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ADAM TATE

ABSTRACT

Few issues in early American politics were more contentious than the issue of sovereignty. This article argues that James Madison, during his first year in Congress, articulated and defended a vision of state sovereignty derived in part from eighteenth-century law of nations theory. Madison believed that the people of the states were sovereign, and he defended that position in a number of particular controversies in 1780–81. During his national political career, Madison returned to his early understanding of state sovereignty. Many accounts of Madison have missed the importance of the concept of state sovereignty in his thought, preferring to interpret him in a more nationalistic direction. But Madison's position on state sovereignty laid important precedents for the use of that concept in American politics.

Political theorists and historians have, in the past 30 years, made important contributions to the study of James Madison's thought. Numerous articles and books have been published explaining the Virginian's intellectual life. Political theorists, such as Gary Rosen (1999), James Read (2000), and Colleen Sheehan (2009), have examined Madison's thought closely, seeking to place it within the context of eighteenth- and nineteenth-century political philosophy or to illuminate certain themes in his thinking. Historians, notably Jack Rakove (1990, 1997) and Lance Banning (1995), have explored the interplay between Madison's public and private writings and actions to portray a complex picture of Madison as a political actor and thinker (Gutzman 2012). Madison's prolific writing and lengthy public political career have forced both theorists and historians to focus on specific issues in Madison's thought or tightly defined time periods in his career, in order to understand his ideas and actions. This study, much like Banning's studies of Madison (1983, 1984) in

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the 1780s and some of the recent approaches by political theorists, takes a contextual approach to examine one important idea in Madison's thought: his understanding of sovereignty.

The explosion of writing on Madison revived what Alan Gibson (2002) calls the "question of consistency" and what Gordon Wood (2006) refers to as the "James Madison problem," that is, how to reconcile the Madison of the 1780s with the Madison of the 1790s (and beyond). James Madison's views on sovereignty have received some attention, particularly his ideas at the Philadelphia Convention and in the *Federalist*, in 1798, during the crisis over the Alien and Sedition Acts, and during the 1830s when he argued against the constitutionalism of South Carolinian John C. Calhoun (Rakove 1988; McCoy 1989; Onuf 1990; Gutzman 1995; Sheldon 2001, xi–xvi). Older interpretations, particularly that of Irving Brant (1941, 370–400), classified Madison as a thorough nationalist during the 1780s, free of any taint of states' rights thought. Madison's consideration of states' rights in the Virginia Resolutions of 1798 was a concession to practical politics and had no roots in his earlier thinking (Koch and Ammon 1948). Lance Banning (1995, 205) provided a thorough reinterpretation of Madison, noting that misunderstanding of Madison's "nationalist" politics during the 1780s, compounded by misreading Madison's position at the Constitutional Convention, had led many scholars to see Madison as inconsistent and thus miss the ways that Madison perpetuated revolutionary republicanism. Banning (1995, 374) wrote, "The strict constructionism, the concern about the economic, cultural, and moral underpinnings of a healthy public life, and even the insistence on states' rights that culminated in the Virginia Resolutions of 1798 were always integral components of his vision." Historian Kevin Gutzman, taking a different position, contended that Madison embraced directly contradictory positions on states' rights and state sovereignty between 1787 and 1836 and, during the Nullification controversy, tried to sanitize his reputation for radicalism when nullifiers cited his Virginia Resolutions to justify their actions (1995, 569–89).

Madison's thinking on sovereignty was important and influential. Scholars, however, have not gone deep enough into Madison's career to grasp the roots of his thinking on the subject. If Madison's consistency is to be judged or the trajectory of his thinking mapped, then a baseline of his beliefs on the issue must be established. This study scrutinizes Madison's understanding of sovereignty during a limited, but important, period of time, in order to illuminate his thinking. Examination of Madison's views of sovereignty during his first year in Congress, from March 1780 through February 1781, reveal his position that the sovereignty of the people of the states was the outcome of the American Revolution. Madison sought to protect and preserve the sovereignty of the people of the states, by his defense of American navigation

rights on the Mississippi River and his insistence on state ownership of western lands. While invocations of state sovereignty often indicated a pragmatic, political tactic by Madison, the concept, as he seemed to understand it, enjoyed an intellectual patrimony in eighteenth-century thought. His first year in Congress suggests that his invocations of state sovereignty later in his career, particularly in 1798, were not innovations in his thinking but returns to earlier modes of thought. Madison defended state sovereignty because he operated initially on an understanding of the confederation informed by eighteenth-century law of nations theory, which envisioned a political world of free, sovereign states.

SOVEREIGNTY AND VATTEL

“The theory of sovereignty,” noted historian Gordon Wood, “pervaded the arguments of the whole Revolutionary generation from the moment in the 1760s when it was first raised through the adoption of the federal Constitution in 1787” (1972, 345). While many historians have echoed Wood’s point about the importance of sovereignty, interpretations have varied (see also Dippel 1996; Rakove 1998; Beaulac 2003; Graham 2009, 88–91). One group has taken the old nationalist interpretation, expressed concisely by Rufus King at the Philadelphia Convention, that the states under the Articles of Confederation were never truly sovereign.¹ The states did not exercise, for example, the powers of war and peace like any true sovereign would. Another group of scholars believes that there was a shift in emphasis during the 1780s from state sovereignty (i.e., the sovereignty of state legislatures) to popular sovereignty at the time of the drafting of the Constitution. Americans realized, these scholars argue, that state sovereignty was unworkable and thus established the Constitution on the surer base of the people (Wood 1972, 344–89; Onuf 1983, 16, 22, 157; Greene 1986, 203, 205–6; Morgan 1988, 267; Onuf and Onuf 1993, 54; Fritz 2008). Other scholars maintain that the framers of the Constitution “slid past” sovereignty in creating a compound republic that discarded traditional notions of sovereignty (Zuckert 1987, 149; see also Ostrom 1994, 51, 78). Finally, some scholars have noted that Americans during the 1780s devised numerous positions on sovereignty, which, if taken as a whole, were contradictory but nonetheless popular. The diversity of argument, they insist, persisted throughout the early republic (Bennett 1964, 46, 78; Davis

1. See Rufus King’s June 19, 1787, speech in Madison (1966, 152–53). See also Brant (1948), Nettels (1957–60), Beer (1978), Rakove (1979, xvi; 1997, 65; 2008), and Morris (1987, 55–76).

