787 ordinance also described a congressional imperial sovereignty based on the British Empire. It created a colonial model for new territories that placed Congress in a position of a sovereign similar to the position of Britain’s Parliament. The ordinance of 1787 was the result of years of negotiations and debates over the western lands. In essence, the Northwest Ordinance definitively answered the question, “Is Congress sovereign over the new states?” The answer to that question was simple according to the 1787 Ordinance. The Northwest Ordinance of 1787 established Congress as an imperial sovereign over the Ohio territories and created subjects of the settlers in the region.

I

The wording of the ordinance established a clear, dominant role for Congress in which it directly controlled the creation, governance, and process to statehood for all territories. Gone were the half measures of the previous ordinances. In fact, the Northwest Ordinance revoked the 1784 and 1785 ordinances. Congress grew more

confident of its role and developed a mature understanding of sovereign, imperial rule in the 1780s, due to its experience in administering the western lands, as well as the failure of the Articles of Confederation. The territories were colonies and their relationship to Congress was subservient. It is ironic that the Northwest Ordinance created a colonial system that was a duplicate of the British system that drove American leaders to revolution.²

Congress began organizing the territories from scratch. The opening section of the ordinance established Congress’s authority to decide the size and number of the new states. Section one of the ordinance stated:

*Be it ordained by the United States in Congress assembled, That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.*³

The western lands were one territory or “district” that Congress would carve up into new territories as it saw fit.

Section 2 established the rights of inheritance in the territories. Placing a guarantee for the rights of inheritance of property owners second in the ordinance seemed an odd priority. However, it revealed the opinions of congressional leaders concerning the capabilities of westerners to govern themselves. Congress feared the creation of non-republican institutions in the west. By placing a detailed inheritance law in the ordinance, the framers signaled their intentions to ensure eastern laws and governmental procedures took hold in the west. Congress took advantage of every opportunity to control the

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² Eblen, 295.

development of the west to ensure protection and support for the union with republican institutions established in the East. That included a fundamental right like that of inheritance.4

The ordinance organized territorial development into three stages. The first stage was the “district stage”. Congress defined this stage in sections 3 through 8 of the ordinance. Each of these sections created a centralized, congressionally controlled office or power. Section 3 concerned the appointment of a governor. Congress appointed a governor who held office at Congress’s discretion. The section read:

*Be it ordained by the authority aforesaid,* That there shall be appointed from time to time by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in 1,000 acres of land, while in the exercise of his office.5

James Monroe, one of the principle architects of the ordinance, inserted this into the text. He supported centralizing all territorial authority under a single governor at the beginning of the territorial process.

Sections 4 and 5 defined the appointment and duties of judges and secretaries and empowered the appointed governor and judges to rule over the district using laws from the original thirteen states. Section 4 read in part, “There shall be appointed from time to time by Congress, a secretary, whose commission shall continue in force for four years unless sooner revoked…There shall also be appointed a court to consist of three judges…and their commissions shall continue in force during good behavior.”6 Section 5

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4 Eblen, 313.

5 Yale, “Northwest Ordinance”.

6 Yale, “Northwest Ordinance”.
empowered the appointed governor and judges to rule over the district using laws from the original thirteen states:

    The governor and judges…shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the district, and report them to Congress from time to time: which laws shall be in force in the district until the organization of the General Assembly therein, unless disapproved of by Congress; but afterwards the Legislature shall have authority to alter them as they shall think fit.7

The absolute legal control of Congress through its appointed governor and judges in the districts is an example of the imperial sovereignty exercised by Parliament before the Revolution. In fact, without representation in Congress or a local assembly, the settlers in the district took on the role of subjects to a monarchical sovereign. Even when settlers formed a local assembly, Congress could void any local laws it deemed inappropriate or illegal. The passage stated that local assemblies could “alter [laws] as they shall think fit”, but it was unclear when or how this was to occur.

A similar debate over the undefined rights possessed by subjects was at the heart of the colonial protests of the 1760s. James Otis addressed the subject in his pamphlet *The Rights of the British Colonies Asserted and Proved* written in 1763. Otis stated, “Every British subject born on the continent of America, or in any other of the British dominions, is by the law of God and nature, by the common law, and by act of parliament, (exclusive of all charters from the Crown) entitled to all the natural, essential, inherent and inseparable rights of our fellow subjects in Great Britain.”8 He went on to

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7 Yale, “Northwest Ordinance”.

list those rights which included local rule based on the consent of the governed, a ban on arbitrary legislation, and most importantly, no legislature could not transfer the power to make laws to any other governing body. The citizens of a society had a natural right to establish their own local assembly. Otis categorically stated that the rights of citizenship were unalienable and the limits of government were specific and rigid. Otis’s protest against parliamentary rule could apply to that of the Continental Congress in 1787. According to Otis, settlers did not surrender their rights when they migrated overseas. One would expect Otis to apply this principle to settlers that migrated over a mountain range or a river, as well as an ocean.