1978, 113–14; McDonald 1979, 311–13; Banning 1987; Kammen 1988, 3–32; Bradburn 2009, 1–18, 61–100).

While unable to agree on the precise meaning of sovereignty during the 1780s, scholars usually concur that Americans derived their arguments about the concept from William Blackstone and the colonial experience, on the one hand, and Emer de Vattel and law of nations theory, on the other.² The English jurist Blackstone noted that “there is and must be in all” states “a supreme, irresistible, absolute, uncontrolled authority, in which . . . the rights of sovereignty, reside” (1893, 1:48). During the eighteenth century, Parliament claimed sovereignty, and, when it pressed its claims on the 13 colonies, revolutionary protests erupted. Blackstone’s insistence on one supreme authority sometimes influenced American discussions of sovereignty. But Americans often attacked Blackstone’s location of sovereignty in government. The Swiss jurist Vattel, working through the implications of Thomas Hobbes’s political theory, envisioned a world of sovereign states, deriving their sovereignty from the people, interacting freely with one another through treaties and commerce. Vattel sought to provide a rational framework for European nations to interact and prosper. Nature itself, he believed, had provided laws, accessible to all through reason, to guide the interactions of sovereigns. Americans recognized both traditions. Madison, during his first year in Congress, acted on his understanding of Vattel when dealing with questions of sovereignty.

Like many of the founders, Madison knew Vattel’s work on the law of nations and cited it in his writings during the early 1780s. Gary Rosen has noted that “Madison was not much for philosophical name-dropping,” thus making it difficult to determine what exactly Madison was reading at a particular time (1999, 187).³ But Vattel’s name sporadically arises in Madison’s early writings and provides one lens by which to view his developing thinking about sovereignty and the American union. The first reference to Vattel in Madison’s papers comes from a 1774 letter from William Bradford to Madison (1962) concerning the Continental Congress. Bradford wrote that congressmen made copious use of the city library during sessions. He noted, “Their measures will be wisely plan’d since they debate on them like philos-

2. Gordon Wood, e.g., quotes both men in his discussion of sovereignty (1972, 344–89). See Corwin (1925).

3. John Witherspoon, Madison’s beloved teacher at Princeton, wrote briefly about the law of nations, without mentioning Vattel, in the second of his “Druid” essays of 1776 (see Collins 1925/1969, 1:199–200, 2:252). Jeffrey H. Morrison (2005) does not mention Witherspoon’s knowledge of law of nations theory. Dennis F. Thompson (1976, 523–29) does not list Vattel in the books required by Witherspoon in his courses. The discussion of law of nations theory in the “Druid” essay can be found in Witherspoon (1801, 4:155–60).

ophers; for by what I was told Vattel, Barlemaqui Locke & Montesquie[u] seem to be the standar[d]s to which they refer either when settling the rights of the Colonies or when a dispute arises on the Justice or propriety of a measure” (1:126).⁴ During his first term in Congress, Madison quoted Vattel several times on various aspects of the law of nations, especially regarding treaties. In January 1783, Madison (1969, 67) included Vattel’s *Law of Nations* in a list of books that Congress should order for its library. His use of Vattel demonstrates that the law of nations served as a familiar concept to both Madison and his colleagues.⁵

Vattel based his political theory on the social contract concept. He argued that the “human race” was part of a natural, “universal society” in which all men “should lend each other mutual assistance in order to attain perfection themselves and to render their condition as perfect as possible” (1758/2008, 72–73; Lang 1985, 14–16). A universal state was a difficult endeavor; instead, humans divided into separate nations in order to guard prosperity, obtain “justice with security,” and provide “a mutual defence against all external violence” (Vattel 1758/2008, 86). In addition, nations would allow men to achieve happiness, the performance of their duties prescribed to them by the universal “law of nature” (145). Each nation possessed sovereignty, “that public authority which commands in civil society, and orders and directs what each citizen is to perform, to obtain the end of its institution.” Sovereign authority “originally and essentially belonged to the body of the society,” but the people “frequently intrusts it” to a government for the “common good of all the citizens” (97). Whereas Thomas Hobbes believed that there was no exit from the social contract, Vattel disagreed. Although the people were supposed to respect the sovereign, the sovereign was not always worthy of respect. “As soon as a prince attacks the constitution of the state,” wrote Vattel, “he breaks the contract which bound the people to him: the people become free by the act of the sovereign, and can no longer view him but as an usurper.” Thus, Vattel denied that there was “any sovereign who is completely and fully absolute,” a point that echoed American concerns during the revolutionary era (104–5).⁶

Like individuals, nations often needed to “contract” with other nations for their mutual security and prosperity. Vattel noted that “several sovereign and

4. On Vattel, see Fenwick (1913), Nussbaum (1947, 155–63), Ruddy (1975), Lang (1985, 13–66), Onuf (1994, 280–303), Tuck (1999, 191–96), and Kaposy and Whatmore (2008, ix–xx).

5. See also Ruddy (1975, 284), Lint (1977, 111), Lutz (1984, 189–97), and Lang (1985, 43, 65). Vattel came in nineteenth on Lutz’s “most-cited” list (1984, 194).

6. See Lang (1985, 31). Vattel’s position resembles Locke’s in the *Second Treatise* as well. See Greene (1986, 87) on Richard Bland’s similar argument.

independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state.” The confederacy will “constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, although they may in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements.” The confederation, on the basis of the equality of its members, could speak to other nations as if it were a sovereign, while still recognizing the internal sovereignty of the member states. Vattel argued, “A person does not cease to be free and independent, when he is obliged to fulfill engagements which he has voluntarily contracted” (1758/2008, 84).⁷ Just as individuals who contracted with each other to create a sovereign retained the ultimate sovereignty, states that voluntarily joined a confederacy held on to their individual sovereignty within the confederation. In both cases, the sovereignty may be abridged in practice, but sovereignty rightly remains the possession of the parties to the contract. Just as individuals must respect the sovereign, states in a confederation must remain loyal to the member states. But, like individuals under a tyrannical sovereign, states could leave a confederacy if it turned against them. Vattel maintained, “We have said that an independent nation, which, without becoming a member of another state, has voluntarily rendered itself dependent on or subject to it in order to obtain protection, is released from its engagements as soon as that protection fails, even though the failure happen through the inability of the protector.” Vattel recognized that secession of states posed dangers to peace and order, but he upheld the appropriateness of disunion under certain circumstances (210, 211; Anderson 2004, 11–12).

Vattel’s unions of sovereign states lacked enforcement mechanisms to compel the sovereigns to act appropriately. He wrote, “But as sovereigns acknowledge no common judge, no superior that can oblige them to adopt an interpretation founded on just rules, the faith of treaties constitutes, in this respect, all the security of the contracting powers” (1758/2008, 411).⁸ Confederations depended on trust. Unlike sovereign governments that could coerce individuals, confederations relied on the good faith of their members. Presumably, member states would uphold their voluntarily contracted obligations because of the benefits of union and as a means to avoid war. Separating himself from Grotius, Vattel denied the right of a nation to “forcibly” promote “the perfection of others.” Instead, a nation should set “good examples,

7. Vattel held that the state was a “moral person.” Thus, drawing parallels between what individuals do and what states do is possible here. See Hutson (1977, 54–55) and Beaulac (2003, 254–56). Hutson’s description of the confederation contains certain Vattelien qualities (Lang 1985, 19–20; Greene 1986, 89, 91).

8. See Ostrom (1987, 68) on Hobbes’s problem with this concept. Hobbes’s objections would be echoed by many American nationalists.

and avoid setting . . . a pattern of any thing evil” (265, 267). Confederations, therefore, were fragile, relying on the good faith of their members.

The organization of the Articles of Confederation permitted a Vattelian interpretation. The articles began by listing the parties to the confederation by name and providing a title for the union, “The United States of America.” Then, Article II affirmed the sovereignty of the states: “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” (Frohnen 2002, 200).⁹ As in Vattel’s discussion of confederation, the constituent states claimed sovereignty. The states delegated powers to Congress, which was simply an assembly of representatives of the sovereigns (Hendrickson 2003, 107). Under Article III, the states pledged to “enter into a firm league of friendship . . . for their common defence, the security of their Liberties, and their mutual and general welfare.” Just as Vattel indicated, the confederation’s central government served to protect the states and relied on the good faith, the “friendship,” of the states, rather than a coercive enforcement mechanism (Frohnen 2002, 200).¹⁰ Article VI restricted the rights of individual states to declare war, while Article IX listed the impressive powers of Congress, including the power to act as a judge to settle disputes between states. Vattel believed, and many Americans of the era would have agreed, such powers in a confederacy were normal and did not threaten the claims of the individual states to sovereignty. The states promised in Article XIII to obey Congress, but their word was the only guarantee of their behavior. The states claimed sovereignty within the confederacy, while deriving that sovereign authority from the people of their respective states. Vattel had explained this posture as well. Popular sovereignty and state sovereignty thus did not necessarily conflict.

MADISON IN CONGRESS

Indirect evidence suggests that Madison saw state sovereignty and popular sovereignty as compatible during his early congressional career. On June 21, 1780, the Virginia House of Delegates sent Madison the following instructions: “Resolved that Theodorick Bland jr: Esquire be appointed a Delegate to represent this Commonwealth in Congress until the first Monday in Novem-

9. See Savelle (1962, 914) for a description of the confederation that rejects later uses of nationalism to understand it.

10. See Zuckert (1987, 136). For a different reading of the articles than the one here, see Forsyth (1981, 1–16, 53–60) and Rakove (1982, 45–66). See also McDonald (2000, 7–25).

ber” (Madison 1962, 2:40).¹¹ The instructions indicate that Bland would represent the state of Virginia in Congress, an affirmation of state sovereignty. A few weeks later, on July 12, Madison and his colleagues received another instruction from the Virginia Assembly. It read, “Resolved that the Virginia Delegates to Congress be informed that the people of this Commonwealth are alarmed at the omission of the Yeas and Nays in the Monthly publication of the proceedings of Congress, as the publication of them best ascertains the conduct of their delegates in every important debate” (2:43). In this case, the Virginia Assembly claimed that Madison represented the “people” of Virginia in Congress. The assembly charged Madison with recording votes to inform the people of Virginia of the actions of “their delegates,” an invocation of popular sovereignty. Taken together, the two instructions indicate that many Virginians, unlike their modern interpreters, linked rather than separated state sovereignty and popular sovereignty.