By the 1780s congressional and local leaders no longer agreed with Otis’s position. In 1788, newly appointed Governor Arthur St. Clair arrived in the Ohio district to establish local government. St. Clair considered the settlers of the Ohio region to be “subjects” of Congress. In a letter to Oliver Wolcott, St. Clair wrote, “The truth is, the Territory is a dependency of the United States, not as yet an integral part of them, but capable of becoming so at a future day.” He went on to state, “The object of the Government was to extend the population of the country; and, as local circumstances would have rendered the new settlements inconvenient parts of the United States, they determined to effect it by colonizing; different stages in the progress of the colonies were contemplated and provided for.” St’ Clair’s reference to the stages of progress is critical to understanding congressional leaders’ logic. St. Clair and his supporters believed that settlers ceased to be American citizens with rights and became “subjects” of Congress when they left the states and entered the Ohio district. However, their status was not

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9 Liberty Fund, “Otis”.

comparable to that of American colonists before the Revolution. Their status hinged upon the definition of “territory”. As Peter Onuf argued, “The developmental model...proved to be central to the very idea of ‘territory’. ‘Territory’ suggested both ‘colony’—the beginning point—and ‘state’—the end.” In essence, the settlers left their rights as American citizens behind them when they migrated to the district. However, they regained their rights when the statehood process reached a certain stage. The ordinance represented a “compact” between the settlers and Congress. Congress would rule as a sovereign in the first stage when local governmental structures were not possible, and transfer sovereignty as the settlers’ numbers increased and local rule was feasible.

Under the British concept of imperial rule in place before the Revolution, the American colonies did not have a process for gaining political sovereignty. The Northwest Ordinance included such a process. This made the temporary classification of “subject” for settlers acceptable within republican government. The opponents of St. Clair employed the language of the Revolution to protest the loss of their rights. Self-government was not a privilege but a right. They invoked the logic of James Otis to protest their loss of rights, no matter how temporary that loss might be. The debate over the rights of settlers and the imperial rule of Congress continued to be a contested point as settlers eventually asserted their rights through a territorial government and stripped the governor of his powers.  

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Section 6 assigned the role of commander in chief of the territorial militia to the congressionally appointed governor. Control of the military within a state was one of the defining criteria for a modern European state. Congressional leaders understood the importance of this authority. The section stated:

The governor, for the time being, shall be commander in chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.\(^\text{12}\)

The leader or political body that controlled the military controlled the state. An army or militia could enforce governmental sovereignty over the people of a state.

In 1787 and 1788 during the ratification debate over the Constitution, Luther Martin, an Anti-federalist in New Jersey, wrote a series of essays entitled *The Genuine Information*. In his ninth essay concerning the office of the Presidency, he addressed the authority of the President as Commander-in-Chief of the military. A supreme ruler who controlled the military was reminiscent of the British military under King George III. Martin wrote, “That the army and navy, which may be encreased [sic] without restraint…and commanded by him in person, will, of course, be subservient to his wishes…in addition, to which the militia also are entirely subjected to his orders.”\(^\text{13}\) The idea of a supreme head of state, or in the case of the Northwest Territory, the governor, controlling the military was very similar to King George III sending an army to quell the rebellion in the colonies. Martin foresaw a time when the federal government would use...
the military to crush state opposition. Congress readily assigned this same expansive power to a territorial governor in 1787.

Sections 7 and 8 of the ordinance mentioned the transition from the original colonial government stage to that of a territory with some self-government but with limits. These sections gave sweeping powers to the governor to control the political and legal structures in the colony. Section 7 stated in part, “Previous to the organization of the general assembly, the governor shall appoint such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same.” However, it shifted the authority to regulate these positions to the assembly once it was functional. It did not shift the power of appointment. That remained with the governor. “After the general assembly shall be organized, the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers not herein otherwise directed, shall during the continuance of this temporary government, be appointed by the governor.”\footnote{Yale, “Northwest Ordinance”}

Section 8 completed the instructions and definition of the authority of the governor of the district. The governor appointed all judges and magistrates, as well as civil officers. He was also empowered to create new townships until a territorial assembly assumed the responsibility.

One of the most contentious issues during the 1770s that drove colonial leaders to protest and revolution was the power of a royal governor. Before 1772, colonial assemblies could moderate the power of a governor because legislators controlled the governor’s salary. In the summer of 1772, Massachusetts Governor Thomas Hutchinson
announced that Britain would pay the salaries of colonial governors. This made
governors completely independent of colonial assemblies. Parliament transferred the
salaries of colonial judges to London later in the year. This set off a storm of protest in
the colonies. Massachusetts radical Sam Adams wrote an essay in November of 1772
protesting the loss of accountability of the governor to the assembly. He began by
framing his protest within John Locke’s theory of natural laws and the creation of a
society. Adams wrote, “When men enter into society, it is by voluntary consent; and they
have a right to demand and insist upon the performance of such conditions and previous
limitations as form an equitable original compact.” Any compact between members of a
society must have accountability built into the compact. Without the authority to control
leaders, the members of a society are at the mercy of a ruler. Sam Adams understood that
any leader who was not accountable to the people was a potential tyrant. The most
effective weapon against the creation of a tyrant was the purse. Adams stated:

Government was instituted for the purposes of common defence [sic], and
those who hold the reins of government have an equitable, natural right to
an honorable support from the same principle that "the laborer is worthy
of his hire." But then the same community which they serve ought to be
the assessors of their pay. Governors have no right to seek and take what
they please; by this, instead of being content with the station assigned
them, that of honorable servants of the society, they would soon become
absolute masters, despots, and tyrants.