While some American politicians blamed state sovereignty for the problems of the United States, Madison initially regarded financial difficulties as the major issue facing the country. When entering Congress during spring 1780 in the middle of the British campaign to subjugate the southern states, Madison faced daily predictions of financial calamity. He wrote to Thomas Jefferson on June 2, 1780, “We have no permanent resource and scarce even a momentary one left but in the prompt & vigorous supplies of the States.” He mentioned that Pennsylvania had given its governor “dictatorial Authority” to seize supplies. “I hope the good resulting from it will be such as to compensate for the risk of the precedent,” he concluded (Madison 1962, 2:38).¹² On November 7, he told Edmund Pendleton that the government needed an immediate influx of money. “It would,” he assured his friend, “reconcile the army & every body else to our republican forms of governments; The principle inconveniences which are imputed to these being really the fruit of defective revenues” (2:166; Banning 1983, 231). For Madison, the lack of revenue led to the inability of the government to fund the war effort consistently. This led some to question republicanism. Presumably, a steady revenue stream would solve these problems. Contrast these sentiments to the comment made by Alexander Hamilton on September 3, 1780, to James Duane, a friend of Madison’s: “But the confederation itself is defective and requires to be altered; it is neither fit for war, nor peace. The idea of an uncontrollable sovereignty in each state, over its internal police, will defeat the other powers given to Congress,

11. On the beginning of Madison’s career in Congress, see Ralph Ketcham (1971/1990, 88–111).

12. For the context surrounding Madison’s entry into Congress, see the brief comments in Rakove (1987, 101–2).

and make our union feeble and precarious” (Kurland and Lerner 1987, 1:151).¹³ For Hamilton, state sovereignty was the real problem. But for Madison, state sovereignty, based on the sovereignty of the people of the states, was the outcome of independence, not a regrettable condition that should be abandoned as quickly as possible.

MADISON ON MISSISSIPPI RIVER NAVIGATION

Madison applied his understanding of sovereignty to the relationship of the United States and Spain. As the Revolutionary War dragged on, Congress sought a treaty with Spain to assist in defeating Great Britain. Spain entered the war in 1779 but not as an official ally of the United States. As Reginald Horsman has noted, Spain “did not want to encourage colonial separatist movements by recognizing American independence” (1985, 22). Spain also had territorial concerns in Europe and allied with France secretly to achieve them (DeConde 1971, 29). In fall 1779, Congress, seeking to hold peace talks, “insisted on independence, a western boundary on the Mississippi River, a southern boundary at the 31st parallel, and free navigation of the Mississippi River” (Horsman 1985, 22). Congress named John Jay minister plenipotentiary to Spain. Arriving in Spain in January 1780, Jay was to “obtain the right of navigation down the Mississippi River through Spanish territory to the Gulf of Mexico” as well as secure official recognition of the United States and a loan. But the Spanish understood that the United States had designs on the Gulf Coast and thus would not agree to yield on the question of Mississippi River navigation. The Spanish frustrated Jay, never receiving him officially. He remained in Spain for 2 years to no avail (DeConde 1971, 29).

In October 1780, Congress sent further instructions to Jay detailing arguments he should make on the Mississippi River question. Madison wrote the draft of the instructions sent by Congress and published in the congressional journal. In the instructions, Madison laid out the question of sovereignty in Vattelian terms. He noted that “all the rights of sovereignty are intended for the benefit of those from whom they are derived and over whom they are exercised,” an acknowledgment of the sovereignty of the people. He then mentioned that while the United States “remained a part of the British Empire, that the Sovereignty of the King of England with all the rights & powers included in it, did not extend to them in virtue of his being acknowledged and obeyed as King by the people of England or of any other part of

13. See Bradburn’s (2009, 68–75) discussion of the differences between Madison and Hamilton. Merrill Jensen called this letter by Hamilton an “outstanding expression of the nationalists’ political philosophy in 1780” (1965, 50).

the Empire, but in virtue of his being acknowledged and obeyed as King by the people of America themselves.” The consent of the people in the colonies served as the basis of royal sovereignty in North America. As a result of independence, “all the territory lying within the limits of the States as fixed by the Sovereign himself, was held by him for their particular benefit, and must equally with his other rights and claims in quality of their sovereign be considered as having devolved on them in consequence of their resumption of Sovereignty to themselves.” For Madison, just as for many Virginians, the people of the independent states absorbed the sovereignty of the king and thus gained the rights over the territory within their borders (Madison 1962, 2:128).¹⁴ For Madison, this meant that Congress could not barter away access to the Mississippi River that lay on the borders of any of the 13 states. Congress “could not relinquish” such territory “without exciting discussions between themselves & those States concerning their respective rights and powers which might greatly embarrass the public councils of the United States and give advantage to the common enemy.” Madison then quoted Vattel on river navigation, revealing his debt to the Swiss jurist (2:130, 132).¹⁵ Congress could not violate the sovereignty of the people of the states by interfering with state claims to their western borders.

But, in late November 1780, Georgia and South Carolina, facing an occupying British army, asked that Congress give up its demand to free navigation of the Mississippi in return for immediate Spanish help against the British in the south. Madison, writing to Joseph Jones on November 25, 1780, noted, “I flatter myself however that Congress will see the impropriety of sacrificing the acknowledged limits and claims of any State without the express concurrence of such State” (1962, 2:203). Madison maintained that each state with land claims bordering the Mississippi could navigate the river within its boundaries. Congress could not give that away, although it could negotiate on behalf of the states regarding the right to navigate the river to its mouth. Just as Vattel noted that in a confederation the central government could present a common face in foreign affairs, Madison trusted that Congress possessed some flexibility in negotiating with Spain, as long as Congress did not trespass on the sovereignty of the states. He thus insisted that Congress wait for the advice of the affected states before issuing Jay new instructions.

14. Madison seemingly endorsed the state succession doctrine here (see Onuf 1983, 29–30). Kevin Gutzman (2007, 16–26) discusses the same argument made by Madison, which had precedents in Virginia. Gutzman (2012, 21–22) mentions the instructions to Jay (Greene 1986, 94–95).

15. On the same day he wrote the instructions to Jay (October 17), Madison wrote to Joseph Jones that he was enclosing letters to him that he had found “between the pages of Vattel.” It seems that Madison had been reading Vattel in October 1780 (1962, 2:137).

Madison wrote a letter from the Virginia delegation to Governor Thomas Jefferson on December 13, 1780, asking for further instruction on the Jay negotiations. The Virginia Assembly responded on January 2, 1781, saying that Virginia should claim free navigation of the Mississippi “co-extensive with our territory.” But Virginia’s congressmen could vote to amend this if Spain would sign a treaty of alliance without such a guarantee (Madison 1962, 2: 273). Jefferson sent this instruction to Madison on January 18, 1781, and Madison presented the contents in a motion to Congress on February 1. The motion pointed to the sovereignty of the people of the states. Madison wrote that the Virginia “General Assembly” authorized the Virginia delegates “to inform Congress, that the zeal of their Constituents to promote the general object of the Union and to remove as far as depends on them every reasonable obstacle to the speedy conclusion of an Alliance” with Spain led them to alter their earlier instructions to Jay (2:302; Banning 1983, 232–33). Just as in the instructions from Virginia during the summer of 1780, this motion made it clear that the Virginia delegation in Congress represented the people of Virginia, “their Constituents.” While Congress possessed the authority to negotiate with Spain, it could not barter away Virginia’s land or rights to navigate the river “co-extensive” with its “territory.” The motion revealed Madison’s consistency in affirming the sovereignty of the people of the states and applying that sovereignty to the confederation in Vattelien terms. He would do the same in the contentious issue of western land claims.

MADISON AND WESTERN LAND CLAIMS

Madison defended Virginia’s interests and sovereignty during his efforts to gain congressional acceptance of the state’s cession of its western land. In September 1780, Congress asked the states to cede their western lands to the United States in order to remove an obstacle for landless states such as Maryland to ratify the Articles of Confederation. The Virginia legislature complied in January 1781, but Congress subsequently refused to accept the cession until March 1784. As Peter Onuf (1983, 92) has pointed out, “The call for cessions recognized the primacy of state titles to the western lands, as well as the states’ sovereign discretion in relinquishing them.”¹⁶ But two interests opposed such reasoning. Land speculators had purchased western lands privately from Indians. They wanted Congress to act as a court to guarantee their claims at the expense of the states. Presumably, if Congress did so, this would negate the states’ sovereign jurisdiction over land titles in their western claims. States

16. See also Abernethy (1959, 242–57). Gutzman (2012, 18–20) has a helpful short discussion of Madison’s involvement in the land issue in 1780–81.

without western lands wanted Congress to take control of and sell the western lands to pay off the public debt. Politicians from landless states feared that states with large western land claims would sell their lands to pay off their own state debts. The combination of a reduced tax burden and plentiful, cheap western lands in landed states would drain population from landless states, leaving citizens there to labor under higher taxes and few opportunities (Onuf 1983, 88; Jillson 1988). Madison resisted attempts by these two interests to question Virginia's sovereignty.

Madison consistently defended Virginia's cession terms and warned that corrupt interests threatened a just resolution of the issue. In October 1780, he wrote his Virginia colleague Joseph Jones that land speculators had influenced congressional votes on the land cessions and had stalled the issue of voiding private claims based on purchases from Indians. Madison noted that Virginia wanted an explicit guarantee from Congress that "no private claims be complied with." "Virginia," Madison wrote, was "so deeply concerned to make it a condition of her grant that no such claims be admitted even within the grants of others, because when they are given up to Congress she is interested in them as much as others, and it might be transferred from the public, to a few land mongers" (1962, 2:136–37; Banning 1983, 231–32). Virginia, thought Madison, could exercise its sovereignty in demanding that Congress honor certain conditions attached to the land cession. The states, rather than Congress, would set the policy governing the internal relations of the confederation on this matter.

Madison contended directly with land speculators seeking to undermine the sovereignty of Virginia. In November 1780, he received a letter from George Morgan, a land agent for the Indiana Company. The company claimed land within the boundaries of the state of Virginia, on the grounds that it had purchased it from Indians. Morgan asked Madison and Theodorick Bland, the other member of the Virginia delegation, to submit the disputed claims to Congress in order to decide the justice of the claims. Madison and Bland wasted no time in denying Morgan's request. They noted on November 20 that "they could not reconcile with the respect due from every State to its own Sovereignty and honor, an appeal, from its own decisions, to a foreign tribunal, in a case which involves the Pretensions of Individuals only—and not the Rights or pretensions of any foreign State" (Madison 1962, 2:188). Congress, in such a situation, was a "foreign" court. Sovereign Virginia possessed jurisdiction within its own boundaries.