To Adams, governors were “servants” not rulers. As servants, royal governors must
answer to their employers, the people of a colony or state. A just society had to make the
rulers directly accountable to the people they ruled. The royal governors’ independence

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16 Constitution.org, “The Rights of the Colonists”. 
from local assemblies in the American colonies in the early 1770s was a contributor to the Revolution. In the Northwestern Ordinance of 1787, Congress employed the same governmental structures used by the crown in the early 1770s. In 1787, congressional leaders cast aside John Locke’s theories of government and natural law, as well as the protests of Sam Adams, John Adams, and Thomas Jefferson in the previous decade, in favor of strict congressional control over the newly created colonies in the west. Congressional leaders understood the value of a governor who answered only to the sovereign.

Congress moved beyond the first stage of colonial governance in section 9 and 10 when it established the conditions for the creation of a local assembly and the replacement of representatives. Section 9 was the first section of the ordinance to define how a district developed beyond the colonial stage. A district moved through the stages of development into a state primarily due to the increase in its population. Sections 9 stated:

So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect a representative from their counties or townships to represent them in the general assembly: Provided, That, for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants shall the right of representation increase, until the number of representatives shall amount to twenty five; after which, the number and proportion of representatives shall be regulated by the legislature.17

As Peter Onuf explained in his text *Statehood and Union*, settlers believed that a “colonial” government was “only necessary because small numbers of scattered settlers

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17 Yale, “Northwest Ordinance”. 
could not conveniently exercise their rights, not because they were politically incompetent.” Congressional oversight was only required until the population became sufficient to govern the district through a local assembly. The district’s progress through the stages of development paralleled the expansion of the settlers’ rights. All parties agreed that only full statehood conferred full rights of citizenship on the settlers in a district.  

Section 10 simply described the process for replacing representatives who died in office or the voters recalled. The section read, “The representatives thus elected, shall serve for the term of two years; and, in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the term.”

The eleventh section spelled out in detail the form and processes of the second stage of government. Once a district moved beyond the colonial stage to the territorial stage, the district’s residences could form an assembly. What is instructive about this passage is the blend of local rule and congressional oversight. The elected representatives nominated candidates for the legislative council but Congress chose the actual members. Congress was, for the first time, limited in its actions in the district. The section began with the composition of the government and the process to select its members.

The general assembly or legislature shall consist of the governor, legislative council, and a house of representatives. The Legislative Council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum: and the members of the Council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected, the

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18 Onuf, *Statehood*, 73.

19 Yale, “Northwest Ordinance”.

Governor shall appoint a time and place for them to meet together; and, when met, they shall nominate ten persons… and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and, whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress; one of whom congress shall appoint and commission for the residue of the term. 20

Congress selected legislative council members, but Congress had to choose from a list provided by the representatives. In addition, Congress alone possessed the right to remove a council member. There was no mention of criteria for removal or allowing representatives request the removal of a council member. The right to remove a council member gave Congress the final say on the worthiness of a council member.

The second part of section eleven defined the legislative process. What is instructive in this section is that the power of the governor remained absolute. Once again, the territorial governor resembled a royal governor from before the Revolution. The house of representatives and the legislative council did not possess the authority to override a governor’s veto of a law. The passage read:

And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases…not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly, when, in his opinion, it shall be expedient. 21

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20 Yale, “Northwest Ordinance”.

21 Yale, “Northwest Ordinance”.
The governor had the right to dissolve the legislature at any time he felt it necessary. Congressional leaders allowed the inclusion of self-rule in the territory in this stage, but ensured control of the process by empowering a governor to rule with absolute authority.

Section 12 concerned the election of a delegate to Congress. The important passage of this section read, “As soon as a legislature shall be formed in the district, the council and house…shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating but not voting during this temporary government.” This limitation reflected the restricted rights of the settlers. Full citizenship, which included representation in Congress with voting rights, was for the citizens of states, not territories.

The final sections of the Northwest Ordinance concerned the rights of the settlers. Sections 13 and 14 were a preamble to the articles listed in the ordinance. These sections establish that the articles listed were, in essence, a bill of rights. Section 13 read, in part:

And, for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory.