After reporting the incident with Morgan to his friend Joseph Jones on November 25, Madison told him that the land issue had important implications for the union. After mentioning that he hoped "Congress will see the impropriety of sacrificing the acknowledged limits and claims of any state with-

out the express concurrence of such State,” Madison warned that if Congress, at the insistence of many landless “Eastern States,” violated Virginia’s sovereignty, the union faced future difficulties. If the eastern states “will not support other States in their rights,” warned Madison, “they cannot expect to be supported themselves when theirs come into question” (1962, 2:203; McCoy 1987). The land issue threatened political cooperation, but Madison refused to compromise the sovereignty of the people of Virginia for sectional peace. As in the case of the navigation of the Mississippi River, Madison followed a Vattelien conception of the union.

MADISON AND VERMONT

The status of Vermont related to the western lands issue. The Vermont problem dated back to 1764, when the Privy Council determined that the eastern border of New York lay at the Connecticut River. There were settlers living on land west of the Connecticut River holding land titles granted by New Hampshire. The decision of the Privy Council threatened the legitimacy of the “New Hampshire Grants,” as the region west of the river came to be called. In July 1777, taking advantage of the chaos of the Revolution, representatives of the towns in the New Hampshire Grants declared themselves to be the state of Vermont, independent of New York. The Vermonters joined the United States in fighting the British. They eventually asked Congress to recognize their status as an independent state. Congress stalled. Faced with independence movements along their western borders, a number of state leaders believed that recognizing Vermont would only encourage similar movements at their expense (see Onuf 1983, 127–45). Congress debated the issue in late September and early October 1780, allowing Madison the opportunity to comment.

Madison’s understanding of the sovereignty of the people of the states contributed to his refusal to recognize Vermont as an independent state. On September 16, 1780, Congress passed resolutions, which Madison supported, on the issue. “Resolved,” Congress began, “that every attempt by force to set up a separate and independent jurisdiction within the limits of any one of the United States is a direct violation of the rights of such state, and subversive of the Union of the whole under the superintending authority of Congress” (Madison 1962, 2:87). The claims of Vermonters unjustly deprived a state, New York, of its sovereignty. Thus, it was illegitimate. Madison explained this in a September 19, 1780, letter to Joseph Jones on the “Vermont business.” “I am clearly of opinion,” Madison wrote about recognizing Vermont, “that it ought to be made on principles that will effectually discountenance the erection of new Governments without the sanction of proper Authority, and in a style marking a due firmness and decision [*sic*] in Congress” (2:90). The notes

of James Duane of New York on a brief speech Madison gave on Vermont on October 6, 1780, read that “if the District in Question was comprehended within the Jurisdiction of one or more of the United States, it must necessarily follow, that the Inhabitants could have no Right to set up an independent State” (2:113). The New Hampshire Grants were in either New York or New Hampshire. There was no third option.

Madison’s understanding of the Vermont issue coincided with Vattel’s opinion on territory. “As every thing included in the country belongs to the nation,” Vattel wrote, “no person whatever has a right to take possession of them without her consent.” “Encroachment of the territory of another is an act of injustice,” the Swiss jurist concluded (1758/2008, 306, 308). Later in October, in his instructions to Jay on the Mississippi River (in which he cited Vattel), Madison argued that the sovereign rights of the king had devolved on the people of the states. Thus, the people of Vermont were part of the sovereign people of either New York or New Hampshire. They could not be an independent people. As in the cases of Mississippi River navigation and western land cessions, Madison upheld the sovereignty of the people of the states.

MADISON AND CONSTITUTIONAL REFORM

No consideration of Madison’s first year in Congress would be complete without mentioning his support of reform efforts associated with the growing nationalist faction. During spring 1781, the nationalists proposed two measures: the impost and the coercive powers amendment. Madison supported both measures. Historians have long viewed Madison’s support as evidence of his growing nationalism and have tended to plot his position in 1781 as the first indication of Madison’s push for constitutional reform, while usually ignoring his previous discussions of sovereignty. His support of these measures, however, can be reconciled with his belief in state sovereignty and his use of Vattel.

After a mutiny of Pennsylvania troops in January 1781, Madison and other nationalists turned their attention to securing an impost amendment in order to supply Congress with a steady income, allowing it to pay its many debts and continue the war effort. But their plans faltered. The editors of *The Papers of James Madison* recovered a motion on the impost written by Madison in February 1781, apparently in response to a motion made by John Wither- spoon to give Congress exclusive rights over regulating foreign trade. It is uncertain whether Madison formally proposed the motion, but nevertheless it reveals his focus on state sovereignty. Madison’s motion read, “That it be earnestly recommended to the States, as indispensably necessary to support of public credit and the prosecution of the war, immediately to pass laws laying

an impost of 5 PerCt. Ad valorem on all goods, wares & merchandises imported into them respectively after the 1st. day of May.” Congress would have “full power to collect & to appropriate” the impost duties “to the discharge of the principal & interest of all debts already contracted or which may be contracted on the faith of the United States during the present war” (“Motion on Impost,” Madison 1962, 2:303–4; Burnett 1941/1975, 482–83). Congressionally approved officers would collect the tariff. Unlike his old teacher Witherspoon, Madison did not want to grant Congress exclusive rights over regulating foreign trade. Instead, his motion asked the states to levy the tax that Congress would collect for a specific purpose, paying the debts and funding the war, with no claims of permanently empowering Congress at the expense of the states. Madison’s constitutional concerns, as Lance Banning revealed, and his sensitivity to state sovereignty qualified his collaboration with the nationalists (Rakove 1979, 282–84; Banning 1995, 19–25).