Section 14 continued to employ the ordinance as a compact between the original states, the new states, and the people used in previous ordinances. It read:

It is hereby ordained and declared by the authority aforesaid, That the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

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22 Yale, “Northwest Ordinance”.

23 Yale, “Northwest Ordinance”.

The Northwest Ordinance created a bill of rights before any territories drafted constitutions. The ordinance began with a bill of rights that would form the foundation for future state constitutions. By agreeing to these articles, the territories entered into a “compact” with the original states and would earn “their admission to a share in the federal councils on an equal footing with the original States.” The new states would join the original states with all the powers of state sovereignty.

The language used in these sections reflected a far more confident and mature understanding by congressional leaders on their role in forming new states and expanding the union. Congress moved beyond the absolute control of an imperial sovereign seen in previous ordinances, to employing a mixture of imperial sovereignty with republican elements to establish states that would support and enhance the union. Congressional leaders understood the usefulness of imperial sovereignty but most importantly, they understood its limitations and failings. The Northwest ordinance defined a flexible sovereignty that adapted as the population in a territory grew and matured. British imperial sovereignty was a dead end for its colonies. There was no escape from the sovereign rule by Parliament. Congressional imperial sovereignty was flexible, evolving, and most of all, a process to republican statehood.

II

The articles included in the ordinance reflect the importance of the document. The previous ordinances of 1784 and 1785 defined the authority of Congress and its relationship with the territories. However, four of the six articles in the 1787 ordinance addressed the relationship between the people of the territories and the governments. The two other articles summarized the principles of statehood previously stated in the
ordinance. When one views the articles as a philosophy of government, it is understandable how some supporters considered the ordinance a constitution for the territories, and why historian Bernard Sheehan wrote that it “read like the Bill of Rights which was later attached to the Constitution.”

Article One established religious freedom for settlers in the territories. Congress employed religion to support a secular republican government that would in turn, support the union. However, Congress did not go so far as to link worship with republicanism. It stated, “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.” The inspiration for this article was the Massachusetts Constitution of 1780, which included an article that stated:

It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great creator and preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

An important difference was the omission of the first sentence that called worship a “duty of all men”. As mentioned before, the 1785 ordinance omitted a requirement for a plot of

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24 Onuf, “Statehood”, 134; Sheehan, 11. Sheehan’s article was a comparison of the various ordinances from the 1780s. Charting the evolution of congressional authority through the ordinances was employed by historians of the period such as Peter Onuf and Richard McCormick in relation to the states, both new and established. Other historians focus on the Northwest Ordinance and its impact on constitutional theory and westward expansion.

25 Yale, “Northwest Ordinance”.

land in each town reserved for religious worship. The omission of the sentence calling worship a “duty” is consistent with congressional sensitivity towards public support for religion. The unmolested right to practice one’s religion—without state influence—was a useful tool to promote the well-being of the territory and thus, the union.27

The second article was the closest Congress came to a formal bill of rights. Congressional leaders used this article to link the rights of citizens to due process and the protection of their property to republican government. Two phrases in this passage are of great importance. The first is the inclusion of the right to “a proportionate representation of the people in the legislature.” Only a proportional representation in the government for the citizens would guarantee the rights of habeas corpus, trial by jury, and due process for the protection of property. The first passage of the article declared, “The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature.”28 Without representation, the people could lose these rights. Congress included a second important phrase in this passage. The citizens of the territory had the rights to “judicial proceedings according to the course of the common law.”29 The phrase “common law” referred to the theory behind the British common law. According to legal theorists of the eighteenth century, no government could arbitrarily rule over a people due to protections in the common law. The common law was an ancient legal instrument that preserved the rights of the people, the privileges of Parliament, and the autonomy of the

27 Hill, 50.

28 Yale, “Northwest Ordinance”.

29 Yale, “Northwest Ordinance”.

common law courts. The common law was a body of traditions and customs that the people accepted as binding and that developed from the time of the Saxons in England. These customs protected the people from an abusive government. Congressional leaders applied this concept to the territories to ensure legal protections for the settlers.30

The remainder of Article Two concerned further rights held by the people of the territory. These statements of rights concerned protection of property, due process, and protection from unreasonable fines and penalties. This article was a limitation on governmental power and established the rights of citizens. This passage linked directly to the Bill of Rights in the Constitution.

All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person’s property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.31

The right to bail, moderate fines, a ban on cruel and unusual punishment, and the right to jury trial and to due process are prominent in both the ordinance of 1787 and the future Bill of Rights. Private property is protected from government seizure without compensation. Both documents include restraints on government in its relationship with individual Americans.


31 Yale, “Northwest Ordinance”.
Article 3 addressed a range of rights and principles, as well as described an ambiguous relationship with the Indians of the territory. The article began by completing the principle first stated in Article 1. The government would foster “Religion, morality, and knowledge” to create good republican citizens in the territories to support and protect the union. The second principle concerned the government’s relationship with the Indians of the territory. The second section of the article created an image of Congress as a paternal protector of the Indians. The article stated:

Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.32

Congress alone would protect the rights of the Indians and their lands. Congress would pass “laws founded in justice and humanity” to ensure the well-being of the Indians. However, the inclusion of the statement “they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress” belied a darker side to the relationship between Congress and the Indians. Congressional protection had limits. Docile Indian tribes received protection from Congress. Those that created problems for the territorial government would be set outside of Congress’s favor and face war with the union. There were no treaties to define what a “just and lawful” war entailed. Congress alone would decide if a war was just.

32 Yale, “Northwest Ordinance”.
Article 4 restated the principles listed in the previous ordinances of 1784 and 1785. This was important since the 1787 ordinance voided the previous ordinances. The new states would be members of the union, subject to the Articles of Confederation, and be responsible for a share of the federal debt. Congress again banned the new states from taxing or interfering with Congress’s disposal of federal lands within each state. The restatement of these principles highlighted the nature of the new ordinance. The ordinance of 1787 was not an elaboration of the previous ordinances but a refutation. According to Peter Onuf, “the new ordinance represented a radical departure from its predecessor, equivalent to the suppression of the Articles of Confederation by the Federal Constitution.” The drafters of the 1787 ordinance restated the republican principles of the territories because the new ordinance was the only valid document that oversaw the territories.

There was one addition to the principles previously stated in the 1784 ordinance. Article 4 declared that the waterways of the territories were open for all traffic and free of state control. This passage expanded the primacy of the union over the states and highlighted the relationship among the various states and with Congress described in the ordinance. The passage stated:

The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

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34 Yale, “Northwest Ordinance”.
As historian Robert Hill wrote, “The Northwest Ordinance, like the Articles of Confederation and the U.S. Constitution, gives rights and imposes obligations by voluntary but inviolable agreement.” Congress created a process for state formation that resulted in an expanded union with equally sovereign states. However, Congress also defined the limits of state authority and placed the power of the union on equal, if not superior terms with the states. Congress assumed control of navigable waterways and would administer them for the good of the union.

Article 5 described the size and location of future states in the territory. Congress mapped out three states in the territory with a possibility of two more on the periphery. The future states of Ohio, Indiana, and Illinois had their boundaries laid out by Congress in the ordinance. By laying out the boundaries of the states, Congress avoided any jurisdictional issues or border disputes between the newly formed territories. The people of each new territory would immediately be part of a political community with which they could associate. Congress gave itself the authority to add additional states and adjust states boundaries in the following passage:

Provided, however, and it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan.

The mention of a possible state on Lake Michigan was contentious for decades after the ordinance passed. Statehood proponents for Michigan maintained a border dispute over

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35 Hill, 49.


37 Yale, “Northwest Ordinance”.
the proposed southern boundary of the new state. It was not until 1836 that Congress allowed Michigan to join the union when state leaders dropped their claim.38

The article ended by stating the conditions for achieving statehood. Several phrases reveal the maturity and confidence of Congress by 1787. New states “shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever.” The conditional entry of state delegates as nonvoting members previously defined in the ordinance of 1784 was gone. Also missing from the article was the requirement that new states adopt a constitution from an existing state. New states were “at liberty to form a permanent constitution and State government: Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy.” The passages did not suggest a growing sense of confidence by Congress in the settlers of the territories and their ability to form republican institutions. Instead, they showed a growing sense of self-confidence within Congress itself. The closing passage of Article 5 read:

And, whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government: Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles; and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.39

39 Yale, “Northwest Ordinance”.
Congressional leaders were confident of their authority, the statehood process, and Congress’ protection of the union. New states would be republican state by assenting to the articles of compact within the ordinance.\footnote{Yale, “Northwest Ordinance”; Hill, 49.}

A final passage within Article 5 reinforced the idea of a confident Congress controlling the expansion of the union. The article included the requirement that a territory have sixty thousand “free inhabitants” before applying for statehood. However, the article closed by seemed to contradicting this requirement. The closing passage read:

so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.\footnote{Yale, “Northwest Ordinance”.}

What may seem contradictory actually reflected the growing sense of power within Congress. Congress designed the statehood process beginning in 1784 with strict requirements to protect the union. By 1787, Congress could adjust the requirements, or ignore some of them in the interests of the union. Congressional leaders felt confident enough in their authority to allow territories to “skip ahead” and become states if they were sufficiently republican.