On March 6, 1781, a congressional committee, of which Madison was a member, convened to consider how to enact the legislation passed by Congress. The committee composed an amendment to the articles that would allow Congress to coerce states that refused to carry out congressional laws. The amendment pointed out that Article XIII of the Articles of Confederation required that the states “abide by the determinations of the United States in Congress assembled on all questions which by this Confederation are submitted to them.” Congress possessed “a general and implied power” to “carry into effect all the Articles of the said Confederation against any of the States which shall refuse or neglect to abide by such their determinations, or shall otherwise violate any of the said Articles” (Madison 1963, 17–19). Because of the expansive ways nationalists, particularly Alexander Hamilton, later used the concept of implied powers, Madison has often been tagged a devout nationalist due to his endorsement of the concept. But the amendment can also be seen through Vattelien lenses. Vattel noted that confederations of sovereigns, while lacking an enforcement mechanism, relied on faithful obedience of their constitution. “But this constitution is a vain phantom,” he charged, “and the best laws are useless, if they be not religiously observed: the nation ought then to watch very attentively, in order to render them equally respected by those who govern and by the people destined to obey” (1758/2008, 93).¹⁷ Thus, the coercive powers amendment could be explained in Vattelien fashion as the means by which Congress encouraged obedience to the articles.

17. See Morris (1987, 246) for one view of this and Banning (1995, 21–22) for an opposite, more contextual reading. Rakove offers the following comment on Madison’s intention for the coercive powers amendment: he “viewed them [coercive powers] as a vehicle for fulfilling rather than subverting the Articles” (1979, 294–95).

Madison revealed to Jefferson in April 1781 that the coercive powers amendment was needed in order to preserve the union of the states. “Without such powers too,” Madison wrote, “in the general government, the whole confederacy may be insulted and the most salutary measures frustrated by the most inconsiderable State in the Union” (1963, 71; Rakove 1979, 293–96; Banning 1983, 235–36). He identified Delaware as a state that thwarted the laws of Congress for its own benefit and cited the injury of states like Virginia who were suffering the presence of British troops on their soil. Madison doubted that much force would have to be used. The mere presence of a few naval vessels would ensure obedience. The amendment’s justification lay with the idea of compliance with constitutional procedures in which each state was represented, not in any violation of a state’s sovereignty. But Madison’s hopes for the amendment seemed more like wishful thinking. The states could hardly be expected to consent to the coercion of Congress in the midst of fighting a war against the presumed coercion of Parliament.

Madison’s disillusionment with the Articles of Confederation became acute in 1784–85. While back in Virginia, he began to see the structure of the confederation as problematic. Lance Banning noted Madison’s central complaint: “the inability of the existing central government to do the tasks that everyone admitted were its proper business” (1995, 116). His famous “Notes on Ancient and Modern Confederacies” and “Vices of the Political System of the United States,” written in preparation for the Annapolis Convention and Philadelphia Convention, respectively, identified structural difficulties, including the arrangement of sovereignty, within republican confederations that, when not fixed, resulted in their collapse (Madison 1975, 3–24, 345–58).¹⁸ At the Philadelphia Convention, Madison, as Michael Zuckert has shown, sought a middle position “between a consolidation and a purely federal system” (1986, 173; Banning 1995, 164). Banning noted that for Madison, the new structure of government “could make the central government effective without endangering the people of the states” (139). While Madison did not obtain all he wished in the final document, he chose to press for ratification and defended the Constitution tenaciously in the *Federalist Papers* and at the Virginia ratifying convention in 1788 (Hobson 1979; Lacroix 2010; Gutzman 2012, 187–237). Madison discussed sovereignty during the ratification battles, holding that the people of the states, rather than the state governments, were sovereign and, as Vattel suggested, that they could divide their sovereign powers. A brief, rather than exhaustive, look at a few of Madison’s *Federalist* essays and Mad-

18. On Madison’s reasons for favoring a constitutional reform, see Banning (1995, 76–107).

ison's response to the Alien and Sedition Acts of 1798 suggests that Madison, at critical junctures, continued to employ his early views of sovereignty.

In *Federalist* no. 39, Madison argued that the act of ratification pointed to the sovereignty of the people of the states. He noted that the new Constitution had a popular basis. The "assent and ratification is to be given by the people, not as individuals composing one entire nation, but as composing the distinct and independent states to which they respectively belong." Madison termed this a "*federal act*" (Publius 2001, 196). The enactment of the Constitution "must result from the *unanimous* assent of the several states that are parties to it, differing no otherwise from their ordinary assent than in its being expressed, not by the legislative authority, but by that of the people themselves" (197). Madison again emphasized his earlier Vattelian distinctions: the people of the states, not the state governments, are sovereign. The people of each state would express its will in the special ratification conventions. In *Federalist* no. 40, Madison, continuing his emphasis, noted, "We have seen that, in the new government, as in the old, the general powers are limited; and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction" (203; Gutzman 2012, 164–67). Madison, here, recalled the language of the Burke Amendment in the articles concerning delegated powers. He also echoed Vattel's portrayal of a federal republic in which member states can limit their sovereign powers through contracts. But, while a state government might have sovereign jurisdiction, it is not sovereign. The people of the states are sovereign; they express some of their sovereignty at the state level and some at the national level. As he put it in *Federalist* no. 45, "We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people" (238; Gutzman 2012, 171–72). In the United States the people, not governments, were sovereign. Again, Madison reused concepts he had previously articulated.

In *Federalist* no. 45, Madison resorted to language that reflected his earlier attitudes about sovereignty and political reform. He framed the reforms of the Philadelphia Convention in a way that resembled his defense of the 1781 coercive powers amendment to Thomas Jefferson. In both cases, necessity required limited reforms that allowed the constitution to function as intended without threatening the sovereignty of the people of the states. Madison contended:

If the new constitution be examined with accuracy and candour, it will be found that the change which it proposes, consists much less in the addition of NEW POWERS to the union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no

apprehensions are entertained. The powers relating to war and peace, armies and fleets, treaties and finance, with the other more considerable powers, are all vested in the existing congress by the articles of confederation. The proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them. (Publius 2001, 241–42)

Whereas Madison's reforms failed in 1781, his approach in 1788 succeeded in securing ratification in Virginia (Banning 1995, 162; Gutzman 2012, 187–237).