The final article in the ordinance was the most revealing evidence of Congressional sovereignty. It was one of the shortest articles in the ordinance and only addressed a single issue. It was also a near duplicate of the principle included in the 1784 ordinance drafted by Jefferson. Article 6 banned slavery in the Northwest Territory. It read:

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party
shall have been duly convicted: Provided, always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.42

Delegate Nathan Dane proposed the article late in the debate over the drafting of the ordinance.43 The article, listed last, was another statement of republican principles for the new states. Thomas Jefferson explained the reasoning behind the contention that slavery was not compatible with republican theory. In his Notes on the State of Virginia written in 1781-2, and published in 1785, Jefferson wrote, “The whole commerce between master and slave is a perpetual exercise of the most boisterous passions, the most unremitting despotism on the one part, and degrading submissions on the other.”44 Slavery degraded the concept of natural rights for all men and threatened republican states as surely as hereditary titles. Legal distinction between humans was an anathema to republican societies.45

Article 6 framed the argument over slavery during the westward expansion of the union. Slavery advocates believed the ban was a means to an end, not an end in itself. The goal of the ordinance was promote the growth of the population and economy of the new states. The ban on slavery was temporary until such times as it made economic sense for the well-being of the state and its citizens to employ slaves. Anti-slave advocates professed a link between generations from the time of the founders to the present. Each generation had a responsibility to previous generations to maintain the principles and

42 Yale, “Northwest Ordinance”.

43 Onuf, “Statehood”, 110.


45 Hill, 51.
ideals set down by the founders. Congress included a nod to the original states and their employment of slaves. The final sentence was a fugitive slave law that directly protected a slave owner’s property, but also indirectly protected the institution of slavery in the union.

The Northwestern Ordinance of 1787 reflected the fully developed sense of sovereign power in Congress. State- making, expanding the union, and banning slavery in the territories reflected congressional leaders’ sense of authority – not just over the territories, but over the established states, as well. In 1787, Congress was an imperial ruler in exercising control over various populations. Western settlers were colonial subjects until trained as republican citizens. Native American tribes were “protected” by Congress as long as they remained docile. Even the established states had to accept that a sovereign Congress was guiding the union and they must take it seriously as a political authority. Congress, in the 1787 ordinance, created a pathway for controlled, republican expansion of the union. The various parties, which sought to exploit the western lands, had to deal with Congress as the sovereign of the territories. By 1787, Congress possessed a clear understanding of the power, the limits, but mostly, the usefulness of imperial sovereignty in expanding a union. Congressional leaders adopted the British Empire’s concept of imperial rule and modified it to support a republican union.

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Conclusion

Britain’s victory over France and Spain in the Seven Years War left it in possession of vast swaths of North America. Parliament used this opportunity to assert more control over colonies that extended from the Hudson Bay in Canada to the Caribbean Sea. The imperial model employed by Britain involved a centralized, powerful Parliament that ruled the empire and based its decisions on what its members perceived to be best for Britain. Colonies, or what some scholars refer to as “periphery”, would serve England, the metropolitan center. As the war ended, imperial administrators sought to assert order and control over the colonies.¹

The Royal Proclamation of 1763 highlighted Britain’s imperial philosophy. Colonies won from France and Spain became royal colonies with court-appointed governors in full control of the political development of each new colony. British leaders claimed possession of open lands to add to established colonies. It also extended Britain’s *dominium* and *imperium* over the Native Americans to the west of the Appalachian Mountains. Great Britain became a powerful, imperial sovereign that controlled all aspects of life in its colonies and the people within its domain. A critical component of the proclamation banned settlers from the western lands beyond the Appalachians. British leaders forbade settlements in the west to protect Native Americans and to avoid an Indian war the empire could ill afford. The ban resulted in vocal protests in America. Numerous colonists ignored it and settled in lands that British policy makers reserved for Native Americans. However, the proclamation established a precedent of centralized, imperial control over lands and peoples regardless of any supposed rights possessed by settlers, Indians, or British subjects. The Royal Proclamation of 1763 documented how a confident, imperial sovereign ruled an empire.

Americans protested the 1763 proclamation and subsequent British acts in the 1760s and early 1770s that attempted to centralize political authority. Authors from James Otis and John Adams, to Thomas Jefferson and James Wilson wrote essays that asserted, first, the constitutional rights of Americans as citizens of the British Empire, and second, their natural rights as humans. These authors, and many others like them, employed the natural rights arguments of John Locke, Jean-Jacque Rousseau, and other Enlightenment *philosophes* to defend American’s rights to self-government. They argued that British leaders were the radicals who swept aside decades of precedence in local rule to deprive Americans of their natural rights. By the middle of the 1770s, American’s republican arguments led to the declaring of independence by thirteen of the mainland colonies. American leaders defended their actions by portraying Britain as an imperial giant bent on reducing colonists to slavery by removing their right to self-government.

Almost immediately after declaring independence, the Continental Congress began to debate how to solidify state borders, to settle land disputes between the states, and to expand the union to the west across the Ohio River. The *Articles of Confederation*, drafted in 1776 and 1777, and ratified in 1781, did not give Congress sufficient authority to act on its own concerning the creation of new states. Article IX of the Articles gave Congress the authority to adjudicate land disputes between the states. The inclusion of this authority highlights the states’ desire for a centralized authority to protect states’ borders. During the remainder of the 1770s, Congress grappled with several attempts to move beyond this limited authority to include creating new states and settling cession movements within states that seemed to be on the verge of splitting apart. State jealousies over the control of contested lands and a distrust of congressional authority limited Congress’s ability to expand its authority.

In 1780, Congress garnered enough support from the states to pass the *Resolution of 1780*. This document detailed Congress’s plans to create a national domain for the expansion of the union. According to the resolution, Congress would control lands ceded by the various states to the United States, for the good of the union. The congressional policy that emerged in this
document is striking for its similarities with the Royal Proclamation of 1763. Congress, in 1780, passed a resolution that employed the same imperial sovereignty as that of Great Britain in 1763. Congressional leaders set aside the republican theories employed by American colonists in the 1770s to protest Parliament’s actions. Congress discovered the usefulness – indeed - the need for centralized, imperial sovereignty when dealing with western lands and people. Republican theory was too uncontrollable, too haphazard, too threatening to the union to provide a reliable basis for development in the west.

Congress passed three ordinances in the 1780s to further expand and define its role in developing the west. In 1784, 1785, and in 1787, Congress continued to develop and mature its concept of imperial sovereignty in the west. The 1784 ordinance established principles for developing the west that included Congressional oversight of the creation of governmental structures in the territories. The 1785 ordinance set down rules for surveying the territories, establishing townships, and selling lands. It also further clarified the control of Congress through the congressionally appointed governors and officials. Finally, in the Northwest Ordinance of 1787, Congress defined a constitution of sorts for the western territories and future states. The 1787 Ordinance defined the relationship between Congress and each new state, but also demarcated the relationship between the settlers and their state government. The articles in the Northwest ordinance read like a bill of rights for the people. This ordinance replaced the first two and left no doubt as to Congress’s absolute authority in creating new states and controlling their development. In the resolution of 1780 and subsequent ordinances, Congress placed all western settlers, Native Americans, and foreign powers on notice that it would determine the form of government, the values of land, the composition of the towns, and the speed of development in the western territories.

The actions of Congress to assert imperial sovereignty raise several issues concerning American constitutional theory and federalism. The first issue concerns the application of republican theory in establishing or expanding a union. By the time that Congress declared
independence in July 1776, a committee was already working on what would become the Articles of Confederation. The thirteen states chose to move as quickly as possible from the imperial sovereignty of the British Empire to a union of states that, among other things, guaranteed the states’ borders. The states surrendered their right to treat with other countries and declare war. The states also gave Congress the right to adjudicate any disagreements between the states. In essence, the states preferred to be in a republican empire or possibly an empire of republics. American leaders believed that a centralized government with some nationalistic powers was required to protect the states. In essence, American leaders wanted to duplicate the British imperial model of government. In the late 1770s and the 1780s, Congress extended this concept to expanding the union. Republican theory about self-rule was unfit for purpose to enlarge a union. The settlers were not to be trusted to do the right thing by creating republican institutions and joining the union on Congress’s terms. Republican theory was a powerful weapon in a revolution. However, it was a poor theory for managing a fledgling union.

If republican theory was inadequate to maintain a union of states, it’s opposite, centralized, imperial sovereignty promised to be more effective. Congressional leaders sought more national authority for Congress during the War for Independence. Even before state land cessions were completed, Congress began developing what would become the policy of an imperial center controlling colonial outposts in the Northwest Territories. Congress hesitated at first, and took tentative steps towards imperial rule, but by 1787, the Northwest Ordinance turned the settlers of the Ohio region into subjects. American citizens - temporarily stripped of their citizenship as they crossed the Ohio River, would regain it, as colonies became territories and finally, states. Article Six in the Northwest Ordinance that bans slavery in the territories, reflects the sovereignty of Congress. Even as territories became states, the language of the ordinance suggested they could not choose to allow slavery within their borders.

The banning of slavery in the territories highlights what seemed to be an inconsistency in Congress’s logic. Congress’s imperial sovereignty was temporary. As noted before, Section 13 in
the Northwest Ordinance stated that once a territory gained the approval of Congress and the original states to become a new state, it would join the union “on an equal footing with the original States.” However, if that were true, then Congress could not ban slavery in the new states. Any new state had the right to allow slavery just as the original states maintained the same right. When Congress surrendered its imperial sovereignty over a new state, that state was equal to all others and possessed the same sovereignty as the other states. Slavery was a state issue, not a congressional issue.

The legal conundrum over slavery in the new states was part of a far larger issue concerning state sovereignty and federalism. Simply put, there was no definition or explanation of state sovereignty in America’s founding documents or Founders’ letters. No legal or constitutional theorist ever described state sovereignty as a theory of political authority. Moreover, the term abruptly disappears with the drafting of the Constitution. As law professor Timothy Zick wrote, “Unlike the Articles of Confederation, which expressly reserved the ‘sovereignty’ of the states, the Constitution does not even mention ‘sovereignty.’”² Professor Zick goes on to describe three potential theories that legal scholars advance for American sovereignty. The “Classicist Theory” supports sovereignty as absolute and exclusive authority. The “Republican Theory” supports the concept that the people are the only sovereign in American political theory. The third, “Skeptic Theory” states that sovereignty makes no constitutional sense and is only a rhetorical device.³ If these three categories are accepted, then Madison’s usage of the phrase “state sovereignty” in the

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³ Zick, 233-4.
Federalist Essays was merely a rhetorical devise that carried no constitutional or theoretical foundation.