After ratification, Madison's constitutional concerns led him to ally with Jefferson and oppose the Federalists during the 1790s. In 1798, in response to the Alien and Sedition Acts, Madison again used his earlier ideas of sovereignty. In his anonymously penned Virginia Resolutions, Madison charged that "the Federal Government" sought "to enlarge its powers by forced constructions of the constitutional charter which defines them" and had construed "certain general phrases (which, having been copied from the very limited grant of powers in the former articles of confederation, were the less liable to be misconstrued), so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases." Just as Madison had claimed in *Federalist* no. 45 that the new Constitution fulfilled the powers granted under the articles rather than adding numerous new powers, here he reaffirms that the Constitution was indeed a grant of limited powers largely "copied" from the articles. To interpret the document broadly, he continued, would "consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or at best, a mixed monarchy" (Frohnen 2002, 398–99).¹⁹ Like in his *Federalist* essays, Madison expressed concern over placing sovereignty in any government.

Madison defended the language of the Virginia Resolutions in the Virginia legislature in 1799, appealing to views that he had previously discussed. In his 1799 "Report of Virginia House of Delegates," Madison suggested that the confusion over sovereignty lay in the ambiguity of terms used to describe it, not in the concept itself. "It is indeed true," he wrote, "that the term 'states,' is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied." "State" could mean "the separate sections of territory occupied by the political societies within each" or "particular governments, established by those societies." It could also mean "those socie-

19. I thank Nathan Coleman for pointing this out to me. See Banning (1995, 293–402) for Madison during the 1790s.

ties as organized into those particular governments” or “the people composing those political societies, in their highest sovereign capacity.” Madison held that the last sense of the term applied to the current constitutional issue, the Virginia Resolution. The people of the states, acting in their sovereign capacity in ratification conventions, had ratified the Constitution. He continued, “In that sense the ‘states’ ratified it: and, in that sense of the term ‘states,’ they are consequently parties to the compact, from which the powers of the federal government result” (Frohnen 2002, 409). His statements sound much like his thoughts during his first year in Congress and in some of his essays as Publius.

Later in the Virginia Report, Madison reaffirmed his language from the fourth of the Virginia Resolutions that the result “of a consolidation of the states into one sovereignty . . . would be” the transformation of “the republican system of the United States into a monarchy” (Frohnen 2002, 413). The Vattelian federation would be demolished, endangering the people. Madison reminded his audience: “The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power” (425). Madison’s understanding of the US Constitution in 1799 bears a strong resemblance to his use of Vattel’s language of states and sovereignty during his first year in the Confederation Congress. In both cases, it is the people of the states, not the state governments, who are sovereign. American politics relied on the consent of the people of the states. The legitimate powers of the Confederation Congress, on the one hand, and the federal government, on the other hand, derived from the people of the states. Clearly, in 1780–81 and 1798–99, Madison understood this to be the revolutionary settlement.

* * *

During his first year in Congress, James Madison defended the sovereignty of the people of Virginia and displayed a Vattelian understanding of the Articles of Confederation. He did not distinguish between state sovereignty and popular sovereignty but saw these concepts as complementary. Madison understood that Congress could represent the United States in foreign affairs but believed that Congress could not barter away any of the sovereign rights of the states to their territory. Thus, he could speak both of the United States as a sovereign among the nations of Europe when discussing foreign affairs and of the sovereignty of the people of each of the United States when discussing the internal affairs of the confederation. Madison was not obscuring the notion of sovereignty but expressing his understanding of the union in Vattelian terms. The image of Madison “the nationalist” and centralizer of the 1780s who became the states’ righter of the 1790s needs to be tempered by a recognition that his later defenses of state sovereignty had their basis in his

stance during the first year of his congressional career.²⁰ While his practical political positions shifted according to the dangers he perceived, Madison, as further examination of his writings in the 1790s would show, did not abandon his early understanding of sovereignty. Madison articulated an understanding of sovereignty in the early republic that, rather than perishing in 1787 as some scholars have held, would find many adherents. State sovereignty rhetoric pervaded the politics of the Jeffersonian Republican Party that Madison helped to create and has remained an important aspect of American political discourse, despite the efforts of the nationalists to proclaim a different narrative of American history.

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20. Part of the problem with interpreting Madison, it seems to me, is that Madison the individual theorist could have a certain understanding of his theoretical and practical positions. But when scholars study Madison the political actor, they see him in the context of the allies with whom he worked. Thus, scholars have seen Madison as a nationalist during the 1780s because of his alliance with Hamilton and Morris and as a states' righter in the 1790s because of his alliance with Jefferson. Paying attention both to context and to Madison's own self-understanding connects Madison's roles as both actor and theorist. The example of Madison and state sovereignty affirms the truth of David Smiley's observation made over 40 years ago: the constitutional defenses used by southerners in the antebellum period had their origins in the revolutionary arguments of the 1770s and 1780s (Smiley 1967, 262). Lenner (2001) traces ways in which law of nations theory was used after 1790. See also Douglas Bradburn's (2009, 2) helpful comments: "Supporters of the decentralized nature of American nationhood considered the arrangement a fulfillment of the promises of the Revolution of '76—as the best protection of the natural rights of man, the purpose of all government. And anyone who called for a strong national state or encouraged a national standard for American citizenship dissented from the common view."

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