The Constitution, instead of amending the Articles of Confederation, rendered them moot as the convention drafted a constitution to “form a more perfect union”. The Constitution invalidated the union formed under the Articles. The ratification process did not require a unanimous vote but only the approval of nine states. Any that rejected it remained outside the new union. As the late historian Kenneth Stampp wrote, “By these acts, the Philadelphia Convention made the historical argument for [a perpetual union] invalid, because the Convention and the ratifying states destroyed the existing Union.” The importance of this theory in a discussion of sovereignty is crucial to understanding the role of the states. The Constitution invalidated the Articles of Confederation, the only document that specifically identified state sovereignty, as a political force. The Constitution formed a new union that did not recognize state sovereignty.4

Alexander Hamilton and James Madison resurrected the concept of state sovereignty in the Federalist Essays. Hamilton argued in Federalist #9 that the states were part of the national sovereignty by appointing senators. Hamilton returned to the issue of sovereignty in Federalist #15 when he applied the revolutionary argument of *imperio in imperium* and asserted that it was illogical to have multiple sovereigns. Madison took up the sovereignty argument in Federalists #19 and 20. He saw the weaknesses in the Articles of Confederation as one of a lack of national authority to hold the union together. It was only after Anti-federalist attacks began to damage the Federalist argument that Madison changed his position. In Federalist #39 Madison wrote, “Each state in ratifying

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the constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation then the new constitution will, if established, be a federal and not a national constitution.” However, Madison digressed from his national/federal government theory in Federalist #40. He refuted his previous statements about a strong central government as well as the loss of state sovereignty when he wrote, “Do they require that in the establishment of the constitution, the states should be regarded as distinct and independent sovereigns? They are so regarded in the constitution proposed.” There was no such statement in the Constitution. It was only with the ratification of the eleventh amendment in 1794 that the Constitution established state sovereignty in judicial procedures. Congress and the states quickly ratified this amendment after the Supreme Court declared that the states did not enjoy sovereign immunity.5

The very creation of states from the thirteen colonies is problematic for state sovereignty. In late 1775, pressure mounted on colonial governments to legitimize their authority. There were no royal governors to sanction the actions of local assemblies. Each colony needed legal authority to raise troops, collect taxes, institute government administrations, and to develop and support judiciaries. The congressional debate over reconstituting provisional governments centered on several issues. Creating republican governmental institutions in each colony would enhance the power of each government and make prosecuting the war against Great Britain more efficient. Also, it would, in reality, make each state a subordinate administrative agency of Congress. A second issue

5 Alexander Hamilton, James Madison, and John Jay. The Federalist. Edited by J. R. Pole. Indianapolis: Hackett Pub Co, 2005; The case mentioned was Chisholm v. Georgia (1793) where the Court ruled that citizens of one state could sue another state for damages and that states were not sovereigns.
in the debate was the fear that newly republican states would change state leadership and upset the working relations between Congress and the states. A third issue was that by rejecting colonial charters and drafting new constitutions, Americans would in effect, be declaring independence. This was something many congressional delegates did not support in the winter of 1775-76. The details of the debate over drafting new state constitutions are outside the purview of this essay. What is important is that the debate took place at all. Congress was the forum for debating new charters for the states. In November of 1775, New Hampshire and South Carolina received congressional authorization to create new governments. This implies that Congress authorized the colonies to become states. The colonies did not act independently to create republican polities. Congress authorized the changes in state governments. State sovereignty, even before the Declaration of Independence, does not appear substantiated by the evidence.6

Further research into state making in the 1770s and the relationship between the Continental Congress and the states could clarify the role of sovereignty as a political theory in the American Revolution, its application in the Constitution, and its role in federalism. This task is fraught with difficulty as various American documents either refer obliquely to the independence of the states (the Declaration), the sovereignty of the states (the Articles of Confederation), or do not refer to sovereignty at all (the Constitution). This task is complicated by the almost careless application of the term “sovereignty” without a definition throughout the period by various writers.

Congress envisioned a centralized, national government before the colonies declared their independence. The Northwestern Territory gave congressional leaders the opportunity to expand the role of Congress and allowed it to assume the role of an imperial sovereign. This affected the

6 Rakove, Beginnings, 81-3.
relationship between Congress and the original states, which displayed itself in the drafting and ratification of the Constitution. The ordinances of the 1780s, which culminated in the Northwest Ordinance of 1787, laid the foundation for American federalism. Congress was a confident imperial sovereign with a sense of its own authority by the summer of 1787 when the constitutional convention met in Philadelphia.
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